

HETA-ELENA HEISKANEN



**Towards Greener  
Human Rights Protection**  
Rewriting the  
Environmental Case-Law  
of the European Court of Human Rights



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Environmental Case-Law  
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ACADEMIC DISSERTATION

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HETA-ELENA HEISKANEN

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The first idea about specializing in environmental and human rights issues goes as far back as 2007, when I started my university studies. However, only in 2015 did I realise to whom I should really be writing. I remember the moment very clearly. Professor *Donald Anton*, Griffith Law School, Australia said in the 30<sup>th</sup> year celebration lecture of The Northern Institute for Environmental and Minority Law (NIEM), that “Research should be like love letters for future generations.” After that I could not get the idea out of my head. I have written this dissertation with his words in mind. In the name of future generations, we also planted tiny spruce of the future on the yard of the University of Tampere together with emeritus Professor *Erkki Hollo* and Director of Legislative Affairs *Riitta Rönn*, Ministry of the Environment.

These years of writing this dissertation have been rich in experiences. I have travelled to Geneva to meet the UN Special Rapporteur on human rights and the environment, *John H. Knox* and to see how Finnish good practices in environmental rights have been included as a part of international good practices. I have visited inspiring academic conferences, for example in Yale, Utrecht, Oslo and Ghent, spent time at the heart of the European Court of Human Rights (ECtHR) in Strasbourg and learned first-hand about the challenges of environmental decision-making for the Sámi people in Käsivarsi, Lapland. I will never forget the helicopter ride above beautiful Kilpisjärvi Lake.

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Tampere, 26 February 2018

Heta-Elena Heiskanen



# SUMMARY

For the past thirty years the European Court of Human Rights (ECtHR) has protected human rights related to the environment. Nevertheless, there are contemporary human rights problems related to the environment where the developments are modest or there is no case law. This research makes a proposal on how the transformation of the current case law and doctrines of the ECtHR facilitate the future greening of the jurisprudence in three areas. The first area discusses the role of the environment in the case law, the second concerns the greening of claims of indigenous peoples and the third focuses on climate change cases. The main method in this research is rewriting the current judgments.

The current case law of the ECtHR has defined and protected the environment primarily as a general interest. However, this does not allow the applicants to file complaints in relation to the protection of the environment without personal damage being involved. In order to strengthen the applicants' position in striving for protection of environmental well-being and sustainable development, the recognition of the right to a healthy environment under the European Convention on Human Rights (ECHR) is required. According to the rewriting of the chosen example judgments, there are no major doctrinal barriers to such recognition. The dynamic interpretation together with current international and national developments in respect of environmental rights provides support for the ECtHR to confirm the existence of the right to a healthy environment.

The established case law of the ECtHR concerning indigenous peoples has not provided strong protection for the applicants. However, current legal doctrines of the ECtHR together with international and national developments provide a promising basis on which to develop the protection of the environmental rights of indigenous peoples in Europe. Building argumentation under Article 8 of the European Convention on Human Rights in relation to the vulnerable position of the indigenous peoples makes it possible to recognize the special relationship between the environment and the cultures of the indigenous peoples. In addition, the current positive obligations doctrine entails a duty to conduct impact assessment during environmental projects, including cultural impact assessment, which can provide procedural protection for the cultures of indigenous peoples.

In relation to areas of rights of nature and climate change the doctrinal difficulties in developing the case law are greater. The lack of European legal traditions in recognizing the rights of nature terminology and broad victim status currently hamper efforts to build legal argumentation before the ECtHR. However, the content of the rights of nature is not as far from the current case law as it first seems. The ECtHR has recognized, for example, the mandate of the environmental NGOs to function as public watchdogs in environmental matters.

Climate change is extremely topical and a severe environmental threat, also affecting the realization of human rights in Europe, but there is as yet no relevant case law from the ECtHR. The significance of strategic litigation cannot be overemphasized, particularly in relation to such areas as climate change, where there is no case law. The building of climate change related responsibility for a single state is possible on the basis of positive obligations. Alternatively it is possible to establish state responsibility on the basis of extraterritoriality and shared liability doctrines. However, these doctrines are not designed for such global problems as climate change, where the implications of climate change are caused by numerous different actors and the building of a causal link between the acts and the impacts is problematic. These factors, together with the current narrow scope of extraterritoriality and shared liability doctrines, make the applicability of the doctrines difficult without doctrinal change.

*Key words:* European Court of Human Rights, environment, case law, climate change, rights of indigenous peoples, human rights, strategic litigation

# TIIVISTELMÄ

Euroopan ihmisoikeustuomioistuin (EIT) on viimeisen kolmenkymmenen vuoden aikana turvannut laajasti erilaisia ympäristöön liittyviä ihmisoikeuksia. Tutkimuksessa analysoidaan, miten ympäristöön liittyvä ihmisoikeuskäytäntö voi kehittyä edelleen tulevaisuudessa niillä osa-alueilla, jossa kehitys on ollut vähäistä tai sitä ei vielä ole. Tarkastelu rajautuu kolmeen alueeseen: ympäristön rooliin oikeuskäytännössä, alkuperäiskansan oikeuksien turvaamisen vahvistamiseen ja ilmastonmuutuskanteisiin. Tutkimuksen keskeisenä metodina on päätösten ja tuomioiden uudelleen kirjoittaminen, joka mahdollistaa yksityiskohtaisen keskustelun niistä reunaehdoista, jotka vaikuttavat oikeuskäytännön kehittymiseen.

Nykyisessä EIT:n oikeuskäytännössä ympäristön rooli on määritelty useimmiten yleisenä intressinä. Yksilöiden kanneoikeus on kuitenkin rajoitettu tilanteisiin, joista koituu heille henkilökohtaista haittaa. Terveellistä ympäristöä koskevan oikeuden tunnustaminen vahvistaisi yksilöiden mahdollisuuksia edistää ympäristön hyvinvointia ja kestävää kehitystä. Tutkimuksen keskeinen havainto on, että opillisesti oikeuden tunnustamiseen ei ole esteitä, vaan kansainvälinen ja kansallinen kehitys tukee dynaamisen tulkinnan harjoittamista.

Toistaiseksi EIT:n oikeuskäytännössä ei ole turvattu alkuperäiskansan ihmisoikeuksia tehokkaasti, vaikka kehitykselle ei ole merkittäviä opillisia esteitä. Euroopan ihmisoikeus-sopimuksen 8 artiklan soveltaminen mahdollistaa positiivisten toimintavelvoitteiden käyttämisen ja alkuperäiskansan erityisen haavoittuvuuden tunnustamisen ympäristöasioissa. EIT:n ympäristökäytännössä kehittyneisiin positiivisiin toimintavelvoitteisiin kuuluu ympäristöprojektien yhteydessä vaikutusarvioiden laatiminen. Vaikutusarviota laadittaessa tulee ottaa huomioon myös kulttuurilliset vaikutukset, kuten vaikutukset alkuperäiskansan kulttuurille.

Luonnon oikeuksien ja ilmastokanteiden osalta EIT:n oikeuskäytännön vihertyminen on haastavampaa. Merkittävimpinä haasteina luonnon oikeuksien kehittymiselle on eurooppalaisen oikeustradition puuttuminen ja nykyisellään kapea uhri-määritelmä. Tästä huolimatta varsinainen luonnon oikeuksien sisältö on yllättävän lähellä EIT:n nykyistä oikeuskäytäntöä esimerkiksi koskien ympäristöjärjestöjen roolia yleisen edun valvojina.

Ilmastonmuutos on erittäin vakava uhka niin ympäristölle kuin ihmisoikeuksien toteutumiselle, mutta toistaiseksi EIT:lle ei ole kehittynyt ilmastonmuutosaiheista oikeuskäytäntöä. Ilmastonmuutosta koskevan ihmisoikeuskäytännön kehittyminen edellyttää selkeää ja jatkuvaa strategista litigaatiota. Positiiviset toimintavelvoitteet mahdollistavat yksittäisen valtion vastuun rakentamisen myös ilmastonmuutuskontekstissa. EIT:n ekstra-

territoriaalisuutta ja jaettua vastuuta koskevien oppien soveltaminen globaaleista hajasaa-  
steista aiheutuneisiin ihmisoikeusloukkauksiin on kuitenkin hankalampaa.

*Avainsanat:* Euroopan ihmisoikeustuomioistuin, ympäristö, oikeustapaukset, ilmaston-  
muutos, alkuperäiskansan oikeudet, ihmisoikeudet, strateginen litigaatio

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# 1 INTRODUCTION

## 1.1 The Green Jurisprudence of the European Court of Human Rights

The development of the green jurisprudence<sup>1</sup> of the European Court of Human Rights (ECtHR or the Strasbourg Court) has progressed steadily for almost thirty years. The contemporary corpus of the green jurisprudence of the ECtHR is a well-established case continuum providing protection both for individuals and the environment. For example, the factsheet on the environment and human rights cover seventy-three cases over the period 1990–2016. Among these cases six have been Grand Chamber cases<sup>2</sup>, eleven decisions on admissibility<sup>3</sup>, four cases pending<sup>4</sup> and the remainder are from different sections of the ECtHR. The ECtHR found violations of the European Convention on Human Rights (ECHR) in approximately half of the cases, which demonstrates the willingness and capability of the ECtHR to develop green jurisprudence. Environmental conditions related to the current green jurisprudence of the ECtHR are heterogeneous including, for example,

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1 Pedersen 2010, pp. 571–595

2 ECtHR, *Öneriyıldız v. Turkey*, 30 November 2004 (GC), ECtHR, *Mangouras v. Spain*, 28 September 2010 (GC), ECtHR, *Athanassoglou and Others v. Switzerland*, 6 April 2000 (GC), ECtHR, *Roche v. the United Kingdom*, 19 October 2005 (GC), ECtHR, *Hatton and Others v. the United Kingdom*, 8 July 2003 (GC), ECtHR, *Depalle v. France and Brosset-Triboulet and Others v. France*, 29 March 2010 (GC)

3 ECtHR, *Smaltini v. Italy*, 24 March 2015 (decision on the admissibility), ECtHR, *Murillo Saldias and Others v. Spain*, 28 November 2006 (decision on the admissibility), ECtHR, *Viviani and Others v. Italy*, 24 March 2015 (decision on the admissibility), ECtHR, *Koceniak v. Poland*, 17 June 2014 (decision on the admissibility), ECtHR, *Luginbühl v. Switzerland*, 17 January 2006 (decision on the admissibility), ECtHR, *Chiş v. Romania*, 9 September 2014 (decision on the admissibility), ECtHR, *Fåggerskiöld v. Sweden*, 26 February 2008 (decision on the admissibility), ECtHR, *Greenpeace e.V. and Others v. Germany*, 12 May 2009 (decision on the admissibility), ECtHR, *Kapsalis and Nima-Kapsali v. Greece*, 23 September 2004 (decision on the admissibility), ECtHR, *Valico S.R.L. v. Italy*, 21 March 2006 (decision on the admissibility)

4 Pending applications: ECtHR, *Locascia and Others v. Italy*, Appl. no. 35648/10, ECtHR, *Cordella and Others v. Italy*, Appl. no. 54414/13, ECtHR, *Ambrogi Melle and Others v. Italy*, Appl. no. 54264/15, ECtHR, *Ahunbay and Others v. Turkey, Austria, and Germany*, Appl. no. 6080/06, ECtHR, *Vecbaštika and Others v. Latvia*, Appl. no. 52499/11

natural disasters<sup>5</sup>, hazardous industrial activities<sup>6</sup>, exposure to nuclear radiation<sup>7</sup>, passive smoking in the detention<sup>8</sup>, dam construction threatening archaeological site<sup>9</sup>, industrial pollution<sup>10</sup>, mobile phone antennas<sup>11</sup>, urban development<sup>12</sup>, waste collection, management, treatment and disposal<sup>13</sup>, water supply contamination<sup>14</sup> and noise pollution<sup>15</sup>.

Regardless of the failure of the Council of Europe to introduce a legal instrument establishing environmental rights<sup>16</sup>, the ECtHR has been able to green several rights of the ECHR. While many scholars and lawyers argue that in general there is indeed a need to secure formal recognition of the rights protected under the human rights agreements in order to avoid undemocratic action of the court, no significant criticism has emerged relating to the greening of the rights of the ECHR<sup>17</sup>. The reasons evinced include that the ECtHR has interpreted the ECHR inherently as a living instrument continuously as

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5 ECtHR, *Murillo Saldias and Others v. Spain*, 28 November 2006 (decision on the admissibility), ECtHR, *Budayeva and Others v. Russia*, 20 March 2008, ECtHR, *Viviani, and Others v. Italy*, 24 March 2015 (decision on the admissibility), ECtHR, *Kolyadenko and Others*, 28 February 2012, ECtHR, *Özel and Others v. Turkey*, 17 November 2015

6 ECtHR, *Öneryıldız v. Turkey*, 30 November 2004 (GC)

7 ECtHR, *L.C.B. v. the United Kingdom*, 9 June 1998

8 ECtHR, *Florea v. Romania*, 14 September 2010, ECtHR, *Elefteriadis v. Romania*, 25 January 2011

9 Pending application: ECtHR, *Abunbay and Others v. Turkey, Austria, and Germany*, Appl. no. 6080/06

10 ECtHR, *Lopez Ostra v. Spain*, 9 December 1994, ECtHR, *Băcilă v. Romania*, 30 March 2010, ECtHR, *Taşkın and Others v. Turkey*, 10 November 2004, ECtHR, *Öçkan and Others v. Turkey*, 28 March 2006, ECtHR, *Lemke v. Turkey*, 5 June 2007, ECtHR, *Fadeyeva v. Russia*, 9 June 2005, ECtHR, *Ledyayeva and Others v. Russia*, 26 October 2006, ECtHR, *Giacomelli v. Italy*, 2 November 2006, ECtHR, *Tătar v. Romania*, 27 January 2009, ECtHR, *Dubetska and Others v. Ukraine*, 10 February 2011, ECtHR, *Apanasewicz v. Poland*, 3 May 2011, ECtHR, *Koceniak v. Poland*, 17 June 2014 (decision on the admissibility), ECtHR, *Smaltini v. Italy*, 24 March 2015 (decision on the admissibility), pending applications: ECtHR, *Locascia and Others v. Italy*, Appl. no. 35648/10, ECtHR, *Cordella and Others v. Italy*, Appl. no. 54414/13 and ECtHR, *Ambrogi Melle and Others v. Italy*, Appl. no. 54264/15

11 ECtHR, *Luginbühl v. Switzerland*, 17 January 2006 (decision on the admissibility)

12 ECtHR, *Kyrtatos v. Greece*, 22 May 2003

13 ECtHR, *Brânduse v. Romania*, 7 April 2009, ECtHR, *Di Sarno and Others v. Italy*, 10 January 2012, pending application: ECtHR, *Locascia and Others v. Italy*, Appl. no. 35648/10

14 ECtHR, *Dzemyuk v. Ukraine*, 4 September 2014

15 ECtHR, *Powell and Rayner v. the United Kingdom*, 21 February 1990, ECtHR, *Hatton and Others v. the United Kingdom*, 8 July 2003 (GC), ECtHR, *Flamenbaum and Others v. France*, 13 December 2012, ECtHR, *Moreno Gómez v. Spain*, 16 November 2004, ECtHR, *Mileva and Others v. Bulgaria*, 25 November 2010, ECtHR, *Zammit Maempel and Others v. Malta*, 22 November 2011, ECtHR, *Chiş v. Romania*, 9 September 2014 (decision on the admissibility), ECtHR, *Frankowski and Others v. Poland*, 20 September 2011, ECtHR, *Deés v. Hungary*, 9 November 2010, ECtHR, *Grimkovskaya v. Ukraine*, 21 July 2011, ECtHR, *Fåggerskiöld v. Sweden*, 26 February 2008 (decision on the admissibility), ECtHR, *Vecbaštika and Others v. Latvia*, Appl. no. 52499/11 (pending application), ECtHR, *Borysiewicz v. Poland*, 1 July 2008, ECtHR, *Leon and Agnieszka Kania v. Poland*, 21 July 2009, ECtHR, *Martinez Martinez and Maria Pino Manzano v. Spain*, 3 July 2012, ECtHR, *Bor v. Hungary*, 18 June 2013

16 CoE, Parliamentary Assembly, Environment and Human Rights, Doc. 9791, 16 April 2003

17 *Morrow* 2013, pp. 317–369

regards several areas which had not been recognized during the drafting of the ECHR<sup>18</sup>. Environmental issues are no exception to the development. States are aware that the introduction of a new instrument among the State Parties is a long-term and burdensome process and new protocols granting new rights are only rarely proposed. The lack of a new protocol has not been perceived as a question of legitimacy among the states as there has been no sustained criticism.

The greening of rights have occurred under the right to life (Article 2)<sup>19</sup>, the right to liberty and security (Article 5)<sup>20</sup>, the right to access to court<sup>21</sup>, prohibition of torture (Article 3)<sup>22</sup>, the right to a fair trial (Article 6)<sup>23</sup>, right to private and family life (Article 8)<sup>24</sup>, freedom of expression (Article 10)<sup>25</sup>, freedom of assembly and association (Article 11)<sup>26</sup>, the right to an effective remedy (Article 13)<sup>27</sup> and the right to peaceful enjoyment of property (Prot. 1 Art. 1) of the Convention.<sup>28</sup> Thus the environmentally related case law has concerned almost all the rights protected by the Convention. In several cases, rights may be protected under several Articles of the ECHR. For example, access to information is protected both under Articles 2 and 8 of the ECHR.<sup>29</sup>

The ECtHR is both an international and a constitutional court, which makes its position unique. Laurence R. Helfer claims that the benefit for applicants of using the ECtHR is

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18 Rainey – Wicks – Ovey 2014, pp. 73–78

19 ECtHR, *Kolyadenko and Others*, 28 February 2012 ECtHR, *Öneryıldız v. Turkey*, 30 November 2004 (GC), ECtHR, *Brincat and Others v. Malta*, 24 July 2014, ECtHR, *Özel and Others v. Turkey*, 17 November 2015

20 ECtHR, *Mangouras v. Spain*, 28 September 2010 (GC)

21 ECtHR, *Athanassoglou and Others v. Switzerland*, 6 April 2000 (GC), ECtHR, *Gorraiz Lizarraga and Others v. Spain*, 27 April 2004, ECtHR, *L'Erablière asbl v. Belgium*, 24 February 2009, ECtHR, *Howald Moor and Others v. Switzerland*, 11 March 2014

22 ECtHR, *Florea v. Romania*, 14 September 2010, ECtHR, *Elefteriadis v. Romania*, 25 January 2011

23 See for example: ECtHR, *Zimmermann v. Switzerland*, 13 July 1983, ECtHR, *Zander v. Sweden*, 25 November 1993, ECtHR, *Taşkın and Others v. Turkey*, 10 November 2004 and ECtHR, *Okyay and Others v. Turkey*, 12 July 2005

24 See for example: ECtHR, *Lopez Ostra v. Spain*, 9 December 1994

25 ECtHR, *Steel and Morris v. the United Kingdom*, February 2005, ECtHR, *Vides Aizsardzības Klubs v. Latvia*, 27 May 2004

26 ECtHR, *Costel Popa v. Romania*, 26 April 2016

27 ECtHR, *Hatton and Others v. the United Kingdom*, 8 July 2003 (GC), ECtHR, *Kolyadenko and Others*, 28 February 2012

28 ECtHR, *Fredin (no. 1) v. Sweden*, 18 February 1991, ECtHR, *Pine Valley Developments Ltd and Others v. Ireland*, 29 November 1991, ECtHR, *Kapsalis and Nima-Kapsali v. Greece*, 23 September 2004 (decision on the admissibility), ECtHR, *Papastavrou and Others v. Greece*, 10 April 2003, ECtHR, *Öneryıldız v. Turkey*, 30 November 2004 (GC), ECtHR, *N.A. and Others v. Turkey*, 11 October 2005, ECtHR, *Valico S.R.L. v. Italy*, 21 March 2006 (decision on the admissibility), ECtHR, *Hamer v. Belgium*, 27 November 2007, ECtHR, *Turgut and Others v. Turkey*, 8 July 2008, ECtHR, *Malfatto and Mieille v. France*, 6 October 2016

29 ECtHR, *Guerra and Others v. Italy*, 19 February 1998, ECtHR, *McGinley et Egan c. Royaume-Uni*, 9 June 1998, ECtHR, *Roche v. the United Kingdom*, 19 October 2005 (GC), ECtHR, *Vilnes and Others v. Norway*, 5 December 2013, ECtHR, *Brincat and Others v. Malta*, 24 July 2014

that it has “numerous opportunities to influence the decision-making of judges, legislators, and executive officials.” The influence of the ECtHR extends to both the jurisprudence of the domestic courts and to domestic legislative amendments. The ECtHR has, for example, the capacity to offer guidance to national authorities in their legislative and administrative duties when a failure has taken place.<sup>30</sup> Through its pilot judgment mechanism, the ECtHR is also able to identify and offer guidance on structural and systemic human rights problems in State Parties.<sup>31</sup> Furthermore, the guidance has not been limited to those cases which are parties to the case but in the case of *Opuz v. Turkey* (2009) it was established that even governments not the party to the case have an obligation to follow and take into account the principles established in the case-law.<sup>32</sup> Besides influencing national systems, the ECtHR also contributes to the international development of minimum standards for human rights protection. All of these observations apply also to the green jurisprudence of the ECtHR.

The green jurisprudence of the ECtHR includes a diverse set of rights, principles and obligations. The rights for rights holders<sup>33</sup> include the right to access environmental information, the right to assembly and the right of access to court<sup>34</sup>. The right to access to environmental information was developed under Articles of 2, 8 and 10 of the Convention. The right to access to adequate environmental information is related to the opportunities of the individual to assess the risks associated with environmental activities. The right to access to information is also closely connected to the right to participate in the environmental decision-making process, as was noted in *Tătar v. Romania* (2009)<sup>35</sup>. The ECtHR also underlined in the case of *Grikovskaya v. Ukraine* (2011) “the importance of public participation in environmental decision-making”.<sup>36</sup> The right to access the court and effective remedy was underlined in the case of *Taskin and Others v. Turkey* (2004).<sup>37</sup> Similarly, in the case of *Grikovskaya v. Ukraine* (2011) the ECtHR pointed out that “an essential element of this safeguard is an individual’s ability to challenge an official act or omission affecting her rights in this sphere before an independent authority”.<sup>38</sup>

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30 Helfer 2008, pp. 134–136

31 See for example: Buyse 2009, pp. 1913–1927

32 ECtHR, *Opuz v. Turkey*, 9 June 2009, para 163

33 Vanneste 2010, pp. 19–21, Humphrey 1967, p. 39

34 ECtHR, *Taşkın and Others v. Turkey*, 10 November 2004, para 119

35 ECtHR, *Tătar v. Romania*, 27 January 2009, para 118

36 ECtHR, *Grikovskaya v. Ukraine*, 21 July 2011, para 71

37 ECtHR, *Taşkın and Others v. Turkey*, 10 November 2004, para 119

38 ECtHR, *Grikovskaya v. Ukraine*, 21 July 2011, paras 67, 69

In addition to the rights of individuals, the green jurisprudence has established specific obligations for the Member States<sup>39</sup> as they have a role as duty-bearers<sup>40</sup>. The development has included various positive obligations. Positive obligations is a general legal doctrine imposing duties upon states to take affirmative action aiming to prevent, control or investigate issues related to human rights. In the context of the green jurisprudence, positive obligations include, but are not limited to, the obligation to carry out effective investigations, adequate environmental impact assessment, adequate legislative framework and domestic supervisory mechanisms. The responsibility of a state is not limited to the failures of that state itself, but “may arise from a failure to regulate [the] private industry”<sup>41</sup> or in the context of privatization<sup>42</sup>. The green jurisprudence of the ECtHR has reiterated the demand for a framework which should include procedural safeguards, such as efficient and accessible procedure to access the environmental information<sup>43</sup>, appropriate impact and risk assessment procedures<sup>44</sup>, carry out sufficient investigations<sup>45</sup> and mechanisms to inform and warn the population of risk<sup>46</sup>. In *Tătar v. Romania* (2009), the ECtHR stated that there is a duty to assess the risks that the activity of the company entail, and to take suitable and adequate measures to protect the rights of individuals as well as the environmental interests. The obligations include the regulation of the authorizing, setting-up, operating, safety and monitoring of such industrial activities having a hazardous impact on the environment and the health of human beings.<sup>47</sup>

What should be noted is that the ECtHR has required the states to take measures that are not only in the interests of the people but to recognize the intrinsic value of nature. The ECtHR has found, for example, that there was a positive obligation to plant specific trees in the forests of landowners and has established prohibition of acts damaging “green belt or areas of rural amenity”.<sup>48</sup>

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39 State includes specific and multiple types of actors, such as the Parliament, military, governmental civil servants, courts and local authorities, but before the ECtHR, they fall under the broader definition of the state, which serves as an umbrella for all the different state actors. Due to the broad understanding of the state, the actions by the state can be controversial and in the conflict between various state authorities.

40 Sieghart 1983, p. 20

41 ECtHR, *Fadeyeva v. Russia*, 9 June 2005, para 89

42 Domelly 2010, pp. 212, 215, 216, 218. Domelly makes also reference to ECtHR, *Giacomelli v. Italy*, 2 November 2006, para 82

43 ECtHR, *Guerra and Others v. Italy*, 19 February 1998, paras 57–60, *López Ostra v. Spain*, 9 December 1994, para 55, ECtHR, *McGinley et Egan c. Royaume-Uni*, 9 June 1998, paras 98–104, and ECtHR, *Roche v. the United Kingdom*, 19 October 2005 (GC), para 157, ECtHR, *Vilnes and Others v. Norway*, 5 December 2013, para 235

44 ECtHR, *Giacomelli v. Italy*, 2 November 2006, para 89

45 ECtHR, *Budayeva and Others v. Russia*, 20 March 2008, paras 101, 117, 132, 163

46 Dutertre 2003, p. 40

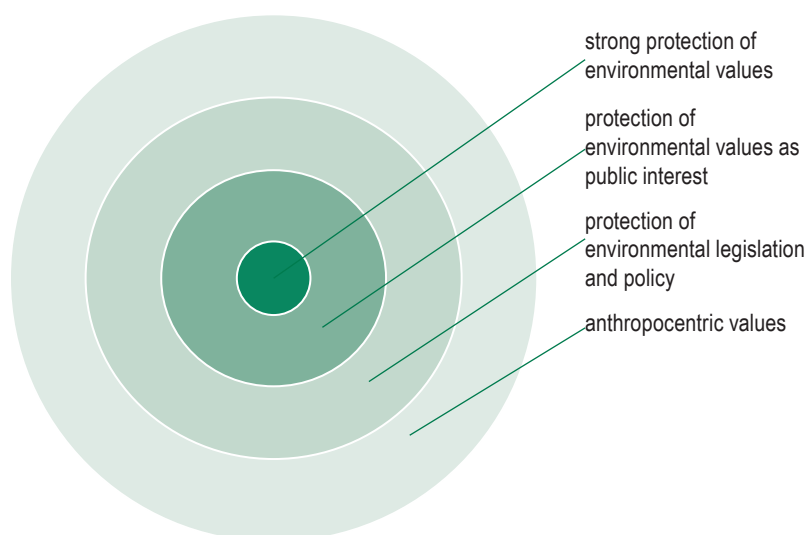
47 ECtHR, *Tătar v. Romania*, 27 January 2009, para 88

48 ECtHR, *Chater v. the United Kingdom*, 7 May 1987, *Herrick v. the United Kingdom*, 11 March 1985

## 1.2 Different Levels of Greening of the European Convention on Human Rights

The human rights approach to the environment has raised concerns about the anthropocentrism of the case law, notably among deep ecologists, who claim that the human rights framework is unable to protect the interests of nature and the environment.<sup>49</sup> Similar criticism has been expressed in the literature, that the green jurisprudence of the ECtHR is dominated by anthropocentric values and has a limited capacity to protect environmental interests<sup>50</sup>. For example, Hana Müllerová has argued that “in the Court’s view, environmental values have no special position”<sup>51</sup>. Similarly, Armelle Gouritin took the view that the Convention is more readily applicable to such cases that have an “anthropocentric dimension,” whereas the ECtHR experiences greater difficulty with ecocentric dimensions.<sup>52</sup> However, the systematization of green jurisprudence in Table 1. illustrates that there are different levels of greening.

Table 1. Greening circle



The most ecological core includes cases where the environmental values have justified the limitation of the rights of individuals and the less green jurisprudence does not discuss the

49 Stallworthy 2008, p. 57, Hancock 2003, Devall and sessions 1985, Naess 1972, p. 95, Naess 1989, Redgwell 1997, reprinted 2003, pp. 71–87, Hayward 2005, pp. 32–35

50 Shall 2008, pp. 428–429

51 Müllerová 2015, p. 84

52 Gouritin 2012, p. 268



role of the natural environment. An example of a case that explicitly provides significant protection for the environment is the case of *Mangouras v. Spain* (2010)<sup>53</sup>. The case concerned the high bail set for the captain of a ship, which accidentally caused an oil leak into the ocean, causing severe environmental damage and negative effects on tourism and fishing.<sup>54</sup> The ECtHR underlined the exceptional nature of the disaster, which should be taken into account in assessing the amount of bail.<sup>55</sup> The ECtHR found that the bail was not unreasonable in the given exceptional circumstances. The extent of the greening was major as the judgment protects environmental interests *per se* and justifies restrictions on individual rights<sup>56</sup>. This proves that the case law is not dominated only by anthropocentric considerations, but it can also take account of ecocentric dimensions.

The second circle includes a case continuum, where the role of the environment and its protection is defined as a legitimate and protected interest of society. The former European Commission on Human Rights (later it will be referred as Commission), which does not exist anymore, already in 1985 maintained that natural beauty may qualify as a legitimate aim that it is necessary and desirable to protect.<sup>57</sup> The ECtHR has further deemed in the case of *Turgut and Others v. Turkey* (2008) that “the protection of nature and forests, and more generally, the environment is a cause whose defence arouses the constant and sustained interest of the public, and consequently the public authorities.”<sup>58</sup> For example in the case of *Coster v. the United Kingdom* (2001) the environment was referred to as “assets common to the whole society”<sup>59</sup> as well as “the protection of the environmental rights of other people in the community.”<sup>60</sup>

There are different formulations of this recognition of the importance of the environment as a public interest, but the core message is that the environment is “assets common to the whole society”<sup>61</sup>, everyone “must have been aware of the fact that environmental protection had become increasingly important”<sup>62</sup> and “in today’s society, the protection of the environment is an increasingly important consideration”.<sup>63</sup> The stand taken by the ECtHR refers to the values and morals, as well as consensus among members of a society. The Court does not expressly use word consensus, but as the Court has after the case of

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53 ECtHR, *Mangouras v. Spain*, 28 September 2010 (GC), para 85

54 *Ibid.*

55 *Ibid.*, para 88

56 Gouritin 2012, p. 167

57 The UK, 11185/84, Dec. March 11, 1985, 42 D.R. 275

58 ECtHR, *Turgut and Others v. Turkey*, 8 July 2008, para 90. See also: ECtHR, *Hamer v. Belgium*, 27 November 2007, para 79

59 ECtHR, *Coster v. the United Kingdom*, 18 January 2001, para 110

60 *Ibid.*, para 116

61 *Ibid.*, para 110

62 ECtHR, *Huoltoasema Matti Eurén oy and Others v. Finland*, 19 January 2010, para 39. See also: ECtHR, *Fredin (no. 1) v. Sweden*, 18 February 1991, para 48

63 *Ibid.*

*Fredin v. Sweden* (1991) repeatedly used the same formulation of “today’s society” and its “important consideration”, regardless of the society in question, it can be interpreted to refer to all societies of the States Parties to the Convention<sup>64</sup>.

The case law has not only recognized the role of the environment in general, but it has explicitly underlined the role of specific parts of the environment and the nature of a protected interest. These have included the protection of the forests<sup>65</sup>, the green belt area<sup>66</sup> and wind power<sup>67</sup>. The ECtHR has further referred to the protection of the shorelines as “reflecting the demands of the general interest of the community”<sup>68</sup> and to the conservation of forests as “public interest to protect”.<sup>69</sup> Furthermore, water resources<sup>70</sup>, such as groundwater<sup>71</sup>, rivers and lakesides<sup>72</sup>, in particularly shores<sup>73</sup>, coastal areas and beaches that are “a public area open to all”<sup>74</sup> have been recognized as public interest. Regarding the use of water resources, conservation of fish stocks has also been regarded as a public interest protected by law<sup>75</sup>. This demonstrates that the environment and parts thereof have consistently and continuously been granted recognition as public interests.

In addition, despite the vast margin of appreciation afforded in the environmental context, which also allows justified restrictions on the basis of the economic well-being of the country, such as in *Hatton and Others v. the United Kingdom*<sup>76</sup> (2003), the ECtHR has taken a stand that economic reasons may not always outweigh environmental interests. The ECtHR stated in *Hamer v. Belgium*, (2007) in relation to the right to property under Article 1 of Protocol 1 that “Financial imperatives and even certain fundamental rights, such as ownership, should not be afforded priority over environmental protection considerations, in particular when the State has legislated in this regard”.<sup>77</sup> This standing grants recognition of the environmental protection *per se*.

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64 ECtHR, *Katte Klitsche de la Grange v. Italy*, 19 September 1994, para 63, ECtHR, *Matos E Silva, LDA and Others v. Portugal*, 16 September 1996, para 88. Also, states themselves have formulated the environment as public interest, see for example ECtHR, *N.A and Others v. Turkey*, 11 October 2005, para 34

65 ECtHR, *Turgut and Others v. Turkey*, 8 July 2008, para 90

66 ECtHR, *Pine Valley Developments Ltd and Others v. Ireland*, 29 November 1991, para 57

67 ECtHR, *Fägerskiöld v. Sweden*, 26 February 2008 (decision on the admissibility)

68 Commission, *Uubiniemi and others v. Finland*, 10 October 1994

69 ECtHR, *Költepe v. Turkey*, 22 July 2008

70 ECtHR, *Dzemyuk v. Ukraine*, 4 September 2014, para 79

71 ECtHR, *Huoltoasema Matti Eurén oy and Others v. Finland*, 19 January 2010, para 39

72 Commission, *Uubiniemi and others v. Finland*, 10 October 1994: “protection of the environment constituting an increasingly important consideration in today’s society.”

73 *Ibid.*

74 ECtHR, *Pine Valley Developments Ltd and Others v. Ireland*, 29 November 1991, para 57

75 ECtHR, *Alatulkkila and others v. Finland*, 28 July 2005, para 68

76 ECtHR, *Hatton and Others v. the United Kingdom*, 8 July 2003 (GC), paras 126 and 129

77 See also: ECtHR, *Hamer v. Belgium*, 27 November 2007, para 79



Furthermore, there is certain amount of green case law recognizing the importance of the implementation of domestic environmental law and policies. The stance is reasonable, as the Court itself has put it:

slow to grant protection to those who, in conscious defiance of the prohibitions of the law, establish a home on an environmentally protected site. For the Court to do otherwise would be to encourage illegal action to the detriment of the protection of the environmental rights of other people in the community.<sup>78</sup>

In addition in *Fadeyeva v. Russia* (2005) the ECtHR recognized the national limits on toxic emissions. Failure to enforce the standards resulted in a violation of Article 8.<sup>79</sup> Furthermore, in the case of *Depalle v. France and Brosset-Triboulet and Others v. France* (2010), the ECtHR underlined the need to “ensure compliance with planning regulations” related to coastal areas.<sup>80</sup>

The category of milder greening including environmentally related cases where the environmental interest was not protection extends to cases involving major financial interest<sup>81</sup> or not concerning the natural environment. In the first set of cases, the ECtHR has used in its evaluation balancing test, including analysis of the protection of the different values in the society in question. For example in *Hatton and Others v. the United Kingdom*, the ECtHR acknowledged that the economic interests justified the disturbances for the small groups of individuals, who had an opportunity to move away from the area close to the airport of Heathrow.<sup>82</sup> The conclusions from Hatton cannot be used as a general rule in the balancing of any economic activity and other interests; it is rather an exception. The economic interest was exceptionally high. This interpretation is supported by the case law established since Hatton.

In addition, there are anthropocentric cases, such as cases of conditions in detention<sup>83</sup>, noise cases<sup>84</sup> or asbestos-related health hazards<sup>85</sup>, where the individuals are the only ones affected, not the natural environment as such<sup>86</sup>. For example in the case of *Howald Moor and Others v. Switzerland* (2014) the worker was exposed to asbestos during his working

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78 ECtHR, *Coster v. the United Kingdom*, 18 January 2001, para 116

79 ECtHR, *Fadeyeva v. Russia*, 9 June 2005, paras 87–88

80 ECtHR, *Depalle v. France and Brosset-Triboulet and Others v. France*, 29 March 2010, para 89

81 See also early case law, where the individual interest override to some extent the environmental considerations: *Bentham v. the Netherlands*, Appl. no 8848/80, 23 October 1985

82 O’Boyle 2014, p. 93, Kratochvil 2011, pp. 324–357, Letsas 2006, pp. 205–732, Feingold 1978, pp. 90–106

83 ECtHR, *Florea v. Romania*, 14 September 2010, ECtHR, *Elefteriadis v. Romania*, 25 January 2011, ECtHR, *Branduse v. Romania*, 7 April 2009

84 ECtHR, *Deés v. Hungary*, 9 November 2010, ECtHR, *Bor v. Hungary*, 18 June 2013, para 27

85 ECtHR, *Brincat and Others v. Malta*, 24 July 2014

86 ECtHR, *Vilnes and Others v. Norway*, 5 December 2013, ECtHR, *Mileva and Others v. Bulgaria*, 25 November 2010, ECtHR, *Moreno Gómez v. Spain*, 16 November 2004, ECtHR, *Banel v. Lithuania*, 18 June 2013

career in the 1960s and 1970s<sup>87</sup>. In 2004 he was diagnosed with an aggressive malignant tumour years after. The sufferer's family members bringing the application to the domestic court asked for damages from the national authorities and the employer of the deceased. However, the domestic court denied them access to a court due to the limitation period. The ECtHR held that there were exceptional circumstances and thus it would be disproportionate that a person who could be diagnosed only after an extended period should be denied the access to court. Thus in this case the ECtHR established that when it is scientifically proven that an individual could not have known that he had a disease, this should influence how the calculation of the limitation period is carried out. The ECtHR found a violation of Article 6(1) of the ECHR.

Furthermore, some of the cases involve an environmental dimension, but the right in question, such as freedom of expression and freedom of assembly and association<sup>88</sup>, the right to a fair trial<sup>89</sup>, access to the beach<sup>90</sup>, or membership related to hunting rights<sup>91</sup>, explain the anthropocentric focus. For example, in the case of *Costel Popa v. Romania* (2016), the Romanian courts refused to register an environmental association. The ECtHR found a violation of Article 11 of the ECHR because the refusal to accept the registration of the NGO was a major measure and did not comply with the legitimate aim test as there was no evidence of a pressing social need to refuse the registration.<sup>92</sup> In this set of case law, anthropocentrism does not necessarily compromise environmental interests, but affords individuals a procedural means to take protective measures for the benefit of the environment.

It can be concluded that "human rights are no longer just the stuff of dreams"<sup>93</sup>, "bawling upon paper"<sup>94</sup> or like believing in unicorns<sup>95</sup>, but the ECtHR provides a useful additional framework to develop protection for human rights in environmental contexts. However, it should also be noted that even though the spectrum of obligations is wide and the jurisprudence has provided protection for both individuals and the environment, the application must meet the minimum criteria. An unsuccessful application may fail to present

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87 ECtHR, *Howald Moor and Others v. Switzerland*, 11 March 2014, para 8

88 ECtHR, *Steel and Morris v. the United Kingdom*, February 2005, ECtHR, *Vides Aizsardzības Klubs v. Latvia*, 27 May 2004, ECtHR, *Costel Popa v. Romania*, 26 April 2016, ECtHR, *Bladed Tromso and Stensaas v. Norway*, 20 May 1999, *Piermont v. France*, 27 April 1995, ECtHR, *Steel and Morris v. the United Kingdom*, February 2005

89 ECtHR, *Zimmermann v. Switzerland*, 13 July 1983, ECtHR, *Howald Moor and Others v. Switzerland*, 11 March 2014, ECtHR, *Leon and Agnieszka Kania v. Poland*, 21 July 2009

90 ECtHR, *Botta v. Italy*, 24 February 1998

91 ECtHR, *Chassagnou and Others v. France*, 29 April 1999

92 ECtHR, *Costel Popa v. Romania*, 26 April 2016, para 45

93 Sellars 2002, p. 197

94 Sen 2009, p. 356

95 MacInery 2007, p. 69

evidence of the violation or harm<sup>96</sup>, the causal link between the harm and the alleged act is not clear<sup>97</sup>, the harm does not violate national or international environmental standards or the injury does not exceed what is normal in “every modern town”<sup>98</sup>. In addition, the wide margin of appreciation can be provided for the states if there are legitimate grounds to justify the limitation of the individual right.<sup>99</sup>

### 1.3 Explaining the Greening Mechanisms of the ECtHR

The development of the green jurisprudence of the ECtHR follows the so-called expansion theory<sup>100</sup> and the procedural approach<sup>101</sup>. These two main approaches have been established in the context of international human rights law in general to explain the application and interpretation of existing rights in new contexts, such as the environment<sup>102</sup>. Expansion theory, meaning the interpretation of existing rights in a new context or meaning, is inextricably linked in the context of the ECtHR to the dynamic interpretation (living instrument doctrine<sup>103</sup>) and cross-fertilization doctrine<sup>104</sup>.

Dragoljub Popovic has noted that, due to the nature of the ECHR as a living instrument, to a certain extent, the jurisprudence of the ECtHR is inherently a result of creative legal thinking<sup>105</sup>. This creative legal thinking results in cases bringing new nuances to the existing theories and interpretation of the scope of the application of human rights treaties<sup>106</sup>. For example Hanneke Senden’s analysis shows that the development of the living instrument doctrine has been rapid under Articles 3 and 8 of the Convention<sup>107</sup>.

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96 ECtHR, *McGinley et Egan c. Royaume-Uni*, 9 June 1998, ECtHR, *Chiş v. Romania*, 9 September 2014 (decision on the admissibility), ECtHR, *Frankowski and Others v. Poland*, 20 September 2011, ECtHR, *Martinez Martinez and Maria Pino Manzano v. Spain*, 3 July 2012, ECtHR, *Borysiewicz v. Poland*, 1 July 2008, ECtHR, *Smaltini v. Italy*, 24 March 2015 (decision on the admissibility)

97 See for example: ECtHR, *L.C.B. v. The United Kingdom*, 9 June 1998, para 39

98 See for example: ECtHR, *Borysiewicz v. Poland*, 1 July 2008, para 53

99 For green jurisprudence, where the economic interest has overruled other interests, See: ECtHR, *Arrondelle v. the United Kingdom*, Appl no 7889/77, friendly settlement, ECtHR, *Powell and Rayner v. the United Kingdom*, 21 February 1990, ECtHR, *Hatton and Others v. the United Kingdom*, 8 July 2003 (GC), ECtHR, *Flamenbaum and Others v. France*, 13 December 2012

100 Hajjar-Leib 2011, p. 72

101 Gouritin 2012, pp. 26–27

102 Hajjar-Leib 2011, p. 72

103 Dzehtsiarou 2011, pp. 1730–1745

104 Grant 2015, pp. 178–179, 181–183

105 Popovic 2009, pp. 363–364

106 Gondek 2011, pp. 221–222

107 Senden 2011, p. 275

The ECtHR has used dynamic interpretation in three main ways to ensure that the interpretation is made in light of the present time<sup>108</sup>. The first category is cases where the dynamic interpretation has supported or complemented other rules of interpretation, such as the object and purpose of the Convention<sup>109</sup>. The second group consists of cases where other doctrines of interpretation have had a dominant role in comparison to the living instrument doctrine<sup>110</sup>. These cases are often connected to contexts where states enjoy a wide margin of appreciation<sup>111</sup>. Hanneke Senden has explained that the Court may also refrain from relying on the evolutive interpretation if it does not find adequate support, such as consensus on the matter, or where the intention of the drafters is clear, and ignoring the intention would not be appropriate.<sup>112</sup> The third group of cases is the most significant in terms of legal development, as the dynamic interpretation has replaced other principles of interpretation.<sup>113</sup> However, it should be noted that the adoption of the interpretation represented by the third category of cases requires specific supporting factors to depart from the earlier case-continuum. This requirement diminishes the radical shifts in the case-law and supports legal certainty and predictability.

The dynamic interpretation has made it possible to analyse subject areas not recognized as human rights issues at the time when the Convention was drafted. As a result, the ECtHR has been able to expand the scope of protection into new areas, such as environmental protection.<sup>114</sup> The living instrument interpretation<sup>115</sup> has not been restricted to the specific rights prescribed in the Convention, but may result in new obligations not foreseen at the time of drafting<sup>116</sup>. Expansion of the protection of environmental matters by the Convention is an example of this development. The case of *Lopez Ostra v. Spain* (1995) illustrates how the dynamic interpretation enabled the application of expansion theory. In that case, the ECtHR established that Article 8 of the ECHR protected pollution based health problems, even though the Convention itself was not at the time of drafting intended to cover problems occurring from industry.<sup>117</sup>

According to the doctrine of “strong reasons”, the ECtHR has to have “strong reasons to substitute its view for that of the final decision of the House of Lords or, indeed to prefer the decision of the minority to that of the majority of the court”<sup>118</sup>. Similarly, the

108 Dworkin 1986, p. 88

109 ECtHR, *Golder v. the United Kingdom*, 21 February 1975, para 34

110 See also: Senden 2011, pp. 279, 280–282

111 Lauts & Rytter 2016, pp. 118–119

112 Senden 2011, pp. 279, 280–282. See also: ECtHR, *Johnston and Other v. Ireland*, 18 December 1986, para 53

113 Viljanen 2003, pp. 142–143

114 Viljanen 2011, p. 263, Pieraccini 2015, p. 87

115 Mowbray 2013, p. 35

116 Letsas 2010, p. 518

117 ECtHR, *Lopez Ostra v. Spain*, 9 December 1994, para 57–58

118 ECtHR, *MGN Limited v. the United Kingdom*, 18 January 2011, para 150

ECtHR has been more reluctant to adopt the expansion approach in the context of green jurisprudence if the domestic courts have found a violation of national legislation or the domestic laws support environmental protection. As Ole W Pedersen puts it, “the bulk of the Court’s jurisprudence relates to situations where national authorities have failed to take into account national legislation and rules.”<sup>119</sup> Consequently, the ECtHR provides additional safeguards for the individual to enforce the national rule or decision. As Dinah Shelton has stated: “The cases presented in Europe and Americas are often centered on issues of the rule of law because they are grounded in the failure of states to enforce their own constitutions, laws and decisions”<sup>120</sup>. Examples of cases where the domestic legislation, rule or ruling was not enforced include *Moreno Gómez v. Spain*<sup>121</sup> (2004), *Lopez Ostra v. Spain*<sup>122</sup> (1995), *Taşkın and Others v. Turkey*<sup>123</sup> (2004), *Fadeyeva v. Russia*<sup>124</sup> (2005), *Gicomelli v. Italy*<sup>125</sup> (2006), *Lemke v. Turkey*<sup>126</sup> (2007) and *Bor v. Hungary*<sup>127</sup> (2013). In some of these cases the domestic rulings supported the greening of the jurisprudence<sup>128</sup>, which created a dialogue between the national court and the ECtHR<sup>129</sup>. The opportunities for direct dialogue between the national courts and the ECtHR will be strengthened when Protocol 16 enters into force as protocol grants an opportunity for the highest courts of the State Parties to request the ECtHR to give advisory opinions on questions relating to the application or the interpretation of the rights protected in the ECHR and its Additional Protocols<sup>130</sup>.

The use of expansion approach has moreover received support from the use of international instruments, creating a cross-fertilization of rights. The Court often waits at least for international reports and soft law instruments to emerge, before departing from the current state practice and into new fields<sup>131</sup>. Therefore it is important to acknowledge which factors would support a living instrument style approach in this field and which factors would oppose extending further protection. Dinah Shelton has explained that: “The tribunals will thus differ in their focus and priorities among legal norms, although accepted rules of interpretation call for taking into consideration all relevant international

119 Pedersen 2010, p. 578

120 Shelton 2015, p. 145

121 ECtHR, *Moreno Gómez v. Spain*, 16 November 2004, para 61

122 ECtHR, *Lopez Ostra v. Spain*, 9 December 1994, paras 55–56

123 ECtHR, *Taşkın and Others v. Turkey*, 10 November 2004, paras 121–125

124 ECtHR, *Fadeyeva v. Russia*, 9 June 2005, para 86

125 ECtHR, *Giacomelli v. Italy*, 2 November 2006, paras 92–93

126 ECtHR, *Lemke v. Turkey*, 5 June 2007, paras 43–45

127 ECtHR, *Bor v. Hungary*, 18 June 2013, para 26

128 ECtHR, *Taşkın and Others v. Turkey*, 10 November 2004, para 113–114

129 See for dialogue example: Dzehtsiarou 2017

130 Lock 2015, p. 226

131 Van der Schyff 2011, p. 69

law”.<sup>132</sup> The ECtHR is no exception to this and has relied on the Vienna Convention on Law of the Treaties Articles 31–33, which guides the ECtHR to take into account “any relevant rules of international law applicable in the relation between the parties.”<sup>133</sup> The ECtHR confirmed the rule in the case of *Ad-Adsani v. the United Kingdom* (2001), where it held that the ECHR “cannot be interpreted in a vacuum” and “it should so far as possible be interpreted in harmony with other rules of international law of which it forms a part.”<sup>134</sup> The approach was further developed in the case of *Demir and Baykara v. Turkey* (2008), where the Court supported its arguments with other human rights law instruments<sup>135</sup>. In *Demir and Baykara v. Turkey* (2008) established that the ECtHR “can and must” take into account international law. In *Al-Adsani v. UK* case, the formulation was that “The Convention should be so far as possible be interpreted in harmony with other rules of international law of which it forms part”.<sup>136</sup> The ECtHR has further in the case of *Nada v. Switzerland* (2012) the ECtHR explained how it recognizes and respects the diversity of coexistence of different applicable norms of international law<sup>137</sup>. The stance of the Court was that it does not claim that the ECHR would prevail or *have de facto* primacy over other rules of international law.

The Court currently uses the comparative materials in multiple ways: as a rhetorical tool, inspiration and as support for the authority and legitimacy of the chosen solution. By rhetorical use McCrudden refers to sources that do not have a substantive, but rather a stylistic meaning. McCrudden has also analysed, how the Court will use the comparative materials as inspiration to provide support in the new fields of protection. In addition, the third purpose is to receive support and justifications for the chosen path by using comparative arguments from other courts.<sup>138</sup> One important way is also to use international law and jurisprudence in order to build consensus argumentation. The consensus doctrine<sup>139</sup> was introduced in *Tyrer v. the United Kingdom* case (1978)<sup>140</sup>. The ECtHR has not clearly defined the content of the consensus<sup>141</sup>, but in general the consensus doctrine refers to how the ECtHR has sought to establish a shared European understanding of the scope of protection. Pauli Rautiainen has noted that the consensus assessment may

132 Shelton 2015, p. 140

133 See for example: Gardiner 2014, pp. 475–506, Schlütter 2010, pp. 92–97

134 *Al-Adsani v. United Kingdom*, 21 November 2001, para 55

135 ECtHR, *Demir and Baykara v. Turkey*, 12 November 2008, paras 147–151

136 ECtHR, *Al-Adsani v. the United Kingdom*, 21 November 2001, para 55

137 ECtHR, *Nada v. Switzerland*, 12 September 2012, paras 169–170

138 Mc Crudden 2007, p. 378

139 Dzehtsiarou 2013, pp. 129–134

140 ECtHR, *Tyrer v. the United Kingdom*, 25 April 1978, para 38. Other central cases for consensus, see cases (not environment), such as ECtHR, *Leyla Shabin v. Turkey*, 10 November 2005, para 109, ECtHR, *Egeland and Hanseid v. Norway*, 16 April 2009, paras 54–55, ECtHR, *Harkins and Edwards v. the United Kingdom*, 17 January 2012, para 138

141 Helfer 1993, pp. 143–144, Helfer 2008, pp. 125–159



consequently be connected to any element so far as it can be observed empirically.<sup>142</sup> Consensus has been constructed on the basis of consensus between states<sup>143</sup>, on the basis of international agreements or contributions of international courts.<sup>144</sup> Consensus is thus used as an interpretative vehicle using various international sources to assess whether there is international or regional consensus on the matter.

The development of environmental jurisprudence is closely connected to the cross-fertilization of rights. In *Demir and Baykara v. Turkey*, the Court used environmental context as an example of the approach, where the use of international sources have been taken into account. The Court held that:

82. In order to determine the criteria for State responsibility under Article 2 of the Convention in respect of dangerous activities, the Court, in the *Öneryıldız* judgment, referred among other texts to the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment (ETS no. 150 – Lugano, 21 June 1993) and the Convention on the Protection of the Environment through Criminal Law (ETS no. 172 – Strasbourg, 4 November 1998). The majority of Member States, including Turkey, had neither signed nor ratified these two conventions (see *Öneryıldız*, cited above, § 59).

83. In the *Taşkın and Others v. Turkey* case, the Court built on its case-law concerning Article 8 of the Convention in matters of environmental protection (an aspect regarded as forming part of the individual's private life) largely on the basis of principles enshrined in the United Nations Economic Commission for Europe's Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (ECE/CEP/43) (see *Taşkın and Others v. Turkey*, §§ 99 and 119, 4 December 2003). Turkey had not signed the Aarhus Convention.<sup>145</sup>

The case of *Demir and Baykara* is a landmark ruling, so the recognition of the cross-fertilization in an environmental context illustrates that environmental jurisprudence is not an isolated area of jurisprudence, but normalized practice, which is closely connected to the development of general doctrines.

In the context of the green jurisprudence, cross-fertilization on the basis of EU law and international environmental principles has been significant particularly in relation to the establishment of the precautionary principle<sup>146</sup> adopted by the ECtHR to clarify the content of the obligations applicable<sup>147</sup>. The development of the requirement for

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142 Rautiainen 2011, p. 1156

143 Forowicz 2010, p. 9

144 Wildhaber et al. 2013, p. 253

145 ECtHR, *Demir and Baykara v. Turkey*, 12 November 2008, paras 82–83

146 See for precautionary principle: Hollo 2007, pp. 76–84

147 ECtHR, *Tătar v. Romania*, 27 January 2009, paras 95 and 100

an environmental impact assessment procedure<sup>148</sup> likewise has a strong basis in cross-fertilization between EU and international law.<sup>149</sup> The procedural approach also has a significant connection to cross-fertilization doctrine<sup>150</sup> as the ECtHR has supported its procedural approach with both general and specific instruments<sup>151</sup>. The ECtHR has utilized in particular the standards of the Aarhus Convention in its green jurisprudence<sup>152</sup> so that currently protection in relation to access to environmental information, the right to participation and the right to effective remedy are on the same level.<sup>153</sup> Furthermore, the ECtHR has to some extent also utilized the environmental regulations of the Council of Europe<sup>154</sup>.

## 1.4 Presenting the Research Questions and Problematization of the Topic

The literature states that the legitimacy of the superior institution in relation to the individual should include treating individual claims as of “equal concern”<sup>155</sup>, the acts should fulfil the criteria of “fairness” and “neutrality” and also consider all relevant interests and the existing case law.<sup>156</sup> Besides, according to Rousseau, the sense of injustice suffices as a basis for the need of assessment of the legitimacy<sup>157</sup>. The ECtHR has maintained its legitimacy as it has treated individual applications submitted in accordance with the object and purpose of the European Convention on Human Rights. The ECtHR itself established in the case of *Soering v. the United Kingdom* (1989) that:

the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective (see, inter alia, the Artico judgment of 13 May 1980, Series A no. 37, p. 16, § 33). In addition, any interpretation of the

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148 For Environmental Impact Assessment, see: The Espoo Convention on Environmental Impact Assessment in a Transboundary Context, adopted 25 February 1991, entered into force 10 September 1997, 1989 UNTS 309. Supervisory organ: The Implementation Committee of the Espoo Convention. Report of the Implementation Committee on its twenty-first session, ECE/MP.EIA/IC/2011/4/ 20 June 2011, para 12. For literature, see for example: Marsden & Koivurova 2011

149 ECtHR, *Giacomelli v. Italy*, 2 November 2006, paras 60, 94, ECtHR, *Hardy and Maile v. the United Kingdom*, 14 February 2012, paras 130–131, 191

150 Senden 2011, Forowicz 2010

151 Stephens 2010, p. 320

152 ECtHR, *Taşkın and Others v. Turkey*, 10 November 2004, paras 99, 118 and 119, ECtHR, *Grimkovskaya v. Ukraine*, 21 July 2011, para 72

153 De Sadeleer 2012, p. 71, See Boyle 2012, pp. 623 and 635

154 See for example: ECtHR, *Öneryıldız v. Turkey*, 30 November 2004 (GC), paras 59–60, ECtHR, *Guerra and Others v. Italy*, 19 February 1998, para 34

155 For legitimacy, see for example: Sieghart 1983, p. 7, Dworkin 2006, p. 97, Dworkin 2000, p. 1

156 Shklar 1990, pp. 89–90

157 *Ibid.*, p. 92



rights and freedoms guaranteed has to be consistent with “the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society” (see the Kjeldsen, Busk Madsen and Pedersen judgment of 7 December 1976, Series A no. 23, p. 27, § 53).<sup>158</sup>

However, areas of green jurisprudence where the ECtHR could strengthen its legitimacy and develop argumentation guaranteeing the protection of the object and purpose of the Convention, are those that have not yet been developed or where the development is its infancy.

For the development of green jurisprudence it is important that researchers participate in the analysis of the potentials and limitations to the extension of the current protection provisions in matters related to green jurisprudence. Scholarly effort can contribute to the development of the law by inspiring strategic litigation and also providing support for the judges of the ECtHR in developing their argumentation. The exact research question can be defined as follows: *How does the transformation of the current case law and doctrines facilitate the future greening of the jurisprudence of the European Court of Human Rights?* In the context of the evolution of case law, the focus is also on the different parties and their roles in influencing the greening of the jurisprudence. How far the ECtHR’s case law can develop in those areas where there is no development or only modest incipient developments, depends on the ECtHR, but also on the contributions of the applicants, the state parties, the national courts, third parties and the practice of international organs. Consequently, the ECtHR’s role as a platform for enabling the development of argumentation on the green jurisprudence is under review in this dissertation.

The main research question is examined more specifically through the following subsidiary research questions:

- 1) How is green jurisprudence created in the system of the European Court of Human Rights?
  - what are the roles of the various parties (applicant, state, third party, the Court) in the formation of green jurisprudence?
  - how do the different roles of the various parties influence the greening of the jurisprudence of the Court?
- 2) How might the role of the environment in green jurisprudence change?
  - under what conditions could the Court recognize the right to a healthy environment?
  - could the Court recognize the rights of nature?
  - how to model the future case law by rewriting the current case law?
  - how would recognition of the right to a healthy environment alter the current protection of the environment under the Convention?
- 3) How can the greening of the case law strengthen the current protection of the human rights of a group of individuals whose rights have not been effectively protected under the Convention?

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<sup>158</sup> ECtHR, *Soering v. the United Kingdom*, 7 July 1989, para 87

- what is the relationship between the environment and the indigenous peoples?
  - what are central doctrines of the Court that enable the development of recognition of the special lifestyle and culture of the indigenous peoples?
- 4) What opportunities and limitations has green jurisprudence to develop in the complex area of climate change?
- how to establish territorial liability in the climate change context?
  - is the application of extraterritorial liability and shared liability doctrines possible in the climate change context?
- 5) How to model the future case law by rewriting the current case-law?

The aim of the dissertation is to explore how the current doctrines of green jurisprudence and other relevant general doctrines can help the ECtHR to develop its protection to cover such contemporary green human rights problems that it does not currently sufficiently protect. All the subsidiary questions are related questions to this. Whereas the questions mostly follow the structure of the dissertation, they are very much interrelated and discussed throughout the thesis.

