University *of*
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School of Law

Public International Law LLM

Dissertation

An Assessment of the Concept of Environmental Justice within the context of the Case Law of the European Court of Human Rights

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September 2014

To my family

ABSTRACT

Environmental rights have not been specified in the European Convention on Human Rights (the ECHR). The ECHR therefore cannot be directly invoked when environmental problems are in question. The question of recognising environmental rights has been frequently raised within the context of the ECHR. However, the concept of environmental justice (EJ) which arose in the US in the late 1970s and which focuses on the fair distribution of environmental burdens and benefits has not been studied in the ECHR or in the case law of the European Court of Human Rights (ECtHR). This dissertation will consider whether the existing provisions of the ECHR guarantee EJ or whether there should be a 'right to environment' under the Convention in order to safeguard EJ. More importantly, the question will be asked whether the ECtHR has ever determined environmental injustices or environmental discrimination, which was encountered in EJ cases in the US, when deciding environmental cases in its history. If the notion of EJ has not been mentioned in the case law, how has the Court achieved EJ for the main target groups of EJ, such as racial groups, and indigenous and poor people? If the ECtHR is inadequate for EJ, what can be done to achieve it in the case law of the ECtHR?

Along with this study, legal documents that underpin the concept of EJ in terms of environmental rights and human rights at international and regional level will be discussed. Some selected cases from the case law of the ECtHR, in particular the ones decided under article 2 and article 8 relating to environmental issues will be assessed in depth. The cases from the US and the regional human rights regimes including the Inter-American and the African human rights systems will also be analysed in order to understand the importance given to EJ. Assessing the case law of the ECtHR from a different perspective will be beneficial for EJ. This new perspective will also widen the approach of the ECtHR towards environmental rights and EJ which has been ignored in the light of general economic concerns in the twenty-first century in which environmental problems are growing in parallel with economic developments.

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INTRODUCTION

The combination of justice and the environment in one phrase gained currency at the end of the 1970s. The concept of EJ which aims at the fair distribution of environmental costs and benefits among people was first academically studied by Bullard in 1990.[1] According to Bullard, 'race' and 'class' are the main factors which cause environmental injustices.[2] People of colour and economically disadvantaged groups have been negatively affected by these environmental inequalities.[3] The EJ movement which is behind the empowerment of the idea of EJ was therefore initiated by those who had been intentionally subjected to environmental inequalities in the US.[4] In the wake of the movement and the idea of EJ, the environment was approached from a different angle. In contrast to the traditional definition, it was defined as a place 'where people live, work and play'.[5] The concept of EJ then began to affect environmental policies and regulations by way of demonstrations and legal victories in the US and across the world.

The protection of the environment has started to be discussed as a matter of human rights. Indeed, the classical approach to human rights had not dealt with the preservation of the environment in the strict sense.[6] However, after some important international conferences on the relation between the environment and human rights, such as the Stockholm Conference,[7] the environment became recognised in the field of human rights. Following this, regional human rights regimes have attached an importance to the environment and some of them have adopted an environmental right in their treaties, such as the African human rights system and the Inter-American human rights system.[8] Together with these developments, disadvantaged groups exposed to the environmental damages have also gained advantages in terms of seeking legal remedies. Nonetheless, in contrast to the abovementioned regional systems, the ECHR,[9] which is the treaty of the European human rights system, does not directly include any provision on the preservation of the environment.[10]

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[1] Robert D Bullard, *Dumping in Dixie: Race, Class, and Environmental Quality* (3rd edn, Westview Press 2000)
[2] Ibid
[3] Ibid
[4] Renee Skelton and Vernice Miller, 'The Environmental Justice Movement' (NRDC, 10 December 1996) <http://www.nrdc.org/ej/history/hej.asp> accessed 30 August 2014
[5] Marina D O Finger and Felipe B Zorzi, 'Environmental Justice' (2013) 1 UFRGS Model United Nations Journal 222
[6] Conor Gearty, 'Do Human Rights Help or Hinder Environmental Protection' (2010) 1 Journal of Human Rights and the Environment 7
[7] Declaration of the United Nations Conference on the Human Environment 1972
[8] The African Charter on Human Rights and Peoples' Rights; Additional Protocol to the American Convention on Human Rights 1988
[9] European Convention on Human Rights 1950
[10] Ole W Pedersen, 'The Ties that Bind: The Environment, the European Convention on Human Rights and the Rule of Law' (2010) 16 European Public Law 571, 573

However, despite this the existing rights and freedoms under the ECHR have been interpreted by the ECtHR to secure environmental rights in many cases.[11]

This dissertation will argue that the ECtHR has occupied a vital position with regard to the interpretation of the existing provisions under the ECHR in environmental cases. However, the same cannot be said for EJ. EJ is not only bound up with the protection of the environment but also the preservation of those who are most subjected to environmental ills. In this regard, the answers to the following questions will be sought. Has the Court ever interpreted the environment-related cases as discriminatory or considered any causes of environmental injustices in its case law? Has the Court taken 'indigenous people' and 'the have-nots' into account in environmental cases? How can EJ be integrated into the case law?

