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The European Convention of Human Rights and Environmental Claims: A Right to a Sound, Quiet and Healthy Environment but no General Protection of the Environment

This essay examines how the European Convention On Human Rights ('ECHR') deals with environmental claims.

It firstly shows that the ECHR does not expressly entail a right to a sound, quiet and healthy environment, but that the European Court of Human Rights ('ECtHR') construed certain existing ECHR rights to include environmental dimensions where necessary to fulfil their objective. The case law based environmental dimensions are afterwards examined in detail.

Secondly, the essay examines the general protection of the environment under the ECHR. It will be shown that although the ECHR is not designed to provide general protection of the environment, the ECtHR has to consider that very interest in some instances.

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1 Introduction

The protection and preservation of the environment has already been for decades and still is one of public's most intensely debated topics. In this social context, law appears as the carrier through which the correspondent major social – and thus political – opinion is made binding. In this connection, the allocation of claims fostering that opinion represents one of the main instrument to effect a change accordingly. Regarding the protection and preservation of the environment, 'environmental claims' perform this task. They constitute claims based on environmental law which comprises 'those substantive, procedural and institutional rules of [...] law which have as their primary objective the protection of the environment'.¹ Definitions of the environment are multi- and manifold.² Suffice to say that it covers all aspects of nature. Thus, environmental law includes the inhuman aspects of nature as well as human beings.³ Concerning the legal context of environmental claims, this differentiation is important because it carves out two different focuses of protection of environmental law, human beings ('human environment') or the environment minus human beings ('inhuman environment').

2 Moreover this differentiation reveals that human rights law, as the sum of 'rights and freedom to which every human being is entitled',⁴ is interweaved with environmental law. It intends to protect the human environment. Yet it becomes visible that human rights law – due to its restricted focus of protection which covers only the human subcategory of the environment – remains limited in allocating environmental claims.

¹ P Sands, *Principles of International Environmental Law* (2nd edition, CUP 2003) 15f; Council of Europe, *Manual on human rights and the environment – Principles emerging from the case law of the European Court of Human Rights* (Council of Europe Publishing 2006) 75; see also Steering Committee for Human Rights (CDDH), 'Final Activity Report Human Rights and the Environment', 29 Nov 2005, CDDH(2005)016 Addendum II, Appendix II.

² P Sands (n 1) 15–16.

³ P Sands (n 1) 15.

⁴ J Law and E A Martin (eds), *A Dictionary of Law* (7th edition, OUP 2009) 269 'human rights'.

- 3 Hence, it does not seem surprising that the European Convention on Human Rights⁵ (hereafter referred to as 'ECHR') is said to be 'not designed to provide general protection of the environment as such and does not expressly guarantee a right to a sound, quiet and healthy environment'.⁶ Although both parts of this statement mention the 'environment', they address the two different focuses of protection. The first part, by addressing the 'general protection of the environment as such', aims to establish the protection of the human and inhuman environment ('general'), solely due to the value of the environment ('ecocentric view'⁷). In contrast, the second part's 'right to a[n] [...] environment' creates a relationship between a holder of rights and the environment. The holder of the right is entitled to the environment. The quality attributed to the environment – 'sound, quiet and healthy' – thus does not (primarily) benefit the environment by assuring a certain quality of it, but benefits the holder of the right by entitling him to an environment with a certain quality. Within this alternative, the environment is only protected as far as it is necessary to protect the rights of the human environment ('anthropocentric view'⁸).

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- 4 Firstly, this essay will examine the right to a sound, quiet and healthy environment under the ECHR. It will be argued that the ECHR does not expressly entail such a right⁹, but that the European Court of Human Rights ('ECtHR') construed certain existing ECHR rights to include environmental dimensions where necessary to fulfil their objective. The environmental dimensions are then examined in detail.¹⁰
- 5 Secondly, the essay will examine the general protection of the environment under the ECHR. It will be shown that although the ECHR is not designed to provide general protection of the environment¹¹, the ECtHR has to consider that very interest in some instances¹².
- 6 **A. The Right to a Sound, Quiet and Healthy Environment and the ECHR**

I. No Express Right to a Sound, Quiet and Healthy Environment under the ECHR

The ECHR does not expressly include a right to a sound, quiet and healthy environment¹³ – it does not even mention the word 'environment'. In particular, it does not contain a 'right to nature preservation'.¹⁴

7 **II. Environmental Dimensions of ECHR Rights**

Nevertheless the European Court of Human Rights (ECtHR) 'has increasingly examined complaints in which individuals have argued that a breach of one of their Convention rights has resulted from adverse environmental factors' (environmental claims).¹⁵ In this context, the term 'adverse environmental factor' describes a man-made

⁵ Full title: 'Convention for the Protection of Human Rights and Fundamental Freedoms', European Treaty Series – No 5.

⁶ Council of Europe (n 1) 5.

⁷ A Boyle 'Human Rights and the Environment: A Reassessment' (2010) UNEP Human Rights and Environment 3; Stephen Davies 'In name or nature? Implementing international environmental procedural rights in the post-Aarhus environment: a Finnish example' (2007) *Environmental Law Review* 190; Robert G Lee 'Resources, Rights, and Environmental Regulation' (2005) 32 *Journal of Law and Society* 125, 130.

⁸ C D Stone 'Should trees have standing?' (1972) 45 *Southern California Law Review* 491; A Boyle (n 7) 1, 3, 12, 32; Stephen Davies (n 7) 190, 199; Robert G Lee (n 7) 113, 125, 130; M Fitzmaurice 'Environmental Degradation' in D Moeckli, S Shah and S Sivakumaran (eds), *International Human Rights Law* (OUP 2010) 627, 634, 635, 642; M Dixon, R McCorquodale and S Williams, *Cases & Materials International Law* (5th edition, OUP 2011) 449.

⁹ See A. I.

¹⁰ See A. II.

¹¹ See B. I.

¹² See B. II.

¹³ *Fadeyeva v Russia*, ECHR 2005-IV para 68; *Kyrtatos v Greece*, ECHR 2003-VI para 52.

¹⁴ *Fadeyeva v Russia* ECHR 2005-IV para 68; *Kyrtatos v Greece*, ECHR 2003-VI para 68.

¹⁵ Council of Europe (n 1) 5 para 3.

environmental factor touching the scope of protection of, but not necessarily interfering with an ECHR right.¹⁶ Hence, adverse environmental factors are the basic requirements for environmental claims. Owing to the large number of environmental claims, the ECtHR created extensive case law that 'indirectly offers a certain degree of protection with regard to environmental matters' ('indirect rights').¹⁷ Consequently the ECtHR added 'environmental dimensions' to the scope of protection of the existing ECHR rights.¹⁸ This approach of the ECtHR is also referred to as 'greening', illustrating the adding of a green – as the colour representing environmentally favourable effects – dimension to an existing right and thereby 'green' it.¹⁹ Hence, these environmental – green – dimensions of the ECHR determine which kind of adverse environmental factors are prohibited and thus to what extent environmental claims are successful under the ECHR.

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8 The ECtHR was able to undergo this 'fundamental change regarding environmental issues'²⁰ because it is not bound by its previous decisions and understands the ECHR as a 'living instrument' being construed according to 'social context and changes in society'.²¹ Obviously, since the signing of the ECHR in 1950, this social context²² changed a lot, not to say fundamentally. In some areas, the Council of Europe responded to this by passing protocols expanding and adapting the ECHR. Other areas had to be covered by the jurisprudence of the ECtHR. The industrial development of the member states since 1950 inevitably lead to adverse environmental factors, especially in states where this – usually rapid and thus unregulated – development was not accompanied by (executed) regulating domestic legislation. Still today, these adverse environmental factors cause breaches of human rights,²³ above all in emerging economies. Given the ECHR's objective of protecting human rights, the ECtHR thus had and still has to include breaches of ECHR rights originating from adverse environmental factors.

9 Two insights follow from these general considerations.

On the one hand, the first restriction²⁴ of the environmental dimensions of the ECHR is revealed, the 'restriction to the ECHR rights' scope of protection'. The environmental dimensions of the ECHR are valid because and insofar as, they are essential to ensure the effective protection not of all human rights, but only of those that are covered by existing ECHR rights.²⁵ The adverse environmental factor has to touch the scope of protection of an ECHR right.²⁶ Hence, precisely speaking, there are merely 'environmental dimensions of ECHR rights' rather than stand-alone 'environmental dimensions of the ECHR'.