The current academic discussion is challenged regarding how the legal argumentation on the interpretation of the ECHR is created. The current research on the European Court of Human Rights and its case law focuses heavily on the outcomes of the judgments, and hence that it is the European Court of Human Rights which develops the case law. However, my understanding is somewhat different as I take the view that the ECtHR does not only develop the law but also serves as a platform, where various parties, such as applicants, states, and third-party interveners submit their understanding of the interpretation of the Convention, which then affects how the ECtHR is able to develop the argumentation. My central argument is that for the future greening of case law, it is not only the ECtHR that can and should develop its argumentation, but that the development is also dependent on the quality of the applications the ECtHR receives, the willingness of the states to make friendly settlements and the ability of third-party interveners to provide the ECtHR with such materials which can be used as determinants for the argumentation.

Other subsidiary questions were formulated primarily because while the discussion in the contemporary research on human rights and the environment is lively, it is less active in the context of the ECtHR. For example the discussion on the recognition of the right to a healthy environment<sup>159</sup> has been lively in relation to both the universal and regional human rights frameworks, but in relation to the ECtHR the discussion has been more restricted. The ECtHR itself has discussed explicitly the recognition of environmental rights or the right to a healthy environment in only few cases, and the literature has consequently only discussed the topic to a limited extent. However, as the development is ongoing elsewhere and the recognition of the right to a healthy environment would empower individuals to make claims for the protection of the environment, it is important to analyse the prospects

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<sup>159</sup> Razzaque 2010, pp. 116–117, Anderson 1996, pp. 4–7, Gioretta 2004, p. 403

and the limitations in recognizing the right to a healthy environment in the context of the ECtHR.

Similarly, the development of the legal instruments providing protection for the indigenous peoples has been ongoing and growing on an international level.<sup>160</sup> The academic discussion on the protection of the rights of the indigenous peoples in relation to environmental decision-making has likewise been fruitful. However, only few researchers have discussed the opportunities to protect the rights of indigenous peoples through the green jurisprudence of the ECtHR, despite the possibilities for dynamic interpretation of its judgments. Despite the limited amount of existing green jurisprudence, there is a need to continue the discussion on the doctrinal prospects and limitations of the ECtHR to protect the rights of a vulnerable group, such as the indigenous peoples, when the access of the indigenous peoples to their ancestral lands is at stake due to climate change and local industrial activities such as mining. Instead of major doctrinal transformation, the idea is to show that depending on the “what does it say in the law?”<sup>161</sup>, the level of protection changes. One purpose of my dissertation is to demonstrate that there is no need to recognize group rights in order to ensure the effective protection of the rights of the indigenous peoples, if the environmentally related vulnerability<sup>162</sup> of individuals belonging to indigenous communities are acknowledged. Therefore my aim is to some extent to provide guidance on the question of what it ought to say in the law<sup>163</sup>, so that the protection of the rights of individuals belonging to indigenous communities would be effective.

The dissertation also discusses an area of human rights on which the ECtHR has not yet given any judgments. For example, the Office of the United Nations High Commissioner for Human Rights has underlined the urgency of climate change-related human rights violations for many years.<sup>164</sup> Climate change is a severe threat to the realization of several fundamental human rights, such as the right to life and the right to health. In order to guarantee that the protection under the ECtHR remains effective, it should be acknowledged that climate change also poses a threat to the rights protected under the ECHR. For example, increasing floods, heats, and extreme weather conditions are already influencing the rights of individuals residing in the States Parties to the ECHR. Consequently, there is practical need for the ECtHR to recognize that climate change is threatening the realization of human rights globally and in Europe and to provide an effective remedy for the victims. Whereas the current green jurisprudence serves a basis for developing the argumentation in the context of climate change, as a unique transboundary environmental threat posed by various actors, the regular logic of territorial liability for a

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160 Barelli 2012, pp. 1–2, Convention Concerning Indigenous and Tribal Peoples in Independent Countries C169, 72 ILO Official Bill. 59 (Jun. 27, 1989) adopted on June 27, 1989, and entered into force on May 9, 1991

161 Smits 2012, p. 9

162 See for example: Pearce et al. 2009, pp. 1–21

163 Hutchinson – Duncan 2012, p. 84–85

164 Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights, 15, UN Doc. A/HRC/10/61, 15 January 2009

single state applies only to specific conditions. It is likely that the future claims will also include elements of shared liability and extraterritoriality, both of which are doctrines established and recognized by the ECtHR in certain other contexts, but only in exceptional circumstances and relatively rarely. Due to the complexity of the application of the ECHR to climate change context, there is a need to discuss the prospects and the limitations. This dissertation aims to open the discussion and calls on the rest of academia also to consider the applicability and suitability of the ECtHR in protecting the rights of individuals against the implications of climate change.

The dissertation incorporates a rewriting method not so far commonly used in the context of ECtHR related research, but limited to one book. The modelling of future case law is done and examined in relation to the role of the environment, indigenous peoples and climate change. The rewriting approach has been selected to discuss the issues in a specific context. The problem with analysing the potential and limitations for the development of the future green jurisprudence on an abstract level is that the level of discussion is general and lacks the specific features of case law, whereas the adoption of the method of rewriting acknowledges that the cases invariably have specific conditions in which the development takes place, so that the doctrines are applied and interpreted in given context. The judges of the ECtHR do not discuss hypothetical cases, nor do they make general comments without a specific case. In the rewriting and the explanatory analysis of rewriting the nature of the jurisprudence of the ECtHR is acknowledged and simulated.

The dissertation has its roots in the traditions of the research concerning the ECHR and the ECtHR and thus even though the topic is close to international environmental law, international human rights law, the rights of indigenous peoples and national constitutional environmental rights, the dissertation does not cover each and every relevant development of other available systems, but focuses on the potential and obstacles in developing the green jurisprudence of the ECtHR. Furthermore, the basis for the dissertation is to discuss the possibilities for developing protection through the present system and case law, consequently it does not examine or evaluate other possibilities, such as the establishment of a new legal instrument or changing of the institutional setting of the Court.

There is an ongoing and lively debate on the legitimacy of the ECtHR, which to some extent influences the development of the future case law. However, as no major concerns have been raised among the states or researchers to suggest that legitimacy questions are critical in relation to green jurisprudence, I do not enter into the debate on legitimacy except to concede that legitimacy concerns exist and should be taken into account. Furthermore, there is an academic discussion about the different backgrounds of judges and the role of these backgrounds in the interpretations made. I concede that the ECtHR is composed of individuals with their own respective characteristics, but as my methods do not include interviews or anthropological observation, the dissertation does not discuss the matter in detail. One further specific limitation is that my focus is on reviewing individual cases, not

pilot judgments. This is because green jurisprudence has not been developed through pilot judgments.

## 1.5 Methodological Considerations

### 1.5.1 Legal Dogmatics as a Basis for the Study

Felix S. Cohen wrote about the dream of a German lawyer called von Jhering. Von Jhering had a dream that there would be a heaven where all the theoreticians of the law would meet.<sup>165</sup> In an ideal world, doctoral students could take this imaginary adventure at the beginning of their dissertation process and wake in the morning with a suitable theory and concepts for their work:

In this heaven, one met, face to face, the many concepts of jurisprudence in their absolute purity, freed from all entangling alliances with human life. Here were the disembodied spirits of good faith and bad faith, property, possession, laches, and rights in rem. Here were all the logical instruments needed to manipulate and transform these legal concepts and thus to create and to solve the most beautiful of legal problems. Here one found a dialectic hydraulic-interpretation press, which could press an indefinite number of meanings out of any text or statute, an apparatus for constructing fictions, and a hair-splitting machine that could divide a single hair into 999,999 equal parts and, when operated by the most expert jurists, could split each of these parts again into 999,999 equal parts.<sup>166</sup>

Lacking such a machine of methods, I relied for a long time on the legal dogmatic method focusing on the current jurisprudence. Consequently, the dissertation largely follows the doctrinal approach. Jan M. Smits stated that for legal dogmatics the crucial question is, “How does the law read?”<sup>167</sup> The legal doctrinal and dogmatic research aims to describe and systematize legal norms and jurisprudence.<sup>168</sup> The Pearce Committee defined doctrinal research as “a systemic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty” and may also make predictions

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165 Cohen 1935, p. 809

166 The ironic ending would not probably be a problem for the dead legal scholars, but what would make the life of the doctoral students difficult: “The boundless opportunities of this heaven of legal concepts were open to all properly qualified jurists, provided only they drank the Lethean draught which induced forgetfulness of terrestrial human affairs. But for the most accomplished jurists, the Lethean draught was entirely superfluous. They had nothing to forget.” Cohen 1935, p. 809

167 Smits 2012, pp. 9 and 13

168 Hutchinson – Duncan 2012, pp. 84–85

on future developments<sup>169</sup>. The doctrinal elements are inherent in legal research, likewise to judges and practising lawyers<sup>170</sup>.

As the case law forms a significant basis for the doctrinal analysis, relevant cases must be selected. The selection of case law necessitates selection criteria as to what qualifies as green jurisprudence. Despite the considerable amount of literature on green jurisprudence, what defines an environmental case is seldom encountered. There is a risk that if environmental jurisprudence is not defined, it is not fully identified and recognized. Neither is there transparency as to why certain cases were selected while others were not. In my definition, the green jurisprudence of the ECtHR includes all such cases that involve natural or human environmental problems, either indoors or outdoors, cases that relate to the management of environment, including urban planning and land use as well as cases that protect procedural environmental rights, such as the right to access to information, the right to participation in environmental decision-making or the right to access the court.

Nor is there a tradition in the research on the green jurisprudence of the ECtHR to explain the method of selecting the cases. Only rarely is a number of cases<sup>171</sup> and timeframe defined.<sup>172</sup> Even in those texts where the selection of cases is limited to a small number there is no analytical reasoning why these cases were included but not others and what the limitations and consequences of the choices might be. Cases were selected for the present study by using the definition of green jurisprudence. The method of identifying all the relevant cases entailed an examination of the relevant literature in relation to green jurisprudence, international environmental law, international human rights law and the rights of the indigenous peoples. Furthermore, I reviewed the factsheet relating to human rights and the environment and relevant reports by NGOs.

It is possible to use green jurisprudence from different perspectives, such as from the point of view of factual circumstances. My aim has been to study green jurisprudence related particularly to the general statements on the role of the environment, the state obligations established and the principles of interpretation used, as these combine with the tools to rewrite current judgments by using the current logic of the ECtHR. At the same time, my aim is not to present an extensive introduction to the contemporary green jurisprudence of the ECtHR, avoiding repetition of the existing literature, but to use the current green jurisprudence to envision future case law. For these reasons, my focus is not on introducing the context of the each and every case, but on the general legal doctrines discussed in the cases.

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169 *Ibid.*, p. 101

170 *Ibid.*, pp. 105 and 107

171 Stephens 2010, p. 320

172 West – Schulz 2013, p. 31

## 1.5.2 Imagining and Rewriting Judgments and Decisions as a Method

Jan M. Smits stated in his book “The Mind and Method of Legal Academic” that legal scholars should be interested in, “what the law *ought* to be”.<sup>173</sup> Smits also calls for researchers to display creativity<sup>174</sup>. Legal scholars should dare to dream about things that have never so far existed, as if scholars do not, who then? The chosen method related to the rewriting of the case law in the third, fourth and fifth chapters resembles that in the book “Diversity and European Human Rights, Rewriting Judgments of the ECHR”<sup>175</sup>. There the authors select a real judgment of the ECtHR, present a critical observation of the ruling and an analysis of how the case might have been resolved differently. Eva Brems has explained that the method aims to achieve better argumentation and identify perspectives that have not been sufficiently taken into account in the judgments<sup>176</sup>. Thus the purpose of the rewriting project has been to show how to improve the protection of the human rights of individuals whose rights have not always been effectively protected.<sup>177</sup> My aim is the same in relation to the indigenous peoples and to some extent in relation to the reformulation of the role of the environment. An additional aim in the context of climate change is to illustrate the relevant arguments in a context where the ECtHR has not yet adopted a position, but which is a serious cause behind some of the contemporary and future human rights violations.

The following chapters involving rewriting are also connected to what Álvaro Núñez Vaquero<sup>178</sup> has defined as “technological model of legal dogmatic” research. Like legal realism and the constructive method, the technological model of legal dogmatic research focuses on the facts and the results of the specific judgments as creating law and acknowledges the impacts of judicial interpretation on society<sup>179</sup>. Vaquero has explained that “the technological model of legal dogmatics requires that legal scholars choose a state of affairs as the best – making that choice explicit – and offering evidence supporting that a particular legal solution is the appropriate one to attain this state of affairs”<sup>180</sup>. Vaquero continues that “proposing solutions for difficult cases – they present practical arguments that seem rational, but in a different sense of the term ‘rational’ (in respect of the model of practical rationality that seeks to justify practical decisions based on norms, moral and/or legal values and principles).” In my dissertation, the guiding legal values are effective protection of human rights and protection of the environment.

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173 Smits 2012, p. 7

174 *Ibid.*, p. 101–103

175 Brems 2012, pp. 21–28

176 *Ibid.*, pp. 21–28

177 *Ibid.*, pp. 17–18, pp. 23–24

178 Vaquero, *Five Models of Legal Science*, <https://revus.revues.org/2449> (last visited 26 February 2018)

179 See for example: Leiter, 2007

180 Vaquero, *Five Models of Legal Science*, <https://revus.revues.org/2449>, para 58 (last visited 26 February 2018)



Chapters Four and Five in particular address the technological model of legal dogmatic research, as my purpose is to articulate the logic of current doctrines that should be fulfilled to be able to develop argumentation in the contexts of the indigenous peoples and climate change. In the context of the indigenous peoples, I accept the realities that the ECtHR is probably not willing in the immediate future to extend its protection to group rights and cultural rights. However, this does not prevent the development of the protection of the indigenous peoples falling under the jurisdiction of the ECtHR if the current doctrines of green jurisprudence are utilized and modified. In contrast to the current claims of indigenous peoples, mainly Sámi people, that have been few and disappointing in their outcome, the green case continuum is diverse and well established. By utilizing the greening mechanism in the indigenous context, it could be possible to strengthen the current protection of the indigenous peoples.

Human rights-based climate change cases are difficult as none have so far come to court. Climate change does not fall into the traditional logic of territoriality and the causal link between the act and the damage. However, it will indubitably affect the realization of human rights.<sup>181</sup> The argumentation that I try to provide is rational, meaning that the arguments take place in accordance with the well-established institution according to its current doctrines. The purpose is thus to analyse how the protection level could be raised so that the development would be compatible with the current development.

## 1.6 Research on the Topic and the Justification for the Research at Hand

The amount of literature on green jurisprudence is on the increase<sup>182</sup>. The research so far has presented in-depth analyses of major<sup>183</sup> or recent<sup>184</sup> developments in case law and landmark cases, such as *Lopez Ostra v. Spain*<sup>185</sup> (1995), *Hatton and Others v. United Kingdom*<sup>186</sup> (2003) and *Tatar v. Romania*<sup>187</sup> (2009). All these cases are landmark judgments and the fact that case comments have been prepared underlines their landmark status. The strengths of the case comments and reviews of a few recent cases are that this is a way to draw attention to the ground breaking judgments. The form makes it possible to analyse the factual circumstances in detail and to conduct in-depth analyses. However, the limitations of using case comments are that they reveal only a limited part of the main developments.

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181 *Ibid.*, para 58

182 See for example: Desgagne 1995, pp. 263–294, San Jose 2010, pp. 9–16

183 De Sadeleer 2012, pp. 39–74

184 See for example: Harrison 2009, pp. 506–508

185 Sands 1996, pp. 597–618

186 Grekos 2002, pp. 46–49

187 Shelton 2010, p. 247



The academic discussion has been particularly active about green developments under Article 8 of the Convention regarding private and family life<sup>188</sup> and under Article 2 of the Convention on the right to life<sup>189</sup>. Another prominent style in the systematization of the case law used in the literature on the green jurisprudence of the ECtHR is to limit the analysis to the one legal norm. This has been done in particularly in relation to Articles 8 and 2 of the Convention<sup>190</sup>. The benefits of the approach limiting the assessment on one legal norm are that it provides a broad understanding of the state obligations despite the environmental context. The ECtHR has developed state obligations in relation to the positive obligations so that they may apply in several environmental contexts. In addition, the selection is reasonable as different rights often include various issues.<sup>191</sup> However, the ensuring a balanced introduction to the developments is challenging; the number of cases is considerable. For example, most of the environmental cases are related to Article 8, which includes inadmissible cases, judgments from Chambers and Grand Chamber cases and other landmark cases. These cases differ from each other in numerous ways: in number, style of argumentation and reasoning, impact and role in research. The focus of the research so far has been on systematizing all these cases under Article 8, but no explanations have been offered for the omission of certain cases.

Furthermore, the academic discussion on green jurisprudence has discussed general doctrines such as margin of appreciation<sup>192</sup> and provided analyses of concepts such as “risk”<sup>193</sup>. The benefits of the approach are that the analysis of the cases in the light of doctrines, such as margin of appreciation, creates an understanding of the content and scope of the doctrine. However, there is a risk that emphasizing one doctrinal development over the rest will result in an unbalanced evaluation of the overall developments. In addition, the research so far has analysed the role of green jurisprudence in reference to a specific State Party, such as the United Kingdom<sup>194</sup>. Country-focused research contributes to the national discussions, which is important in order to understand what minimum standards of green jurisprudence have been set in relation to the domestic fundamental rights. The systematization of case law on a country basis also serves the purposes of conducting comparative analysis.

A common feature of the research so far on the green jurisprudence of the ECtHR is that it focuses on analysing the existing environmental jurisprudence. The style is inherent to the doctrinal research of the European Convention on Human Rights and the European

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188 See for example: Drupsteen 2012, pp. 121–122, Malgosia 2011, p. 107

189 Lauts – Rytter 2016, pp. 113–115

190 Malgosia 2011

191 Letsas 2010, p. 510.

192 Hilson 2013, pp. 262–286, Müllerová 2015, pp. 83–92

193 Hilson 2009

194 Morrow 2013, pp. 317–369, Fitzmaurice – Marshall 2007, p. 103

Court of Human Rights<sup>195</sup>. However, there is less thorough analysis of the possible future developments of green jurisprudence particularly in those areas where there are currently no major developments. For example, there is no tradition of rewriting green jurisprudence. However, the book *Diversity and European Human Rights, Rewriting Judgments of the ECHR* edited by Eva Brems has introduced the method in the context of the case-law of the European Court of Human Rights<sup>196</sup> and this has served as an inspiration for this dissertation.

There is a need to imagine the case-law and rewrite the current jurisprudence to yield a model of how the argumentation can be built. The benefit of rewriting is that the future prospects are not on the level of high abstraction, but there is context. This is highly relevant as real case law always has a specific context, and factual circumstances in relation to the legal interpretation are made. By rewriting the judgments, the researcher has an opportunity to specifically illustrate the future prospects by applying the same means and methods as judges. The context of green jurisprudence in particular is an area where new types of human rights violations will take place. Examples of the contemporary human rights problems include violations related to climate change. If the research is kept on hold until the point that the first judgment on climate change is given, it will have contributed nothing to the issue even though the relevance has been already identified.

This dissertation is moreover connected to the international developments in the right to a healthy environment<sup>197</sup>, environmental rights<sup>198</sup> and in general to the human rights approach to the environment<sup>199</sup>. The development of the green jurisprudence of the ECtHR has been relatively compatible with the other parallel international instruments related to human rights and the environment, and thus it is essential to take into account the relevant developments when assessing the future limitations and potential for further greening of the jurisprudence. Due to the specific analysis on the rights of indigenous people<sup>200</sup>, climate change<sup>201</sup> and the rights of nature<sup>202</sup>, the dissertation also has connections to the literature on these aspects, which have been studied only to the extent that is relevant to the further development of the green argumentation of the ECtHR. Therefore different parallel supervisory institutions are not explained in detail in the dissertation, but references are made to specific instruments or practices as a source of inspiration and support.

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195 Letsas 2010, p. 510

196 Brems 2012, pp. 21–28

197 Razzaque 2010, p. 115

198 Osofsky 2005, pp. 107–118, Hayward 2005, p. 10, Evans – Hancock 1998, pp. 1–21, Cook 2002, pp. 196–215, Boyle 2007, pp. 471–511, Shelton 1991, p. 104, Shelton 2001, p. 185, Knox 2010

199 Shelton 2003, Francioni 2010, pp. 41–53, Collins 2015, p. 231

200 See for example: Heinämäki 2006, pp. 187–232, Koivurova 2011, pp. 1–37, Northcott 2012, Otis – Aurélie 2013, pp. 156–180

201 Caney 2010

202 Burdon 2011

## 2 THE EUROPEAN COURT OF HUMAN RIGHTS AND THE DEVELOPMENT OF THE CASE LAW

My main interest is to focus on deducing a law from the case law of the European Court of Human Rights: what are the conditions necessary for the case law to evolve in new areas? Only after that is it possible to imagine and rewrite as yet non-existent judgments. My interest is therefore not only in the outcomes of the current case law and the law emerging but also in the process of producing the law in the legal framework of the ECtHR. The principal tenet is that the forming of law is not limited to events taking place inside the court building of Strasbourg, nor even in the mind of a single judge, but that these two are the physical places, necessary platforms, on which the analysis of what the law amounts to is made. Consequently, the ECtHR and its judges represent the final stages in the formation of the law. The vision of the developing of law predates this.

### 2.1 Creation of the Claims

Law begins to take shape from the moment that someone feels a sense of severe injustice in society. Such a feeling may have its roots in abusive behaviour on the part of the state authorities or even in the acts of private parties, such as another individual or a corporation that the state has failed to supervise. At this point, the anonymous subject lacks a clear understanding of what the law is before the ECtHR. However, the individual should be aware of a breach of the law, how the law should provide protection and for what reasons. The feeling of suffering injustices prompts the individual to react against such injustice. From this moment, the law begins to take shape.

The national courts then start the interpretation of the law and the scope of protection. If the applicant has evinced argumentation on the basis of the European Convention on Human Rights, the national court or courts form their interpretation of the circumstances, the application of legal principles and the obligations under the Convention. In principle, the national courts should follow the interpretation of the ECtHR and apply the rights of the Convention in the light of the well-established principles and case law. However, if there a strong feeling of injustice persists after domestic remedies have been exhausted, the law before the ECtHR is about to take shape.

The individual makes an important decision on how the process will continue. This decision is influenced by the capacity of the individual to invest time, knowledge and

funding in the issues. One option is for the individual to trust her own capability to appeal to the ECtHR or then the individual has no alternative but to appeal alone. The decision may also be made for pragmatic reasons: the individual lacks the financial resources to retain professional lawyers. The strength of the approach, where the individual him or herself prepares the application is that the individual herself knows best what has happened and is highly motivated to lodge an optimal claim. While the presentation of the circumstances of the case is a determinant to pass the admissibility stage, the individual's own expertise is a strength. However, as a layperson, the individual may lack a legal understanding of the current scope of protection afforded and the importance of understanding the role of evidence, that is, what evidence may support or undermine the argumentation of the appeal. For these reasons, the interpretation of the individual as to what the law should be may not necessarily provide convincing or supporting argumentation for the ECtHR, but it is up to the ECtHR to decide without support.

Another option is that the individual seeks expertise help in making the appeal. The members of vulnerable groups may, for example, need to contact an NGO and report their case, or an individual can decide to find a suitable lawyer to bring the case before the Court. At this point, there is a risk that there is no NGO willing or able to bring the case before the Court. NGO may lack interest in that particular case or subject area; they may lack expertise in the matter or the time or financial resources for the strategic litigation.<sup>203</sup> Strategic litigation is litigation that seeks strong and relevant cases that can result a judgment striving for legal and policy reforms. The aim of the strategic litigation is to find suitable individuals whose circumstances represent a wider, structural problem and then build an application before the court. Unfortunately, even major human rights NGOs in Europe, such as Amnesty International or Human Rights Watch, do not necessarily provide help for individuals in court cases, but their focus is on action by other methods. Before the ECtHR one of the strongest fields having a tradition in strategic litigation is discrimination against Roma people.<sup>204</sup> However, there is no similar significant tradition in relation to the green jurisprudence of the ECtHR, even though strategic litigation could in principle be undertaken by both human rights NGOs and environmental NGOs.

Finding a suitable lawyer may also involve pragmatic difficulties: lawyers' fees are high, and they may not accept cases if they are already overloaded or perceive no potential in the case. For example, large enterprises specialized in environmental law in Finland specialize mainly incorporate clients, which reduces the opportunities of the individual to seek a specialized lawyer to represent them. Also, there is a risk that the lawyer that takes the case is not expert enough.

While it is essential for the formulation of the law that potential cases are brought before the ECtHR, there are also circumstances when it is better that the case is not brought before

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203 On strategic litigation see for example: Solvang 2008, pp. 208–219, Fuchs 2013, pp. 21–43

204 See for example: Weiss, *What is Strategic Litigation?* <http://www.errc.org/blog/what-is-strategic-litigation/62> (last visited 26 February 2018)

the Court. A case which is weak in its settings but likely to meet the admissibility criteria, may be prejudicial to the development and the future interpretation. Legal advisors and NGOs are crucial in identifying cases which may have negative consequences for the future development. For example, in the field of immigration, the case *K.A.B v. Sweden*<sup>205</sup> (2013), which was the first case for several years justifying the expulsion of a person to Somalia, has been applied actively by the Netherlands to other Somalis, even though individual consideration would still be of the essence. The risk of a similar outcome is also present in other areas of law. If the case is handled as in *K.A.B v. Sweden* (2013), it may impair the success of future claims. It should be noted, however, that occasionally even “failed cases” can be useful, in particular if the dissenting and concurring opinions produce convincing counter-arguments to the majority opinions, which will be of use in future litigation.

However, another option is that the case does indeed have potential and the individual finds either a lawyer or an NGO, or even combinations of these two to make application to the ECtHR. From this point on, it is no longer only a matter of the vision of the individual as to what the law should be; there are also other individuals having their ideas and motives. The level of interest, expertise and commitment of the NGO or a lawyer varies. The lawyer may be specialized in the particular human rights issues in question, in human rights issues in general, but not in cases similar to the one in hand, or the lawyer may not have any particular specialization in the issue: the more expertise there is, the more convincing, but also the more conventional is the argumentation. An experienced lawyer is aware of the current state of case law, the relevant legal doctrines that can be involved and the likelihood of the ECtHR departing from the case law. The more experience there is available, the more the lawyer can use the current jurisprudence argumentation, dissenting opinions or separate opinions of the ECtHR to justify the interpretation.

However, at the same time, the level of innovativeness of the application may suffer if the lawyer is careful not to invoke anything but what the law currently states. On the other hand, the NGO may have a great deal of important information on the subject areas, but there is no legal team conversant with the current interpretation of the Convention. This can easily lead to argumentation, which is unconvincing. For these reasons a combination of an experienced lawyer and an NGO can be fruitful: the NGO may have more creative suggestions on how the law should be and why, whereas the lawyer can mobilize these ideas in a form and language which is palatable to the ECtHR. The NGO can focus on gathering evidence on the case and other relevant studies on the topic, whereas the lawyer can focus on the development of the legal argumentation on the basis of the materials.

The involvement of NGOs or researchers can contribute positively to the arguing of the burden of proof or discuss the international development of the field. The burden of proof is in most cases on the side of the applicant and is transferred only in exceptional cases when the state is in a better position to access the relevant information, and the gathering

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205 ECtHR, *K.A.B v. Sweden*, 5 September 2013

of evidence would be disproportionate for the applicant<sup>206</sup>. However, if the burden of proof is on the side of the applicant, it is important to provide the ECtHR with information about the local context, such as the area in question, the duration of the activities, medical certificates, and accurate information about the time when the problem occurred. For example, in the case of *Luginbühl v. Switzerland* (2006), the ECtHR pointed out the need for a scientific study or scientific validity of the claim that an activity is dangerous to the environment and human beings.<sup>207</sup> Thus the team of the applicant is in a decisive role in providing convincing and sufficient evidence in support of the claims. The evidence may include a diverse amount of proof, including medical certificates, scientific research findings, reports from the well-established or specialized NGOs and international institutions such as the United Nations, depending on the matter at hand.

However, if there is not enough time to prepare the application, even an ideal team has its limitations. The lawyer may work *pro bono* or then work only for the hours that the applicant is ready to pay for. Needless to say, an application prepared in five hours will look very different from one prepared for a month with all the supporting evidence. The less time there is available the more the application will focus on the minimum requirements to create an application which meets the admissibility criteria. There is no extra time to propose convincing arguments for the amendment of the case continuum or legal doctrines.

Even given sufficient time, the focus in the argumentation of the case may vary depending on the motivation and background of the team involved: it is possible that a lawyer or NGO seeks compensation for the individual. However, the applicant herself, the lawyer or the NGO may also perceive other interests in the case. These interests may include the potential to strive for wider societal and structural changes through a single case, or the interest may be in changing the prevailing legal doctrines through the case. This will influence the content of the application so that the likelihood of amending the case law is either increased or decreased. The roots of doctrinal change or change in the case continuum start to take shape in this stage, when the team of the applicant determines what key issues to address in the application and to what extent they will formulate the single case to represent a wider social problem if indeed such a problem exists. The team of the applicant can then present evidence on emerging consensus on the matter and focus on the argumentation to show that there are systemic flaws as illustrated by the single case at hand.

## 2.2 To Start to Develop or Not to Start: The Admissibility Stage

After the submission of the application, the role of the ECtHR and its Registry begins. Some of the applications are “files disposed of administratively”. These applications

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206 See also: Viljanen – Heiskanen 2016, p. 187

207 ECtHR, *Luginbühl v. Switzerland*, 17 January 2006 (decision on the admissibility)



lack information on the respondent state or include illegible statements of the facts and consequently do not satisfy the requirements of Rule 47 of the Rules of the ECtHR.<sup>208</sup> Such applications are not processed further. Other cases are prioritized on the basis of their content from high priority cases to applications that are manifestly inadmissible. Furthermore, the cases will be distinguished between cases that go through the single judge procedure or are communicated to the respondent state.<sup>209</sup> The role of the Registry is central in the prioritization process.

The judge does not necessarily have much time to review the case, but bases the decision on “gut feeling.” For the case to proceed, the judge must be quickly convinced that the applicant complies with the victim criteria, the application is submitted within six months’ time, the domestic remedies are exhausted, and the violation is significant<sup>210</sup>. Most of the sub-elements of the admissibility criteria are relatively clear, such as the time limits and the exhaustion of domestic remedies. However, compliance with the victim criterion and the significant harm criteria have more room for interpretation.

The judge must be convinced that the applicant is a victim of the case and the case is not *actio popularis*<sup>211</sup>. On the basis of the current case law, the victim is an individual or a group of individuals who have directly been the victims of a violation of the Convention. A victim may also be a relative of a deceased individual and in limited circumstances an NGO formed by the individual applicants<sup>212</sup>.

The assessment of the minimum level of severity does not limit only at the admissibility stage but starts from that. The single judge uses professional experience and intuition to decide whether the severity of the case is sufficient. The green jurisprudence provides guidance in this respect. In *Fadayeva v. Russia* (2005) it was established that “the environmental hazards inherent to life in every modern city” do not fall into the category of minimum severity of nuisance, but the hazard must be more severe.<sup>213</sup>

If the application fails to convince the single judge, Committee or Chamber that the full admissibility criteria is not satisfied, the application will be declared inadmissible.<sup>214</sup> In 2016, single judges, Committees and Chambers declared a total of 36,579 applications inadmissible and removed the cases from the list of cases<sup>215</sup>. For these cases, the formation of law ends in inadmissibility decisions. Thus even cases which would indubitably include a substantive violation, but do not meet the procedural requirement of the admissibility

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208 Rule 47 of the Rules of the Court

209 See also: Council of Europe 2015, *Understanding the Court’s statistics* [http://www.echr.coe.int/Documents/Stats\\_understanding\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_understanding_ENG.pdf), pp. 6–8, (last visited 26 February 2018)

210 On admissibility criteria see also: Kiestra 2011, p. 30

211 See for the *actio popularis*: Aceves 2003, pp. 378–380

212 Council of Europe 2014

213 ECtHR, *Fadayeva v. Russia*, Appl no 55723/00, 9 June 2005, para 69–70.

214 See for inadmissible decisions and the critique: Gerards 2014, pp. 148–158

215 Council of Europe 2017, *Analysis of statistics 2016*, [http://www.echr.coe.int/Documents/Stats\\_analysis\\_2016\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_analysis_2016_ENG.pdf), p. 4, (last visited 26 February 2018)

criteria will not be successful. Despite the clear rules, there are a significant proportion of applications that do not meet the admissibility criteria, and thus the question is not always whether the ECtHR is capable of providing sufficient protection, but rather if the applicant failed to meet the admissibility criteria. Therefore, for the development of case continuums, it would be important for potential cases to comply with the admissibility criteria enabling a more thorough analysis before the ECtHR.

### 2.3 States and their Roles in Developing the Interpretation

When the application is communicated to the State Party, the state starts to have a role in the process. The ECtHR may request from the responding government factual information and other observations. In addition, the ECtHR may inform the State about “the subsequent procedure without asking for observation” in cases where there are “repetitive applications” concerning well-established case law. The ECtHR may also inform the responding government about the urgency or importance of the case.<sup>216</sup> After receiving the communication from the ECtHR, the State Party may end the process by agreeing on a friendly-settlement procedure, it may function as a coordinator and translator between the national courts and the ECtHR or it may actively contribute to the interpretation of the Convention. As there are different kinds of State Parties, depending on the availability of resources and the development of the national human rights coordination, the role of the state may alter in a significant manner in comparing to each other. Some states may contribute significantly and substantially to the interpretation of the Convention, whereas the other states function more like coordinators and translators between the ECtHR and the respective national courts. Consequently, as the *de facto* performance of the states is heterogeneous, the aim is not to discuss in detail and with examples how the states *de facto* perform during the process, but to give general observations on the main approaches the states can adopt.

The analysis of the case law of the ECtHR does not represent all the apparent violations of the European Convention on Human Rights inside the State Parties, as cases involving potential violations may be settled between the applicant and the states. Little information is available on these processes other than that they are more likely with some states than with some others. If all the potential cases involving violations are settled, it ensures that the applicant receives compensation. However, the large number of settlements may also impede the development of the legal interpretation of the law. As judge Pinto de Albuquerque has pointed out, settlement of a case that would enable a ground-breaking judgment having a wider impact, hinders the opportunity of the Court to act as an active gatekeeper of the

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<sup>216</sup> See also: Council of Europe 2015, *Understanding the Court's statistics*, [http://www.echr.coe.int/Documents/Stats\\_understanding\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_understanding_ENG.pdf), p. 10. (last visited 26 February 2018)



rights protected under the ECHR. In the immigration context, he formulated this in the dissenting opinion as follows:

My concern is not only for the fate of the applicant and her family but for the fate of those in a similar situation in Belgium and all over Europe. While the individual problem of the applicant in the present case is solved, the Court cannot neglect the general issue of the hopeless, terrible situation of severely ill persons waiting to be extradited, expelled, deported or removed in Europe. As will be shown, casuistic, humanitarian considerations do not provide a reliable basis for addressing the situation of these people, and there is a genuine, urgent and general interest in dealing with their situation in terms of a rights-based approach in the light of the Convention, an interest which called for the case not to be struck out. Moreover, I cannot accept the apparent cost-benefit strategy consisting in “buying” a strike-out decision and thus resolving the situation of the present applicant to remain free “to do business as usual” with all other foreign nationals in a similar situation.<sup>217</sup>

Whereas the state may be active in suggesting a settlement, the applicant and the ECtHR can determine whether the settlement is approved. The applicant may agree to a friendly-settlement proposal, which will end the process. However, a state has the power to make unilateral declaration if the applicant does not accept a satisfactory friendly-settlement proposal and does not provide a valid justification for the rejection. After unilateral declaration, the ECtHR has power to remove the application from the list of cases if it considers the friendly-settlement proposal satisfactory<sup>218</sup>. Alternatively, if the ECtHR does not so strike the case and the applicant decides to reject the friendly-settlement proposal, the applicant risks an unfavourable judgment and also increases the chance of the judgment having a wider influence on the issue. The background of the team of the applicant and the motivation to seek justice is decisive at this stage. If the applicant acknowledges the importance of developing the overall protection of human rights, they will reject the friendly-settlement proposal however good it may be.

In cases where the state does not seek the settlement, they can contribute inherently in the interpretation of the law in their submission. The state provides argumentation and evidence showing its interpretation of the human rights standards of the ECHR and the case law of the ECtHR. It is for the states to show the “quality” of their domestic reviews<sup>219</sup>, their compliance with the minimum harm rule, their legitimate use of the margin of appreciation<sup>220</sup> and their activities under the positive obligations doctrine. For example, if the national courts have evaluated the suitability of the earlier case law in a new context and developed a suitable interpretation of the basis of it, they contribute to the discussion

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<sup>217</sup> ECtHR, *S.J. v. Belgium*, Appl. no 70055/10, Struck out of the List, 19 March 2015

<sup>218</sup> See also: Council of Europe 2015, *Understanding the Court's statistics*, [http://www.echr.coe.int/Documents/Stats\\_understanding\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_understanding_ENG.pdf), p. 10 (last visited 26 February 2018)

<sup>219</sup> See also: ECtHR, *Animal Defenders International v. the United Kingdom*, 22 April 2013, para 116

<sup>220</sup> For margin of appreciation see for example: Greer 2000

on how the law should be understood or how the law should be. The national discussion illustrates for the ECtHR the areas of law requiring clarification, confirmation or the making of a clear distinction from earlier case law.<sup>221</sup> Therefore the role of the national courts can be significant in developing the interpretation that the ECtHR is capable of taking into consideration when forming its judgment.<sup>222</sup>

Also, if the case concerns balancing between an individual right and the public interest, the state has a significant role in arguing on behalf of the public interest. States have been active in developing argumentation that environmental protection can serve a legitimate purpose in providing legitimate justification for limiting individual rights under Article 8 of the Convention on the right to private and family life and Article 1 of the Protocol 1 of the Convention on the right to property. For example in the case of *Jane Smith v. the United Kingdom* (2001), there was identifiable dialogue between the state and the ECtHR, where the British Government used the “preservation of the environment and public health” as a legitimate aim<sup>223</sup> and the ECtHR recognized it by establishing that “It is apparent that the reasons given for the interferences in the planning procedures in this case were expressed primarily in terms of environmental policy” and that “the measures pursued the legitimate aim of protecting the “rights of others” through preservation of the environment”.<sup>224</sup> Interestingly, as a result of the argumentation of the state, the ECtHR developed protection of the environment under Article 8 (2) of the Convention under the “rights of others” condition.

Similarly, the state influenced the argumentation and the scope of the public interest in the case of *Fägerskiöld v. Sweden* (2008). The Government of Sweden claimed that wind power served “the legitimate aim of protecting the economic well-being of the country and the rights and freedoms of others by contributing to the sustainable development of Sweden’s natural resources and ensuring that its citizens could live in a safe and peaceful environment,” and in more general terms that “wind power is a renewable source of energy considered to be environmentally friendly and to contribute to the sustainable development of society.”<sup>225</sup>

There is a clear dialogue, where the ECtHR responses and confirms the arguments of the Government of Sweden by stating that:

to the Court, there is no doubt that the operation of the wind turbine is in the general interest as it is an environmentally friendly source of energy which contributes to the sustainable development of natural resources. It observes that the wind turbine at issue in the present case is capable of producing enough energy to heat between

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221 Pellonpää 2012, p. 71

222 O’Boyle 2014, p. 96

223 ECtHR, *Jane Smith v. the United Kingdom*, 18 January 2001, para 87

224 *Ibid.*, para 89

225 ECtHR, *Fägerskiöld v. Sweden*, 26 February 2008 (decision on the admissibility), p. 12

40 and 50 private households over a one-year period, which is beneficial both for the environment and for society.<sup>226</sup>

The position of the ECtHR is clear as in the case it actually reiterates a second time its position and the wording is almost identical to that of the Government of Sweden: “In relation to the interests of the community as a whole, the Court reiterates that wind power is a renewable source of energy which is beneficial for both the environment and society.”<sup>227</sup> It is probable that if the Government had not raised the role of wind power and sustainable development as matters of legitimate aim, the ECtHR would not have developed its green argumentation along similar lines.

In addition, the states have contributed to the greening of the rights of the ECtHR through the constitutionalization of environmental rights. The development of environmental rights in national constitutions<sup>228</sup> has given a clear signal to the ECtHR on the importance of the environment in contemporary societies and on the relationship between rights and the environment. David R. Boyd presents a comparative analysis in his book *Environmental Rights Revolution* on the relationship between the environmental, constitutional rights and environmental performance<sup>229</sup> and finds that countries having environmental rights have smaller ecological footprints; they perform better according to environmental indicators, reduce emissions more effectively and are more likely to commit to international environmental agreements. In addition, Tim Hayward has stated that environmental constitutional right has benefits as it:

entrances a recognition of the importance of environmental protection, it offers the possibility of unifying principles for legislation and regulating it secures these principles against the vicissitudes of routine politics, while at the same time enhancing possibilities of democratic participation in environmental decision-making processes.<sup>230</sup>

These constitutional developments in relation to environmental rights together with the development of national environmental legislation, regional environmental agreements and international environmental law agreements have guided the ECtHR in assessing the role of the environment. For example in *Mangouras v. Spain* (2010), the ECtHR held that:

Against this background the Court cannot overlook the growing and legitimate concern both in Europe and internationally in relation to environmental offences. This is demonstrated in particular by States’ powers and obligations regarding the prevention of maritime pollution and by the unanimous determination of States

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226 *Ibid.*, pp. 18–19

227 *Ibid.*, p. 19

228 See for example: Cramer 2009, pp. 73–103, Razzaque 2010, pp. 127–128

229 Boyd 2012, pp. 119–122

230 Hayward 2005, p. 7

and European and international organisations to identify those responsible, ensure that they appear for trial and, if appropriate, impose sanctions on them (see “Relevant domestic and international law” above). A tendency can also be observed to use criminal law as a means of enforcing the environmental obligations imposed by European and international law.<sup>231</sup>

The wording of the judgment of the ECtHR making explicit reference to the States and relevant domestic law reveals that it has been the both the international and national development that have empowered the ECtHR to develop its green approach further.

## 2.4 Third-Party Interventions as the Court’s Assistants

The proceedings may be limited to the applicant and the state, but in Grand Chamber cases in particular, there may be third parties able to influence the interpretation of the ECtHR. The legal basis for the third-party interventions is established in Article 36 of the ECHR<sup>232</sup> and Rule 44 of the Rules of the Court<sup>233</sup>. According to Article 36(1) of the ECHR, other States can make a third party intervention.<sup>234</sup> Paul Harvey has explained that the motivation for the states is typical that they estimate that the judgment will influence their legal systems or, more recently, to ensure that the ECHR is interpreted in compliance with public international law<sup>235</sup>. In addition to states, third-party interventions have been made by other international institutions such as the European Commission<sup>236</sup>, the OSCE<sup>237</sup>, and the United Nations High Commissioner for Human Rights<sup>238</sup>, national human rights institutions<sup>239</sup>, NGOs<sup>240</sup> and universities<sup>241</sup>.

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231 ECtHR, *Mangouras v. Spain*, 28 September 2010 (GC), para 86

232 Article 36(1) of the European Convention on Human Rights

233 Rule 44 § of the Rules of Court

234 See also: Article 36(1) of the European Convention on Human Rights on states exercising the right to intervene in cases brought by one of their nationals against another States Party. Furthermore, states can request intervention by other grounds. For cases, see for example: ECtHR, *Soering v. The United Kingdom*, 7 July 1989, ECtHR, *Saadi v. Italy*, 28 February 2008, ECtHR, *Lautsi and others v. Italy*, 18 March 2011

235 Harvey, *Third Party Interventions before the ECtHR: A Rough Guide*, <https://strasbourgobservers.com/2015/02/24/third-party-interventions-before-the-ecthr-a-rough-guide/> (last visited 26 February 2018)

236 See for example: ECtHR, *Bosphorus v. Ireland*, 30 June 2005, paras 9, 122–128

237 See for example: ECtHR, *Blecic v. Croatia*, 29 July 2004, paras 44–48

238 See for example: ECtHR, *El-Masri v. The Former Yugoslav Republic of Macedonia*, 13 December 2012 (GC), para 175

239 See for literature: Buyse 2013, pp. 173–186. For cases: ECtHR, *Eweida and others v. the United Kingdom*, 15 January 2013, paras 77–78

240 Active third-party interveners among NGOs include for example Amnesty, FIDE, JUSTICE, Interights, the International Commission of Jurists

241 See for example: ECtHR, *S.A.S. v. France*, (GC) 1 July 2014, paras 95–98

Third parties can request permission to intervene in the proceedings in one of the official languages of the Court<sup>242</sup>. After the request, the ECtHR may grant permission to submit *amicus curiae* for the case that is already pending before the ECtHR.<sup>243</sup> The Court can also grant permission to make an oral submission. After the request has been granted, the ECtHR provides instructions for third parties<sup>244</sup>. These instructions include, for example, the deadline for submission, the length of the submission (10 pages) and guidance on the nature of the submission. In principle, the ECtHR has guided the third parties that “submissions should not include any comments on the facts of the case, but address only [] particular interests of the matter.”<sup>245</sup> The *amicus curiae* are also forwarded to the parties, so that they can reply to them in the oral pleadings<sup>246</sup>.

The participation of third parties in the case before the ECtHR assists the ECtHR to take relevant arguments into account.<sup>247</sup> Hodson has considered that through third-party interventions NGOs “fulfil a role of assisting the Court in new areas of law where the impact is particularly broad. They provide comparative analysis and practical information that the parties may be unable to marshal and the Court would otherwise be unable to acquire”. An example of this kind of development is Roma rights, where third-party interventions have had an impact on the development and outcomes.<sup>248</sup> These *amicus curiae* that the NGOs have provided for the ECtHR have provided factual and legal expertise that has supported the work of the ECtHR on the evaluation of the discrimination.<sup>249</sup>

Hodson has pointed out that while the role of the NGOs is not the “lifeblood” of the Court, they still have “meaningful and largely overlooked impact”.<sup>250</sup> Similar findings have been made by Harvey, who has worked in the Registry of the European Court of Human Rights. Harvey has stated that:

It is not a polite fiction to say that the Strasbourg Court, like most courts, values that assistance. Even an expert tribunal like the Strasbourg Court cannot know all

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242 See also: Article 36(1) of the Convention, Article 36(2) of the Convention, Article 36(3), Rule 34 § 4 (a) of the Rules of Court

243 Rule 44 § 3 of the Rules of Court. See for example: ECtHR, *Saadi v. Italy*, 28 February 2008, ECtHR, *Scappola v. Italy* (No 3), 22 May 2012, ECtHR, *Tanase and Others v. Romania*, 26 May 2009, ECtHR, *D. H and Others v. Czech Republic*, 13 November 2007

244 Rule 44 § 5 of the Rules of Court

245 ECtHR, *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, Appl. no. 931/13, ECHR-LE14.8bP3

246 Rule 44 § 6 of the Rules of Court

247 Rossi 2010, pp. 315–317

248 van den Eynde 2013, pp. 285–286

249 Cichowski 2012, p. 77, Frigessi di Rattalma 2005, p. 58

250 See also: Hodson 2011, p. 371, pp. 152–153 and about the role of Greenpeace, pp. 142–146

of the law or other materials that may have a bearing on the outcome of a case. The best third party interventions supply those materials.<sup>251</sup>

Harvey continues by claiming that the ECtHR in particular has benefitted from third-party interventions that provide scientific information, statistics, studies showing discriminatory policies or practices, international and comparative law or relevant precedents from other courts. Harvey even calls on third parties to submit information on precedents of other courts more actively<sup>252</sup>.

However, it should be noted that not all the third-party interventions contribute to the decision-making. Harvey explains the problems as follows:

The well-established rule is that a third party intervener should not comment on the facts or merits of the case. Too often that rule is either expressly or implicitly flouted. Too often third-party interventions have passed from being welcome and valued *amicus curiae* to being *animus curiae*. (– –) Too many others rely almost exclusively on philosophical or religious arguments. Without in any way criticizing the sincerity of the beliefs or philosophies upon which these submissions are based, the reality is that they provide little assistance.<sup>253</sup>

Thus it can be concluded that the involvement of third parties can have a significant impact on the interpretation of the law, but the third parties should follow the guidance of the ECtHR and not rely on the argumentation that is not independent, impartial, scientific or legal.

## 2.5 How is the Interpretation of the European Court of Human Rights Developed?

### 2.5.1 On the Role of the European Court of Human Rights

After the written and oral submissions of the state, the applicant and possible third-party interveners, the role of the ECtHR to form the interpretation of the law becomes dominant. The ECtHR has a clear institutional mandate to assess the merits of the case and determine after the evaluation of submissions from the parties whether or not the state has infringed the rights and freedoms of the Convention. In so doing it acts both as a constitutional court and an international court: it assesses the legality of the actions of the State Parties in conformity with its earlier case law and also develops regional and international human rights standards and legal doctrines.

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<sup>251</sup> Harvey, *Third Party Interventions before the ECtHR: A Rough Guide*, <https://strasbourgobservers.com/2015/02/24/third-party-interventions-before-the-ecthr-a-rough-guide/> (last visited 26 February 2018)

<sup>252</sup> *Ibid.*

<sup>253</sup> *Ibid.*

The ECtHR can establish the violation by analysing one or more Articles of the Convention from either procedural or substantive sides. When the ECtHR has evaluated the claim under one of the Articles, it usually does not consider the claims under other Articles having the same basis for the violation. The ECtHR may also invoke the assistance of its Registry, such as the Research and Library Division or *Jurisconsult* regarding the doctrinal coherency and consistency<sup>254</sup>. The development concerning the use of the research unit and *Jurisconsult* has served to increase its importance in developing the argumentation of cases in recent years.

However, whereas the mandate of the ECtHR to interpret the ECHR is self-evident, the more detailed role of the ECtHR on how the interpretation should be made is less obvious. George Letsas proposes that the ECtHR may be considered as an international court supervising the constitutional principles, consensus and state practice, but not extending the protection. The idea behind this approach can be summarized such that the role of law is to be “an image of life”, which “can temper and modulate the national ways of life only when it keeps pace with the development of national morality and opinion”<sup>255</sup>. The way the ECtHR ensures that the state practice and consensus of the State Parties are not overstepped is to apply the doctrines of margin of appreciation and consensus. The margin of doctrine has been described as the “latitude a government enjoys”<sup>256</sup>, or a “certain latitude in resolving the inherent conflicts between individual rights and national interests or among different moral convictions”<sup>257</sup> and “room for manoeuvre the Strasbourg institutions are prepared to accord national authorities in fulfilling their obligations”.<sup>258</sup> For example, concerning Article 8 of the Convention, the ECtHR will limit the margin of appreciation if a national court has not understood the case law of the ECtHR, the domestic decision is manifestly arbitrary, and there are clear issues relating to proportionality<sup>259</sup>.

The level of margin of appreciation that the ECtHR affords State Parties is also connected to consensus. The ECtHR has not defined the content of consensus<sup>260</sup>, but in general, the consensus doctrine refers to how the ECtHR has sought to establish a shared European understanding on the scope of protection. In principle, the consensus assessment may be connected to any element so far as it can be observed empirically. If there is an emerging consensus on the matter, the ECtHR will most likely afford only a limited margin for the state, whereas if there is no consensus, the margin may be wide.<sup>261</sup>

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254 Rule 18 of the Rules of Court

255 Drost 1965, p. 248

256 Arai-Takahashi 2002, p. 2

257 Benvenisti 1999, p. 843

258 Greer 2000, p. 5, Kratochvil 2011, p. 327

259 O’Boyle 2014, p. 93

260 Helfer 1993, pp. 143–144

261 Rautiainen 2011, p. 1156



Alternatively, the role of the ECtHR can be defined as that of an actor participating in the search for more holistic and progressive approaches to human rights protection having a universal impact in the long run.<sup>262</sup> The role of the ECtHR is seen as that of an international court and developer of international human rights law. Such a definition of the role of the Court requires dynamic and moral interpretation of the Convention, which includes cross-fertilization of international human rights. These altering understandings of the role of the ECtHR influence how the judges perceive the interpretation of the law, their own role as judges<sup>263</sup> and the role of the ECtHR. Consequently, there are different conceptions of the role of the ECtHR as a developer of legal doctrines. For example, Judge Iulia Motoc has raised concerns that the Sections rarely contribute to doctrinal development, but this is left to Grand Chamber.<sup>264</sup> The attitudes of the judges will influence what rules of interpretation the ECtHR utilizes in the argumentation, whether they have interest in developing the doctrines and what other virtues it takes into account in the process. The rules themselves are a matter of interpretation enabling even major deviation, but those applying the rules also have other virtues and pragmatic reasons influencing this development.

In relation to green jurisprudence, the Court has been relatively unanimous in its findings on its role in providing protection in relation to environmental harms<sup>265</sup>. However, there are a few examples where the Court has been divided, and the dissenting opinions have adopted a more progressive greening approach than the majority. Interestingly, reading of the dissenting opinions illustrates that the opinions of the dissenting judges in the cases of *Hatton and Others v. the United Kingdom* (2003) and *Kyrtatos v. Greece* (2003) are similar to what the majority of the ECtHR has subsequently developed. For example in the case of *Hatton and Others v. the United Kingdom* (2003) the twelve judges of the Grand Chamber found no violation under Article 8 of the Convention relating to the protection of private and family life. However, five judges, namely Costa, Ress, Türmen, Zupancic and Steiner, contributed to the greening by explaining that contemporary international and constitutional law has explicitly recognized the need to protect human rights in an environmental context<sup>266</sup>. With the support of the international and national trends, the dissenting judges stated that:

the close connection between human rights protection and the urgent need for a decontamination of the environment leads us to perceive health as the most basic human need and as pre-eminent. After all, as in this case, what do human

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262 Letsas 2011, p. 7

263 White 2009, p. 13

264 Judge Iulia Motoc, Conference on The ECHR and General International Law, 5 June 2015, Strasbourg

265 See for example: ECtHR, *Lopez Ostra v. Spain*, 9 December 1994, ECtHR, *Taşkın and Others v. Turkey*, 10 November 2004, ECtHR, *Öçkan and Others v. Turkey*, 28 March 2006, ECtHR, *Dubetska and Others v. Ukraine*, 10 February 2011, ECtHR, *Budayeva and Others v. Russia*, 20 March 2008. ECtHR, *Hamer v. Belgium*, 27 November 2007

266 ECtHR, *Hatton and Others v. the United Kingdom*, 8 July 2003 (GC), dissenting opinion, para 1



rights pertaining to the privacy of the home mean if, day and night, constantly or intermittently, it reverberates with the roar of aircraft engines? (– –) We believe that this concern for environmental protection shares common ground with the general concern for human rights<sup>267</sup>.

Similarly, in the case of *Kyrtatos v. Greece* (2003), Judge Zagrebelsky wrote in his partly dissenting opinion that:

there is no doubt that a degradation of the environment could amount to a violation of a specific right recognised by the Convention (*Powell and Rayner v. the United Kingdom*, judgment of 21 February 1990, Series A no. 172, § 40; *López Ostra v. Spain* (judgment of 9 December 1994, Series A no. 303-C, § 51; *Guerra v. Italy*, judgment of 19 February 1998, Reports of Judgments and Decisions 1998-I, § 57). (– –) It is true that the importance of the quality of the environment and the growing awareness of that issue cannot lead the Court to go beyond the scope of the Convention. But these factors should induce it to recognise the growing importance of environmental deterioration on people's lives. Such an approach would be perfectly in line with the dynamic interpretation and evolutionary updating of the Convention that the Court currently adopts in many fields<sup>268</sup>.

Interestingly, both of these cases, *Hatton and Others v. the United Kingdom* (2003) and *Kyrtatos v. Greece* (2003) have been actively referred to and commented on the academic literature<sup>269</sup>. It could even be said that these two cases have sometimes excessively dominated the discussion on the capacity of the ECtHR to protect environmentally-related human rights and the interests of the environment. The ECtHR has later departed from its position established in the case of *Hatton and Others v. the United Kingdom* (2003) and *Kyrtatos v. Greece* (2003) and have come closer to the arguments of the dissenting opinions. For example, in the case of *Tătar v. Romania* (2009), the ECtHR referred to the same international instruments<sup>270</sup> as the dissenting judges in the case of *Hatton and Others v. the United Kingdom* (2003)<sup>271</sup>. The contemporary greening of the jurisprudence of the ECtHR is to be explained by Judge Zagrebelsky requested and encouraged the ECtHR to do: the use of the capacity of the ECtHR to update the Convention through dynamic interpretation<sup>272</sup>.

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267 *Ibid.*

268 ECtHR, *Kyrtatos v. Greece*, 22 May 2003, dissenting opinion, paras 2 and 6

269 See literature relating to Hatton-case: Grekos 2002, pp. 46–49, Hart 2004, pp. 100–139, Hyum 2003, pp. 631–640

270 ECtHR, *Tătar v. Romania*, 27 January 2009, para 111

271 ECtHR, *Hatton and Others v. the United Kingdom*, 8 July 2003 (GC), dissenting opinion, para 1

272 ECtHR, *Kyrtatos v. Greece*, 22 May 2003, dissenting opinion, para 6

## 2.5.2 Rules and Principles of Interpretation as Crucial Tools

The creating of law and amendments to its current interpretation affects what rules and principles of interpretation the ECtHR chooses to use. Compared to the domestic courts, the *travaux préparatoires* have only a minor role in the interpretation of the Convention.<sup>273</sup> Some of the rules and principles of interpretation have been adopted from international agreements and some have been developed by the jurisprudence of the ECtHR. The rules of interpretation simultaneously allow and restrain the ECtHR in exercising its interpretation of the rights of the ECHR. The rules of interpretation may be in contradiction with each other or in relation to general interests.

An important external source of interpretation of the ECHR is the Vienna Convention on the Law of the Treaties, Articles 31–33.<sup>274</sup> Article 31(1) stipulates that international agreements should be interpreted in good faith and the words should be interpreted according to their ordinary meaning as well as in the light of the object and purpose of the Convention.<sup>275</sup> This rule enables both dynamic interpretations through object and purpose doctrine, but also imposes restraints on interpreting the words otherwise than in their ordinary meaning. Inherent in the object and purpose of the ECHR is the fulfilment and protection of human rights in present-day conditions. The present-day conditions should reflect the preamble but not the *travaux préparatoires*.<sup>276</sup> The reference to the object and purpose of the Convention can provide justification for the ECtHR to stretch its interpretation in those areas where no case law has so far been developed. It would be contrary to the object and purpose of the Convention not to recognize the needs of contemporary societies.

Furthermore, the Vienna Convention on the Law of Treaties underlies the capacity of the ECtHR to take account of other national and international legal instruments in its interpretation of the Convention<sup>277</sup>. The ECtHR reiterated this in the case of *Demir and*

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273 Pellonpää 2002, p. 214, Viljanen 2003, p. 95

274 Vienna Convention on the Law of the Treaties, Articles 31–33, ECtHR, *Golder v. the United Kingdom*, 21 February 1975, para 29, ECtHR, *Johnston and Others v. Ireland*, 18 December 1986, para 51, ECtHR, *Lithgow and Others v. the United Kingdom*, 8 July 1986, paras 114 ja 117, ECtHR, *Witold Litwa v. Poland*, 4 April 2000, paras 54 and 57

275 Vienna Convention on the Law of the Treaties, Article 31(1)

276 Senden 2011, pp. 206–207, 210–211

277 However, despite the existence of the principle of cross-fertilization, there is little tendency in practice for the ECtHR to make reference to Articles 31 and 32 of the 1969 Vienna Convention on the Law of the Treaties on referring to international trends is shown by the statistics: reference was made in only 23 judgments out of 18,000 (1969–1 May 2015). Harvey, who works at the Registry of the ECtHR, has estimated that only approximately 10 percent of the judgments are influenced by domestic or international and comparative materials, Section President Mark E. Villager, (The Role of the 1969 Vienna Convention on the Law of Treaties in the Interpretation of the Convention by the Court, p. 30), Harvey, *Third Party Interventions before the ECtHR: A Rough Guide*, <https://strasbourgobservers.com/2015/02/24/third-party-interventions-before-the-ecthr-a-rough-guide/> (last visited 26 February 2018)

*Baykara v. Turkey*<sup>278</sup> (2008), by holding that in its interpretation it was compelled to take account of evolving norms of national and international law. The case of *Hamer v. Belgium* (2007) illustrates the Court's tendency to leave property rights aside due to the violation of the domestic environmental law<sup>279</sup>. Failure to comply with these national environmental standards has also empowered the Court to enforce these rules in several other cases. Examples of cases where the domestic legislation or ruling was not enforced include *Moreno Gómez v. Spain*<sup>280</sup> (2004), *Lopez Ostra v. Spain*<sup>281</sup> (1995), *Taşkın and Others v. Turkey*<sup>282</sup> (2004), *Fadeyeva v. Russia*<sup>283</sup> (2005), *Gicomelli v. Italy*<sup>284</sup> (2006), *Lemke v. Turkey*<sup>285</sup> (2007) and *Bor v. Hungary*<sup>286</sup> (2013). In these cases the greening of the case law came about when the ECtHR provided support for the domestic ruling<sup>287</sup> or legislation, instead of proactive measures. For example, in the case of *Okayay and others v. Turkey* (2005) the ECtHR recognized that the national constitutional right to live in a healthy and balanced environment also empowered the ECtHR to hold that a power plant's hazardous activities qualified as "a genuine and serious dispute," that it can investigate.<sup>288</sup> Consequently there is dialogue between national courts and the ECtHR. Such direct dialogue can be estimated to increase due to the new Protocol establishing a mechanism of advisory opinion<sup>289</sup>.

