Council of Europe and the right to a healthy environment

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Hominum causa omne ius constitutum

DIGNITAS

Slovenska revija za človekove pravice

The Slovenian Journal of Human Rights

59-60

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Revija za človekove pravice

The Slovenian Journal of Human Rights

Ljubljana, 2013

DIGNITAS
izhaja pod pokroviteljstvom
SLOVENSKE KOMISIJE PRAVNIKOV
in
DRUŠTVA ZA PRIMERJALNO IN USTAVNO PRAVO

DIGNITAS is published under the auspices of
THE SLOVENIAN SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS
and
THE SLOVENIAN COMPARATIVE CONSTITUTIONAL LAW ASSOCIATION

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Ustanovitelj in izdajatelj revije je
Inštitut za ustavno ureditev in človekove pravice

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Izid publikacije je finančno podprla Javna agencija za raziskovalno dejavnost Republike Slovenije iz sredstev državnega proračuna iz naslova razpisa za sofinanciranje domačih znanstvenih periodičnih publikacij.

Uredništvo:

Revija Dignitas,

Predoslje 39, 4000 Kranj

telefon: +386 (0)4 2601 856

fax: + 386 (0)4 2601 855

e-mail: dignitas@fds.si

Izdaja:

Inštitut za ustavno ureditev in človekove pravice, d.o.o.

Lektoriranje:

Rok Janežič

Amanda Saksida

Oblikovanje:

Miljenko Licul in Julija Zornik

Založba:

Fakulteta za slovenske in mednarodne študije

Prelom:

Tiskarna Januš

Izdelava E-knjige:
Založba Obzorja d. d. Maribor

E-knjiga je dostopna na:
http://itunes.apple.com/si/book/isbn

Ljubljana, 2014

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Maša Marochini[130] The council of europe and the right to a healthy environment

ABSTRACT

The paper looks at the right to a healthy environment as guaranteed by two main instruments of the Council of Europe for the protection of human rights: the European Convention on Human Rights, and the European Social Charter. As an instrument on civil and political rights, the Convention contains no explicit or implicit reference to the right to a healthy environment. Nevertheless, in its jurisprudence, particularly regarding Article 8 (and in certain situations Article 2), the European Court of Human Rights has started to interpret the Convention so as to include the right to a healthy environment. On the other side, as an instrument on economic and social rights the Charter also does not explicitly include the right to a healthy environment, although it does so implicitly under Article 11(3) which obliges State parties to take appropriate measures to prevent, as far as possible, epidemic, endemic and other diseases, as well as accidents. This provision seems much more suitable for interpretation in such a way as to guarantee the right to a healthy environment than Articles 2 and 8 of the Convention that guarantee the right to life and the right to respect for private and family life, home and correspondence. Already in its conclusions in the Reporting system, the European Committee on Social Rights has started interpreting the Charter so as to guarantee the right to a healthy environment and this has continued in the Committee's decisions on collective complaints. Therefore, as will be argued, the right to a healthy environment is now included in the Charter through the interpretation of the Committee. Consequently, what this paper contends is that the right to a healthy environment is more suitable and better placed under the Charter than the Convention.

Keywords: the right to a healthy environment, Articles 2 and 8 of the European Convention on Human Rights, judgments concerning the right to a healthy environment, Article 11 of the European Social Charter, decisions and conclusions concerning the right to a healthy environment

Svet EVROPE in pravica do zdravega okolja

POVZETEK

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Ta članek se spoprijema s pravico do zdravega okolja, kot je zagotovljena v okviru dveh glavnih instrumentov Sveta Evrope za varstvo človekovih pravic: Evropske konvencije o varstvu človekovih pravic in temeljnih svoboščin ter Evropske socialne listine. Konvencija kot instrument o državljanskih in političnih pravicah ne vsebuje eksplicitne ali implicitne omembe pravice do zdravega okolja. Kljub temu pa je Evropsko sodišče za človekove pravice skozi svojo sodno prakso, zlasti na podlagi člena 8 (in v nekaterih primerih člena 2), Konvencijo začelo razlagati tako, da vključuje pravico do zdravega okolja. Po drugi strani pa Listina kot instrument o ekonomskih in socialnih pravicah, čeprav eksplicitno ne vključuje pravice do zdravega okolja, to počne implicitno na podlagi člena 11 (3), ki države pogodbenice obvezuje, da sprejmejo ustrezne ukrepe za preprečitev, kolikor je mogoče, epidemičnih, endemičnih ter drugih bolezni in nesreč. Ta določba se zdi veliko bolj primerna od členov 2 in 8 Konvencije za razlago, da zagotavlja pravico do zdravega okolja. Skozi sistem poročanja je Evropski odbor za socialne pravice Listino že začel razlagati tako, da zagotavlja pravico do zdravega okolja. To se je pokazalo tudi v odločbah Odbora o kolektivnih pritožbah. Pravica do zdravega okolja je torej na podlagi razlage Odbora vsebovana v Listini. Ta članek torej trdi, da je pravica do zdravega okolja bolje zaščitena v Listini kot v konvenciji.

Ključne besede: pravica do zdravega okolja, člena 2 in 8 Evropske konvencije o varstvu človekovih pravic in temeljnih svoboščin, sodbe v zvezi s pravico do zdravega okolja, člen 11 Evropske socialne listine, odločbe in sklepi v zvezi s pravico do zdravega okolja

1. Introduction

The European Convention on Human Rights (the ECHR, the Convention) does not contain a guaranteed right to a healthy environment, nor does its counterpart in the area of economic and social rights, the European Social Charter (the ESC, the Charter). However, through the jurisprudence of the European Court of Human Rights (the ECtHr, the Court) and the decisions and reports of the European Committee on Social Rights (the Committee, the ESCR) many aspects of the right to a healthy environment are now very much included in the Council of Europe (the CoE) system for the protection of human rights. Some scholars consider the right to a healthy environment as a third-generation right.[131] Nevertheless, it is now implicitly included in the ESC (as will be discussed here) and explicitly in the Inter-American Protocol on Social, Economic and Cultural Rights (San Salvador Protocol, Article 11) as well as in the African Charter on Human and Peoples' Rights (the AfCHPR, Article 24). It is thus generally treated as a second-generation right. According to A. Boyle, environmental rights do not fit into any category of human rights and can be seen from at

[131] S. P Marks, 'Emerging Human Rights: A New Generation for the 1980s?' (1980-1981) 33 Rutgers L. Rev. 435; JA Downs, 'Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right' (1992-1993) 3 Duke J. Comp. & Int'l L. 352; S. Atapattu, 'Right to a Healthy Life or the Right to Die Polluted: The Emergence of a Human Right to a Healthy Environment under International Law' (2002-2003) 16 Tul. Envtl. L.J. 65.

least three different perspectives, straddling all of the various categories of human rights.[132] It is not my intention here to question whether the right to a healthy environment is a secondor a third-generation right (or even a first-generation one). My intention is to look at the existing machineries for human rights protection within the Council of Europe and to propose a solution for the effective protection of the right to a healthy environment. What can be seen from the global and regional practice is that environmental rights are considered to be more appropriate for protection under economic and social instruments and are nowadays included in the mainstream of human rights.

Within the Convention system, alleged violations of the right to a healthy environment have been considered by the Court under Articles 2 and 8. Both Article 2 and Article 8 of the Convention consist of two paragraphs. In the first paragraph, the rights are expressed while, in the second paragraph, permissible interferences with those rights are elaborated. Article 8 obliges states to respect a wide range of personal interests. Generally, four main interests are protected: private life, family life, home and correspondence and all of those interests have an 'autonomous' meaning. In its application of Article 8, the Court has taken a flexible approach to the definition of the individual interests protected, with the result that the provision continues to broaden in scope. One of the interests pursued in this paper is the inclusion of the right to a healthy environment under Article 8. The cases where the Court has been willing to require the protection of persons from serious environmental pollution under the aegis of Article 8 will be examined. Further, when dangerous and hazardous activities have had detrimental effects on the health of the applicant or resulted in death, they have resulted in claims for a violation of Article 2 of the Convention. Those cases will also be elaborated upon.

After discussing the most relevant case-law regarding violations of Articles 8 and 2 due to environmental pollution, the current state of the execution of judgments concerning that case-law will be presented. What will be argued is that the execution of general measures required from states in environmental cases is a long and financially demanding process. My question here will be whether it is really necessary, or I might even say wise, to consider the issue of the right to a healthy environment under the Convention. With regard to that question, the discussion that ensued within the CoE in relation to making an Additional Protocol to the Convention on the Right to a Healthy Environment will be presented. This question was raised in 2003 and 2009 and on both occasions the opinion of the Committee on Legal Affairs and Human Rights (CLAHR) of the Parliamentary Assembly was that it did

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[132] A. Boyle, 'Human Rights and the Environment: A Reassessment' (2007) XVIII Fordham Environmental Law Review 471, 471. On the right to the healthy environment and the Convention, also see OW Pedersen, 'The Ties that Bind: the Environment, the European Convention on Human Rights and the Rule of Law' (2010) 16(4) European Public Law 571; NA Morenham, 'The Right to Respect for a Private Life in the European Convention on Human Rights: a Re-examination' (2008) 1 E.H.R.L.R. 44; L. G. Loucaides, *The European Convention on Human Rights*: *Collected Essays* (Martinus Nijhoff Publishers 2007) Chapter 10 "Environment Protection through the Jurisprudence of the European Convention on Human Rights; M. DeMerieux, 'Deriving Environmental Rights from the European Convention for the Protection of Human Rights and Fundamental Freedoms' (2001) 21(3) Oxford Journal of Legal Studies 521; *Manual on Human Rights and the Environment, Principles Emerging from the case-law of the European Convention on Human Rights* (CoE Publishing 2006); and D. Garcia San Jose, *Environmental Protection and the European Convention on Human Rights* (CoE Publishing 2005).

not believe that extending the Convention with the proposed additional protocol was the correct solution.