10 On the other hand, it becomes evident that the environmental dimensions of the ECHR rights were introduced as a necessity with regard to protecting existing ECHR rights in their entirety rather than a satisfactory tool for the society's claims concerning the

¹⁶ Council of Europe (n 1) 77 'Legitimate aim'; *Hatton and Others v the United Kingdom*, ECHR 2003-VIII para 96.

¹⁷ M Fitzmaurice (n 8) 627, 636; Council of Europe (n 1) 5 para 3.

¹⁸ Council of Europe (n 1) 5 para 3 point 1 and 2, 9 para 3.

¹⁹ A Boyle (n 7) 1, 12, 13–29.

²⁰ M Fitzmaurice (n 8) 628.

²¹ Council of Europe (n 1) 8 and footnote 6.

²² See also Introduction.

²³ European Commission, *Environment fact sheet: industrial development* (Office for Official Publications of the European Communities 2006) 2.

²⁴ For the second restriction of the environmental dimensions of ECHR rights see A.II.1.b), first paragraph (text to ns 38–42) and for the third restriction of the environmental dimensions of ECHR rights refer to A.II.1.b), fourth paragraph (text to ns 47–54).

²⁵ Council of Europe (n 1) 8 para 4.

²⁶ See text to n 16.

protection of the (inhuman) environment.²⁷

- 11 These two insights illustrate that the environmental dimensions of the ECHR rights aim at supporting the ECHR in its main target, the protection of certain rights of human beings. Hence, they demonstrate the anthropocentric view behind the ECHR, rendering possible only a right to an environment of a certain quality rather than a general protection of the environment.²⁸

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- 12 **1. Environmental Dimension of Article 8 ECHR – The Right to Respect for Family and Private Life**

a) History, Interests and Adverse Environmental Factors regarding the Environmental Dimension of Art 8(1) ECHR

In *Lopez Ostra v Spain*, the ECtHR held for the first time that '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 [protected under art 8 ECHR, author's note] adversely, without, however, seriously endangering their health [protected by art 2 ECHR].²⁹ Since then, most environmental claims under the ECHR were concerned with the right to respect for family and private life in article 8(1) ECHR. The ECtHR found that the scope of protection of private life³⁰ and home³¹ was touched because of adverse environmental factors such as vandalism³², harassment³³, noise³⁴ and pollution³⁵. Hence the right to environment mentioned beforehand³⁶ protects against these adverse environmental factors. Therefore, the quality³⁷ of the environment pursued by art 8(1) ECHR can be described as being sound (free of vandalism and harassment), quiet (free of noise) and healthy (free of pollution).

- 13 **b) Requirements of the Environmental Dimension of Art 8(1) ECHR Regarding the Concerned Person: Directly and Severely Affected**

As a second restriction³⁸ of the environmental dimensions of ECHR rights, the ECtHR established the 'restriction to directly affected individuals'. In *Kyrtatos v Greece*, it found the limit of the scope of protection of art 8(1) ECHR if no 'harmful effect on a person's private or family sphere' but 'simply the general deterioration of the environment' is at hand.³⁹ According to its judgment in *Hatton and Others v the United Kingdom*, art 8(1) ECHR is only interfered 'where an individual is directly [...] affected'.⁴⁰ Hereby, it becomes obvious that the merits test of art 8(1) ECHR requires the adverse environmental factor to relate to a human being. Consequently, the environmental dimension of art 8(1) ECHR covers only one of the two focuses of

²⁷ See Introduction.

²⁸ For the beforehand introduced relation between the anthropocentric view and the right to an environment of a certain quality refer to Introduction, third paragraph (text to ns 5–8).

²⁹ *Lopez Ostra v Spain A 303-C* para 51; *Kyrtatos v Greece ECHR 2003-VI* para 52.

³⁰ *Lopez Ostra v Spain A 303-C* para 15; *Hatton and Others v the United Kingdom ECHR 2003-VIII* para 96; *Guerra v Italy Reports 1998-I* paras 56–58.

³¹ *Hatton and Others v the United Kingdom ECHR 2003-VIII* para 96; *Giacomelli v Italy ECHR 2006-XII* para 76.

³² *Moreno Gomez v Spain ECHR 2004-X*; *Oluic v Croatia App no 61260/08 (ECtHR, 20 May 2010)*.

³³ *Surugiu v Romania App no 48995/99 (ECtHR, 20 April 2004)*.

³⁴ *Hatton and Others v the United Kingdom ECHR 2003-VIII*; *Moreno Gomez v Spain ECHR 2004-X*; *Oluic v Croatia App no 61260/08 (ECtHR, 20 May 2010)*.

³⁵ *Taskin v Turkey ECHR 2004-X*; *Fadeyeva v Russia ECHR 2005-IV*; *Lopez Ostra v Spain A 303-C*; *Fägerskiöld v Sweden App no 37664/04 (ECtHR, 25 March 2008)*; *Guerra v Italy Reports 1998-I*.

³⁶ See text to n 28.

³⁷ See text to n 28 and Introduction, third paragraph.

³⁸ For the first restriction of the environmental dimensions of ECHR rights see A.II., third paragraph (text to ns 24–26) and for the third restriction of the environmental dimensions of ECHR rights see A.II.1.b, fourth paragraph (text to ns 47–54).

³⁹ *Kyrtatos v Greece ECHR 2003-VI* para 52.

⁴⁰ *Hatton and Others v the United Kingdom ECHR 2003-VIII* para 96.

protection of environmental law, the human environment (anthropocentric view).⁴¹ Hereby the general insight from above⁴² is confirmed specifically for art 8(1) ECHR, no general protection of the environment but only a right to a sound, quiet and healthy environment is provided by the ECHR.

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- 14 It is the anthropocentric concept⁴³ behind the ECHR which renders this conclusion compulsory. A legal instrument that aims at protecting the human's rights is necessarily limited to infringements that affect humans. This becomes evident in art 34 ECHR which demands for a directly affected applicant within the admissibility test to acknowledge the applicant's victim status.⁴⁴ Because this limit is derived from the anthropocentric concept of the ECHR, it amounts to a general statement for all the environmental dimensions of the ECHR rights.
- 15 Precisely speaking, this second restriction of the environmental dimensions of ECHR rights, requiring a human being to be directly affected by the alleged violation, is a part of the beforehand introduced⁴⁵ first restriction, demanding the scope of protection of an ECHR rights being touched. For the scope of protection of a human right to be violated, a human being needs to be violated in his rights and hence be 'directly affected'.⁴⁶
- 16 Moreover, the ECtHR requests the adverse environmental factor to account for a 'certain minimum level'⁴⁷, a 'level of severity'⁴⁸ or a 'minimum level of severity'⁴⁹. The ECtHR approves this 'severity threshold' 'where an individual is [...] seriously affected by noise or other pollution'⁵⁰. The evaluation whether this severity criterion is matched 'depends on all [...] circumstances of the case'.⁵¹ For example, the ECtHR approved a sufficient level of severity when a person suffered from harassment by neighbours for a prolonged time⁵², but negated it when only 'a comparatively small area' of the applicant's land was concerned by the construction of a hydroelectric plant⁵³. From a different angle of view, the severity threshold constitutes a third restriction⁵⁴ of the environmental dimensions of ECHR rights, the 'restriction to severe adverse environmental factors'. The environmental dimensions of ECHR rights can only be engaged in case the severity threshold is exceeded. That precludes cases which involve insignificant adverse environmental factors.
- 17 **c) Interferences with the Environmental Dimension of Art 8(1) ECHR: Negative and Positive Obligations**

ECHR rights can impose two obligations on states. In general, each ECHR right obligates the state to refrain from acting contrary to its scope of protection ('negative

⁴¹ For the beforehand introduced relation between the human environment as a focus of protection of environmental law and the anthropocentric view please refer to the Introduction.

⁴² See text to n 28.

⁴³ See text to n 28 and 41.

⁴⁴ D J Harris, M O O'Boyle, E P Bates and C M Buckley, *Law of the European Convention on Human Rights* (2nd edition, OUP 2009) 790.

⁴⁵ For this first restriction of the environmental dimensions of ECHR rights see A.II. (text to ns 24–26).