The Court has established that it "can and must" take account of international sources. The inspiration and guidance for interpretation derived from the outer world were particularly important in developing the interpretation in new fields of protection. References to the comparative materials in the current jurisprudence of the Court have been very diverse including: "UN Documents, other regional HR instruments, CoE documents from the Parliamentary Assembly, material from the EU, like Directives, the EU Charter on Fundamental Rights, EU Court cases, judgments from other international Courts specialized in international treaties and judgments from foreign jurisdictions".<sup>290</sup> So far the ECtHR has used materials in several ways: as a rhetorical tool, inspiration and as support for the authority and legitimacy of the chosen solution. Depending on the use, the influence may also be substantive. Such a substantive contribution can support the

278 ECtHR, *Demir and Baykara v. Turkey*, 12 November 2008, paras 67 and 85. For case comment, see Ewing – Hendy 2010, pp. 1–33

279 ECtHR, *Hamer v. Belgium*, 27 November 2007, para 79

280 ECtHR, *Moreno Gómez v. Spain*, 16 November 2004, para 62

281 ECtHR, *Lopez Ostra v. Spain*, 9 December 1994, para 55–56

282 ECtHR, *Taşkın and Others v. Turkey*, 10 November 2004, paras 121–125

283 ECtHR, *Fadeyeva v. Russia*, 9 June 2005, para 86

284 ECtHR, *Giacomelli v. Italy*, 2 November 2006 October 2006, paras 92–93

285 ECtHR, *Lemke v. Turkey*, 5 June 2007, paras 43–45

286 ECtHR, *Bor v. Hungary*, 18 June 2013, para 26

287 ECtHR, *Taşkın and Others v. Turkey*, 10 November 2004, paras 113–114

288 ECtHR, *Okayay and Others v. Turkey*, 12 July 2005, para 65

289 See for example: Lock 2015, p. 226

290 Senden 2011, p. 256

ECtHR in justifying the departure in the case law or the developing of law in a new field of protection.<sup>291</sup>

In the green jurisprudence of the ECtHR, the international sources based on cross-fertilization have had a substantive role<sup>292</sup>. The ECtHR developed the requirement of environmental impact assessment procedure with a firm connection to EU law in the case of *Giacomelli v. Italy*<sup>293</sup> (2006) and *Tătar v. Romania*<sup>294</sup> (2009). In *Giacomelli v. Italy* (2006), the ECtHR found the failure on the part of the national authorities to fulfil the requirements of environmental impact assessment (EIA) procedure<sup>295</sup>. The national law implementing the EU's EIA Directive was not respected regarding issuing a licence and modifying the licence of a waste treatment facility. The ECtHR argued that the requirement of European Directive 85/337/EEC in respect to impact assessment was necessary for every project with potentially harmful environmental consequences<sup>296</sup>.

The case of *Tătar v. Romania* (2009) continued the discussion on the Environmental Impact Assessment. The two applicants lived close to a company using sodium cyanide in the open air in their goldmine. In January 2000 a dam collapsed releasing approximately 100,000 m<sup>3</sup> of cyanide-contaminated tailings water into the environment. The applicants alleged that some of the authorities had failed to take effective measures in regard to the accident, their health and the environment. The ECtHR held that Article 8 of the ECHR had been violated as a result of the failure of the state authorities to assess the risks of the activities and in taking protective measures to guarantee the rights of the applicants. The ECtHR pointed out that pollution may constitute an interference in a person's private and family life as well as in the right to enjoy a healthy and protected environment.

The focus of the Court was in arguing the principle of the positive obligations of state authorities to assess and mitigate risks caused by hazardous toxic substances, which is directly related to the Environmental Impact Assessment Procedure (EU EIA Directive). The Court established that the minimum standards require the establishment of a regulative framework. The specifications of the framework include licensing, settlement, operation and control of the hazardous activity and conducting public surveys and studies allowing the public to assess the environmental risks.<sup>297</sup> The ECtHR used the

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291 Mc Crudden 2007, p. 378

292 See for example for the idea of cross-fertilization: Knox 2010, p. 83, Boyle 2012, p. 637

293 ECtHR, *Giacomelli v. Italy*, 2 November 2006, paras 87–89

294 ECtHR, *Tătar v. Romania*, 27 January 2009, para 100

295 On Environmental Impact Assessment, see: The Espoo Convention on Environmental Impact Assessment in a Transboundary Context, adopted 25 February 1991, entered into force 10 September 1997, 1989 UNTS 309. Supervisory organ: The Implementation Committee of the Espoo Convention. Report of the Implementation Committee on its twenty-first session, ECE/MP.EIA/IC/2011/4/ 20 June 2011, para 12

296 ECtHR, *Giacomelli v. Italy*, 2 November 2006, paras 60 and 94

297 ECtHR, *Tătar v. Romania*, 27 January 2009, para 88

EU principles and legislation especially those concerning the precautionary principle<sup>298</sup>. This ruling considerably strengthened the minimum standard under the ECHR regarding risk assessment and precautionary measures and specified the content of the positive obligations.<sup>299</sup> In the case of *Hardy and Maile v. the United Kingdom* (2012) the ECtHR also assessed the obligation to maintain an adequate regulative framework<sup>300</sup>. These requirements include permissions, consent and control procedures and mechanisms. These obligations has a close connection to EU environmental law, more specifically the Environmental Impact Assessment norms, to which the ECtHR also made reference<sup>301</sup>. Thus it can be concluded that the ECtHR has in some respects taken a model from EU law when assessing the obligations under its system. As a result, the EU law has clarified the content of the positive obligations under the ECHR and made clear the obligations in the environmental context.

Moreover, in case of *Tătar v. Romania* (2009) the ECtHR used also the Rio Declaration in the substantive matter of the precautionary principle<sup>302</sup>. The ECtHR used the soft law to specify the obligations and to illustrate the standing of the states in relation to environmental protection.<sup>303</sup> The ECtHR referred to the spirit of these two declarations to support its view on the duty of authorities to prevent environmental damage both in their respective territories, but also in other countries. This permits the interpretation that the ECtHR used the soft law to specify the obligations and to illustrate the standing of the states as regards environmental protection.<sup>304</sup>

Also, the significance of the Aarhus Convention<sup>305</sup> to the ECtHR was acknowledged especially in the case of *Taskin and others v. Turkey* (2004).<sup>306</sup> The applicants lived in the district of Bergama (Izmir) or in the surrounding villages, where a goldmine using the cyanidation process located. The permit was allowed against the decision of the Supreme Administrative Court, which held that the permit would be against the private life of the applicants and against the right to a healthy environment and against the public interest. However, the goldmine was not ordered to close immediately, but only after several months. The ECtHR found violations of Articles 8 and 6 of the ECHR. The case makes several

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298 *Royaume Uni/Commission, Aff C-180/96, et CJCE, National Farmer's Union, C-157/96, paras 111–112*

299 See for precautionary principle: *Hollo* 2007, pp. 76–84

300 ECtHR, *Hardy and Maile v the United Kingdom*, 14 February 2012, para 231

301 As a relevant list of law, the Court included: Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended (“the EIA Directive”), Article 1(1), 2(1) and 3(1).

302 ECtHR, *Tătar v. Romania*, 27 January 2009, para 111

303 *Shelton* 2011, pp. 61–62

304 *Ibid.*

305 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) 38 I.L.M. 517, 25 June 1998

306 ECtHR, *Taskin and Others v. Turkey*, 10 November 2004, paras 99, 118 and 119

references to the Aarhus Convention, and its influence in the environmental argumentation is indispensable. Interestingly, the ECtHR recognized the value of the Aarhus Convention despite the fact that Turkey had not ratified the Aarhus Convention.<sup>307</sup>

Furthermore in the cases of *Tătar v. Romania*<sup>308</sup> (2009) and *Grimkovskaya v. Ukraine* (2011), the ECtHR made references to the Aarhus Convention<sup>309</sup> In the case of *Grimkovskaya v. Ukraine* (2011), the application related to the re-routing of a motorway via a residential area, which the applicant found unsuitable for heavy traffic. In addition, the applicant submitted that the local authorities had failed to monitor the pollution and other nuisances related to the motorway. The ECtHR found a violation under Article 8 of the ECHR as the state had failed to fulfil its positive obligations to carry out an environmental feasibility study and to take mitigating measures. Furthermore, the applicant had not sufficient opportunity to challenge the policy concerning the motorway. The ECtHR explained that

the importance of public participation in environmental decision-making as a procedural safeguard for ensuring rights protected by Article 8 of the Convention, the Court underlines that an essential element of this safeguard is an individual's ability to challenge an official act or omission affecting her rights in this sphere before an independent authority<sup>310</sup>

was supported with the obligations of Aarhus Convention. The protection level between the ECHR and the Aarhus Convention has been so similar, that researchers have even noted, with some degree of criticism, that the ECtHR does not provide protection additional to the standards of the Aarhus Convention.<sup>311</sup>

In addition, the ECtHR has used other Council of Europe documents in a few cases. In case of *Öneryıldız v. Turkey*<sup>312</sup> (2004) a methane explosion occurred on a rubbish tip. Consequently, ten houses were damaged and nine relatives of the applicant died. The applicant argued that the state authorities had failed to take preventive measures, even though the risks had been noted in expert reports. The ECtHR found a violation under Article 2 of the ECHR as a result of failure to secure the lives of the applicant's relatives. The ECtHR emphasized that the state had failed to guarantee adequate information about the risks of the rubbish tip. In the case of *Guerra*, the applicants lived close to a chemical factory where there has been several accidents. The applicants claimed that the state had failed to take practical measures to reduce pollution and other hazards caused by the operations of the factory. In addition, the applicant alleged failure of the authorities to

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307 Pieraccini 2015, p. 88

308 ECtHR, *Tătar v. Romania*, 27 January 2009, para 118

309 ECtHR, *Grimkovskaya v. Ukraine*, 21 July 2011, para 72

310 ECtHR, *Grimkovskaya v. Ukraine*, 21 July 2011, para 69. See also for public participation: Ebbesson 1997, pp. 70–75

311 De Sadeleer 2012, p. 71, Boyle 2012, pp. 623 and 635

312 ECtHR, *Öneryıldız v. Turkey*, 30 November 2004 (GC), paras 59 and 62



inform the public. The ECtHR found a violation of Article 8 of the ECHR as the pollution constituted a risk to the realization of the rights of the applicants and they did not receive timely essential information concerning the production of fertilisers. In both of the cases of *Öneryıldız v. Turkey*<sup>313</sup> (2004) and *Guerra and Others v. Italy*<sup>314</sup> (1998) the ECtHR has acknowledged the relevance of other Council of Europe documents in the interpretation. The ECtHR used Resolution 1087 to provide support for establishing the right of the public to access environmental information harmoniously with the other norms of the Council of Europe<sup>315</sup>.

The use of object and purpose argumentation and the use of international sources are often connected to the doctrine of “living instrument”<sup>316</sup> and the dynamic interpretation of the Convention.<sup>317</sup> The dynamic interpretation has made it possible to address themes not recognized as human rights issues at the time that the Convention was drafted<sup>318</sup>. As a result, the ECtHR has been able to expand the scope of protection into new areas, such as environmental protection or the rights of sexual minority.<sup>319</sup> When arguing about the needs of the present time and societies<sup>320</sup>, the ECtHR analyses international and national development in the field, including changes in morals and technology.<sup>321</sup> The role of the dynamic interpretation varies in the interpretation. There are cases where the ECtHR has given the dynamic interpretation only a minor role, or in practice a dynamic interpretation either in conjunction with other rules of interpretation, such as the object and purpose of the Convention<sup>322</sup> or with the principle of “practical and effective rights”<sup>323</sup>. However, there are also cases where dynamic interpretation has replaced other principles of interpretation.<sup>324</sup> In the latter situation there have been specific supporting factors to depart from the earlier case continuum.<sup>325</sup> The ECtHR may also restrain itself when the intention of the drafters is clear, and ignoring the intention is not appropriate<sup>326</sup>. These requirements diminish the significant shifts in the case law and support legal certainty

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313 *Ibid.*

314 ECtHR, *Guerra and Others v. Italy*, 19 February 1998 (GC), para 34

315 *Ibid.*

316 Popovic 2009, pp. 363–364

317 Pellonpää 2002, p. 213

318 Viljanen 2003, pp.152–153

319 Viljanen 2011, p. 263

320 See for example: ECtHR, *Selmouni v. France*, 28 July 1999, para 101

321 Viljanen 2003, p. 93

322 Dworkin 1986, p. 88

323 ECtHR, *Christine Goodwin v. the United Kingdom*, 11 July 2002, para 74

324 Viljanen 2003, pp. 93, 95, 231, 142–143, 148, 152–153, Viljanen 2011, p. 263

325 Viljanen 2003, pp. 131, 148

326 Senden 2011, pp. 279, 280–282. See also: ECtHR, *Johnston and other v. Ireland*, 18 December 1986, para 53

and predictability.<sup>327</sup> However, it should be noted that the use of dynamic interpretation is also connected to the understanding of the judges on the nature of the law. For example, activist judges<sup>328</sup> can value the protection of the individual over legal certainty or are highly motivated towards doctrinal development. These factors influence how the judges apply the rules of interpretation.

Even though the ECtHR can and must take account of international developments, it can make an autonomous interpretation concerning concepts of law.<sup>329</sup> As a result, the common concepts used for example in the domestic or international context do not necessarily have an identical meaning in the context of the ECHR<sup>330</sup>. The autonomy of concepts may inhibit the comparability of the concepts and their interpretation by different actors. On the other hand, it may enable dynamic interpretation and provide protection when the application of national or international interpretation of a particular concept would not. Furthermore, as there are different concepts and interpretations of the same concepts among the States Parties, the ECtHR cannot take all these into account.<sup>331</sup> The Court has used the test of autonomous interpretation especially to determine if the domestic classification prevents protection that would satisfy the threshold of the ECHR or alternatively, if the case requires evolutive interpretation<sup>332</sup>.

Furthermore, even though applicants must specify their claims under Articles of the Convention, the Convention must be interpreted as a whole.<sup>333</sup> Overemphasis on a single Article may lead to conflicting interpretations between different Articles.<sup>334</sup> Therefore applicants may propose that an obligation developed under one Article also be applied under another Article. The ECtHR itself has explained that, for example, the positive obligations under Article 8 on private and family life and Article 2 of the Convention on the right to life are similar to each other. In the green jurisprudence of the ECtHR the obligations under Articles 2 and 8 have converged and are largely overlapping under the doctrine of positive obligations<sup>335</sup>. For example, in the case of *Öneriyıldız v. Turkey* (2004), the Court applied the same test used in *Guerra and Others v. Italy* (1998) under Article 8 of the Convention on private and family life, in *Öneriyıldız v. Turkey* (2004) under Article 2 of the Convention on the right to life.<sup>336</sup> As a consequence, the positive obligation under

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327 Viljanen 2003, p. 95

328 Harwood 2012, p. 2

329 Pellonpää 2002, p. 212, Senden 2011, pp. 289–310

330 Senden 2011, p. 291

331 Viljanen 2003, p. 89

332 Senden 2011, pp. 297–298

333 ECtHR, *Kjeldsen, Busk Madsen & Pedersen v. Denmark*, 7 December 1976, para 52

334 Uoti 2004, pp. 123–124

335 ECtHR, *Öneriyıldız v. Turkey*, 30 November 2004 (GC), para 90 and 160, ECtHR, *Budayeva and Others v. Russia*, 20 March 2008, para 133

336 Hilson 2009



Article 8 requires that national authorities take practical measures similar to those under Article 2 of the Convention.

### 2.5.3 Other Virtues of the Court (and Pragmatic Limitations)

In addition to clear principles and rules of interpretation, the Court has other virtues it aims to protect in its interpretations. These virtues are related to maintaining the legitimacy of its actions. First of all, it aims to maintain its case law as predictable and consistent for the protection of legal certainty. Therefore, whereas the Court is not bound by its earlier case law, it aims to build case continuums where the departures are relatively rare and reasonable. This virtue significantly guides the ECtHR in its interpretation. For example, Harvey has estimated that almost 90 percent of the cases have been resolved on the basis of the Court's own precedents the general principles contained therein<sup>337</sup>.

A further virtue of the ECtHR is the avoidance of unnecessary fragmentation of international law. This virtue is seen in the acts of the ECtHR when it explains that other institutions have a better mandate on some subjects. The case of *Atanov v. Bulgaria* illustrates this tendency. The Court held that "other international instruments and domestic legislation are better suited to address such issues" and referred to Council of Europe's Parliamentary Assembly recommendations related to environmental protection<sup>338</sup>. In *Kyrtatos v. Greece* (2003), the Court referred to other international instruments and to its own role as supplementary:

Neither Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such; to that effect, other international instruments and domestic legislation are more pertinent in dealing with this particular aspect<sup>339</sup>.

The ECtHR must enjoy legitimacy to ensure that the judgments and the institution itself are respected. Consequently, the ECtHR is not free from pressure to maintain its legitimacy and good reputation in the eyes of states, researchers, the public, colleagues of the judges and the international community. Maintaining a good reputation is one practical consideration influencing how far the ECtHR develops its interpretation. A good reputation enables the ECtHR to achieve respect from the States Parties to follow the rulings of the ECtHR, whereas a bad reputation would undermine the willingness of states to respect the rulings of the Court.<sup>340</sup> Dothan Shai is of opinion that in general the ECtHR has a good reputation

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337 Harvey, *Third Party Interventions before the ECtHR: A Rough Guide*, <https://strasbourgobservers.com/2015/02/24/third-party-interventions-before-the-ecthr-a-rough-guide/> (last visited 26 February 2018)

338 ECtHR, *Atanov v. Bulgaria*, 2 December 2010, para 77, for recommendations, see paras 55–57

339 ECtHR, *Kyrtatos v. Greece*, 22 May 2003, para 52

340 Dothan 2011, pp. 115–126

as a result of the high level of respect the rulings enjoy among the States Parties, which has further enabled the ECtHR to extend the protection it affords.<sup>341</sup>

Despite a good reputation, political debate, discussion of the national courts and scholarly literature on the legitimacy of the ECtHR have been continuous. The criticism by the States Parties to the ECtHR has its roots in the protection of the sovereignty of the states, which some of the States Parties have felt to be threatened by the mandate of the ECtHR, in particular in those cases where the ECtHR has deviated from the interpretation of the national courts. Consequently, the States Parties have already established the Brighton Declaration and the Additional Protocol underlining the subsidiary role of the ECtHR.<sup>342</sup> However, as Michael O’Boyle has stated:

There is a popular misconception that the European Court of Human Rights (ECtHR) in Strasbourg regularly runs roughshod over the decisions of national courts. It is simply wrong. It has been convincingly demonstrated that in the great majority of cases, for example, the UK, where the criticism has been most strident – that the Strasbourg Court has followed the conclusions reached by the appeal courts in the three UK jurisdictions in the great majority of cases.<sup>343</sup>

Closely connected to this discussion explaining the tendency of the ECtHR to take account of the national rulings is the doctrine of deference.<sup>344</sup> The ECtHR has used this doctrine to assess the quality of the domestic parliamentary and judicial review and to practice self-restraint out of respect for the democratic process when the national parliaments, courts and authorities have taken sufficient account of its case law and the principles of the Convention.<sup>345</sup> The doctrine was developed most significantly in the case of *Animal Defenders International v. the United Kingdom* (2013), where the ECtHR stated that:

115. It was this particular competence of Parliament and the extensive pre-legislative consultation on the Convention compatibility of the prohibition which explained the degree of deference shown by the domestic courts to Parliament’s decision to adopt the prohibition (in particular, paragraphs 15 and 24 above). The proportionality of the prohibition was, nonetheless, debated in some detail before the High Court and the House of Lords. Both courts analysed the relevant Convention case-law and principles, addressed the relevance of the above-cited VgT judgment and carefully applied that jurisprudence to the prohibition. Each judge at both levels endorsed the objective of the prohibition as well as the rationale of the legislative choices which defined its particular scope and each concluded that it was

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341 *Ibid.*, p. 117

342 CoE, Brighton Declaration, The High-Level Conference meeting at Brighton on 19 and 20 April 2012

343 O’Boyle 2014, p. 91

344 See for the doctrine of deference: Hunt 2003, Jowell 2003

345 ECtHR, *Animal Defenders International v. the United Kingdom*, 22 April 2013, paras 115–116

a necessary and proportionate interference with the applicant's rights under Article 10 of the Convention.

116. The Court, for its part, attaches considerable weight to these exacting and pertinent reviews, by both parliamentary and judicial bodies, of the complex regulatory regime governing political broadcasting in the United Kingdom and to their view that the general measure was necessary to prevent the distortion of crucial public interest debates and, thereby, the undermining of the democratic process<sup>346</sup>.

The conclusion of the case of *Animal Defenders International v. the United Kingdom* (2013) illustrates the ability and the willingness of the ECtHR to evaluate and take account of the feedback from a constitutional court and domestic authorities<sup>347</sup>. The message for the domestic institutions is that the ECtHR does not wish to override the domestic rulings in such cases where appropriate balancing and sufficient reviews have indeed taken place.

Whereas the academic debate has focused predominantly on the legitimate relationship between the states, the national courts and the ECtHR, the legitimacy of the actors of the ECtHR concerning the applicants and the public should not be underestimated. If the individuals and the general public do not trust the impartiality and the capacity of the ECtHR to guarantee protection, there is a decrease of applications to the ECtHR. Such a dramatic decline would result in the ECtHR not receiving potential applications.

Maintaining a balance between legitimacy in the eyes of the state, the applicants and the public is indispensable an imbalance would be detrimental to the effectiveness of the European judicial human rights system. If victims are not protected, and the wider public starts to question the ability of the ECtHR to provide effective protection, other means and methods may prevail over recourse to the ECtHR. Likewise, if the states do not enforce the judgments of the ECtHR, the influence of the judgments will also decrease.

## 2.6 The Law was Born: Judgment and Separate Opinions

Judgment is the written end result of the process of forming the law. The judgment includes factual circumstances, a list of the relevant legal instruments, an evaluation of the arguments of the parties, the application of legal doctrines to the factual circumstances, conclusions, a determination of a possible violation and a ruling on the compensation. The judgment may reaffirm the current interpretation of the law, or it may differentiate the case from earlier jurisprudence and depart from it. The judgment is the primary sources illustrating the public reasons of the ECtHR for why it concluded the case as it did and what the law is. This does not reveal all the deliberations of the ECtHR, but the reading of the judgment presents the choices of the ECtHR and also aspects on which it did not take a stand.

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<sup>346</sup> *Ibid.*

<sup>347</sup> Pellonpää 2012, pp. 89–90

It should be noted that in the same area of law judgments may point in different directions. This leaves space for the parties to select from these cases suitable judgments lending support to their argumentation. Furthermore, the parties are not limited to utilizing only judgments related to situations similar to their own but can utilize general doctrines of law developed in other contexts. As a result, a single judgment modifying the interpretation of law may inspire the parties in several contexts.

The importance of the judgments of the ECtHR is that the development of the law does not necessarily impede the development of the case law of the ECtHR; the judgment may modify the European minimum standard. Also, it may influence the domestic legislation of a particular country, the drafting of the legislation of other State Parties as well as the interpretation of other international human rights organs. Therefore the judgment does not only illustrate the law under the ECHR, but it impacts the interpretation of law and the creation of law in national and international legal frameworks.

The judgment will often include dissenting opinions and concurring opinions with no authority to establish the content of the law, but still the power to claim what the law should be or how it should have been interpreted. Dissenting opinions and separate opinions may foreshadow future developments and be useful to applicants, particularly when societies have changed. Dissenting and separate opinions show that there is already to some extent a willingness to develop the case law in a different direction. For example, in environmental jurisprudence, in 1997 there was an obvious frustration among the dissenting judges that the Court had not taken due account of international developments in the field of environmental protection:

The majority appear to have ignored the whole trend of international institutions and public international law towards protecting persons and heritage, as evident in the European Union and Council of Europe instruments on the environment, the Rio agreements, UNESCO instruments, the development of the precautionary principle 2 and the principle of conservation of the shared heritage. United Nations Resolution no. 840 of 3 November 1985 on the abuse of power was adopted as part of the same concern. Where the protection of persons in the context of the environment and installations posing a threat to human safety is concerned, all States must adhere to those principles.<sup>348</sup>

The ECtHR has in its latter case law made references to the EU and Council of Europe instruments related to the environment<sup>349</sup>, which shows that what the dissenting judges argued earlier has been realized subsequent to the judgments. Therefore the parties to the cases have a high potential for assessing the current separate opinions, thereby finding inspiration and support for their argumentation. Particularly in those cases where the

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348 ECtHR, *Balmer Schafroth and Others v. Switzerland*, 26 August 1997, Dissenting Opinion of Judge Pettiti and others

349 See for example: ECtHR, *Öneryıldız v. Turkey*, 30 November 2004 (GC), paras 59 and 62, ECtHR, *Tătar v. Romania*, 27 January 2009, para 95

Court is deeply divided, the dissenting and separate opinions give the litigants a clear signal on the potential of the departure, which provides support to continue to seek cases that could utilize the potential of the dissenting and concurring opinions.

## 2.7 Concluding Remarks

The current research on the European Convention on Human Rights and the European Court of Human Rights has focused on analysing the capability of the Court to afford protection in different circumstances and the role of the doctrines. Therefore it is important to complement the current understanding and underline that the European Court of Human Rights alone cannot determine how fast and in what direction the case law is developing. There is a strong interdependence between the ECtHR and the parties in the formation of the judgments as the ECtHR act in the cases only if there are admissible applications; it evaluates primarily the materials submitted by the parties.

The development of the jurisprudence of the ECtHR requires failures by the States Parties to protect the rights of the European Convention on Human Rights. Only thereafter do applicants have control over choosing the case that they want to bring before the European Court of Human Rights. There may be potential cases for developing the case law that are never brought before the ECtHR and cases that are very weak in their settings but are nevertheless submitted before the ECtHR. If there are several potential situations in different State Parties, the strategic litigant has major control to select a country against which the application is filed and to seek suitable applicants for the case. For the purposes of strategic litigation the selection of a suitable state is important as some states offer compensation in cases that would probably result in a judgment in favour of the applicant. Whereas for some applicants this is an asset as the applicant receives compensation, the agreement between parties hinders the development of the case law. Therefore applicants wishing to develop the case law should choose states that are likely to allow the ECtHR to decide the result.

In strategic litigation, choosing a suitable case is also related to the right timing to bring the case before the ECtHR. The domestic and international development of the matter may have a positive effect on the development, whereas the ECtHR may be more hesitant to develop protection in those areas where it receives no support from its earlier case law or external sources. Failure to choose suitable timing may in the worst case result in a situation where the ECtHR states explicitly that it does not have the mandate to intervene.

The variation and difficulty in choosing the right timing are that the process may take a long time and sudden changes in a single society or even in the European region as a whole may to some extent influence the interpretation of the Convention. For example, changes in security issues, lack of resources to maintain health services or a significant increase in immigration influence the settings in which the ECtHR reaches its decisions. The ECtHR reflects the obligations of the states in the light of the factual circumstances,

and thus changes in security may result in greater latitude for the states under the margin of appreciation doctrine. Besides, the failure of Greece to provide adequate living conditions for asylum seekers influenced the ECtHR to establish a ban on the application of regular EU law concerning Dublin process. Consequently, even one sudden and significant event may have a lasting impact on the development of the European Court of Human Rights.

After choosing the state against which the application is to be filed and the timing conducive to the ECtHR developing the case law further, the applicant needs to be able to present the case successfully. The assessment of the current green jurisprudence means ensuring that the factual circumstances satisfy the requirement of severity and that the state has failed to meet its obligations under the Convention. If the state has failed to comply with its own environmental legislation or enforce the rulings of the national courts, the likelihood of the ECtHR finding a violation is high. Furthermore, as the current development of green jurisprudence has benefitted from references to the international development, external sources have provided favourable support for the applications.

It should be noted that it is also customary for the applicants to involve the current case law of the ECtHR and the logic incorporated in it, as the ECtHR relies on its well-established case law even in new areas. The building of a case under an Article which has not earlier protected a given interest is not as well grounded in the arguments as an Article which has protected similar interests.

However, there are factors that are harder for applicants to control. As the European Court of Human Rights consists of individuals, the differing professional and cultural backgrounds, hierarchies and all the variations in these people's daily lives to some extent affect the process of giving judgment. It is hard to estimate the influence of the human element in the formation of a single judgment. Empirical observation using anthropological methods would reveal more about this aspect. However, in principle, this variation persists and influences the development of the case law.

The states complying well with the Convention are important for the protection of human rights, but not the main drivers of the development of the case law of the ECtHR. Conversely states that do not comply with the obligations of the Convention, their legislation and their own rulings create a fruitful basis to find violations of the Convention. This will affect not only their systems but also contribute to the creation of a minimum standard for Europe. On the basis of current green jurisprudence, the failures of states allowing the development have been for example: failure to take action according to the precautionary principle, failure to conduct adequate environmental impact assessment, failure to provide access to information, failure to inform and warn the population of risk, failure to maintain a sufficient legislative framework, failure to establish a national supervisory mechanism, failure to control or regulate a private industry or a person, failure to enforce national court decisions and failure to conduct sufficient investigations.

The role of the state after the application is to provide evidence on the circumstances and to respond to the claims of the applicants. The state may deny failing to protect the

rights of the Convention or argue that its actions were justified under the Convention to protect other public interests. States have developed discussions particularly in relation to sovereignty and a wide margin of appreciation. Whereas the margin of appreciation may limit an individual right, such as the right to private and family life, in contexts such as environmental jurisprudence it also provides a platform to justify the protection of environmental interests. Thus in current green jurisprudence, in some cases, instead of the applicants, it has been the states that have promoted the greening of the case law by claiming that the environmental protection measures justified the limitation of the individual rights in question.

The ECtHR has ultimately the autonomy to develop the argumentation of the judgments by examining the circumstances of the case and the arguments the various parties. Even though the rules of interpretation and the other general doctrines allow dynamic interpretation, the ECtHR tends if possible to follow its case law in order to be consistent, predictable and to guarantee legal certainty. This is so, even though in principle, the ECtHR is not bound by its earlier case law. In practice, the ECtHR does not want to exceed its mandate, which would impair its legitimacy in the eyes of the States Parties. Due to the parallel existence of both the window of opportunity and practical restraints, the judgments often balance between contradictory rules of interpretation and other virtues. The speed of the development is also related to the timing of the application because societies differ and the legal culture has also developed: an application which in the 1980s was not successful could nevertheless be successful in the 2000s.

Particularly in areas where the development of the jurisprudence has been modest, there is a need for constant strategic litigation carefully incorporating the recent domestic and international developments into the argumentation and enabling the Court to update its approach to comply with recent developments. Consistent and long-term litigation is most likely to further the development of the case law into the direction that the litigants aim at. The professional pursuit of structural changes in society should seek applicants who are aware of the slow pace of the development and who want to be part of it despite the slight probability of gaining personal compensation.



### 3 THE ROLE OF THE ENVIRONMENT IN FUTURE JUDGMENTS

#### 3.1 Rewriting the Current Green Jurisprudence

The rewriting of the example cases from the current green jurisprudence of the ECtHR and the decisions of the Commission are based on the current green jurisprudence of the European Court of Human Rights and the general principles of law. The aim is to conduct the rewriting so as to maintain a strong connection to the current doctrinal development of the case law. Consequently, even though the technocratic method is used in predicting the future development, the aim is to provide realistic future developments that can provide inspiration for scholars, judges and litigants. To ensure realistic rewriting, the analysis of the current developments of the green jurisprudence forms the backbone for rewriting. Unconventional departures are made only if there is a genuine necessity to discuss the area of law that would be impossible without some attempt at judicial activism<sup>350</sup>. Argumentation falling under judicial activism includes in particular areas related to extraterritoriality and shared liability, where the scope of the doctrines in their current form is narrow.

The two approaches to greening based on the current case-law which I propose to use in the rewriting are called applicant-driven greening and state-driven greening. In applicant-driven greening the argumentation has been developed by the applicant. Third-party interveners are also included in this approach as they often support the arguments of the applicants, even though their role in the development of the green jurisprudence has not so far been significant. The main elements of the current green jurisprudence of the ECtHR supporting the finding of the violation in favour of the individual applicant have been the following.

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<sup>350</sup> See for judicial activism: Kmiec 2004, p. 1444, Harwood 1996, p. 2, Zarbiyev 2012, pp. 1–32

Table 2. Applicant-driven greening

<b>The Applicant</b>	<b>The Responding State</b>	<b>Third-Party Interveners</b>
<ul style="list-style-type: none"> <li>- There has been significant and continuous environmental problem to the victim and for the environment</li> <li>- Victim belongs to vulnerable group</li> <li>- There is close interrelationship between the environmental pollution and the violation of the Convention</li> </ul>	<ul style="list-style-type: none"> <li>- The state has violated its domestic environmental legislation</li> <li>- The state has violated its international obligations</li> <li>- The state has not been executing the ruling of the domestic court</li> <li>- The state has not facilitated sufficient legislative and administrative framework for the environmental matters</li> </ul>	<ul style="list-style-type: none"> <li>- Third-party interveners provide scientific research data</li> <li>- Third-party interveners collect supporting international reports from the United Nations and EU</li> <li>- Third-party interveners collect supportive comparative data on the domestic legislation of the State Parties and international agreements</li> </ul>
<b>The European Court of Human Rights</b>		
<ul style="list-style-type: none"> <li>- The Court utilizes its general doctrines and rules of interpretations, such as living instrument, international trends, the margin of appreciation, consensus, positive obligations</li> <li>- The case is before the Grand Chamber</li> </ul>		

Based on the assessment of the current green jurisprudence, and under these conditions, the ECtHR has been likely to find a violation of the ECHR in favour of the applicant. As the ECtHR has a strong tendency to adhere to its earlier case law, a similar approach is used in the rewriting to ensure a certain level of coherence between the rewritten judgments and the current green jurisprudence of the ECtHR. These conditions are also such that the applicants aiming at strategic litigation should be aware of and follow during the litigation.

Another approach that can be identified based on the current green jurisprudence of the ECtHR is state-driven greening. In these cases the argumentation in favour of the environment and contributing to the greening does not originate with the applicant; responding state has developed the argumentation on the importance of environmental protection.

Table 3. State-driven greening

<b>The applicant</b>	<b>State</b>	<b>Third-party interveners</b>
<ul style="list-style-type: none"> <li>- There has been damage to the rights of the individual, but the level of severity is not significant</li> </ul>	<ul style="list-style-type: none"> <li>- The state claims that the limitation of the individual right serves a public interest</li> </ul>	<ul style="list-style-type: none"> <li>- Third-party interveners provide supporting scientific research, international reports and legislation on the public interest in concern for the support of the state</li> </ul>
<b>The European Court of Human Rights</b>		
<ul style="list-style-type: none"> <li>- The Court utilizes margin of appreciation doctrine and allows for the wide margin of appreciation for the protection of the public interest</li> </ul>		

In the rewriting of green judgments of the ECtHR, reference is also made to this category of cases, where the states have contributed to establishing the environment as a legitimate and public interest. The ECtHR has already established that the environment as such is a public interest, and this general position is used in the rewriting as a basis and in addition to further establish that climate change is an increasing concern for human rights.

Furthermore, strategic litigants can benefit from utilizing state-driven green jurisprudence and the logic incorporated therein. Strategic litigants seeking to strengthen the European minimum standards could consistently seek cases where the responding states develop, for example, argumentation mitigating climate change as a public interest. If there are several cases from different states where the public interest is defined in general terms, it may begin to constitute a consensus on the public interest, which may also influence the standards of those states which do not safeguard that public interest. Consequently, through the argumentation of the respondent states, the ECtHR would be able to strengthen its current approach in relation to the protection of the environment.

## 3.2 Various Approaches to the Role of the Environment

### 3.2.1 Prevailing Approaches to the Role of the Environment

In the current constitutional and human rights framework the role of the environment has been defined in various ways. The role of the environment and nature in the human rights framework can be defined as a public interest, as a part of the right to a healthy environment<sup>351</sup> and environmental rights<sup>352</sup> or as rights holder (rights of nature). In the green jurisprudence of the ECtHR, the environment is most often perceived as a public interest, but on a few occasions the ECtHR has also departed from its general approach and acknowledged the right to a healthy environment<sup>353</sup>.

The purpose of this section is to discuss the two less used approaches, namely the right to a healthy environment and the rights of nature that the ECtHR could use to develop the role of the environment in its green jurisprudence. The green jurisprudence occasionally refers to the right to a healthy environment, and consequently the purpose is first to analyse the future potential of these emerging developments. International and national developments in respect to the right to a healthy environment approach are discussed and their applicability to the context of the ECtHR is analysed. The other approach has not yet occurred in the current green jurisprudence of the ECtHR, and it relates to the granting of rights to nature. However, at the international level the discussion and use of rights to nature have been on the increase, hence the need to assess the appropriateness of the

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351 See for example: Bosselmann 2015, p. 533

352 Boyd 2015, p. 170

353 ECtHR, *Tătar v. Romania*, 27 January 2009, paras 107 and 112

approach in the context of the green jurisprudence of the ECtHR. For both parts, one judgment is rewritten to illustrate how the argumentation might develop. In the rewriting the elements noted above of both individual-driven greening and state-driven greening will be utilized.

### 3.2.2 Development of the Approach of the Right to a Healthy Environment

#### 3.2.2.1 The State-of-the-Art on the Right to a Healthy Environment

The academic discussion on environmental rights or the right to a healthy environment has been lively since the 1990s<sup>354</sup>. In addition, the right to a healthy environment has been recognised on the level of international human rights declarations, such as the Stockholm Declaration on Human Rights<sup>355</sup> as well as by over 100 national constitutions.<sup>356</sup> Compared to the expansion and greening of current human rights, the approach acknowledging that there is a right alters the dynamics. By relying on the right to a healthy or clean environment, an individual is in a better position to make a claim solely on the basis of the particular right in question without explaining the relationship between existing human rights and the environmental issue at stake. The recognition of healthy environment as a right can also enable the individual to claim the violation of the right *per se* and as a representative of nature.

Adopting this approach would change the logic of the current environmental litigation before the ECtHR as the requirement is that to qualify as a violation, the environmental damage must have a clear connection with the realization of individual rights, such as the right to health, life or ownership. The current role of the environment under the ECHR as a public interest allows the balancing of general interests, but does not allow individuals to make a complaint solely because of the environmental problems. Currently, acknowledging the right to enjoy a healthy environment has been fermenting under development in the green jurisprudence of the ECtHR, but not consistently and continuously, as the Court has also specifically refrained from establishing a specific right to enjoy a healthy environment.<sup>357</sup>

Despite the cautious approach to recognizing the right to enjoy a healthy environment, the ECtHR has also on a few occasions stated explicitly that the ECHR includes a right to enjoy a healthy environment in such cases as *Tătar v. Romania* (2009). The Court recognized the failure of the authorities to safeguard the applicants' right to enjoy a healthy

354 Shelton 1991, p. 104, Shelton 2001, p. 185, Cook 2002, pp. 196–215, Kiss – Shelton 1991, pp. 21–31, Cullet 1995, pp. 25–40, Trindade 1998, pp. 117–153, Boyle 2007, pp. 471–511

355 Sohn 1973, pp. 423–515, Report of the United Nations Conference on the Human Environment and Development, Stockholm Declaration, UN Doc. A/CONF.48/14/REV.1, 1 January 1973

356 Collins 2015, pp. 228–232

357 ECtHR, *Janina Furlepa v. Poland*, 18 March 2008, p. 6 (admissibility decision)

environment.<sup>358</sup> Besides, in case of *Hatton and Others v. the United Kingdom*, the Court referred to its earlier case *López Ostra v. Spain*<sup>359</sup> by stating that “Article 8 could include a right to protection from severe environmental pollution”.<sup>360</sup> Furthermore, in the dissenting opinion of Judge Costa and others in *Hatton*, the judges stated twice that the Convention protects the right to a healthy environment:

In the field of environmental human rights, which was practically unknown in 1950, the Commission and the Court have increasingly taken the view that Article 8 embraces the right to healthy environment, and therefore to protection against pollution and nuisances caused by harmful chemicals, offensive smells, agents which precipitate respiratory ailments, noise and so on<sup>361</sup>.

The second statement held that:

4. The Court has given clear confirmation that Article 8 of the Convention guarantees the right to a healthy environment: it found violations of Article 8, on both occasions unanimously, in *López Ostra v. Spain* (judgment of 9 December 1994, Series A no. 303-C) and *Guerra and Others v. Italy* (judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I).<sup>362</sup>

Regarding doctrinal development, there are no barriers as such to confirm that there is indeed a human right to a healthy environment under the ECHR as the ECtHR has over the years found that the right already exists. The right would already have well developed content, including such procedural rights as access to information, the right to participation and the right to effective remedies. Furthermore, the content includes the obligation for the state to take preventive measures, mitigate the damage and investigate the environmental problems. The current content of the green jurisprudence of the ECtHR is harmonious and similar to the content defined regarding the right to a healthy environment. Thus the clarification and confirmation of the existence of the rights to a healthy environment would require no significant departures from the current case law, but make the greening even more visible and holistically recognized.

Despite the domestic and international recognition of the right to a healthy environment, the ECtHR could define the content independently from the domestic and international development to the extent that it wishes to do so. According to David R. Boyd, in Europe, 40 countries have included environmental protection in their national constitutions.<sup>363</sup> Boyd

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358 ECtHR, *Tătar v. Romania*, 27 January 2009, paras 107 and 112

359 ECtHR, *Lopez Ostra v. Spain*, 9 December 1994, para 51

360 ECtHR, *Hatton and Others v. the United Kingdom*, 8 July 2003 (GC), para 96

361 ECtHR, *Hatton and Others v. the United Kingdom*, 8 July 2003 (GC) dissenting opinion of Costa and others

362 *Ibid.*

363 Boyd 2015, p. 171: Albania, Andorra, Armenia, Australia, Azerbaijan, Belarus, Belgium, Bulgaria, Croatia, Czech Republic, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Italy,

has estimated that the constitutional rights related to environmental protection typically include five different kinds of archetypes: “government’s duty to protect the environment; substantive rights to environmental quality; procedural environmental rights; individual responsibility to protect the environment; and a miscellaneous ‘catch-all’ category of diverse provisions”<sup>364</sup>. The most common form is the obligation of the government; among European countries substantive environmental rights are protected in 30 countries, and procedural environmental rights are particularly well established in Eastern Europe.<sup>365</sup>

The further development of the current fermenting developments is supported by the constitutional environmental rights. As the constitutional environmental rights system is well developed, also among the State Parties to the ECHR, the dialogue between national constitutional rights systems and the ECHR on the environmental issue might increase if the ECtHR were to recognize the existence of the right to a healthy environment. Through references to the domestic constitutional rights, the ECtHR could justify its adoption of the new right under the living instrument doctrine.

### 3.2.2.2 Rewriting the Case Law: The Case of *Gorraiz Lizarraga and Others v. Spain*

The origins of the case of *Gorraiz Lizarraga and Others v. Spain* (2004) are in the year 1989 in Spain, in the province of Navarre, when there were plans to build a dam. The authorities were planning to build a dam that would cause flooding of three nature reserves and in some small villages. The negative implications were estimated to include 159 landowners. Concerned individuals set up an association, Coordinadora de Itoiz in order to

coordinate its members’ efforts to oppose construction of the Itoiz dam and to campaign for an alternative way of life on the site, to represent and defend the area affected by the dam and this area’s interests before all official bodies at all levels, whether local, provincial, State or international, and to promote public awareness of the impact of the dam.<sup>366</sup>

The NGO brought the case before the ECtHR on behalf of its members, but the names of the members were not separately included as applicants. Consequently, the Government of Spain argued that the applicants did not meet the victim criteria<sup>367</sup> and the issue did not

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Latvia, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland and Ukraine

364 *Ibid.*, p. 175

365 *Ibid.*, pp. 175–179

366 ECtHR, *Gorraiz Lizarraga and Others v. Spain*, 27 April 2004, para 10

367 *Ibid.*, para 38

fall under the criteria of “civil rights and obligations”<sup>368</sup>. The ECtHR acknowledged that there was a need to interpret the criteria for a victim under Article 34 of the Convention in an “evolutive manner” as the applicant environmental NGO had interests to defend the environment and the homes of the members of the association due to the adverse implications of constructing the dam. The ECtHR also recognized that the dam would have a “direct and far-reaching” impact on the property rights and lifestyles of the members of the NGO as population displacement and expropriation of property were involved<sup>369</sup>. The ECtHR held that:

Indeed, in modern-day societies, when citizens are confronted with particularly complex administrative decisions, recourse to collective bodies such as associations is one of the accessible means, sometimes the only means, available to them whereby they can defend their particular interests effectively. Moreover, the standing of associations to bring legal proceedings in defense of their members’ interests is recognized by the legislation of most European countries. That is precisely the situation that obtained in the present case. The Court cannot disregard that fact when interpreting the concept of “victim.” Any other, excessively formalistic, interpretation of that concept would make protection of the rights guaranteed by the Convention ineffectual and illusory.<sup>370</sup>

The Government also claimed that the case lacked private interests of the applicants such as “economic rights.” However, the ECtHR found that the applicants did indeed meet the criteria of “civil” rights within the meaning of Article 6 § 1 of the Convention as they had presented in the domestic proceedings that the dam would cause expropriation and displacement of the population in the area.<sup>371</sup> The case is a regular Chamber judgment of the ECtHR that does not develop any general doctrines further. However, the factual circumstances create a fruitful basis to discuss the right to a healthy environment as the argumentation of the applicants relies heavily on the role of the individuals and environmental associations to protect the environment as a public interest.

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368 *Ibid.*, para 40–42

369 *Ibid.*, para 38

370 *Ibid.*, para 38

371 *Ibid.*, para 42



### 3.2.2.3 Rewriting of the Case of *Gorraiz Lizarraga and Others v. Spain*

#### *Extracts from the current judgment*

44. In the instant case, while it is common ground that a dispute existed over a right recognized under domestic law, there was disagreement as to its subject matter. According to the Government, at no point did the dispute focus on the association's economic or private rights, but instead on upholding the law and collective rights, so that no "civil" right was at stake. The applicant association, on the other hand, claimed to have acted to defend the individual and private rights and interests of its members.

45. The Court notes that, in addition to defense of the public interest, the proceedings before the Audiencia Nacional and subsequently before the Supreme Court were intended to defend certain specific interests of the association's members, namely their lifestyle and properties in the valley that was due to be flooded. As to the proceedings before the Constitutional Court concerning the request for a preliminary ruling on constitutionality, the applicants emphasise that this was the only method of challenging the Autonomous Community law of 1996, in that only a finding of unconstitutionality could have had the result of protecting both the environment and their homes and other immovable property.

46. Admittedly, the aspect of the dispute relating to the defense of the public interest did not concern a civil right which the first five applicants

#### *Rewritten judgment*

The Court notes that the claims of the applicants should be assessed under Article 8 of the Convention. The environmental case law has developed particularly under Article 8 and thus provides the relevant standards to the present case.

The Court notes that the Convention must be interpreted in the light of present-day conditions (See: *Tyrer v. the United Kingdom*, Appl. 5856/72, 24 April 1978, 31 §)). As the Court has continuously held, the environment is an increasingly important consideration in the contemporary societies (*Fredin (no. 1) v. Sweden*, 18 February 1991, para 48, *Katze Klitsche de la Grange v. Italy*, 21/1993/416/495, 19 September 1994, para 63, ECtHR, *Matos E Silva, LDA and Others v. Portugal*, Appl no 15777/89, 16 September 1996, para 88). Furthermore, the development of the right to a healthy environment has been continuous at regional level (See also: Aarhus Convention 1998, art. The 1981 African Charter on Human and Peoples Rights (art. 24) and the 1988 Additional Protocol to the American Convention on Human Rights (art. 11, para. 1), the Protocol to the African Charter on Human and Peoples Rights, Rights on the Rights of Women in Africa (art. 18) (art. 19)) and constitutional level as over 90 states have adopted a right to a healthy environment (See also: David R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment*, 2012)). Consequently, as the Court can and must take into account the relevant domestic and international developments (*Demir and Baykara v. Turkey*, § 85)) on environmental matters in its assessment, it takes into account

could have claimed on their own behalf. However, that was not true with regard to the second aspect, namely the repercussions of the dam's construction on their lifestyles and properties. In its appeals, the applicant association complained of a direct and specific threat hanging over its members' personal assets and lifestyles. Without a doubt, this aspect of the appeals had an "economic" and civil dimension, and was based on an alleged violation of rights which were also economic (See: *Procola v. Luxembourg*, judgment of 28 September 1995, Series A no. 326, pp. 14–15, § 38).

47. While the proceedings before the Constitutional Court ostensibly bore the hallmark of public law proceedings, they were nonetheless decisive for the final outcome of the proceedings brought by the applicants in the ordinary courts to have the dam project set aside. In the instant case, the administrative and constitutional proceedings even appeared so interrelated that to have dealt with them separately would have been artificial and would have considerably weakened the protection afforded in respect of the applicants' rights. By raising the question of the Autonomous Community law's constitutionality, the applicants used the single, albeit indirect, means available to them for complaining of interference with their property and lifestyles (See: Ruiz-Mateos, cited above, p. 24, § 59). The Court, therefore, finds that the proceedings as a whole may be considered to concern the civil rights

the national, regional and international developments of the field.

The Court reaffirms its earlier case law, where it has established that Article 8 of the Convention may in principle include protection of "environmental rights" (*Coster v. the United Kingdom*, 18 January 2001, § 116) and the right to a healthy environment (*Tatar v. Romania*). Court has emphasized in its earlier case law relating to the right to a healthy environment, that "public participation in environmental decision-making" is important (*Grikovskaya v. Ukraine*, 21 July 2011, § 71).

In the present case, the Court acknowledges that the applicants have referred to the Spanish Constitution, Section 45, which also protects the right to a healthy environment. Section 45 includes both the "right to enjoy an environment suitable for the development of the person, as well as the duty to preserve it".

The Court notes that in its earlier case law, it has upheld domestic legislation concerning the environment to ensure the effectiveness of environmental protection (*Hamer v. Belgium*, 27 November 2007, § 79). Furthermore, the Court reaffirms its earlier position, that it "will be slow to grant protection" to acts that are illegal and constitute a threat to "the protection of the environmental rights of other peoples in the community" (*mutandis mutatis*, *Coster v. the United Kingdom*, 18 January 2001, 116 §).

In the present case, the Court holds that the applicants have exercised their constitutional right in their complaint about both the protection of the environment as a public interest and for the protection of their lifestyle and property. It would result in ineffective protection under the Convention if the applicants were unable to exercise their constitutional rights with regard to the right to a healthy environment.

of the first five applicants as members of the association.

48. Accordingly, Article 6 § 1 of the Convention applied to the contested proceedings.

74. The applicants alleged that the enactment of the Autonomous Community law of 1996 represented a violation of their right to respect for private and family life and their homes under Article 8 of the Convention, as well as of the right to the peaceful enjoyment of their possessions as guaranteed by Article 1 of Protocol No. 1.

75. The Court notes that the applicants' complaints are substantially the same as those submitted under Article 6 § 1 and examined above. Accordingly, it considers that it is not necessary to examine them separately under the other provisions relied on.

The Court notes that the state has positive obligations to “to take all appropriate steps to safeguard” the private and family life of the applicants for the purposes of Article 8, including “govern licensing, setting up, operation, security and supervision of the activity” and to “make it compulsory for all those concerned to take practical measures to ensure the effective protection” (see: *Öneryıldız v. Turkey*, 30 November 2004, 90 § and 160 §, *Budayeva and others v. Russia*, 20 March 2008, § 133).

The Court underlines that in the present case, the specific content of the positive obligations is related to the standards of the domestic environmental legislation. Consequently, it is necessary to assess whether the Government of Spain has complied with its constitutional standards. The Spanish Constitution, Section 45(2) together with Section 46 of the Spanish Constitution oblige the state to supervise and restore the environment as well as to preserve the environment as well as the historical, cultural and artistic heritage of the nation and its property. In the light of the factual circumstances, the national authorities have failed to take sufficient measures.

In the light of the facts, the Court holds that accordingly, the Government has failed to fulfil its positive obligations under Article 8 of the Convention on the protection of the right to a healthy environment.

### 3.2.2.4 Explaining the Logic of Rewriting and Other Remarks

Instead of rewriting the case under Article 6 of the Convention, the argumentation of the rewritten judgment draws on its major parts under Article 8 of the Convention on the right to private and family life. The reasons are that the current cases referring to the right to a healthy environment have been established under Article 8 of the Convention and the current case law provides a fruitful basis for further development. The applicants and the third-party interveners should be aware that the tendency of the ECtHR to rely on its

earlier case law is so strong that utilization of similar logic as the current case incorporates may lower the threshold for the Court to continue to develop its argumentation. However, at the same time the doctrine of “present-day conditions”<sup>372</sup>, forms a basis for updating the case law to comply with the contemporary human rights approach to the environment.

In its green jurisprudence the ECtHR has consistently stressed the importance of the environment in current societies since the judgment in the case of *Fredin v. Sweden* (1991).<sup>373</sup> The confirmation of the current position of the ECtHR on the importance of environmental considerations lays the foundations for a discussion on the role of the environment. In the rewritten judgment the basis is on the current development rather than foreshadowing a clear departure from the well-established green jurisprudence.

In the rewritten judgment, the discussion on the recognition of the right to a healthy environment is founded on similar logic: the argumentation relies heavily on the current developments, and the argumentation is to reaffirm the earlier case law, which supports the development. For this reason, for example, the international trends doctrine is invoked only to a limited extent demonstrating the awareness of the ECtHR of the development, but little more. This approach resemble the way the ECtHR utilizes international instruments. Most often the ECtHR does not incorporate the content of the instruments, but rather makes reference or includes the relevant list of cases, as in the cases of *Taşkın and Others v. Turkey* (2004) and *Tătar v. Romania* (2009).<sup>374</sup>

Referring to the earlier case law is possible as there are few exceptional references to the recognition of “environmental rights” (*Coster v. the United Kingdom* (2001))<sup>375</sup> and the right to a healthy environment (*Tatar v. Romania* (2009))<sup>376</sup>. However, the ECtHR has previously stated explicitly that in case of *Kyrtatos v. Greece* (2003) “none of the Articles of the Convention is specifically designed to provide general protection of the environment as such”<sup>377</sup>. Besides, in case of *Hatton and Others v. the United Kingdom* (2003), the Court stated that “it would not be appropriate for the Court to adopt a special approach in this respect by reference to a special status of environmental, human rights.”<sup>378</sup>

In respect to these references, it should be noted that the ECtHR has been inconsistent in its recognition of the right to a healthy environment. In most of the green jurisprudence, the ECtHR does not mention the existence or non-existence of the right to a healthy environment, but instead, in cases where it explicitly states its standing, it has adopted contradictory positions. As the level of recognition has varied from a clearly recognized

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372 ECtHR, *Tyrer v. the United Kingdom*, 24 April 1978, para 3

373 ECtHR, *Fredin (no. 1) v. Sweden*, 18 February 1991, para 48

374 ECtHR, *Taşkın and Others v. Turkey*, 10 November 2004, paras 98–100, ECtHR, *Tătar v. Romania*, 27 January 2009, para 111

375 ECtHR, *Coster v. the United Kingdom*, 18 January 2001, para 116

376 ECtHR, *Tătar v. Romania*, 27 January 2009, paras 107 and 112

377 ECtHR, *Kyrtatos v. Greece*, 22 May 2003 para 52

378 ECtHR, *Hatton and Others v. the United Kingdom*, 8 July 2003 (GC), para 122. For Hatton and margin of appreciation: Kratochvil 2011, pp. 329–330

right to explicit references that the ECtHR does *not* recognize a right as such, the doctrinal development has not been consistent but probably influenced by the combination of judges in the Chamber. However, the applicants and the third-party interveners may invoke supporting arguments to render visible the developments recognizing the right in order to show the ECtHR that the recognition of the right does not require a major departure, but rather reaffirmation of its earlier findings.

In addition, as Shelton has noted, the ECtHR has constantly supported the enforcement of the domestic legislation<sup>379</sup>. In the current green jurisprudence (*Hamer v. Belgium*, (2007)) this was stated explicitly by the ECtHR itself<sup>380</sup>. For this reason, in the rewritten judgment, the argumentation utilizes this approach, recognizing the existence of and the need to ensure effective protection of the constitutional environmental right of the Spanish Constitution. This obligation to enforce the national constitutional right has a connection to “the protection of the environmental rights of other people in the community” under Article 8, paragraph 2 of the Convention<sup>381</sup> as a legitimate interest and the positive obligation doctrine, which entails measures ensuring the effective protection of the rights in the specific environmental context. As the constitutional environmental right is similar in content to Article 8 on private and family life, in the rewritten judgment it is held that failure to protect the rights of the environmental constitutional right is a failure to protect the rights of the applicant under Article 8 of the Convention, but also the rights of other people in the community, which have been compromised due to the public actions.

In principle the ECtHR uses external materials, such as domestic law, in a flexible manner. It may use the materials as a source of inspiration, a reference or in a substantive manner. For these reasons the ECtHR could use the existence of the constitutional provision as a supporting factor without no need for extensive study of the scope of protection under the provision. However, it is possible that if the Spanish government were to emphasize that the right to a healthy environment is included in “Chapter 3: Guiding Principles of Economic and Social Policy” and not in “Chapter 2: Rights and Freedoms” and if the courts have interpreted the provision in a narrow manner, the ECtHR would then be cautious on building argumentation relying heavily on the constitutional development.

The rewriting of a judgment as in this example case would also be possible concerning the other States Parties to the ECtHR as the constitutional development in relation to the right to a healthy environment is relatively common among the States Parties. Consequently recognition of the right would not entail major changes to the European minimum standards as such. The major consequence would be, however, that the protection under the ECHR would be stronger and wider as the applicants could rely on the right to a healthy environment with no need to demonstrate unequivocal health-related consequences. The nature of the right to a healthy environment includes an idea of collective interests that the

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379 Shelton 2015, p. 145

380 ECtHR, *Hamer v. Belgium*, para 79

381 ECtHR, *Coster v. the United Kingdom*, 18 January 2001, para 116

individual can protect through the ability to participate in environmental decision-making and by court claims seeking effective remedies in circumstances where public authorities have failed to protect the general interest and the individual rights. As the collective nature of the rights is not incorporated into the Convention, the ECtHR may experience acknowledgment of a right including such elements, difficult in the framework, where the rights are inherently individual rights.

An additional important point to consider is the implications of a single judgment recognizing the existence of the right to a healthy environment. The judgment may be given for a particular state, which has indeed a constitutional right, but there are states that do not guarantee the right in their constitution. The ECtHR sometimes distinguishes its cases from each other clearly and may implement different standards on the same issue for different states. This has occurred most notably in areas of a particularly morally sensitive nature and is thus less likely to occur in an environmental context. However, the ECtHR would, for example, invoke consensus doctrine and discuss whether there exists adequate consensus on the existence of the right to a healthy environment. Kanstantsin Dzehtsiarou has assessed that:

If evolutive interpretation utilises the approach of European consensus, greater overall credibility is accomplished because European consensus has at its heart a strong emphasis on commonality between states thereby reflecting the traditional approach of international law.<sup>382</sup>

In sum, the consensus doctrine allows the ECtHR to take into account not only the considerations of one state, as in examining the margin of appreciation, but also to pay broader attention to the European development. This is essential, as if the focus were only on the practices of one state the case-law would soon become inconsistent. Due to the status of the judgments of the ECtHR as European minimum standards, the consistency of the case-law is important. The use of consensus argumentation also increases the legitimacy of the ECtHR because the domestic views are taken into account, even if the case does not concern exclusively each State Party. The establishment of the existence of the right to a healthy environment on the basis of consensus could serve legitimate grounds for the ECtHR to do so, if it can show that the majority of the State Parties do indeed already acknowledge the existence of the right.