After presenting that discussion, I will look at the ESC system. In both the Collective Complaints and the Reporting systems, the ECSR has read a right to a healthy environment into the right to health in Article 11 of the Charter. The reason for doing so is to show that nowadays, considering all the problems the Convention system is facing (particularly the extensive caseload, the long time it takes to produce a judgment and even longer time it takes to enforce it), this is one issue that might be better dealt with through the ESC system of Collective Complaints and through the reporting system for those states that have not (yet) accepted the system of collective complaints. In my opinion, the right to a healthy environment is still too vague and has too many socio-economic elements to be guaranteed under the Convention, despite the non-absolute nature of Articles 2 and 8. Moreover, I see no reason why this right should not be secured through the ESc without in any way lessening its relevance.

2. The european convention on human rights and the right to a healthy environment

2.1. Article 8 of the echr and the right to a healthy environment

Article 8 states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In its application of Article 8, the Court has taken a flexible and evolutive approach to defining the individual interests protected, with the result that the provision continues to broaden in scope in line with social and technical developments. Issues falling within Article 8 now even include search and seizure, secret surveillance, immigration law, paternity and identity rights, child and family law, assisted reproduction, suicide, prisoners' rights, inheritance, tenants' rights, and environmental protection.[133] What is of interest in this paper is environmental protection. The Court has made it clear that there are positive obligations inherent in Article 8(1), including both those requiring states to take steps to provide rights or privileges for individuals and those which require states to protect persons against the

[133] D. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (2nd ed OUP 2009) 361.

activities of other private individuals which prevent the effective enjoyment of their rights.[134] In most cases regarding Article 8, its application requires a two-stage test. The question of whether the complaint falls within the scope of Article 8(1) comes in the first stage. If it does, the second stage entails an examination of whether the state's interference is consistent with the requirements of Article 8(2).

The determination of whether a positive obligation exists under Article 8 cannot be precisely defined. The Court has stated: "In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention".[135] In *Johnston and Others v Ireland*, it concluded: "... Especially as far as those positive obligations are concerned, the notion of 'respect' is not clear-cut: having regard to the diversity of the practices followed and the situations obtaining in the contracting states, the notion's requirement will vary considerably from case to case. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of the individuals".[136]

The court has held that a state's positive obligations include an obligation to take action to deal with serious environmental pollution affecting an applicant's home. Environmental degradation does not necessarily involve a violation of Article 8, but will do if the adverse effects reach a certain minimum level. The assessment of that minimum will depend on all the circumstances of the case, such as the intensity and duration of the nuisance and its physical and mental effects, as well as on the general environmental context.[137] The Court has even found a state in breach for its failure to notify affected residents of the risks associated with the operation of a fertiliser plant emitting toxic substances and inflammable gases.[138]

The *Guerra* judgment indicated that states may be found in breach of their positive obligations under Article 8 if they fail to provide crucial safety and environmental information to local residents facing serious risks of severe pollution. Later, in *McGinley and Egan v United Kingdom* the Court held that: "...(w)here a Government engages in hazardous activities, such as those in issue in the present case, which might have hidden adverse consequences on the health of those involved in such activities, respect for private and family life under Article 8 requires that an effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information".[139]

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[134] Ibid. 362. *X and Y v Netherlands* (1986) 8 E.H.r.r. 235

[135] *Rees v United Kingdom* (1987) 9 E.H.R.R. 56

[136] *Johnston and Others v Ireland* (1987) 9 E.H.R.R. 203 [55]

[137] *Manual on Human Rights and the Environment* (n 2) 14

[138] *Guerra and Others v Italy* (1998) 26 E.H.R.R. 357

[139] *McGinley and Egan v United Kingdom* (1999) 27 E.H.R.R. 1 [101]

These cases consider the issue of providing information on dangerous activities to the people that may be affected. What will be looked at now are cases where the Court examined the issue of protecting persons from serious environmental pollution under the aegis of Article 8. As stated by one of the most eminent experts in the area of the European system for human rights protection: "That type of protection can involve considerable public expenditure and may be characterised as a newer generation right than the civil and political rights underpinning most of the Convention's substantive guarantees".[140]

One of the first environmental cases, *Powell and Rayner v United Kingdom*,[141] involved pollution, whereby the applicants claimed that noise from Heathrow Airport gave rise to a violation of Article 8. The Court agreed with the applicants that the "scope for enjoying the amenities of his home have been adversely affected' and that Article 8 is a 'material provision'".[142] It concluded, however, that in the light of the public need for the airport and the efforts that had been made to limit the noise, no violation of Article 8 had been made out. The first applicant lived under a flight departure route several miles from Heathrow Airport, whilst the second applicant lived directly under flight paths just over one mile from the airport's northern runway. The Court held that Article 8 applied to both applicants as the quality of their private lives and their ability to enjoy the amenities of their homes had been adversely affected, to different degrees, by noise from aircraft using Heathrow. This airport had been privatised in 1986; therefore the government submitted that its only obligations under Article 8 with regard to the applicants' homes were positive ones. In the Court's opinion:

"Whether the present case be analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under paragraph 1 of Article 8 or in terms of an 'interference by a public authority' to be justified in accordance with paragraph 2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention. Furthermore, even in relation to the positive obligations flowing from the first paragraph of Article 8, 'in striking [the required] balance the aims mentioned in the second paragraph may be of certain relevance."[143]

The Court noted the uncontested data produced by the government demonstrating the economic importance of Heathrow and that many measures, including restrictions on night flights, aircraft noise monitoring, a £19 million scheme for the sound insolation of 16,000 homes and the purchase of homes very close to the runways, had been undertaken to reduce the noise pollution from Heathrow. Consequently, the Court determined that "there is no

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[140] A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004) 149-150

[141] *Powell and Rayner v United Kingdom* (1990) 12 E.H.R.R. 355

[142] Ibid. [40]

[143] Ibid. [41]

serious ground for maintaining that either the policy approach to the problem or the content of the particular regulatory measures adopted by the United Kingdom authorities gives rise to violation of Article 8, whether under its positive or negative head".[144] Strictly speaking, this case was not decided under Article 8, but under Article 13, which involved the Court having to determine whether the applicants had an arguable case under Article 8. However, it is important to consider it in the context of including the right to a healthy environment under the aegis of Article 8.

Another significant environmental case concerning Heathrow Airport is *Hatton and Others v United Kingdom*.[145] Here, unlike in *Powell and Rayner* the Chamber majority found the regime governing night flights from Heathrow to be in breach of Article 8. The applicants complained that the government's policy on night flights at Heathrow Airport in London violated their rights under Article 8. The Chamber, by five votes to two, distinguished the current case from the earlier Heathrow case by reference to the different factual circumstances since the present action was concerned with night flights under the post-1993 regime. The majority held that mere reference to the economic well-being of the country is not sufficient to outweigh the rights of others. It considered that states are required to minimise, as far as possible, the interference with these rights by trying to find alternative solutions and by, generally seeking, achieving their aims in the least onerous way as regards human rights. In order to do that, a proper and complete investigation and study with the aim of finding the best possible solution which will, in reality, strike the right balance should precede the relevant project.[146]

In her partly dissenting opinion, Judge Greve stated that she did not believe there had been a breach of Article 8. She believed that the majority had impermissibly narrowed the margin of appreciation accorded to states in environmental matters by the established case-law and made the following interesting statement:

"In modern society, environmental problems are not discreet and only of concern to those who may invoke Article 8, given their proximity to the source of the given problem. One of the functions of planning is, to the extent possible, to protect people against the negative impact on the environment of, for instance, and as *in casu*, the transport infrastructure; another function is to ensure that no group of people is disproportionately affected by what is considered necessary to meet the needs of modern urban society. The amount and complexity of the factual information needed to strike a fair balance in these respects is more often than not of such a nature that the European Court will be at a marked disadvantage compared to the national authorities in terms of acquiring the necessary level of understanding for appropriate decision-making. Moreover, environmental rights represent a new generation of human rights. How the balance is to be struck will therefore affect the rights not only of those close enough to the source of the environmental problem to invoke Article 8, but also the rights of those members of the wider public affected by the problem

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[144] Ibid. [42]

[145] *Hatton and Others v United Kingdom* (2002) 34 E.H.R.R. 1

[146] Ibid. [97]

and who must be considered to have a stake in the balancing exercise. Furthermore, the general principle concerning the assessment of facts argues in favour of a wide margin of appreciation in these cases."[147]

This case was later referred to the Grand Chamber which found no violation of the same article. It explained that in cases involving state decisions affecting environmental issues there are two aspects to the Court's inquiry: the first is to assess the substantive merits of the government's decision to ensure that it is compatible with Article 8 and the second is to scrutinise the decision-making process to ensure that due weight has been accorded to the interest of the individual.[148] Significantly, with respect to the former, the Grand Chamber avoided identifying which approach to the application of Article 8 was applicable in this case, viewing the central issue as simply whether a fair balance has been struck between the relevant interests. It remarked that economic interests were specifically enumerated as a legitimate aim under Article 8(2) and that, accordingly, it was appropriate for the state to take them into account in policy-making.[149] It suggested that the essential question is the breadth of the state's margin of appreciation.[150] The Grand Chamber did not find that the authorities had 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 did it find that there had been fundamental procedural flaws in the preparation of the 1993 regulations on limitations for night flights. Therefore, it found no violation of Article 8.