⁴⁶ *Hatton and Others v the United Kingdom* ECHR 2003-VIII para 96; *Fadeyeva v Russia* ECHR 2005-IV paras 68 and 89; Council of Europe (n 1) 5 para 3 point 1.

⁴⁷ *Fadeyeva v Russia* ECHR 2005-IV para 69.

⁴⁸ *Fadeyeva v Russia* ECHR 2005-IV para 70.

⁴⁹ *Fägerskiöld v Sweden* App no 37664/04 (ECtHR 26 February 2008) 15, 16.

⁵⁰ *Hatton and Others v the United Kingdom* ECHR 2003-VIII para 99; *Fägerskiöld v Sweden* App no 37664/04 (ECtHR 26 February 2008) 14.

⁵¹ *Fadeyeva v Russia* ECHR 2005-IV para 69.

⁵² *Surugiu v Romania* App no 48995/99 (ECtHR, 20 April 2004).

⁵³ *G and E v Norway* App no 9278/81 and 9415/81 (joined) 30 (head note), 36 (Commission 3 October 1984).

⁵⁴ For the first restriction of the environmental dimensions of ECHR rights see A.II. (text to ns 24–26) and the second restriction of the environmental dimensions of ECHR rights see A.II.1.b), first paragraph (text to ns 38–42).

obligation').⁵⁵ Further, they sometimes obligate the state to 'do something'⁵⁶ when remaining passive would cause an interference with the scope of protection of an ECHR right ('positive obligation').⁵⁷ This positive obligation obligates the state to act to preclude an infringement.⁵⁸ Through this the member states can be held responsible for adverse environmental factors caused by private industry but not prevented by the state, eg for the 'failure to regulate properly'.⁵⁹

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- 18 Regarding art 8(1) ECHR, the member state generally have 'to take reasonable and appropriate measures to secure the applicant's rights under paragraph 1 of Article 8'⁶⁰ ('positive obligation to prevent violations of art 8(1) ECHR'). In addition to that, the ECtHR clarified this general and abstract positive obligation by stating more precise ones.
- 19 Firstly, it ruled that the member states have to regulate sources of adverse environmental factors like polluting plants⁶¹ ('positive obligation to regulate sources of adverse environmental factors of art 8(1) ECHR').
- 20 Secondly, the ECtHR noted that '[r]egulations to protect guaranteed rights serve little purpose if they are not duly enforced and [...] that the [ECHR] is intended to protect effective rights'⁶² ('positive obligation to enforce regulations regarding sources of adverse environmental factors threatening art 8(1) ECHR'). This obligation is necessary since the positive measure alone – eg the introduction of a provision – does not guarantee an effective enjoyment of the ECHR rights. The effect of positive actions has to be ensured and thus the provision enforced.⁶³
- 21 Thirdly, states are submitted to positive obligations regarding information about adverse environmental factors. '[I]n the particular context of dangerous activities'⁶⁴, the ECtHR found an issue with art 8(1) ECHR because the state had failed to emit 'essential information that would have enabled [the public] to assess the risks'⁶⁵. The ECtHR defines dangerous activities or 'industrial risks'⁶⁶ to some extent by giving examples like 'nuclear tests'⁶⁷, 'the operation of waste collection sites'⁶⁸ or of 'chemical factories with toxic emissions'⁶⁹. In this context, states have the obligation to inform their nationals in terms of adverse environmental factors⁷⁰ ('positive obligation to inform nationals concerning adverse environmental factors of art 8(1) ECHR in respect of dangerous activities'). Furthermore, states are obligated to provide 'public access to the conclusions of studies and to information which would enable members of the

⁵⁵ Jean-François and Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights – A guide to the implementation of the European Convention on Human Rights – Human rights handbooks, No 7* (Council of Europe 2007) 5, 10–14; D J Harris, M O O'Boyle, E P Bates and C M Buckley (n 44) 18–21.

⁵⁶ Jean-François and Akandji-Kombe (n 55) 7.

⁵⁷ Jean-François and Akandji-Kombe (n 55) 10–14; D J Harris, M O O'Boyle, E P Bates and C M Buckley (n 44) 18–21.

⁵⁸ Jean-François and Akandji-Kombe (n 55) 7.

⁵⁹ *Hatton and Others v the United Kingdom* ECHR 2003-VIII para 98; *Fadeyeva v Russia* ECHR 2005-IV paras 89–93.

⁶⁰ *Lopez Ostra v Spain A 303-C* para 51; *Guerra v Italy* Reports 1998-I para 58; *Moreno Gomez v Spain* ECHR 2004-X para 55; *Fadeyeva v Russia* ECHR 2005-IV paras 89–92.

⁶¹ *Hatton and Others v the United Kingdom* ECHR 2003-VIII paras 98 and 119; *Fadeyeva v Russia* ECHR 2005-IV paras 89 and 124–134; F Francioni, 'International Human Rights in an Environmental Horizon' (2010) 21 *The European Journal of International Law* 49.

⁶² *Moreno Gomez v Spain* ECHR 2004-X para 61.

⁶³ *Lopez Ostra v Spain A 303-C* para 56; Jean-François and Akandji-Kombe (n 55) 7.

⁶⁴ Council of Europe (n 1) 50 (d).

⁶⁵ *Guerra v Italy* Reports 1998-I para 60.

⁶⁶ *Budayeva and Others v Russia* ECHR 2008 para 130.

⁶⁷ *McGinley and Egan v the United Kingdom* Reports 1998-III paras 97, 101.

⁶⁸ *Budayeva and Others v Russia* ECHR 2008 para 130.

⁶⁹ Council of Europe (n 1) 23; Council of Europe (n 1) 12 (b), 73 'Dangerous Activities'.

⁷⁰ *Öneriyildiz v Turkey* ECHR 2004-XII para 90; Council of Europe (n 1) 50 (d) para 39.

public to assess the danger to which they are exposed'⁷¹ ('positive obligation to provide public access to information concerning adverse environmental factors of art 8(1) ECHR in respect of dangerous activities'). Another positive obligation emerges, 'where a Government engages in hazardous activities [...] which might have hidden adverse consequences on the health of those involved in such activities' and a 'countervailing public interest' is absent. In this context, art 8(1) ECHR 'requires that an effective and accessible procedure [is] established which enables such persons to seek all relevant and appropriate information'⁷² ('positive obligation to establish an effective and accessible information procedure concerning adverse environmental factors of art 8(1) ECHR in respect of dangerous activities').

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22 **d) Justification of Adverse Environmental Factors under Art 8(2) ECHR**

Furthermore, adverse environmental factors will not constitute a violation of art 8(1) ECHR if they are justified by art 8(2) ECHR. That means being in accordance with the law ('first stage of justification test'), following a legitimate aim ('second stage') and constituting a proportionate measure to that legitimate aim ('third stage').⁷³ The case law of the ECtHR features several aspects in dealing with adverse environmental factors under art 8(2) ECHR.

23 **aa) First Stage of the Justification of Adverse Environmental Factors under Art 8(2) ECHR: Being in Accordance with the Law**

The case law of the ECtHR shows that most of the cases featuring a violation of art 8(1) ECHR contain adverse environmental factors that are unlawful under domestic law.⁷⁴ Moreover, in the majority of these cases, 'the breach [does] not result from the absence of legislation protecting the environment [failure to cope with positive obligation to regulate sources of adverse environmental factors⁷⁵], but rather the failure of the authorities to respect such legislation [failure to cope with positive obligation to enforce these regulations]'.⁷⁶ Hence, in these cases, a justification of the adverse environmental factors would already have to be negated at that early stage, the first of the test. However, the ECtHR rather mixes the questions of the lawfulness of the adverse environmental factor (first stage of justification test) with its proportionality (third stage). Thus, ultimately it treats the question of lawfulness 'not as a separate and conclusive test, but rather as one of many aspects which should be taken into account in assessing whether the state has struck a "fair balance"' within the proportionality test. Therefore, the domestic illegality of the adverse environmental factor does not automatically render the interference or failure to cope with positive obligations a violation of the ECHR and thus illegal under it – as would a 'separate and conclusive test'⁷⁷. The ECtHR justifies this approach by referring to the 'margin of appreciation' that states possess in determining the precise domestic transposition of their positive obligations.⁷⁸

24 At first sight, this practice seems problematic. It seems to render the first stage of the justification test – accordance with the law – superfluous by treating illegal adverse environmental factors merely as a (negative) factor in the fair balancing of the competing interests of the parties, whereas in fact, they should ultimately be rendered

⁷¹ *Taskin v Turkey* ECHR 2004-X para 119; *McGinley and Egan v the United Kingdom* Reports 1998-III para 97.