As has been noted, there are no doctrinal barriers as such to confirm the existence of the right to a healthy environment under the ECHR. However, as the ECtHR has in some of the cases refrained from establishing the right, it is likely that the ECtHR is divided on the issue. It is possible that the ECtHR will not declare its position on the existence of the right as long as it disagrees with the scope of the protection of the Convention. It is likely that the discussion will only appear in the dissenting and concurring opinions of the majority of the ECtHR when it is ready to recognize the existence of the right. As the issue

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<sup>382</sup> Dzehtsiarou 2011, p. 1745



is fundamental and includes discussion on the collective rights, it is difficult to estimate under what conditions the ECtHR would be willing to discuss the issue. In principle this could be done in any of the upcoming cases where the applicants rely on the existence of the environmental constitutional right.

### 3.3 Development of the Approach of the Rights of Nature

#### 3.3.1 The State-of-the-Art on the Rights of Nature

Deep ecologists<sup>383</sup> and some environmental legal researchers have been cautious about adopting the human rights approach to environmental protection<sup>384</sup>. The key claim has been that the human rights approach is anthropocentric<sup>385</sup>. The anthropocentrism of the human rights approach has been argued to be able to protect only human interests, but not the intrinsic value of nature.<sup>386</sup> Consequently, anthropocentric interests have been argued to be inherently in conflict with environmental interests, such as protection of the environment.<sup>387</sup> The main criticism of anthropocentrism can be summarised as follows:

anthropocentric approaches to environmental protection are seen as perpetuating the values and attitudes that are at the root of environmental degradation. Furthermore, they deprive the environment of direct, independent protection: because human rights to life, health, and standards of living are all determining factors for the aims of environmental protection, the environment is only protected as a consequence of protecting human well-being. An environmental right thus subjugates all other needs, interests, and values of nature, to those of humanity. Finally, humans are the beneficiaries of any relief granted for an infringement of the right.<sup>388</sup>

An alternative approach to the use of human rights in the protection of the environment has been the idea of establishing and recognizing the rights of nature<sup>389</sup>. The original discussion on the rights of the nature<sup>390</sup> has started a long ago<sup>391</sup>, but it had a breakthrough in Western legal thought in 1972, when Christopher Stone published a well-known book

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383 See for example: Devall and Sessions 1985, Naess 1989, Devall 1980, pp. 295–322, Bradford 1989, Drengson – Yuichi 1995, Fox 1984, pp. 194–200

384 Hancock 2003

385 Redgwell 1996 pp. 71–87, Hayward 2005, pp. 32–35, Burdon 2015, pp. 67–69, Taylor 2010, pp. 198, 205

386 Razzaque 2010, p. 117, Birnie – Boyle – Redgwell 2009, p. 280

387 Stallworthy 2008, p. 57

388 Bosselmann 2015, p. 537

389 Sama, Welcomer & Gerde 2004, pp. 140–165, Bosselmann 2015, p. 541, Burdon 2011, p. 74

390 Stutzin 1976, p. 129

391 Boyd 2017, p. 126



“Should trees have standing?”<sup>392</sup> Stone was proposing “to give legal rights to forest, oceans, rivers and other so-called “natural objects” in the environment -indeed, to the natural environment as a whole”<sup>393</sup>. He proposed that nature’s lack of the right to sue could be resolved by introducing the appointment of a guardian, a committee or a conservator.<sup>394</sup> Another significant development in 1972 was the dissenting opinion of Justice William Douglas in the case of *Sierra Club v. Morton*<sup>395</sup>. The case concerned the Mineral King Valley, an area where Walt Disney Enterprises planned to develop an 80-acre ski resort, which would have also required building infrastructure, such as a new highway and massive power lines, which would have run through the Sequoia National Forest. The Sierra Club wanted to protect the area so they applied for an injunction, which the district court granted. However, the US Court of Appeals for the Ninth Circuit and later the Supreme Administrative Court overturned the injunctions due to the lack of standing under the Administrative Procedure Act. Both courts held that the applicant had not provided adequate evidence to show direct personal injury. However, Justice William Douglas gave a dissenting opinion, where he suggested that the doctrine should have allowed standing for environmental NGOs, such as the Sierra Club, to represent inanimate objects such as land<sup>396</sup>. Justice William Douglas wrote:

Inanimate objects are sometimes parties in litigation. A ship has a legal personality, a fiction found useful for maritime purposes. The corporation sole – a creature of ecclesiastical law – is an acceptable adversary and large fortunes ride on its cases. The ordinary corporation is a “person” for purposes of the adjudicatory processes, whether it represents proprietary, spiritual, aesthetic, or charitable causes.

So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life. The river, for example, is the living symbol of all the life it sustains or nourishes – fish, aquatic insects, water ousels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water – whether it be a fisherman, a canoeist, a zoologist, or a logger – must be able to speak for the values which the river represents and which are threatened with destruction.<sup>397</sup>

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392 Stone 1996

393 Stone 1972, p. 456

394 *Ibid.*, p. 464

395 The United States Supreme Court, *Sierra Club v Morton*, 405 US 727 (1972), Dissenting opinion of Justice William Douglas, for literature, See also: Boyd 2017, pp. 120–125

396 The United States Supreme Court, *Sierra Club v Morton*, 405 US 727 (1972), Dissenting opinion of Justice William Douglas

397 *Ibid.*

Since the time approach has been further developed in particular in the national<sup>398</sup> and regional context through legislation and litigation. David R. Boyd has introduced the developments in extensive manner in his recent book “The Rights of Nature: A Legal Revolution that Could Save the World”<sup>399</sup>. In 2010, the framework of the World People’s Conference on Climate Change and the Rights of Mother Earth launched a draft Universal Declaration of the Rights of Mother Earth, where nature is defined as a ‘living being’.<sup>400</sup> The approach has been adopted nationally, for example in Bolivia and Ecuador. In the Bolivia’s Law on the Rights of Mother Earth, Mother Earth is defined as “a collective subject of public interest.”<sup>401</sup> There is a *Defensoria de la Madre Tierra*, a counterpart to the ombudsman for human rights. The law grants seven rights to Mother Earth and its life systems, including human beings. The rights include the right to life, diversity of life, water, clean water, equilibrium, and restoration and freedom from contamination<sup>402</sup>.

In Ecuador the rights are recognized in constitutional level<sup>403</sup>. The Constitution explicitly stipulates that “Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes”<sup>404</sup>. Besides, nature is explicitly considered as a procedural party that could be represented by several actors such as a

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398 See for example: Navajo National Code Ann, 1 § 454 (2003), Tamaqua Borough, Penn, Ordinance 612, 19 September 2006, Pittsburg, Penn., Community Protection from Natural Gas Extraction Ordinance, 16 November 2010 (amending Pittsburg Code by adding Chapter 618), Santa Monica Cal, Municipal Code, § 4.75.040 (2013), *Pa. Gen. Energy Co. v. Grant Twp.*, 139 F. Supp. 3d 706 (W.D.Pa 2015), *Seneca Resources Corporation v. Highland Township et al.* Case No. 1:16-CV-289, (US District Court, W.D., Pennsylvania), Nottingham, New Hampshire, Nottingham Water Rights and Local Self-Government Ordinance, 15 March 2008, Lafayette, Colorado, Ordinance 2017-02, 21 March, 2017, *Attorney General of Belize v. MS Westerbaven et al.* (2009) Supreme Court of Belize, 26 April 2010, Mexico: State of Guerrero (2014), Political Constitution of the State of Guerrero, Federal District of Mexico, Environmental law for the Protection of the Earth 2013, Ley de Proteccion a la Tierra, Gaceta Oficial del Distrito Federal, 17 September 2013, Constitutional Court of Colombia 2015, Tayrona National Park Case, Decision T-606/15, Constitutional Court of Colombia 2015, Rio Atrato Case, Decision T-622 of 2016

399 Boyd 2017

400 Draft Universal Declaration of Rights of Mother Earth. Annex II to the letter dated 7 May 2010 from the Permanent Representative of the Plurinational State of Bolivia to the United Nations addressed to the Secretary-General. U.N. Doc. A/64/777

401 Ley de Derechos de la Madre Tierra, December 2010. See also: Framework La won mother Earth and Holistic Development for Living Well, Law, No. 300, 2012

402 Ley de Derechos de la Madre Tierra, December 2010, Articles 7. See also: Boyd 2017, pp. 199–201

403 See for the process: Boyd 2017, pp. 174–179

404 Georgetown University & Center for Latin American Studies Program, Translation of the Constitution of the Republic of Ecuador, Political Database of the Americas, 2011: <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html> Articles 71–74, (last visited 26 February 2018). See also related legislation and case law: National Assembly, Republic of Ecuador, *Comprehensive Criminal Code*, 3 February 2014, National Assembly, Republic of Ecuador, *Environmental Code*, 21 December 2014, *F.F Wheeler and E.G. Huddle v. Attorney General of the State of Loja*, Judgment No 11121-0010, 30 March 2011, Loja Provincial Court of Justice

natural or legal person, an association or *ombudsman*.<sup>405</sup> David R. Boyd has called the legal implications of the Ecuadorian constitutional provisions as “game-changing culture and legal shift from the anthropocentric view of the world to an eco-centric perspective that reflects the interdependence of all species and the ecosystems”, even though in the same time constitution includes “troubling contradictions” defining nature also as “strategic resources” and in practice the nature is still facing threats<sup>406</sup>.

Furthermore specific development concerning rivers has been emerging<sup>407</sup>. The recognition of legal personhood for the river was granted in India for the Rivers Ganga and Yamuna<sup>408</sup>, in New Zealand for Whanganui River<sup>409</sup> and in Colombia to the Atrato River<sup>410</sup>. In India, the Court held that:

[– –] as juristic/legal persons/living entities having the status of a legal person with all corresponding rights, duties and liabilities of a living person in order to preserve and conserve river Ganga and Yamuna [and] all their tributaries, streams, every natural water flowing with flow continuously or intermittently [– –]<sup>411</sup>.

Similarly, in New Zealand, the river is recognized as a legal personality, having the obligations, liabilities and rights of a legal person<sup>412</sup>. The legal status of the river means that any possible abuse of or harm to the river is recognized before the law as would be the abuse of the indigenous tribe representing the river. The river will be represented by two people, one from the Maori tribe *iwi* and another from the tribe Crown. The representation allows the river to be represented in court proceedings. The development took a long time in New Zealand and is connected to the development of the indigenous people’s rights and their self-determination. Before the bill became law, the Maori fought for over 160 years for recognition and settled the longest-running litigation of the country. However, now the time was right. New Zealand’s Treaty Negotiations Minister Chris Finlayson said “I know the initial inclination of some people will say it’s pretty strange to give a natural resource

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405 Código Orgánico General de Procesos, publicado en el Suplemento del Registro Oficial # 506, de 22 de mayo de 2015. Articles # 30 (6) and 38.

406 Boyd 2017, pp. 181–183

407 *Ibid.*, pp. 149–155

408 High Court of Uttarakhand at Nainital, *Mohd. Salim v. State of Uttarakhand & others* (Writ Petition (PIL) No.126 of 2014), 20 March 2017, para. 19. The Indian High Court decision related to the rights of the Ganges and Yamuna Rivers was stayed in June 2017, pending an appeal hearing at the Supreme Court of India

409 *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 # 7*, 20 March 2017, Parliamentary Counsel Office of New Zealand.

410 Sexta Sala de Revisión de la Corte Constitucional: Case T-622, Centro de Estudios para la Justicia Social “*Tierra Digna*” & *Otros v. Colombia* (Expediente # T-5.016.242), Judgment of 10 November 2016, para. 4.

411 High Court of Uttarakhand at Nainital, *Mohd. Salim v. State of Uttarakhand & others* (Writ Petition (PIL) No.126 of 2014), 20 March 2017, para. 19

412 *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 # 7*, 20 March 2017, Parliamentary Counsel Office of New Zealand, *Te Urewa Act, 2014*, New Zealand Public Act No. 51, 27 July, 2014

a legal personality. But it's no stranger than family trusts, or companies or incorporated societies."<sup>413</sup>

The greening of ECHR does not currently include a similar acknowledgement of the rights of nature as in some of the countries mentioned above. The current admissibility criteria, where the victim criteria are strict, would not in its current form acknowledge nature as a rights holder, as for example, animals have not been accepted as victims<sup>414</sup>. In the case of *Balluch v. Austria* an animal protection activist submitted a complaint on behalf of a chimpanzee, but the ECtHR found the application incompatible on the basis of *ratione materiae*<sup>415</sup>. However, it should be noted that Judge Pinto de Albuquerque has acknowledged the development of protection of rights of animals. He elaborated in his dissenting opinion in the case of *Herrmann v. Germany* (2012), that:

This “clear and uncontested evidence of a continuing international trend” in favour of the protection of animal life and welfare is reflected in the application of the Convention. As one of the hallmarks of international and European law in contemporary times, the protection of animal life and welfare has also been upheld under the Convention, although this protection is still viewed as a derivative effect of a human right to property or to a healthy, balanced and sustainable environment. The evolving position of the Court shows that it is ready to reject both extremes: neither the commodification of animals nor their “humanisation” reflects the actual legal status of animals under the Convention. In other words, animals are viewed by the Convention as a constitutive part of an ecologically balanced and sustainable environment, their protection being incorporated in a larger framework of intra-species equity (ensuring healthy enjoyment of nature among existing humans), inter-generational equity (guaranteeing the sustainable enjoyment of nature by future human generations) and interspecies equity (enhancing the inherent dignity of all species as “fellow creatures”).<sup>416</sup>

As judge Pinto explained in his dissenting opinion, the ECtHR has not developed rights for animals as such, but regards the position of animals as a part of the environment and nature, which has come to be included in a status as a general interest of society under the ECHR. Due to the nature of the general interest, there is responsibility of the state, but as Pinto puts it, no rights as such, which would have standing before the court through a representative:

Under the Convention, “animal rights” are not legal claims attributed to animals and exercisable through a representative, but instead correspond to obligations imposed on the Contracting Parties as part of their commitment to full, effective

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413 BBC News, *New Zealand river first in the world to be given legal human status*: <http://www.bbc.com/news/world-asia-39282918> (last visited 26 February 2018)

414 ECtHR, *Stibbe v. Austria*, no. 26188/08, application lodged on 6 May 2008

415 ECtHR, *Balluch v. Austria*, Appl no. 26180/08, application lodged on 4 May 2008

416 ECtHR, *Herrmann v. Germany*, 26 June 2012, dissenting opinion, Pinto

and practical enjoyment of human rights, and specifically of a human right to a healthy and sustainable environment.<sup>417</sup>

The current European constitutional environmental rights does not support the granting of rights to nature. However, if the domestic development among the States Parties to the ECHR were to start to recognize the rights of nature, it is possible that the ECtHR would follow the development and establish consensus. Judge Pinto also expressed this in his opinion, as he found “potential for environmental and animal protection”<sup>418</sup>.

One of the cases where the ECtHR stated explicitly that there is a necessity to make a connection between individual rights and environmental pollution is the case of *Kyrtatos v. Greece*<sup>419</sup>. The case of *Kyrtatos* is a suitable case for rewriting purposes as the applicants try to use their rights primarily for the protection of the environment and thus the argumentation is focused on the rhetoric of protection. Furthermore, the case is suitable as it involved a specific part of nature, a swamp, around which the discussion revolves.

### 3.3.2 Rewriting the Case Law: Case of *Kyrtatos v. Greece*

The applicants in the case of *Kyrtatos v. Greece* (2003) were the owners of some property in the south-eastern part of Greek island of Titos. Some of the land co-owned by the first applicant was located on the Ayia Kiriaki-Apokofto peninsula, adjacent to a swamp by the coast. The Greek authorities issued several permits, including building permits for the area. A domestic environmental NGO, the Greek Society for the Protection of the Environment and Cultural Heritage lodged a complaint before the domestic Supreme Administrative Court. The main claim was that the permits were unconstitutional as Article 24 of the Greek Constitution protects the environment.<sup>420</sup> In 1995 the Court found that the decision violated Article 24 of the Constitution because the area was “an important natural habitat for various protected species (such as birds, fish, and sea turtles).”<sup>421</sup> However, the national authorities did not uphold the court decision, and the Supreme Administrative Court found noncompliance with the decisions in 1997. In parallel, there were civil proceedings.

The applicants lodged complaints under Article 6 of the Convention and Article 8 of the Convention. Under Article 6 of the Convention, the applicants claimed that the proceedings had not been taken within a reasonable time and that the authorities failed to execute the domestic decisions of the court. Under Article 8 of the Convention, the applicants claimed that urbanization of the area had destroyed their physical environment

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417 *Ibid.*

418 ECtHR, *Herrmann v. Germany*, 26 June 2012, dissenting opinion, Pinto

419 ECtHR, *Kyrtatos v. Greece*, 22 May 2003, para 52

420 *Ibid.*, paras 11–12

421 ECtHR, *Kyrtatos v. Greece*, 22 May 2003, para 13

impacting on their private lives<sup>422</sup>. They claimed aesthetic loss of natural scenery, changes in the natural habitat, noise and light at night and environmental pollution.<sup>423</sup>

The main counter-argument of the Government regarding the alleged violation of Article 8 of the Convention was that the complaint did not concern the protection of the homes and private lives of the applicants, but the general protection of the swamp.<sup>424</sup> Furthermore, the Government of Greece claimed that if there had been any interference, the nature of the interference would have been such that the implications should “be tolerated as an inevitable and temporary consequence of the urban way of life.”<sup>425</sup>

The ECtHR found a violation under Article 6 on the basis of failure to execute the decisions of the domestic Supreme Administrative Court on time, as seven years had elapsed from the giving of the decision and on the basis of the excessive length of the proceedings, accordingly over eight and 12 years.<sup>426</sup> However, the ECtHR found no violation under Article 8 of the Convention as it did not find a close connection between the protection of the swamp and the private lives of the applicants. The ECtHR summarised this argument as follows:

In the present case, even assuming that the environment has been severely damaged by the urban development of the area, the applicants have not brought forward any convincing arguments showing that the alleged damage to the birds and other protected species living in the swamp was of such a nature as to directly affect their rights under Article 8 § 1 of the Convention. It might have been otherwise if, for instance, the environmental deterioration complained of had consisted in the destruction of a forest area in the vicinity of the applicants’ house, a situation which could have affected more directly the applicants’ well-being. To conclude, the Court cannot accept that the interference with the conditions of animal life in the swamp constitutes an attack on the private or family life of the applicants.<sup>427</sup>

It should be underlined that the case of *Kyrtatos v. Greece* (2003) has been repeatedly cited in the literature as an example of a case that does not recognize the value of environmental protection. This is due to the explicit statement of the Court in this respect. It has been less discussed that despite this well-known statement, the ECtHR provided support for the protection of the environment by finding a violation in the execution of the domestic rulings. As the domestic court found a violation of domestic constitutional environmental right, the ECtHR assisted in enforcing the measures related to the environmental protection. The argumentation of the ECtHR could have been different if the domestic court had not already provided adequate protection of the constitutional right. Furthermore, the ECtHR

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422 *Ibid.*, para 44

423 *Ibid.*, para 46

424 *Ibid.*, para 48

425 *Ibid.*, para 49

426 *Ibid.*, paras 31–32, para 43

427 *Ibid.*, para 53



gave guidance for future litigation on the conditions that could satisfy the threshold for a violation in a similar context.

Besides, even though the *Kyrtatos v. Greece* (2003) judgment alone, assessed separately from the rest of the green case continuum, gave a signal of the inability of the ECtHR to protect the swamp, it does not illustrate the full capacity and capability of the ECtHR. The result might have been different if the ECtHR had applied similar argumentation as in *Mangouras*. In the case of *Mangouras v. Spain* (2010), the recognition of the importance of the environmental protection, which was not co-dependent on the realization of the rights of an individual, was possible due to the exceptional severity of the harm<sup>428</sup>. In *Kyrtatos v. Greece*, the presence of a rare species, which the domestic court failed to protect and the existence of exceptionally severe damage might have led to a different outcome.

### Rewriting the Case of *Kyrtatos v. Greece*

#### *Extracts from the Original Judgment*

51. The Court notes that the applicants' complaint under Article 8 of the Convention may be regarded as comprising two distinct limbs. First, they complained that urban development had destroyed the swamp which was adjacent to their property and that the area where their home was had lost all of its scenic beauty. Second, they complained about the environmental pollution caused by the noises and night-lights emanating from the activities of the firms operating in the area.

52. With regard to the first limb of the applicants' complaint, the Court notes that according to its established case-law, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health (see also:

#### *Rewriting of the Judgment*

The Court notes that the applicant's complaint under Article 8 of the Convention has three distinct dimensions. First, the issue is, can the destruction of the swamp be regarded as exceptional and severe (*Mangouras v. Spain*, Appl. no 12050/04, 28 September 2010) as an act against the public interest. The second issue is, can the swamp enjoy legal protection under the Convention. The third issue relates to the human interest to have a right to a healthy environment, including the protection against all forms of pollution.

The Court notes that it has continuously held that environmental protection is increasingly in the interest of society. It has stated specifically that certain parts of the environment are significant as a public interest (*Turgut and Others v. Turkey*, Appl. no 1411/03, 8 July 2008, 90 §, *Köktepe v. Turkey*, Appl. no 35785/03, 22 July 2008, *Pine Valley Developments Ltd and Others v. Ireland*, Appl. no 12742/87, 29 November 1991, 57 §, *Fägerskiöld v. Sweden*, 26 February 2008 (decision on admissibility). Commission, *Uuhiniemi and others v. Finland*, Appl. no

428 ECtHR, *Mangouras v. Spain*, 28 September 2010 (GC), para 88



*Lopez Ostra v. Spain*, judgment of 9 December 1994, Series A no. 303-C, p. 54, § 51). Yet the crucial element which must be present in determining whether, in the circumstances of a case, environmental pollution has adversely affected one of the rights safeguarded by paragraph 1 of Article 8 is the existence of a harmful effect on a person's private or family sphere and not simply the general deterioration of the environment. Neither Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such; to that effect, other international instruments and domestic legislation are more pertinent in dealing with this particular aspect.

53. In the present case, even assuming that the environment has been severely damaged by the urban development of the area, the applicants have not brought forward any convincing arguments showing that the alleged damage to the birds and other protected species living in the swamp was of such a nature as to directly affect their own rights under Article 8 § 1 of the Convention. It might have been otherwise if, for instance, the environmental deterioration complained of had consisted in the destruction of a forest area in the vicinity of the applicants' house, a situation which could have affected more directly the applicants' own well-being. To conclude, the Court cannot accept that the interference with the conditions of animal life in the swamp constitutes an attack on the private or family life of the applicants.

21343/93, 10 October 1994, Commission, *Photiades Ltd v. Cyprus*, Appl. no 41113/93, 21 October 1998, *Dzemyuk v. Ukraine*, Appl. no 42488/02, 4 September 2014, ECtHR, *Kolyadenko and Others*, Appl. nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, 28 February 2012, *Huoltoasema Matti Eurén oy and Others v. Finland*, Appl. no 26654/08 26654/08, 19 January 2010, 39 §)

The Court assessed the expert statements and the statements of the environmental NGOs, all of which confirm that the swamp had an important role in maintaining the local ecosystem and biodiversity. In addition, the same expert opinions underlined that the area is vulnerable to any major changes. Furthermore, the domestic court found a violation of the Greek Constitution. Consequently the Court is convinced that the implications reached a sufficient degree of seriousness under Article 8.

The international and regional development of the protection of biodiversity (Convention on Biological Diversity, June 5, 1982, 31 ILM 822 (1992)), together with the constitutional right of the Greek Constitution support the interpretation that public authorities should ensure that important swamps are not destroyed. It would be against the public interest to impair the biodiversity.

The Court notes that the Convention is a living instrument that should be interpreted in the light of the conditions prevailing in society (*Tyrer v. the United Kingdom*, Appl. 5856/72, 24 April 1978, 31 §). The Court notes that there are increasing international trends in relation to recognizing the rights of nature as stakeholders. For example, in New Zealand, a river has representation through the representatives of indigenous tribes (see also: *Te Awa Tupua (Whanganui River Claims Settlement)* Act 2017 # 7, in force 20 Mar. 2017, Parliamentary Counsel Office of New

54. As regards the second limb of the complaint, the Court is of the opinion that the disturbances coming from the applicants' neighborhood as a result of the urban development of the area (noises, night-lights, etc.) have not reached a sufficient degree of seriousness to be taken into account for the purposes of Article 8.

55. Having regard to the foregoing, the Court considers that there is no lack of respect for the applicants' private and family life. There has accordingly been no violation of Article 8.

Zealand) and in India the legal personality of the river was also recognized (see also: High Court of Uttarakhand at Nainital, *Mohd. Salim v. State of Uttarakhand & others* (Writ Petition (PIL) no. 126 of 2014), Judgement of 20 March 2017, para. 19). In the given context, it is the inhabitants, experts and environmental NGOs that are in the best position to represent the rights of the swamp. As there is a scientific consensus (*mutandis mutatis*, *Brincat and Others v. Malta*, Appl. no 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11, 24 July 2014) on the exceptionally severe damage caused to the swamp, the Court is ready to accept that the swamp enjoys protection under the Convention.

Furthermore, the Court notes that there is emerging international consensus on the acknowledgment of the right to a healthy environment (Aarhus Convention 1998, art. The 1981 African Charter on Human and Peoples Rights (art. 24) and the 1988 Additional Protocol to the American Convention on Human Rights (art. 11, para. 1), the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (art. 18) (art. 19), David R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment*, 2012). The Court notes that as a part of the right to a healthy environment individuals have a right to access adequate information, a right to participation and the right to access to court. In several constitutions the right includes the idea that everyone has responsibility for the protection of the environment. The Court thus concludes that in this case the applicants were legitimately exercising their right to the protection of the environment.

Having regard to the foregoing, the Court considers that there is accordingly a violation of Article 8 in respect of the applicant's private and family life.

### 3.3.3 Explaining the Logic of Rewriting and Other Remarks

The rewritten judgment is based on the principles of the dynamic interpretation<sup>429</sup> of the Convention, consensus<sup>430</sup> and international trends<sup>431</sup>. These rules of interpretation are utilized with the support of the current case law. The beginning of the rewritten judgment introduces three dimensions that it analyses under Article 8 of the Convention in respect to the right to a private and family life. The first dimension relates to the exceptionally severe circumstances of the case, the other whether the swamps enjoy legal protection under the Convention and the third relates to the assessment of the nature of the relationship between the protection of the swamp and the right to a healthy environment.

The first part in the rewritten judgment has its roots in the case of *Mangouras v. Spain* (2010)<sup>432</sup>, which discussed the exceptional circumstances of and consequences for the environment. Establishing that the case is exceptional, the ECtHR is more likely to depart from its current case law and the special circumstances justify specific standards because of the context. The ECtHR has introduced in its case law mechanisms to assess the severity of the harm by reference to the documents available. Whereas the state usually has the best access to information about the severity of the harm, the ECtHR is capable of assessing the severity if it is provided with a sufficient amount of evidence. The applicants can also be active in seeking scientific information or reports from the NGO that prove their claims regarding the severity. The consequences of certain acts to a specific piece of the environment, such as the swamp, typically requires specialized local knowledge. The ECtHR itself does not have resources to seek this. Thus in the rewritten judgment the assumption is that the applicant, the third-party interveners and the state all provided materials supporting their claims.

The exceptional circumstances assessment also has a connection to the assessment on the level of the public interest in the swamp. If the state has failed to balance fairly between the different interests, it has not fulfilled its positive obligations under Article 8 of the Convention. It should be noted concerning the use of public interest that the ECtHR itself has not established criteria for the construction of the public interest but it has been discussed in the literature. The two approaches presented were one regarding the public interest as a combination of controversial interest with active objective interest while the other refers to those interests shared by all members of the community.<sup>433</sup> In practice, in the green jurisprudence, the Court assesses the interests aiming at well-being in a broad sense. The protection of the biodiversity is a *de facto* shared interest of everyone, even if ideologically opposed to the protection of the environment.

429 See for example: Helgesen 2011, pp. 275–281

430 See for example: Dzehtsiarou 2011, pp. 1730–1745, Tzevelekos – Dzehtsiarou 2016, pp. 313–344, Helfer 1993, pp. 133–165

431 See for example: Nordeide 2009, pp. 567–574

432 ECtHR, *Mangouras v. Spain*, 28 September 2010 (GC), para 88

433 McHarg 1999, pp. 676–677, Oppenheim 1981, p. 144

The second part in the rewritten judgment is partly overlapping with the public interest considerations and the third limb discussing the relationship between the environmental protection and the individual right to a healthy environment, as the crucial issue is whether the swamp can enjoy protection under the Convention. In the rewritten judgment the seriousness of the implications is reflected not only in the implications for the individual applicant, but also in light of the public interest. The argumentation is based on international trends with the combination of the current procedural rights established in the green jurisprudence. In the rewritten judgment, the international trends include other court cases recognizing that nature can have rights which can be represented before the Court. The developments in New Zealand<sup>434</sup>, India<sup>435</sup> and elsewhere have a connection with the current case law of the ECtHR on the role of the NGOs as “watchdog” in environmental issues<sup>436</sup>. In the case of New Zealand, it is the entitlement of the indigenous community to represent nature. Similarly, the ECtHR has already recognized that in general and specific conditions an NGO may have a role as a guardian of the public interest, supervising the public authorities. Consequently, in conceptual terms, even though the ECtHR has not recognized the rights of nature, it has conferred upon an NGO the right to represent the environment as “watchdog”. However, even though the scope of protection of these two regimes is closer than it first seems, the ECtHR is using terminology in a careful manner – therefore, it is unlikely that the ECtHR will adopt terminology originating neither in European constitutional tradition or widely ratified international agreements.

### 3.4 Concluding remarks

The basis for the current green jurisprudence of the ECtHR has been in the exercise of the current rights rather than establishing a right to the healthy environment. The greening has taken place due to the violations to human health or through protecting the environment as a public interest. The limitations of the current approach are that applicants may not request for environmental protection *per se*, by relying on the right to a healthy environment, but they need to claim on the basis of the procedural rights or harm they have experienced.

The strengthening of the right to a healthy environment approach will change the current inability of individuals to make claims on the basis of environmental protection if there is no clear connection between the harm and the protection of anthropocentric interests, such as health, life or property. Unequivocal recognition of the right to a healthy environment could enable the individual to seek protection for the environment as a

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434 *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 # 7*, in force 20 March 2017, Parliamentary Counsel Office of New Zealand.

435 High Court of Uttarakhand at Nainital, *Mobd. Salim v. State of Uttarakhand & others* (Writ Petition (PIL) No.126 of 2014), Judgement of 20 March 2017, para. 19

436 ECtHR, *Steel and Morris v. the United Kingdom*, February 2005, ECtHR, *Vides Aizsardzības Klubs v. Latvia*, 27 May 2004

public interest. In the ECtHR there are already forces at work concerning the approach recognizing the right to a healthy environment. A few cases have referred to the right to a healthy environment, which shows the capacity of the ECtHR to develop the approach further. Besides, the green jurisprudence of the ECtHR would already suffice to provide content for the right to a healthy environment. However, the ECtHR has probably so far been hesitant to establish the right to a healthy environment, as there is no protocol about the right and the attempts of the other CoE organs have been unsuccessful.

The development of the case law in this direction could be applicant-driven and consistent argumentation of the applicants and the third-party interveners on the emerging international and European consensus of the existence of such a right. Compilations of the existing constitutional rights could encourage the ECtHR to establish consensus or a growing trend. Alternatively the development could be state-driven, if the responding states start to actively argue with the support of their constitutional environmental rights. The environment has been defined as a public interest due to the state-driven approach, so the ECtHR could be willing to amend its approach if given clear indications from the States Parties that they recognize the right to a healthy environment under the ECHR.

The protection provided by the ECtHR in its green jurisprudence is already decidedly reminiscent of the domestic constitutional protection recognizing the right to a healthy environment and thus the ECtHR would not have to make major amendments, but rather a logical update. However, its practical importance for applicant-driven greening would be significant; the applicants could clearly represent environmental issues also in cases where there the connection between the harm and the rights of the individual is not crucial, but the aim to protect environmental well-being and sustainable development as such.

An alternative approach would be recognition of the rights of nature. The discussion on the rights of nature has been ongoing and parallel to the human rights approach to the environment. In the past few years the legal development recognizing the rights of nature has been taking place particularly through the legislative and court practice in the United States and India. Whereas the rights of nature do not at first sight have much in common with the human rights approach to the environment, in practice, the approaches are relatively close to each other. The main difference is that ideologically the rights of nature approach focuses on the protection of the environment and nature, whereas in the human rights approach the interest of the humans has to be present at the level of violation of their rights. However, the right to a healthy environment can protect the same interests if individuals utilize their capacity to bring a case before the Court for the protection of nature and the environment.

The current green jurisprudence already recognizes the role of the NGO as a public “watchdog” in environmental matters, which is surprisingly close to the system of the rights of nature, where a community or individual can represent the interests of nature in environmental decision-making and before the Court. The ECtHR, however, is cautious in the terminology it uses, and whereas the rights of nature have been recognized

internationally, the lack of connection to the European tradition may delay and obstruct the development before the ECtHR. Therefore the development in this direction would require state-driven greening, which is consistent and sustained in recognizing the rights of nature.

The establishment of rights of nature would benefit from the introduction of the Additional Protocol. Full recognition of the rights of nature would require clarification and modification of current victim status. Establishing an Additional Protocol on the rights of nature would be a legitimate way to expand the scope of protection of the ECHR in an area where the European legal tradition is not strong. The benefits of an Additional Protocol would also include that new discussions on biodiversity offsetting or other ecological compensations could be recognized and incorporated into the relevant forms of compensation.

## 4 GREENING INDIGENOUS RIGHTS CLAIMS

### 4.1 Introduction

Among the Member States of the Council of Europe, there are several indigenous peoples, such as the Inuit in Greenland<sup>437</sup>, the Sámi people in Finland<sup>438</sup>, Sweden, Norway and Russia as well as numerous indigenous groups in Russia<sup>439</sup>. The relationship between the nature and the culture of the indigenous peoples is close. These meanings include “fundamental spiritual, cultural, economic and political significance that is integrally linked to both their identity and continued survival.”<sup>440</sup> The cultural and economic connection includes agricultural activities, hunting, fishing and use of other natural resources such as water and plants.<sup>441</sup> This relationship between nature and the indigenous peoples has been underlined by the indigenous communities themselves<sup>442</sup> and their governing bodies such as the Nordic Sámi Parliaments<sup>443</sup>. Consequently the relationship has also been

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437 See for example: ECtHR, *Hingitaq 53 et al. v. Denmark*, 12 January 2006

438 See for example: ECtHR, *Jobitti Sapmelaccat ry and Others v. Finland*, 18 January 2005, Admissibility Decision

439 Koivurova 2011, p. 3, Brömann – Zieck 1993, pp. 187–220

440 Northcott 2012, pp. 74–76

441 Curtis 2008, p. 200

442 See for example: Kapiainen-Heiskanen 2016, Kapiainen-Heiskanen, *Poro kuuluu Käsivarren luontoon*, <http://www.ymparistokonfliktisovittelu.fi/fi/haastattelut/Juuso> (last visited 26 February 2018), Kapiainen-Heiskanen, *Laidunmaita ei voi enää pienentää*, <http://www.ymparistokonfliktisovittelu.fi/fi/haastattelut/Ketola> (last visited 26 February 2018), Petition to the Inter-American Commission on Human Rights Seeking Relief From Violations Resulting from Global Warming Caused by Acts and Omissions of the United States, I Summary of the Petition: <http://www.inuitcircumpolar.com/uploads/3/0/5/4/30542564/finalpetitionsummary.pdf> (last visited 26 February 2018), Inter-American Court of Human Rights, Case of the Kichwa Indigenous People of *Sarayaku v. Ecuador*, 27 June 2012, paras 149 and 152

443 See for Sami Parliaments for example: Koivurova – Stepien – Petretei 2015, for statements on the relationship between the environment and indigenous culture: Finnish Sami Parliament, Saamelaiskäräjien lausunto Käsivarren erämaa-alueen ja Saanan alueen hoito- ja käyttösuunnitelmaluonnoksesta, Dnro: 339/D.a.3/2017, 30.6.2017, Finnish Sami Parliament, Saamelaiskäräjien lausunto ehdotuksesta ympäristönsuojelulain muutokseksi koskien kullankaivua, 436/D.a.2/2016, 27.9.2017



recognized in international human rights law<sup>444</sup>, international environmental law<sup>445</sup> and in the framework of the rights of indigenous peoples<sup>446</sup>. The recognition of the relationship between the indigenous peoples and the environment has taken place for example in the practice of the Human Rights Committee concerning the interpretation of Article 27 of the International Covenant on Civil and Political Rights (ICCPR).<sup>447</sup> The Human Rights Committee has given a General Comment in Article 27, where the “right to the protection of traditional activities” was acknowledged. The traditional activities include, for example, hunting, fishing, and reindeer husbandry, all of which require a sufficient amount of land and an unpolluted environment. In addition, the Human Rights Committee has assessed the rights of indigenous peoples in the contexts of stone quarrying<sup>448</sup> and sacred sites and destroying old-growth forest. In *Ilmari Länsman et al. v. Finland* (1992), the Human Rights Committee found that the survival of indigenous culture has interdependence with their traditional activities, which are closely tied to the use of their ancestral lands and resources<sup>449</sup>. Similarly to the development of the practice of the Human Rights Committee, the Inter-American Court of Human Rights and Inter-American Commission on Human Rights has developed a vivid case-continuum of indigenous rights and the environment<sup>450</sup>. The IACtHR has recognized the relationship between the rights of the indigenous peoples and the environment in such cases as *Saramaka v. Suriname* case (2007)<sup>451</sup> and *Sarayaku v. Ecuador* (2012)<sup>452</sup>.

In addition to human rights law, international environmental agreements, such as Article 8 (j) of the Convention on Biodiversity guides to “respect, preserve and maintain” the “traditional lifestyles relevant for the conservation and sustainable use of biological diversity.”<sup>453</sup> For example in Finland the state has implemented Article 8(j) by introducing

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444 Heinämäki 2006, pp. 187–232, Report of the Special Rapporteur on the issues of human rights obligations relating to the enjoyment of a safe, clean, healthy and suitable environment, A/HRC/37/59, pp. 18–19

445 Convention on the Biodiversity, Article 8 (j) and Article 10 (c)

446 Declaration on the Rights of Indigenous Peoples 2007 G.A. Res. 61/295, UN Doc. A/RES/61/295, 13 September, 2007, See also: Coutter 2011, pp. 211–225, Stamatopoulou 2011, pp. 226–249

447 Triggs 2002, p. 129

448 See also: Human Rights Committee, *Ilmari Länsman et al. v. Finland*, Communication No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992, 1994, see also: Thio 2005, p. 232

449 Human Rights Committee, *Ilmari Länsman et al. v. Finland*, Comm. No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992, 1994, para 9.5

450 Schaaf – Fisher 2002, Thériault 2015, pp. 309–329. For case law, see for example: *Awás Tingni v. Nicaragua*, *Moiwana v. Suriname*, 15 June 2005, *Yakye Axa v. Paraguay*, 29 March 2006, *San Mateo de Huanchor v. Peru*, Report No. 69/04, 15 October 2004, *Sarayaku v. Ecuador*, 2012

451 See also: IACtHR, *Saramaka People v. Suriname*. Preliminary objections, merits, reparations and costs, para 129, and IACtHR, *Saramaka People v. Suriname*, 2007, Interpretation of the judgment on preliminary objections, merits, reparations and costs, paras 26 and 27

452 Courtis 2008, p. 200

453 The Convention on Biological Diversity, 5 June 1992 (1760 U.N.T.S. 69), Article 8 (j) and Article 10 (c)

the Akwé: Kon mechanism, which allows the Sámi people to assess the implications of the land management plans for the state.<sup>454</sup> Furthermore, the third framework of international law recognizing the relationship between the environment and indigenous rights is the framework relating to the rights of indigenous peoples. International legal instruments relating to the protection of indigenous rights include the International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169 Convention) and the United Nations Declaration on the Rights of Indigenous Peoples<sup>455</sup>. The rights of the indigenous peoples under the ILO 169 Convention include rights to the natural resources on their lands and the right to participate in the use, management and conservation of these resources<sup>456</sup>. In addition, the UN Declaration on the Rights of Indigenous Peoples acknowledges the rights of the indigenous peoples to their traditional lands and resources to conserve and protect the environment.<sup>457</sup> This right is specified by Article 29 requiring “effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent”, which can be interpreted to include “veto rights”.<sup>458</sup>

The review of the variety of international legal instruments related to the indigenous peoples shows that there is a continuous and consistent stance on the relationship between the indigenous peoples and the environment. Consequently, there is marked tendency that hazardous environmental activities and global environmental problems, such as climate change<sup>459</sup>, impact the opportunities of the indigenous peoples to use their traditional lands which will have a direct impact on the survival of the indigenous communities and the cultural rights.<sup>460</sup> The relationship between the environment and indigenous communities creates a basis for building the green argumentation of the ECtHR. In principle, the ECtHR could provide effective protection for indigenous peoples due to the enforcement mechanism. However, the current case law has been modest<sup>461</sup> and the scholarly interest has also been limited<sup>462</sup>. Timo Koivurova has explained that the reasons include the subsidiary

454 See for example: Ministry of the Environment, Akwé: Kon-ohjeet, Ympäristöhallinnon ohjeita 1/2011, 31 May 2011, Olsén – Harkoma – Heinämäki – Heiskanen 2017

455 Declaration on the Rights of Indigenous Peoples 2007 G.A. Res. 61/295, UN Doc. A/RES/61/295 (Sep. 13, 2007). See also: Heinämäki 2004, pp. 231–259

456 Convention Concerning Indigenous and Tribal Peoples in Independent Countries C169, 72 ILO Official Bull. 59 (Jun. 27, 1989) adopted on June 27, 1989, and entered into force on May 9, 1991, Article 15

457 Declaration on the Rights of Indigenous Peoples 2007 G.A. Res. 61/295, UN Doc. A/RES/61/295 (Sep. 13, 2007). See also: Coutter 2011, pp. 211–225, Stamatopoulou 2011, pp. 226–249

458 Koivurova 2011, p. 13

459 On climate change and indigenous peoples, see for example: Koivurova – Prior – Duyck – Heinämäki – Stepien 2013, Koivurova – Stephien – Gremsperger – Niemi 2014

460 Westra 2008, p. 23, Ward 1994, pp. 9–148

461 Koivurova 2011, pp. 22–24

462 See for example: Otis – Aurélie 2013, pp. 173–174, Koivurova 2013, pp. 217–257

role of the ECtHR, the lack of universal definition of indigenous peoples and the lack of specific instruments under the ECHR and its Protocols on minorities<sup>463</sup>.

My purpose is to demonstrate how the greening of indigenous claims could change the currently modest case continuum.<sup>464</sup> The analysis is built on the current doctrines of the living instrument<sup>465</sup>, consensus<sup>466</sup>, international trends, positive obligations<sup>467</sup>, balancing test and vulnerability<sup>468</sup>. The green aspect of the claims of the indigenous peoples on their ancestral lands has been recognised in the literature<sup>469</sup> and practice<sup>470</sup> outside the ECtHR context<sup>471</sup>. Consensus among the international human rights organs and academia could encourage the ECtHR to adopt the same stance, in particular as the assessment of the current case law involving indigenous peoples shows a factual connection with the environment. The relevant case law, *Alta v. Norway*, *Könkämä* and *Handölsdalen and Others v. Sweden* have a connection to the use of lands, such as the building of a dam and land use<sup>472</sup>. The contemporary green jurisprudence could provide support for indigenous peoples to protect their traditional lands in particular through the utilization of environmental impact assessment and the vulnerability approach. For example, the current doctrine of positive obligations requires an adequate environmental impact assessment process<sup>473</sup> and proper balancing of issues such as “cultural, environmental and economic impact” as well as conducting “appropriate investigations and studies to allow them to strike a fair balance between the various conflicting interests at stake”.<sup>474</sup> Besides, application of living instrument and international doctrines to the context of the green indigenous claims could alter the current outcomes. In addition, the recognition of the vulnerable position of the indigenous peoples could serve as a basis for building stronger protection for their culture.

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463 Koivurova 2011, pp. 21, 30, 33

464 Grote 2007, pp. 425–443, Otis – Aurélie 2013, pp. 156–180

465 See for example: Senden 2011, pp. 279, 280 and 282

466 Dzehtsiarou 2011, pp. 1730–1745

467 Kratochvil 2011, pp. 333–334, Mowbray 2004, pp. 145, 149, 181–186, 192 and 228

468 Heiskanen – Knuutila – Heinämäki 2017, pp. 35–55

469 Westra 2007, Firestone – Lilley – Torres de Noronha 2005, pp. 219–292, Heinämäki 2014, pp. 540 and 546–547

470 Report of the Committee on the Convention on the Elimination of All Forms of Racial Discrimination for the Sixty-fourth and Sixty-fifth sessions, Consideration of Reports, Comment Sophie Thériault, Environmental justice and the Inter-American Court of Human Rights, (eds.) Anna Grear and Louis J. Kotze, *Research Handbook on Human Rights and the Environment*, Edward Elgar, 2015, pp. 309–329, pp. 321–326, and Information Submitted by State Parties: Nigeria, 1 October 2004, UN Doc. A/59/18, para 194

471 Middaugh 2006, p. 179, Manus 2005

472 ECtHR, *Handölsdalen Sami Village and Others v. Sweden*, 30 March 2010, Commission, *G. & E. v. Norway* (Alta case), App. No. 9278/81, Dec. & Rep. 30, 1983, ECtHR, *Könkämä and 38 other Sami villages v. Sweden*, 25 November 1996

473 ECtHR, *Taşkın and Others v. Turkey*, 10 November 2004, para 113

474 *Zammit Maempel and Others v. Malta*, 22 November 2011, para 70

At the end of this chapter, a decision from the Commission, *Alta v. Norway* (1983)<sup>475</sup> and a judgment from the ECtHR, *Handölsdalen and Others v. Sweden* (2010)<sup>476</sup> are rewritten. These cases simulate how the argumentation of the ECtHR could look after modifying the doctrines and utilizing greening. The aim is to illustrate how the current doctrines would allow greening of indigenous claims and development of stronger protection. As a limitation to the chapter, the focus is on green jurisprudence, other issues related to the indigenous peoples, such as self-determination, fall outside of the scope of the present research<sup>477</sup>.

## 4.2 Building Argumentation for Future Claims

### 4.2.1 Principles of Interpretation as a Tool to Green the Claims of Indigenous Peoples

The jurisprudence of the ECtHR is inherently a result of creative legal thinking due to the nature of the ECHR as a living instrument.<sup>478</sup> Dynamic interpretation allows the ECtHR to process contemporary human rights problems connected to the present time and societies<sup>479</sup>. The dynamic interpretation has enabled the analysis of themes that were not recognized as human rights issues during the time of drafting the Convention.<sup>480</sup> The living instrument interpretation<sup>481</sup> has not been restricted to the specific rights of the Convention<sup>482</sup>, but the development has been particularly rapid under Articles 3 and 8<sup>483</sup>.

The indigenous rights approach was not developed at the time of drafting the ECHR but has been a more recent development. The position of the indigenous peoples has been difficult throughout the world, and there is a need to protect their rights. The use of natural resources and their ancestral lands has put their survival and cultural rights at risk. The core object and purpose of the ECHR is to protect human dignity<sup>484</sup>. Application of the living instrument doctrine would allow protection for the indigenous peoples to guarantee respect for their human dignity.

The fundamental characteristic of the rights of the ECHR is to protect individual rights, not collective rights. However, a dynamic interpretation could allow the protection of the

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475 Commission, *G. & E. v. Norway* (Alta case), App. No. 9278/81, Dec. & Rep. 30, 1983

476 ECtHR, *Handölsdalen Sami Village and Others v. Sweden*, 30 March 2010

477 See for example for self-determination: Koivurova 2008, pp. 1–26, Koivurova 2013, pp. 105–125

478 Popovic 2009, pp. 363–364

479 Bates 2010, p. 322

480 Pieraccini 2015, p. 87

481 Jacobs – White – Ovey 2014, pp. 73–78, Mowbray 2013, p. 35

482 Letsas 2010, p. 518, For evolutive interpretation, see also: Bates 2010, pp. 328–329 and 337–338

483 Senden 2011, p. 275

484 Zysset 2017, pp. 1–4

indigenous peoples without necessarily recognizing collective rights. The environmental problems that would influence the capacity of indigenous communities to practise their traditional culture and activities could be formulated as a case of an individual claim on the basis of the right to private life and the right to property. Besides, one application may include several rights holders, which would *de facto* protect the community as a whole.

The recognition of the rights relating to culture would also be possible because of dynamic interpretation. The cultural rights could be formulated as a part of the private life of the individual as has been done with Roma people. The scope of protection of private life has been wide, and concerning Roma people, the ECtHR has recognized their special lifestyle and relationship with the land. By adopting analogous argumentation, the culture of the indigenous peoples could be recognized as a part of their right to private life. The dynamic interpretation is connected to the cross-fertilization of rights and the “international trends” doctrine. The Court often waits for international reports and minimal soft law instruments before stepping out of the current state practice into new fields.<sup>485</sup> The ECtHR has made reference to the international trends both in principle and substantively. In the context of the rights of indigenous peoples and the environment, the ECtHR could assess the development. The approach recognising green indigenous rights started in 1989 with the ILO 169 Convention and has not faltered, but continued; in 2007 the United Nations Declaration on the Rights of Indigenous Peoples was accepted<sup>486</sup> and the Nordic Sámi Convention introduced<sup>487</sup>. In parallel with the development on the level of agreements and practice, the UN Special Rapporteurs have underlined the interrelationship between the environment and indigenous peoples. The UN Special Rapporteurs on Human Rights and the Environment together with the UN Special Rapporteur on the Rights of Indigenous Peoples have constantly issued joint comments<sup>488</sup> and prepared a compilation of good practices<sup>489</sup>. On the basis of these developments, it could be maintained that there is an increasing international awareness of the connection between the realization of the rights of indigenous peoples and environmental protection.

International instruments can also be used as legal transplants. The green jurisprudence has been using legal tests created by another institution and in another context<sup>490</sup>. The ECtHR could refer, use or draw inspiration, for example, from the jurisprudence of

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485 Van der Schyff 2011, p. 69. See also: Alexy 2002, pp. 210 and 47–48

486 Koivurova 2011, pp. 31–32, Åhren 2009, pp. 212–213

487 For literature, see for example: Koivurova 2008, pp. 279–293, Koivurova 2007, pp. 103–136

488 See for example: Knox – Forst – Tauli-Corpuz 2016, *Protecting those who work to defend the environment is a human rights issue*: <https://www.theguardian.com/global-development/2016/jun/05/world-environment-day-protecting-activists-human-rights-issue> (last visited 26 February 2018)

489 See also: Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, *Compilation of Good Practices*, A/HRC/2/8/61 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/017/26/PDF/G1501726.pdf?OpenElement>, pp. 19–20 (last visited 26 February 2018)

490 See for example: ECtHR, *Mangouras v. Spain*, 28 September 2010, para 89

the Inter-American Court of Human Rights; for example the IACtHR has created an assessment test on the relationship between indigenous peoples and their traditional lands, as follows:

this relationship can be expressed in different ways depending on the indigenous group concerned and its specific circumstances, and (ii) that the relationship with the land must be possible. The ways in which this relationship is expressed may include traditional use or presence, through spiritual or ceremonial ties; sporadic settlements or cultivation; traditional forms of subsistence such as seasonal or nomadic hunting, fishing or gathering; use of natural resources associated with their customs or other elements characteristic of their culture. The second element implies that Community members are not prevented, for reasons beyond their control, from carrying out those activities that reveal the enduring nature of their relationship with their traditional lands.<sup>491</sup>

The test would provide a basis for the ECtHR to assess the relationship in the context of the ECtHR and would ensure the harmonious development of greening of indigenous cases with the other regional human rights supervisory bodies. Additionally or alternatively to the use of international trends doctrine, the ECtHR could assess whether the international developments form an emerging consensus. The ECtHR has not specified the elements forming the consensus<sup>492</sup>, so the consensus assessment may be connected to any element so far as it can be empirically observed.<sup>493</sup> The consensus has been formed, for example, on the basis of consensus among States Parties, including moral, policy and legislative consensus<sup>494</sup> as well as on the basis of the assessment of the existence of international treaties or on “scientific reports by universities and government agencies, expert opinions, and experiential testimony”.<sup>495</sup>

In the context of the indigenous peoples, the consensus could be formed on the basis of international agreements and the basis of “the practice of Contracting States”<sup>496</sup>. It should be noted that there are not many States Parties to the ECHR having indigenous peoples in their territories. Sámi people, the main indigenous community in Europe, live in Norway, Sweden, Finland, and Russia. Of these countries, Norway has ratified ILO 169, recognizing the environmental rights related to the indigenous peoples<sup>497</sup>. Moreover, in Sweden a recent landmark case recognized the rights of the Sámi people to control hunting and

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491 IACtHR, *Sarayaku v. Ecuador*, 27 June, 2012, para 148

492 Helfer 1993, pp. 143–144, Helfer 2008, pp. 125–159

493 Rautiainen 2011, p. 1156

494 Forowicz 2010, p. 9

495 Dzehtsiarou 2009, West – Schultz 2015, p. 31

496 ECtHR, *Demir and Baykara v. Turkey*, 12 November 2008, para 85

497 1989 ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, Articles 13–19 on land



fishing permits<sup>498</sup>. In Finland the environmental legislation has established a prohibition to weaken the position of indigenous cultures<sup>499</sup>. As the major international agreements recognize the green rights of the indigenous peoples and the domestic development of those States Parties having indigenous peoples in their territories has recognized the relationship between the indigenous peoples and nature, this would provide a solid basis for the ECtHR to establish consensus.

## 4.2.2 Building Argumentation on Impact Assessment

The current jurisprudence on indigenous peoples has not included a thorough discussion about the necessity for impact assessment of environmental projects. The requirement for a proper impact assessment would enable a fair balance to be struck between the different interested parties to the matters, such as economic, individual and environmental interests. For example, the Human Rights Committee developed a survival test in *Jouni Länsman et al. v. Finland* (2001) which requires that the evaluation of the activities impacting the traditional activities should include an assessment of the “effects past, present and planned”.<sup>500</sup> The requirement for an impact assessment is connected to the requirement for effective participation.<sup>501</sup> This model together with other national and international developments could be used by the ECtHR as a justification for modifying its current doctrine on environmental impact assessment.

The ECtHR has so far required environmental impact assessment as a part of the positive obligations under Article 8 of the ECHR, which has developed the standards of human rights protection further.<sup>502</sup> In addition, the ECtHR has continuously required sufficient studies on the activities to strike a fair balance between the different interests. Furthermore, the ECtHR has assessed the implications in light of the international standards, such as noise, in light of the WHO recommendations. Thus the construction of the requirement of impact assessment on the implications of environmental projects for the indigenous peoples is connected to the positive obligations<sup>503</sup>, balancing of rights and developments in the international and domestic legal frameworks.

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498 See for the ruling of Gällivare District Court 3 February 2017 on Girgas Sámi Villages: Sámi Council, March 2016, Sweden’s compliance with the International Covenant on Civil and Political Rights (ICCPR), Briefing paper submitted for the UN Human Rights Committee’s review of Sweden during its 16 session, 7–13 March 2016

499 See for example: Finnish Water Act (587/2011), Chapter 2, Section 8, Reindeer Grazing Act (848/1990), Section 2.2.

500 Human Rights Committee, *Jouni Länsman et al. v. Finland*, Comm. No. 1023/2001, para 10.2

501 Human Rights Committee, *Apirana Mabuika et al. v. New Zealand*, Comm. No. 547/1993 and *Ángela Poma Poma v. Peru*, Comm No. 1457/2006

502 Xenos 2012, p. 4

503 See also: Mowbray 2004, pp. 2–3, Shelton 2013, pp. 262–583, Lavrysen 2014, pp. 69–129



Green jurisprudence on positive obligations creates a basis for the requirement for impact assessment that would cover social and environmental impacts on the indigenous peoples. Furthermore, the ECtHR has found that striking a fair balance between the competing interests requires appropriate studies. In *Taskin and Others v. Turkey* (2004) it underlined that:

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<sup>504</sup>

In addition, the Court has stated that in the case of *Zammit Maempel v. Malta* (2011) that:

a governmental decision-making process concerning issues of cultural, environmental and economic impact (– –) must necessarily involve appropriate investigations and studies in order to allow them to strike a fair balance between the various conflicting interests at stake.<sup>505</sup>

Consequently, if the government has not conducted sufficient investigations and studies, the ECtHR may not accept that the balancing has been done correctly. As a result, the ECtHR may limit the space for national discretion<sup>506</sup>, and the margin of appreciation will be narrow. The current impact assessment could already provide a sufficient basis for the requirement to conduct proper studies on the implications of environmental activities concerning indigenous communities. The ECtHR has required that environmental and cultural aspects be assessed<sup>507</sup>. However, the current case law concerning the green claims of indigenous peoples does not include discussion of the impact assessment.

The ECtHR could require the application of the impact assessment concerning claims under Article 8 and Protocol 1 Article 1 of the ECHR relating to the indigenous peoples and the environment. The international developments would support the application of impact assessment requirement to the context of green indigenous claims. At the level of international agreements, ILO Convention 169, Article 7(3) recommends conduct impact assessment in the case of projects impacting the environment of the ancestral lands of indigenous peoples.<sup>508</sup> Furthermore, the Human Rights Committee has underlined in its practice related to the indigenous peoples and the environment that there is a necessity to conduct an impact assessment analysing the ability of the indigenous peoples to enjoy their

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504 ECtHR, *Taşkın and Others v. Turkey*, 10 November 2004, para 119

505 ECtHR, *Zammit Maempel and Others v. Malta*, 22 November 2011, para 70

506 Kratochvil 2011, pp. 324–357

507 ECtHR, *Zammit Maempel and Others v. Malta*, 22 November 2011, para 70

508 1989 ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries

culture currently and in the future. The impact assessment is thus an ongoing monitoring process, which requires assessment of “past, present and future” activities”.<sup>509</sup>

The Inter-American Court of Human Rights has also adopted a consistent requirement on impact assessment in the homelands of indigenous peoples. The practice of the IACtHR could provide inspiration and support to adopt a similar approach. The IACtHR has required that the environmental and social impact assessment should “respect the indigenous peoples’ traditions and culture” and be “in conformity with the relevant international standards and best practices”<sup>510</sup>. The impact assessment evaluates the risks and impact, including “cumulative impact” relating to “the property and community in question”. Conducting an impact assessment also entails the obligation to inform the indigenous peoples so that they are aware of the potential risks, such as health hazards or environmental damage.<sup>511</sup> The court has required that the impact assessment should be conducted by “independent and technically competent bodies,” and the impact assessment must be supervised by the state.

The standards set in the context of the IACtHR could provide specific content for the ECtHR when applying the requirement of impact assessment in the context of green indigenous claims. Similarly and additionally, the development at the domestic level could provide support for the application of green impact assessment in the context of indigenous peoples. For example in Finland, the Mining Act includes conducting impact assessments in relation to the Sámi culture<sup>512</sup>, including reindeer herding.

#### Section 38

##### *Procedure to be applied in the Sami Homeland, Skolt area, and special reindeer herding area*

In the Sami Homeland, the permitting authority shall – in co-operation with the Sami Parliament, the local reindeer owners’ associations, the authority or institution responsible for management of the area, and the applicant – establish the impacts caused by activity in accordance with the exploration permit, mining permit, or gold panning permit on the rights of the Sami as an indigenous people to maintain and develop their language and culture and shall consider measures required for decreasing and preventing damage. In such a case, the following shall be taken into account:

- 1) any corresponding permits valid in the vicinity of the area referred to in the application;
- 2) to which areas key to the rights of the Sami as an indigenous people the application pertains;

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<sup>509</sup> Human Rights Committee, *Jouni Länsman et al. v. Finland*, Comm. No. 1023/2001, para 10.2

<sup>510</sup> *Ibid.*, para 206

<sup>511</sup> IACtHR, *Sarayaku v. Ecuador*, 27 June 2012, para 205

<sup>512</sup> See for literature: Koivurova – Petrétei 2014, pp. 119–133

- 3) other forms of usage of areas interfering with the rights of the Sami as an indigenous people in the area that the application involves, and in its vicinity.