However, five judges issued a joint dissenting opinion which advocated a stronger role for the Court in responding to complaints concerning environmental pollution.[151] They stated that, while it is true that the original text of the Convention does not disclose an awareness of the need to protect environmental human rights, in the 1950s the universal need for environmental protection was not yet apparent.[152] They also emphasised that 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 deviate from the developments in the case-law and even takes a step backwards. According to them, 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.[153] The dissenters considered that in the context of constant disturbance to persons' sleep at night by aircraft noise there was a positive obligation upon States to ensure as far as possible that ordinary

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[147] Ibid., partly dissenting opinion of Judge Greve

[148] *Hatton and Others v United Kingdom* (GC judgment) (2003) 37 E.H.R.R. 28 [128]

[149] Ibid. [121]

[150] Ibid. [100]-[103] and [122]

[151] Ibid., joint dissenting opinions of Judges Costa, Ress, Turmen, Zupancic and Steiner

[152] Ibid. [1]

[153] Ibid. [5]

people enjoy normal sleeping conditions.[154] Consequently, the margin of appreciation of the state is narrowed because of the fundamental nature of the right to sleep, which may be outweighed only by the real, pressing (if not urgent) needs of the state.[155]

In *Hatton*, the judges were not unanimous in their approach regarding the protection of the right to a healthy environment under Article 8 of the Convention. The Chamber found there had been a violation, thereby narrowing the state's margin of appreciation, whereas the Grand Chamber found that economic interests prevailed over the applicant's right not to be subjected to noise from the airport. I would mostly agree with Judge Greve and her dissenting opinion on the Chamber judgment since the right to a healthy environment is not a right that is appropriate for protection under the convention because environmental problems are not discreet and only of concern to those who may invoke Article 8, given their proximity to the source of the given problem.[156] This line of thinking will be elaborated on further in the paper.

The first case where an environmental complaint was upheld came in 1994 in *Lopez Ostra v Spain*.[157] The applicant complained that the fumes and noise from a waste treatment plant situated near her home made her family's living conditions unbearable. After having had to bear the nuisance caused by the plant for more than three years, the family moved when it became clear that the nuisance could go on indefinitely and when the applicant's daughter's paediatrician recommended that they do so. While recognising that the noise and smells had a negative effect on the applicant's quality of life, the national authorities argued that they did not constitute a grave health risk and that they did not reach a level of severity whereby the applicant's fundamental rights were breached. The Court balanced the 'town's economic well-being' against the applicant's interest in home and private and family life when deciding whether there had been a breach of Article 8. Whilst the plant was necessary for the economic well-being of the town and its leather industry, the judges were united in concluding that a fair balance had not been struck by the authorities in seeking to protect the applicant from the effects of severe pollution. The Court found that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to adversely affect their private and family life, even though it does not seriously endanger their health. In this case, the Court found a violation of Article 8. This decision gave an indication that it will not be sufficient for states to simply create pollution control regimes; instead, they must also take adequate steps to enforce those rules.

Are we talking here of a negative or positive obligation on the part of the state? Again, the Court has not made this clear but it stated that in both contexts regard must be had to the fair

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[154] Ibid. [12]

[155] Ibid. [17]

[156] *Hatton and Others v United Kingdom* (n 15), partly dissenting opinion of Judge Greve

[157] *Lopez Ostra v Spain* (1995) 20 E.H.R.R. 513

balance that has to be struck between the competing interests of the individual and of the community as a whole, and in any case the state enjoys a certain margin of appreciation.[158]

Another relevant case regarding a healthy environment in the context of industrial pollution is *Fadeyeva v Russia*.[159] Here, the applicant lived in the vicinity of a steel plant, an important steelproducing centre in the respondent state. From 1982 on, the applicant and her family were living less than 500 metres from the large steel plant. In order to limit the impact of pollution from the plant, a 5,000 metre wide 'sanitary security zone' existed. The zone was supposed to separate the plant from residential areas although, in practice, several thousand people, including the applicant and her family, lived in the zone. In 1996, the government noted that the plant was responsible for 96 per cent of all emissions in the area and that the overlap between industrial and residential areas was plainly harmful to health. The pollution was found to be responsible for the huge increase in the number of children with respiratory and skin diseases and the higher number of adult cancer deaths. The Court observed that, in order to fall under Article 8, complaints relating to environmental nuisances have to show that there has been actual interference with an individual's "private sphere" and that these nuisances have reached a certain level of severity. In the case in question, the Court found that over a significant period of time the concentration of various toxic elements in the air near the applicant's house had seriously exceeded safe levels and that the applicant's health had deteriorated as a result of the prolonged exposure to the industrial emissions from the steel plant. Therefore, the Court accepted that the actual detriment to the applicant's health and well-being had reached a level sufficient to bring it within the scope of Article 8. Finally, it concluded that there had been a violation of Article 8.

Further, in *Giacomelli v Italy*[160] the applicant had lived since 1950 in a house on the outskirts of Brescia, 30 metres away from a plant for the storage and treatment of 'special waste'. An operating licence for the plant had been granted for the storage and treatment of hazardous and non-hazardous waste. The regional council subsequently authorised the treatment of harmful and toxic industrial waste by a detoxification process involving significant risks to the environment and human health. The applicant brought judicial review proceedings, and the national court held that the renewal of the operating licence had been unlawful and ordered the suspension of operations pending an environmental impact assessment which the regional council had previously ordered. The assessment was carried out and revealed that the plant's operation was incompatible with environmental regulations, but would be allowed to continue provided that it complied with requirements laid down by the regional council. The respondent government submitted that the interference with the applicant's right to respect for her home was justified as being in accordance with the law and in pursuit of the legitimate aims of protecting the public health and preserving the region's economic well-being. The Court upheld the applicant's complaint and found a

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[158] Ibid. [51]

[159] *Fadeyeva v Russia* (2007) 45 E.H.R.R. 10

[160] *Giacomelli v Italy* (2007) 45 E.H.R.R. 38

violation of Article 8 of the Convention. It stated that the respondent government had not succeeded in striking a fair balance between the interest of the community in having a plant for the treatment of toxic industrial waste and the applicant's effective enjoyment of her right to respect for her home and her private and family life.

One of the most recent cases concerning hazardous industrial processes and their impact on the local population is *Tatar v Romania*.[161] In this case, the applicants lived in baia Mare. In 1998, the company S.c. Aurul S.A., obtained a licence to exploit the Baia Mare gold mine. The company's extraction process involved the use of sodium cyanide and part of its activity was located in the vicinity of the applicants' home. On 30 January 2000, an environmental accident occurred at the site. A UN study reported that a dam had breached, releasing about 100,000 m3 of cyanide-contaminated tailings water into the environment. The report stated that S.C. Aurul S.A. had not halted its operations. The applicants complained under Article 2 that the activities carried out by the company was putting their lives in danger, and that the authorities had failed to take any action. In its admissibility decision of July 2007, the Court ruled that the applicants' complaints should be examined under Article 8. When it comes to the medical condition of the first applicant, the Court noted that the applicant had failed to prove the existence of a causal link between exposure to sodium cyanide and asthma. Nevertheless, despite the lack of such a link, the existence of a serious and material risk for the applicants' health and well-being entailed a duty on the part of the state, under Article 8, to assess the risks both at the time it granted the operating permit as well as subsequent to the accident, and to take appropriate measures. The Court noted that, even after the accident, from January 2000 the company was allowed to continue its industrial operations, in breach of the precautionary principle according to which the absence of certainty with regard to current scientific and technical knowledge could not justify any delay on the part of the state in adopting effective and proportionate measures. The Court also stressed the authorities' duty to inform the public and guarantee the right of its members to participate in the decision making process concerning environmental issues.[162] Finally, the Court concluded that the Romanian authorities had failed in their duty to assess the risks entailed by the activity, and had failed to take suitable measures to protect the applicants' rights under Article 8 and more generally their right to a healthy environment.[163]

All of these judgments demonstrate the Court's willingness to accept that complaints concerning environmental pollution can be made within the ambit of Article 8. Further, states may be liable if they fail to take adequate measures, such as through enacting and enforcing appropriate regulatory regimes or ameliorating the effects of significant forms of pollution caused by private sector business that affect persons' enjoyment of their homes. Acknowledging the need for many possible sources of pollution in modern developed societies, the Court has also accorded states a margin of appreciation in their task of

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[161] *Tatar v Romania* App no 67021/01 (ECtHR, 27 January 2009)

[162] Ibid. [115]-[118]

[163] Ibid. [122]-[125]

balancing the conflicting interests of society as a whole and the needs of residents near unavoidable sources of pollution.[164] Where decisions of public authorities affect the environment to the extent that there is an interference with the right to respect for private and family life or the home, they must accord with the conditions set out in Article 8(2),[165] meaning that such decisions must be provided for by law, follow a legitimate aim and must be proportionate to the legitimate aim pursued. As mentioned, this basically means that a fair balance must be struck between the individual and the interests of a community as a whole. Therefore, in certain situations, interference by public authorities may be acceptable under the Convention, but it has to be justified. These cases also show that on certain occasions protecting civil rights, such as the right to private and family life, and to respect for the home, enters the sphere of socio-economic protection, such as protection of the right to a healthy environment. The socio-economic elements of the rights to a healthy environment are particularly visible when it comes to the execution of judgments concerning this right.

2.2. The execution of article 8 'environmental judgments'

As with all the Court's judgments, the committee of Ministers (the CoM) is the body responsible for monitoring the execution of judgments.[166] The first case to consider is the execution in *Lopez Ostra v Spain* where the CoM adopted a Resolution a year after the Court had delivered a judgment[167] stating that the Government of Spain had paid the applicant the sum provided for in the judgment and had therefore exercised its functions under Article 54 of the Convention in this case. Therefore, in this case only individual measures were necessary.

Now, the latest CoM report on the execution of judgments of the last three cases described above, the most recent ones, viewed in July 2012 will be presented. In *Tatar v Romania*, the authorities provided information on the execution of this judgment on 5 March 2010.