This dissertation consists of three sections. The first section will begin with an explanation of the concept of EJ and its historical background. It will then continue by examining the factors which cause environmental injustices and the cases which have stemmed from environmental inequalities in the US. Furthermore, the differences and similarities between the understanding of EJ and traditional environmentalism will be discussed. Lastly, the position and legal foundations of EJ in international environmental law will be assessed.

The second section will investigate the significance of the recognition of environmental rights for EJ in the realm of international human rights. It will then touch on the developments which procedurally ensure environmental rights and interpret such developments in the name of EJ. Finally, it will evaluate regional human rights regimes including the Inter-American system and the African system within the context of environmental rights and their contribution to EJ.

In the third section, after a brief introduction to the ECHR, the protection of the environment by the ECHR and the ECtHR will be discussed by referring to selected cases. Next, it will be assessed whether the ECtHR has taken the causes of environmental injustices into consideration when assessing the cases particularly under the right to life and right to respect for private and family life. Moreover, the approach of the Court to the preservation of the people who are negatively affected by environmental injustices will be examined. Finally, the question of what can be done in the name of the maintenance of EJ in the case law will be assessed.

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[11] Ibid

SECTION 1

THE EMERGENCE OF THE CONCEPT OF ENVIRONMENTAL JUSTICE IN THE US AND ITS POSITION IN INTERNATIONAL ENVIRONMENTAL LAW

1.1 Background of Environmental Justice

1.1.1 *What is meant by Environmental Justice?*

The term EJ as defined by the US Environmental Protection Agency (EPA) refers mainly to the environmental struggle between the North and South of the globe.[12] According to the EPA, EJ means that everyone on earth irrespective of their 'colour', 'race', 'income' or 'national origin' has the right to 'fair treatment' and 'meaningful involvement' within the context of the enjoyment of environmental policies, practices of environmental laws, developments and implementations.[13] The work of the United Church of Christ (UCC) and Bullard's book on EJ were initial and valuable steps in clarifying the relations between race, class and toxic waste.[14] Bullard describes EJ as the fair distribution of environmental burdens and benefits.[15] However, there are a number of notions to be taken into consideration concerning EJ, such as environmental racism, environmental equality, environmental injustices, environmental discrimination and environmental segregation. Environmental racism (ER) is, for example, important according to Bullard in that it includes every kind of environmental policy, implementation or instruction which results in discrimination (with a good or bad grace) between people or communities on the basis of race or colour.[16] He also maintains that EJ and ER are not the same notions and cannot be used for another.[17] On the other hand, Kameri-Mbote and Cullet assert that the two notions have almost the same meaning in the context of the distribution of environmental burdens and benefits.[18] Burns et al agree with Bullard, stating that EJ is broader than ER.[19] Accordingly, an extensive definition of EJ comprising 'distributive justice', 'procedural justice', 'corrective justice' and 'social justice' was made by

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[12] Carmen G Gonzalez, 'Environmental Justice and International Environmental Law' in Shawkat Alam and others (eds), *Routledge Handbook of International Environmental Law* (Routledge 2013)
[13] Robert D Bullard (n 1) 138
[14] Ronald G Burns and others, *Environmental Law, Crime, and Justice* (LFB Scholarly Publishing LLC 2008) 181
[15] Robert D Bullard (n 1)
[16] Robert D Bullard, 'Environmental Racism and 'Invisible' Communities' (1994) 96 W. Va. L. Rev. 1037
[17] Robert D Bullard, 'Environmental Justice: It's More Than Waste Facility Siting' (1996) 77 Social Science Quarterly 493, 497
[18] P Kameri-Mbote and P Cullet, 'Environmental Justice and Sustainable Development' (1996) IELRC 1/1996, 1 <http://www.ielrc.org/content/w9601.pdf> accessed 08 July 2014
[19] Ronald G Burns and others (n 14) 181

Kuehn.[20] Despite the fact that everyone defines the notion in their own way, its meaning roughly amounts to the same thing and it will be considered as the fair distribution of environmental benefits and burdens throughout this work.

1.1.2 *A Brief History of Environmental Justice*

The primary examples of environmental injustices date back to the invasion of the American continent by Europeans.[21] However, since there are no concrete works dealing with EJ problems that pertain to those years, the period after the second half of the twentieth century is good enough to assess the issue. Studies on EJ have been largely carried out by Bullard[22] and other sociologists and lawyers in the areas where black communities live in the US, particularly in Houston, Dallas, Texas and Louisiana. Among these, Houston is the one with the largest Afro-American population in the South.[23] 'Locally unwanted land uses' (LULUs) and 'toxic dumping' had been located in these black and poor communities which have low resistance.[24] Black people have therefore been faced with environmental as well as health problems since birth according to research conducted over the last forty years.[25]