The provisions laid down in subsection 1 shall also apply to projects implemented outside the Sami Homeland that is of considerable significance as regards the rights of the Sami as an indigenous people.<sup>513</sup>

The ECtHR has tended to refer to the domestic environmental legislation when relevant and thus if the Sámi mining claim were to be placed in the Finnish context, the ECtHR could use the domestic mining law to give specific content and context to the positive obligations.

The application of the current green doctrine of environmental impact assessment in the context indigenous peoples, concerning the international and domestic development, could support building an understanding of the special and specific implications that any activity influencing the traditional lands of the indigenous peoples could have. The development would be a logical corollary to the basis of the current well-established green jurisprudence. The application of the doctrine in the context of claims of indigenous peoples would not require amendment or departure from the current doctrine of positive obligations, but it could have a positive effect for the indigenous peoples. Carrying out an appropriate impact assessment could make the vulnerable status of the indigenous peoples and their special lifestyle more visible and understandable. Acknowledging their vulnerability and also the relationship between the land and Sámi people could increase the trust and confidence of the Sámi people in the capability of the ECtHR to protect their rights effectively and have a positive impact on the sense of the legitimacy of the ECtHR.

#### 4.2.3 The Indigenous Peoples and the Greening Vulnerability Approach

An alternative or supporting approach to the previous approaches to green the indigenous claims would be to develop vulnerability argumentation. The vulnerability approach has acknowledged the special need to protect disadvantaged individuals and groups in society.<sup>514</sup> An environmental problem or alternatively environmental protection may affect or impact on the level of vulnerability of individuals.<sup>515</sup> In the green jurisprudence of the ECtHR, the vulnerability approach has been adopted on the basis of situation related vulnerability and discriminatory action. The development includes situation related vulnerability due to environmental problems causing health hazards as well as discrimination based

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513 Finnish Mining Act, (621/2011), 10 June 2011, Section 38

514 Chapman – Carbonetti 2011, pp. 682–732, Culletts 2010, pp. 183–206, Eakin – Luers 2006, pp. 365–394, Cutter 1996, pp. 529–539

515 See in Finnish: Heiskanen – Knuutila – Heinämäki 2017, pp. 35–55, Report of the Special Rapporteur on the issues of human rights obligations relating to the enjoyment of a safe, clean, healthy and suitable environment, A/HRC/37/59, para 41(d)

vulnerability due to environmental protection measures preventing the Roma people from practising their traditional culture. Moreover, environmental conditions and activities may combine several grounds for vulnerability factors, thus the environmental problems can be seen contributing to vulnerability. For example, climate change increases the vulnerability of the people and the environment.<sup>516</sup>

Situation vulnerability may include environmental projects or environmental problems rendering individuals vulnerable due to changes in the living environment<sup>517</sup>. The vulnerability is not related to the individuals themselves, but to the circumstances that render vulnerable almost every individual in the same geographic area except those with the financial capacity to take preventive measures. For individuals lacking sufficient information and understanding of the consequences of the environmental problems or alternatively financial means, for example, to move elsewhere, environmental problems or projects may cause health risks. The case of *Fadeyeva v. Russia* (2005) discussed this relationship between environmental problems and elevated susceptibility to diseases:

In the instant case, however, the very strong combination of indirect evidence and presumptions makes it possible to conclude that the applicant's health deteriorated as a result of her prolonged exposure to the industrial emissions from the Severstal steel plant. Even assuming that the pollution did not cause any quantifiable harm to her health, it inevitably made the applicant more vulnerable to various illnesses. Moreover, there can be no doubt that it adversely affected her quality of life at home. Therefore, the Court accepts that the actual detriment to the applicant's health and well-being reached a level sufficient to bring it within the scope of Article 8 of the Convention<sup>518</sup>.

The Court acknowledged that even though the environmental pollution did not cause significant damage to the applicant's health, it made the individual more likely to fall ill. The Court reached similar conclusions in the case of *Ledyayeva and others v. Russia* (2006), where it held that: "the excessive levels of industrial pollution inevitably made her more vulnerable to various diseases. Moreover, there was no doubt that it had adversely affected the quality of life at her home"<sup>519</sup>.

For indigenous people, the background to situation related vulnerability is that they cannot move and transfer their culture outside of their traditional lands, which makes it even more difficult to prevent the vulnerability by other means than preventing environmental harm or banning such economic activities in the traditional land that create

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516 McCubbin – Smit – Pearce 2015, pp. 43–55, Reidsma et al. 2015, Tucker et al. 2014, pp. 783–800, Bennett – Blythe – Tyler – Ban 2015, pp. 1–20, Hansen – Cramer 2015, pp. 182–185, Pearce et al. 2009, pp. 1–21

517 Westerhoff – Smit 2009, pp. 317–337, Smit – Wandel 2006, pp. 282–292, Philippopoulos-Mihalopoulos 2015, pp. 46–75

518 ECtHR, *Fadeyeva v. Russia*, Appl no 55723/00, 9 June 2005 para 88

519 ECtHR, *Ledyayeva and Others v. Russia*, 26 October 2006, para 95

risks to the environment. An applicable vulnerability basis for indigenous peoples is also vulnerability related to discrimination. This type of vulnerability arises from membership of a social group that is marginalized in society<sup>520</sup>. The marginalisation and discrimination will impact the capacity of the group and the individual members of the group to fully enjoy their rights. Sijniensky has defined that such vulnerability is:

The situation of structural discrimination grounded in historical, social and/or cultural roots that cause vulnerability is usually reinforced by a situation of exclusion due to a lack of empowerment of the group that is a lack of access to positions of power, whether economic or representative, within a certain country or society.<sup>521</sup>

For example, land use may be dominated by the majority and cause structural discrimination to groups that cannot fully practise their culture.<sup>522</sup> Discrimination related vulnerability has been recognised in the context of the European Court of Human Rights in particular in relation to the Roma people<sup>523</sup>. The case continuum on land management cases related to Roma people did not first acknowledge the specific features of Roma culture related to the use of the land, but there was a departure from the early Roma cases in *Chapman v. the United Kingdom*<sup>524</sup> (2001) and then *Connors v. the United Kingdom*<sup>525</sup> (2004). In addition, in the case of *Winterstein and Others v. France* (2013), the Court expressed recognition of the lifestyle of the Roma people. The Court held that:

In addition, it is necessary, as the Government has accepted, to take into account the fact that the applicants belong to a vulnerable minority. The Court would refer to its previous finding that the vulnerable position of Gypsies and Travellers as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in reaching decisions in particular cases (see *Connors*, cited above, § 84; *Chapman*, cited above, § 96; and *Stenevry and Adam*, cited above). It has also stated in *Yordanova and Others* (cited above, §§ 129 and 133) that, in cases such as the present one, the applicants' specificity as an underprivileged social group and their resulting needs must be taken into account in the proportionality assessment that the national authorities are under a duty to undertake, not only when considering approaches to dealing with their unlawful settlement but also, if their removal is necessary, when deciding on its timing and manner and, if possible, arrangements for alternative shelter.<sup>526</sup>

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520 Sijniensky 2014, pp. 266–267

521 *Ibid.*

522 Trindade 1998, p. 127

523 For relevant case law of the ECtHR related to vulnerability, see for example: ECtHR, *D.H v. Czech Republic*, 13 November 2007, paras 143, 169 and 181, ECtHR, *Alajos Kiss v. Hungary*, 20 August 2010, para 42

524 ECtHR, *Chapman v. the United Kingdom*, 18 January 2001, para 96

525 ECtHR, *Connors v. the United Kingdom*, 27 May 2004, para 84

526 ECtHR, *Winterstein, and Others v. France*, 17 October 2013, para 88

One explanation of the development is that there has been active strategic litigation. The Roma Rights Center is one of the most active third-party interveners before the ECtHR, and started active third-party intervention in 1998. The Roma Rights Center intervened in the cases of *Chapman v. the United Kingdom* (2001), *Coster v. the United Kingdom* (2001), *Jane Smith v. the United Kingdom* (2001), *John and Catherine Beard v. the United Kingdom* (2001), *Lee v. United Kingdom* (2001), *Tanase and Others v. Romania*<sup>527</sup>. In addition, the landmark case *D.H and Others v. the Czech Republic* several NGOs actively contributed as third-party interveners: the International Step by Step Association, the Roma Education Fund, the European Early Childhood Research Association, the Minority Rights Group International, the European Network against Racism, the European Roma Information Office, the International Federation for Human Rights, Interights, Human Rights Watch.<sup>528</sup>

There are already signs of change in the development of the vulnerability approach in the case law of the ECtHR in relation to the indigenous peoples. The case of *Halvar From against v. Sweden* (1998) is an example of the development. In the case the County Administrative Board of the County of Västerbotten registered an elk-hunting area for the Sámi village, even though there was an applicant who already had hunting licences for the same area. Consequently the applicant claimed that the registration of his property violated his property rights. The Commission found the application manifestly ill-founded. The Commission argued its position by holding that it is “general interest that the special culture and way of life of the Sámi be acknowledged, and it is clear that reindeer herding and hunting are important parts of that culture and way of life. The Commission is therefore of the opinion that the challenged decision was taken in the general interest.”<sup>529</sup> The position taken by the Commission illustrates that recognizing indigenous culture as “general interest,” can be used as a legitimate justification to limit the rights under Article 8. The recognition covers acknowledgment of the cultural relation to the environment and thus if there is a connection between the vulnerability of the indigenous peoples and the activities related to the environment.

In addition, in the dissenting opinion of Judge Ziemele, the vulnerability of the Sámi was recognized. Ziemele referred to an “obviously disadvantaged” group in “particular circumstances”<sup>530</sup>. The research supports the argumentation, as there has been prolonged

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527 ECtHR, *Chapman v. the United Kingdom*, 18 January 2001 (GC), para 89, ECtHR, *Coster v. the United Kingdom*, 18 January 2001 (GC), para 103, ECtHR, *Jane Smith v. the United Kingdom*, 18 January 2001 (GC), para 96, ECtHR, *John and Catherine Beard v. the United Kingdom*, 18 January 2001 (GC), para 100, ECtHR, *Lee v. the United Kingdom*, 18 January 2001 (GC), para 91, ECtHR, *Tanase and Others v. Romania*, 26 May 2009, para 4

528 van den Eynde 2013, pp. 285–286

529 Commission, *Halvar From against Sweden*, 4 March 1998, inadmissible

530 ECtHR, *Handölsdalen Sami Village and Others v. Sweden*, 30 March 2010, Partly dissenting opinion of Judge Ziemele, para 8



historical discrimination<sup>531</sup>. The wording is slightly different from that used in *Winterstein and Others v. France* (2013) for example, but in essence, both wordings recognize the disadvantaged position and the needs related to it.

Furthermore, the current emerging developments in the vulnerability of the indigenous peoples has a connection to the environment, as culture has a strong connection to the land and the environment. The development could be strengthened with consensus and international trends argumentation. The ECtHR could make references to the development in the Inter-American Court of Human Rights, which has developed the approach relating to the vulnerability of indigenous peoples in an environmental context.<sup>532</sup>

In the case of *Yakye Axa v. Paraguay* (2005), the doctrine was formulated as follows:

The culture of the members of the indigenous communities directly relates to a specific way of being, seeing, and acting in the world, developed on the basis of their close relationship with their traditional territories and the resources therein, not only because they are their main means of subsistence, but also because they are part of their worldview, their religiosity, and therefore, of their cultural identity.<sup>533</sup>

The Inter-American Commission also recognized the vulnerability of the indigenous people in the case of *Yanomami v. Brazil* (1985)<sup>534</sup>. The case was brought by several NGOs on behalf of the Yanomami Indians due to failure to implement legislation relating to the prohibition of the exploitation of the resources of the region. The Commission found several violations caused by the construction of the highway allowing exploitation of the subsoil, displacing the Yanomami from their traditional lands and failure to establish the Yanomami Park.<sup>535</sup> In *Sarayaku v. Ecuador* (2012), the vulnerability was also recognized as follows:

Furthermore, lack of access to their territories may prevent indigenous communities from using and enjoying the natural resources necessary to ensure their survival, through their traditional activities; or from having access to their traditional health systems and other socio-cultural functions, thereby exposing them to poor or inhuman living conditions and to increased vulnerability to diseases and epidemics, and subjecting them to situations of extreme vulnerability that can

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531 Aikio-Puoskari – Pentikäinen 2001, Toivanen 2014, pp. 6–17, Toivanen 2013, pp. 30–39, Eriksen – Hansen – Javo – Schei 2015, pp. 588–596, Hansen 2015, pp. 1–12

532 Courtis 2008, p. 201. For cases, see also: IACtHR, *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 31 August 2001, Serie No. 79, paras 142–155, IACtHR, *Moiwana v. Suriname*, Serie C No. 124, 15 June 2005, paras 131 and 133, IACtHR, *Yakye Axa v. Paraguay*, Series C no 125, 17th June 2005, paras 117–145

533 IACtHR, *Yakye Axa v. Paraguay*, Series C no 125, 17th June 2005, para 135

534 IAComm, *Yanomami v. Brazil*, Case No. 7615, Resolution No. 12/85, 5 March 1985

535 *Ibid.*



lead to the violation of various human rights, as well as causing them suffering and jeopardizing the preservation of their way of life, customs and language.<sup>536</sup>

Historical events, the findings of the supervisory organs and the current assessment of society show that indigenous communities, such as those of the Sámi, have faced discrimination in relation to language and cultural rights<sup>537</sup>. In Finland, for example, there is a generation of Sámi who lost their Sámi language skills due to the lack of language skills education and the stigma attached to the Sámi languages. Researchers on racism in Finland have also provided evidence that even nowadays there are discriminatory attitudes towards the Sámi culture, which makes them vulnerable.<sup>538</sup>

The findings of the special nature of the indigenous cultures are also applicable at European level. If the ECtHR were to adopt a similar view on the indigenous culture, it would evidently also affect how it assesses the claims related to indigenous peoples. The ECtHR has so far not addressed the question of how indigenous status affects the interpretation of the rights. There are signs that the ECtHR is aware of the vulnerability<sup>539</sup> of the indigenous peoples, but this vulnerability is rarely reflected in the analysis and outcome. Thus the case law on indigenous peoples is not in line with the vulnerability approach adopted in relation to the Roma people, asylum seekers and people who are HIV positive, where the vulnerability has had a substantive significance in the outcome.<sup>540</sup>

### 4.3 Rewriting the Case Law: Greening of the Indigenous Cases

The purpose in rewriting the green indigenous judgments is to illustrate how the argumentation of the ECtHR might have been if it had been created at the time and represented dynamic interpretation. The rewriting has its basis in the analysis introduced above of the development of positive obligations in relation to impact assessment and the vulnerability approach.

Rewriting of the judgments in two green indigenous cases is presented, the landmark case *Alta*<sup>541</sup> and the more recent case *Handsöldalen and Others v. Sweden*<sup>542</sup>. In respect to the Alta case, the decision has been rewritten with reference to Article 8 of the Convention. Regarding the other case, the rewriting first concerns the admissibility decision, which enables the questions to be assessed in wider terms than only focusing on the judgment

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536 IACtHR, *Sarayaku v. Ecuador*, 27 June, 2012, para 147

537 Puuronen 2011, see: Chapter 4, Parliamentary Deputy-Ombudsman of Finland, 11 December 2012, Dnro 3709/2/10, Southbound et al. 2012, pp. 26–50, Hansen et al. 2008, pp. 97–113, Tuori 2012, p. 910

538 Puuronen 2011, see: Chapter 4

539 Fineman 2008, pp. 1–6

540 Timmer 2013, p. 147

541 Commission, *G. & E. v. Norway* (Alta case), 3 October 1983

542 ECtHR, *Handölsdalen Sami Village and Others v. Sweden*, 30 March 2010

of the chamber. In the latter part half of the chamber judgment has been rewritten, where the ECtHR found no violation. The part of the judgment where the chamber judgment did find a violation in relation to the length of the proceedings, has been omitted from the rewriting as it provided effective protection for the litigants and did not involve core issues of greening as such.

The original judgment or extracts from it appear on the left side of the page in order to provide comparative material on the differences in the argumentation. However, in the paragraphs the original and the rewritten judgments, do not necessarily follow the same order.

#### 4.3.1 Rewriting the Case Law: the Case of Alta

The context of the first indigenous peoples claim, the *Alta* case, before the European Commission on Human Rights, concerned building a dam in the valley located in the traditional homeland of the Sámi people in Norway. The building of the hydropower plant required an area of 2.8 km<sup>2</sup>. The argumentation relied on the historical background and general discrimination. The applicants argued that due to their lack of Norwegian language skills and constant discrimination against them, they were a group with fewer opportunities to protect their rights. The applicants also claimed that their access to an effective remedy was denied as the work in Alta had already started and initiating proceedings would not prevent the damage already caused. Furthermore, they felt that the restricted access to their ancestral lands violated their identity and was thus discriminatory under the terms of Article 14.

The Commission took the view that despite the traditional property rights, due to the minority status and the relationship between the Sámi and the land, the Alta project might constitute interference. The analysis of the Commission showed that the interference would have required a major impact on the practice to the traditional culture and lifestyle, including reindeer herding, fishing and hunting in order to constitute interference in the rights of the Sámi applicants. However, the Commission concluded that the state had acted within its margin of appreciation under Article 8 as the area was a “relatively small area” and thus did not prevent the practising of the culture in the fullest sense.<sup>543</sup>

The criticism by Patrick Thornberry and Timo Koivurova from the cultural perspective is justified and understandable.<sup>544</sup> Koivurova stated that: “it is striking that the Commission studied the Saami reindeer herding not so much in cultural terms (– –) but as a business activity.”<sup>545</sup> The observation is well-founded when studying indigenous people’s cultures. The Court held that the area in question was relatively limited and did not impede the

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543 Thornberry 2002, p. 298

544 Koivurova 2011, p. 10

545 *Ibid.*

applicants from continuing to practise their traditional lifestyle. Later, the ECtHR has held in the case of *Zammit Maempel v. Malta* (2011) on the minimum level of severity test as follows:

However, under Article 8 the alleged nuisance must have attained the minimum level of severity required for it to amount to an interference with applicants' rights to respect for their private lives and their homes. The assessment of that minimum is relative and depends on all the circumstances: the intensity and duration of the nuisance, its physical or mental effects, the general context, and whether the detriment complained of was negligible in comparison to the environmental hazards inherent to life in every modern city (see, among other authorities: *Fadeyeva v. Russia*, no. 55723/00, §§ 66–70, ECHR 2005-IV, and *Galev and Others v Bulgaria*, (dec.), no. 18324/04, 29 September 2009).<sup>546</sup>

The indigenous point of view should be taken into account when assessing the general context of the harm. The relationship between environmental well-being and the realisation of the rights of indigenous people is very close<sup>547</sup>. Even if the area taken over for economic activities is small, it can have a great meaning and impact on the area in general, and thus the minimum level of harm test may be justified despite the small area concerned<sup>548</sup>. It should also be noted that among indigenous communities, such as Sámi people, the traditional lands may be divided into small traditional villages and there may be no alternative area where the same activities can be carried out. This renders the members of the communities vulnerable, and they do not have the same opportunity as non-indigenous people to start their life somewhere else.

#### *Alta/G. and E v. Norway, Commission 9278/81 & 9415/81*

##### *The original decision on the admissibility of the applications*

The applicants allege that the Lapps, as a minority, are discriminated against and that their rights have not been sufficiently protected.

The Commission observes that the Convention does not guarantee specific rights to minorities. The rights and freedoms set forth in the Convention are, according to Article

##### *Rewritten judgment*

The applicants claim that the Sámi people, as an indigenous people, are a vulnerable group requiring recognition of their special relationship between their ancestral lands and their traditional lifestyle.

The European Court of Human Rights observed that the Convention does not guarantee specific groups rights as minorities or indigenous peoples. However, the Court

<sup>546</sup> ECtHR, *Zammit Maempel v. Malta*, Appl no 24202/10, 22 November 2011, para 37

<sup>547</sup> See also: Heinämäki 2012, pp. 415–474, Heinämäki 2009, pp. 3–68

<sup>548</sup> See for sacred sites or traditional cultural property: Butzier – Stevenson 2014, pp. 300–303

I of the Convention, guaranteed to “everyone” within the jurisdiction of a High Contracting Party. The enjoyment of the rights and freedoms in the Convention shall, according to Article 14, be secured without discrimination on any ground such as, *inter alia*, association with a national minority.

The applicants are Norwegian citizens, living in Norway, and under Norwegian jurisdiction. They have, as other Norwegians, the right to vote and to stand for election to the Norwegian Parliament. They are thus democratically represented in Parliament, although the Lapps have no secured representation for themselves. The applicants are thus entitled to enjoy the guarantees of the Convention. They are also bound by Norwegian law and obliged to comply with decisions lawfully taken.

2. The Commission considers that the applicants’ complaints must only be examined under Article 8 of the Convention, which guarantees the right to respect for private life, family life, and home.

The Commission is of the opinion that, under Article 8, a minority group is, in principle, entitled to claim the right to respect for the particular lifestyle it may lead to being “private life,” “family life” or “home.”

The Commission finds that the manner in which the applicants demonstrated outside the Parliament cannot raise an issue under Article 8 (as regards the issues under Articles 10 and 11, see below). In respect of the applicants’

recognizes that as citizens of Norway, the Sámi people enjoy protection under the Convention.

The Court points out that the inherent purpose of the Convention is to protect human dignity and individual rights. As individuals, members of the indigenous peoples enjoy protection of their rights.

The European Court of Human Rights observes that even though the applicants do not raise their issues under Article 8 of the Convention, the complaints must partly be examined under Article 8.

The European Court of Human Rights is of the opinion that under Article 8 minority groups are in principle entitled to enjoy protection on the basis of their particular lifestyle. The culture of the indigenous peoples forms a significant part of their private life, family life and home.

The Court notes that the Convention is a living instrument and “can and must” take account of other relevant international instruments in their interpretations. The Court thus takes into account that Norway is a member of the ILO 169 Convention.

The applicants claim that the valley where they were born, and where they intended to continue to practise their culture and traditional work, will be partly under water. The Court accepted that the consequences of the hydroelectric plant constitute an interference with their private life under Article 8 of the Convention as members of indigenous peoples, whose traditional style of reindeer herding requires adequate access to their traditional lands.

Under the terms of Article 8, para 2 of the Convention, an interference with the rights set out in Article 8 para 1 is permissible if it is in accordance with the law, necessary in a democratic society and protects a legitimate interest, such as rights of other peoples or

allegation that land is being taken away from them, the Commission must limit its examination to the project in the Alta river. Here, the Commission notes that the applicants do not appear to have any “property rights” to this area in the traditional sense of that concept. Nor have they claimed compensation for any such rights. The applicants claim that the valley where they were born, and where they intended to live, will be partly under water. They do not allege that they will be unable to continue their life as a reindeer shepherd and a fisherman and hunter respectively. The Commission is prepared to accept that the consequences, arising for the applicants from the construction of the hydroelectric plant, constitute an interference with their private life, as members of a minority, who move their herds and deer around over a considerable distance. It is recalled that an area of 2,8 km<sup>2</sup> will be covered by water as a result of the plant. In addition, it must be acknowledged that the environment of the said plant will be affected. This could interfere with the applicants’ possibilities of enjoying the right to respect for their private life. Nevertheless, in comparison with the vast areas in northern Norway which are used for reindeer breeding and fishing, the Commission considers that it is only a comparatively small area which will be lost for the applicants, for such purposes, as a result of the Alta River project.

Furthermore, under the terms of Article 8, para. 2 of the Convention,

other interests, such as the right of others in the community to environmental protection (*mutatis mutandis*, *Coster v. the United Kingdom*, Appl. no. 24876/94, 18 January 2001, para 116). The assessment of compliance with Article 8 requires assessment on whether the states have struck a fair balance between these competing interests.

An area of 2.8 km will be covered by water as a result of the plant. In addition, the surrounding environment of the plant will be damaged. The Court has repeatedly stated that everyone has a shared interest in the well-being of the environment. International research has demonstrated that the interrelation between the environmental well-being and the indigenous peoples is even more significant.

The Court points out that the States have positive obligations to prevent environmental damage that could impede the realization of the rights of the Convention (*mutatis mutandis*, Sweden, 12570/86 Dec. Jan 1, 1989, 59 D.R. 127, *Chater v. the UK*, 11723/85, Dec. May 7, 1987, 52 D.R. 250, *Herrick v. the UK*, 11185/84 Dec. March 11, 1985, 42 D.R. 75). Furthermore, the Court considers, in accordance with its earlier case law that:

a governmental decision-making process concerning issues of cultural, environmental and economic impact (– –) must necessarily involve appropriate investigations and studies in order to allow them to strike a fair balance between the various conflicting interests at stake. (*Zammit Maempel and Others v. Malta*, Appl. no 24202/10, 22 November 2011, para 70)

The land project in relation to the Alta river would have required sufficient studies relating to the economic, social and cultural impacts of the project in order to ensure that there is adequate information for striking a fair

an interference with the rights set out in Article 8, para. 1 is permissible if it is in accordance with the law and necessary in a democratic society for one of the purposes enumerated, *inter alia*, the economic well-being of the country. The Commission finds that, without ascertaining the exact extent and nature of the interference with the applicants' rights under Article 8, para. 1, after the careful consideration of the necessity of the project by the national organs the interference could reasonably be considered as justified under Article 8, para 2, as be in accordance with law, and necessary in a democratic society in the interests of the economic well-being of the country. It follows that this part of the applications is manifestly ill-founded, within the meaning of Article 27, para 2. The applicants have invoked. 3 Article 1 of the First Protocol and complained that their land has been taken away from them and that the taking away of this land also affects their way of life. The article 1, of the First Protocol, guarantees to everyone the peaceful enjoyment of his possessions. However the applicants have in no way substantiated that they have any property rights or claims, as guaranteed by Article I of the First Protocol to the land in question. The Commission, furthermore, notes that, under Article 105 of the Norwegian Constitution, individuals are guaranteed compensation if rights of theirs are being expropriated. The applicants have not shown that they have instituted any proceedings for the establishment of whether they were entitled to such compensation. It

balance between the competing interest of the applicants, environment and the economy.

The Court takes the view that the impact assessment should further take into account the traditional knowledge of the Sámi people in order to assess the implications for the Sámi culture. The impact assessment procedure should follow the standards of the well-established practice of the Human Rights Committee on the holistic assessment of short-term and long-term implications.

For the exercising of Sámi culture, even a small alteration in the land can prevent successful herding. The Sámi communities have their division of use of land, thus if one is damaged, there is no area that could replace the damaged area.

However, the state has not provided a comprehensive and balanced study taking account of the views of the indigenous people. The economic interest was given value over other interests, including both environmental considerations and the protection of the private life of the applicants. Thus the Court finds that the national authorities did not "take the measures necessary for protecting the applicant's right to respect for" family life under Article 8 of the Convention (*mutatis mutandis*, *Hatton and Others v. the United Kingdom*, Appl. no 36022/97, 2 October 2001, para 97).

The applicants have invoked Article 1 of the First Protocol and complained that the restrictions to access to their traditional lands violate their capabilities to continue their traditional professions.

The Court acknowledges that the project has been implemented in the area, which was damaged and that this affects the traditional use of land in respect to reindeer herding. The Court further recognizes the domestic development in the Nordic countries in relation



follows that the applicants' complaints under Article I of the First Protocol are manifestly ill-founded, within the meaning of Article 27, para 2, even assuming that the applicants have exhausted domestic remedies, as required by Article 26 of the Convention.

It follows that also this aspect of the applications is manifestly ill-founded within the meaning of Article 27, para. 2 of the Convention.

to the recognition of the property rights of the Sámi people. For example, in Finland the reindeer herding can qualify as property and enjoys constitutional protection. As reindeer herding is endangered due to the project and as there is no alternative land where the applicants can continue their traditional activities, there are grounds for the Court to recognize that there has been a violation of Article 1 of the Protocol 1.

#### 4.3.2 Explaining the Logic of Rewriting and Other Remarks

The rewriting has its basis in the doctrine of “object and purpose”<sup>549</sup> of the Convention. The object and purpose discussion would serve a basis for the ECtHR to justify why it extends its protection to a new area with its specific instruments and altering the view of rights as group rights as in the areas of rights of indigenous peoples. The ECtHR has not so far taken an explicit stance to suggest it is incapable of protecting the rights of indigenous peoples because the rights are group rights and concern economic, cultural and social rights. In the rewriting, the approach adopted is that the rights of indigenous peoples can also be defined as individual rights under the Convention because it would be contrary to the object and purpose of the Convention not to protect vulnerable individuals. The object and purpose of the Convention include the “rights practical and effective, not theoretical and illusory”<sup>550</sup>, and this is not possible in relation to the private and family life of the indigenous peoples if their special way of living is not taken into consideration.

This interpretation has a strong connection to the earlier case law of the ECtHR. The ECtHR has previously departed from its case law and extended the protection to cover vulnerable groups to ensure the effectiveness of the rights of the Convention. In case of *Christine Goodwin v. the United Kingdom* (2002), the ECtHR held as follows:

However, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved (see, amongst other authorities: the *Cossey* judgment, p. 14, § 35, and *Stafford v. the United Kingdom* [GC], no. 46295/99, judgment of 28 May 2002, to be published in ECHR 2002–, §§ 67–68). It is of crucial importance that the Convention is interpreted and applied

549 On the principle of object and purpose see: ECtHR, *Loizidou v. Turkey*, 23 March 1995, para 62

550 See for example: ECtHR, *Stafford v. the United Kingdom*, 28 May 2002, para 68



in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement (see the above-cited *Stafford v. the United Kingdom* judgment, § 68). In the present context the Court has, on several occasions since 1986, signalled its consciousness of the serious problems facing transsexuals and stressed the importance of keeping the need for appropriate legal measures in this area under review (see the Rees judgment, § 47; the Cossey judgment, § 42; the Sheffield and Horsham judgment, § 60).<sup>551</sup>

There are similar grounds to recognize that there is an increasing international awareness of the seriousness of the threats to the cultures of the indigenous peoples and consequently there is a need to practice dynamic interpretation to ensure the effectiveness of the protection. As explained in this chapter, since the late 1980s there has been increasing international, regional and domestic awareness of the violations of the rights of indigenous peoples due to environmental problems and restricted access to their traditional lands.

The rewriting does not radically alter the decision on the Commission, when it in its initiatives it decides to examine the case under Article 8 of the Convention even though the applicants did not rely on the Article. However, in practice the ECtHR still has more cases that it can examine, so it is unlikely that the case would be assessed by other arguments than those submitted to the Court. Whereas minority rights issues and issues related to private life have developed under Article 8 of the Convention<sup>552</sup>, it also provides the most fruitful ground for rewriting the case.

It is an inherent technique used in the ECtHR that the Court reaffirms its earlier case law and uses this as a basis for further development<sup>553</sup>. This technique is incorporated in relation to the recognition of particular lifestyles as a part of the private life of a person. The ECtHR has recognized the particular lifestyles, for example in relation to the Roma people<sup>554</sup>, so in rewriting, the development is utilized to apply a similar standard to the lifestyle of indigenous peoples. The practical assessment of the private and family life of the indigenous peoples practising their traditional culture would confirm that it is impossible to separate the private, family life and even the homes of indigenous peoples such as Sámi reindeer herders from their environment. The recognition of the protection of the lifestyle of the Sámi as a part of their private and family life and home would be essential for the further examination of claims of violations. If the Court does not first recognize the existence of private and family life, it cannot examine whether the private and family life or home has been violated.

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551 ECtHR, *Christine Goodwin v. the United Kingdom*, 11 July 2002, para 74

552 See for example: ECtHR, *Winterstein and Others v. France*, 17 October 2013, paras 69–167

553 Harvey, *Third Party Interventions before the ECtHR: A Rough Guide*: <https://strasbourgobservers.com/2015/02/24/third-party-interventions-before-the-ecthr-a-rough-guide/> (last visited 26 February 2018)

554 See for example: ECtHR, *Winterstein and Others v. France*, 17 October 2013, para 91

In this case vulnerability is also connected to the location of the applicants, potentially causing the applicants to become vulnerable. This type of vulnerability is situation-based vulnerability and is not related to ethnicity, age or health, but rather to the geographical location of the applicants<sup>555</sup>. In *Fadeyeva v. Russia* (2005), the ECtHR held that: “Even assuming that the pollution did not cause any quantifiable harm to her health, it inevitably made the applicant more vulnerable to various illnesses”.<sup>556</sup> Similarly, even though the alterations in the land use would not directly and immediately prevent the reindeer herding, it would make the applicants more vulnerable to future alterations in land management.

The rewriting does not greatly differ from the findings of the Commission that in the Alta case there was interference with the private life under Article 8 of the Convention. The difference in argumentation is that in the rewritten version the applicants are recognized as an indigenous people, and due to their cultural roots in Sámi culture, their access to their traditional lands as a part of their private life is recognized. The more significant difference in the existing case law and the rewritten version is the argumentation in relation to the positive obligation of the state to prevent environmental damage detrimental to the realization of the rights protected by the Convention, the obligation to carry out sufficient impact assessment and the assessment of the interference under Article 8(2) of the Convention.

Unlike the findings of the Commission, in the rewritten judgment the argumentation also includes environmental considerations. The green jurisprudence of the ECtHR was still in its infancy at the time of the Alta case, which explains that the environmental protection elements were not included in the arguments. However, on the basis of the current green jurisprudence, the ECtHR would need to examine the environment as a public interest under Article 8 of the Convention and evaluate how the state complied with the procedural requirements of the doctrine of positive obligations. The rewritten judgment has included these in its argumentation.

The rewritten judgment utilizes the doctrine of positive obligations, which has been used continuously in the green jurisprudence of the ECtHR. The ECtHR has in its earlier case law established a necessity to conduct sufficient research relating to the environmental, economic, social and cultural impacts of the project in order to strike a fair balance between the various competing interests. This doctrine has been used in the rewritten judgment as it is in line with the current continuum. If the applicants, with the support of the third-party interveners, were able to provide convincing evidence that the state has failed to conduct sufficient studies and impact assessment of the project or alternatively if the state had failed to provide evidence of having conducted a proper impact assessment, it would be reasonable for the Court to find a violation of the positive obligations under Article 8 of the Convention.

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555 Tucker et al. 2014, pp. 783–800, Bennett – Blythe – Tyler – Ban 2015, pp. 1–20, Pearce et al. 2009, pp. 1–21, Philippopoulos-Mihalopoulos 2015, pp. 46–75

556 ECtHR, *Fadeyeva v. Russia*, 9 June 2005, para 88

Whereas the requirement for environmental impact assessment and assessment of the economic, social and cultural rights of the project does not alter the current case law, it has not been applied in the context of indigenous peoples. The application of the doctrine in the context of indigenous peoples would not necessarily need a doctrinal change as such if the social and cultural assessment took into account the special features of the traditional culture and knowledge of the Sámi people. However, the international development in the Human Rights Committee would provide support for the ECtHR to find the impact assessment to be particularly important when the area is located on the traditional lands of indigenous peoples, such as the Sámi.

The ECtHR does not itself have resources and capacity to take into account the special features of the indigenous cultures without support from the applicants and the third-party interveners, thus it would require an active contribution from the parties to explain the differences between the implications of the same project to indigenous person and non-indigenous person. If such an explanation were provided to the ECtHR, the ECtHR could take the special features into account in its balancing test. In the current practice, for example, the size of the land area was one of the determinant factors in establishing that there was no such interference, which would have been illegitimate. However, if the Court had been aware that the size of the land does not have a similar significance to the non-indigenous person than for the lifestyle of an individual belonging to the indigenous community, it could transfer its focus to the implications for the private and family life of indigenous peoples.

The balancing test is closely connected to the application of Article 8(2) of the Convention, which the Commission also examined in its original decision. However, whereas the analysis of the Commission reflects the time of the decision, the circumstances have changed for the rewriting. The Commission determined that the economic interests justified the action, but in the rewritten judgment the application of the same standards resulted in different conclusions. The understanding of the special features of the indigenous culture is nowadays more detailed.

In the rewriting, the doctrines of the Convention as a living instrument<sup>557</sup> are incorporated into a basic setting. However, the international trends, for example, are not fully utilized in the rewriting, as it is more likely the Grand Chamber which makes reference to international developments. Another reason is to illustrate that the current doctrinal developments of positive obligations<sup>558</sup> and green jurisprudence can as such provide grounds for further development. As the Court bases its case law chiefly on previous cases, a similar style was adopted in the rewriting. An exception to the references to the international developments is made in relation to the ILO 169 Convention because Norway has ratified the Convention<sup>559</sup> and this reflects the change in the prevailing

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557 Popovic 2009, pp. 363–364

558 Mowbray 2004, pp. 145, 149, 181–186, 192 and 228

559 Uimonen 2011, pp. 742–747

conditions in Norway in relation to the Sámi peoples. The ECtHR has been willing to lend support to enforce domestic rulings and regulations, so the rewritten judgment treats the ILO 169 Convention similarly, as it has been ratified.

The rewritten judgment demonstrates that the strengthening of the protection of the indigenous peoples before the ECtHR would not need a doctrinal transformation as such, but updating the case law to match the prevailing conditions of societies and international law. As *Alta* is a product of its time, it is likely that the ECtHR would utilize the standards it has established in its current green jurisprudence rather than conduct a simplified balancing of interests in favour of the economic interests.

Despite the factors which support developing the case law on the ECtHR, there is still the probability that the judges have views on what issues should fall under the jurisdiction of the ECtHR and some might not include the affairs of indigenous peoples.

#### 4.3.3 Rewriting the Case Law: Case of *Handölsdalen and Others v. Sweden*

The context of the case of *Handölsdalen and Others v. Sweden* (2010) also concerned land rights issues. The background of the complaint was that the several landowners had lodged complaints against five Sámi villagers to deny the right of the Sámi villagers to reindeer grazing without a contract with the land-owners. The Sámi applicants lodged a complaint before the ECtHR and claimed that the rulings of the domestic courts were violating the rights of the Sámi to use the land for winter grazing within the meaning of Article 1 of Protocol no. 1 of the Convention, a violation under Article 6 § 1 of the Convention and a violation of Article 13 in conjunction with Article 1 of Protocol 1<sup>560</sup>. The ECtHR gave an admissibility decision and final ruling on these issues<sup>561</sup>.

The applicants claimed that “the Court of Appeal judgment were not prescribed by sufficiently clear and precise domestic law, as the grazing areas remain undefined, and did not strike a fair balance between the demands of the public and the rights of the Sami villagers.” Also, the applicants claimed a violation under Article 6 § 1 of the Convention due to the “insurmountable burden and standard of proof, as the Court of Appeal’s judgment shows that very specific evidence on the frequency and location of the reindeer grazing during several hundred years was required.” Besides, the Sámi claimed that they did not have effective access to court as the proceedings were lengthy and as the legal expenses amounted some 1.4 million euros, which necessitated taking a loan. Also, the claims included a violation of Article 13 in conjunction with Article 1 of Protocol no. 1.<sup>562</sup>

The case included two types of emergent developments. Already in facts of the case *Händölsdalen and Others v. Sweden* it was acknowledged that “their historical use of the

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560 ECtHR, *Handölsdalen Saami Village and Others v. Sweden*, 30 March 2010, paras 40–42

561 *Ibid.* and ECtHR, *Handölsdalen Saami Village and Others v. Sweden*, 17 February 2009

562 ECtHR, *Handölsdalen Saami Village and Others v. Sweden*, 17 February 2009, paras 40–42

land has given rise to a special right to real estate, the reindeer herding right.” Reference was made to the Swedish Reindeer Husbandry Act, which acknowledges the right of Sámi villages and their members to use land and water for maintenance of reindeer and the living of the Sámi<sup>563</sup>. Besides, the dissenting opinion from Judge Ziemele gives signs in which direction the ECtHR could go in the future. Judge Ziemele referred actively to the international developments and the need for special protection for Sámi people recognizing the vulnerability of the indigenous peoples. Ziemele also took the view that the approach adopted “excluded considerations relating to the specific context of the situation and rights of indigenous peoples.”<sup>564</sup>

Despite these emerging developments, the ruling did not alter the case continuum: the judgment was disappointing for the applicants. Instead of opting for an evolutive interpretation, the ECtHR focused on the definition of possession. The ECtHR assessed whether Article 1 of Protocol no. 1 was applicable, referring to the requirement of “possessions” and “legitimate expectations” on the applicant’s side and did not take into consideration that the applicants complied with the requirements.

The margin of appreciation explains the final result at least to some extent as the District Court and the Court of Appeals carried out extensive historical analyses on whether the winter grazing was part of the immemorial rights and came to the conclusion that the applicants did not comply with the domestic requirement of at least 90 years’ use of the land<sup>565</sup>.

### *Handölsdalen Sami Village and Others v. Sweden*

#### *Original decision and judgment Admissibility decision*

48. The Court reiterates that an applicant can allege a violation of Article 1 of Protocol no. 1 only in so far as the impugned decisions related to his “possessions” within the meaning of this provision. Possessions can be either “existing possessions” or

#### *Rewritten judgment*

It remains to be determined whether that claim constituted “possessions” or an “asset” under the Article 1 of Protocol No. 1.

The Court takes the view that the definition of “possessions” within the meaning of the wording of Article 1 of Protocol No 1 cannot be interpreted solely by reference to the

<sup>563</sup> *Ibid.*, para 3

<sup>564</sup> ECtHR, *Handölsdalen Saami Village and Others v. Sweden*, 30 March 2010, the Partly dissenting opinion of Judge Ziemele, paras 2–7. Reference was made to the 1989 ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries and the 2007 UN Declaration on the Rights of Indigenous Peoples, as adopted by General Assembly Resolution 61/295, Articles 26–27. Besides, reference as made to supervisory organs: the UN Working Group on Indigenous Populations, the UN Special Rapporteur on the Rights of Indigenous Peoples and the UN Expert Mechanism on the Rights of Indigenous Peoples. Also reference was made to General Comment No. 23 and cases examined by the Human Rights Committee under the International Covenant on Civil and Political Rights.

<sup>565</sup> ECtHR, *Handölsdalen Saami Village and Others v. Sweden*, 17 February 2009, paras 13–25

assets, including claims, in respect of which the applicant can argue that he or she has at least a legitimate expectation of obtaining effective enjoyment of a property right. By way of contrast, the hope of recognition of a property right which it has been impossible to exercise effectively cannot be considered a possession within the meaning of Article 1 of Protocol no. 1 (see *Kopecký v. Slovakia* [GC], no. 44912/98, § 35, ECHR 2004-IX, with further references).

49. In the present case, the national courts were called upon to determine whether, under the law in force, the four applicant Sami villages and the Idre Nya Sami village had a right to winter grazing for their reindeer on the specific property belonging to the 571 landowners in the municipality of Härjedalen. Thus, the object of the courts' examination was not to define or geographically demarcate the Sami right to such grazing.

50. As mentioned above, under section 3 of the 1971 Reindeer Herding Act, winter grazing may be carried out in such areas outside the reindeer grazing mountains where, since time immemorial, reindeer grazing has been conducted during certain times of the year. The exact delimitation of those areas not having been set out in the Act, the preparatory works of that Act and its predecessor states, as noted by the Court of Appeal in its impugned judgment, that it is for the courts to examine whether a right to winter grazing applies in a disputed area. This examination is to be made on the basis of the evidence presented concerning prescription from

domestic law of the respondent state (*Köning v. Germany*, para 88). The problem of the "autonomy" of the meaning of the definitions used in the Convention, compared with their meaning in domestic law, has been raised before the Court on the earlier case law in relation to such words as "charge" (Neumeister judgment of 27 June 1968, Series A no. 8, p. 41, para 18) and "criminal" (Engel and others judgment of 8 June 1976, Series A no. 22, p. 34, para 81).

The Court reaffirms that the same principle of autonomy applies to the concept of "possession" and "asset" as any other interpretation could lead to results incompatible with the object and purpose of the Convention (*Engel and others*, p. 34, para 81).

Whereas the Court has autonomy to interpret concepts, the Court notes that it "can and must" take account of elements by competent organs and the state practice in defining the meaning of terms and notions in the text of the Convention. The Court confirms its position that the consensus emerging from international instruments and practice may constitute a relevant consideration for the interpretation of the Court (*Demir and Baykara v. Turkey*, § 85).

In the present case, the interpretation of "assets" and "possessions" requires assessment of the evolution of the norms and principles applied in international law and in the domestic law of the relevant States Parties. Main purpose of the assessment is to evaluate if there is common ground in Nordic societies and the international community to interpret "assets" and "possessions" in the light of recent developments in the rights of indigenous peoples (see: *mutatis mutandis*, Marckx, § 41, *Demir and Baykara v. Turkey*, § 86).



time immemorial. It is evident that the outcome of such examinations may differ depending on the circumstances pertaining to the area in question and the available evidence.

51. Having regard to the foregoing, the right claimed by the applicants did not vest in them without the intervention of the courts. Their property interest was accordingly in the nature of a claim and cannot, therefore, be characterised as an “existing possession” within the meaning of the Court’s case-law (cf. the *Kopecký v. Slovakia* judgment cited above, § 41).

52. It remains to be determined whether that claim constituted an “asset,” that is whether it was sufficiently established to attract the guarantees of Article 1 of Protocol No. 1. In this context, it is of relevance whether a “legitimate expectation” of obtaining effective enjoyment of the alleged asset arose for the applicants in the context of the proceedings complained of. In the above-mentioned *Kopecký v. Slovakia* judgment, the Court examined the concept of “legitimate expectation” according to its case-law. It concluded, inter alia, that no legitimate expectation can be said to arise where there is a dispute as to the correct interpretation and application of domestic law and the applicants’ submissions are subsequently rejected by the national courts (see § 50). It further stated that where the proprietary interest is in the nature of a claim, it may be regarded as an “asset” only where it has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it (§ 52). This line of reasoning has been confirmed in

The main objective is to evaluate whether the Sámi people had a “legitimate expectation” of obtaining effective enjoyment of the alleged asset in the given context.

The Court notes that, as the Government has accepted, the applicants belong to an indigenous community.

The Court refers to its previous finding that the vulnerable position of minorities (*Winterstein and Others v. France*, § 88) should also be applied to the Sámi people. Consequently, special consideration should be given to the needs and different lifestyle of the individuals belonging to communities of indigenous peoples in reaching decisions about environmental decision-making, including land management (see Connors, § 84). In cases like the present one, the special position of the applicants as an underprivileged social group and their special needs must be taken into account in the assessment that the national authorities are obliged to do (*Yordanova and Others*, §§ 129 and 133)

The Court further notes that the Inter-American Court of Human Rights has developed relevant case law on the definition of possessions in the context of indigenous peoples and their traditional lands. While conscious of the fact that the jurisdiction of the Inter-American Court of Human Rights differs from its own, the Court nevertheless observes that similar criteria are applicable in the present case. The Inter-American Court of Human Rights held in the case of *Sarayaku v. Ecuador*, that:

145. notions of land ownership and possession do not necessarily conform to the classic concept of property but deserve equal protection under Article 21 of the American Convention. Ignoring the specific forms of the right to the use and enjoyment of property based on the



later judgments (see also: *Eskelinen and Others v. Finland* [GC], no. 63235/00, § 94, 19 April 2007).

53. In regard to the applicant's claim in the present case, it should first be noted that the Supreme Court in the so-called "Taxed Mountains Case" in 1981 had concluded that the rights pertaining to reindeer herding were exhaustively regulated by the Reindeer Husbandry Act. As the right to winter grazing thus was dependent on the conditions for prescription from time immemorial being met, the claim to be examined by the courts was the applicants' assertion that they had used the disputed land in such a way and for such a long time that a right based on prescription had arisen on the property in question.

54. In determining this issue, the District Court and the Court of Appeal had regard to extensive evidence dating back several hundred years. Reaching the conclusion that the applicants had not shown that the claimed right existed, notably that the Sami had not used the land for a sufficient length of time without objections from the landowners concerned, the courts gave detailed reasons for the different periods of time. Considering that it has only limited power to deal with alleged errors of fact or law committed by the national courts (see: *inter alia*, *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I), the Court finds no appearance of arbitrariness in the way in which the District Court and the Court of Appeal determined the applicants' claim.

55. While the domestic law did not give indications for the applicants to know for certain whether the requisite elements

culture, practices, customs and beliefs of each people, would be tantamount to maintaining that there is only one way to use and dispose of property, which, in turn, would render protection under Article 21 of the Convention illusory for millions of people.

The Court notes that the rights of indigenous peoples in Europe would be similarly endangered if their culture and lifestyle do not protect their property rights with regard to reindeer herding.

The relationship between the environment and the indigenous communities has been continuously recognized in the case law of the Inter-American Court of Human Rights (*Sarayaku v. Ecuador*, § 148), international agreements such as the Declaration on the Rights of Indigenous Peoples, ILO Convention no 169 and the domestic legislations.

The Court holds that it cannot disregard that there has been increasing international awareness of the necessity to protect the survival of cultures of indigenous peoples, including traditional activities such as reindeer herding.

The Court acknowledges that the domestic courts have assessed extensive evidence dating back a hundred years about the use of land. However, the interpretation does not result in effective protection of the rights of the present Sámi generations.

The Court reaffirms that the Convention is intended to protect effective rights, not illusory ones, and therefore a fair balance between the various interests at stake may be upset not only where regulations to protect the guaranteed rights are lacking, but also where they are not duly complied with (see: *Moreno Gómez v. Spain*, no. 4143/02, §§ 56

for a right based on a prescription from time immemorial were at hand in the instant case, the fact remains that this issue was to be determined in the judicial proceedings. Having examined the evidence, the courts found that this was not the case. In these circumstances, the Court is not satisfied that the applicants' claim to a right to winter grazing on the disputed property was sufficiently established to qualify as an "asset" attracting the protection of Article of Protocol No. 1. Thus, the applicant did not have a "possession" within the meaning of that provision.

56. It follows that Article 1 of Protocol No. 1 is not applicable to the present complaint and that it must be rejected as being incompatible *ratione materiae* with the provisions of the Convention, in accordance with Article 35 §§ 3 and 4.

-----Judgment

51. The Court reiterates that the Convention is intended to guarantee practical and effective rights. This is particularly so of the right of access to a court in view of the prominent place held in a democratic society by the right to a fair trial. It is central to the concept of a fair trial, in civil as in criminal proceedings, that litigants are not denied the opportunity to present their case effectively before the court and that they are able to enjoy equality of arms with the opposing side. Article 6 § 1 leaves to the State a free choice of the means to be used in guaranteeing litigants the above rights. The institution of a legal aid scheme constitutes one of those means, but there are others, such as for example simplifying the applicable procedure. The question of whether the provision

and 61, ECHR 2004X, *Dubetska and Others v. Ukraine*, § 144).

The logic of the domestic courts is that if there are long historical roots, 90 years, for winter grazing, the present generation will enjoy access to use the lands. However, if they do not have this historical background, they do not have the right. Accepting this logic would result in the present applicants complying with the time requirement at a later stage in their lives and would enjoy protection in the future, but not at present. Such an interpretation is against the object and purpose of the Convention to ensure effective protection.

The Court acknowledges that the international developments together with the regional developments on drafting the Nordic Saami Convention support the dynamic interpretation of "asset" and "possession," constituting a violation of Article 1 of Protocol No. 1.

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Article 6 § protects the right of access to a court and the right to a fair trial.

The question whether the provision of legal aid was necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of the case. The assessment will include the importance of what is at stake for the applicants in the proceedings, the complexity of the relevant law and procedure and the applicants' capacity to represent themselves.

Firstly, the Court notes that it is necessary to assess the relationship between the indigenous peoples and their traditional lands, to determine the level of importance of the proceedings for the Sámi people.

of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend, inter alia, upon the importance of what is at stake for the applicants in the proceedings, the complexity of the relevant law and procedure and the applicants' capacity to represent themselves effectively.

The right of access to a court is not, however, absolute and may be subject to restrictions, provided that these pursue a legitimate aim and are proportionate. It may, therefore, be acceptable to impose conditions on the grant of legal aid based, inter alia, on the financial situation of the litigants or the prospects of success in the proceedings. Moreover, it is not incumbent on the State to seek, through the use of public funds, to ensure total equality of arms between the parties to the proceedings, as long as each side is afforded a reasonable opportunity to present their case under conditions that do not place them at a substantial disadvantage vis-à-vis the adversary (see: *Steel and Morris v. the United Kingdom*, cited above, §§ 59–62, with further references).

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54. First, as regards what was at stake for the applicants, it is reiterated that the national courts examined whether they had a right to free winter grazing on the land in question. As the proceedings concerned property belonging to 571 landowners, the issue determined was undoubted of considerable importance to the applicants.

55. Furthermore, with respect to the complexity of the case, it is to be noted that the Reindeer Husbandry Act does

The Court refers to the legal test developed by the Inter-American Court of Human Rights on the relationship between indigenous peoples and their traditional lands. The Inter-American Court of Human Rights held in the case of *Sarayaku v. Ecuador* (§ 148) that the Court must take into account:

“(i) that this relationship can be expressed in different ways depending on the indigenous group concerned and its specific circumstances, and (ii) that the relationship with the land must be possible. How this relationship is expressed may include traditional use or presence, through spiritual or ceremonial ties; sporadic settlements or cultivation; traditional forms of subsistence such as seasonal or nomadic hunting, fishing or gathering; use of natural resources associated with their customs or other elements characteristic of their culture.<sup>162</sup> The second element implies that Community members are not prevented, for reasons beyond their control, from carrying out those activities that reveal the enduring nature of their relationship with their traditional lands.”

As in the present case, the proceedings concerned the possibilities of the indigenous peoples to practise their traditional culture and economic activities as well as the rights of numerous landowners; the issue is of considerable importance to the parties.

The Court also acknowledges the complex nature of the case. The case has included an assessment of the historical evidence on the use of the law. Also, the case requires assessment of the international protection of indigenous peoples.

The Court considers that the vulnerable position of the applicants should be taken into account, when assessing the legal costs

not regulate which particular pieces of land may be used for winter grazing, but leaves it to the courts to determine disputes on the basis of the evidence presented. The proceedings in issue involved an examination of reindeer herding in the area over several centuries and the applicants, in claiming a right to winter grazing, were called upon to show that the Sami had used the land unchallenged for at least 90 years. In these circumstances, it is evident that the case was of a complex nature.

56. Against this background, the Court must assess the extent to which the applicants were able to present their case despite the legal costs incurred. (– –)

(– –)

59. In conclusion, the Court does not doubt that the applicants' adversaries, the landowners, had greater financial resources. Moreover, the complexity of the case, having a bearing also on the length of the proceedings, certainly contributed to the costs that the applicants had to bear. However, examining the proceedings as a whole, the Court finds that the applicants were afforded a reasonable opportunity to present their case effectively before the national courts and that there was not such an inequality of arms vis-à-vis the landowners as to involve a violation of Article 6 § 1 of the Convention.

incurred. Despite their capability to hire a legal representative and gather information to bring before the court, the burden of proof has been unreasonable.

The Court notes that the position of the landowners and the members of the indigenous communities are different in Swedish society. The Sámi people are a marginalized, vulnerable group, whereas the landowners do not belong to a socially underprivileged group. Furthermore, the landowners were financially in a better position to pay the costs of the proceedings.

Examining the proceedings as a whole, and also taking into account the length of the proceedings and the vulnerable position of the Sámi people in Swedish society, the Court finds a violation of Article 6 § 1 of the Convention.

#### 4.3.4 Explaining the Logic of Rewriting and Other Remarks

The rewriting of the case includes the incorporation of several techniques of interpretation. The rewriting started with a reformulation of the definitions of “possessions” and “asset” under Article 1 of Protocol No. 1, because it provides a starting point to recognize that the traditional economic activities based on the use of natural resources satisfy the conditions of Article 1 of Protocol No. 1 of the Convention. Whereas the original judgment based the definition on the domestic definitions and its previous case law, the approach of the rewritten judgment incorporates the concept of the autonomy of concepts to ensure the protection of the object and purpose of the Convention. Effective protection is only possible if the traditional economic activities enjoy the same protection as do other property related activities.

The autonomy of concepts in the domestic law leaves space for the ECtHR to discuss its understanding but also affords the option to draw inspiration from international interpretation. Consequently, the rewriting relies on the fact that the Court itself has stated that it “can and must take into account” the contemporary development of both international and national standards<sup>566</sup> related to the rights of indigenous peoples. The ECtHR has also utilized the doctrine in its green jurisprudence so it would not radically alter the current practice of the Court. It should be noted, however, that in general the ECtHR is more likely to refer to international instruments in the Grand Chamber. The involvement of the third-party interveners could also increase the awareness of the Court of the international development, which would make it easier to refer to relevant documents.

The argumentation that there is a necessity to redefine “asset” and “positions” relies essentially on evaluating the “legitimate expectation” of the applicants due to their internationally and nationally recognized vulnerable position. Nationally, in the Nordic countries, for example, Finland recognizes that reindeer herding can qualify as a property and it enjoys constitutional protection.

There is no doctrinal barrier preventing the ECtHR from explicitly establishing that indigenous peoples are vulnerable. In the rewritten judgment the basis of the vulnerability is expressed similarly as in respect to the Roma people. The vulnerability arises from membership of a social group that is marginalized in society. The marginalization and discrimination will impede the capacity of the group and the individual members of the group to enjoy fully their rights.<sup>567</sup>

The rewritten judgment uses the same doctrine developed in the Roma context, referring to the need for special consideration of their needs and lifestyles.<sup>568</sup> This approach recognizes the discrimination based vulnerability<sup>569</sup> that indigenous communities face. The

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566 ECtHR, *Demir and Baykara v. Turkey*, 12 November 2008, paras 147–151

567 Sijniesky 2014, pp. 266–267

568 ECtHR, *Chapman v. the United Kingdom*, 18 January 2001, para 96

569 Sijniesky 2014, pp. 266–267

significance of the utilization of the vulnerability approach is that it empowers individuals belonging to marginalized groups to request greater protection from the state. Whereas less vulnerable individuals are capable of taking sufficient measures against human rights abuses, the vulnerable position of the applicants results in a lack of similar resources.

In the rewriting, space is given to the example from other legal frameworks, such as the Inter-American Court of Human Rights. While this is not a regular practice of the ECtHR as such, it has similarly borrowed a legal test from the ITLOS in the case of *Mangouras v. Spain* (2010)<sup>570</sup>. Thus the purpose was to demonstrate that in areas where the ECtHR needs support, it can be flexible and draw inspiration from various instruments. For the rewriting of the case, the references to the Inter-American Court of Human Rights provided a similar context in the assessment of ownership and possession. In practice, however, it is also possible that the ECtHR could also disassociate itself from the practice of the Inter-American Court of Human Rights by explaining the differences between the rights protected by the courts. Most probably opinions in the ECtHR were divided, as it has not actively utilized the case law of the Inter-American Court of Human Rights.

In addition to using a legal test from another legal framework, in the rewritten judgment the instruments are used to establish that there is increasing international awareness, which influences the interpretation of the ECtHR and provides support for adopting a dynamic interpretation. In the rewriting of the case, the international development underlines the need to ensure that the rights of the applicants are effectively protected. Thus in the rewriting the ECtHR sets aside the national requirement of 90 years of winter grazing and focuses on the fact that the applicants are indigenous peoples practicing their culture even though they may not comply with the technical time requirement.

In addition to Article 1 of Protocol 1 of the Convention as a basis for the rewriting, Article 6 of the Convention on the right of access to court and to a fair trial served as a further basis. The rewritten judgment adopted the same test as that used in the actual judgment on the basis of the argumentation. The test included an assessment of the importance of the issue for the applicants, the complexity of the relevant law and procedure as well as the applicants' capacity to represent themselves in the case. Whereas in the real judgment the ECtHR concluded that the applicants were able represent themselves in this complex case, which was indeed of importance for them, the rewritten judgment made different conclusions.