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[164] Mowbray (n 10) 182-183

[165] *Manual on Human Rights and the Environment* (n 2) 14

[166] The CoM is the CoE's decision-making body which comprises of the Foreign Affairs Ministers of all the Member States, or their permanent diplomatic representatives in Strasbourg. Under Article 14 of the Statute of the Council of Europe each Member State shall be entitled to one representative on the CoM, and each representative shall be entitled to one vote. The work and activities of the CoM include political dialogue, interacting with the Parliamentary Assembly, interacting with the Congress of Local and Regional Authorities of the CoE, admitting new Member States, monitoring respect of commitments by Member States, concluding conventions and agreements, adopting recommendations to Member States, adopting the budget, adopting and monitoring the Programme of Activities, implementing cooperation and assistance programmes and supervising the execution of judgments of the Court. Currently the main tasks of the CoM relating to the Court are the supervision of the execution of judgments of the Court, receiving and forwarding the lists of candidates for the election of judges to the Parliamentary Assembly, requesting advisory opinions of the Court and setting the court's annual budget. The CoM, when supervising the execution of judgments, operates under Rules of Procedure adopted in May 2006 (rules of the CoM for the supervision of the execution of judgments and the terms of friendly settlement, adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers' Deputies).

[167] Resolution DH(95)252 adopted by the Committee of Ministers on 20 November 1995 at the 549th meeting of the Ministers' Deputies.

Bilateral contracts are underway to secure the additional information necessary to present an action plan/action report to the CoM.[168]

In *Giacomelli v Italy*, in relation to the individual measures, information is awaited on implementation of the environmental requirements of the Decree of the Ministry of the Environment of 2004, which were issued five years after the judgment. As to the general measures, the CoM is awaiting for confirmation of dissemination of the judgment to the Ministry of the Environment authorities so that they may take the Court's findings into account and be aware of their obligations under the Convention.[169]

When it comes to the *Fadeyeva* case, the CoM report points out that all information provided by authorities so far regarding the execution of the judgment as well as the outstanding issues are summarised in Memorandum CM/Inf/DH(2007)7.[170] The CoM report on the execution of judgments concerns not only the Fadeyeva case but also the Ledyayeva, Dobrokhotova, Zolotareva and Romashina cases.[171] The Memorandum has been prepared to assist the coM in its supervision of the judgment in the *Fadeyeva case* and is being updated on the basis of information provided by the applicants.[172]

"The memorandum sums up the information provided by the Russian authorities to the Committee of Ministers and notes the positive environmental dynamic around Severstal plant since the facts at issue in the judgment. It further points out a number of outstanding issues arising in the light of the Court's findings. These issues concern in particular:

- the general legislative and regulatory framework governing the decision-making process leading to the setting up of sanitary zones around polluting enterprises;
- the public scrutiny of this decision-making process and domestic remedies available to the population;
- close supervision of polluting enterprises' compliance with the domestic environmental rules and the action to be taken to ensure compliance."[173]

The information is provided by the authorities regarding the measures they are taking to improve the situation. However, regarding all the information provided by the Russian authorities, the CoM Secretariat wrote in its assessment: "The statistics provided by the Russian authorities are encouraging as they show a positive general dynamic as regards the decrease of the level of air pollution in the region. However, it remains to be demonstrated whether the level of air pollution all along the new border of the sanitary zone is below the

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[168] Current state of execution, *Tatar v Romania* <http://www.coe.int/t/dghl/monitoring/execution/reports/pendingcases_en.asp?CaseTitleOrNumber=Tatar&StateCode=ROM&SectionCode> accessed 10 September 2013

[169] Current state of execution, *Giacomelli v Italy* <http://www.coe.int/t/dghl/monitoring/execution/%20Reports/pendingCases_en.asp?CaseTitleOrNumber-Giacomelli&StateCode-ITA&SectionCode> accessed 10 September 2013

[170] Ministers' Deputies Information documents CM/Inf/DH(2007)7 13 February 2007, Industrial pollution in breach of the European convention: Measures required by a European Court judgment

[171] App nos. 53157/99; 53247/99, 56850/00 and 53695/00 (ECtHR, 16 October 2006)

[172] Ibid.

[173] Memorandum CM/Inf/DH(2007)7 (n 40)

MPLs provided for by Russian legislation".[174] As to the long-term programmes to improve the situation, the Secretariat pointed out that the authorities indicated in the framework of the proceedings before the Court that the new deadline for bringing the plant's emissions below the dangerous level is now 2015. The Court considered that the overall improvement of the environmental situation appeared to be very slow and that the authorities had failed to clearly show what their policy was in order to accelerate the plant's compliance with the standards. The authorities mention in their action plan that certain environmental programmes are under way without specifying what kind of measures have been taken by the local authorities or by the plant itself. Therefore, the CoM requested more details about these programmes.[175]

Most cases pertaining to violations of the right to a healthy environment concern not only the applicants, but also a population that might be (or is) affected. In addition, judgments concerning the right to a healthy environment cannot be executed immediately but require an action plan from the states and, furthermore, the enforcement of that action plan. This is chiefly visible in the *Fadeyeva* case where the CoM prepared a Memorandum consisting of the required measures. The Russian authorities have shown that they have taken certain measures to improve the situation regarding the industrial pollution together with the resettlement of the applicants in an ecologically safe area. However, despite the applicants' resettlement and the measures taken, the situation is still not satisfactory. It will take years for the situation in the area to conform with the healthy environment requirements, which is in connection with the great financial expenditure needed by the russian government. This all shows the significant socio-economic elements inherent in the execution of healthy environment judgments and the challenges for both the CoM when supervising the execution of judgments, and for states when trying to bring the situation in conformity with the healthy environment requirements.

In the following section, environmental cases decided under the aegis of Article 2 of the convention will be discussed.

2.3. 'Environmental cases' decided under article 2 of the convention

When it comes to Article 2 and environmental issues, the court has not considered them in as many cases as it has under Article 8. Further, Article 2 is likely to only be applicable in the case of environmental disasters where there is a loss of life, whereas more routine instances of violations of a claimed right to a healthy environment will fall under Article 8. However, judgments decided under Article 2 are also worth mentioning and analysing here since, once again, the execution of these judgments requires numerous general measures. Although Article 2 is primarily negative in character since its purpose is to prevent the state from deliberately taking life, as with all the other Convention articles, it was impossible to keep this right absolutely negative in its nature because the living instrument and the

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[174] Ibid. [53]

[175] Ibid. [55] and [56]

dynamic and evolutive interpretation doctrines have stimulated the development of positive obligations for the state.

It was the *L.C.B. case*[176] where the Court recognised for the first time that obligations from Article 2 require the State to not only refrain from the intentional or unlawful taking of life, but to also take all appropriate steps to safeguard the lives of those within their jurisdiction.[177] Here, the applicant's father had been exposed to radiation whilst serving in the armed forces on Christmas Island in 1957 and 1958 when a number of nuclear tests were carried out by the UK. The applicant was born in 1966 and in 1970 she was diagnosed as having leukaemia which she attributed to her father's exposure to radiation. In 1993 she applied to the Commission, which referred her case to the Court. She contended that the UK's failure to warn her father of the possible risks to health and its failure to monitor the dose of radiation which he received amounted to breaches of the convention's Articles 2 and 3. The Court considered that the UK would only have been required to act on its own motion to advise her parents and monitor her health if it had appeared likely that the father's exposure to radiation might have caused a real risk to her health. In the instant case, the court considered that the applicant had not established a causal link between her father's exposure to radiation and her leukaemia. Therefore, the UK's failure to take any measures regarding the risk to L.C.B.'s health between 1966 and the date of the diagnosis in 1970 did not constitute a breach of Articles 2 or 3. Nevertheless, it was the first case where environmental hazards and issues were raised before the Court.

The next significant and much more complex case concerning environmental issues was *Oneryildiz v Turkey.*[178] This case was considered before the Chamber and before the Grand Chamber and here only the Grand Chamber's decision will be presented. The applicant complained that the failure of the Turkish authorities to take appropriate steps to prevent the accidental death of nine of his relatives and the destruction of his property breached Articles 2 and 13 of the Convention and Article 1 of Protocol 1. The applicant had lived with his family in a slum bordering on a municipal refuse tip. A methane explosion at the tip caused a landslide which engulfed his house, killing 39 people, of whom nine were his relatives. Responsibility was attributed to a number of public authorities. The applicant commenced administrative proceedings against the authorities responsible for the tip and claimed compensation for the loss of his relatives and destruction of his possessions. In its assessment of the case, the Court found a direct causal link between the accident and the contributory negligence of the authorities. As to a possible violation of Article 2, the applicant argued that the death of his relatives and the flaws in the ensuing proceedings violated the Article 2 right to life. The Grand Chamber found a violation of the substantive aspect of Article 2. In its assessment of the general principles applicable in this case, the judges stated that the positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 above all entails a primary duty on the state to put in place a legislative

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[176] *L.C.B. v United Kingdom* (1999) 27 E.H.R.R 212

[177] Robin C.A. White and Clare Ovey, *The European Convention on Human Rights* (5th ed OUP 2010) 152

[178] *Onerylidiz v Turkey* (2005) 41 E.H.R.R. 20

and administrative framework designed to provide effective deterrence against threats to the right to life.[179] Although this had previously been applied in the context of law enforcement, the significance of the *Öneryıldız* judgment is that the judges stated that this also applies in the context of dangerous activities. The judges said that the regulation of such activities should make it compulsory for all those concerned to take practical measures to protect people whose lives might be endangered by the inherent risks. That obligation had to be construed as applying in the context of any activity, whether public or not, where the right to life might be at stake, and *a fortiori* in the case of industrial activities which by their very nature are dangerous..[180] Information had been available to the authorities to the effect that inhabitants of the slum were in danger on account of the shortcomings of the tip. However, the authorities had failed to take the necessary measures to protect those inhabitants.

Further, where lives have been lost in circumstances potentially engaging the responsibility of the state, that provision entails a duty on the state to ensure, by all available means, an adequate response, judicial or otherwise. This response by the state includes the duty to promptly initiate an investigation. In *Önery ld z v Turkey*, where lives had been lost, the Grand Chamber held that the authorities should on their own initiative have launched investigations into the accident which led to these deaths. Therefore, the Grand Chamber found violations of both substantive and procedural aspects of Article 2 showing that a state can and will be responsible for the loss of lives caused by dangerous industrial activities.