⁷² *Roche v the United Kingdom* ECHR 2005-X para 165; *McGinley and Egan v the United Kingdom* Reports 1998-III para 101; Council of Europe (n 1) 50 (e).

⁷³ D J Harris, M O O'Boyle, E P Bates and C M Buckley (n 44) 397–424; Council of Europe (n 1) 35 and 36.

⁷⁴ *Taskin v Turkey* ECHR 2004-X paras 14–89, 112, 121f; *Lopez Ostra v Spain A 303-C* paras 16–22, 55 and 56; *Guerra v Italy* Reports 1998-I paras 25–27, 59 and 60; Council of Europe (n 1) 36 para 21.

⁷⁵ See text to ns 61 and 62.

⁷⁶ Council of Europe (n 1) 36 para 21; Eg *Lopez Ostra v Spain A 303-C* and *Guerra v Italy* Reports 1998-I.

⁷⁷ *Fadeyeva v Russia* ECHR 2005-IV para 98; Council of Europe (n 1) 36 para 21.

⁷⁸ *Fadeyeva v Russia* ECHR 2005-IV paras 96 and 97, 124, 128, 131; *Hatton and Others v the United Kingdom* ECHR 2003-VIII para 123; *Lopez Ostra v Spain A 303-C* para 51.

unjustifiable. Theoretically, this could lead to the paradox situation that a domestically illegal adverse environmental factor that follows a legitimate aim (second stage of the justification test) and is proportionate (third stage), is considered illegal under the ECHR. This constitutes a problem, because the ECHR thereby antagonises the more extensive scope of protection of domestic law. This, in turn, antagonises the ECHR's concept of providing merely a consensual minimum, rather than a contested maximum, standard of protection.⁷⁹ Nevertheless, in practice, domestically illegal adverse environmental factors are also found illegal under the ECHR.⁸⁰

- 25 The reversed combination – an adverse environmental factor that was deemed legal domestically but rendered illegal by the ECtHR – appeared in *Fadeyeva v Russia*.⁸¹ It is possible due to the fact that, from the ECtHR's point of view, 'it is primarily for the national authorities, notably the courts, to interpret and apply domestic law'⁸², but for the ECtHR to interpret the ECHR. Hence, the answer to the question, whether the adverse environmental factor is in accordance with the law, can diverge under domestic law and the ECHR.
- 26 In contrast, in *Hatton v the United Kingdom*, the adverse environmental factor was eventually deemed legal both domestically and by the ECtHR.⁸³

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27 **bb) Second Stage of the Justification of Adverse Environmental Factors under Art 8(2) ECHR: Following a Legitimate Aim**

The economic well-being of the respective country is often submitted by the defendant, and accepted by the ECtHR, as a legitimate aim for adverse environmental factors.⁸⁴ This seems reasonable, especially considering the developing condition of some member states.⁸⁵

28 **cc) Third Stage of the Justification of Adverse Environmental Factors under Art 8(2) ECHR: Constituting a Proportionate Measure to the Legitimate Aim**

The ECtHR states that 'the complexity of the issues involved with regard to environmental protection renders the [ECtHR's] role primarily a subsidiary one'.⁸⁶ This means, that it principally merely examines the decision-making process preceding the adverse environmental factor⁸⁷ ('first aspect of review') and 'only in exceptional circumstances may [...] go beyond this line and revise the material conclusion of the domestic authorities'⁸⁸ ('second aspect of review').⁸⁹ The rationale behind this 'reluctant dual review' of the ECtHR is that '[b]y reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions'.⁹⁰ Thus, the member states possess a margin of appreciation, transferring on them a

⁷⁹ D J Harris, M O O'Boyle, E P Bates and C M Buckley (n 44) 2.

⁸⁰ *Lopez Ostra v Spain* A 303-C paras 51–58; *Guerra v Italy* Reports 1998-I paras 58–60.

⁸¹ *Fadeyeva v Russia* ECHR 2005-IV paras 20–28, 116, 122, 132.

⁸² *Lopez Ostra v Spain* A 303-C para 55.

⁸³ *Hatton and Others v the United Kingdom* ECHR 2003-VIII para 120; Council of Europe (n 1) 36 para 21.

⁸⁴ *Fadeyeva v Russia* ECHR 2005-IV paras 101, 111; *Hatton and Others v the United Kingdom* ECHR 2003-VIII paras 121, 126; *Lopez Ostra v Spain* A 303-C para 58; *Taskin v Turkey* ECHR 2004-X para 119; *Tatar v Romania* App no 67021/01 (ECtHR, 27 January 2009) para 78; *Powell and Rayner v United Kingdom* 12 EHRR 355 paras 39, 42; Council of Europe (n 1) 35 (e); A Boyle (n 7) 21 and 22.

⁸⁵ See A.II., second paragraph (text to ns 20–23).

⁸⁶ *Hatton and Others v the United Kingdom* ECHR 2003-VIII paras 97 and 123; *Fadeyeva v Russia* ECHR 2005-IV para 102.

⁸⁷ *Buckley v the United Kingdom* ECHR 1996-IV para 76.

⁸⁸ *Taskin v Turkey* ECHR 2004-X para 117.

⁸⁹ *Fadeyeva v Russia* ECHR 2005-IV para 105; similarly: *Hatton and Others v the United Kingdom* ECHR 2003-VIII para 99; Council of Europe (n 1) 54 and 55 para 45.

⁹⁰ *Buckley v the United Kingdom* ECHR 1996-IV para 75; *Hatton and Others v the United Kingdom* ECHR 2003-VIII para 97; similarly: *Handyside v. the United Kingdom* A 24 (1976) 17; *Fadeyeva v Russia* ECHR 2005-IV para 105; Council of Europe (n 1) 35 (e).

discretion concerning the question whether the pursued legitimate aim and the adverse environmental factor are fairly balanced.⁹¹ The ECtHR's review is limited to the evaluation whether a 'manifest error of appreciation by the national authorities in striking a fair balance' occurred.⁹² The respective national authority's margin of appreciation – and thus the threshold for a manifest error of appreciation – 'will vary according to the context' of the case ('context relation of the margin of appreciation').⁹³ Moreover, the extent of the margin of appreciation varies according to which aspect of review is concerned ('aspect of review relation of the margin of appreciation').

29 **aaa) Third Stage of the Justification of Adverse Environmental Factors under Art 8(2) ECHR: The Review of the Decision-making Process (First Aspect of Review)**

The review of the decision-making process (first aspect of review) tends 'to ensure that due weight has been accorded to the interests of the individual'.⁹⁴ Although art 8(1) ECHR does not contain 'explicit procedural requirements', the decision-making process leading to the adverse environmental factor 'must be fair'.⁹⁵ Hence, the ECtHR 'is required to consider all the procedural aspects, including the type of policy or decision involved, the extent to which the views of individuals (including the applicants) were taken into account throughout the decision-making procedure, and the procedural safeguards available'.⁹⁶ Regarding 'complex issues of environmental and economic policy', the decision-making process of the respective member states 'must necessarily involve appropriate investigations and studies in order to allow them to strike a fair balance between the various conflicting interests at stake'.⁹⁷ Parallel to the positive obligations mentioned above⁹⁸, the results of these investigations and studies have to be publicly accessible.⁹⁹ Yet, the ECtHR reserves the member states' right to take decisions although no 'comprehensive and measurable data are available in relation to each and every aspect of the matter to be decided'.¹⁰⁰ Furthermore, the individuals concerned by the adverse environmental factor have to be permitted to submit representations and challenge decisions ignoring them.¹⁰¹

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30 With regard to the member states' margin of appreciation in terms of adverse environmental factors, two facets have to be incorporated.