The different conclusions are based on recognizing the status of the applicants as indigenous peoples with different needs due to their special lifestyle. The importance of the matter, the access to the land, is inherently connected to the relationship between the indigenous peoples and the land. Supporting arguments for the rewriting were again found in the case law of the Inter-American Court of Human Rights, where a test of the relationship between the indigenous peoples and the land has been established. Acknowledging the existence of a relationship between the indigenous peoples and their

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570 ECtHR, *Mangouras v. Spain*, 28 September 2010, para 89



land would be one of the most important considerations as it is connected to the survival of the whole culture.

Concerning the complexity of the case, the rewritten judgment acknowledged the complexity due to the assessment of the historical evidence and connections to international standards. Also, the rewritten judgment takes account of the vulnerable position of the applicants, which in turn affects the assessment of the proportionality of the proceedings.

#### 4.4 Concluding remarks

The case law of the ECtHR concerning indigenous peoples has not been extensive, and the special relationship between the land and the indigenous peoples has not been reflected in the judgments. To some extent this is explained by the timing of the cases and the weaknesses of the facts. The early case law of green indigenous claims, such as *Alta* case, dates back to the time when the indigenous rights development had not yet established itself, protection of minorities under the ECHR was only in its infancy, and even the greening of the rights of the ECtHR was only taking its first steps<sup>571</sup>. The present day conditions with respect to the rights of indigenous peoples in the Nordic countries are different from the era of *Alta* case. The legislative measures have been continuously developing, and the domestic rulings have strengthened the level of protection. The societal change also provides reasons for the ECtHR to amend its current position. The earliest cases were at a time when the development of international law on indigenous peoples was only starting, whereas the contemporary international law has increasingly recognized the need to protect the relationship between the environment and indigenous peoples. In addition, the facts of the *Alta* case were not exceptionally severe as reindeer grazing was not totally banned, but only limited to some extent. The outcome of the case could have been different if the level of severity had been more significant. Consequently, there are no legal barriers as such to developing the case-law, but rather the factual circumstances were not favourable for the development.

Furthermore, the protection of the rights of the individuals belonging to communities of indigenous peoples does not necessarily require specific recognition of group rights and indigenous rights but may incorporate the conventional logic of the ECtHR to protect individual rights. For example the Finnish Sami have made the interpretation that lack of success before the ECtHR means that the ECtHR is incapable of providing additional safeguards to protect their rights<sup>572</sup>. This impression and disappointment has hindered the development; not all potential cases are taken before the ECtHR, but rather to other human rights supervisory organs under the United Nations. Thus, if the ECtHR wants to maintain its legitimacy in the eyes of indigenous communities, it should in the future case

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571 Koivurova 2011, pp. 1–2

572 Findings are based on field trips to Käsivarsi, Lapland, Finland to Finnish Sami communities in 2015 in project *Saisiko olla ympäristökonfliktisoppaa*, funded by Kone foundation.



law take greater account of the vulnerable position of the indigenous peoples and recognise the relationship between the indigenous peoples and nature. The legitimacy aspect should not be underestimated, as the development is totally dependent on the motivation of the potential victims to submit their case before the ECtHR.

The rewriting of the current green jurisprudence concerning indigenous peoples illustrates that there are no significant doctrinal limitations to departing from the present case continuum and utilizing the current doctrinal development to strengthen the level of protection. However, the benefits of strengthening would be significant; the ECtHR could enhance its legitimacy in the eyes of indigenous communities. Under the current case law there are several approaches to developing the argumentation.

The contemporary green positive obligation doctrine includes an obligation to conduct sufficient impact assessment of the activities related to land management and environmental activities. This impact assessment has also required the cultural and social implications of the activities to be assessed. However, this requirement has not been central in the current case law of the indigenous peoples as the claims have not been made under Article 8. The application of this doctrine in the context of the indigenous peoples would render visible the relationship between traditional culture and nature. If a state has failed to conduct a sufficient impact assessment, this may constitute a violation of private and family life under Article 8 of the Convention. The development requires capability on the part of the applicants and the third-party interveners to formulate their claim on the basis of Article 8 of the Convention with the supporting evidence about the failure of the state to take account of the cultural and social implications.

As the greening of rights related to indigenous peoples has been more significant in other international platforms, the utilization of international trends would provide significant support for the ECtHR to develop its argumentation. The dissenting opinion of Judge Ziemele made references to the international development of the rights of indigenous peoples and their vulnerable position. This suggests that inside the ECtHR there is an awareness of the developments and that further steps are possible. The applicants and the third-party interveners could provide the ECtHR with persuasive evidence and argumentation about the emerging international consensus and encourage the ECtHR to take account of the domestic development in the protection of nature for the sake of the survival of the culture of the indigenous peoples.

## 5 CLIMATE CHANGE AND THE ECTHR

### 5.1 Introduction

Climate change is increasing the occurrence of droughts, floods, extreme heat and severe storms. The implications of climate change will affect, for example, living conditions, food production and access to drinkable water. Climate change thus has undeniable global impacts on the enjoyment of human rights. It has been estimated that climate change will affect the right to life, to health, to food, to clean water and several other human rights<sup>573</sup>.

The number of responses to climate change in the United Nations framework to climate change<sup>574</sup> as such has increased, including responses related to climate change and human rights.<sup>575</sup> For example, the UN Special Rapporteur on human rights and the environment has studied the topic and made its recommendations<sup>576</sup>. However, the major climate change agreements have been compromises, including the most recent Paris Accord, where human rights have been mentioned in the preamble<sup>577</sup>, but the Accord does not include a specific provision or enforcement mechanism.

In addition to the responses of the international organizations, there has been scholarly interest in the assessment of the relationship between human rights and climate change and the search for suitable political and legal solutions.<sup>578</sup> The approaches vary from

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573 The Office of the High Commissioner for Human Rights, *Understanding Human Rights and Climate Change*, submission to the 21st Conference of Parties to the UNFCCC, 27 November 2015, pp. 13–24

574 See for example: Freestone 2011, pp. 5–12

575 Bothe 2003, pp. 239–254, United Nations Framework Convention on Climate Change (2009) Decision 2/CP.15, The Copenhagen Accord (UN Doc. FCCC/CP/2009/11/Add.1). United Nations, New York. United Nations Framework Convention on Climate Change (UNFCCC) (2007) Decision 1/CP.13 The Bali Action Plan. FCCC/CP/2007/6/Add.1. Bonn, United Nations, United Nations Human Rights Council (UNHRC) (2009). Res. 10/4, U.N. Doc. A/HRC/10/L.30. UNHRC, Geneva. United Nations Human Rights Council (UNHRC) (2008). Res. 7/23 on human rights and climate change, UN Doc. A/HRC/7/78. UNHRC, Geneva, United Nations, Human Rights Council (2010), *Applying a Human Rights-Based Approach to Climate Change Negotiations, Policies and Measures*, Resolution 10/4, 25 March 2009, Quirico – Boumghar 2015

576 HRC, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/31/52, pp. 20–21

577 See for example: Mayer 2016, pp. 109–117

578 Limon 2009, p. 455, Wewerinke – Doebller 2011, p. 157, Knox 2009, p. 212, Sachs 2006, pp. 349–369, Morgera 2013, pp. 350–390, Cameron 2016, Bodansky 2010, pp. 511–524

utilizing the current UN human rights framework to the establishment of new regimes<sup>579</sup>. However, even less researched is the field of human rights concerning climate change in the context of the European Court of Human Rights.

The reasons for this lack of interest in researching the ECtHR for climate change litigation could include that research on the European Court of Human Rights is often reactive, not proactive and in the absence of case law on climate change, research interest has been slight. Moreover, no specific attempt has been made to create a new Protocol in relation to climate change, to clarify the scope of protection under the ECHR. However, it would be important to assess the suitability of the ECtHR as an organ to tackle climate change as climate change will undeniably endanger the protection of the rights for which the ECHR stands.

Even though the framework of the ECtHR was established primarily to process individual claims on a territorial basis, in theory it does not, nor should it, prevent the ECtHR from affording in practice effective and practical safeguards to the victims of global human rights infringements related to the environment, which are a significant and growing contemporary human rights problem. One purpose of this chapter is to demonstrate that it is possible to establish liability for a single state through positive obligations under the ECHR, even though the phenomenon of climate change is inherently global in nature. Adopting this approach enables effective protection of human rights without necessitating any major doctrinal change.

The current greening of the jurisprudence has been a reaction from the ECtHR in response to the same environmental issues that have raised concerns in the States Parties. The logical corollary natural step is for the greening of the jurisprudence of the ECtHR to be extended to global environmental catastrophes, such as climate change, which has been a shared concern of all the States for several years. The national courts, such as Dutch court in the *Urgenda* case<sup>580</sup> have already discussed the relationship between the ECHR, the green jurisprudence of the ECtHR and climate change and there are other applications pending in national proceedings. In the case of the *Urgenda* a citizens' platform including 886 individuals sued the Netherlands before the District Court of the Hague due to the inaction of the state to reduce its emissions.<sup>581</sup> In its judgment, the District Court of the Hague referred actively to the green jurisprudence of the ECtHR. Despite not accepting the applicability of Articles 2 and 8 of the ECHR due to their failure to meet the victim criteria, the Hague District Court stated, that Articles 2 and 8 of the ECHR "hold meaning" for the legal analysis in relation to the duty of care.<sup>582</sup> The Court made a reference to the "Manual on human rights and the environment" as well as to the European Social Charter and its supervisory organ, the European Committee of Social Rights. The

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579 See for example: Wewerinke-Singh 2018, pp. 75–89, Atapattu 2018, pp. 128–144

580 Rechtbank Den Haag, The District Court of the Hague, *Urgenda* C/09/456689, 13-1396, 24 May 2015

581 *Urgenda* C/09/456689 / HA ZA 13-1396, 24-06-2015

582 *Ibid.*, para 4.109, 4.52

Hague District Court first explained that the environmental jurisprudence of the ECtHR has developed as “the interpretation of the rights and freedoms is not fixed but can take account of social context and changes in society”. The statement shows that the national court acknowledged the “living instrument” and “dynamic interpretation” doctrine as well as the contextualism underlying the development of the green jurisprudence of the ECtHR. Furthermore, the Dutch court recognized the tendency of the ECtHR to use comparative materials as it stated “The Court has also made reference, in its case law, to other international environmental law standards and principles”.<sup>583</sup>

The Dutch court also quoted in detail the current developments of the green jurisprudence in relation to the positive obligations under Article 2 of the ECHR to guarantee the right to life when activities endangering the environment also create a threat to human life. In relation to these positive obligations, preventive obligations were mentioned. Furthermore, the Dutch court quoted state obligations under Article 8 of the ECHR, where the minimum threshold of the harm was discussed in relation to the intensity and duration of the harm. In addition, the quotation pointed out that the environmental harm need not be caused by public authorities, but that state obligations may arise if the state authorities fail to control private actors<sup>584</sup>. The Hague District Court further stated that the ECHR standards could be used in assessing “what degree of discretionary power the State is entitled to in how it exercises the tasks and authorities given to it” and in “determining the minimum degree of care the State is expected to observe.”<sup>585</sup> The Hague District Court made a general reference to the jurisprudence of the ECtHR in the latter judgment. It held that:

If, and this is the case here, there is a high risk of dangerous climate change with severe and life-threatening consequences for man and the environment, the State has the obligation to protect its citizens from it by taking appropriate and effective measures. For this approach, it can also rely on the aforementioned jurisprudence of the ECtHR.<sup>586</sup>

While the reference is not very detailed, it permits the interpretation that the Hague District Court was referring to the positive obligations doctrine of the ECtHR and was backing up its own argumentation. The Hague District Court concluded in its judgment that the Netherlands has a duty to take more effective measures to reduce the emissions on its territory and consequently the state has to ensure that domestic emissions in the year 2020 will be at least 25% lower than in 1990. The state has appealed, so it is possible that the case will at some point end up before the ECtHR<sup>587</sup>.

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583 *Ibid.*, 4.48hb vg

584 *Ibid.*, para 4.49

585 *Ibid.*, para 4.52

586 *Ibid.*, para 4.74

587 *Urgenda, Climate Change Case*, <http://www.urgenda.nl/en/climate-case/> (last visited 11 January 2018)

It is probable that after exhaustion of domestic instances at some point there applications will come before the ECtHR with regard to climate change. Before these applications come before the ECtHR, there will be time to consider how to utilize the developments in the green jurisprudence of the ECtHR in the national proceedings. However, whereas the climate change litigation is in its infancy even in the domestic context, it is unlikely that there will be any judgments from the ECtHR in the near future; these things take time.

The reason why there is no time to wait for the first judgment is that climate change is an extraordinary and wicked problem putting at risk the living requirements of the Earth. At the same time, the mechanisms related to climate change are difficult to apply in a local context, as the phenomenon is global in nature. The academic community and the United Nations have recognized that, in principle, climate change constitutes a threat to human rights. However, before the court, it is necessary to establish a causal link between climate change and a specific human rights violation. The task is difficult and even scientists are struggling to prove that a specific environmental hazard is beyond reasonable doubt caused by climate change. There is evidence that climate change will increase extreme heat and other weather conditions, such as storms, but the difficulty arises in proving that a specific environmental hazard was caused by climate change. Natural phenomena and environmental hazards are extremely complex to explain as there are so many factors involved. Consequently, scientific research is time-consuming and requires resources. Even case studies are often broader in nature than the implications of climate change for the specific hazard and person. The applicants in the case may be unable to access such scientific knowledge which would enable them to build convincing argumentation on the causal link between climate change, environmental hazards, inaction from the state and the human rights of the applicant.

In a legal sense, too, climate change is problematic and has multiple perpetrators. If shared and extraterritorial liability is to be established, this fits poorly into the current legal frameworks. The most drastic implications have been estimated to be in developing countries that have not been significant contributors. The developing countries have also the greatest struggles to adapt to the changes due to lack of financial means. Thus the acceptance of primary responsibility on the basis of territoriality would result in an unreasonable burden on developing countries, whereas Western countries that have been historically the biggest contributors to the carbon emissions would not be held responsible. Consequently, the legal community has not only been striving to adopt territorial liability but has also discussed other options. Adopting the idea of common but shared responsibilities takes the burden away from the states, often developing states which suffer most from the implications of climate change and which have not been the major contributors to the climate change<sup>588</sup>. In theory, the extraterritorial liability doctrine of the ECtHR could provide protection for victims in developing countries. However, the current doctrine of extraterritoriality is very narrow and the conditions require effective control of the area. This would mean that the

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588 Voigt 2008, p. 20

likelihood of compliance with the current doctrine would require military occupation or similar in developing country. Additional legal challenges include establishing a causal link between the act or omission of the State Party to the ECHR, the climate change and the harm caused to the victim in the developing country. Establishing such a link in practice is very difficult. For these reasons, in this dissertation rewriting is not suggested in relation to climate change and victims in developing countries.

Due to these legal and practical problems, prior discussion is necessary to empower the applicants and the ECtHR to build argumentation concerning such a difficult problem. Research can support the strategic litigants so that they would be aware of the risks and opportunities relating having recourse to the ECtHR. Furthermore, academia can contribute to the argumentation of the ECtHR by analysing the applicability of the current doctrines in the context of climate change. This chapter analyses the appropriateness of the ECtHR for climate change and human rights litigation and provides rewritten case examples of how the argumentation of the ECtHR could be in the climate change context. The first perspective assesses the theoretical opportunities available to a single state to establish climate change liability before the ECtHR with regard to that state's citizens (territorial liability). The inspiration is drawn from the Dutch *Urgenda* case and the Vienna airport case on human rights and climate change.<sup>589</sup> Furthermore, one of the most famous green cases, *Hatton and Others v. the United Kingdom* is rewritten to illustrate how the argumentation of the ECtHR could be at the present time. In the second part the purpose is to assess the applicability of the doctrines of extraterritoriality<sup>590</sup> and shared liability<sup>591</sup>. The ECtHR has established extraterritorial human rights obligations<sup>592</sup> and shared responsibility that provide guiding principles for climate change litigation, even though there is as yet no green jurisprudence on extraterritoriality or shared liability. In the end of the chapter, a hypothetical case is discussed. This case draws inspiration from two real-life cases, namely the Arctic Sunrise Case (*Kingdom of the Netherlands v. Russian Federation*)

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589 The Hague District Court ruled that the Netherlands must take more action to reduce greenhouse gas emissions in its territory. The Court ruled that the Netherlands should ensure that domestic emissions are at least 25% lower than 1990 levels by 2020. The Dutch Government has appealed the decision. Rechtbank Den Haag, The District Court of the Hague, *Urgenda* C/09/456689, 13-1396, 24 May 2015, see in particular paras 3.2., 4.45, 4.46, 4.49, 4.52, 4.74. Furthermore Vienna airport case developed discussion on the use of scientific data and environmental values. However, note that the Vienna airport case was overturned: Physorg, *Climate change can't halt Vienna third runway: court*: <https://phys.org/news/2017-06-climate-halt-vienna-runway-court.html> (last visited 26 February 2018)

590 In the environmental context, the literature rarely refers to extraterritorial liability terminology, but instead to transboundary damage and liability. However, as the assessment is made in the context of the ECtHR, I will use the terminology which is currently used by the ECtHR itself. On transboundary environmental damage see for example Rosas 1991

591 See, for example: Boyle 1991, p. 378, Francioni 1991, p. 279

592 See, for example: Heiskanen – Viljanen 2014, p. 285

from the International Tribunal on Law of the Sea<sup>593</sup> and the case of *Women on Waves and Others v. Portugal* from the ECtHR.<sup>594</sup>

## 5.2 The Basis for the Liability of a Single State in a Climate Change Context

### 5.2.1 Territorial liability

The assumption in the European Convention on Human Rights is that the state's responsibility is primarily connected to its territorial liability: the state is responsible for its actions and the controlling of the acts of others inside its territory<sup>595</sup>. Climate change is caused by both state and private actors around the world and its implications vary depending on the state concerned. For these reasons there are practical and legal difficulties in establishing the sole responsibility of a single state. However, the Dutch *Urgenda* case affords an example of how to approach this question. The Hague District Court held that even though there are multiple parties causing the global emissions, it is within the power of the state to control the collective emission levels inside its country. The Dutch court took the voluntary commitment of the Netherlands to international climate change agreements as acceptance of this responsibility<sup>596</sup>. The applicants of the Dutch *Urgenda* case formulated their claim as follows:

the State acting unlawfully by, contrary to its constitutional obligation (Article 21 of the Dutch Constitution), mitigating insufficiently as defined further in international agreements and in line with current scientific knowledge. In doing so, the State is damaging the interests it pursues, namely: to prevent the Netherlands from causing (more than proportionate) damage, from its territory, to current and future generations in the Netherlands and abroad. Furthermore, *Urgenda* argues that under Articles 2 and 8 of the ECHR, the State has the positive obligation to take protective measures. *Urgenda* also claims that the State is acting unlawfully because, as a consequence of insufficient mitigation, it (more than proportionately) endangers the living climate (and thereby also the health) of man and the environment, thereby breaching its duty of care. *Urgenda* asserts that in doing so the State is acting unlawfully towards *Urgenda* in the sense of Book 6, Section 162

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593 See also: ITLOS, Case no 22, *The Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation)*, *Provisional Measures*, <https://www.itlos.org/en/cases/list-of-cases/case-no-22/> (last visited 26 February 2018)

594 ECtHR, *Women on Waves and Others v. Portugal*, 3 February 2009

595 For literature on territoriality see: Buyse 2008, pp. 269–296

596 Rechtbank Den Haag, The District Court of the Hague, *Urgenda C/09/456689*, 13-1396, 24 May 2015, para 4.66.



of the Dutch Civil Code, whether or not in combination with Book 5, Section 37 of the Dutch Civil Code<sup>597</sup>.

Applying the similar logic, climate change cases can be formulated to comply with the logic and rules of territorial liability under the ECHR. The case illustrates that even though it is European domestic case, the impact can be global: if the courts compel the states to comply with ambitious goals to mitigate climate change this will also have a positive impact on the developing countries. The landmark case in the context of the ECtHR on climate change and human rights would have an even wider impact as it can establish the European minimum standards.

The analysis of territorial liability entails modelling public interest argumentation in climate change, assessing the awareness of the state requirement, the role of the burden of proof and the suitability of the doctrine of positive obligations. The findings will be put into practice in the rewriting of *Hatton and Others v. the United Kingdom* case concerning the increased use of the airport.

### 5.2.1.1 Building Public Interest Argumentation on Climate Change

The ECtHR is capable of protecting rights under the ECHR and is able to acknowledge the necessity of protecting the public interest, as in environmental protection. Recognizing climate change as a public interest could enable the ECtHR to assess whether the states have succeeded or failed to strike a fair balance between competing interests, such as economic interests and climate change. It would thus be important for the ECtHR to explicitly recognize the relationship between the realization of human rights and climate change as in the fictitious case. Without general recognition of the connection between climate change and human rights problems the ECtHR is unlikely to proceed.

As the ECtHR has provided no legal definition of public interest predicting the suitability of climate change as a public interest entails analysis of the current case law. The existing green case law has continuously recognized that the environment plays an increasing role in contemporary societies<sup>598</sup>. As regards establishing the status of the environment as a public interest, the ECtHR has often made reference to the international, European or domestic development<sup>599</sup>. Recognition of the public interest role of the measures against climate change would be a natural corollary to the current case law. Assessment of the statements of the current international scientific community on climate change suggests that consensus

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597 *Ibid.*

598 *Commission, Uuhiniemi and others v. Finland*, 10 October 1994, ECtHR, *Fägerskiöld v. Sweden*, 26 February 2008 (decision on the admissibility), ECtHR, *Fredin (no. 1) v. Sweden*, 18 February 1991

599 ECtHR, *Mangouras v. Spain*, 28 September 2010 (GC), para 86

on the severity of the climate change can indeed be established<sup>600</sup>. Furthermore, there are significant civil movements on climate change<sup>601</sup>. Several states have passed national climate laws in Europe<sup>602</sup>, and there are also the domestic rulings of the courts on climate change<sup>603</sup>. All these developments illustrate an increase in the ongoing attempts to mitigate climate change: Mitigating climate change is a public interest for civil societies and the international community alike.

Even though in principle the fight against climate change might constitute a harmonious continuance of current green jurisprudence, there are areas of case law where the ECtHR has consistently established that economic interests legitimately override environmental and individual interests. Most of these cases relate to airports. One of the most famous cases concerning the airports is that of *Hatton and Others v. the United Kingdom*, which concerned an increase of night air traffic over Heathrow airport<sup>604</sup>. In the Hatton case, the focus was on balancing between economic considerations and the rights of individuals to protection against noise pollution, but the questions related to the climate change were not pivotal issues.

However, on the European domestic level there are signs of change. The landmark case in Austria showed that mitigating climate change was a priority public interest overriding other interests, such as those of public economy. The federal administrative court of Vienna gave a ruling banning the construction of a new runway at Vienna airport despite the positive economic considerations<sup>605</sup>. The reasoning was that the project would increase greenhouse emissions, air pollution and consequently climate change and thus was not in compliance with the domestic and international environmental legislation nor the public interest. The ruling took into consideration the cut targets set in the Paris climate agreement.<sup>606</sup> However, later Austrian constitutional court overturned the landmark judgment.<sup>607</sup>

The ECtHR need not follow its case law, even though it often requires specific reasons for departing from its previous case continuum. This leaves space and a window of opportunity for the ECtHR to practice dynamic interpretation illustrating the changing

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600 NASA, *Scientific consensus; Earth's Climate is Warming*: <https://climate.nasa.gov/scientific-consensus/>, (last visited 26 February 2018)

601 Schaefer Caniglia et al. 2015

602 Peeters et al. 2012

603 Rechtbank Den Haag, The District Court of the Hague, *Urgenda C/09/456689*, 13-1396, 24 May 2015

604 ECtHR, *Hatton and Others v. the United Kingdom*, 8 July 2003 (GC)

605 See also: Airportwatch, *Court in Austria blocks 3rd runway at Vienna airport, as climate harm outweighs a few more jobs*: <http://www.airportwatch.org.uk/2017/02/court-in-austria-blocks-3rd-runway-at-vienna-airport-as-climate-harm-outweighs-few-more-jobs/>, (last visited 26 February 2018)

606 See also: Berwyn, *Climate Change Concerns Prompt Court to Block Vienna Airport Expansion*: <https://insideclimatenews.org/news/14022017/climate-change-vienna-airport-paris-climate-agreement-james-hansen>, Greenair, *Austrian federal court rejects Vienna Airport's third runway plans on climate protection grounds*: <http://www.greenaironline.com/news.php?viewStory=2339>, (last visited 26 February 2018)

607 See also: Physorg, *Climate change can't halt Vienna third runway: court*: <https://phys.org/news/2017-06-climate-halt-vienna-runway-court.html> (last visited 26 February 2018)

views of societies on the severity of climate change. However, as the case continuum relating to airports has long remained unchanged, it is most likely that the ECtHR would not make a significant change of direction in this respect without domestic support.

On the basis of the current green jurisprudence, the ECtHR has repeatedly acknowledged the environment as a public interest if the state authorities have defined it so, or if the domestic courts have so established. Thus in the context of climate change-related human rights claims against airports, the most likely development would also take place through these two alternative mechanisms.

In the current green jurisprudence the ECtHR has acknowledged that the states have had a legitimate interest in restricting the exercise of rights under Articles 8 and Protocol 1 Article 1 of the Convention on the basis of city planning or environmental protection<sup>608</sup>. The departure on the basis of this mechanism would require that the state has denied expansion of air traffic. There is, for example, a complaint under Protocol 1 Article 1 of the Convention and the ECtHR could find that climate change policy serves a legitimate interest to limit the rights under Protocol 1 Article 1 of the Convention. Alternatively, the ECtHR could be ready to change its current position if the domestic courts defined adequate climate change policy to be a public interest and found that the state had failed to fulfil its obligations, or had failed to enforce the decision. If the ECtHR adhered to its current green jurisprudence, it would back up the decision of the domestic courts and request enforcement of the domestic ruling, thereby making an interpretation in keeping with the domestic court, which would empower it to depart from its case law.

### 5.2.1.2 Assessment of the State's Awareness of Climate Change

The current jurisprudence of the ECtHR has established a requirement that the state should take preventive measures to protect the rights, if “the authorities knew or ought to have known of the existence of a real and immediate risk to the life of an identified individual or individuals.”<sup>609</sup> The implications of climate change can in specific circumstances constitute a real and immediate risk. Such conditions may include severe heatwaves, which causes death particularly among elderly people. Severe heat can also cause further accidents, such as forest fires, thereby placing individuals living close to such areas under immediate risk. Furthermore, severe weakening of the ice in Arctic areas may create threats to indigenous peoples moving in their traditional lands. In addition, extreme storms causing buildings to collapse may directly constitute a threat to life. Building a successful human rights claim on the basis of inadequate action of the state to prevent climate change requires sufficient evidence that the state was aware of the grave consequences of climate change or, if not so aware, that it should have been conscious of the implications.

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608 ECtHR, *Hamer v. Belgium*, 27 November 2007, para 79

609 ECtHR, *Osman v. UK*, 2000, 29, EHRR 245, para 166. See also: Turner 2015, p. 101

The assessment on the level of state awareness is well illustrated in the case of *Brincat and Others v. Malta* (2014). The ECtHR used a consensus assessment to determine whether Malta knew or should have known the health risks related to asbestos. The ECtHR assessed the state of both domestic and international scientific knowledge of asbestos at the time when the applicants were exposed. Besides, the ECtHR noted that Malta's membership of the ILO, which had asbestos-related activities, proved that the state should have been aware of the risks.<sup>610</sup> The ECtHR found in *Vilnes and Others v. Norway* (2013), that scientific uncertainty may create grounds for the state to take preventive measures<sup>611</sup>.

The legal test of the ECtHR in assessing the level of a state's awareness is similar to that introduced in the Netherlands concerning the awareness of the state of the implications of climate change. The domestic landmark judgment, *Urgenda* case<sup>612</sup> illustrates how to assess whether the state should have been aware of the risks of climate change and at what point. The first evidence in the *Urgenda* case was to prove the existence of a scientific basis for the urgent demand to take action to reduce the level of greenhouse gas emissions. These materials included scientific reports from both international and domestic institutions, such as the Intergovernmental Panel on Climate Change IPCC reports assessing risks, consequences and adaption and mitigation opportunities underlining urgent actions to diminish the level of greenhouse gas emissions, research by the Netherlands Environmental Assessment Agency and the Royal Netherlands Meteorological Institute. The second body of evidence included materials on the relevant obligations related to the global climate change legal and policy framework, such as the UN Framework Convention on Climate Change 1992, the Kyoto Protocol 1997, the Cancun Agreement 2010, Durban 2011 and the Doha Amendment 2012 as well as to European climate change policy. The document on European climate change policy included the EU's obligations, such as Article 191 of the Treaty on the Functioning of the European Union (TFEU) promoting preservation and protection of human health and quality of the environment and where climate change is also mentioned. Furthermore, the EU's commitment to the Kyoto Protocol was discussed in relation to Decision 1600/2002/EC and references were made to several Directives, such as Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, which introduced the European Union Emission Trading System. In addition, the Communication of the European Commission to the European Parliament, the Council, the EESC and the CoR of 10 January 2007, was discussed in relation to defining the EU's emission targets. In addition to these, several other documents between 2010 and 2015 were discussed in order to illustrate the stable and continuing position of the EU to reduce greenhouse emissions together with other international

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610 ECtHR, *Brincat, and Others v. Malta*, 24 July 2014, paras 9, 37–40, 105, 106.

611 ECtHR, *Vilnes and Others v. Norway*, 5 December 2013, paras 174 and 244

612 Rechtbank Den Haag, The District Court of the Hague, *Urgenda* C/09/456689, 13-1396, 24 May 2015

actors<sup>613</sup>. The Hague District Court found that the involvement of the Netherlands in the UN and EU climate change agreements and policy measures proved that the state should have been aware of the risks of climate change since 1997, and indisputably since 2007. All these documents showed that the Netherlands was involved in international policymaking that undoubtedly presupposed the state's awareness of the risks of climate change.

The similarities between the *Urgenda* and *Brincat* cases may have lowered the threshold for the ECtHR to conduct a similar assessment in the context of climate change and to conclude that there is scientific and international consensus on the existence of climate change and its impacts on human rights. The application of the test could in general be to the awareness of climate change and its implications for human rights, but also in more specific terms depending on the context. For example, if the facts of the case were related to the airport complaint, the assessment would include an analysis of the scientific reports on the role of airports in greenhouse emissions internationally and domestically and whether the state was aware of the correlation.

### 5.2.1.3 Burden of Proof

As illustrated concerning the *Urgenda* case, human rights litigation related to climate change requires producing an extensive amount of evidence to estimate the awareness of the state. The burden of proof before the ECtHR in establishing, whether “the authorities knew or ought to have known” about the risks to the protection of life, such as climate change, primarily rests with the applicant. For an individual applicant, the opportunities to submit evidence for the point in time at which the state became aware of the risks related to climate change may be an unreasonable task. The ECtHR has conceded that the state may be in a better position than the individual applicant to provide evidence that they have not failed to fulfil their obligations. Thus in principle it is also possible for the burden of proof to shift to the side of the state, depending on the circumstances of the case.<sup>614</sup>

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613 The Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, entitled “Analysis of options to move beyond 20% greenhouse gas emission reductions and assessing the risk of carbon leakage” of 26 May 2010 and the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions of 8 March 2011, entitled “A roadmap for moving to a competitive low carbon economy in 2050. On 15 March 2012, the European Parliament adopted a resolution on the Roadmap referred to in 2.64, in which the Roadmap as well as the path and specific milestones for the reduction of the Community's domestic emissions of 40%, 60% and 80% for 2030, 2040 and 2050 respectively, were endorsed. On 22 January 2014 the European Commission published the following Communication: “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, “A policy framework for climate and energy in the period from 2020 to 2030”, On 25 February 2015 the European Commission published the “Communication to the European Parliament and the Council, entitled The Paris Protocol – A blueprint for tackling global climate change beyond 2020”

614 See also: ECtHR, *Aksoy v. Turkey*, 18 December 1996, para 61, ECtHR, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, para 78, ECtHR, *Creangă v. Romania*, 23 February 2012, para 88

The current case law of the ECtHR has established that adjustment of the distribution of burden of proof is affected by such considerations as the seriousness of the case<sup>615</sup>, the diversity and accessibility of the evidence<sup>616</sup>, compelling reasons for different treatment known exclusively to the authorities<sup>617</sup> and the coexistence of sufficiently strong, clear and concordant inferences or similar un rebutted presumptions of fact<sup>618</sup>.

Depending on the facts of the case, the climate change complaint may meet the criteria for shifting the burden of proof from the applicant to the state. The establishment of the interrelationship between climate change and the state's actions may entail presenting the use of diverse scientific evidence not easily accessible to the applicant as the majority of scientific journals are not open-access publications. The language barrier may also impede access to the relevant evidence for applicants belonging to vulnerable groups. English is a *lingua franca* of science, but illiterate or little educated people seeking political asylum possibly due to the adverse implications of climate change would not be capable of showing the interrelationship between the inaction of the state on climate change and their being compelled to flee.

There has recently been criticism that the ECtHR may require an unnecessarily high threshold for green jurisprudence before transferring the burden of proof from an individual to the state.<sup>619</sup> Thus it is likely that the threshold would likewise be demanding in the case of climate change claims. In any case relating to climate change support from relevant NGOs and other experts during the drafting of the application or as third-party interveners would be essential, and even more so in cases where the burden of proof rests with the applicant.

#### 5.2.1.4 Positive Obligations as a Basis for Liability

It may at present be difficult to establish a causal link between particular damage to health and an inadequate climate change policy of a single state due to the various contributors to climate change. However, this does not prevent the establishment of state liability in the context of climate change on the basis of positive obligations, which may even constitute the risk of deprivation of rights. The scientific and the UN reports have predicted that climate change will constitute a threat to life, so in situations where the state fails to take necessary measures to prevent the adverse implications of climate change, in principle the case could fall under positive obligations.

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615 ECtHR, *Salman v. Turkey*, 27 June 2000, para 100

616 Harrison 2013, p. 511

617 See also: ECtHR, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, para 78

618 ECtHR, *El-Masri v. the Former Yugoslav Republic of Macedonia*, 13 December 2012, (GC) para 151

619 Gouritin 2012, pp. 171–173



The ECtHR has been greening the general positive obligations doctrine and interprets specific content for the doctrine depending on the circumstances. The current general doctrine of green positive obligations serves as a basis for assessing the adequacy of climate change policy and action for the protection of rights. The doctrine of positive obligations requires states “to take all appropriate steps to safeguard life for the purposes of Article 2”, including “a legislative and administrative framework”, and states must “govern the licensing, setting up, operation, security and supervision of the activity” and “make it compulsory for all those concerned to take practical measures to ensure effective protection”.<sup>620</sup> A similar legal standard was also required in the Dutch *Urgenda* case as the District Court of the Hague stated in relation to the Article 21 of the Constitution that:

If, and this is the case here, there is a high risk of dangerous climate change with severe and life-threatening consequences for man and the environment, the State has the obligation to protect its citizens from it by taking appropriate and effective measures. For this approach, it can also rely on the aforementioned jurisprudence of the ECtHR<sup>621</sup>.

The Dutch Court built its argumentation with the support of the ECtHR, international climate policy, EU principles and by analogy with hazardous climate change and hazardous negligence developed in other contexts.<sup>622</sup> The applicants could use similar argumentative support originating from the positive obligations doctrine in claims before the ECtHR.

Specific measures under the current green positive obligations doctrine, which could support the building of climate change claims have included, for example, the right of access to environmental information;<sup>623</sup> the establishment of safety zones;<sup>624</sup> the implementation of effective risk assessment; the establishment of a coherent supervisory system, including an emergency warning system; the establishment of specific mutual agreements for cooperation between authorities crossing the borders of Member States and the control of private parties.

Sufficient information on general and specific aspects of climate change is essential for the individual to take preventive measures. General information on climate change and policy is needed so that people can assess, for example, whether the political measures are adequate. Access to adequate and specific information could mean, for example, that the individual is capable of assessing the risks related to housing and to choose a place to live in allow-risk area instead of a high-risk area. For example, a rising sea level or increasing flood

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620 ECtHR, *Öner Yardız v. Turkey*, 30 November 2004 (GC), paras 89–90, 100–102

621 Rechtbank Den Haag, The District Court of the Hague, *Urgenda C/09/456689*, 13-1396, 24 May 2015, para 4.74

622 Kelderluin ruling of the Supreme Court (HR 5 November 1965, ECLI:NL:HR:1965:AB7079, NJ 1966, 136) and on jurisprudence on the doctrine of hazardous negligence developed later, para 4.54

623 See also: ECtHR, *Guerra and Others v. Italy*, 19 February 1998 (GC), paras 57–60, ECtHR, *Brincat and Others v. Malta*, 24 July 2014, para 114, ECtHR, *Grikovskaya v. Ukraine*, 21 July 2011, paras 67 and 69

624 ECtHR, *Kolyadenko and Others*, 28 February 2012, para 173



risk may endanger the housing, health and even the lives of coastal residents if there are no sufficient safety zones by the sea or rivers or an effective monitoring and early warning system. As the time frame for the rising sea level is long, there is time for both states and individuals to react in time, but this needs adaptive measures<sup>625</sup>.

In addition, implementing effective risk assessment could require the state to conduct sufficient investigations into the relationship between its policies and their impacts on climate change and human rights. The requirement for impact assessment could include all the main polluting fields. The positive obligations also entail an obligation on the part of the state to exercise control in respect of private parties. Private parties may include industries, but also individuals. In practice it would be possible to incorporate into the scope of positive obligations a duty to control highly polluting industries to ensure adequate decrease of greenhouse emissions. Furthermore, it should be noted that the ECtHR has invoked domestic and international law in defining specific content for positive obligations in a particular context. In the climate change context the current global and regional climate change agreements could be interpreted to constitute such mutual agreements to co-operate and control those private parties to which the positive obligations refer.<sup>626</sup> This would include adequate legislative and enforcement mechanisms.

## 5.2.2 Rewriting the Airport Case Law in Times of Climate Change

The airport case saga of the ECtHR started as early as 1982, when the Heathrow airport disagreement resulted in a friendly settlement in the case of *Arrondelle v. the United Kingdom*<sup>627</sup>. The case was followed by *Powell and Rayner v. the United Kingdom* and *Hatton and Others v. the United Kingdom* concerning the Heathrow airport.<sup>628</sup> The central discussion of these cases have been included for example noise problems and economic interests. However, as air traffic causes also considerable amount of emissions contributing to the climate change<sup>629</sup> and the awareness of the climate change has been increasing, it should be reflected also in the case law of the ECtHR. Among the current green jurisprudence of the ECtHR the airport cases provide a foundation to develop discussion on the climate change liability.

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625 European Environment Agency, *Global and European sea levels*, <https://www.eea.europa.eu/data-and-maps/indicators/sea-level-rise-5/assessment> (last visited 10 January 2018)

626 See, for example: Kiss – Shelton 1991, p. 131

627 ECtHR, *Arrondelle v. the United Kingdom*, Appl no 7889/77, friendly settlement

628 ECtHR, *Powell and Rayner v. the United Kingdom*, 21 February 1990

629 IPCC, *Special report on Aviation and the Global Atmosphere, Summary for Policymakers*, <https://www.ipcc.ch/pdf/special-reports/spm/av-en.pdf> (last visited 10 January 2018)

### 5.2.2.1 The Hatton Judgment in the Light of Present Day Conditions

The *Hatton and Others v. the United Kingdom* (2003) Grand Chamber case concerns noise pollution caused by night flights over Heathrow Airport. At that time, Heathrow Airport was the busiest airport internationally<sup>630</sup>. Eight of the applicants lived from 4.4 km to 17.3 km from the runways of Heathrow. They claimed that since 1993 the night time noise was “intolerable” and caused them sleeping problems. For some, the sleeping problems were severe, causing headache, depression<sup>631</sup> and ear infections.<sup>632</sup> After some years, several applicants moved away<sup>633</sup>. Studies showed that they belonged to a minority of the population, which was in particular sensitive to noise.<sup>634</sup>

The applicants claimed violations of Article 8 and Article 13 of the ECHR. The argumentation of the applicants was anthropocentric, focusing on the sleeping problems caused by the noise, whereas the third-party intervener Friends of the Earth expressed their support to the Chamber judgment because it was in line with international environmental law and human rights.<sup>635</sup> The applicants underlined that the margin of appreciation should be narrow and there should be balancing of interest in favour of their rights.<sup>636</sup> The authorities claimed that the night flights scheme was necessary due to the status of the airport as a competitive twenty-four-hour international airport<sup>637</sup>.

The economic interests relating to the night flight scheme were deemed to override the individual interests of sleeping of a vulnerable group and also the environmental interests. The British Government referred to “the economic interest of the country as a whole” and also to the economic interests of the operators of airlines and their clients.<sup>638</sup> The analysis on balancing between individual interests and economic interests acknowledged the importance of the economic interests<sup>639</sup>. In relation to that, the ECtHR assessed the economic interests as follows:

As to the economic interests which conflict with the desirability of limiting or halting night flights in pursuance of the above aims, the Court considers it reasonable to assume that those flights contribute at least to some degree to the general economy. The Government has produced to the Court reports on the results of a series of inquiries on the economic value of night flights, carried out both before and after the 1993 Scheme. Even though there are no specific indications about the economic cost of eliminating specific night flights, it is possible to infer from those

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630 ECtHR, *Hatton and Others v. the United Kingdom*, 8 July 2003, para 28

631 *Ibid.*, para 12

632 *Ibid.*, para 18

633 *Ibid.*, paras 12, 14, 25

634 *Ibid.*, paras 35, 109, 117

635 *Ibid.*, para 94

636 *Ibid.*, para 90

637 *Ibid.*, para 32

638 *Ibid.*, para 121

639 *Ibid.*, paras 125–126

studies that there is a link between flight connections in general and night flights. (– –) One can readily accept that there is an economic interest in maintaining a full service to London from distant airports, and it is hard, if not impossible, to draw a clear line between the interests of the aviation industry and the economic interests of the country as a whole. However, airlines are not permitted to operate at will, as substantial limitations are put on their freedom to operate, including the night restrictions which apply at Heathrow.<sup>640</sup>

The ECtHR did not thoroughly assess whether there was fair striking of a balance between the environmental interests and the economic interests, but only stated

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. In this context, the Court must revert to the question of the scope of the margin of appreciation.<sup>641</sup>

The conclusions of the judgment were already controversial at the time of the judgment as the dissenting opinions by Judges Costa, Ress and others, for example, disagreed on the interpretation<sup>642</sup>. The judges acknowledged the increasing importance of environmental issues:

The Grand Chamber's judgment in the present case, in so far as it concludes, contrary to the Chamber's judgment of 2 October 2001, that there was no violation of Article 8, seems to us to deviate from the above developments in the case-law and even to take a step backward. It gives precedence to economic considerations over basic health conditions in qualifying the applicants' "sensitivity to noise" as that of a small minority of people (see paragraph 118 of the judgment). The trend of playing down such sensitivity – and more specifically concerns about noise and disturbed sleep – runs counter to the growing concern over environmental issues all over Europe and the world. A simple comparison of the above-mentioned cases (*Arrondelle*, *Baggs* and *Powell and Rayner*) with the present judgment seems to show that the Court is turning against the current.<sup>643</sup>

Present-day conditions have changed so that the major airport-related issues involving human rights argumentation also include discussion in relation to climate change emissions. The case of *Hatton and Others v. the United Kingdom* has been chosen for rewriting in the climate change context as it affords circumstances to discuss climate change, the public interest and human rights.

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640 *Ibid.*, para 126

641 *Ibid.*, para 122

642 ECtHR, *Hatton and Others v. the United Kingdom*, 8 July 2003 (GC) dissenting opinion: Joint dissenting opinion of Costa, Ress and others

643 *Ibid.*

### 5.2.2.2 Rewritten Judgment of the *Hatton Case* (Grand Chamber)

The focus in the rewriting of the judgment is in Article 8 of the Convention. The extracts from the judgment are in the left paragraph, and rewritten judgment is in the right paragraph.

#### *Extracts from the judgment*

98. Article 8 may apply in environmental cases whether the pollution is directly caused by the State or whether State responsibility arises from the failure to regulate private industry properly.

(– –)

117. The 1993 Scheme accepted the conclusions of the 1992 sleep study (see paragraph 35 above) that for the large majority of people living near airports there was no risk of substantial sleep disturbance due to aircraft noise and that only a small percentage of individuals (some 2 to 3%) were more sensitive than others. On this basis, disturbances caused by aircraft noise were regarded as negligible in relation to overall normal disturbance rates (See: paragraph 40 above).

(– –)

119. It is clear that in the present case the noise disturbances complained of were not caused by the State or by State organs, but that they emanated from the activities of private operators. It may be argued that the changes brought about by the 1993 Scheme are to be seen as a direct interference by the State with the Article 8 rights of the persons concerned. On the other hand, the State's responsibility in environmental cases may also arise from a failure to regulate private

#### *Rewritten judgment*

The Court reiterates that while none of the Articles of the Convention is designed to provide protection of the environment as such (see *Kyrtatos v. Greece*, no. 41666/98, § 52, ECHR 2003-VI), in today's society the protection of the environment is an increasingly important consideration, which has been protected under several Articles of the Convention (See: *Fredin v. Sweden* (no. 1), 18 February 1991, § 48, Series A no. 192, *Hamer v. Belgium*, § 79).

In this case, the sufficient and clear evidence of the harm caused to the applicants due to the night noise permits the conclusion that the applicants' health deteriorated as a result of prolonged exposure to the night noise from Heathrow Airport. The noise rendered the applicants vulnerable to various illnesses, such as mental health problems. There can be no doubt that the noise adversely affected quality of health, private life and well-being reaching a level sufficient to fall within the scope of Article 8 of the Convention (See: *Fadeyeva v. Russia*, § 88).

It is clear that in the present case the noise pollution and climate change emissions were not caused by the State or its organs, but originated from the activities of private airlines. On the other hand, the Court has held on many occasions that the State has a positive duty to take reasonable and appropriate measures to secure an applicant's rights under Article 8 of the Convention, including controlling the activities of private actors (See, among others: *López Ostra v. Spain*, cited above, § 51, Series A no. 303 C; *Di Sarno and Others v. Italy*, no.

industry in a manner securing proper respect for the rights enshrined in Article 8 of the Convention. As noted above (See: paragraph 98), broadly similar principles apply whether a case is analysed in terms of a positive duty on the State or in terms of interference by a public authority with Article 8 rights to be justified in accordance with paragraph 2 of this provision. The Court is not therefore required to decide whether the present case falls into the one category or the other. The question is whether, in the implementation of the 1993 policy on night flights at Heathrow Airport, a fair balance was struck between the competing interests of the individuals affected by the night noise and the community as a whole.

(– –)

122. The Court must consider whether the State can be said to have struck a fair balance between those interests and the conflicting interests of the persons affected by noise disturbances, including the applicants. 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. In this context, the Court must revert to the question of the scope of the margin of appreciation available to the State when taking policy decisions of the kind at issue (See: paragraph 103 above).

30765/08, § 96, 10 January 2012 and *Brincat and Others v. Malta*, § 102).

The question the Court must thus consider is whether the State has struck a fair balance between the conflicting interests of the case concerning noise disturbances to individuals, climate change emissions and public economic interests.

As to whether it was legitimate to take the economic considerations into account in the present case, the Court reiterates at the outset that the domestic courts, which are in touch with local reality, are in principle better placed than the international judge to assess issues related to the environmental protection (*Hatton and Others v. the United Kingdom*, para 122)

In the present case it is clear from the context that the domestic courts considered it essential to protect public economic interests, whereas the needs of the applicants or the general environmental considerations including implementation of climate change policies did not constitute a major concern.

The Court must consider whether the Government knew or ought to have known of the dangers arising from noise pollution and climate change (*Brincat and Others v. Malta*, § 205). In this connection, the Court emphasizes that the Government implicitly admitted to being aware of the sensitivity of a minority group to night noise at the time. Nevertheless, the State failed to protect the health of the applicants. Furthermore, the State admitted their awareness of the severity of the climate change and its implications for the realization of human rights as they have been part of the global climate change regime.

As to the particular case, the Court cannot overlook the growing and legitimate concern both in Europe and globally in relation to

(– –)

125. Whether in the implementation of that regime the right balance has been struck in substance between the Article 8 rights affected by the regime and other conflicting community interests depends on the relative weight given to each of them. The Court accepts that in this context the authorities were entitled, having regard to the general nature of the measures taken, to rely on statistical data based on the average perception of noise disturbance.

(– –)

126. As to the economic interests which conflict with the desirability of limiting or halting night flights in pursuance of the above aims, the Court considers it reasonable to assume that those flights contribute at least to a certain extent to the general economy. The Government have produced to the Court reports on the results of a series of inquiries on the economic value of night flights, carried out both before and after the 1993 Scheme.

(– –)

127. A further relevant factor in assessing whether the right balance has been struck is the availability of measures to mitigate the effects of aircraft noise generally, including night noise. A number of measures are referred to above (See: paragraph 74). The Court also notes that the applicants do not contest the substance of the Government's claim that house prices in the areas in which they live have not been adversely affected by the night noise. The Court considers it

environmental problems, including climate change (*Mangouras v. Spain*, § 86). This is demonstrated in particular by the above-mentioned States' obligations regarding climate change and the unanimous determination of States and European and international organizations to co-operate to prevent global warming (See: "Relevant domestic and international law").

The Court considers that these new international realities regarding climate change have to be taken into account in interpreting the requirements of Article 8 in this regard.

In that connection, the Court notes that the facts of the present case – concerning climate change emissions – have significant implications for the compliance of the United Kingdom with its international climate change obligations to which it has committed.

The Court reaffirms that financial imperatives should not be afforded priority over environmental considerations, in particular when the State has legislated regarding environmental protection or the domestic environmental legislation is entirely ineffective (*Hamer v. Belgium*, § 79). The Court interprets that the ongoing commitment of the United Kingdom on the developing of a global climate change mitigation regime shows its commitment to developing policies and laws on climate change that contradict the current policies to increase a highly polluting field such as air traffic.

The Court reaffirms that the Convention is intended to protect effective rights, not illusory ones, and therefore a fair balance between the various interests at stake may be upset not only where the regulations on the protection of guaranteed rights are lacking, but also where they are not duly complied with (See: *Moreno Gómez v. Spain*, no. 4143/02, §§ 56



reasonable, in determining the impact of a general policy on individuals in a particular area, to take into account the individuals' ability to leave the area. Where a limited number of people in an area (2 to 3% of the affected population, according to the 1992 sleep study) are particularly affected by a general measure, the fact that they can, if they choose, move elsewhere without financial loss must be significant to the overall reasonableness of the general measure.

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129. In these circumstances the Court does not find that, in substance, the authorities overstepped their margin of appreciation by failing to strike a fair balance between the right of the individuals affected by those regulations to respect for their private life and home and the conflicting interests of others and of the community as a whole, nor does it find that there have been fundamental procedural flaws in the preparation of the 1993 regulations on limitations for night flights.

130. There has accordingly been no violation of Article 8 of the Convention.

and 61, ECHR 2004 X, *Dubetska and Others v. Ukraine*, § 144). The ineffective implementation of the international climate change agreements has wide human rights implications for the applicants in the case as well as for the general public. In addition, the applicants as a group specifically susceptible to noise should receive protection from the legal provisions on noise pollution.

In these circumstances, the Court finds that the authorities have exceeded their margin of appreciation by failing to strike a fair balance between the conflicting interests. There has accordingly been a violation of Article 8 of the Convention.

### 5.2.2.3 Explaining the Logic of Rewriting and Other Remarks

The beginning of the rewriting follows the usual style of the ECtHR by making references to its earlier position on similar matters. The crux of the argumentation is that, even though private airlines cause the emissions in question, the state has a positive obligation to take reasonable and appropriate measures, including controlling the activities of private actors to protect the rights under Article 8 of the Convention.<sup>644</sup> The ECtHR has created a test

<sup>644</sup> ECtHR, *Lopez Ostra v. Spain*, 9 December 1994, para 51, ECtHR, *Di Sarno and Others v. Italy*, 10 January 2012, para 96



on whether the measures were appropriate and reasonable. The elements of the test include an analysis of the harmfulness and seriousness of the act and harm, the foreseeability of the risks to life or health, whether the state has balanced the competing interests reasonably and whether the applicants are vulnerable.

The main point in the rewritten judgment is whether the State struck a fair balance between the conflicting interests of the case. Green jurisprudence developed a balancing test, for example, in the case of *Lopez Ostra v. Spain* (1994), where the ECtHR was not satisfied with the balancing conducted by the national authorities<sup>645</sup>. The landmark case concerned nuisance emanating from a waste-treatment plant, causing health problems to the applicants, whose only option was to move away. The ECtHR took the view that the Spanish authorities failed to balance between the interests of economic well-being, meaning the maintaining of the waste-treatment plant and the right to respect for the home and health of the applicant under Article 8 of the ECHR.

Another landmark case, that of *Fadeyeva v. Russia* (2005), likewise underlined failure to strike a fair balance between collective interests and the interests of the applicant. The case concerned the operation of a steel plant located close to the applicant's home. The ECtHR underlined that the toxic emissions of the polluting enterprise were regulated by the national legislation, but the laws had not been implemented in practice. The ECtHR found that the Russian authorities had failed to protect the interests of the local population against industrial pollution.<sup>646</sup> These cases form a basis for the use of a balancing test in the rewritten judgment.

Whereas in the original judgment the balancing was conducted primarily on the basis of the noise disturbances to the individuals and the public economic interest, in the rewritten case the public interests are redefined to follow those of current contemporary societies, where climate change policies are central. In the rewritten judgment the logic is that if the state was and should have been aware of the risks related to climate change and failure to implement the climate change policy, the balancing ignoring the implementation of climate change policies did not strike a fair balance. The test used in the rewritten judgment about the level of awareness of the harmfulness of the failure to implement climate change policy is borrowed from earlier green jurisprudence, *Brincat and Others v. Malta* (2014), where the ECtHR assessed thoroughly whether Malta should have been aware of asbestos-related health problems<sup>647</sup>.

Furthermore, in the rewritten judgment reference is made to the increase in European attention to the severity of climate change issues and the relevant domestic and international law sections. The ECtHR has made similar references, for example, in relation to the increasing tendency of states to criminalize environmental offences, and, given the significant number of climate change laws and policy activities in the States Parties, it

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645 ECtHR, *Lopez Ostra v. Spain*, 9 December 1994, para 58

646 ECtHR, *Fadeyeva v. Russia*, 9 June 2005, paras 133–134

647 ECtHR, *Brincat, and Others v. Malta*, 24 July 2014, para 116

is possible that the ECtHR could recognize the international and European interest in combatting climate change. The ECtHR refers typically to the relevant materials in this minimalistic style, where it presents its concluding sentence or paragraph, but otherwise it refers to the relevant section of the law. As in the original judgment in *Hatton and Others v. the United Kingdom*, also in the rewritten judgment, the assumption is that the environmental NGOs would contribute to the case by collecting relevant international climate change agreements, comparative legal materials as well as scientific data on the implications of climate change.

The ECtHR has been relaxed in its use of different legal materials, and so also in the rewritten judgment, the idea being that as long as the international agreements are incorporated into the domestic law and policies, the ECtHR can treat the instruments similarly to the national legislation. As the ECtHR has established that “financial imperatives should not be afforded priority over environmental considerations, in particular when the State has legislated in regard to environmental protection or the domestic environmental legislation would be entirely ineffective”<sup>648</sup>, this principle is utilized in the rewritten judgment to explain how priority for protecting both individual rights and the public interest in effective climate change policy is valued over economic considerations. Therefore the rewritten judgment does not aim to create new legal obligations as such for the United Kingdom, but to enforce the relevant norms developed and embraced by itself.

In the rewritten judgment the idea is that the effective protection of rights entails implementation of the relevant environmental legal and policy instruments when there is consensus, so that implementation does have an impact on the realization of human rights. Therefore, in the rewritten judgment, the adoption of measures contrary to the international commitments of the state to reduce its climate change emissions does not serve the public interest under Article 8 of the Convention.

Whereas the rewritten judgment reflects the present time and interests of society, it would still be possible for the ECtHR to hesitate to depart from its earlier case law in relation to airports due to the major economic interest. The Court was profoundly divided at the time of the original judgment of *Hatton and Others v. the United Kingdom* and it can be expected that if the case were to be ruled on now, the Court would continue to be divided. However, depending on the combination of judges, there could be a greater awareness of the implications of airports in climate change which could be reflected in the judgment as illustrated in the rewritten version. The applicants, with the help of third-party interveners, could at least try to build argumentation to explicitly explain the relationship between climate change emissions and airports and the relationship of these two to the public interest. The argumentation could be supported with international and domestic materials to illustrate the public interest to reduce the climate change emissions. These materials could provide convincing arguments for those judges who at the time of the original judgment were inclined to reach different conclusions.

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648 ECtHR, *Hamer v. Belgium*, 27 November 2007, para 79

### 5.3 Establishing Shared and Extraterritorial Liability in the Context of Climate Change

An alternative to establishing responsibility in climate change related claims is based on the shared liability<sup>649</sup> of two or more states. A factor in favour of building argumentation on shared liability is that climate change is an inherently global environmental problem caused by states and private actors. However, building liability shared among all contributors to climate change would involve each and every state as well as corporations and even individuals. The ECtHR has a limited mandate to its own States Parties to the Convention, and thus the application of shared liability is currently limited to the States Parties.

The ECtHR has established two models of shared liability: the joint venture approach and the differentiated faults doctrine. The joint venture approach was developed as early as in the case of *Hess v. the United Kingdom* (1975)<sup>650</sup>. The applicant in the case was a prisoner in a prison in the British sector of Berlin under the control of the four World War Two Allied Powers. In that case, the Four Allied Powers were committed inherently to joint conduct, illustrated by the decision-making body and actual control over the person. However, while the Commission acknowledged the de facto existence of shared activity in *Hess*, it was not at the time ready to establish a division of “joint authority” between the states involved.

In the case of *Hussein v. Albania and twenty other States* (2006), a large coalition force invaded Iraq in 2003 and captured the applicant near Tikrit. The capture was conducted by US soldiers and the following year the applicant was handed over by US forces to the Iraqi Government for trial. The applicant complained about his arrest, detention, and handing over as well as about the ongoing trials and formulated a claim that the coalition states were responsible for his human rights in Iraq. However, the ECtHR continued its cautious approach by emphasising the dominant role of the USA in the arresting process, giving the presence of the European coalition a secondary role.<sup>651</sup> The threshold used in the case requires active and direct involvement and a common act of joint enterprise instead of sole participation in a joint enterprise.<sup>652</sup> A strict reading of the case would imply that joint action and intent are not present in the context of climate change because the phenomenon has developed over the years without proper joint control. However, in specific circumstances, it could be possible to establish joint liability on the basis of the joint venture. If two or more states were to have shared a significant energy project using polluting sources of energy, such as coal and oil, which cause major climate change emissions and threats to the realization of the rights of the local people, in theory joint liability could be established if the ECtHR were to make a dynamic interpretation.

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649 Vandenbogaerde 2015, p. 14

650 ECtHR, *Hess v. United Kingdom*, 28 May 1975

651 ECtHR, *Hussein v. Albania and twenty other States*, 14 March 2006

652 *Ibid.*

Whereas the joint venture approach is one theoretically feasible way to establish shared liability in climate change, the doctrine in its current form has been used only a few times and the scope is extremely narrow. Consequently, the probability that the application would succeed is decidedly low. However, the basis of the differentiated fault doctrine could provide better grounds for establishing shared liability in climate change related cases.

The jurisprudence of the ECtHR has established shared responsibility doctrine on differentiated faults, but there is currently no green practice in it. One of the landmark cases, *Rantsev v. Cyprus and Russia* (2010), on differentiated faults was formulated in the context of sexual exploitation.<sup>653</sup> The case illustrates how the ECtHR distinguished different bases for the liability of Cyprus and Russia. Rantseva was trafficked from Russia to Cyprus, where she died. The ECtHR assessed that Cyprus as the state of destination failed to protect Rantseva from trafficking and after her death to sufficiently investigate the case. In addition to the responsibility of Cyprus, the ECtHR found that Russia had an obligation as the state of origin to sufficiently investigate how the trafficking of Rantseva took place over its borders. Similarly in specific circumstances it is possible to build convincing argumentation that several states have failed to take sufficient measures against the implications of climate change.