The next relevant case in terms of the right to a healthy and safe environment that was examined under Article 2 is *Budayeva and Others v Russia*[181] where the Court extended the state's positive obligation even to situations involving natural disasters. Here the Court directly addressed questions concerning recourse to the Convention in circumstances of an allegedly ineffective regulatory performance on the part of the state. The applicants lived in an area which over several decades had suffered from regular, annual mudslides, and these culminated (in 2000) in a week-long series of mudslide events. Consequences included eight deaths, numerous serious injuries and other health effects, together with the destruction of homes and other property. Although the authorities had responded by providing replacement housing and lumpsum emergency allowances, the disaster appeared to be officially regarded as accidental, and no public investigation, criminal or otherwise, had been launched thereafter. Meanwhile, civil proceedings taken out against the authorities had been dismissed on the basis that local residents had been informed of the risk, and that all reasonable mitigating measures had been taken by the authorities. The applicants alleged violations of Articles 2, 8 and 13 of the convention and of Article 1 of Protocol No. 1.

As to the alleged violation of Article 2, the applicants complained that the authorities had failed to comply with their positive obligations to take appropriate measures to mitigate the risks to their lives against the natural hazards. The first applicant complained that the local

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[179] Ibid. [89]

[180] Ibid. [70]

[181] *Budayeva and Others v Russia*, App nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (ECtHR, 20 March 2008)

authorities were responsible for the death of her husband in the mudslide of July 2000. She and the other applicants also complained that the local authorities were responsible for putting their lives at risk as they had failed to discharge the state's positive obligations and had been negligent in maintenance of the dam, in monitoring the hazardous area and in providing an emergency warning or taking other reasonable measures to mitigate the risk and the effects of the natural disaster. In its assessment, the Court reiterated that Article 2 lays down a positive obligation on states to take appropriate steps to safeguard the lives of those within their jurisdiction.[182] The Court applied the general principles mentioned in the *L.C.B. and Onedryildiz* cases to the alleged failure to maintain defence and warning infrastructures (a substantive aspect of Article 2) and to the judicial response required in the event of alleged infringements of the right to life (a procedural aspect of Article 2). As to the substantive aspect, the Court concluded that there was no justification for the authorities' omissions in implementing the land-planning and emergency relief policies in the hazardous area given the foreseeable exposure of residents, including all applicants, to mortal risk. It found that there was a causal link between the serious administrative flaws that impeded their implementation and the death of Mr Budayev and the injuries sustained by the first and second applicants and members of their family. The authorities had thus failed to discharge the positive obligation to establish a legislative and administrative framework designed to provide effective deterrence against threats to the right to life as required by Article 2. Accordingly, the Court found a violation of Article 2 in its substantive aspect.[183] In relation to the procedural aspect, having found that the question of state responsibility for the accident in Tyrnauz had never as such been investigated or examined by any judicial or administrative authority, the Court concluded that there had also been a violation of Article 2 in its procedural aspect.[184]

It is clear from *Budayeva* that factors crucial to determining whether interference with Convention rights is justified will encompass circumstances such as anticipated levels of risk, past events, and the imminence and seriousness of future threats.

2.5. Execution of article 2 'environmental judgments'

Let us now take a look at the execution of the *Onedryildiz* and Budayeva cases where the Court found a violation of Article 2 caused by the environment-related hazards and accidents.

In the *Onedryildiz* case, the damage caused by the violations including the unpaid sums awarded by domestic courts has been covered by the just satisfaction awarded by the Court. However, what are again of interest here are the general measures. The CoM noted that the Turkish authorities had submitted numerous pieces of information regarding a plan of action for executing this judgment. The Ümraniye tip had been covered with earth following a

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[182] Ibid. [128]

[183] Ibid. [158]-[160]

[184] Ibid. [165]

decision of the local council which also installed air ducts on it. Further, a rehabilitation project had been put into force by the Istanbul Metropolitan Municipality, which planted trees in the area of the former site of the tip and had a sports ground laid down. The new Criminal Code had been brought into force and a strategic plan for solid waste management in Istanbul, guided by the environmental regulations of the European Union, had been prepared and put into practice. However, despite all these measures, the judgment has still not been fully executed and the information from the Turkish authorities has still to be provided.[185]

In *Budayeva v Russia*, regarding individual measures only just satisfaction for the non-pecuniary damage had to be paid. However, concerning the general measures, the CoM reported:

"Information provided by the Russian authorities (1059th meeting, June 2009): On 6/01/2006 the government of the Russian Federation adopted a Federal Programme aimed at lowering the risks and reducing the consequences of emergencies of natural and industrial origins covering the period until the end of 2010. To implement it, a regional programme for the Republic of Kabardino-Balkariya (RKB), was adopted by the Parliament of the RKB. The regional programme focuses not least on setting up an adequate legislative and administrative framework, improving monitoring and forecasting systems and developing the warning infrastructure.

• *This information is being assessed."*[186]

The CoM decided to resume consideration of this item in the light of the information to be provided on general measures.

What can be concluded is that the *Onedryildiz and Budayeva* cases are particularly important for establishing the principle of positive obligations under Article 2 of the Convention and the protection of life, although from the perspective of protecting the right to a healthy environment their contribution is not so significant. Further, the governments are not keen on executing these judgments speedily and, as we will see, they are reporting on the same issues to the ECSR through the Reporting and the Collective Complaints procedures. Therefore, it does not seem that these judgments will have any significance in terms of protecting the right to a healthy environment as such.

2.6. Conclusion on environmental cases decided under the ECHR

We can draw certain conclusions from all these cases that concern Article 8 and Article 2 violations regarding environmental issues. First of all, "states have a positive duty to take appropriate measures to prevent industrial pollution or other forms of environmental nuisance from seriously interfering with health or the enjoyment of private life or

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[185] Current state of execution, *Onedryildiz v Turkey* <http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=48939%2F99&StateCode-TUR&SectionCode-> accessed 10 September 2013

[186] Current state of execution, *Budayeva and others v Russia* <http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=Budayeva&StateCode-RUS&SectionCode-> accessed 10 September 2013

property".[187] The extent of that duty will depend on the harmfulness of the activity and the foreseeability of the risk. Second, although the Court refers to the need to balance the rights of the individual with the needs of the community as a whole, in some cases a state's failure to apply or enforce its own environmental laws has left no room for such a defence.[188] States cannot expect to persuade the Court that the needs of the community can best be met in such cases by not enforcing the law. Third, the beneficiaries of this duty to regulate and control sources of environmental harm are not the community at large, still less the environment per se, but only those individuals whose rights will be affected by any failure to act. The duty is not one of protecting the environment, but of protecting humans from significantly harmful environmental impacts.[189]

Regarding the third point mentioned, in *Kyrtatos v Greece*[190] the Court took an opportunity to clarify the scope of Article 8 with regard to environmental issues. It noted first:

"Severe environmental pollution may affect individuals' wellbeing 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. The crucial element in determining whether pollution has adversely affected one of the rights safeguarded by Art.8(1) is a harmful effect on a person's private or family sphere, not simply the general deterioration of the environment. Neither Art.8 nor any of the Convention's other Articles provide general protection of the environment."[191]

And, second:

"Even if the environment has been severely damaged by urban development, the applicants have not shown that the alleged damage to the birds and other protected species living in the swamp directly affected their own rights under Art.8(1). It might have been otherwise if 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 their own well-being more directly. As it is, however, the interference with the conditions of animal life in the swamp does not constitute an attack on the applicants' private or family life."[192]

In this case, the Court found no violation of Article 8 since the disturbances caused by urban development of the area had not reached a sufficient degree of seriousness to be taken into account for the purposes of Article 8.

Therefore, an application under the Convention can only be brought by direct victims of environmental hazards who can prove a causal link between their loss and the environmental

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[187] Boyle (n 2) 488

[188] Ibid., 489

[189] Ibid.

[190] *Kyrtatos v Greece* (2005) 40 E.H.R.R. 16

[191] Ibid. [52]

[192] Ibid. [53]

disturbances. As we have seen, applicants are not always able to show there has been a causal link between their right to private life and an environmental hazard, and even more rarely with their right to life. What will also not be taken into account are potential violations of the Convention.[193] Finally, while cases are brought by individuals, in many of those cases hundreds or thousands of other people are affected by the same harmful activity. Therefore, even when the court delivers a judgment finding a violation such a judgment will have wide-ranging socio-economic elements since there will usually be numerous other people affected by the same environmental hazard and it will take years for the state to bring the situation into conformity with the healthy environment standards.

The individual cases concerning environmental issues do not have much impact on protection of the environment itself, nor is the Convention system suitable for those issues. These judgments, particularly those where a violation of Article 8 has been found, only bring uncertainty regarding states' obligations under the Convention and make the supervision of the execution extremely demanding and the point at which the judgment is actually enforced in its entirety uncertain.

The appearance of 'environmental cases' raised the idea of making an additional protocol to the Convention on the right to a healthy environment. The discussion on adopting an additional protocol to the Convention will now be analysed before turning to a healthy environment as protected under the ESC system. As will be seen, the ESC system, both the Reporting and the Collective Complaint systems, are much more suitable for cases involving environmental hazards since no victim is required, potential violations are taken into account and by its character it is more suitable for non-individual complaints.

3. Discussion on adopting an additional protocol to the european convention on the right to a healthy environment

In response to new environmental cases that had appeared before the Court, in 2009 the Committee on the Environment, Agriculture and Local and regional Affairs of the CoE's Parliamentary Assembly recommended that the CoM draw up an additional protocol to the Convention, recognising the right to a healthy and viable environment.[194]

However, already in June 2003 the Parliamentary Assembly's CLAHR had rejected the idea of an additional protocol on the right to a healthy environment as being unjustifiable and potentially counterproductive.[195] The new recommendation from 2009 made by the

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[193] *Tauira and Eighteen Others v France*, App no 28204/95 (EComHR Decision, 4 December 1995). Also see similar cases where the environmental claims were rejected due to the inability to satisfy the 'victim requirement': *Balmer-Schafroth v Switzerland* (1998) 25 E.H.R.R. 598; *Athanassoglou and Others v Switzerland* (2001) 31 E.H.R.R. 13.