Having regard to the foregoing detrimental developments for black and poor communities, some positive legal steps have been taken for the maintenance of EJ across the nation. The Executive Order 12 898[26] (Federal Actions to Address Environmental Justice in Minority Populations and Law-Income Populations) on EJ was signed by President Clinton as a result of the efforts of Dr. Bullard and Benjamin F. Chavis.[27] The National Environmental Justice Advisory Council (NEJAC) is another significant establishment founded by the EPA in 1993.[28] The EPA Region IV Waste Division Summit[29] and the Office of Environmental Equity[30] were also vital developments performed by the EPA. Moreover, EJ laws and programs were adopted by many Southern States including Louisiana and Texas in the 1990s.[31]

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[20] Robert R Kuehn, 'A Taxonomy of Environmental Justice' (2000) 30 ELR 10681
[21] Carmen G Gonzalez (n 12) 80
[22] Robert D Bullard (n 1)
[23] Robert D Bullard, 'Environmental Justice For All: It's the Right Thing To Do' (1994) 9 J. Envtl. L. & Litig. 281, 292
[24] Robert D Bullard (n 1) 3
[25] Ibid 98
[26] The President's Executive Order 1994
[27] Robert D Bullard, (n 23) 289
[28] 'National Environmental Justice Advisory Council' (EPA) <http://www.epa.gov/compliance/ej/nejac/> accessed 9 July 2014
[29] Robert D Bullard (n 1) 152
[30] 'Basic Information' (EPA) <http://www.epa.gov/environmentaljustice/basics/ejbackground.html> accessed 9 July 2014
[31] Robert D Bullard (n 1) 120

1.1.3 *Causes of Environmental Injustices*

Bullard has identified 'race' and 'class' as primary factors of environmental injustices[32] and this assertion has also been confirmed by the Commission for Racial Justice's landmark study, *Toxic Wastes and Race* (race is the most significant factor), and the Greenpeace report, *Playing with Fire 1990*.[33] Similarly, Cole and Foster emphasise that 'race' and 'colour' are the most important determinants in the distribution of environmental burdens.[34] The fact that race appears to be an element of environmental racism is also approved by McGee-Collier with reference to her experiences.[35] However, some argue that the studies carried out by Bullard do not reflect reality. For instance, Yandle and Burton claim that there were no direct links between black areas and hazardous facilities when the facilities were established and these facilities were also seen in the areas in which white populations lived.[36] They asserted that the use of current data in Bullard's work resulted in this mistake.[37] They concluded that 'population density' can be accepted as another potential reason for environmental injustices because communities which have less density cannot effectively make objections when compared to communities with higher density.[38]

Moreover, debates about the relations between the siting of hazardous waste landfill areas and race-income-class have made the priority question a current issue. In this sense, Been accepts that the areas where black communities live are close to LULUs, yet it is not clear which came first – LULUs or poor-coloured communities.[39] He further claims that this uncertainty about sequence stems from inadequate historical data.[40] Furthermore, Orfield, who has examined the race factor in the context of EJ, touched on another aspect of the issue alleging that poor whites are lucky to have more housing options than blacks when comparing the two groups, and therefore, whites can easily move from waste landfill areas to better places.[41]

Together with race and colour factors, the term indigenous people also refers to specific groups across Africa, Asia and America which are included in the scope of EJ.[42] In addition to these

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[32] Ibid 83
[33] Ibid 102
[34] Luke W Cole and Sheila R Foster, *From the Ground Up Environmental Racism and the Rise of the Environmental Justice Movement* (New York University Press 2001) 54,5
[35] Melissa McGee-Collier, 'Reflection on Environmental Justice' (2012) 81 Miss. L.J. 683
[36] Tracy Yandle and Dudley Burton, 'Reexamining Environmental Justice: A Statistical Analysis of Historical Hazardous Waste Landfill Siting Patterns in Metropolitan Texas' (1996) 77 Social Science Quarterly 477, 79
[37] Ibid 479,80
[38] Ibid
[39] Vicki Been, 'Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics' (1994) 103 The Yale Law Journal 1383, 1406
[40] Ibid
[41] Myron Orfield, 'Segregation and Environmental Justice' (2006) 7 Minn. J.L. Sci. & Tech. 147, 155
[42] Rebecca A Tsosie, 'Indigenous People and Environmental Justice: The Impact of Climate Change (2007) 78 University of Colorado Law Review 1625

substantive groups, some claim gender to be a part of environmental injustices debate[43] while others argue that gender is not as concrete as race and class.[44] Together with the gender factor, children might be a group which is affected by environmental injustices due to their sensitive nature.[45] Consequently, the abovementioned factors besides race and class are also related to the question of EJ. Even though there is an uncertainty as to the usage of historical data which have been used for the determination of environmental injustice situations, the general status of black communities in those years are pertinent to the argument of Bullard and his followers.