Establishing shared liability may also entail establishing extraterritorial liability. It should be noted that the extraterritorial approach of the ECtHR differs from its logic established in non-extraterritorial cases. Thus the first successful climate change claim would probably have to comply with the current extraterritoriality doctrine. The extraterritoriality doctrine requires the following elements: there are “exceptional circumstances” resulting from “acts of (– –) authorities”, the acts may take place inside or outside national boundaries,<sup>654</sup> the acts have adverse effects outside the territory of the responsible state<sup>655</sup>, and the state should have effective control over the person or area.<sup>656</sup> The ECtHR has been cautious in extending its jurisprudence of extraterritoriality beyond the limited context of military operations, extradition and expulsions, so there is no current jurisprudence concerning environmental matters.<sup>657</sup> However, international environmental law has had long and well-established rules on transboundary liability, which could provide inspiration and support for extending the current doctrine on extraterritoriality. The development of transboundary liability started in the famous Trail Smelter Arbitration

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653 ECtHR, *Rantsev v. Cyprus and Russia*, 7 January 2010

654 The question of whether the act is committed inside or outside the state border is not necessary as responsibility may be established currently under both circumstances. See: ECtHR, *Soering v. the United Kingdom*, 7 June 1989, ECtHR, *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, ECtHR, *Bankovic v. Belgium*, 12 December 2001, ECtHR, *Illich Sanchez Ramirez v. France*, 24 June 1996, ECtHR, *Hirsi Jamaa Others v. Italy*, 23 February 2012

655 See: ECtHR, *Loizidou v. Turkey*, 23 March 1995, paras 134–136, ECtHR, *AlSkeini and Others v. the United Kingdom*, 7 July 2011. For literature, see for example: Milanovic 2011, pp. 126–127

656 ECtHR, *Loizidou v. Turkey*, 23 March 1995, para 62

657 See: Milanovic 2014, pp. 203–209, Karagiannis 2012, pp. 322–323

case, a private smelter located in Canada, near to the US border, caused transboundary pollution damaging privately owned crops and timber<sup>658</sup>. The case established a basis for the polluter pays rule that the state has no right to use or allow the use of its territory in a way that causes serious harm to individuals or property outside of its territory<sup>659</sup>. Similarly, the International Court of Justice (ICJ) established in the Corfu Channel case that the state should not allow the use of its land for activities violating the rights of other states<sup>660</sup>. Furthermore, the ICJ took the view that international human rights law is applicable “in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.”<sup>661</sup> A dynamic interpretation would render tenable that economic, social and cultural rights could also be applicable in an extraterritorial context.<sup>662</sup> These developments support the ECtHR in adopting extraterritorial liability in an environmental context.

It is important to underline that there is a practical demand to extend the doctrine as international corporations cause significant emissions in foreign countries<sup>663</sup> and often the state has been involved indirectly in causing the damage by failing to implement environmental policies.<sup>664</sup> Olivier de Schutter has described this as follows:

The State in which a corporation is domiciled may control the activities of the corporation even when these are pursued abroad, either directly or through the setting up of a subsidiary corporation with a distinct legal personality (home state responsibility). The ‘receiving’ state where the corporation has its activities may be said to be under an obligation to protect the human rights of its population (host state responsibility).<sup>665</sup>

In theory, the ECtHR could change the doctrine to correspond to that of territorial liability, thereby obviating the necessity of acts of state authorities. Changing the doctrine would also receive support from international developments<sup>666</sup>. This approach can be found in the

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658 McCaffrey 2003, p. 203

659 Vennemann 2006, p. 296. See also: Trail Smelter, the *USA v. Canada*, 1938 and 1941, 3, R.I.A.A. 1905. See also: Bratspies – Miller 2006, Sands 2003, pp. 318–319, 885–886, Stephens 2010, pp. 123–133, McCaffrey 2003, pp. 203–207

660 See: the International Court of Justice, *Corfu Channel v. Albania*, 1949

661 ICJ 19 December 2005, Armed Activities on the Territory of the Congo (*The Democratic Republic of the Congo v. Uganda*) Judgment 168

662 Breen 2015, p. 128. See for Israeli case: Israeli Wall Advisory Opinion, ICJ 9 July 2004,

663 Francioni 1991, p. 275. See for multinational enterprises: Karavias 2014, pp. 604–605, See also: Chirwa 2004, pp. 1–65

664 Knox 2010, p. 82

665 De Schutter 2006, pp. 22–23

666 De Schutter et al. 2012, I, pp. 1084–1169, Francioni 1991, p. 283, Report of the United Nations High Commissioner for Human Rights, the Analytical study on the relationship between human rights and the environment A/HRC/19/34, para 67

General Comment of the Committee on the Rights of the Child<sup>667</sup>. The Committee held that, if there is a reasonable link, the obligations of the home state include duties to “respect, protect and fulfil children’s rights in the context of businesses’ extraterritorial activities and operations”.<sup>668</sup> The Committee has defined that a requirement of the reasonable link is satisfied “when a business enterprise has its centre of activity, is registered or domiciled or has its main place of business or substantial business activities in the State concerned.”<sup>669</sup> However, in most of the cases the ECtHR relies on its earlier case law and departures require exceptional and compelling reasons. It is unlikely that the ECtHR would give a judgment overturning the fundamentals of the current extraterritorial liability doctrine. More likely is slow change. Due to the low probability of the ECtHR relaxing its approach in relation to the requirement of state authority, the focus in the case analysis is on such circumstances where the requirement of acts of state authorities is clearly fulfilled.

The current doctrine of extraterritorial liability requires also effective control or effective authority,<sup>670</sup> which should also be respected in climate change context. The concept refers to the effective control over a person<sup>671</sup> or an area<sup>672</sup>. The first category includes acts of diplomats or consular officials over persons or exercising physical control through detention or similar actions, such as capturing suspected terrorists outside European borders.<sup>673</sup> Besides, such executive or judicial functions that are in accordance with international law fall under the criteria. Lawful or unlawful military actions may qualify with the effective control over an area requirement. However, whereas the effective control requirement must have been fulfilled in other extraterritorial cases, there are also exceptions to this rule. The ECtHR found in the case of *Ilascu* that Moldova did not have effective control over the Transdnistrian region, but it still established that Moldova had “a positive obligation “to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention.”<sup>674</sup> In the climate change context effective control over a person could be exercised, for example, in situations where a climate change activist would be taken into custody. In addition, military personnel could have control over a refugee camp that is, facing implications of climate change, such as extreme heat, storms and erosion.

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667 Committee on the Rights of the Child (CRC Committee), General comment No. 16 (2013) on State Obligations Regarding the Impact of the Business Sector on Children’s Rights, UN Doc. CRC/C/GC/16, para 43

668 *Ibid.*

669 *Ibid.*

670 See the consolidated version of these principles in *Issa and Others v. Turkey*, 16 November 2004, paras 69–71. See also: Lawson 2011, p. 434

671 ECtHR, *Öcalan v. Turkey*, 12 May 2005, para 91

672 ECtHR, *Loizidou v. Turkey*, 23 March 1995, para 62

673 Commission, *Illich Sanchez Ramirez v. France*, 24 June 1996, p. 155

674 ECtHR, *Ilascu and Others v. Moldova and Russia*, para 331. See also: Vandenbergde 2015, p. 18



In an extraterritorial context the scope of the “exceptional circumstances” criterion includes a short list of well-established circumstances.<sup>675</sup> If the term is interpreted broadly, the exceptional nature of the circumstances may mean exceptionally serious implications or exceptional negligence due to prior knowledge of the risks. The exceptional nature of the circumstances could include other things than the serious nature of the right or the level of seriousness concerning the victim. Such issues as far-reaching impacts, the duration of the violations and the knowledge of the violations could be criteria to expand the notion of exceptionality.

Despite the strict conditions of the doctrine of extraterritoriality, the application of each criterion is not necessary for the analysis of extraterritoriality in a climate change context<sup>676</sup>. For example, the question of whether the act is committed inside or outside the national border of the state is not the most central as responsibility may be currently established under both circumstances. Besides, focusing solely on the absolute nature of rights does not fit into the environmental context, as environmental law has an extensive focus on procedural rights that also have a recognized applicability in extraterritorial context<sup>677</sup>. The application of procedural rights in the context of the ECtHR environmental extraterritorial issues may in future developments have a crucial impact on the development of the use of procedural rights in other extraterritorial issues.

My aim is to apply the shared liability and extraterritoriality doctrines in a hypothetical case influenced by real-life cases such as The Arctic Sunrise Case (*Kingdom of the Netherlands v. Russian Federation*) from the International Tribunal of Law of the Sea<sup>678</sup> and the case of *Women on Waves and Others v. Portugal* from the ECtHR<sup>679</sup>, both of which concern freedom of expression and the context of the sea. However, these real cases provide only inspiration and the example case is fictitious. Due to the lack of a suitable real-life case, the imaginary case is created in order to discuss the matter as an inherently climate change case and to illustrate the diversity of the possible argumentation. On the basis of this imaginary case, an imaginary judgment is presented to illustrate the possible argumentation. At the end of the chapter the argumentative choices in the imaginary judgment are explained and discussed.

### 5.3.1 Creating of an Example case on Climate Change

Several Greenpeace activists made a campaign against climate change on the high seas close to the Russian exclusive economic zone. Their boat was under the flag of the Belgium.

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675 Miller 2009, pp. 1223–1246

676 Heiskanen – Viljanen 2014, pp. 285–295

677 Boyle 2012, pp. 639–640

678 See: ITLOS, Case no 22, *The Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation), Provisional Measures*, <https://www.itlos.org/en/cases/list-of-cases/case-no-22/> (last visited 26 February 2018)

679 ECtHR, *Women on Waves and Others v. Portugal*, 3 February 2009



The aim of the activists was to make a peaceful visit to an oil rig and raise their flag on it. The international press was interested in their campaign and the activists issued several press releases underlining the need to seek alternative sources of energy to oil and other fossil fuels. One of the activists was 16 years old and rest of the applicants were young adults. The Russian authorities informed Belgium of their intention to take the activists into custody if they did not stop their campaign. Belgium took no protective measures for the activists, but only informed the Russian authorities that they should not intervene in the activities of the activists. However, the Russian border authorities took action against the activists and they were detained for three months. The Russian authorities claimed that the arrest was legitimate due to the threat to public security. The Russian authorities also claimed that the activities of the activists might have involved spying close to Russian military submarines, which could have risked the strategic use of the military. Belgium requested the release of the activists, but offered them no legal assistance. The Greenpeace activists themselves rejected the arguments of the Russian authorities, claiming that the arrest served no legitimate purpose, but was done to prevent negative publicity on the use of Arctic oil resources. Consequently the activists claimed that their freedom of expression under Article 10 of the ECHR was limited without legal justification. Furthermore, the activists claimed that their arrest was disproportionate to its setting and violated Article 8 of the ECHR.

### 5.3.2 Forming an Imaginary Judgment on Climate Change

The Court takes the view that a flag state Belgium and the receiving state Russia were both liable in the case (*mutatis mutandis*, *Rantsev v. Cyprus and Russia*, Appl. no 25965/05, 7 January 2010). The Court holds that Belgium had a responsibility for the applicants, who sailed under the flag of the Belgium, whereas Russia became liable after the capture of the applicants. The Court holds that Belgium failed to meet its positive obligations to maintain a framework providing assistance to activists as the activists were taken into custody and held there for a significant period of time. The Belgium did not provide the applicants with adequate legal assistance and failed to protect the best interests of the child before the arrest.

The Court acknowledges that the given case concerns the Russian border authorities (*mutatis mutandis*, *Bankovic v. Belgium*, 12 December 2001, Appl. no 5220/99), which qualifies the requirement of the state actor. The Court is also convinced in the light of the submissions of the state and the applicant that the control exercised over the activists was effective as the activists were placed in detention (See also: *Illich Sanchez v. France*, 24 June 1996, Appl. no 28780/95). Furthermore, the Court holds that the case involves exceptional circumstances. The Court thus concludes that the factual circumstances of the case satisfy the conditions to establish extraterritorial liability for Russia.

The Court holds that both Article 8 and Article 10 apply to the given case. The Court reaffirms that freedom of expression under Article 10 includes freedom to disseminate

information on matters of general public interest, such as the implications of climate change (see: *Steel and Morris v. the United Kingdom*, Appl. no 68416/0115, February 2005). The ECtHR recognizes that activities against climate change serve the public interest. The Court takes the view that the national research institute has published several reports on the implications of climate change, particularly in coastal areas. Furthermore, international scientific journals have continuously discussed in general the human rights threats posed by climate change. In addition, Russia has voluntarily signed the Paris Accord 2015<sup>680</sup>, thus at that point at the latest the state should have been aware of the implications of climate change (On the evaluation of materials see: *Brincat and Others v. Malta*). The assessment of the submission of the applicant and third-parties clearly shows that there is emerging scientific consensus on the implications of climate change for the realization of human rights. Even provocative information falls under the scope of protection, in particular as the general public interest in climate change issues is high. The Court takes the view that the applicants were activists exercising their role as a public watchdog (see: *mutatis mutandis, Vides Aizsardzības Klubs v. Latvia*, Appl. no 57829/00, 27 May 2004).

In respect to Article 8 of the Convention, the Court notes that it has continuously acknowledged the importance of access to environmental information (*Tătar v. Romania*, Appl no 67021/01, 27 January 2009). Access to information is necessary to ensure that individuals can assess the risks to their health and living environment (*Vilnes and Others v. Norway*, Appl. no 52806/09 and 22703/10, 5 December 2013, *Öneryıldız v. Turkey*, Appl. no 48939/99, 30 November 2004 (GC)). Public access to the conclusions of environmental studies and information includes that the public authorities do not restrict the freedom of speech of activists, NGOs or scientists because otherwise public access to information would be restricted.

The Court also points out the “importance of public participation in environmental decision-making” (*Grikovskaya v. Ukraine*, Appl. no 38182/03, 21 July 2011, para 71), which has also been protected under the Aarhus Convention<sup>681</sup>. The Court considers that individuals should have a right to public participation, also in relation to climate change matters, as climate change constitutes a serious global threat to the realization of human rights.

In addition, the best interests of the child should have been the paramount interest (*Neulinger and Shuruk v. Switzerland*, Appl. no 41615/07, 6 July 2010, para 135) in the case, as one of the applicants is under 18 years old. The health certificates and the national reports on conditions in the prison confirm that her best interest was not taken into account.

For these reasons, the Court holds that there was no pressing social need for Russia to capture the Greenpeace activists (*mutatis mutandis, Costel Popa v. Romania*, Appl. no 47558/10, 26 April 2016). Applicants were peacefully exercising their rights under Articles

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680 The Paris Agreement, adopted on 12 December 2015, entered into force 4 November 2016

681 On the Aarhus Convention See: Cramer 2009, pp. 73–103

8 and 10 of the Convention to increase awareness of the implications of climate change. Consequently, there is a violation of Article 8 and Article 10 of the Convention.

### 5.3.3 Explaining the Logic of the Fictitious Case and Other Remarks

The basis for creating suitable circumstances for a climate change case involving shared liability and extraterritorial liability was to identify conditions from the current case law, which could be modified to create the ECtHR conditions under which it could recognize climate change as a public interest. The approach presented is not radical in its setting, as it requires no major doctrinal changes, but utilizes the current doctrines in a new context. However, this is due to the current restricted development of the applicability of the extraterritorial doctrine. There is a risk that, if the application does not satisfy the conditions, it can impede the future development.

As the current doctrine of extraterritorial liability accepts only the acts of state actors<sup>682</sup>, the conditions for the case incorporate circumstances which satisfy the criteria of state actors. The ECtHR has explicitly accepted that extraterritorial liability may arise from the acts of diplomatic and consular officials<sup>683</sup>, as in this case. Furthermore, the extraterritorial liability doctrine has required effective control over a person<sup>684</sup> or a territory<sup>685</sup>. In the imaginary case the circumstances included capturing an individual, which constitutes effective control.

After establishing that extraterritorial liability may in principle arise, the judgment focuses on establishing that the freedom of expression under Article 10 of the Convention includes freedom to disseminate information on matters of public interest, such as climate change and its implications. This is in line with the current green jurisprudence, as the ECtHR has held that environmental issues serve a public interest. In the cases of *Steel and Morris v. the United Kingdom* (2005)<sup>686</sup>, the applicants were acting in a small NGO campaigning on environmental and social issues, such as an anti-McDonald's campaign in the 1980s. The campaign included distribution of leaflets, where McDonald's was criticised. McDonald's made a claim against the applicants on the basis of libel. The ECtHR found a violation of Article 10 of the ECHR and stated that in a democratic society freedom of expression includes freedom to disseminate information on matters of general public interest, like the environment. Climate change belongs to the broad spectrum of environmental matters, and the public interest has been increasing, thus the suggested argumentation in the presented case would be feasible.

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682 Vennemann 2006, p. 297, ECtHR, *Bankovic v. Belgium*, 12 December 2001, para 80

683 See: ECtHR, *Bankovic v. Belgium*, 12 December 2001-. On the Bankovic case, See also: Vennemann 2006, pp. 298-300

684 ECtHR, *Öcalan v. Turkey*, Appl 46221/99, 12 May 2005, para 91

685 ECtHR, *Loizidou v. Turkey*, 23 March 1995, para 62

686 ECtHR, *Steel and Morris v. the United Kingdom*, February 2005, para 89

In the judgment reference is made to the role of an activist as a “public watchdog”. The “watchdog” role of environmental NGOs was discussed in the case of *Vides Aizsardzības Klubs v. Latvia*, where the environmental NGO adopted a resolution about its concerns over the conservation of the coastal dunes of the Gulf of Riga<sup>687</sup>. The resolution targeted the competent authorities, and a regional newspaper publicized claims that the mayor had facilitated illegal construction work in the area. The local mayor claimed that the resolution was defamation. The domestic courts found that the statements were not demonstrably true and ordered the NGO to compensate their action by monetary payments and a public apology. However, the ECtHR found a violation of Article 10 of the ECtHR due to the limitation of the role of the NGO to exercise its role as a public watchdog.

The development of access to environmental information and the right of the public to participate in environmental decision-making was also developed under Article 8 of the Convention. The argumentation of access to environmental information was included in the argumentation to show the value that the ECtHR has given in its case law to guaranteeing access to studies and information<sup>688</sup>. The argumentation also acknowledges the role of the activists, NGOs and scientists as contributors of relevant environmental information on such issues as climate change.

Furthermore, the idea was to utilize the position of the ECtHR in holding that access to information is critical in empowering people to conduct risk assessment<sup>689</sup>. The Court had repeatedly acknowledged the “importance of public participation in environmental decision-making”<sup>690</sup>. Whereas the right has usually referred to national participation, in the imaginary judgment participation was understood in its widest sense to include participation in international climate change policies due to the acknowledged relationship between climate change implications and human rights violations. If the ECtHR adopted such a position, it would be a strong message to the states.

At the end of the judgment, reference was made to a “pressing social need.” “Pressing social need” was discussed in the green jurisprudence relating to the right to assembly and participation. In the case of *Costel Popa v. Romania* (2016), the ECtHR noted that there was no pressing social need to refuse the registration of an environmental NGO.<sup>691</sup> Similar argumentation was invoked in the judgment to illustrate that as climate change matters are public interest unless there are substantial reasons to ban the dissemination of information, there should be no interference in the participation of individuals. As the green jurisprudence has established, the information disseminated may be critical of and even provocative regarding public figures, but the protection of the reputation of a public figure or a state does not as such constitute legitimate justification.

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687 ECtHR, *Vides Aizsardzības Klubs v. Latvia*, 27 May 2004, para 42

688 ECtHR, *Tătar v. Romania*, 27 January 2009, paras 118–119

689 ECtHR, *Vilnes and Others v. Norway*, para 187

690 ECtHR, *Grikovskaya v. Ukraine*, 21 July 2011, para 71

691 ECtHR, *Costel Popa v. Romania*, 26 April 2016, para 45

Furthermore, in the case of *Rantsev v. Cyprus and Russia* (2010)<sup>692</sup> the context was human trafficking. To apply that logic in the imaginary claim, the applicant belongs similarly to a vulnerable group, as the applicant is a minor. Hence the ECtHR is more likely to develop its interpretation and depart from its earlier case law in cases involving exceptional and severe conditions, where the need for protection is great. The state has an obligation to take active measures to protect rights in particular in those cases where the individuals themselves lack the resources and capacity to take protective measures.

## 5.4 Concluding remarks

The ECtHR does not yet have jurisprudence on climate change and human rights. One pragmatic explanation is that there have been only few recent domestic rulings on climate change and human rights and even they are still in the appeal stage. As climate change litigation based on human rights is still in its infancy, there are so far no suitable cases exhausting all the domestic remedies and appropriate to be brought before the ECtHR. However, the current doctrines of the ECtHR provide guiding principles for climate change litigation. These guiding principles provide a model for litigants on how to establish whether the state is aware of climate change, what precautionary measures states are obliged to take under human rights law in order to prevent violations, how to argue that the state has a responsibility towards citizens of other countries and under what conditions such responsibility can be shared.

The current green jurisprudence is based on territorial liability. The challenges to the traditional territorial liability approach are that climate change is a result of global emissions and there is no single polluting state to be held responsible. However, the global nature of the emissions does not negate the fact that in a specific context a single state has control over its own policies. Future climate change cases may be based on the failure of the state to fulfil its positive obligations. In the climate change context, these positive obligations would include sufficient mitigation measures, such as firm policies to decrease the emissions and the effective implementation of such policies. This approach was already successful in a Dutch national court decision and also provides a basis for the argumentation in the ECtHR.

Furthermore, climate change policy frequently involves balancing between economic interests. Such balancing relates, for example, to traffic and energy solutions. One of these areas is aviation. A discussion recently took place in Austria, where the administrative court gave a ground breaking ruling stating that the increase in air traffic is not in compliance with climate change agreements<sup>693</sup>. Similar argumentation could be used in the ECtHR

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692 ECtHR, *Rantsev v. Cyprus and Russia*, 7 January 2010

693 However, note that the judgment was overturned by the constitutional court: Physorg, *Climate change can't halt Vienna third runway: court*: <https://phys.org/news/2017-06-climate-halt-vienna-runway-court.html>, (last visited 26 February 2018)

as the ECtHR in its green jurisprudence has previously confirmed the failure of the state to implement its domestic environmental law and policies, which have connections to the protection of the rights of the Convention. As climate change fundamentally threatens the right to life and health, the ECtHR would have an opportunity to establish this in its case law.

Positive obligations, the necessity to conduct balancing of rights and interests together with the emerging global and regional political and scientific consensus on the severity of climate change as a threat to human rights, served as a starting point for the rewriting of the case of *Hatton and Others v. United Kingdom*. Whereas at the time of the ruling on *Hatton and Others v. United Kingdom*, the climate change discussion was not entirely incorporated into the arguments about the legitimacy of increasing air traffic, there are signs of this in the domestic litigation processes, for example those in Austria. The Austrian context is similar to that in *Hatton*, which supports the idea that nowadays in *Hatton* the climate change dimensions could have been more strongly present than in the past.

Whereas the application may have a regular jurisdictional basis, it may alternatively involve questions of extraterritoriality and shared liability. There has been no environmental jurisprudence, which would have taken discussed on the basis of extraterritorial liability. However, the doctrinal development in another context can be used to assess the probable future usage and its limitations. It is likely that the ECtHR would apply its earlier extraterritorial doctrine as a basis for discussing liability in the climate change context. The aim of the fictitious case was to afford an opportunity to speculate what conditions might comply with the current doctrine of extraterritoriality.

As climate change is inherently a global issue, shared liability could be a possible claim before the ECtHR. In principle, shared liability would take into account the fact that climate change emissions cannot be attributed to one single polluter. However, the current doctrines impose strict conditions on the requirements for the involvement of states to fall under shared liability. There has been no environmental jurisprudence incorporating the shared liability doctrines. Thus, as with the extraterritorial cases, rewriting is not possible, but instead future factual circumstances can be imagined.

The actual development of climate change related human rights case law under the European Convention on Human Rights requires strategic litigation, such as that in the *Urgenda* case in the Netherlands and *the People v. Arctic Oil in Norway*<sup>694</sup>. In the Norwegian case Greenpeace and a citizens' movement sued the government on the basis of the constitutional right to a healthy environment. The applicants claimed that expanding oil production by issuing more permits for oil exploration in Arctic was contrary to the constitutional right to a healthy environment and the international obligations on climate

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694 Neslen, *Norway faces climate lawsuit over Arctic oil exploration plans*, <https://www.theguardian.com/environment/2016/oct/18/norway-faces-climate-lawsuit-over-oil-exploration-plans> (last visited 22 January 2017)



change. However, the district court of Oslo ruled against the applicants.<sup>695</sup> There are also several other cases currently pending in Europe, such as the *Swiss senior* case, the Swedish *Magnolia* case and the *Klimaatzaak* case in Belgium.<sup>696</sup> In the *Swiss senior* case, 770 senior ladies aged 65 or over argued with the support of Greenpeace Switzerland<sup>697</sup> that the failure of the Swiss Government to reduce emissions effectively constitutes a violation of Articles 2 and 8 of the ECHR and the constitutional right to life (Article 10 of the Swiss Constitution), the sustainability principle (Article 73 of the Swiss Constitution) and the precautionary principle (Article 74 of the Swiss Constitution). The applicants used vulnerability argumentation by claiming that elderly people are particularly vulnerable to the heatwaves caused by climate change. The applicants further requested that the government develop a holistic regulatory approach to ensure that the greenhouse gas emission reductions are at least 25% below 1990 levels by 2020.<sup>698</sup>

In the *Swedish Mangolia* case Swedish 178 young people drew up a complaint against Sweden due to its major coal sales, which the applicants found to be contrary to the international climate agreements, national climate targets, the national Constitution and the ownership policy of Sweden.<sup>699</sup> However, the Stockholm District Court states that the applicants have not yet experienced a real life threat and consequently found no violation. The case is currently in the appeal stage<sup>700</sup>, whereas in the *Klimaatzaak* case in Belgium the judgment has not yet been given. The Belgium *Klimaatzaak* case is similar to the *Urgenda* case as it was also brought by concerned citizens against Belgium in order to reduce climate change emissions more effectively. The judgment has been delayed, for example due to the

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695 Darby, *Norwegian campaigners lose court case against Arctic oil drilling*, <http://www.climatechangenews.com/2018/01/04/norwegian-campaigners-lose-court-case-arctic-oil-drilling/> (last visited 10 January 2018), Norway oil: *Environmentalists lose Arctic exploration case* <http://www.bbc.com/news/world-europe-42569104> (last visited 10 January 2018)

696 Klimaseniorinnen, *Swiss senior case* (2016), <http://klimaseniorinnen.ch/wp-content/uploads/2016/10/Gesuch-um-Erlass-Verfuegung-Sperrfrist.pdf> (last visited 22 January 2018), Jan Palmblad and Pia Björnstrand, *Magnolia Summons Application* (2016) <https://drive.google.com/file/d/0BwNst9QrJa18Y2x6X1hMYmJmSEk/view> (last visited 22 January 2018), Neslen, *Norway faces climate lawsuit over Arctic oil exploration plans*, <https://www.theguardian.com/environment/2016/oct/18/norway-faces-climate-lawsuit-over-oil-exploration-plans> (last visited 22 January 2018), *Klimaatzaak*, *De Rechtszaak*, <http://www.klimaatzaak.eu/nl/de-rechtszaak/#klimaatzaak> (last visited 22 January 2018)

697 Greenpeace, *Swiss authorities refuse to act, so these senior women are taking their climate case to court*, <http://www.greenpeace.org/international/en/press/releases/2017/Swiss-authorities-refuse-to-act-so-these-senior-women-are-taking-their-climate-case-to-court/> (last visited 10 January 2018)

698 *Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council*, [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2016/20161025\\_3585\\_petition-1.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2016/20161025_3585_petition-1.pdf) (last visited 10 January 2018)

699 Mangoliämålet, *Youth sue Swedish state for coal deal*, <http://www.mangoliämålet.se/news/press-release-in-english-2016-09-15/> (last visited 10 January 2018)

700 Mangoliämålet, *Stockholm District Court denies trial of youth's Magnolia Case*, [http://www.mangoliämålet.se/news/pressrelease\\_2017-07-04/](http://www.mangoliämålet.se/news/pressrelease_2017-07-04/), (last visited 10 January 2018)



disagreement on the language of the proceedings and the judgment, which illustrates that timewise court litigation is not a fast solution<sup>701</sup>.

In relation to the new areas of protection, the ECtHR often awaits domestic and international developments in order to be consistent before extending its interpretation to new fields. Thus the importance of the rulings resulting from current strategic litigation cannot be overemphasised. Even if the national strategic litigation fails, it prepares suitable cases for the purposes of complaints to the ECHR as national remedies have been exhausted. Whereas my basic claim is that new applications are necessary for the development in those areas where there are so far no cases, litigation must be carefully designed to prevent unwanted outcomes. If the ECtHR states in the first and only case that it has no mandate to assess climate change related issues, it will be more difficult to depart from this position. Hence, the development of the future climate change jurisprudence requires cases that are strong enough to encourage further development. There is currently at least one attempt to make a complaint to the ECtHR on the basis of the climate change caused forest fires. The applicants are Portuguese children, who with the support of the NGO Global Legal Action Network and lawyers are currently planning to sue all the State Parties before the ECtHR. Their attempt is to build their claim to include right to life and the right to private life claims.<sup>702</sup> As has been shown, establishing shared liability will be difficult, but there is a good chance that the applicants will succeed in bringing a case against Portugal on the basis of the positive obligations.

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701 Trouw, *Belgische klimaatzaak verzuipt in bureaucratie*, <https://www.trouw.nl/groen/belgische-klimaatzaak-verzuipt-in-bureaucratie~aobdo9fc/> (last visited 10 January 2018)

702 Revezs 2017, *Portuguese children crowdfund European climate change case to sue 47 countries*, <http://www.independent.co.uk/news/world/europe/portuguese-children-europe-climate-change-case-lawsuit-crowdfund-47-countries-global-warming-a7966231.html> (last visited 10 January 2018)

## 6 CONCLUSIONS

The aim of this dissertation was to explore how the ECtHR can contribute to the resolution of contemporary green human rights problems. To illustrate the conditions under which the green jurisprudence can develop, I have imagined how the current judgments could have been written differently or what the future claims might be. Imagining claims and judgments changes the current logic of studying the ECHR and the jurisprudence of the ECtHR. Whereas the current jurisprudence does have a major role in imagining the future cases, it differs significantly from the traditional doctrinal approach. The analysis of current jurisprudence serves as a starting point for the imagination process, not the final interest.

I have presented two levels of imagining a future case of the ECtHR. The first model for imagining followed an approach to rewriting judgments similar to that presented in the book edited by Eva Brems<sup>703</sup>. The basis of this approach is in analysing the current case continuum and a particular case, then rewriting the judgment and after that the analysis of the rewritten judgment. This rewriting method is like simulating the work of the judges of the ECtHR as I have rewritten real life cases from the case law of the ECtHR using the same interpretative tools and general principles as those used by the judges. The basis is also the same as judges have, as I have treated the ECHR as a living instrument and my aim was to take the protection of the spirit of the Convention as a guiding principle. By using the rewriting method I avoided discussion of the development of the law on a solely abstract level, but was able to illustrate that specific conditions and the context do matter in the development. I utilized this rewriting approach in two different areas, namely re-establishing the role of the environment and the strengthening of the protection of the indigenous peoples through greening.

My focus on the role of the environment was in recognition of the right to a healthy environment and the rights of nature. I chose to consider these two approaches in relation to the role of the environment as both approaches would result in the applicants being able to strive unequivocally for environmental protection, also in cases where there the connection between the harm and the rights of the individual is not crucial, but the aim to protect environmental well-being and sustainable development as such is important for the protection of the environment itself and/or for future generations.

There has been litigation aiming to establish the right to a healthy environment and even a few references to the existence of such a right under the ECHR, which provides a promising setting for the future development. There is no necessity for the ECtHR to

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703 Brems 2012, pp. 21–28

establish the existence of the right to a healthy environment for the first time, but instead to confirm its earlier case law, where the right is already recognized, and to clarify the current inconsistent state of the matter.

Consequently, there are no doctrinal barriers as such to the future development. The ECtHR could clarify and justify its argumentation through the application of the current living instrument and consensus doctrines, which show that the interpretation would be in compliance with the international and domestic developments. Comparative materials of domestic and international sources serve a basis for the ECtHR to establish international and European consensus on the existence of the right to a healthy environment. Furthermore, the easy access to compilations of the existing constitutional rights, national court practice and legislation as well as the international literature would support the ECtHR in recognizing the accelerating European and international trend of recognizing the right to a healthy environment. Recent developments in the UN context provide important inspiration and support for the ECtHR. The UN Special Rapporteur on Human Rights and the Environment, John H Knox, has prepared Framework Principles on Human Rights and the Environment, which summarize the current rights and obligations under human rights law relating to the environment<sup>704</sup>. In addition, the Special Rapporteur suggests that the Human Rights Council should consider the recognition of a global instrument, such as a General Assembly resolution, on the right to a healthy environment<sup>705</sup>.

Under the current green jurisprudence of the ECtHR NGOs can function as public watchdogs in environmental matters similarly as a community or an individual can represent the interests of nature under the approach of the rights of nature. Consequently these two approaches are similar in content, but this similarity is seldom discussed in relation to the ECHR. However, compared to the recognition of the right to a healthy environment, incorporating the terminology of the rights of nature faces more challenges due to the European legal traditions, current case law and legal doctrines. Currently there is a lack of national and regional development of the rights of nature in Europe, which would guide and support the ECtHR to adopt the terminology in relation to the rights of nature.

Furthermore, in the current case law, the admissibility criteria in relation to victim status has been limited to individuals, and do not, for example, extend to animals. Changing the interpretation in regard to victim status is possible, but not very likely in light of the current case law. In addition, the further development of the rights of nature terminology before the ECtHR would require major regional and national development as well as ongoing strategic litigation. However, even though there are so far no signs of the adoption of the terminology on the rights of nature, in practice, through strategic litigation, the environmental NGOs can continue in their role as gatekeepers of the public interest in protecting nature. The more green jurisprudence there is similar in content to

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704 Report of the Special Rapporteur on the issues of human rights obligations relating to the enjoyment of a safe, clean, healthy and suitable environment, A/HRC/37/59

705 Newsletter No. 26 (1 February 2018) from the UN Special Rapporteur on Human Rights and the Environment

that of recognizing the rights of nature, the lower will be the threshold for the ECtHR to make reference to international developments in respect to the rights of nature.

It should be noted that in rewriting the cases related to the right to a healthy environment and the rights of nature, the question is one of recognizing new rights, whereas in the greening of the cases related to the protection of the indigenous peoples the question is more one of applying the current doctrines to a context where the full potential of the law has not been recognized. This difference in the setting has influenced the rewriting. These two types of cases are also fundamentally different in nature. The recognition of the right to a healthy environment and the rights of nature is relevant to all the State Parties, whereas there are fewer State Parties having indigenous peoples on their territory. Consequently the construction of consensus does not follow the same logic. Furthermore, the primary beneficiaries of the reformulation of the role of the environment would be the environment and nature, whereas as the greening of the claims of indigenous peoples would afford protection for culture and individuals practising that culture.

There are no doctrinal barriers as such to applying the greening mechanisms to the claims of indigenous peoples. Even though the rights of indigenous peoples are in the nature of collective rights and the ECtHR recognizes only individual rights, the protection of an individual belonging to the community of indigenous peoples does not require recognition of group rights. The special nature of the culture and lifestyle of individuals practising their traditional cultures can be recognized through the doctrine of vulnerability, as has been done, for example, in relation to the Roma people.

As the ECtHR has a certain minimum threshold for the severity of the violation, it would be necessary to identify strong factual circumstances making it feasible to build convincing legal argumentation. Furthermore, it would be important for the applicants to explain and argue before the ECtHR the special relationship pertaining between nature and the indigenous peoples, so that the ECtHR is able to take this into account when assessing the level of severity. The current doctrine on assessing the severity of the violation has been developed in various contexts and there are no doctrinal barriers to adjust the application in the context of indigenous peoples.

The positive obligations of the green jurisprudence currently include a requirement for an impact assessment of different projects related to the environment. The ECtHR has already required cultural impact assessment under the positive obligations, which is highly relevant state obligation, also in some cases of indigenous peoples. The ECtHR has been continuously willing to develop the scope of positive obligations and applies the doctrine often in green jurisprudence. Therefore positive obligations provide a promising argumentative basis in the context of green jurisprudence relating to indigenous peoples.

For all of these reasons there is every likelihood that the consistent and ongoing strategic litigation would support the ECtHR to provide protection for the indigenous peoples. However, as there are currently no signs of such a strategic litigation movement there is a need for awareness raising and training among the communities of the indigenous

peoples and relevant NGOs, researchers and lawyers working with indigenous peoples in Europe so that they become aware of their opportunities to prepare complaints before the ECtHR. The situation is likely to remain unchanged unless the communities of indigenous peoples are empowered to take their cases before the ECtHR. Furthermore, in the event of strong applications from the indigenous peoples, it would be important for the development of the green jurisprudence that the most promising applications are not settled. Whereas it can be embarrassing for the state to have a ruling against them, if the state prevent the processing of promising applications by making settlements with the parties, they may at the same time impede the development of a minimum standard of protection of human rights in Europe.

The logic of the rewriting in the two different areas, namely the role of the environment and the claims of indigenous peoples, share commonalities and differences. The commonalities between the rewriting of the case law in both areas included using the current well-established case law as well as supporting external materials in order to illustrate international trends or consensus. The explanatory reason for relying on external sources to develop the protection under the ECtHR is that the transformation of the current case law and doctrines is facilitated by the ECtHR, but the legal transformation has long been influenced by the consensus among State Parties and the development of international agreements. The main differences in the rewriting include that, in rewriting the role of the environment, there was no similar focus on cultural issues of the individuals involved as in the context of indigenous peoples.

Another model for rewriting that I have introduced goes a few steps further from rewriting the existing judgments, where there are given circumstances and the argumentation of the judges. Instead of rewriting an existing judgment, I have first created the fictitious circumstances and then the judgment. It is possible to imagine claims and judgments so that the imaginary cases do not incorporate the logic of the current jurisprudence. Innovative out-of-the-box thinking can produce inspirational thinking that cannot be accessed by faithful adherence to conventional thinking. However, the old saying according to which it is necessary to know the traditions in order to flout them applies here: the credibility of the arguments is influenced on the level of understanding of the rules of interpretation and case law of the Court. Therefore, the model presented in this dissertation had a basis in the current doctrinal development.

The imagining of cases in new areas of law is useful in particular in those fields where there is so far no case law. It is possible to discuss the possibilities and limitations of developing the case law without imagining claims, but the level of abstraction is high. This approach does not necessarily establish a model for litigants and the Court similar to how the litigation and interpretation can be developed. The strength of creating imaginary cases is that it provides a context for the application of the rules. As in law the context and circumstances of the case make the case law different from the codified legislation, it

is beneficial to illustrate how the context and factual conditions could be when discussing the development of case law.

Imagining of cases was done in the area of climate change, where there is so far no jurisprudence of the ECtHR that could be discussed. Whereas the first rewritten case in relation to climate change, the Hatton case and its territorial basis, resembled the rewritten judgments, the imagined judgment involved shared liability instead of a regular form of state responsibility and an extraterritorial basis. This influenced the rewriting as the focus in the imagined judgment was on establishing responsibility for multiple states. However, there are also similarities between the rewritten and imagined judgments. The technique of transferring a certain legal doctrine to another context was used, for example, in the context of indigenous peoples and in the climate change context. The vulnerability approach, which was developed in relation to the Roma people was applied to indigenous peoples and in the climate change context the extraterritorial doctrine developed, for example, in the military context was applied in the environmental context.

The climate change cases before the ECtHR face most challenges among the judgments selected for rewriting. It is likely that the ECtHR will be ready to establish that in general there is an international trend and European consensus recognizing that climate change is a threat to the realization of human rights. The ECtHR has established scientific consensus on the implications of asbestos and a similar logic is also applicable in relation to climate change. The most recent scientific research has an important role in establishing the scientific consensus and thus there is need for co-operation between litigants, NGOs and scientists to provide such information for the ECtHR.

In addition, in relation to the development of the legal argumentation of territorial liability in the climate change context, the role of the national courts should not be underestimated. In the new areas of law, the impact of the national interpretation may not always be limited to a single case or to the particular state, but the argumentation can contribute to the establishing of minimum standards of protection of human rights throughout Europe. A single national case can provide inspiration; it can be used in building the consensus or it can slow down the development. National courts should be aware of their role in this respect.

However, whereas the development of territorial liability in relation to climate change seems to be promising, the establishment of shared liability doctrines and the application of extraterritoriality liability in their current form are more difficult to apply in the context of climate change without major doctrinal change and decidedly dynamic interpretation. The two doctrines have not been designed for global environmental problems, nor to sue all States Parties at the same time on the basis of global emissions, but for cases where the causal link between the act and the harm can be clearly shown. An Additional Protocol could clarify the application of shared responsibility as well as extraterritorial liability so that the ECtHR could focus on the interpretation of the law.

At the same time, as there is so far no climate change jurisprudence of the ECtHR to guide the development, there are opportunities for innovative openings, where the ECtHR would distinguish the climate change context from other existing contexts and develop new doctrines in order to protect the object and purpose of the ECHR. In addition, there is an opportunity for states to start to use the complaint mechanism against other states if climate change begins to involve major political interests. This development would again change the settings for the development of the new jurisprudence.

The future greening of the jurisprudence of the ECtHR may take place in various contexts. Even though in this dissertation the modelling of the rewriting and imagining of judgments have been limited to three contexts, similar logic is applicable in respect to greening of the case law in general. The main lesson from the study of the current green case law is that the ECtHR has a tendency to build case continuums and thus it is useful to examine the current case law in detail and use it as a basis for future argumentation. It is highly unlikely that the ECtHR would develop its argumentation in isolation from the current case law.

Another major lesson is connected to the rules and principles of interpretation and other general doctrines of the ECtHR. The decision on which rules and principles of interpretation are applied in the case has a significant effect on the extent to which greening is possible. In general the dynamic interpretation enables further greening, but application of many other rules and principles of interpretation may result either in further greening or in hindering of greening. For example, consensus doctrine can support further greening, if there are enough international and domestic developments to establish consensus, but lack of such development results in the ECtHR not finding such consensus. Therefore there is no automatic mechanism such that using consensus argumentation would result in further greening, but the consequence could be stagnation of the development and a higher threshold for greening. Similarly in regard to other general doctrines, positive obligations and even margin of appreciation doctrines have enabled greening of the case law, but it is also possible that the state has acted in accordance with its margins or fulfilled its positive obligations and consequently in these conditions the doctrines does not result in further greening.

It should be also noted that, whereas the main rules and principles of interpretation for greening include dynamic interpretation, consensus and international trends, other rules and principles of interpretation can also provide strong grounds for argumentation. For example autonomic interpretation enables the ECtHR to distinguish its terminology from domestic terminology in cases where the application of domestic terminology would be contrary to the well-established green case law of the ECtHR. In addition, object and purpose argumentation can help to justify why it is necessary for the ECtHR to depart from its well-established case law and strengthen the current level of greening of the case law.



Whereas future greening may in some specific circumstances require doctrinal change, many of the doctrines of the ECtHR are already suitable and flexible, but have not yet been applied in a given context. These doctrinal developments are sometimes difficult to identify as they have not always taken place in the green context. Therefore it is important that researchers also discuss such doctrines as they provide important guidance in such areas of green jurisprudence where there is a lack of development.

The imagining of future case law can provide inspiration for litigants and judges to build their argumentation. However, evaluation of how well the rewritten judgments and imaginary claim predict the future developments is still premature. One day future generations can read these imaginary cases and evaluate whether the cases remained dreams from the past or became a part of the established contemporary case law of the ECtHR.

# BIBLIOGRAPHY

- Aceves W 2003, 'Actio Popularis – The Class Action in International Law,' *University of Chicago Legal Framework*, Vol. 2003, Issue I, pp. 353–402
- Aikio-Puoskari U & Pentikäinen M 2001, *The Language Rights of the Indigenous Saami in Finland*, *Juridica Lapponica* 26, Lapin yliopisto/Pohjoisen ympäristö- ja vähemmistöoikeuden instituutti, Rovaniemi
- Alexy 2002, *A Theory of Constitutional Rights*, Oxford University Press
- Anderson, M 1996, 'Human Rights Approaches to Environmental Protection: An Overview,' Boyle, A & Anderson, M (eds), *Human Rights Approaches to Environmental Protection*, Clarendon Press
- Arai-Takahashi Y 2002, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Intersentia
- Atapattu S 2018, 'Climate change under regional human rights systems,' Duyck S, Jodoin S & Johl A (eds.), *The Routledge Handbook of Human Rights and Climate Governance*, Routledge, pp. 128–144
- Barelli M 2012, 'Free, prior and informed consent in the aftermath of the UN Declaration on the Rights of Indigenous Peoples: developments and challenges ahead,' *The International Journal of Human Rights*, Vol. 16, No. 1, pp. 1–24
- Bates E 2010, *The evolution of the European Convention on Human Rights. From its Inception to the Creation of a Permanent Court of Justice*, Oxford University Press
- Bennett N J, Blythe J, Tyler S & Ban N C 2015, 'Communities and change in the Anthropocene: understanding social-ecological vulnerability and planning adaptations to multiple interacting exposures,' *Regional Environmental Change*, pp. 1–20
- Benvenisti E 1998, 'Margin of Appreciation, consensus, and universal standards,' *New York University Journal of International Law and Politics*, Vol. 31, No. 4, pp. 843–854
- Birnie P, Boyle A & Redgwell C 2009, *International Law and the Environment*, Oxford University Press
- Bradford G 1989, *How deep is deep ecology?*, Times Change Press
- Brems E 2012, 'Introduction,' *Diversity and European Human Rights, Rewriting Judgments of the ECHR*, Brems E (ed.)
- Bodansky D 2010, 'Climate Change and Human Rights: Unpacking the Issues,' *Georgia Journal of International and Comparative Law*, Vol. 38, No. 3, pp. 511–524
- Bosselmann K 2015, 'Environmental and human rights in ethical context,' Grear A & Kotzé L, *Research handbook on Human Rights and the Environment*, Edgar Elgar
- Bothe M 2003, 'The United Nations Framework Convention on Climate Change: an unprecedented multilevel regulatory challenge,' *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*, Vol. 63, p. 239–254
- Boyd DR 2012, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment*, UBC Press

- Boyd DR 2015, 'Constitutions, human rights, and the environment: national approaches,' Grear A & Kotzé L (eds), *Research Handbook on Human Rights and the Environment*, Edgar Elgar
- Boyd DR 2017, *The Rights of Nature: A Legal Revolution that Could Save the World*, ECW Press, Canada (electronic book)
- Boyle A 1991, 'Making the Polluter Pay? Alternatives to State Responsibility in the Allocation of Transboundary Environmental Costs', in F. Francioni (ed.), *International Responsibility for Environmental Harm*
- Boyle A 2007, 'Human Rights or Environmental Rights? A Reassessment', 18 *Fordham Environmental Law Review*, pp. 471–511
- Boyle A 2012, 'Human Rights and Environment: Where Next?', *European Journal of International Law*, Vol. 23, No. 3, pp. 613–642
- Breen C 2015, 'Progressing Towards Peace? States' Extraterritorial Obligations in Peace Operations and the Added Value of Human Rights Indicators', *Human Rights & International Legal Discourse*, No. 2, pp. 123–150
- Brömann C & Zieck M 1993, 'Indigenous Peoples', Brömann C, Lefeber R & Zieck M (eds), *Peoples and Minorities in International Law*, Martinus Nijhoff Publishers
- Burdon P 2011, 'The Rights of Nature: Reconsidered', *Australian Humanities Review*, Vol 49, pp. 69
- Burdon P 2015, 'Environmental human rights: a constructive critique', Grear A & Kotzé L (eds.), *Research Handbook on Human Rights and the Environment*, Edgar Elgar
- Butzier SR & Stevenson SM 2014, 'Indigenous People's Rights to Sacred Sites and Traditional Cultural Properties and the Rule of Consultation and Free, Prior and Informed Consent', *Journal of Energy & Natural Resources Law*, Vol. 32, No. 3, pp. 297–334
- Buyse AC 2008, 'A Legal Minefield – The Territorial Scope of the European Convention', *Inter-American and European Human Rights Journal*, 2008 (2), pp. 269–296
- Buyse AC 2009, 'The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges', *Nomiko Vima*, Vol. 57, No. 8, pp. 1913–1927
- Buyse AC 2013, 'The Court's Ears and Arms: National Human Rights Institutions and the European Court of Human Rights', Wouters J & Meuwissen K (eds.), *National Human Rights Institutions in Europe. Comparative, European and International Perspectives*, pp. 173–186
- Cameron E 2016, *Building Climate Justice: An analysis of how the nexus between climate change and human rights shapes public policy agendas and alternatives*, Faculty of Social Sciences and Economics (FSE) of Åbo Akademi University Finland
- Caney S 2010, 'Climate change, human rights and moral thresholds', Humphreys S (ed.), *Human Rights and Climate Change*, Cambridge University Press
- Chapman AR & Carbonetti B 2011, 'Human Rights Protection for Vulnerable and Disadvantaged Groups: The Contributors of the UN Committee on Economic, Social and Cultural Rights', *Human Rights Quarterly*, Vol. 33, No. 3, pp. 682–732
- Chirwa DM 2004, 'The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights', 5 *Melbourne Journal of International Law*, Vol. 1, No. 5, pp. 1–65
- Cichowski R 2012, 'Civil Society and the European Court of Human Rights', Christoffersen J & Madsen M (eds.), *The European Court of Human Rights between Law and Politics*, Oxford University Press
- Cohen F 1935, 'Transcendental nonsense and the functional approach,' *Columbia Law Review*, Vol. XXXV, No. 6, pp. 809–849

- Collins L 2015, 'The United Nations, human rights and the environment', in *Research handbook on Human Rights and the Environment*, (ed.) Anna Grear and Louis J. Kotzé, Edgar Elgar
- Cook K 2002, 'Environmental Rights as Human Rights', *European Human Rights Law Review*, Issue 2, pp. 196–215
- Courtis C 2008, 'Litigating Environmental Disputes in the Inter-American Human Rights System: Eight Strategic Approaches', *Human Rights & International Legal Discourse*, pp. 179–209
- Coutter RT 2011, 'The United Nations Declaration on the Rights of Indigenous Peoples: A Historic Change in International Law', ed. Weissbrodt D & Rumsey M, *Vulnerable and Marginalized Groups and Human Rights*, Human Rights Law 1, An Elgar Research Collection
- Cramer BW 2009, 'The Human Right to Information, the Environment and Information about the Environment: From the Universal Declaration to the Aarhus Convention', *Communication Law and Policy*, Vol. 14, pp. 73–103
- Cullet P 1995, 'Definition of an Environmental Right in a Human Rights Context', *Netherlands Quarterly of Human Rights*, Vol. 13, No. 1, pp. 25–40
- Cullet P 2010, 'The Kyoto Protocol and Vulnerability: Human Rights and Equity Dimensions', ed. Humphrey S, *Human Rights and Climate Change*, Cambridge, pp. 183–206
- Cutter S 1996, 'Vulnerability to Environmental Hazards', *Progress in Human Geography*, Vol. 20, pp. 529–539
- De Sadeleer N 2012, 'Enforcing EUCHR Principles and Fundamental Rights in Environmental Cases', *Nordic Journal of International Law*, Vol. 81, No 1, pp. 39–74
- Desgagnée R 1995, 'Integrating environmental values into the European Convention on Human Rights', *American Journal of International Law*, Vol. 89, No. 2, pp. 263–294
- De Schutter O 2006, 'The Challenge of Imposing Human Rights Norms on Corporate Actors', (ed.) De Schutter O, *Transnational Corporations and Human Rights*, Hart Publishing
- De Schutter O, Eide A, Khalfan A, Orellana M, Salomon M & Seiderman I 2012, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights', *Human Rights Quarterly*, Vol. 34, No. 4, pp. 1084–1169
- Devall B 1980, 'The deep ecology movement', *Natural Resources Journal*, Vol. 2, pp. 295–322
- Devall B & Sessions G 1985, *Deep Ecology: Living as if Nature Mattered*, Peregrine Smith
- Domelly, C 2010, 'Positive obligations and privatization', *Northern Ireland Legal Quarterly*, Vol. 61, No. 3, pp. 209–224
- Dothan S 2011, 'Judicial Tactics in the European Court of Human Rights', *Chicago Journal of International Law*, Vol. 12, No 1, pp. 115–126
- Drengson A & Yuichi I 1995, *The deep ecology movement: An introductory anthology*, North Atlantic Books
- Drost P 1965, *Human Rights as Legal Rights*, 2nd ed., Sijthoff
- Drupsteen T 2012, 'Environmental Protection under Article 8 of the European Convention on Human Rights', van Roosmalen M, Vermeulen B, van Hoof F & Oosting M (eds.), *Fundamental Rights and Principles, Liber amicorum, Pieter van Dijk*, Intersentia
- Dutertre G 2003, *Key case-law extracts, European Court of Human Rights*, Council of Europe Publishing
- Dworkin R 1986, *Law's Empire*, Harvard University Press
- Dworkin R 2000, *Sovereign Virtue, The Theory and Practice of Equality*, Harvard University Press
- Dworkin R 2006, *Is Democracy Possible Here?* Princeton University Press
- Dzehtsiarou K 2009, 'European Consensus: a way of reasoning?', University College Dublin Law Research Paper No 11

- Dzehtsiarou K 2011, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights', *German Law Journal*, Vol 12, No 10, pp. 1730–1745
- Dzehtsiarou K 2013, 'Interaction between the European Court of Human Rights and member States: European consensus, advisory opinions and the question of legitimacy', Flogaitis S, Zwart T & Fraser J (eds), *The European Court of Human Rights and its discontents, Turning criticism into strenght*, Edward Edgar, pp. 129–134
- Dzehtsiarou K 2017, 'Dialogue or Diktat? The Nature of the Interaction between National Court and the European Court of Human Rights and How It Influences Criticism of the Human Rights Act'. In F. Cowell (Ed.), *Critically Examining the Case against the 1998 Human Rights Act*. Routledge.
- Eakin H & Luers 2006, A, 'Assessing the Vulnerability of Socio-Ecological Systems', *Annual Review of Environment and Resources*, Vol. 31, pp. 365–394
- Ebbesson J 1997, 'The Notion of Public Participation in International Environmental Law', *Yearbook of International Environmental Law*, Vol. 8, pp. 51–97
- Eriksen A, Hansen KL, Javo C & Schei B 2015, 'Emotional, physical and sexual violence among Sami and non-Sami populations in Norway: The SAMINOR 2 questionnaire study', *Scandinavian Journal of Public Health*, Vol. 43, No. 6, pp 588–596
- Evans T & Hancock J 1998, 'Doing Something Without Doing Anything, International Human Rights Law and the Challenge of Globalization', *The International Journal of Human Rights*, Vol. 2, No. 3, pp. 1–21
- Ewing KD & Henty J, 'The Dramatic Implications of Demir and Baykara', *Industrial Law Journal*, March 2010, 39 Indus L. J.Z., pp. 1–33
- Feingold C 1978, 'The Doctrine of Margin of Appreciation and the European Convention on Human Rights', *Notre Dame Law Review*, Vol. 53, pp. 90–106
- Fineman MA 2008, 'The Vulnerability Subject: Anchoring Equality in the Human Condition', *Yale Journal of Law and Feminism*, Vol. 20, No. 1, pp. 1–23
- Firestone J, Lilley J & Torres de Noronha I 2005, 'Cultural Diversity, Human Rights, and the Emergence of Indigenous Peoples in International And Comparative Environmental Law', 20 *Am. U. Int'l L. Rev.*, pp. 219–292
- Fitzmaurice F & Marshall J 2007, '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*, Vol. 76, No. 2, p. 103–151
- Forowicz M 2010, *The Reception of International Law in the European Court of Human Rights*, International Courts and Tribunals Series, Oxford University Press
- Fox W 1984, 'Deep ecology: A new philosophy for our time', *The Ecologist*, Vol. 14, No. 5–6, pp. 194–200
- Francioni F 1991, 'Exporting Environmental Hazard Multi-national Enterprises: Can the State of Origin be Held Responsible?' ed. Francesco Francioni, *International Responsibility for Environmental Harm*, Kluwer Academic Publishers
- Francioni F 2010, 'International Human Rights in an Environmental Horizon', *European Journal of International Law*, Vol. 21, No. 1, pp. 41–53
- Frigessi di Rattalma M 2005, 'NGOs Before the European Court of Human Rights: Beyond Amicus Curiae Participation?' Treves T et al. (eds.), *Civil Society, International Courts and Compliance Bodies*, TMC Asser Press
- Freestone D 2011, 'The International Legal Framework for Climate Law', *Ympäristöjuridiikka*, Vol. 3, pp. 5–12

- Fuchs G 2013, 'Using strategic litigation for women's rights: Political restrictions in Poland and achievements of the women's movement', *European Journal of Women's Studies*, Vol. 20, Issue 1, pp. 21–43
- Gardiner R 2014, 'The Vienna Convention Rules on Treaty Interpretation', Tams CJ, Tzanakopoulos A & Zimmermann A with Richford AE, *Research Handbook of the Law of Treaties*, Edward Elgar, pp. 475–506
- Gerards J 2014, 'Inadmissibility Decisions of the European Court of Human Rights: A Critique of the Lack of Reasoning', *Human Rights Law Review*, Vol. 14, No. 1, pp. 148–158.
- Gioiretta S 2004, 'The Right to a Healthy Environment', Schrijver N & Weiss F (eds.), *International Law and Sustainable Development. Principles and Practice*, Martinus Nijhoff Publishers
- Gouritin A 2012, 'Can International Environmental Law and Human Rights Law Fill the Gaps of EU Environmental Law? The Case of Environmental Responsibility', Ph.D. thesis, Institute for European Studies, Vrije Universiteit Brussels, Institute for European Studies
- Grant E 2015, 'Re-imagining adjudication: human rights courts and the environment', Grear A & Grant E, *Thought, Law, Rights and Action in the Age of Environmental Crisis*, Edward Elgar
- Grekos M 2002, 'Human rights and the environment (Hatton v. the United Kingdom (E.C.H.R Oct 2, 2001))', *Environmental Liability*, Vol. 10, No 1, pp. 46–49
- Greer S 2000, *The Margin of Appreciation, Interpretation and Discretion under the European Convention on Human Rights*, Council of Europe Publishing
- Grote R 2007, 'On the Fringe of Europe: Europe's Largely Forgotten Indigenous Peoples', *American Indian Law Review*, Vol. 31, pp. 425–443
- Hajjar-Leib X 2011, *Human Rights and the Environment, Philosophical, Theoretical and Legal Perspectives*, Martinus Nijhoff Publishers
- Harrison J 2009, 'International law: significant environmental cases 2008–2009', *Journal of Environmental Law*, Vol. 21, No 3, pp. 506–508
- Harrison J 2013, 'Reflections on the Role of International Courts and Tribunals in the Settlement of Environmental Dispute and the Development of International Environmental Law', Special Issue: Environmental Law: Looking Backwards, Looking Forwards, *Journal of Environmental Law*, Vol. 25, No. 3, p. 511
- Hart D 2004, 'Night flights and Strasbourg's retreat from environmental human rights: Hatton and others v. UK', *Journal of Environmental Law*, Vol 16., No. 1, pp. 100–139
- Harwood S 2012, *Judicial Activism. A Restrained Defense*, Austin and Windfield 1996
- Hancock J 2003, *Environmental Human Rights. Power, Ethics and Law*, Critical Security Series, Ashgate
- Hansen KL, Melhus M, Høgmo A M, Lund E 2008, 'Ethnic discrimination and bullying in the Sami and non-Sami populations in Norway: The SAMINOR study', *International Journal of Circumpolar Health*, Vol. 67, pp. 97–113
- Hansen G & Cramer W 2015, 'Global distribution of observed climate change impacts', *Nature Climate Change*, Vol. 5, No. 3, pp. 182–185
- Hansen KL 2015, 'Ethnic discrimination and health: the relationship between experienced ethnic discrimination and multiple health domains in Norway's rural Sami population', *International Journal of Circumpolar Health*, Vol. 74, pp. 1–12
- Hayward T 2005, *Constitutional Environmental Rights*, Oxford University Press
- Heinämäki L 2004, 'Environmental Rights Protecting the Way of Life of Arctic Indigenous Peoples: ILO Convention no. 169 and the UN Draft Declaration on Indigenous Peoples', T. Koivurova, T. Joona and R. Shnorro (eds.), *Arctic Governance*, Juridica Lapponica 29, the Northern Institute for Environmental and Minority Law, Arctic Centre, University of Lapland