[194] Parliamentary Assembly, 'Preparation on an additional protocol to The European Convention on Human Rights, on the right to a healthy environment', Opinion, Committee on Legal Affairs and Human Rights, Doc. 12043, 29 September 2009

[195] Parliamentary Assembly, 'Preparation on an additional protocol to The European Convention on Human Rights, on the right to a healthy environment', Opinion, Committee on Legal Affairs and Human Rights, Doc. 9833, 19 June 2003

Committee on the Environment, Agriculture and Local and Regional Affairs afforded the CLAHR the opportunity to re-examine its position, and the justifications and viability of such a Protocol.

On 29 December 2009, the CLAHR published its opinion on the "Preparation on an additional protocol to The European Convention on Human Rights, on the right to a healthy environment". At the beginning of its opinion, the CLAHR stated that although it recognises the importance of a healthy, viable and decent environment, it did not believe that extending the Convention through the proposed additional protocol was the correct solution.[196]

In its explanatory memorandum, the CLAHR considered the background history and existing case-law. It stressed that the Court had already identified in its case-law issues related to the environment which could affect the right to life (Article 2), the right to respect for private and family life as well as the home (Article 8), the right to a fair trial and access to a court (Article 6), the right to receive and impart information and ideas (Article 10), the right to an effective remedy (Article 13) and the right to the peaceful enjoyment of one's possessions (Article 1 of Protocol No. 1).[197] In answer to the question whether the environment is protected under the Convention, it is stated that "The Convention is not designed to provide a general protection of the environment as such and does not expressly guarantee a right to a sound, quiet and healthy environment. However, the Convention indirectly offers a certain degree of protection with regard to environmental matters as demonstrated by the evolving case law of the Court in this area".[198]

In the 2009 Opinion, in his explanatory memorandum the CLAHR Rapporteur, Mr Chope, stated that the inclusion of a new protocol, which was so vague, would lead to uncertainty and be a recipe for a substantial increase in the Court's case load. In 2003, Mr Erik Jurgens had expressed similar concerns, stating:

"It must be remembered that, despite its enormous success in advancing the protection of a particular range of human rights in Europe, the Convention is not an instrument that is appropriate for all forms of rights. The Convention was intended to protect a narrow range of rights and its mechanisms designed specifically with those rights in mind; it is not structured for, nor capable of, the protection of all rights addressed by international instruments. Its past achievements are not a guarantee of limitless resilience: indeed, this very success can generate risks to its future integrity and to the capacity of the Court to work effectively in enforcing its provisions. These risks include the temptation to extend its jurisdiction to other forms of rights of uncertain content, scope and application. The inclusion of such 'untested rights' – which to a large extent could require primary elaboration not on national political and legal levels but through the case law of a panEuropean judicial body – could not only undermine the standing of the Court but threaten it with an unmanageable burden of new applications (at a time when the level of

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[196] Parliamentary Assembly, Doc. 12043 (n 64) [I]

[197] Ibid. [12]

[198] Ibid. [13]

applications is already a serious problem), to the detriment of protection of the rights currently included."[199]

In his opinion, Mr Chope again quoted Mr Jurgens' warning that "If we give citizens a broadly formulated, individual right to a healthy environment without being more specific as to the basis on which and against whom a citizen can in fact make a claim arising from that right, it becomes difficult for a judge to adjudicate".[200]

Mr Chope went on to emphasise that "introducing a right into the convention that is impossible to enforce endangers the whole system".[201] In his concluding remarks before stating his belief that an additional protocol was not the correct solution, Mr Chope stated: "There is a significant difference between an environment that is healthy and one that merely supports life. In order for the Court not to be overwhelmed with ambitious and speculative applications, any additional protocol would need to clearly define which acts or omissions constitute a human rights violation. It must be remembered that not every environmental problem can be perceived as a potential human rights violation".[202]

As we can see from both of the opinions in 2003 and 2009, the experts agreed that it would not be advisable to make an additional protocol to the Convention on the right to a healthy environment. As the main obstacle, the Rapporteurs in both opinions mentioned the vagueness and uncertainty of the right to a healthy environment and its broadness as well as the danger that a huge number of new applications might come before the Court.

The Convention, despite being a living instrument, is intended to protect a narrow range of rights with mechanisms designed specifically with those rights in mind and it does not seem to be a good idea to include the right to a healthy environment under the Convention. However, the Convention is not the only human rights instrument in Europe. The following part of the paper addresses the right to a healthy environment as interpreted by the ECSR under the ESC, and will consider whether that would be a possible alternative to the Convention and Court as a means of guaranteeing the right to a healthy environment.

4. The ESC and the right to a healthy environment

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[199] Parliamentary Assembly, Doc. 9833 (n 65) [9]

[200] Parliamentary Assembly, Doc. 12043 (n 64) [17]

[201] Ibid. [41]

[202] Ibid. [43]

Article 11 of the ESC guarantees the right to the protection of health.[203] The wording of Article 11 is the same in both versions of the Charter, with a difference in paragraph 3 of the Revised Charter where it urges states to take appropriate measures to prevent as far as possible epidemic, endemic and other diseases, as well as accidents, while the original version of the charter does not refer to accidents. Taking account of the complementarity with the Convention and the growing link that State parties to the Charter and other international bodies now make between the protection of health and a healthy environment, the ECSR has interpreted Article 11 as including the right to a healthy environment.[204]

In an information document on the right to health prepared by the secretariat of the ESC in March 2009, with regard to the right to a healthy environment the ECSR emphasised that:

"The ECSR acknowledges that overcoming pollution is an objective that can only be achieved gradually. States must nevertheless take measures to achieve this goal within a reasonable time, with measurable progress and making maximum use of available resources. The measures taken are assessed with reference to their national legislation and regulations and undertakings entered into with regard to the European Union and the United Nations, and in terms of how the relevant law is applied in practice."[205]

Further, under the heading "air pollution", the ECSR pointed out:

"In order to guarantee a healthy environment, states must therefore:

– develop and regularly update sufficiently comprehensive legislation and regulations in the environmental field;

– take specific steps (such as modifying equipment, introducing threshold values for emissions, measuring air quality, etc.) to prevent air pollution at local level and to help reduce it on a global scale...;

– ensure that environmental standards and rules are properly applied, through appropriate supervisory machinery that is both effective and efficient, i.e. comprising measures which have been shown to be sufficiently dissuasive and have a direct effect on polluting emission levels;

– assess, systematically if necessary, health risks through epidemiological monitoring of the groups concerned."[206]

The right to a healthy environment is not something that can be achieved and realised immediately. The ECSR has stressed the economic and social nature of the right to a healthy environment, regardless of its obvious importance for society and its individuals. This

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[203] Article 11 of the Revised Charter: "With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed inter alia:
1. to remove as far as possible the causes of ill-health;
2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health.
3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents."

[204] *Marangopoulos Foundation for Human Rights (MFHR) v Greece* (30/2005), (2007) 45 E.H.R.R. SE11, [195]

[205] The right to health and the European Social Charter, Information document prepared by the secretariat of the ESC (March 2009) 2

[206] Ibid. 2-3

information document is based on ECSR decisions and conclusions as the ECSR has been scrutinising the situation in Member States regarding environmental issues for years. Even though states only have to report every four years, through the reporting system states are informing the ECSR of relevant matters regarding the environment. One might suspect that, by stating how overcoming pollution is an objective that can only be achieved gradually, the ECSR will be tolerant to and open handed in its conclusions and decisions concerning states when assessing the measures they have introduced in order to secure a healthy environment. However, we will see from the collective complaints and reports that will be discussed that is not the case at all.

4.1. Collective complaints concerning the right to a healthy environment

According to the preamble to the 1995 Protocol providing for a system of Collective Complaints, the Member States have "Resolved to take new measures to improve the effective enforcement of the social rights guaranteed by the Charter; Considering that this aim could be achieved in particular by the establishment of a Collective Complaints procedure, which, *inter alia*, would strengthen the participation of management and labour and of non-governmental organisations".[207] Under this Protocol, which came into force in 1998, complaints of violations of the ESC may be lodged with the ECSR.[208] So far, only 15 Member States have ratified the Collective Complaints Protocol.[209]

Unfortunately, the ECSR case-law on the right to a healthy environment is not extensive; in fact, only two collective complaints on that issue have been lodged to date and, regarding one of them, the ECSR adopted a decision on the merits.[210] Nevertheless, this single decision does give us a very valuable overview of the ECSR's standpoint on the issue of the right to a healthy environment.

The Marangopoulos Foundation for Human rights lodged a complaint on 4 April 2005 in relation to Article 11 (right to protection of health), Article 2(4) (right to reduced working hours or additional holidays for workers in dangerous or unhealthy occupations), Article 3 (1) (safety and health regulations at work) and Article 3(2) (provision for the enforcement of safety and health regulations by measures of supervision) of the ESC. It was alleged in the

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[207] Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, Strasbourg, 9 XI 1995, ETS No. 158

[208] R. Churchill and U. Khaliq, 'Violations of Economic, Social and Cultural Rights: The Current Use and Future Potential of the Collective Complaints Mechanism of the European Social Charter' in M. A. Baderin and R. Mccorquodale (eds) *Economic, Social and Cultural Rights in Action* (OUP 2007)

[209] European Social charter website http://www.coe.int/T/DGHL/Monitoring/SocialCharter/, visited 20 September 2013

[210] *Marangopoulos Foundation for Human Rights (MFHR) v Greece* (n 74) and *International Federation for Human Rights (FIDH) v Greece* (72/2011), decision on admissibility of 7 December 2011. (The later complaint concerns the effects of massive environmental pollution on the health of persons living near the Asopos river and in proximity to the industrial zone of Inofyta. The complainant organisation alleges that the State has not taken adequate measures to eliminate or reduce these dangerous effects and to ensure the right to health protection, in violation of Article 11 of the ESC).

complaint that in the main areas where lignite is mined Greece had not adequately prevented the impact on the environment nor developed an appropriate strategy in order to prevent and respond to the health hazards for the population. It was also alleged that there was no legal framework guaranteeing the security and safety of persons working in lignite mines and that the latter did not benefit from reduced working hours or additional holidays. Here, only that part of the complaint regarding Article 11 will be analysed.