On the one hand, it is questionable whether the respective member state possess a margin of appreciation within the decision-making process in (complex) environmental cases. Although the ECtHR explicitly requires that the decision-making process formally comprises investigations and studies and the possibility to submit representations and to challenge decisions ignoring them, the precise substantial form of these requirements remains questionable. In fact, it would not be appropriate and hardly be feasible to define them substantially owing to the diversity of cases involving adverse

⁹¹ *Hatton and Others v the United Kingdom* ECHR 2003-VIII para 123.

⁹² *Fadeyeva v Russia* ECHR 2005-IV para 105.

⁹³ *Leander v. Sweden* A 116 (1987) para 59; *Buckley v the United Kingdom* ECHR 1996-IV paras 74, 76.

⁹⁴ *Hatton and Others v the United Kingdom* ECHR 2003-VIII para 99; similarly: *Buckley v the United Kingdom* ECHR 1996-IV para 76; *Fadeyeva v Russia* ECHR 2005-IV para 128; Council of Europe (n 1) 35 (e).

⁹⁵ *Buckley v the United Kingdom* ECHR 1996-IV para 76; *Fadeyeva v Russia* ECHR 2005-IV para 105.

⁹⁶ *Hatton and Others v the United Kingdom* ECHR 2003-VIII para 104; Council of Europe (n 1) 54 and 55 para 45.

⁹⁷ *Hatton and Others v the United Kingdom* ECHR 2003-VIII para 128; *Taskin v Turkey* ECHR 2004-X para 119; Council of Europe (n 1) 54 (b).

⁹⁸ See text to ns 64–72.

⁹⁹ *Hatton and Others v the United Kingdom* ECHR 2003-VIII para 128; *Taskin v Turkey* ECHR 2004-X para 119; Council of Europe (n 1) 54 (b) and 55 para 46.

¹⁰⁰ *Hatton and Others v the United Kingdom* ECHR 2003-VIII para 128; *Taskin v Turkey* ECHR 2004-X para 119; Council of Europe (n 1) 54 (b).

¹⁰¹ *Hatton and Others v the United Kingdom* ECHR 2003-VIII para 128; *Taskin v Turkey* ECHR 2004-X para 119; Council of Europe (n 1) 54 (a) and 55 para 46.

environmental factors. Yet, the limit would be a procedural requirement that only exists formally but is deprived of any substantial content and thus meaningless. Furthermore, the phrasing of the ECtHR concerning the requirements of the decision-making process is open and thus allows and requires the use of discretion by the member states. Whether 'due weight'¹⁰² is accorded to the interests of the individual, 'appropriate'¹⁰³ investigations and studies are involved or the overall decision-making process can be regarded as 'fair'¹⁰⁴, are subjective questions. As stated above¹⁰⁵, the member states are in the best position to assess these questions. Hence, the member states possess a considerable margin of appreciation within the decision-making process leading to the adverse environmental factor ('procedural margin of appreciation').

31 On the other hand, the procedural safeguards of the decision-making process – which are subject to the procedural margin of appreciation – and the margin of appreciation regarding the material conclusion ('substantive margin of appreciation') are interrelated.¹⁰⁶ If a material conclusion originates from a decision-making process whose procedural safeguards are insufficient and which is thus out of the procedural margin of appreciation of the member state, it will be rendered illegal due to the overstepping of the procedural margin of appreciation. One would come to that result, even if the material conclusion would be within the substantive margin of appreciation of the member state if examined on its own – without the decision-making process and its procedural safeguards ('determining character of the decision-making process regarding the legality of the material conclusion').

32 ***bbb) Third Stage of the Justification of Adverse Environmental Factors under Art 8(2) ECHR: The Review of the Material Conclusion (Second Aspect of Review)***

The review of the material conclusion tends 'to ensure that [the material conclusion] is compatible with art 8 [ECHR]'.¹⁰⁷ Except for the general compatibility with art 8 ECHR, the ECtHR does not define framework requirements for the material conclusion of the member state like it does for the decision-making process in respect of the collection of decisive data, the possibility of representations and appeal¹⁰⁸. Once again, anything else would not be feasible, due to the diversity of cases involving adverse environmental factors¹⁰⁹, and not appropriate, due to the member states being in a better position than the ECtHR to generate an adequate conclusion¹¹⁰. Besides, a certain amount of creative leeway in terms of material conclusions is vital for the political sovereignty of the member states.¹¹¹ Thus, the member states' margin of appreciation regarding the material conclusion (substantive margin of appreciation) is considered to be, in general, wide.¹¹² However, 'where government policy in the form of criminal laws interferes with a particularly intimate aspect of an individual's private life, the margin of appreciation left to the state will be reduced in scope'.¹¹³ In such cases, the 'conflict of views on the margin of appreciation can be resolved only by reference to the context of a particular case'.¹¹⁴

¹⁰² See text to n 94.

¹⁰³ See text to n 97.

¹⁰⁴ See text to n 95.

¹⁰⁵ See text to n 90.

¹⁰⁶ *Buckley v the United Kingdom* ECHR 1996-IV para 76.

¹⁰⁷ *Hatton and Others v the United Kingdom* ECHR 2003-VIII para 99.

¹⁰⁸ See text to ns 100 and 101.

¹⁰⁹ See also A.II.1.d) cc) aaa).

¹¹⁰ See text to n 95.

¹¹¹ *Hatton and Others v the United Kingdom* ECHR 2003-VIII para 97.

¹¹² *Powell and Rayner v United Kingdom* 12 EHRR 355 para 44; *Buckley v the United Kingdom* ECHR 1996-IV para 75; *Hatton and Others v the United Kingdom* ECHR 2003-VIII para 100; Council of Europe (n 1) 35 (e).

¹¹³ *Dudgeon v. the United Kingdom* 4 EHRR 149 para 48, 49, 59; *Hatton and Others v the United Kingdom* ECHR 2003-VIII para 102.

¹¹⁴ *Hatton and Others v the United Kingdom* ECHR 2003-VIII para 103.

33 **2. Environmental Dimension of Article 2 ECHR – The Right to Life****a) Interests and Adverse Environmental Factors regarding the Environmental Dimension of Art 2 ECHR**

The environmental dimension of art 2 ECHR, which was first found in *Öneryildiz v Turkey*,¹¹⁵ prohibits every interference on the life of the member states' nationals by adverse environmental factors such as an explosion of a nearby municipal rubbish tip¹¹⁶ or mudslides¹¹⁷. Therefore it prohibits an environment detrimental to the nationals' health and thus supports a right to a healthy environment.

34 **b) Requirements of the Environmental Dimension of Art 2 ECHR Regarding the Concerned Person: Directly Affected**

Due to art 34 ECHR within the admissibility test, the environmental dimension of art 2 ECHR requires that the adverse environmental factor directly affects an individual giving him victim status.¹¹⁸

35 **c) Interferences with the Environmental Dimension of Art 2 ECHR: Positive Obligations**

As well as for art 8(1) ECHR¹¹⁹, the ECtHR also generally stated regarding art 2 ECHR that the member states have to 'take all appropriate steps to safeguard life for the purposes of Article 2'¹²⁰ ('positive obligation to prevent violations of art 2 ECHR').¹²¹ In contrast to the positive obligation to prevent violations of art 8(1) ECHR with reasonable and appropriate measures, the measures required by the general positive obligation of art 2 ECHR are not restricted by their reasonability. That follows from the fact that the scope of the justification clauses of art 2 ECHR – in paragraph 1 sentence 2 and in paragraph 2 – do not cover interfering adverse environmental factors. Thus, within art 2 ECHR, they generally cannot be justified and all measures – not only reasonable ones – are required to respect it. In addition to the general positive obligation, the ECtHR defined more precise positive obligations, some of them obliging the member states at all times, some merely obliging them when engaging in dangerous activities¹²².

36 In any case, the member states firstly have the duty 'to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life'¹²³ ('positive obligation to regulate sources of adverse environmental factors of art 2 ECHR'). Within the environmental dimension of art 2 ECHR, positive obligations like this one are defined as 'substantive'¹²⁴ because they 'require the basic measures needed for full enjoyment of the rights guaranteed'¹²⁵. That means they establish 'proper rules' for the domestic substantive law of the member states.¹²⁶

37 In case 'lives have been lost', the ECtHR secondly imposes on the member states a

¹¹⁵ Council of Europe (n 1) 83.

¹¹⁶ *Öneryildiz v Turkey* ECHR 2004-XII; Council of Europe (n 1) 12 (c).