1.2 Turning the Concept into a Movement: Initial Legal Victories

1.2.1 *Environmental Justice Movement*

The 1960s and 1970s witnessed middle-class environmental movements which contributed to the creation of political ground for environmental arrangements.[46] The nature of environmental issues, however, showed a change in the 1980s and 1990s, and there is a difference between the classical environmental groups and the new one.[47] In fact, the very first example of the second type of environmental movement called the Environmental Justice Movement (EJM) was Martin Luther King's mission in Memphis before his assassination in 1968.[48] In the 1980s, some EJM defenders argued that environmental injustices in the South were civil rights matters because the Civil Rights Movement had also emerged in the South.[49] In 1982, the first EJM demonstration was held by blacks against hazardous-wastes in Warren County.[50] Warren County has therefore been accepted as a national symbol and the birthplace of the EJM.[51] The eradication of legal inequalities in human rights, public health, housing, the creation of facilities and transportation are recognised as targets of the EJM.[52] However, the EJM has also had some difficulties with regard to reinforcement. For example, it has been deprived of official support from the government or it has not been promoted

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[43] Peter Newell, 'Environmental Justice Movements: Taking Stock, Moving Forward' (2006) 15 Environmental Politics 656, 659

[44] Sharon Stephens, 'Reflections on Environmental Justice: Children as Victims and Actors' (1996) 23 Social Justice 62, 71

[45] Ibid

[46] Robert D Bullard (n 1) 4

[47] Ibid

[48] Robert D Bullard (n 16) 1038

[49] Robert D Bullard (n 1) 14

[50] Ibid 29,30

[51] Robert D Bullard and Beverly Wright, 'Disastrous Response to Natural and Man-made Disasters: An Environmental Justice Analysis Twenty Five Years after Warren County' (2008) 26 UCLA J. Envtl. L. & Pol'y 217, 222

[52] Robert D Bullard and others, 'Confronting Environmental Injustices: It's Right Thing To Do' (1997) 5 Race, Gender & Class 63, 77

by scholars, or middle-class white environmentalists.[53] It has rather been based on 'bottom-up' movement supported by black grassroots activists who have wanted to make a change in environmental policies.[54] As a result of their great efforts, the First National People of Color Environmental Leadership Summit 1991 was organised.[55]

1.2.2 *The Case of Bean v. Southwestern Waste Management*

The case of *Bean v. Southwestern Waste Management,*[56] in which Dr. Bullard took part as an expert, was the first case filed by Linda Bullard (Dr. Bullard's wife) against the city of Houston, Texas, on the ground of environmental discrimination under the Civil Rights Act in 1979.[57] Plaintiffs alleged that the permission approved by the Texas Department of Health (TDH) for siting a solid waste facility in Houston was 'part of a pattern or practice of discrimination'.[58] They also maintained that the decision posed a risk to their constitutional rights.[59] The Court, however, denied a preliminary injunction requested by the Plaintiffs because they could not establish 'a substantial likelihood of success on the merits'.[60] As can be seen in the above debate between Bullard and Yandle-Burton, there was an inconsistency in the use of historical data regarding the relationship between siting a hazardous waste facility and race. This inconsistency, therefore, was proof of the preconditions of a preliminary injunction which were difficult for the Plaintiffs in *Bean v. Southwestern Waste Management.* Ulezalka here suggested that defendants may have been required to prove the necessity of these waste facilities.[61] Consequently, despite the fact that the result of the case was not in favour of EJ defenders, the case reignited the problem of environmental racism in the following cases.

1.2.3 *The Case of CANT v LES*

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[53] Filomina C Steady (ed), *Environmental Justice in the New Millenium Global Perspectives on Race, Ethnicity, and Human Rights* (Palgrave Macmillan 2009) 20
[54] Ibid 21
[55] Robert D Bullard, (n 16) 1038-1046
[56] *Bean v Southwestern Waste Management Corp* 482 F Supp 673 (1979)
[57] Robert D Bullard (n 1) XIV
[58] *Bean* (n 56) 677
[59] *Bean* (n 56) 676
[60] *Bean* (n 56) 677
[61] Tara Ulezalka, 'Race and Waste: The Quest for Environmental Justice' (2007) 26 Temple Journal of Science, Technology & Environmental Law 51, 69-70

CANT v. LES[62] was the first case concluded in favour of EJ defenders. It was a struggle between Louisiana Energy Service (LES), which tried to construct a uranium enrichment plant in a rural area where poor-black people lived in Louisiana, and Citizens Against Nuclear Trash (CANT).[63] Even though LES's research determined this poor-black area as the 'best place' for the uranium enrichment plant, the Nuclear Regulatory Commission (NRC) found that 'racial bias played a part in the selection process.'[64] Dr. Bullard as an intervenor witness in this case played a significant role in the achievement of this success by revealing 'institutionalized racism' in his statistical analysis.[65]

Another significant accomplishment gained by poor and black people as victims of environmental racism was undoubtedly the struggle between the Convent community in Louisiana and a Japanese company Shintech which intended to build a Polyvinyl Chloride Plant in Convent.[66] The people of Convent prevented the company from building the plant on their land by means of public hearings and with the help of Tulane University Environmental Law Clinic.[67] The company gave up on the plant construction in 1998.[68]

Overall, when the above EJ cases are considered, it can be seen that permissions for plants were given by officials despite their detrimental side effects on poor coloured people. The reason behind this issue is, as Dr. Bullard claims, the weak resistance of those people against such activities. He also underlines the fact that the poor education of these people results in a lack of legal aid for defending themselves. These facts unfortunately lead to institutional racism. Consequently, these initial victories were achieved with the rise of the EJM promoted by the Civil Rights Act of 1964.[69]