- Heinämäki L 2006, 'The Protection of the Environmental Integrity of Indigenous Peoples in Human Rights Law', *Finnish Yearbook of International Law*, Vol. XVII, pp. 187–232
- Heinämäki L 2009, 'Protecting the Rights of Indigenous Peoples – Promoting 'The Sustainability of the Global Environment?', *International Community Law Review*, Vol. 11, No. 1, 2009, pp. 3–68
- Heinämäki L 2014, *Ihmisoikeudet ympäristönsuojelussa*, ed. Koivurova T & Pirjatanniemi E, *Ihmisoikeuksien käsikirja*, Tietosanoma
- Heinämäki L 2012, 'The Right to Be a Part of Nature: Greening Human Rights via Strengthening Indigenous Peoples', *The Yearbook of Polar Law*, Vol. 4, pp. 415–474
- Heiskanen H-E, Viljanen J 2014, 'Reforming the Strasbourg Doctrine on Extraterritorial Jurisdiction in the Context of Environmental Protection', *European Law Reporter*, Vol. 11, pp. 285–295
- Heiskanen H, Knuutila R, Heinämäki L 2017, 'Ympäristöllinen haavoittuvuus Euroopan ihmisoikeustuomioistuimen tapausten valossa'. *Oikeus*, Vol. 1, pp. 35–55.
- Helfer L 1993, 'Consensus, Coherence and the European Convention on Human Rights', *Cornell International Law Review*, Vol. 133, Issue 1, pp. 133–165
- Helfer L 2008, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime,' *The European Journal of International Law*, Vol. 19, No. 1, pp. 125–159
- Helgesen J-E 2011, 'What are the Limits to the Evolutive Interpretation of the European Convention on Human Rights', *Human Rights Law Journal*, Vol. 31, No. 7-12, pp. 275–281
- Hilson C 2009, 'Risk and the European Convention on Human Rights: Towards a New Approach', *The Cambridge Yearbook of European Studies 2008–2009*, Vol. 11, Hart Publishing
- Hilson C 2013, 'The margin of appreciation, domestic irregularity and domestic court rulings in ECHR environmental jurisprudence: global legal pluralism in action', *Global Constitutionalism*, Vol. 2, No. 2, pp. 262–286
- Hodson L 2011, *NGOs and the struggle for human rights in Europe*, Hart Publishing
- Hutchinson T & Duncan N, 2012, 'Defining and describing what we do: doctrinal legal research', *Deakin Law Review*, Vol. 17, No. 1, pp. 83–119
- Hollo E 2007, 'Comparative analysis of the precautionary principle in the Nordic Countries: Finland', *Implementing the precautionary principle*, Earthscan, pp. 76–84
- Humphrey J 1967, 'The United Nations Charter and the Universal Declaration of Human Rights', in Luod E (ed.), *The International protection of human rights*, Thomas and Hudson
- Hunt M 2003, 'Sovereignty's Blight: Why Contemporary Public Law Needs a Doctrine of Due Deference', Bamforth & Leyland (eds.), *Public Law in a Multi-Layered Constitution*, Hart Publishing
- Hyum J 2003, 'Hatton v. the UK in the Grand Chamber, one step forward, two steps back?' *European Human Rights Law Review*, Issue 6, 2003, pp. 631–640
- Jowell J 2003, 'Judicial Deference and Human Rights: A Question of Competence, in Craig & Rawlings (eds.), *Law and Administration in Europe: Essays in Honour of Carol Harlow*, Oxford University Press
- Karagiannis S 2012, 'The Territorial Application of Treaties', in Duncan B. Hollis, *Oxford Guide to Treaties*, pp. 322–323
- Karavias M 2014, 'Treaty Law and Multinational Enterprises: More than Internationalized Contracts', ed. Christian J. Tams, Antonios Tzanakopoulos and Andreas Zimmermann with Athene E Richford, *Research Handbook on the Law of Treaties*, Edward Elgar



- Kiestra L R 2011, *The Impact of the European Convention on Human Rights on Private International Law*, Springer
- Kiss A & Shelton D 1991, *International Environmental Law*, Transnational Publishers Inc
- Knox J H 2009, 'Climate Change and Human Rights', *Virginia Journal of International Law Association*, Vol. 50, No. 1, pp. 163–218
- Knox J. 2010, 'Diagonal environmental rights', Gibney M & Skogly S (eds.), *Universal Human Rights and Extraterritorial Obligations*, Pennsylvania Studies in Human Rights
- Koivurova T 2007, 'The Draft for a Nordic Saami Convention,' *European Yearbook of Minority Issues*, Vol 6, pp. 103–136
- Koivurova T 2008, 'Draft for a Nordic Saami Convention: Nations Working Together,' *International Community Law Review*, pp. 279–293
- Koivurova T 2008, 'From High Hopes to Disillusionment: Indigenous peoples' Struggle to (Re) again Their Right to Self-Determination', *International Journal on Minority and Group Rights*, Issue 15, pp. 1–26
- Koivurova T 2011, 'Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects,' *International Journal on Minority and Group Rights*, Vol. 18, pp. 1–37
- Koivurova T, 2013, 'Can Saami Transnational Indigenous Peoples Exercise Their Self-Determination in a World of Sovereign States', *The Proposed Nordic Saami Convention: National and International Dimensions of Indigenous Property Rights*, Hart Publishing, pp 105–125
- Koivurova T & Bankes N (eds.) 2013, *The Proposed Nordic Saami Convention: National and International Dimensions of Indigenous Property Rights*, Hart Publishing
- Koivurova T 2013, 'Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects', Fitzmaurice M & Merkouris P, *The Interpretation and Application of the European Convention on Human Rights: Legal and Practical Implications*, pp. 217–257
- Koivurova T & Petrétei A 2014, 'Enacting a New Mining Act in Finland – How were Sami Rights and Interests Taken into Account?', *Nordic Journal of Environmental Law*, Vol. 1, pp. 119–133
- Koivurova T, Stephien A, Gremesperger A & Niemi H 2014, 'Arctic Indigenous Peoples and the Challenge of Climate Change', Tedsen E, Cavalieri S & Kraemer RA (eds.), *Arctic Governance: Opportunities for Transatlantic Cooperation*, Springer
- Koivurova T, Stepien A & Petretei A 2015, 'Sami Parliaments in Finland, Norway and Sweden', Malloy, Osipov & Vizi (eds.), *Managing Diversity Through Non-Territorial Autonomy*, Oxford University Press
- Koivurova T, Masloboev V, Hossain K, Nygaard V, Petrétei A & Vinogradova S 2015, 'Legal Protection of Sami Traditional Livelihoods from the Adverse Impacts of Mining: A Comparison of the Level of Protection Enjoyed by Sami in Their Four Home States', *Arctic Review on Law and Politics*, Vol. 6, No. 1, pp. 11–51
- Kratochvil J 2011, 'The Inflation of the margin of appreciation by the European Court of Human Rights', *Netherlands Quarterly of Human Rights*, Vol. 29, No. 3, pp. 324–357
- Lauta K & Rytter J 2016, 'A landslide on a mudslide? Natural hazards and the right to life under the European Convention on Human Rights', *Journal of Human Rights and the Environment*, Vol. 7, Issue 1, pp. 113–115
- Lavrysen L 2014, 'Protection by the Law: The positive obligation to develop a legal framework to adequately protect ECHR', Brems E et al. (eds.), *Human Rights and Civil Liberties in the 21st Century*, Springer

- Lawson R 2011, 'Across the Universe. The Extra-Territorial Application of the European Convention on Human Rights', *European Yearbook on Human Rights*, pp. 427-444
- Leiter B 2007, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy*, Oxford University Press
- Limon M 2009, 'Human Rights and Climate Change: Constructing a Case for Political Action', *Harvard Environmental Law Review*, Vol. 33, pp. 439-476
- Letsas G 2006, 'Two Concepts of the Margin of Appreciation', *Oxford Journal of Legal Studies*, Vol. 26, No. 4, 2006, pp. 205-732
- Letsas G 2010, 'Strasbourg's Interpretive Ethic: Lesson for the International Lawyer', *The European Journal of International Law*, Vol. 21, No. 3, p. 510
- Letsas G 2011, 'Judge Rozakis's Separate Opinions and the Strasbourg Dilemma,' in Dean Spielmann et al., *The European Convention on Human Rights: A Living and Dynamic Instrument – Liber Amicorum in Honour of Judge Rozakis*, Bruylant
- Lock T 2015, *The European Court of Justice and International Courts*, Oxford University Press
- Manus P 2005, 'Indigenous Peoples' Environmental Rights: Involving the Common Law Perspective in Canada, Australia and the United States', *Boston College Environmental Affairs Law Review*, Vol. 33, No. 1, pp. 1-86
- Mayer B 2016, 'Human Rights in the Paris Agreement', *Climate Law*, Vol. 6, pp. 109-117
- Mc Crudden C 2007, Judicial Comparative and Human Rights in Trüciü (ed.), *Comparative law, A Handbook*, Hart Publishing
- MacInery A 2007, *After Virtue*, 3rd ed, Notre Dame
- McManus F 2005, 'Noise pollution and human rights,' *European Human Rights Law Review*, Issue 6, pp. 579-583
- Malgosia F 2011, 'The European Court of Human Rights, Environmental Damage and the Applicability of Article 8 of the European Convention on Human Rights and Fundamental Freedoms', *Environmental Law Review*, Vol. 13, Issue 2, pp. 107
- Marsden S & Koivurova T, 2011. *Transboundary Environmental Impact Assessment in the European Union: The Espoo Convention and its Kiev Protocol on Strategic Environmental Assessment*, Earthscan
- Marr S 2003, *The precautionary principle in the law of the sea: modern decision-making in international law*, Nijhoff
- McCaffrey SC 2003, *The Law of International Watercourses, Non-navigational uses*, Oxford University Press
- McCubbin S, Smit B & Pearce T 2015, 'Where does climate fit? Vulnerability to climate change in the context of multiple stressors in Funafuti, Tuvalu', *Global Environmental Change*, 30, pp. 43-55
- McHarg A 1999, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights', *The Modern Law Review*, Vol. 62, No. 5, pp. 671-696
- Middaugh ME 2006, 'Linking Global Warming to Inuit Human Rights', *San Diego International Law Journal*, Vol. 8, pp. 179-207
- Milanovic M 2011, *Extraterritorial Application of Human Rights Treaties, Law, Principles and Policy*, Oxford University Press
- Milanovic M 2014, 'The Spatial dimension: Treaties and Territory', in C.J. Tams, A. Tzanakopoulos and A. Zimmermann with A.E Richford, *Research Handbook on the Law of Treaties*

- Miller S 2009, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the Convention.' *The European Journal Of International Law*, Vol. 20, No. 4, pp. 1223–1246
- Morawa AHE 2003, 'Vulnerability as a Concept of International Human Rights Law', *Journal of International Relations and Development*, Vol. 6, No. 2, pp. 139–155
- Morgera E 2013, 'No Need to Reinvent the Wheel for a Human Rights-Based Approach to Tackling Climate Change: The Contribution of International Biodiversity Law' in Hollo E, Kulovesi K & Mehling M (eds.), *Climate Change and the Law*, Springer, pp. 350–390
- Morrow K 2013, 'After the Honeymoon: The Uneasy Marriage of Human Rights and the Environment Under the European Convention on Human Rights and in UK Law Under the Human Rights Act 1998', *Revue Generale de Droit*, Vol. 43, p. 317–369
- Mowbray A 2004, *The development of positive obligations under the ECHR by the ECtHR*, Vol 2, Series Human Rights Law in Perspective, Hart Publishing
- Mowbray A 2015, 'Between Will and Needs,' Brems E & Gerards J (eds.), *Shaping Rights in the ECHR, The role of the European Court of Human Rights in Determining the Scope of Human Rights*, Cambridge University Press
- Müllerová H 2015, 'Environment Playing Short-handed: Margin of Appreciation in Environmental Jurisprudence of the European Court of Human Rights', *RECIEL*, Vol. 24, No. 1, pp. 83–92
- Naess A 1989, *Ecology, Community and Lifestyle*, Cambridge University Press
- Naess A 1972, *The Shallow and the Deep Long-Range Ecology Movement*, 16 *Inquiry*, 95
- Nordeide R 2009, 'Demir & Baykara v. Turkey', *American Journal of International Law*, Vol. 103, pp. 567–574
- Northcott H 2012, 'Realization of the right of indigenous peoples to natural resources under international law through the emerging right to autonomy,' *The International Journal of Human Rights*, Vol. 16, No. 1
- O'Boyle M 2014, 'The Role of Dialogue in the relationship between the European Court of Human Rights and National Courts', in *The Realisation of Human Rights: When Theory Meets Practice. Studies in Honour of Leo Zwaak*, Intersentia
- Olsén L, Harkoma A, Heinämäki L & Heiskanen H 2017, *Saamelaiusten perinnetiedon huomioiminen ympäristöpäätöksenteossa*, *Juridica Lapponica* 41, Lapin yliopisto
- Oppenheim F 1981, *Political Concepts: a Reconstruction*, Basil Blackwell
- Osofsky H M 2005, 'Learning from Environmental Justice: A New Model for International Environmental Rights,' *Stanford Environmental Law Journal*, Vol. 24 No. 1, pp. 107–118
- Otis G & Aurélie L 2013, 'Indigenous land claims in Europe: The European Court of Human Rights and the decolonization of property', *Arctic Review on Law and Politics*, Vol. 4, No. 2, pp. 156–180
- Pearce T et al. 2009, Inuit vulnerability and adaptive capacity to climate change in Ulukhaktok, Northwest Territories, Canada. *Polar Record*, Vol. 45, pp. 1–21
- Pedersen OW 2010, 'The Ties that Bind: The Environment, The European Convention on Human Rights and the Rule of Law,' *European Public Law*, Vol. 16, No. 4, pp. 571–595
- Peeters M, Stallworthy M, de Cendra de Larragán J (eds.) 2012, *Climate Law in EU Member States Towards National Legislation for Climate Protection*, Edgar Elgar
- Pellonpää M 2002, *Euroopan ihmisoikeussopimus*, Helsinki
- Pellonpää M 2012, 'Euroopan ihmisoikeussopimuksen tulkintaa koskevasta vuoropuhelusta', Heinonen T & Lavapuro J (eds.), *Oikeuden eurooppalaistuminen*, Helsinki

- Pieraccini M 2015, 'Reflections on the relationship between environmental regulation, human rights and beyond – with Heidegger', Grear A & Grant E, *Thought, Law, Rights and Action in the Age of Environmental Crisis*, Edward Elgar
- Philippopoulos-Mihalopoulos A 2015, 'Actors or spectators? Vulnerability and critical environmental law', Grear A & Grant E, *Thought, Law, Rights and Action in the Age of Environmental Crisis*, Edward Elgar, pp. 46–75
- Popovic D 2009, 'Prevailing of Judicial Activism over Self-restraint in the Jurisprudence of the European Court of Human rights,' *Creighton Law Review*, Vol. 42, Issue 3, pp. 361–396
- Priorová T L, Duyck S, Heinämäki L, Koivurova, T & Stępień A 2013, *Addressing Climate Vulnerability: Promoting the Participatory Rights of Indigenous Peoples and Women through Finnish Foreign Policy*, University of Lapland
- Puuronen V 2011, *Rasismi Suomessa*, Gaudeamus
- Quirico O & Boumghar M 2015, *Climate Change and Human Rights: An International Law Perspective*, Routledge
- Rainey B, Wicks E & Ovey C 2014, *Jacobs, White and Ovey: The European Convention on Human Rights*, Oxford University Press 6th ed
- Rautiainen P 2011, 'Moninaisuudessaan yhtenäinen Eurooppa: konsensusperiaate ja valtion harkintamarginaalioppi,' *Lakimies*, Issue 6, pp. 1152–1171
- Razzaque J 2010, 'Right to a Healthy Environment in Human Rights Law, International Human Rights Law,' in Baderin A & Ssenyonjo M (eds.), *Six Decades after the UDHR and Beyond*, Ashgate
- Redgwell C 1996, 'Life, the Universe and Everything: A Critique of Anthropocentric Rights,' Boyle A & Anderson M (eds), *Human Rights Approaches to Environmental Protection*, Clarendon Press
- Reidsma P, Wolf J, Kanellopoulos A, Schaap B F, Mandryk M, Verhagen J & van Ittersum M K 2015, 'Climate change impact and adaptation research require integrated assessment and farming systems analysis: a case study in the Netherlands,' *Environmental Research Letters*, Vol. 10, No. 4
- Rosas A 1991, 'Issues of State Liability for Transboundary Environmental Damage,' *Nordic Journal of International Law*, Vol. 60, No. 5, pp. 29–47
- Rossi I 2010, *Legal Status of Non-Governmental Organizations in International Law*, Intersentia
- Sachs W 2006, 'Climate Change and Human Rights,' *The Pontifical Academy of Sciences*, 106, pp. 349–369
- Sands P 1996, 'Human Rights, environment, and the Lopez-Ostra case: context and consequences,' *European Human Rights Law Review*, No. 6, pp. 597–618
- Sands P 2003, *Principles of International Environmental Law*, 2nd ed., Cambridge University Press
- San Jose D 2010, *Enforcing the Human Rights to Environment in Europe, A Critical Overview of the European Court of Human Rights Case-law*, Edita Knoros
- Sama L, Welcomer S & Gerde V 2004, 'Who speaks for the trees? Invoking an ethic of care to give voice to the silent stakeholder,' Sharma S & Starik M (eds.), *Stakeholders, the Environment and Society*, Edward Elgar Publishing
- Schaaf D & Fisher J 2002, 'Inter-American Commission on Human Rights: Victory for Indian Land Rights and the Environment,' *TUL Env. LJ*, Vol. 16, pp. 175
- Schaefer Caniglia B, Brulle RJ & Szasz A 2015, 'Civil Society, Social Movements and Climate Change,' Dunilap RE & Brulle RJ (eds.), *Climate Change and Society: Sociological Perspectives*, Oxford University Press

- Schlütter B 2010, *Developments in Customary International Law, Theory and the Practice of the ICJ and the International Ad Hoc Criminal Tribunals for Rwanda and Yugoslavia*, Martinus Nijhoff Publishers
- Shall C 2008, 'Public Interest Litigation Concerning Environmental Matters before Human Rights Courts: A Promising Future Concept?', *Journal of Environmental Law*, Vol. 20, No. 3, pp. 428–429
- Smit B & Wandel J 2006, 'Adaptation, adaptive capacity, and vulnerability', *Global Environmental Change*, Vol. 16, No. 3, pp. 282–292
- Southbound P H, Ketil L & Sørli T 2012, 'Ethnic discrimination and psychological distress: A study of Sami and non-Sami populations in Norway.' *Transcultural Psychiatry*, Vol. 49, No. 1, pp. 26–50
- Stallworthy M 2008, *Understanding Environmental Law*, Sweet and Marwell
- Sellars K 2002, *The Rise and Rise of Human Rights*, Sutton Publishing Limited
- Sen A 2009, *The Idea of Justice*, The Belknap Press of Harvard University Press
- Senden H 2011, *Interpretation of Fundamental Rights in a Multilevel Legal System, An analysis of the ECtHR and the Court of Justice of the EU*, Intersentia
- Shai D 2011, 'Judicial Tactics in the European Court of Human Rights', *Chicago Journal of International Law*, Vol. 12, No. 1, pp. 115–142
- Shklar NJ 1990, *The faces of injustice*, Yale University Press
- Shelton D 1991, 'Human Rights, Environmental Rights and the Right to Environment', *Stanford Journal of International Law*, Vol 28, No 1, pp. 103–138
- Shelton D 2001, 'Environmental Rights', Alston P (ed.), *People's Rights*, Oxford University Press
- Shelton D 2003, 'Introduction', Picolotti R & Taillant J (eds), *The Environmental Jurisprudence of International Human Rights Tribunals in Linking Human Rights and The Environment*, University of Arizona Press
- Shelton D 2010, 'International Decision: Tătar v. Romania', *American Journal of International Law*, Vol. 104, pp. 247
- Shelton D 2011, 'Comments on the normative challenge of environmental "soft law"', Kerbrat Y, Maljean-Dubois & Pedone S (eds.), *The Transformation of International Environmental Law*, Hart Publishing
- Shelton D 2013, *Positive and negative obligations*, The Oxford University Press
- Shelton D 2015, 'Legitimate and necessary: adjudicating human rights violations related to activities causing environmental harm or risk', *Journal of Human Rights and the Environment*, Vol. 6, No. 2, pp. 139–155
- Sieghart P 1983, *The International Law of Human Rights*, Oxford University Press
- Sijniesky RI 2014, 'From the Non-Discrimination concept of Vulnerability in International Human Rights Law, Advancing on the Need for Special Protection of Certain Groups and Individuals', Heck Y, McGonigle Leyh B, Burbano-Herrera-Burbano C & Contreras-Garduño, D (eds.), *The Realisation of Human Rights: when Theory meets Practice*, Portland
- Smits J 2012, *The Mind and Method of Legal Academic*, Edward Elgar
- Sohn LB 1973, 'The Stockholm Declaration on the Human Environment', *Harvard International Law Journal*, Vol. 14, pp. 423–515
- Solvang O 2008, 'Chechnya and the European Court of Human Rights, The merits of Strategic Litigation', *Security and Human Rights*, Vol. 19, Issue 3, pp. 208–219
- Stallworthy M 2008, *Understanding Environmental Law*, Sweet and Marwell



- Stamatopoulou E 2011, Indigenous Peoples and the United Nations: Human Rights as a Developing Dynamics, Weissbrodt D & Rumsey M (eds.), *Vulnerable and Marginalized Groups and Human Rights, Human Rights Law 1*, An Elgar Research Collection
- Stephens T 2010, *International Courts and Environmental Protection, Cambridge Studies in International and Comparative Law*, Cambridge University Press
- Stone C 1972, 'Should Trees Have Standing? – Toward Legal Rights for Natural Objects', *Southern California Law Review*, Vol. 45, No. 2, pp. 450–501
- Stone C 1996, *Should tree have standing? and other essays on law, morals and the environment*, 25th anniversary edn, Oceana Publications
- Stutzin G 1976, 'Should We Recognize Nature's Claim to Legal Rights?', *Environmental Policy and Law*, Vol. 2, No. 3, pp. 129
- Taylor P 2010, 'The Imperative of Responsibility in a Legal Context: Reconciling Responsibilities and Rights', Engel J, Westra L & Bosselmann K (eds.), *Democracy, Ecological Integrity and International Law*, Cambridge Scholars Publishing
- Thériault S 2015, 'Environmental justice and the Inter-American Court of Human Rights', Grear A & Kotze LJ (eds.), *Research Handbook on Human Rights and the Environment*, Edward Elgar
- Timmer A 2013, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights', Fineman M & Grear A (eds.), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, Ashgate
- Thio L 2005, *Managing Babel: The International Legal Protection of Minorities in the Twentieth Century*, *International Studies in Human Rights*, Martinus Nijhoff Publishers
- Thornberry P 2002, *Indigenous Peoples and Human Rights*, Manchester University Press
- Toivanen R 2013, 'Saamelaiden oikeudet Suomessa: Ekskursio: Miksi saamelaiden oikeudet eivät toteudu?', *Saamelaiset Suomessa: Näkökulmia ja ääniä tämän päivän saamelaisuuteen*, Siljander H (ed.), 1 ed., Sukukansojen ystävät ry., Vol. 1, No. 1, pp. 30–39
- Toivanen R 2014, 'Vähemmistöjen oikeuksien toteutumisen haasteet Suomessa: katsaus saamelaiden ja romanien tulevaisuuteen', *Futura*, Vol. 33, No. 4, pp. 6–17
- Triggs G 2002, 'The Rights of Indigenous Peoples to Participate in Resource Development: An International Legal Perspective', Zillman D, Lucas A & Pring G (eds.), *Human Rights in Natural Resource Development, Public Participation in the Sustainable Development of Mining and Energy Resources*, Oxford University Press
- Trindade A 1998, 'Human Rights and the Environment', Symonides J (ed.), *Human Rights: New Dimensions and Challenges*, UNESCO, Manual on Human Rights/Ashgate
- Tucker J et al. 2014, 'Social vulnerability in three high-poverty climate change hot spots: What does the climate change literature tell us?' *Regional Environmental Change*, Vol. 15, No. 5, pp. 783–800
- Tuori K 2012, 'Alkuperäiskansat ja maakysymys' (Indigenous Peoples and the Land Issue), *Lakimies*, Vol. 110, No. 6, pp. 891–911
- Turner BS 2006, *Vulnerability and Human Rights*, The Pennsylvania State University Press
- Turner I 2015, 'Positive obligations and Article 4 of the European Convention on Human Rights: a defence of the UK's Human Rights Act 1998', *The International Journal of Human Rights*, Vol. 18, No. 1, pp. 94–114
- Tzevelekos V & Dzehtsiarou K 2016, 'International Custom Making and the ECtHR's European Consensus Method of Interpretation', *European Yearbook of Human Rights*, Vol. 16, pp. 313–344

- Uimonen J 2011, 'Alkuperäiskansojen oikeudet: pohjaton kaivo vai askel eteenpäin?', *Lakimies*, Vol. 4, pp. 742–747
- Uoti K 2004, *Euroopan ihmisoikeustuomioin – lainkäyttäjän oikeuden tekijänä*, Helsinki
- Vandenbogaerde A 2015, 'Jurisdiction Revised. Attributing Extraterritorial State Obligations under the International Covenant on Economic,' *Social and Cultural Rights*, HR&ILD 1, p. 18
- van den Eynde L 2013, 'An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs before the European Court of Human Rights,' *Netherlands Quarterly of Human Rights*, Vol. 31, No. 3, pp. 271–313
- Van der Schyff G 2011, 'Two-stage rights in the ECHR,' Brems & Gerards (eds.), *Shaping Rights in the ECHR, The role of the European Court of Human Rights in Determining the Scope of Human Rights*, Cambridge University Press
- Vanneste F 2010, *General International Law Before Human Rights Courts, Assessing the Specialty Claims of International Human Rights Law*, Intersentia
- Vennemann N 2006, Application of International Human Rights Conventions to Transboundary State Acts, Rebecca M. Bratspies & Russell A. Mills (eds.), *Transboundary Harm in International Law*, Cambridge
- Viljanen J 2003, *The European Court of Human Rights as a Developer of the General Doctrines of Human Rights Law, A Study of the Limitation Clauses of the European Convention on Human Rights*, Acta Universitatis Tamperensis 965
- Viljanen J 2011, 'The Role of the European Court of Human Rights as a Developer of International Human Rights Law', *Cuadernas Constitucionales de la Cátedra Fadrique Furió Cerial*, No. 62/63, pp. 249–265
- Viljanen J & Heiskanen H 2016, 'The European Court of Human Rights: A Guardian of Minimum Standards in the Context of Immigration', *Netherlands Quarterly of Human Rights*, Vol. 34, No. 2, pp. 174–196
- Voigt C 2008, 'State Responsibility for Climate Change Damages', *Nordic Journal of International Law*, Vol. 77, pp. 1–22
- Ward E 1994, *Indigenous Peoples between Human Rights and Environmental Protection*, Danish Institute for Human Rights
- West SP & Schultz L 2015, 'Learning for resilience in the European Court of Human Rights: adjudication as an adaptive governance practice', *Ecology and Society*, Vol. 20, No. 1, pp. 31–42
- Westerhoff L & Smit B 2009, 'The rains are disappointing us: Dynamic vulnerability and adaptation to multiple stressors in the Afram Plains, Ghana', *Mitigation and Adaptation Strategies for Global Change*, Vol. 14, No. 4, pp. 317–337
- Westra L 2007, *Environmental Justice and the Rights of Indigenous Peoples: International And Domestic Legal Perspectives*, Routledge
- Westra L 2008, *Environmental Justice and the rights of indigenous peoples, International and domestic legal perspective*, Earthscan
- Wewerinke M & Doebbler C 2011, 'Exploring the Legal Basis of a Human Rights Approach to Climate Change', *Chinese Journal of International Law*, pp. 141–160
- Wewerinke-Singh M 2018, 'State responsibility for human rights violations associated with climate change', Duyck S, Jodoin S & Johl A (eds.), *The Routledge Handbook of Human Rights and Climate Governance*, Routledge, pp. 75–89
- White R 2009, 'Judgments in the Strasbourg Court: Some Reflections,' *Social Science Research Network*, 6/2009, pp. 1–16



- Wildhaber L et al. 2013, 'No Consensus on Consensus? The practice of the ECtHR', *Human Rights Law Journal*, Vol. 33, No. 7–12
- Xenos D 2012, *The positive obligations of the state under the ECHR*, Routledge Research in Human Rights Law
- Zarbiyev F 2012, Judicial Activism in International Law - A Conceptual Framework for Analysis', *Journal of International Dispute Settlement*, Vol. 3, No. 2, pp. 1–32
- Zysset A 2017, *The ECHR and Human Rights Theory, Reconciling the Moral and the Political Conceptions*, Routledge
- Åhren M 2009, the Provision on Land, Territories and Natural Resources in the UN Declaration on the Rights of Indigenous Peoples: An Introduction, C Charters and R Starenhagen (eds.), *Making the Declaration Worth: The United Nations Declaration on the Rights of the Indigenous Peoples*, Eks-Skolens Trykkeri

### ***Case law of the ECtHR and the former Commission***

- Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Appl. no. 9214/80, 9473/81 and 9474/81, 28 May 1985
- Ahunbay and Others v. Turkey, Austria and Germany*, Appl. no. 6080/06, pending application
- Aksoy v. Turkey*, Appl. no. 21987/93, 18 December 1996
- Alajas Kiss v. Hungary*, Appl. no. 38832/06, 20 August 2010
- Alatulkkila and others v. Finland*, Appl. no. 33538/96, 28 July 2005
- AlSkeini and Others v. the United Kingdom*, Appl. no. 55721/07, 7 July 2011.
- Ambrogi Melle and Others v. Italy*, Appl. no. 54264/15, pending application
- Animal Defenders International v. the United Kingdom*, Appl. no. 48876/08, 22 April 2013
- Apanasewicz v. Poland*, Appl. no. 6854/07, 3 May 2011
- Arrondelle v. the United Kingdom*, Appl. no. 7889/77, friendly settlement
- Atanasov v. Bulgaria*, App. no. 12853/03, 2 December 2010
- Athanassoglou and Others v. Switzerland*, Appl. no. 27644/95, 6 April 2000 (GC)
- Băcilă v. Romania*, Appl. no. 19234/04, 30 March 2010
- Balluch v. Austria*, Appl. no. 26180/08, application lodged on 4 May 2008
- Balmer Schafroth and Others v. Switzerland*, Appl. no. 67\1996\686\876, 26 August 1997
- Banel v. Lithuania*, Appl. no. 14326/11, 18 June 2013
- Bankovic v. Belgium*, Appl. no. 5220/99, 12 December 2001
- Beard v. United Kingdom*, Appl. no. 24882/94, 18 January 2001
- Bentham v. the Netherlands*, Appl. no. 8848/80, 23 October 1985
- Bhosphorus v. Ireland*, Appl. no. 45036/98, 30 June 2005
- Bladed Tromso and Stensaas v. Norway*, Appl. no. 21980/93, 20 May 1999

*Blecic v. Croatia*, Appl. no. 59532/00, 29 July 20048

*Bor v. Hungary*, Appl. no. 50474/08, 18 June 2013

*Borysiewicz v. Poland*, Appl. no. 71146/01, 1 July 2008

*Botta v. Italy*, Appl. no. 153/1996/772/973, 24 February 1998

*Brânduse v. Romania*, Appl. no. 6586/03, 7 April 2009

*Brincat and Others v. Malta*, Appl. no. 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11, 24 July 2014

*Buckley v. the United Kingdom*, Appl. no. 20348/92, 29 September 1996

*Budayeva and Others v. Russia*, Appl. no. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 20 March 2008

*Chapman v. the United Kingdom*, Appl. no. 27238/95, 18 January 2001 (GC)

*Chassagnou and Other v. France*, Appl. no. 25088/94, 28331/95 and 28443/95, 29 April 1999

*Chater v. the United Kingdom*, Appl. no. 11723/85, 7 May 1987

*Chiş v. Romania*, 9 September 2014, decision on the admissibility

*Christine Goodwin v. the United Kingdom*, Appl. no. 28957/95, 11 July 2002

*Connors v. the United Kingdom*, Appl. no. 66746/01, 27 May 2004

*Cordella and Others v. Italy*, Appl. no. 54414/13

*Costel Popa v. Romania*, Appl. no. 47558/10, 26 April 2016

*Coster v. the United Kingdom*, Appl. no. 24876/94, 18 January 2001 (GC)

*Creangă v. Romania*, Appl. no. 29226/03, 23 February 2012

*D.H and Others v. Czech Republic*, Appl. no. 57325/00, 13 November 2007

*Deés v. Hungary*, Appl. no. 2345/06, 9 November 2010

*Demir and Baykara v. Turkey*, Appl. no. 34503/97, 12 November 2008

*Depalle v. France and Brosset-Triboulet and Others v. France*, Appl. no. 34044/02, 29 March 2010

*Di Sarno and Others v. Italy*, Appl. no. 30765/08, 10 January 2012

*Dubetska and Others v. Ukraine*, Appl. no. 30499/03, 10 February 2011

*Dzemyuk v. Ukraine*, Appl. no. 42488/02, 4 September 2014

*Egeland and Hanseid v. Norway*, Appl. no. 34438/04, 16 April 2009

*Elefteriadis v. Romania*, Appl. no. 38427/05, 25 January 2011

*El-Masri v. The Former Yugoslav Republic of Macedonia*, Appl. no. 39630/09, 13 December 2012 (GC)

*Eweida and others v. the United Kingdom*, Appl. no. 48420/10, 59842/10, 516710/10 and 36516/10, 15 January 2013

*Fadeyeva v. Russia*, Appl. no. 55723/00, 9 June 2005  
*Fägerskiöld v. Sweden*, 26 February 2008 (decision on the admissibility)  
*Flamenbaum and Others v. France*, Appl. no. 3675/04 and 23264/04, 13 December 2012  
*Florea v. Romania*, Appl. no. 37186/03, 14 September 2010  
*Frankowski and Others v. Poland*, Appl. no. 25002/09, 20 September 2011  
*Fredin (no. 1) v. Sweden*, Appl. no. 12033/86, 18 February 1991  
*G. & E. v. Norway (Alta case)*, Appl. no. 9278/81, 3 October 1983  
*Giacomelli v. Italy*, App. no. 59909/00, 2 November 2006  
*Golder v. the United Kingdom*, Appl. no. 4451/70, 21 February 1975  
*Gorraiz Lizarraga and Others v. Spain*, Appl. no. 62543/00, 27 April 2004  
*Greenpeace e.V. and Others v. Germany*, 12 May 2009 (decision on the admissibility)  
*Grimkovskaya v. Ukraine*, Appl. no. 38182/03, 21 July 2011  
*Guerra and Others v. Italy*, Appl. no. 14967/89, 19 February 1998 (GC)  
*Halvar From against Sweden*, Appl. no. 34776/97, 4 March 1998, inadmissible  
*Hamer v. Belgium*, Appl. no. 21861/03, 27 November 2007  
*Harkins and Edwards v. the United Kingdom*, Appl. no. 9146/07 and 32650/07, 17 January 2012  
*Handölsdalen Saami Village and Others v. Sweden*, Appl. no. 39013/04, 17 February 2009 (decision on the admissibility)  
*Handölsdalen Saami Village and Others v. Sweden*, Appl. no. 39013/04, 30 March 2010  
*Hardy and Maile v United Kingdom*, Appl. no. 31965/07, 14 February 2012  
*Hatton and Others v. the United Kingdom*, Appl. no. 36022/97, 8 July 2003 (GC)  
*Herrick v. the United Kingdom*, Appl. no. 11185/84, 11 March 1985  
*Herrmann v. Germany*, Appl. no. 9300/07, 26 June 2012, dissenting opinion, Pinto  
*Hess v. United Kingdom*, Appl. no. 6231/73, 28 May 1975  
*Hingitaq 53 et al. v. Denmark*, Appl. no. 18584/04, 12 January 2006  
*Hirsi Jamaa Others v. Italy*, Appl. no. 27765/09, 23 February 2012.  
*Howald Moor and Others v. Switzerland*, Appl. no. 52067/10 and 41072/11, 11 March 2014  
*Huoltoasema Matti Eurén oy and Others v. Finland*, Appl. no. 26654/08 26654/08, 19 January 2010  
*Hussein v. Albania and twenty other States*, Appl. no. 23276/04, 14 March 2006  
*Ilascu and Others v. Moldova and Russia*, Appl. no. 48787/99, 8 July 2004  
*Illich Sanchez Ramirez v. France*, Appl no. 28780/95, 24 June 1996  
*Issa and Others v. Turkey*, Appl. no. 31821/96, 16 November 2004

*Jane Smith v. the United Kingdom*, Appl. no. 25154/94, 18 January 2001 (GC)

*Janina Furlępa v. Poland*, Appl. no. 62101/00, 18 March 2008

*John and Catherine Beard v. the United Kingdom*, Appl. no. 24882/94, 18 January 2001 (GC)

*Johnston and other v. Ireland*, 18 December 1986, Series A No 122

*Johtti Sappmelaccat ry and Others v. Finland*, Appl. no. 42969/98, 18 January 2005 Admissibility Decision

*K.A.B v. Sweden*, Appl. no. 886/11, 5 September 2013

*Kapsalis and Nima-Kapsali v. Greece*, 23 September 2004 (decision on the admissibility)

*Katte Klitsche de la Grange v. Italy*, Appl. no. 21/1993/416/495, 19 September 1994

*Kjeldsen, Busk Madsen & Pedersen v. Denmark*, Appl. no. 5095/71 5920/72 5926/72 5095/71 5920/72 5926/72, 7 December 1976

*Koceniak v. Poland*, 17 June 2014 (decision on the admissibility)

*Költepe v. Turkey*, Appl. no. 35785/03, 22 July 2008

*Kolyadenko and Others*, Appl. nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, 28 February 2012

*Kolyadenko, and Others*, Appl. nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, 28 February 2012

*Köning*, Judge Marches, Series A No 27 28 June 1989

*Könkämä and 38 other Sámi villages v. Sweden*, Appl. no. 27033/95, 25 November 1996

*Kyrtatos v. Greece*, Appl. no. 41666/98, 22 May 2003

*L 'Erasblière A.S.B.L v. Belgium*, Appl. no. 49230/07, 24 February 2009

*L.C.B. v. the United Kingdom*, Appl. no. 23413/94, 9 June 1998

*Lautsi and others v. Italy*, Appl. no. 30814/06, 18 March 2011

*Ledyayeva and Others v. Russia*, Appl. no. 53157/99, 53247/99, 53695/00 and 56850/00, 26 October 2006

*Lee v. the United Kingdom*, Appl. no. 25289/94, 18 January 2001 (GC)

*Lemke v. Turkey*, Appl. no. 17381/02, 5 June 2007

*Leon and Agnieszka Kania v. Poland*, Appl. no. 12605/03, 21 July 2009

*Leyla Shabin v. Turkey*, Appl. no. 44774/98, 10 November 2005

*Lithgow etc. v. the United Kingdom*, Appl. no. 9006/80, 9263/81, 8 July 1986

*Locascia and Others v. Italy*, Appl. no. 35648/10

*Loizidou v. Turkey*, Appl. no. 15318/89 23 March 1995

*López Ostra v. Spain*, Appl. no. 16798/90, 9 December 1994

*Luginbühl v. Switzerland*, 17 January 2006 (decision on the admissibility)

*Malfatto and Micelle v. France*, Appl. no. 40886/06, 6 October 2016  
*Mangouras v. Spain*, Appl. no. 12050/04, 28 September 2010 (GC)  
*Martinez Martinez and Maria Pino Manzano v. Spain*, Appl. no. 61654/08, 3 July 2012  
*Matos E Silva, LDA and Others v. Portugal*, Appl. no. 15777/89, 16 September 1996  
*McGinley et Egan c. Royaume-Uni*, Appl. no. 21825/93, 9 June 1998  
*MGN Limited v. the United Kingdom*, Appl. no. 39401/04, 18 January 2011  
*Mileva and Others v. Bulgaria*, Appl. no. 43449/02, 25 November 2010  
*Moe and others v. Norway*, Appl. no. 30966/96, 14 December 1999  
*Moreno Gómez v. Spain*, Appl. no. 4143/02, 16 November 2004  
*Murillo Saldias and Others v. Spain*, 28 November 2006 (decision on the admissibility)  
*N.A. and Others v. Turkey*, Appl. no. 37451/97, 11 October 2005  
*Nada v. Switzerland*, Appl. no. 10593/08, 12 September 2012  
*Öçkan and Others v. Turkey*, Appl. no. 46771/99, 28 March 2006  
*Okyay and Others v. Turkey*, Appl. no. 36220/97, 12 July 2005  
*Öneryıldız v. Turkey*, Appl. no. 48939/99, 30 November 2004 (GC)  
*Opuz v. Turkey*, Appl. no. 33401/02, 9 June 2009  
*Osman v. UK*, 2000, 29, EHRR 245  
*Özel and Others v. Turkey*, Appl. no. 14350/05, 15245/05 and 16051/05, 17 November 2015  
*Papastavrou and Others v. Greece*, Appl. no. 46372/99, 10 April 2003  
*Piermont v. France*, Appl. no. 15773/89; 15774/89, 27 April 1995  
*Pine Valley Developments Ltd and Others v. Ireland*, Appl. no. 12742/87, 29 November 1991  
*Powell and Rayner v. the United Kingdom*, Appl. no. 9310/81, 21 February 1990  
*Rantsev v. Cyprus and Russia*, Appl. no. 25965/05, 7 January 2010  
*Roche v. the United Kingdom*, Appl. no. 32555/96, 19 October 2005 (GC)  
*S.A.S. v. France*, Appl. no. 43835/11, 1 July 2014 (GC)  
*S.J. v. Belgium*, Appl. no. 70055/10, Judgment, Struck out of the List, 19 March 2015  
*Saadi v. Italy*, Appl. no. 37201/06, 28 February 2008  
*Salman v. Turkey*, Appl. no. 21986/93, 27 June 2000  
*Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, Appl. no. 931/13, ECHR-LE14.8bP3  
*Scappola v. Italy (No 3.)*, Appl. no 126/05, 22 May 2012  
*Selmouni v. France*, Appl. no. 00025803/94, 28 July 1999  
*Smaltini v. Italy*, Appl. no. 24 March 2015 (decision on the admissibility)

*Soering v. the United Kingdom*, Appl. no. 14038/88, 7 June 1989

*Stafford v. the United Kingdom*, Appl. no. 13229/03, 29 January 2008

*Steel and Morris v. the United Kingdom*, Appl. no. 68416/0115, February 2005

*Stibbe v. Austria*, Appl. no. 26188/08, application lodged on 6 May 2008

*Tanase and Others v. Romania*, Appl. no. 62954/00, 26 May 2009

*Taşkın and Others v. Turkey*, App. no. 46117/99, 10 November 2004

*Tătar v. Romania*, Appl. no. 67021/01, 27 January 2009

The UK, 11185/84, Dec. March 11, 1985, 42 D.R. 275

*Turgut and Others v. Turkey*, Appl. no. 1411/03, 8 July 2008

*Tyrer v. the United Kingdom*, Appl. no. 5856/72, 24 April 1978

*Uuhiniemi and others v. Finland*, Appl. no. 21343/93, 10 October 1994

*Valico S.R.L. v. Italy*, 21 March 2006, decision on the admissibility

*Vecbaštica and Others v. Latvia*, Appl. no. 52499/11, pending application

*Vides Aizsardzības Klubs v. Latvia*, Appl. no. 57829/00, 27 May 2004

*Vilnes and Others v. Norway*, Appl. no. 52806/09 and 22703/10, 5 December 2013

*Vilvarajah and Others v. the United Kingdom*, Appl. nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, 30 October 1991

*Viviani and Others v. Italy*, 24 March 2015, decision on the admissibility

*Winterstein, and Others v. France*, Appl. no. 27013/07, 17 October 2013

*Witold Litwa v. Poland*, Appl. no. 26629/95, 4 April 2000

*Women on Waves and Others v. Portugal*, Appl. no. 31276/05, 3 February 2009

*Zammit Maempel and Others v. Malta*, Appl. no. 24202/10, 22 November 2011

*Zander v. Sweden*, Appl. no. 14282/88, 25 November 1993

*Zimmermann v. Switzerland*, Appl. no. 8737/79, 13 July 1983

### ***International Conventions and Other Normative Instruments***

Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) 38 I.L.M. 517, 25 June 1998

C169, 72 ILO Official Bull. 59, 27 June 1989, and entered into force on 9 May 1991

CoE, Brighton Declaration, The High-Level Conference meeting at Brighton on 19 and 20 April 2012

CoE, Parliamentary Assembly, Environment and Human Rights, Doc. 9791, 16 April 2003



Convention for the Protection of Human Rights and Fundamental Freedoms (The European Convention on Human Rights), no. 5; 213 U.N.T.S. 221, 4 November 1950

Declaration on the Rights of Indigenous Peoples 2007 G.A. Res. 61/295, UN Doc. A/RES/61/295, 13 September, 2007

Declaration, UN Doc. A/CONF.48/14/REV.1, 1 January 1973

Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended (“the EIA Directive”)

Draft Universal Declaration of Rights of Mother Earth. Annex II to the letter dated 7 May 2010 from the Permanent Representative of the Plurinational State of Bolivia to the United Nations addressed to the Secretary-General. U.N. Doc. A/64/777

ILO 169, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989

Report of the United Nations Conference on the Human Environment and Development, Stockholm, 5-16 June 1972

The Convention on Biological Diversity, 1760 U.N.T.S. 69, 5 June 1992

The Council of Europe, The Rules of the Court, 14 November 2016

The Espoo Convention on Environmental Impact Assessment in a Transboundary Context, UNTS 309, adopted 25 February 1991, entered into force 10 September 1997

The Implementation Committee of the Espoo Convention. Report of the Implementation Committee on its twenty-first session, ECE/MP.EIA/IC/2011/4/ 20 June 2011

The Paris Agreement, adopted on 12 December 2015, entered into force 4 November 2016

Vienna Convention on the Law of the Treaties, no. 18232, 23 May 1969

### *Other International and Regional Cases and Practice*

Constitutional Court of Colombia 2015, Tayrona National Park Case, Decision T-606/15

Constitutional Court of Colombia 2015, Rio Atrato Case, Decision T-622 of 2016

High Court of Uttarakhand at Nainital, *Mohd. Salim v. State of Uttarakhand & others* (Writ Petition (PIL) no. 126 of 2014), 20 March 2017

Human Rights Committee, *Apirana Mahuika et al. v. New Zealand*, Comm. no. 547/1993 and *Ángela Poma Poma v. Peru*, Comm no. 1457/2006

Human Rights Committee, *Ilmari Länsman et al. v. Finland*, Comm. no. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992, 1994

Human Rights Committee, *Jouni Länsman et al. v. Finland*, Comm. no. 1023/2001

IACComm, *Yanomami v. Brazil*, Case no. 7615, Resolution no. 12/85, 5 March 1985

IACtHR, *Awas Tingni v. Nicaragua*, *Moiwana v. Suriname*, 15 June 2005

IACtHR, *Moiwana v. Suriname*, Serie C no. 124, 15 June 2005

IACtHR, *San Mateo de Huanchor v. Peru*, Report no. 69/04, 15 October 2004

IACtHR, *Saramaka People v. Suriname*, 2007, Interpretation of the judgment on preliminary objections, merits, reparations and costs

IACtHR, *Sarayaku v. Ecuador*, 27 June 2012

IACtHR, *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 31 August 2001, Serie no. 79

IACtHR, *Yakye Axa v. Paraguay*, Series C no 125, 17 June 2005

ICJ 19 December 2005, Armed Activities on the Territory of the Congo (*The Democratic Republic of the Congo v. Uganda*) Judgment 168

ICJ, *Corfu Channel v. Albania*, Reports 1949

ICJ, *Israeli Wall Advisory Opinion*, 9 July 2004

ITLOS, The Arctic Sunrise Case (*Kingdom of the Netherlands v. Russian Federation*), Provisional Measures, Case no 22, 2013

Klimaseniörinnen, *Swiss senior case* (2016), [http://klimaseniörinnen.ch/wp-content/uploads/2016/10/Gesuch-um-Erlass-Verfuegung\\_Sperrfrist.pdf](http://klimaseniörinnen.ch/wp-content/uploads/2016/10/Gesuch-um-Erlass-Verfuegung_Sperrfrist.pdf)

Loja Provincial Court of Justice, *F.F Wheeler and E.G. Huddle v. Attorney General of the State of Loja*, Judgment No 11121-0010, 30 March 2011

*Pa. Gen. Energy Co. v. Grant Twp.*, 139 F. Supp. 3d 706 (W.D.Pa 2015)

Palmblad, J & Björnstrand, P 2016, *Magnolia Summons Application*, <https://drive.google.com/file/d/0BwNst9QrJa18Y2x6X1hMYmJmSEk/view>

Parliamentary Deputy-Ombudsman of Finland, 11 December 2012, Dnro 3709/2/10

Petition to the Inter-American Commission on Human Rights Seeking Relief From Violations Resulting from Global Warming Caused by Acts and Omissions of the United States, I Summary of the Petition, Available: <http://www.inuitcircumpolar.com/uploads/3/0/5/4/30542564/finalpetitionssummary.pdf>

Royaume Uni/Commission, Aff C-180/96, et CJCE, National Farmer's Union, C-157/96

Sexta Sala de Revisión de la Corte Constitucional: Case T-622, Centro de Estudios para la Justicia Social "Tierra Digna" & Otros v. Colombia (Expediente # T-5.016.242), 10 November 2016

Supreme Court of Belize, *Attorney General of Belize v. MS Westerhaven et al.* (2009), 26 April 2010

*Te Awa Tupua (Whanganui River Claims Settlement Settlement)* Act 2017 # 7, in force 20 March 2017, Parliamentary Counsel Office of New Zealand

The Netherlands, *Kelderluin*, ruling of the Supreme Court (HR 5 November 1965, ECLI:NL:HR:1965: AB7079, NJ 1966, 136)

The Netherlands, *Urgenda* C/09/456689, 13-1396, 24 May 2015

The USA v. Canada, *Trail Smelter*, 1938 and 1941, 3 R.I.A.A. 1905

The US District Court, W.D, Pennsylvania, *Seneca Resources Corporation v. Highland Township et al.* Case No. 1:16-CV-289

The United States Supreme Court, *Sierra Club v Morton*, 405 US 727 (1972), Dissenting opinion of Justice William Douglas

### *Other UN documents*

Committee on the Rights of the Child (CRC Committee), General comment no. 16 (2013) on State Obligations Regarding the Impact of the Business Sector on Children's Rights, UN Doc. CRC/C/GC/16

HRC, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/31/52

Information Submitted by State Parties: Nigeria, 1 October 2004, UN Doc. A/59/18

Report of the Committee on the Convention on the Elimination of All Forms of Racial Discrimination for the Sixty-fourth and Sixty-fifth sessions, Consideration of Reports, Comment

Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights, 15, UN Doc. A/HRC/10/61, 15 January 2009

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

Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, Compilation of Good Practices, A/HRC/2/8/61, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/017/26/PDF/G1501726.pdf?OpenElement>

Report of the Special Rapporteur on the issues of human rights obligations relating to the enjoyment of a safe, clean, healthy and suitable environment, A/HRC/37/59, 24 January 2018

The Bali Action Plan. FCCC/CP/2007/6/Add.1

The Office of the High Commissioner for Human Rights, Understanding Human Rights and Climate Change, submission the 21st Conference of Parties to the UNFCCC, 27 November 2015

UNHRC, Geneva, United Nations, Human Rights Council (2010), Applying a Human Rights-Based Approach to Climate Change Negotiations, Policies and Measures, Resolution 10/4, 25 March 2009

UNHRC, Geneva. United Nations Human Rights Council (UNHRC) (2008). Res. 7/23 on human rights and climate change, U.N. Doc. A/HRC/7/78

United Nations Framework Convention on Climate Change (2009) Decision 2/CP.15. The Copenhagen Accord (UN Doc. FCCC/CP/2009/11/Add.1). United Nations, New York.

United Nations Framework Convention on Climate Change (UNFCCC) (2007) Decision 1/CP.13

United Nations Human Rights Council (UNHRC) (2009). Res. 10/4, U.N. Doc. A/HRC/10/L.30

### *Other Materials from the Council of Europe*

- Council of Europe 2017, Analysis of statistics 2016, [http://www.echr.coe.int/Documents/Stats\\_analysis\\_2016\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_analysis_2016_ENG.pdf)
- Council of Europe 2015, Understanding the Court's statistics [http://www.echr.coe.int/Documents/Stats\\_understanding\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_understanding_ENG.pdf)
- Section President Mark E. Villager, (The Role of the 1969 Vienna Convention on the Law of Treaties in the Interpretation of the Convention by the Court, p. 30)
- Judge Iulia Motoc, Conference on the ECHR and General International Law, 5 June 2015, Strasbourg
- Council of Europe (ed.) 2014, 'Bringing a case to the European Court of Human Rights: A practical guide on admissibility criteria', 3rd Ed, Wolf Legal Publishers
- Harvey, P 2015, Third Party Interventions before the ECtHR: A Rough Guide, <https://strasbourgoobservers.com/2015/02/24/third-party-interventions-before-the-ecthr-a-rough-guide/>

### *National Laws and Rules*

- Código Orgánico General de Procesos, publicado en el Suplemento del Registro Oficial # 506, de 22 de mayo de 2015
- Environmental law for the Protection of the Earth 2013, Ley de Protección a la Tierra, Gaceta Oficial del Distrito Federal, 17 September 2013
- Finnish Mining Act, (621/2011), 10 June 2011
- Finnish Water Act (587/2011), 27 May 2011
- Finnish Reindeer Grazing Act (848/1990), 14 September 1990
- Framework Law on Mother Earth and Holistic Development for Living Well, Law, No. 300, 2012
- Georgetown University & Center for Latin American Studies Program, Translation of the Constitution of the Republic of Ecuador, Political Database of the Americas, 2011: <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>
- Lafayette, Colorado, Ordinance 2017-02, 21 March 2017
- Ley de Derechos de la Madre Tierra
- National Assembly, Republic of Ecuador, Comprehensive Criminal Code, 3 February 2014
- National Assembly, Republic of Ecuador, Environmental Code, 21 December 2014
- Navajo National Code Ann, 1 § 454 (2003)
- Nottingham, New Hampshire, Nottingham Water Rights and Local Self-Government Ordinance, 15 March 2008
- Pittsburg, Penn., Community Protection from Natural Gas Extraction Ordinance, 16 November 2010 (amending Pittsburg Code by adding Chapter 618)

Santa Monica Cal, Municipal Code, § 4.75.040 (2013)

State of Guerrero (2014), Political Constitution of the State of Guerrero, Federal District of Mexico

Tamaqua Borough, Penn, Ordinance 612, 19 September 2006

Te Urewa Act, 2014, New Zealand Public Act No. 51, 27 July, 2014

### *Statements from the Finnish Sami Parliament and the*

Finnish Sami Parliament, Saamelaiskäräjien lausunto Käsivarren erämaa-alueen ja Saanan alueen hoito- ja käyttösuunnitelmaluonnoksesta, Dnro: 339/D.a.3/2017, 30.6.2017

Finnish Sami Parliament, Saamelaiskäräjien lausunto ehdotuksesta ympäristönsuojelulain muutokseksi koskien kullankaivua, 436/D.a.2/2016, 27.9.2017

### *Other Internet Sources*

Airportwatch, *Court in Austria blocks 3rd runway at Vienna airport, as climate harm outweighs a few more jobs*: <http://www.airportwatch.org.uk/2017/02/court-in-austria-blocks-3rd-runway-at-vienna-airport-as-climate-harm-outweighs-few-more-jobs/>

BBC, *New Zealand river first in the world to be given legal human status*, <http://www.bbc.com/news/world-asia-39282918>

BBC, *Norway oil: Environmentalists lose Arctic exploration case* <http://www.bbc.com/news/world-europe-42569104>

Berwyn, *Climate Change Concerns Prompt Court to Block Vienna Airport Expansion*, <https://insideclimatenews.org/news/14022017/climate-change-vienna-airport-paris-climate-agreement-james-hansen>

Darby, *Norwegian campaigners lose court case against Arctic oil drilling*, <http://www.climatechangenews.com/2018/01/04/norwegian-campaigners-lose-court-case-arctic-oil-drilling/>

European Environment Agency, *Global and European sea levels*, <https://www.eea.europa.eu/data-and-maps/indicators/sea-level-rise-5/assessment>

Field trips to Käsivarsi, Lapland, Finland to Finnish Sami communities in 2015 in project Saisiko olla ympäristökonfliktisoppaa, funded by Kone foundation: <http://www.ymparistokonfliktisovittelu.fi/fi/Projekti>

Greenair communications, *Austrian federal court rejects Vienna Airport's third runway plans on climate protection grounds*, <http://www.greenaironline.com/news.php?viewStory=2339>

Greenpeace, *Swiss authorities refuse to act, so these senior women are taking their climate case to court*, <http://www.greenpeace.org/international/en/press/releases/2017/Swiss-authorities-refuse-to-act-so-these-senior-women-are-taking-their-climate-case-to-court/>

IPCC, *Special report on Aviation and the Global Atmosphere, Summary for Policymakers*, <https://www.ipcc.ch/pdf/special-reports/spm/av-en.pdf>

Kapiainen-Heiskanen, *Laidunmaita ei voi enää pienentää*: <http://www.ymparistokonfliktisovittelu.fi/fi/haastattelut/Ketola>

Kapiainen-Heiskanen, *Poro kuuluu Käsivarren luontoon*, <http://www.ymparistokonfliktisovittelu.fi/fi/haastattelut/Juuso>

Klimaatzaak, *De Rechtszaak*, <http://www.klimaatzaak.eu/nl/de-rechtszaak/#klimaatzaak>

Knox, Forst, Tauli-Corpuz, *Protecting those who work to defend the environment is a human rights issue*: <https://www.theguardian.com/global-development/2016/jun/05/world-environment-day-protecting-activists-human-rights-issue>

Knox, J.H, *Newsletter No. 26* (1 February 2018) from the UN Special Rapporteur on Human Rights and the Environment

Mangoliamålet, *Stockholm District Court denies trial of youth's Magnolia Case*: [http://www.mangoliamålet.se/news/pressrelease\\_2017-07-04/](http://www.mangoliamålet.se/news/pressrelease_2017-07-04/)

Mangoliamålet, *Youth sue Swedish state for coal deal*, <http://www.mangoliamålet.se/news/press-release-in-english-2016-09-15/>

Ministry of the Environment, *Akwé: Kon-ohjeet*, Ympäristöhallinnon ohjeita 1/2011, 31 May 2011: <https://julkaisut.valtioneuvosto.fi/handle/10138/41525>

NASA, *Earth's climate is warming*: <https://climate.nasa.gov/scientific-consensus/>

Neslen, *Norway faces climate lawsuit over Arctic oil exploration plans*, <https://www.theguardian.com/environment/2016/oct/18/norway-faces-climate-lawsuit-over-oil-exploration-plans>

OECD *Guidelines for Multinational enterprises*: <http://mneguidelines.oecd.org/guidelines/>

PHYS.ORG, *Climate change can't halt Vienna third runway: court*: <https://phys.org/news/2017-06-climate-halt-vienna-runway-court.html>

Revezs, *Portuguese children crowdfund European climate change case to sue 47 countries*: <http://www.independent.co.uk/news/world/europe/portuguese-children-europe-climate-change-case-lawsuit-crowdfund-47-countries-global-warming-a7966231.html>

Trouw, *Belgische klimaatzaak verzuipt in bureaucratie*: <https://www.trouw.nl/groen/belgische-klimaatzaak-verzuipt-in-bureaucratie~aobdo9fc/>

Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council, [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2016/20161025\\_3585\\_petition-1.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2016/20161025_3585_petition-1.pdf)

Urgenda, *Climate Change Case*, <http://www.urgenda.nl/en/climate-case/>

Vaquero, *Five Models of Legal Science*: <https://revus.revues.org/2449>

Weiss, *What is Strategic Litigation?*: <http://www.errc.org/blog/what-is-strategic-litigation/62>