¹¹⁷ *Budayeva and Others v Russia* ECHR 2008; Council of Europe (n 1) 12 (c).

¹¹⁸ See text to n 44.

¹¹⁹ For the positive obligation to take measures of art 8(1) see text to n 60.

¹²⁰ *Öneryildiz v Turkey* ECHR 2004-XII para 89; similarly: *Budayeva and Others v Russia* ECHR 2008 para 128.

¹²¹ *Budayeva and Others v Russia* ECHR 2008 para 128; *Öneryildiz v Turkey* ECHR 2004-XII paras 71, 89 and 90; *Paul and Audrey Edwards v the United Kingdom* ECHR 2002-II para 54; *L.C.B. v the United Kingdom* ECHR 1998 para 36.

¹²² For some insight into the notion of 'dangerous activities' refer to the text of ns 64–69.

¹²³ *Öneryildiz v Turkey* ECHR 2004-XII para 89; *Budayeva and Others v Russia* ECHR 2008 para 129; *Tatar v Romania* App no 67021/01 (ECtHR, 27 January 2009) para 88.

¹²⁴ *Budayeva and Others v Russia* ECHR 2008 paras 131 and 132, 128–145; *Öneryildiz v Turkey* ECHR 2004-XII paras 89–118.

¹²⁵ Jean-François and Akandji-Kombe (n 55) 16.

¹²⁶ Jean-François and Akandji-Kombe (n 55) 16.

duty 'to ensure, by all means at [their] disposal, an adequate response – judicial or otherwise' ('positive obligation to an adequate response in case lives have been lost because of adverse environmental factors'). By doing this, it wants to assure the proper implementation of the regulations protecting art 2 ECHR and the repression and punishment of violations of art 2 ECHR.¹²⁷ A judicial response not necessarily requires criminal proceedings, provided that the violation of art 2 ECHR 'is not caused intentional'¹²⁸ and can otherwise be satisfied¹²⁹. There is no 'right for an applicant to have third parties prosecuted or sentenced for a criminal offence [...] or an absolute obligation for all prosecutions to result in conviction, or indeed in a particular sentence'.¹³⁰ Nevertheless, 'the national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished'.¹³¹ The positive obligation to an adequate response in case lives have been lost constitutes a positive 'procedural'¹³² obligation for the member states. In contrast to positive substantive obligations, positive procedural obligations 'call for the organisation of domestic procedures to ensure better protection of persons'.¹³³ They aim at securing 'an effective investigation'.¹³⁴

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- 38 In the context of dangerous activities¹³⁵, the ECtHR reinforces the positive (substantive) obligation to regulate to provide for 'enhanced legislation'¹³⁶ ('positive obligation to enhanced legislation regarding adverse environmental factors of art 2 ECHR in respect of dangerous activities'). This requires four aspects. At first, the regulating legislation 'must govern the licensing, setting up, operation, security and supervision of the activity'. Secondly, it 'must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks'. Thirdly, 'particular emphasis should be placed on the public's right to information' and fourthly the regulating legislation 'must also provide for appropriate procedures [...] for identifying shortcomings in the processes concerned and any errors committed by those responsible at different levels'.¹³⁷
- 39 Concerning dangerous activities and the positive (procedural) obligation to an adequate response in case lives have been lost, the ECtHR deems 'an official criminal investigation [...] indispensable [sic]' ('positive procedural obligation to an official investigation in case lives have been lost because of adverse environmental factors in respect of dangerous activities'). This is considered necessary because the officials of the member states hold a supervisory position, enabling them to illuminate the events.¹³⁸ The obligation comprises 'an independent and impartial official investigation procedure' that is firstly effective and secondly 'capable of ensuring that criminal penalties are applied to the extent that this is justified by the findings of the investigation'. In this context, the member states' responsible authorities generally have to act diligently and promptly. They possess two duties. On the one hand, they have to independently initiate investigations that explain the events and disclose 'any shortcomings in the operation of the regulatory system'. On the other hand, they have to identify 'the State officials or authorities involved in whatever capacity in the chain

¹²⁷ *Öneryildiz v Turkey* ECHR 2004-XII para 91; *Budayeva and Others v Russia* ECHR 2008 para 138.

¹²⁸ *Öneryildiz v Turkey* ECHR 2004-XII para 92; *Budayeva and Others v Russia* ECHR 2008 para 139.

¹²⁹ *Budayeva and Others v Russia* ECHR 2008 para 139.

¹³⁰ *Perez v France* ECHR 2004-I para 70; *Tanli v Turkey* ECHR 2001-III para 111; *Öneryildiz v Turkey* ECHR 2004-XII para 96; *Budayeva and Others v Russia* ECHR 2008 para 144.

¹³¹ *Öneryildiz v Turkey* ECHR 2004-XII para 96.

¹³² *Budayeva and Others v Russia* ECHR 2008 para 138.

¹³³ Jean-François and Akandji-Kombe (n 55) 16.

¹³⁴ Jean-François and Akandji-Kombe (n 55) 16.

¹³⁵ For some insight into the notion of 'dangerous activities' refer to the text of ns 64–69.

¹³⁶ M Fitzmaurice (n 8) 631.

¹³⁷ *Öneryildiz v Turkey* ECHR 2004-XII para 90; *Budayeva and Others v Russia* ECHR 2008 para 132; Council of Europe (n 1) 12 (c).

¹³⁸ *Budayeva and Others v Russia* ECHR 2008 para 140.

of events in issue'.¹³⁹

40 **d) No Justification of Adverse Environmental Factors under Art 2 ECHR**

Unlike art 8(2) ECHR, art 2 ECHR does not contain a general justification clause but merely precise exemptions. However, these are irrelevant in terms of environmental claims. Hence, an interference with art 2 ECHR simultaneously amounts to an violation thereof.¹⁴⁰ Nevertheless, due to the complexity¹⁴¹ of the cases featuring adverse environmental factors, the member states carry a wide margin of appreciation in determining the means by which they safeguard art 2 ECHR.¹⁴² Because of this, 'an impossible or disproportionate burden must not be imposed on the authorities without consideration being given, in particular to the operational choices which they must make in terms of priorities and resources'.¹⁴³

41 **3. Environmental Dimension of Article 1 of the First Protocol to the ECHR – The Protection of Property**

Art 1(1) of the First Protocol to the ECHR ('P1') protects the 'peaceful enjoyment of possessions', however, it 'does not, in principal, guarantee the right to continue to enjoy those possessions in a pleasant environment'.¹⁴⁴ Nevertheless, the ECtHR held, that the member states have to prevent violations of art 1(1) P1 'in respect of dangerous activities' ('positive obligation to prevent violations through adverse environmental factors in respect of dangerous activities'). It imposed such an obligation when possessions of nationals were destroyed by the explosion of a nearby municipal rubbish tip¹⁴⁵ or mudslides¹⁴⁶. In this context, art 1(1) P1 enables the member states' nationals to enforce a environment which is not detrimental to their possessions, fostering a right to a sound environment.

42 Like art 8(2) ECHR¹⁴⁷, art 1(2) P1 contains a justification clause, allowing the member states to restrict art 1(1) P1 if it serves the 'general interest' and is proportionate and fairly balanced.¹⁴⁸ Hence, in line with art 8(2) ECHR¹⁴⁹, the member states possess a wide margin of appreciation in determining the measures promoting the general interest.¹⁵⁰

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43 **4. Environmental Dimension of Article 6 ECHR – The Right to a Fair Trial**

The ECtHR held, that if the member states' domestic law transfers a 'right to live in a healthy and balanced environment'¹⁵¹ to its nationals, this right constitutes a 'civil right' within the meaning of art 6(1) ECHR.¹⁵² As a consequence, art 6(1) ECHR thus requires the member states to decide about that civil right in 'a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. Hence, ultimately, if a domestic right to live in healthy and balanced environment exists and is at stake, art 6(1) ECHR obliges the member states to comply with these

¹³⁹ *Budayeva and Others v Russia* ECHR 2008 para 142; Council of Europe (n 1) 12 and 13 (d).

¹⁴⁰ See A.II.2.c), first paragraph (text to n 122).

¹⁴¹ *Budayeva and Others v Russia* ECHR 2008 para 135; *Öneryildiz v Turkey* ECHR 2004-XII para 107; see also text to n 87.