1.3 Environmentalism or Environmental Justice?

Environmentalism and EJ do not amount to the same thing. According to the Cambridge Dictionary, environmentalism refers to the conservation of the environment from human activities[70] whereas the latter means the fair distribution of environmental burdens and benefits among people as defined in the very beginning of this section. Their differences stem from their focal points. Wenz claims that no disputes exist between the purposes of environmentalism and EJ, and they are

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[62] *CANT v LES 45 NRC* 367 (1997)
[63] 'Louisiana Energy Services: Uranium and Environmental Racism' (Environmental Justice Network) <http://www.ejnet.org/ej/les.html> accessed 16 July 2014
[64] *CANT* (n 62) 396
[65] Ibid 386
[66] 'Environmental Justice Case Study: Shintech PVC in Convent, Louisiana' (University of Michigan, 1999) <http://www.umich.edu/~snre492/shin.html#Key Actors> accessed 17 July 2014
[67] Ibid
[68] Ibid
[69] Civil Rights Act 1964
[70] *Cambridge Advanced Learners' Dictionary* (2nd edn, Cambridge University Press 2005) 418

promoters of one another.[71] The fact that a decent and healthy environment plays a greater role in the maintenance of welfare of people and communities[72] shows the connection between these two concepts. As will be seen in the second section, environmentalism and EJ are inseparable sides of the same coin.

1.4 Mutual Interaction between International Environmental Law and Environmental Justice

International environmental law (IEL) and EJ are fields which affect one another in some respects. On the one hand, IEL, without doubt, contributes to the establishment of the legal ground of EJ by its fundamental developments. For example, Principle 6 of the Stockholm Declaration[73] emphasises dumping of toxic materials, which was the main reason for the commencement of the EJ struggle. Likewise, the Rio Declaration[74] is another development in the context of IEL. The fact that 80 percent of global environmental pollution stems from the usage of detrimental materials from human activities was discussed by the UN in Rio.[75] This determination about pollution is important not only for the preservation of the environment but also the maintenance of EJ. The third important event after Stockholm and Rio on behalf of IEL as well as EJ was the Summit on Sustainable Development held in 2002 in Johannesburg[76] in which efforts were made to enhance the quality of people's lives.

On the other hand, the emergence of EJ plays a vital role in the investigation of the effectiveness of environmental law, policies and principles.[77] EJ also reveals the links between civil rights and environmental law.[78] EJ and IEL, therefore, are equally important to each other.

1.5 Correlations between International Environmental Law Principles and Environmental Justice Principles

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[71] Peter Wenz, 'Does Environmentalism Promote Injustice for the Poor?' in Ronald Sandler and Phaedra C Pezzullo (eds), *Environmental Justice and Environmentalism the Social Justice Challenge to the Environmental Movement* (MIT Press 2007)
[72] Felicity Millner, 'Access to Environmental Justice' (2011) 16 Deakin L. Rev. 189, 191
[73] The UN Declaration 1972 (n 7)
[74] Rio Declaration on Environment and Development 1992
[75] Filomina C Steady (n 53) 7
[76] Maria-Claire C Segger and Ashfaq Khalfan, *Sustainable Development Law Principles, Practices, & Prospects* (OUP 2006) 5
[77] Ole W Pedersen, 'Environmental Principles and Environmental Justice' (2010) 12 Envtl. L. Rev. 26
[78] P Kameri-Mbote and P Cullet (n 18) 3

The mutual interaction between IEL and EJ can be seen when their fundamental principles are taken into account. Seventeen basic principles of EJ were established in the First National People of Color Environmental Leadership Summit as a result of the endeavours of the EJM in 1991 in Washington DC.[79] These principles have the characteristics of an answer to the history of all environmental injustice which coloured, indigenous and other minority populations have encountered since the beginning of colonization to the present. From this point, fundamental principles of IEL match up with the purpose of EJ principles in general. The principles of 'prevention', 'sustainable development', 'precautionary' and 'common but differentiated responsibility'[80] are the ones which will be examined in the context of the protection of the environment as well as its inhabitants as the main concern of EJ.

First, the principle of sustainable development (SD), like EJ, aims at the enhancement of people's welfare and the equal distribution of development among the present and future generations as stressed by Kameri-Mbote and Cullet.[81] However, despite the fact that the SD principle goes well together with EJ, the environmental aspect of the principle has been given much more attention than the human aspect in the context of economic sustainability.[82] In a nutshell, some recognise a nexus between SD and EJ on 'pragmatic' grounds while others reject such a nexus on 'theoretical' grounds.[83] Second, common but differentiated responsibility (CBDR) is another important IEL principle in relation to EJ. The distribution of environmental costs and benefits as the purpose of EJ can be practiced by this principle because CBDR mainly imposes environmental burdens on developed countries (the North) due to their non-proportional negative effects on the environment.[84] Lastly, the principles of precaution and prevention occupy a place in the context of EJ. In fact, Bullard has placed an emphasis on preventing environmental damage which negatively affects people's lives before the occurrence of harm.[85]