Greece is the second largest lignite producer in the EU and the fifth in the world. Since the Greek government had acknowledged the polluting effects of lignite production, the questions before the ECSR were whether the pollution was attributable to Greece and whether it led to a violation of the right to health (as well as of the right to just conditions of work and the right to safe and healthy working conditions). The government claimed that the mining operations were undertaken by private entities for whose actions the state could not be held accountable. In response to that argument, the ECSR concluded that regardless of the company's legal status Greece was required to ensure compliance with its positive undertakings under the Charter. The ECSR's jurisdiction *ratione temporis* also had to be considered since the Protocol establishing the collective complaint procedure came into force in Greece in August 1998. The Greek government maintained that acts or omissions prior to that date could not be taken into consideration. On this issue (which had already been considered in the decision on admissibility), the ECSR relied on the notion of a "continuing violation" developed by the Court,[211] meaning that the government will be held accountable for an event occurring before the entry into force of a treaty if it continues to produce effects after this. The ECSR found that there might be a breach of the duty to prevent damage arising from air pollution for as long as the pollution continues. It also needs to be emphasised that, when deciding whether a violation of the Charter had occurred, the ECSR stressed that the ESC is a living instrument and that the rights and freedoms set out in it are to be interpreted in the light of current conditions.[212]

The ECSR acknowledged that the use of lignite and its mining serve legitimate objectives under the Charter (such as energy independence, access to electricity at a reasonable cost, and economic growth), but it nonetheless identified several areas in which the state's efforts fell short of Greece's national and international undertakings to overcome pollution which, in turn, had resulted in a failure to protect the health of the population. It found that, although the Greek Constitution makes protection of the environment an obligation of the state and, at the same time, an individual right, national environmental protection legislation and regulations were not applied and enforced in an effective manner, and that the environmental inspectorates were not sufficiently equipped.[213] Based on these and other facts before it, the ECSR found no real evidence of Greece's commitment to improving the situation within a reasonable time.[214] The ECSR also concluded that, "even taking into

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[211] *Papamichalopoulos v Greece* (1993) 16 E.H.R.R. 440

[212] *Marangopoulos Foundation for Human Rights (MFHR) v Greece* (n 74) [194]

[213] Ibid. [208]-[216]

[214] Ibid. [207]

consideration the margin of discretion granted to national authorities in such matters, Greece had not managed to strike a reasonable balance between the interests of persons living in the lignite mining areas and the general interest",[215] and thus that there had been a violation of Greece's obligations with respect to the right to protection of health under the Charter.

In her paper, M. Trilisch wrote that *Marangopoulos v Greece* is, "undoubtedly, one of the most important decisions the ECSR has taken so far. Not only does it provide some much-needed input on the social right to health, it also clarifies the ECSR jurisdiction *ratione temporis* when dealing with positive obligations under the Charter. Most importantly, however, it places the right to a healthy environment in the mainstream of human rights".[216] Further, she emphasised the impact this decision has on the material content of the right involved as well as on the removal of the right to a healthy environment from the constrained realm of so-called thirdgeneration rights. She mentioned one of the first cases examined by the Court (*Lopez Ostra v Spain*), emphasising that "the Court did not expressly rely on the right to a healthy environment as such. Therefore, the Committee's decision can be understood as further advancing the progressive endorsement of environmental issues by the European human rights institutions".[217] This is something to be welcomed and encouraged. Through this decision, the ECSR has proven its willingness and ability to provide decisions on complex and demanding issues like environmental pollution.

In its Resolution on the case[218] adopted on 16 January 2008, the CoM stated with regard to violation of Articles 11(1), 11(2) and 11(3) of the Charter:

"The Greek National Action Plan for 2005-2007 (NAP1) provides for greenhouse gas emissions for the whole country and all sectors combined to rise by no more than 39.2% until 2010, whereas Greece was committed, in the framework of the Kyoto Protocol, to an increase in these gases of no more than 25% in 2010. When air quality measurements reveal that emission limit values have been exceeded, the penalties imposed are limited and have little dissuasive effect. Moreover, the initiatives taken by DEH (the public power corporation operating the Greek lignite mines) to adapt plant and mining equipment to the 'best available techniques' have been slow.

The Committee finds that Greek regulations satisfy all the requirements concerning information to the public about and their participation in the procedure for approving environmental criteria for projects and activities. However, the circumstances surrounding the granting and extension of several authorisations, and the publication on the Internet of such a complex document as the NAP1 for just four days, show that in practice the Greek authorities do not apply the relevant legislation satisfactorily.

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[215] Ibid. [221]

[216] M. Trilsch, 'European Committee of Social Rights: The Right to a Healthy Environment' (2009) 7(3) I.J.C.L. 529, 532

[217] Ibid. [533]

[218] Resolution CM/ResChS(2008)1 on the Collective Complaint No. 30/2005 by the Marangopoulos Foundation for Human Rights (MFHR) against Greece (Adopted by the Committee of Ministers on 16 January 2008 at the 1015th meeting of the Ministers' Deputies)

The Committee considers that the government does not provide sufficiently precise information to amount to a valid education policy aimed at persons living in lignite mining areas. Finally, very little has so far been done to organise systematic epidemiological monitoring of those concerned and no morbidity studies have been carried out."[219]

Unfortunately, not only did it take two years for the CoM to adopt a Resolution but it seems relatively mild by only stating that it welcomes the measures already taken by the Greek authorities as well as further measures envisaged in order to ensure the effective implementation of the rights protected by the ESC. However, as will be seen, through the reporting procedure the ECSR is also continuously supervising the situation in Greece concerning the environmental problems arising from lignite mining.

4.2. The reporting system concerning the right to a healthy environment

The Reporting system has been in existence since 1961 and is obligatory for all State parties to the ESC. When it comes to the Reporting procedure, every year State parties submit a report indicating how they are implementing the ESC in law and in practice. Each report concerns some of the accepted provisions of the ESC. The provisions are divided into four thematic groups and each provision of the ESC will be reported on once every four years.

The ECSR examines the reports and decides whether the situations in the countries concerned are in conformity with the ESC. Its decisions, known as "conclusions", are published every year.[220]

There is an ongoing dialogue between states that send reports and the ECSR that adopts conclusions on those reports. Unlike the collective complaints where there have only been two complaints concerning the right to a healthy environment, there are numerous reports and conclusions regarding Article 11(3) of the both the Original and the Revised Charter.

Unfortunately, despite the fact that states often take years to bring their behaviour into line with the ESC rights, to date the CoM has not yet issued any recommendation or resolution regarding the rights protected by Article 11(3). When it comes to the collective complaints system, as discussed above, regarding the *Marangopoulos* decision the CoM adopted quite a bland Resolution two years after the ECSR had adopted its decision on the merits of that case.

First, we will look at the conclusions related to the previously discussed decision on *Maragngopoulos Foundation v Greece*. The ECSR adopted its Conclusions after Greece sent its 19th report to the ECSR on, *inter alia*, Article 11, for the period 01/01/2003 –

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[219] Ibid.

[220] For more on the ESC supervisory system, see P. Alston, 'Assessing the Strength and Weaknesses of the European Social Charter's Supervisory System' in G. de Burca and B. de Witte, Social Rights in Europe (OUP 2005); U. Khaliq and R. Churchill, 'The European Committee of Social Rights: putting flesh on the bare bones of the European Social Charter' in M. Langford (ed), *Social Rights Jurisprudence, Emerging Trends in International and Comparative Law* (CUP 2008); Churchill and Khaliq, 'Violations of Economic, Social, and Cultural Rights...' (n 78); and D. Harris and J. Darcy, *The European Social Charter* (Ardsley N.Y. 2001).

31/12/2007[221]. There it again concluded that Greece was in nonconformity with the requirements of Article 11(3) of the Revised Charter. The ECSR noted progress in Greece's policies on the prevention of avoidable risks and reduction of environmental and other issues examined under Article 11(3); however, in relation to most of the issues it requested further information.[222] Further, the ECSR focused on the *Marangopoulus Foundation for Human Rights* complaint where the CoM had found the measures taken by the authorities to improve the situation were insufficient. The ECSR took note of the information provided by the Greek government in its latest report and noted that it was quite similar to that provided in its submissions in the case. It concluded that the situation was still not in conformity with Article 11(3) on the ground that it had not been demonstrated that sufficient measures had been adopted during the reference period to improve the right to a healthy environment of persons living in lignite mining areas.[223]

Obviously, ensuring the situation is in harmony with the Article 11(3) requirements is a long process. The important thing is that both the ECSR and, we might say, the CoM are closely monitoring the situation and the fact that the case was decided and supervised under the ESC did not diminish its relevance.

Now, the reports and conclusions on Turkey, Italy, Romania and the United Kingdom, which were the respondent states in the Court cases analysed above on the right to a healthy environment, will be looked at. In relation to Russia, there is currently no information. The Russian Federation signed the revised ESC on 14 September 2000 and ratified it on 16 October 2009. It has accepted 67 of the Revised Charter's 98 paragraphs, including all three paragraphs of Article 11. The first report to be submitted by the Russian Federation on implementation of the revised charter was due by 31 October 2011, but it did not concern Article 11 on the right to health.