¹⁴² *Budayeva and Others v Russia* ECHR 2008 paras 134 and 135.

¹⁴³ *Budayeva and Others v Russia* ECHR 2008 para 135; *Osman v the United Kingdom* ECHR 1998-VIII para 116.

¹⁴⁴ Council of Europe (n 1) 40 and 41 (a).

¹⁴⁵ *Öneryildiz v Turkey* ECHR 2004-XII paras 133–138.

¹⁴⁶ *Budayeva and Others v Russia* ECHR 2008 paras 171–185.

¹⁴⁷ Refer to A.II.1.d).

¹⁴⁸ *Fredin v Sweden* 13 EHRR 784 para 41; *Pine Valley Developments Ltd and Others v Ireland* 14 EHRR 319 para 57; *Chapman v the United Kingdom* ECHR 2001-I para 120; Council of Europe (n 1) 40 and 41.

¹⁴⁹ See A.II.1.d) cc) bbb) (text to n 112).

¹⁵⁰ *Fredin v Sweden* 13 EHRR 784 para 51.

¹⁵¹ *Okyay v Turkey* ECHR 2005-VII para 65.

¹⁵² *Okyay v Turkey* ECHR 2005-VII paras 67–69; Council of Europe (n 1) 60 para 50.

procedural requirements.¹⁵³ By doing this, art 6(1) ECHR assures a common procedural standard of the member states' domestic rights to live in a healthy and balanced environment. This contributes to the aim of the (ECHR) right to a sound, quiet and healthy environment and thus can be considered to indirectly foster it.

44 The procedural requirements of art 6(1) ECHR can also be claimed if the respective member state's domestic law does not accommodate a (individually enforceable) right to live in a healthy and balanced environment. In this case, nationals seeking to challenge an adverse environmental factor, will have to establish a sufficient link between it and one of their other civil rights.¹⁵⁴ For this purpose, they have to prove that the environmental factor 'is directly decisive for the right in question'.¹⁵⁵

45 **5. Environmental Dimension of Article 10 ECHR – The Freedom of Expression**

As a part of the freedom of expression, art 10(1) ECHR protects the 'disseminating [of] information and ideas on matters of general public interest such as [...] the environment'.¹⁵⁶ This right 'cannot be construed as imposing on public authorities a general obligation to collect and disseminate information relating to the environment of their own motion'.¹⁵⁷ Nonetheless, it renders possible the ECHR's right to a sound, quiet and healthy environment by providing for an informed public and by assuring open public discussion. Art 10(2) ECHR enables the member states to restrict this right.

46 **III. Conclusion regarding the Right to a Sound, Quiet and Healthy Environment and the ECHR**

The ECHR does not expressly contain a right to a sound, quiet and healthy environment.¹⁵⁸ Nevertheless, certain ECHR rights – above all arts 8 and 2 ECHR – have been interpreted by the ECtHR to include environmental dimensions.¹⁵⁹ Thus, when speaking of the ECHR's right to an environment of a certain quality, one has to bear in mind that this term merges all the environmental dimensions of ECHR rights. It does not, however, point to a written article of the ECHR labeled 'right to environment' or something similar.

47 Due to the adverse environmental factors identified by the ECtHR in terms of arts 8(2), 2 ECHR and art 1 P1, the quality of the environment assured by the right can be referred to as being sound, quiet and healthy.¹⁶⁰ In addition, art 6 ECHR indirectly fosters the right to a sound, quiet and healthy environment by defining common procedural standards for domestic rights to live in a healthy and balanced environment or other domestic civil rights which are adversely influenced by an environmental factor.¹⁶¹ Furthermore, art 10 ECHR makes a right to a sound, quiet and healthy environment possible, because it provides for an informed public and assures open public discussion.¹⁶²

¹⁵³ *Zander v Sweden* 13 EHRR 175 para 29; *Allan Jacobsson v Sweden (No 1)* 32 EHRR 463 para 42; *Fredin v Sweden (No 1)* 13 EHRR 784 para 63; *Ortenberg v Austria* 19 EHRR 524 para 28; Council of Europe (n 1) 60 para 50.

¹⁵⁴ Council of Europe (n 1) 62 para 54.

¹⁵⁵ *Balmerschafroth and Others v Switzerland* ECHR 1997-IV para 32; *Athanassoglou and Others v Switzerland* ECHR 2000-IV para 43; similarly: *Balmerschafroth and Others v Switzerland* ECHR 1997-IV paras 39 and 40; *Athanassoglou and Others v Switzerland* ECHR 2000-IV paras 38 and 39, 41; Council of Europe (n 1) 62 para 54.

¹⁵⁶ *Steel and Morris v the United Kingdom* ECHR 2005-II para 89; Council of Europe (n 1) 47 para 35.

¹⁵⁷ Council of Europe (n 1) 49 (c) and para 38; similarly: *Guerra v Italy* ECHR 1998-I para 53.

¹⁵⁸ See A.I.

¹⁵⁹ See A.II.

¹⁶⁰ In terms of art 8(1) ECHR see A.II.1.a) (text to ns 30–37) and regarding art 2 ECHR see A.II.2.a) (text to ns 116 and 117), concerning art 1 P1 see A.II.3. (text to ns 144 and 145).

¹⁶¹ See A.II.4.

¹⁶² See A.II.5.

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- 48 Moreover, three restriction of the ECHR's right to a sound, quiet and healthy environment can be exposed. It is restricted to the scope of protection of the ECHR rights that carry the respective environmental dimension (restriction to the ECHR rights' scope of protection).¹⁶³ Further, it can only be engaged if an individual is directly (restriction to directly affected individuals)¹⁶⁴ and severely affected (restriction to severe adverse environmental factors)¹⁶⁵.
- 49 Under these conditions, the general positive obligation to prevent violations of arts 8(1)¹⁶⁶ and 2¹⁶⁷ ECHR becomes operative. Art 1 P1 emits a similar positive obligation in case of dangerous activities.¹⁶⁸ In addition, arts 8(1) and 2 ECHR can unfold more precise positive obligations in terms of environmental claims. Art 8(1) ECHR can impose positive obligations to regulate sources of adverse environmental factors¹⁶⁹ and to enforce these regulations¹⁷⁰. In the context of adverse environmental factors and dangerous activities, it is able to generate positive obligations to inform nationals¹⁷¹, to provide public access to information¹⁷² to establish an effective and accessible information procedure¹⁷³. Like art 8(1) ECHR, art 2 ECHR can emit a positive obligation to regulate sources of adverse environmental factors¹⁷⁴. Moreover, it may impose a positive obligation to an adequate response in case lives have been lost because of adverse environmental factors.¹⁷⁵ In the context of adverse environmental factors and dangerous activities, art 2 ECHR can transfer positive obligations to enhanced legislation¹⁷⁶ and, in case lives have been lost, to an official investigation¹⁷⁷.
- 50 Art 8 ECHR¹⁷⁸ and art 1 P1¹⁷⁹ provide for the justification of adverse environmental factors by containing a justification clause. From a different angle, the member states are allowed to remain passive and disregard the positive obligations of the environmental dimensions of the ECHR rights if the adverse environmental factor is justifiable.¹⁸⁰ In contrast, art 2 ECHR does not possess a justification clause with regard to adverse environmental factors.¹⁸¹
- 51 All this demonstrates that the ECHR right to a sound, quiet and healthy environment is well established and developed, but also that, notably due to its three restrictions, it is highly dependent on the written ECHR right carrying the environmental dimension. Furthermore, it has to be emphasised that the ECHR right to a sound, quiet and healthy environment is anthropocentric.¹⁸²

¹⁶³ See A.II., first paragraph (text to ns 24–26).

¹⁶⁴ See A.II., first paragraph (text to ns 39–46).

¹⁶⁵ See A.II., second paragraph (text to n 54).

¹⁶⁶ See A.II.1.c), second paragraph (text to n 60).

¹⁶⁷ See A.II.2.c), first paragraph (text to ns 120 and 121).

¹⁶⁸ See A.II.3. (text to ns 144–146).

¹⁶⁹ See A.II.1.c), third paragraph (text to n 61).

¹⁷⁰ See A.II.2.c), fourth paragraph (text to ns 61 and 63).

¹⁷¹ See A.II.2.c), fifth paragraph (text to n 70).