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[79] Robert D Bullard and Glenn S Johnson, 'Environmental Justice: Grassroots Activism and Its Impact on Public Policy Decision Making' (2000) 56 Journal of Social Issues 555, 56-57

[80] Philippe Sands and Others, *Principles of International Environmental Law* (3rd edn, Cambridge University Press 2012) 187

[81] P Kameri-Mbote and P Cullet (n 18)

[82] Ibid 7

[83] Ole W Pedersen (n 77) 43; Andrew Dobson, *Justice and the Environment Conceptions of Environmental Sustainability and Dimensions of Social Justice* (OUP 1998)

[84] Carmen G Gonzalez (n 12) 91

[85] Ole W Pedersen (n 77) 36

SECTION 2

ENVIRONMENTAL RIGHTS, HUMAN RIGHTS AND ENVIRONMENTAL JUSTICE

2.1 How Much Do Environmental Rights as Human Rights Contribute to Environmental Justice?

The question of recognition of the right to environment as a human right has been one of the debates concerning everyone one way or another and more importantly environmentalists, human rights defenders and scholars. What is important here is how much EJ reaps a benefit from the recognition of the right to environment as a human right. Is EJ directly affected by this recognition, or does the present position of the environment in the field of human rights adequately serve EJ? The answers to these questions will be sought and then the regional human rights regimes including the Inter-American system and the African system will be assessed in this section.

Traditionally, the rights which people enjoy are primarily divided into three generations called 'first generation', 'second generation' and 'third generation' rights. This was the idea of Karel Vasak,[86] the former Secretary-General of the International Institute of Human Rights. 'Civil and Political rights' are the first generation rights (negative rights) which require states' non-intervention[87] while the second generation rights called Social, Economic and Cultural rights necessitate states to take positive action to secure these rights.[88] The third generation rights, including the right to 'development', 'ownership of the common heritage of mankind' and 'healthy and ecologically balanced environment', which is the main theme of this section, follow the path.[89] Even though this classification has been generally approved, some do not agree with this. For instance, Shelton claims that the importance attached to the first and second generation rights is not at the same level in all countries and international law.[90] It is also not clear whether the rights in each generation really belong to their generations.[91] The relationship between the generation rights and their negative/positive state liabilities show inconsistency between theory and practice.[92] In a similar way, Boyle asserts that environmental rights cannot be confined into only one generation

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[86] Karel Vasak, 'A 30-year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights' [1977] the Unesco Courier 29-32
[87] Ibid
[88] Ibid
[89] Ibid
[90] Dinah Shelton, 'Human Rights, Environmental Rights, and the Right to Environment' (1991-2) 28 Stan. J. Int'l L. 103, 122
[91] Ibid 123
[92] Ibid 123

right because they are enjoyed by people by means of civil-political rights as well as economic-social rights.[93] This debate shows that the position of environmental rights is an ongoing issue. It would, therefore, be good to investigate the necessity of environmental rights by discussing the relations between the environment and human life from different perspectives.

The debate as to the preservation of the environment, whether it is important for the environment per se or for the protection of human beings, is the primary point which needs to be examined. On the one hand, the 'Biocentric approach' argues that the environment is an asset in itself and its existence and values cannot be diminished by mankind with the exception of meeting their basic needs.[94] Stone agrees with this approach by stressing the protection of the environment, and he criticises the idea which does not recognise the environment as a right holder.[95] On the other hand, the 'Anthropocentric approach' defends the argument that the environment is a provider of natural sources for the maintenance of human life.[96] The importance of protecting the environment for the sake of human beings at the present time as well as in the future was also expressed under principle 2 of the Stockholm Declaration.[97] However, as Shelton points out, to say that the protection of the environment is important for humanity does not result in an explicit clash because the utilization of the environment by mankind is the result of an inseparable link between human beings and nature.[98] From this point of view, this inseparable link between human beings and the environment has initiated the discussion of environmental rights within the framework of human rights.

Starting from the interdependency between the environment and human life, the recognition of an environmental right as a human right seems to be an essential development. 'Healthful', 'safe', 'natural', 'decent', 'pure', 'clean', 'ecologically-balanced' are the common notions used for this environmental right.[99] The fact that human rights have been initiated by environmental activists[100] does support the recognition of an environmental right as well. In fact, the preservation of a 'healthy environment' is a precondition of the utilization of fundamental human rights as stressed by Picolotti.[101] In this sense, Fitzmaurice mentions three different schools one of which is against

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[93] Alan Boyle, 'Human Rights or Environmental Rights? A Reassessment' (2007) 18 Fordham Environmental Law Review 471

[94] Loretta Feris, 'Constitutional Environmental Rights: An Under-Utilized Resource' (2008) 24 S. Afr. J. on Hum. Rts. 29, 30-31

[95] Christopher Stone, 'Should Trees Have Standing? – Toward Legal Rights For Natural Objects' (1972) 45 Southern California Law Review 450