In March 2009, Turkey submitted its 15th report on the Original Charter and 1st report on the Revised Charter on the accepted provisions of Thematic Group 2 "Health, social security and social protection" (Articles 3, 11, 12, 13, 14, 23 and 30). conclusions in respect of these provisions were published in January 2010. In its report, Turkey presented in detail all the administrative and legislative work it had been doing on the provisions mentioned above.[224] In its Conclusion, in respect of Article 11(3) the ECSR stated that it took note of the information contained in the report submitted by Turkey. However, it also noted that much

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[221] 19th report on the implementation of the European Social Charter and 5th report on the implementation of the 1998 Additional Protocol submitted by the Government of Greece (Articles 3, 12 and 13 for the period of 01/01/2005-31/12/2007; Articles 11, 14 and Article 4 of the Additional Protocol for the period 01/01/2003-31/12/2007), Cycle 2009, RAP/Cha/GR/XIX(2009)

[222] ESC, ESCR Conclusions XIX-2 (2009) (GREECE), Articles 3, 11, 12, 13, 14 and Article 4 of the Additional Protocol of the Charter (CoE Publishing 2010) 15-18

[223] Ibid. 18

[224] European Social Charter, 15th National Report on the Implementation of the European Social Charter and 1st National Report on the implementation of the European Social Charter (revised) submitted by the government of Turkey, Articles 11, 12, 13 & 14 for the period between January 1, 2003 to July 31, 2007 (1961 charter) and August 1, 2007 to December 31, 2007 (Revised Charter) Articles 3, 23 & 30 for the period between August 1, 2007 to December 31, 2007 (Revised Charter) Cycle 2009 RAP/ RCha/TU/I(2009) 18-20

of the information needed to assess the situation was lacking. It considered that if the information requested later in its Conclusion were not to be provided in the next report there would be nothing to show that the situation in Turkey is in conformity with this provision of the revised Charter. Since information was lacking on all aspects of Article 11(3), the ECSR decided to defer its conclusion pending receipt of the information requested.[225] The same conclusion was adopted regarding Romania where once again the ECSR could not reach a final conclusion regarding conformity or non-conformity due to a lack of information, and so decided to defer its conclusion.[226]

In the same 2009 conclusions regarding Italy, the ECSR stated that although some information was still awaited, the situation in Italy was in conformity with Article 11(3) of the revised charter.[227] Finally, in the 2009 Conclusions on the UK on Article 11(3) of the Original Charter (the UK has not ratified the Revised Charter) the ECSR concluded that the situation in the UK was in conformity with Article 11(3) of the Charter. [228]

Therefore, states can be and some are in conformity with the Article 11(3) requirements, and the ECSR Reporting system is dealing with all the environmental risks one country is facing. One can see from the 2009 Conclusions on the Revised Charter that out of the twenty-three states that have accepted Article 11(3) ten had been found to be in conformity, in relation to eight states the ECSR had decided to defer its conclusion, while five had been found to be in non-conformity.[229] In the Conclusions from the same year but on the Original Charter, the ECSR had found eleven out of fifteen states to be in conformity with Article 11 (3), while only two had been found to be in non-conformity.[230] The number of states that are in conformity and the improvements states are making suggests that the Charter and the pressure of the Reporting procedure are (at least to some extent) the cause of this. Of course, this system is not ideal because of its non-binding form and the long time periods between the country reports. However, within the CoE it is the most detailed and most regular way to supervise the countries' methods of dealing with environmental risks.

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[225] Ibid.

[226] ESC (Revised), ECSR conclusions 2009 (Romania), Articles 3, 11, 12 and 13 of the Revised Charter (CoE Publishing) 16-17

[227] ESC (Revised), ECSR conclusions 2009 (Italy), Articles 3, 11, 12, 13, 14, 23 and 30 of the Revised Charter (CoE Publishing 2010) 17-18

[228] ESC, ECSR conclusions XIX2 (2009) (United Kingdom), Articles 3, 11, 12, 13 and 14 of the Charter (CoE Publishing 2010) 13-17

[229] States that are found to be in conformity with Article 11(3) of the Revised Charter are: Estonia, Finland, France, Italy, Lithuania, Malta, the Netherlands, Norway, Slovenia and Sweden. ESC (Revised), ECSR Conclusions 2009-Volume I (Albania, Andorra, Armenia, Azerbaijan, Belgium, Bulgaria, Cyprus, Estonia, Finland, France, Georgia, Ireland, Italy) (CoE Publishing 2010) 16.

[230] States that are found to be in conformity with Article 11(3) of the Original Charter are: Austria, Croatia, Czech Republic, Denmark, Germany, Hungary, Iceland, Luxemburg, Poland, Spain and the United Kingdom. ESC, ECSR Conclusions XIX-2 (2009) (Austria, Croatia, Czech Republic, Denmark, Germany, Greece, Hungary, Iceland, Latvia, Luxembourg, Poland, Slovakia, Spain, »the Former Yugoslav republic of Macedonia«, the United Kingdom) (CoE Publishing 2010) 16.

5. Conclusion

The ECSR has not developed nearly as significant or extensive case-law as the Court since the Collective Complaints system has only been in operation since 1998 and only 15 Member States to the CoE have so far accepted it. Another disadvantage of the Collective Complaints system is the absence of a judicial body, with only the ECSR which at most can be called a 'quasi-judicial' body. However, the number of complaints is increasing and awareness of the protection of economic and social rights through the system of Collective Complaints is growing. On the other hand, the Reporting system on Article 11(3), despite having the same disadvantages as the Collective Complaints system – the small number of states that have accepted Article 11(3) and the ESCR conclusions that are non-binding in character – shows that it is the most detailed supervising process of environmental hazards. The ECSR is looking at all the elements necessary for fulfilling the healthy environment conditions, which are numerous, and is placing pressure on states to bring the situation in conformity with Article 11(3).

Further, there are two other problematic issues with the ESC system that cannot be ignored. First, the more information the ECSR requires from State parties to provide for it to be able to make a judgment about their compliance with the Article 11(3) obligations, the more difficult it becomes for the ECSR to make a definite judgment about such compliance.[231] This is evident from all the ECSR conclusions where it decided to defer its conclusion and, as we saw in the previous section, there are quite a few of such conclusions. Another and even bigger disadvantage and problematic issue of both the ECS Reporting and Collective Complaints systems is the ineffectiveness of the CoM and its unwillingness to issue Recommendations and Resolutions. Moreover, even when it adopts them they are rather vague and bland. Unfortunately, we have seen that the CoM is the same when supervising the execution of the Court's judgments, and it places relatively mild, if any, pressure on states.

On the other hand, the ECHR system is seriously over-burdened now and it is not wise for the Court to extend its interpretation of Convention rights into the area of protecting the right to a healthy environment. Both the Court and the ECSR have admitted that a healthy environment is something that cannot be achieved immediately but can only be achieved gradually. Although nowadays there is a tendency to abandon the distinction between economic and social and civil and political rights, the fact that they are guaranteed by two separate documents remains. After looking at the ESC Reporting and the Collective Complaints systems with a special overview of the right to a healthy environment, it may be concluded that, although problematic issues remain, the right to a healthy environment can be protected under the ESC system. Further, it seems that the Court and the ECSR are starting to duplicate each other's work and, in my opinion, this is not a solution to be welcomed.

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[231] Khaliq and Churchill, 'The European Committee of Social Rights: putting flesh... (n 90) 452

The ESC system is developing, together with its machinery of protection. The ECSR and the CoE bodies should focus on improving the ESC system, including the protection of the right to a healthy environment. The right to a healthy environment should primarily be a collective right and not an individual right since the effects of pollution or any other kind of environmental hazard will generally affect a large group of people, not just one individual. Since the Court deals only with individual complaints and the ECSR with collective ones, the Court should not deal with the healthy environment issue, only the ECSR should. As stated by Margared DeMerieux: "Central to the idea of environmental rights and of the protection of the environment is that the interests of *populations as a whole* and indeed of *unborn generations* are crucial".[232] In addition, environmental disasters should be prevented rather than treated after they have happened, which is only possible under the ESC system. And if the CoE bodies try to improve the ESC system and make the Reporting procedure together with the system of Collective Complaints as effective as possible, the environmental threats to people living in a particular territory might be much better protected than under the Convention. The CoE bodies should urge states to ratify the Collective Complaints Protocol[233] as well as the CoM to start making recommendations to states, recommendations that are not mild and bland, both under the Collective Complaints and the Reporting procedure.

The ECHR's biggest contribution to human rights protection in Europe is that it protects individuals against state actions and that it imposes positive obligations on the state to protect individuals from various types of human rights violations. When it comes to the right to a healthy environment, this is not an issue that should be left for the Convention and the Court. The Court should not deliver judgments concerning the right to a healthy environment since it has numerous socio-economic elements. Environmental hazards on most occasions affect hundreds or thousands of people and the execution of such a judgment can only be achieved progressively at substantial financial cost. Instead of entering this sphere, when an application that concerns the right to live in a healthy, sound and viable environment comes before the Court, it should not deal with it. One way of doing so might be for the Court to announce in the next environmental case that all future environmental applications will be declared incompatible *ratione materiae* with the provisions of the Convention or the Protocols thereto (based on Article 35(3)(a) of the Convention), and therefore inadmissible.[234]

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[232] DeMerieux (n 2) 534

[233] See, for example, Parliamentary Assembly Recommendation 1795 (2007) 'Monitoring of commitments concerning social rights'. Text adopted by the Standing Committee, acting on behalf of the Parliamentary Assembly, on 24 May 2007. "The Assembly therefore recommends that the Committee of Ministers:
11.1. take the necessary measures to ensure that member states that have not already done so ratify the revised European Social Charter, the Protocol amending the European Social Charter and the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints and grant national NGOs the right to lodge complaints." [11]

[234] *See Practical Guide on Admissibility Criteria* (CoE 2011) 44-45; White and Ovey (n 47) 33-34; Mark W. Janis, Richard S. Kay and Anthony W. Bradley, *European Human Rights Law: Text and Materials* (3rd ed, OUP 2008) 47-49; Harris, O'boyle and Warbrick (n 3) 800-801; and case *Pančeko v Latvia* App No 40772/98 (ECtHR Decision, 28 October 1999)