¹⁷² See A.II.2.c), fifth paragraph (text to n 71).

¹⁷³ See A.II.2.c), fifth paragraph (text to n 72).

¹⁷⁴ See A.II.2.c), second paragraph (text to n 123).

¹⁷⁵ See A.II.2.c), third paragraph (text to n 127).

¹⁷⁶ See A.II.2.c), fourth paragraph (text to n 136).

¹⁷⁷ See A.II.2.c), fifth paragraph (text to n 138).

¹⁷⁸ See A.II.1.d).

¹⁷⁹ See A.II.3., second paragraph (text to ns 147–149).

¹⁸⁰ See A.II.1.c), first paragraph (text to ns 55–59).

¹⁸¹ See A.II.2.d) (text to ns 124 and 125).

¹⁸² See A.II., last paragraph (text to n 28) and A.II.1.b), first paragraph (text to ns 38–41).

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52 **B. General Protection of the Environment and the ECHR****I. No General Protection of the Environment as such under the ECHR**

Because of its deep-rooted focus on the human environment (anthropocentrism), the ECHR is 'not designed' to provide general protection of the environment as such, which would require the focus to be on the entire – human and inhuman – environment (ecocentrism).¹⁸³ Therefore, the ECHR does 'not directly require states to protect the environment'.¹⁸⁴ At last, '[t]he duty is not of protecting the environment, but of protecting humans from significantly harmful environmental impact'.¹⁸⁵

However, a few aspects can be detected suggesting that the ECtHR to some extent considers the general protection of the environment.

53 **II. Aspects of General Protection of the Environment within the ECHR****1. Preservation and Protection of the Environment as a Legitimate Aim in the course of the Justification of Interferences of ECHR rights**

It was already shown that the environmental dimensions of ECHR rights can be restricted through legitimate aims serving a public interest – such as the economic well-being of the respective member state.¹⁸⁶ This is the effect of the justification clauses of art 8(2) ECHR and art 1(2) P1. However, more interesting is the fact that the ECtHR accepted the protection of the environment as a public interest restricting ECHR rights,¹⁸⁷ in particular 'in the framework of planning policies'¹⁸⁸. In *Chapman v the United Kingdom*, the ECtHR used the 'preservation of the environment' as a legitimate aim for justifying an interference with 'the applicant's right to respect for her private life, family life and home'¹⁸⁹ of art 8(1) ECHR under art 8(2) ECHR.¹⁹⁰ Furthermore, in *Pine Valley Developments Ltd and Others v Ireland*, the ECtHR justified an interference of art 1(1) P1 with the protection of the environment, being the legitimate aim emanating from 'planning legislation'.¹⁹¹

54 These days, the preservation and protection of the environment form public interests.¹⁹² Thus, it would have been inappropriate for the ECtHR not to accept them as a legitimate aim to restrict ECHR rights.

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55 **2. Environmental Protection as a Factor within the Member States' Margin of Appreciation**

In *Hatton v the United Kingdom* the ECtHR held that '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'.¹⁹³ It is questionable why the ECtHR decided in that way. For a fair balancing in terms of the ECHR, it would have been sufficient to ask the state to take into account the environmental dimensions of ECHR rights. They alone already contain the scope of protection necessary to provide for a reliable realisation of the ECHR's objective – the protection of the human environment. In

¹⁸³ *Kyrtatos v Greece* ECHR 2003-VI para 52; F Francioni (n 61) 50.

¹⁸⁴ A Boyle (n 8) 15.

¹⁸⁵ *Kyrtatos v Greece* ECHR 2003-VI para 52; A Boyle (n 8) 17.

¹⁸⁶ See A.II.1.d) bb).

¹⁸⁷ Council of Europe (n 1) 5 para 3 point 3.

¹⁸⁸ Council of Europe (n 1) 37 (f) and para 24; A Boyle (n 8) 20.

¹⁸⁹ *Chapman v the United Kingdom* ECHR 2001-I para 74.

¹⁹⁰ *Chapman v the United Kingdom* ECHR 2001-I para 82.

¹⁹¹ *Pine Valley Developments Ltd and Others v Ireland* 14 EHRR 319 para 57.

¹⁹² See Introduction.

¹⁹³ *Hatton and Others v the United Kingdom* ECHR 2003-VIII para 122; D J Harris, M O'Boyle, E P Bates and C M Buckley (n 44) 391.

contrast, by requiring the member states to include the environmental protection in their margin of appreciation, the ECtHR imposes a broader duty of consideration upon them.

- 56 However, the ECtHR continues 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'.¹⁹⁴ On the one hand, according to the wording – 'environmental human rights' – , this quote merely relates to anthropocentric rights to environment of a certain condition rather than to ecocentric environmental protection. On the other hand, this quote has to be read in connection with the one before in which the ECtHR addresses 'environmental protection'. Therefore, it is obvious that the ECtHR, in this regard, deems environmental protection to be a part of environmental human rights. For this reason, the second quote illustrates that the ECtHR allows environmental protection to constitute a parameter without predominant influence within the margin of appreciation of the member states yet nothing more. Hence, environmental protection holds an equal value as, for example, the economic well-being of the respective member state.

Nonetheless, the ECtHR requires the Members States to include environmental protection in their consideration process. In this respect, the ECtHR at least indirectly considers environmental protection through the member states' margin of appreciation which has to include this parameter.

57 **III. Conclusion regarding General Protection of the Environment and the ECHR**

Due to its deep-rooted anthropocentric objective, the ECHR does not provide for general protection of the environment.¹⁹⁵ Nevertheless, the ECtHR to some extent considers it by accepting the preservation and protection of the environment as a legitimate aim to restrict ECHR rights¹⁹⁶ and by indirectly considering environmental protection through the member states' margin of appreciation which has to consider it¹⁹⁷.

- 58 In summary, environmental protection may be taken into account in these respects, but this does not amount to a departure of the ECHR's and ECtHR's anthropocentric position. On the contrary, the ECtHR emphasises the purely anthropocentric objective of the ECHR. This is clearly visible in *Hatton v the United Kingdom* where it denies any 'special approach' regarding environmental protection. It only acknowledges general protection of environment to a limited extent where it is indispensable due to its significance in the contemporary zeitgeist.

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59 **C. Overall Conclusion**

The ECHR includes a right to a sound, quiet and healthy environment¹⁹⁸ but it does not provide for general protection of the environment¹⁹⁹. It was not created for that purpose and thus its anthropocentric focus precludes such a scope of application.

- 60 To change that, the ECHR would have to be amended in terms of its objective. The area of protection – and with it the admissibility criteria and the scope of the ECHR rights – would have to be widened to cover the entire – human and inhuman – environment, the ECHR would have become ecocentric. This amendment would deprive the ECHR of its (anthropocentric) identity, even the name would be inappropriate. The European Convention on Human Rights would become a 'European Convention on

¹⁹⁴ *Hatton and Others v the United Kingdom* ECHR 2003-VIII para 112.

¹⁹⁵ See B.I.

¹⁹⁶ See B.II.1.

¹⁹⁷ See B.II.2.

¹⁹⁸ See A.

¹⁹⁹ See B.

Environmental Protection'. Apart from the fact that such an extension would be almost impossible to ratify in terms of the current amount of states that ratified the ECHR, it would also be a long-winded act compared to the creation of a new legal instrument. Furthermore, it seems counterproductive to risk to destroy such a well establish entity like the ECHR and the case law of the ECtHR.

- 61 Hence, the ECHR's right to a sound, quiet and healthy environment may in the future be expanded by the ECtHR through further greening of existing ECHR rights, however, it will not be overexpanded to cover general protection of the environment. This has to be provided for by domestic or other instruments of international law.²⁰⁰ For example, art 6 of the Aarhus Convention²⁰¹ provides 'participation rights to anyone having an "interest" in the decision' in terms of adverse environmental factors.²⁰² Thereby, it declares a public interest application admissible and is hence open to ecocentrism.

Zitierempfehlung: Christoph Gramlich, HFR 2013, S. 95 ff.

²⁰⁰ *Kyrtatos v Greece* ECHR 2003-VI para 52; Council of Europe (n 1) 32 para 11.

²⁰¹ Full name: Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, on 25 June 1998.

²⁰² A Boyle (n 8) 23 and 24.