[96] Loretta Ferits (n 94) 32

[97] The UN Declaration 1972 (n 7) art2

[98] Dinah Shelton (n 90) 109

[99] Melissa Thorme, 'Establishing Environment As a Human Right' (1990-1) 19 Denv. J. Int'l L. & Pol'y 301, 309

[100] Kerri Woods, *Human Rights and Environmental Sustainability* (Edward Elgar Publishing 2010) 3

[101] Romina Picolotti and Jorge D Taillant (eds), *Linking Human Rights and the Environment* (The University of Arizona Press 2003) 48; see also Richard P Hiskes, 'Environmental Human Rights and Intergenerational Justice' (2006) 7 Human Rights Review 81, 82

environmental rights whereas the others support the idea of the environment as a human right.[102] The one which is in favour of the environment is of the opinion that the right to environment is one of the fundamental human rights and the existence of other human rights is dependent on the recognition of this environmental right while the other school accepts that environmental right can only be derived from other existing human rights.[103] For instance, Sax expresses the fundamental criteria for the formulation of an environmental right by making a reference to democratic values.[104] First, the public should be informed about the decision-making process.[105] Second, everyone should be seen as equally important.[106] Last, the protection of the earth and future generations from impoverishment should be valued.[107]

Nevertheless, the opponents of the recognition of an environmental right as distinguished from the existing human rights argue that the enforcement of an environmental right as a human right is not possible because of the far-reaching nature of environmental rights in a judicial context.[108] Environmental degradation like climate change is a universal problem which cannot be confined by borders, human rights law is, however, defective in its extra-territorial applications.[109] The fact that environmental rights unlike other basic human rights such as freedom of expression do not have any 'historical experience' which can be used as a guide[110] is another criticism against them. Moreover, the occurrence of a clash in some cases between environmental rights and the right to property makes the situation difficult in a human rights context.[111] Due to these reasons, the recognition of an environmental right has not yet been realised. However, legal attempts towards recognising an environmental right in an international context have created the infrastructure of this right.

The creation of legal treaties and declarations has strengthened the position of the environment in the realm of human rights. The very first signal with regard to the recognition of the environment as a part of human rights was given in the United Nations General Assembly Resolution which pointed to the risk of technological developments on people's fundamental rights in 1968.[112] A concrete step towards declaring the environment as a human right was then taken in the Stockholm

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[102] Malgosia Fitzmaurice, 'The Right of the Child to a Clean Environment' (1998-9) 23 S.III. U. L. J. 611,612
[103] Ibid 612,613
[104] Joseph L Sax, 'The Search for Environmental Rights' (1990-1) 6 J. Land Use & Envtl. L. 93
[105] Ibid
[106] Ibid
[107] Ibid
[108] Philippe Cullet, 'Definition of An Environmental Right in A Human Rights Context' (1995) 13 Netherlands Quarterly of Human Rights 25, 34-5
[109] Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 The European Journal of International Law 613
[110] Joseph L Sax (n 104) 94
[111] Dinah Shelton (n 90) 137
[112] Melissa Thorme (n 99) 303; See also UNGA Res 2389 (3 December 1968)

Conference. Principle 1 of the Declaration, for example, lays emphasis on the importance of the environment for the welfare of peoples.[113] In 1988, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Economic and Social Council Commission on Human Rights investigated environmentally harmful products, toxic and wastes, and issued a resolution in this regard.[114] Similarly, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal signed in 1989 is another important development, the purpose of which is to preserve the environment and human beings.[115] It is therefore important to note that the environment has become more crucial and recognised as being a human right at an international level.

The legal arrangements for the empowerment of the environment as a human right have made a major contribution to EJ. The first principle of the Stockholm Declaration[116] underlines the elimination of environmental discrimination and similar treatments which is the main point of EJ in environmental policies. Besides this, the content of the Resolution adopted by the UN Sub-Commission[117] in 1988 which serves the environment as a human right is directly related to EJ because this Resolution like EJ aims at the prevention of the harmful effects of toxic waste on people's lives. The Basel Convention[118] also makes a mention of the requirement of due diligence in terms of hazardous wastes which need to be eradicated for the preservation of EJ. As can be clearly seen, the attempts to make the environment a human right represent an effort to realise what the EJ defenders have also been trying to do.

In the case of the right to environment being recognised as a human right, it would provide benefits theoretically and practically.[119] It could also prevent people being exposed to pollution.[120] Depledge and Carlarne claim that global warming caused by greenhouse gas emissions which are the result of human activities affect nearly 150.000 people each year.[121] For example, 30,000 premature deaths were seen in Europe in 2003 because of air pollution and the natural consequences of heat waves.[122] They further argue that in addition to the existence of the right to health and the right to protection of human beings from natural disasters like 'climate change' and 'loss of biodiversity' as well as man-caused disasters such as 'chemical and radiation pollution' and irresponsible agricultural measures, the right to a healthy environment must be recognised in order to uphold

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[113] The UN Declaration (n 7) Principle 1
[114] Dinah Shelton (n 90) 129
[115] The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal 1989
[116] The UN Declaration (n 7) Principle 1
[117] Dinah Shelton (n 90) 109
[118] Basel Convention (n 115)
[119] Michael H Depledge and Cinnamon P Carlarne, 'Environmental Rights and Wrongs' (2008) 42 Environmental Science and Technology 990, 992
[120] Aaron Lercher, 'Are There Any Environmental Rights?' (2007) 16 Environmental Values 355
[121] Depledge and Carlarne (n 119) 993
[122] Ibid

these existing rights.[123] When the right to health or in a similar way the right to life is taken into consideration in the existing instruments of human rights, it is necessary to recognise the right to a healthy environment as a combined right for guaranteeing health and life.

To conclude, in conjunction with the recognition of an environmental right, the maintenance of EJ will ideally progress in the way that everyone will share environmental benefits together with environmental burdens. Since the right to environment will be preventing or reducing the side effects of the above-mentioned manmade disasters, people and communities with low resistance will be able to find opportunities to protect themselves. Similarly, children or babies as one of the target groups of EJ will be relatively less affected by environmental pollution contrary to the specific examples given in the previous paragraph. Therefore, it could be said that the recognition of the right to health or a decent environment will without doubt positively affect the allocation of environmental benefits and burdens as proposed by EJ. However, because there is no substantive environmental right which is recognised as a human right in an international context, procedural rights play an essential role in the protection of the environment and human life as well. In this regard, the Aarhus Convention is an outstanding development which will be discussed under the following heading.

2.2 The Importance of the Aarhus Convention for Environmental Rights and Environmental Justice

The Aarhus Convention officially known as the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters[124] was adopted by the UN Economic Commission for Europe in Denmark in 1998.[125] Forty-six states and the European Union have ratified the Convention.[126] The Aarhus Convention as a multilateral environmental treaty is generally accepted as the most progressive one for environmental issues in international law,[127] and is therefore important in many ways.

One significant point with regard to the Convention is that it has strengthened the nexus between the protection of the environment and human rights by expanding Principle 10 of the Rio

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[123] Ibid
[124] The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 1998
[125] 'Introduction' (UNECE) <http://www.unece.org/env/pp/introduction.html> accessed 12 August 2014
[126] 'Parties to the Convention and Their Dates of Ratification' (UNECE) <http://www.unece.org/env/pp/aarhus/map.html> accessed 28 August 2014
[127] Mathew Hall, *Victims of Environmental Harm Rights, Recognition and Redress under National and International Law* (Routledge 2013) 84

Declaration, and more importantly, it recognizes 'the right to a healthy environment'.[128] The first Article of the Convention explicitly mentions 'the right to live in a healthy environment' for present and future generations, and it requires party states to secure the three main pillars of the Convention namely 'the right to access to information', 'public participation in decision making' and 'access to justice'. [129] The Convention together with the evolution of the IEL has played an important role in the development of procedural rights[130] and this is a crucial step due to the absence of substantively recognised environmental rights. It is thus important to analyse each pillar of the Convention with regard to its contribution to environmental rights as well as EJ.

In the first place, access to information as already cited in the title of the Convention is an indispensable requirement for the protection of the environment and the maintenance of EJ. Articles 4 and 5 of the Convention allow the public to get environmental information which may prevent the occurrence of potential damages.[131] These Articles also require party states to take adequate measures for accessing environmental information. Free access to information might, however, be seen as a threat in terms of the confidentiality of states in some instances, yet, despite this, the Convention has been good at striking a balance between the confidentiality of states and the right to access to information through the Compliance Committee as remarked by Krämer.[132] The opportunity to know a risk before it occurs is a vital development for the protection of human life as a part of environmental human rights. Furthermore, when the disproportionate situation of black people, the have-nots and indigenous people compared to the whites in the South of the US are considered, it is clear that access to environmental information is important for EJ. If those people had such a right to access to environmental information they would be able to prevent the dumping of hazardous waste. Therefore, access to information is one of the supportive instruments for environmental rights and EJ.

Secondly, public participation in the decision-making process makes decisions meaningful and enforceable, and hence contributes to environmental rights and EJ. The provisions supporting public participation in decision-making are encountered in Article 6, 7 and 8 of the Convention.[133] Public participation can be ensured, for example, by means of public hearings.[134] The decisions taken in a society where the public is excluded from the decision-making process on environmental policies cannot be permanent. This phenomenon is clearly seen in EJ cases in the US. Due to the

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[128] Sueli Giorgetta, 'The Right to a Health Environment, Human Rights and Sustainable Development' (2002) 2 International Environmental Agreements: Politics, Law and Economics 173
[129] Aarhus convention (n 124) art 1
[130] Amedeo Postiglione, 'Human Rights and The Environment' (2010) 14 The International Journal of Human Rights 524, 521
[131] Aarhus convention (n 124) art 4 art 5
[132] Ludwig Krämer, 'Transnational Access to Environmental Information' (2012) 1Transnational Environmental Law 95
[133] Aarhus convention (n 124) art 6 art 7 art 8
[134] Ibid

fact that the opinions of the people in the concerned areas in the US were not taken into account when locating LULUs and energy plants, those buildings could not be completed. Accordingly, the existence of the right to public participation in decision-making is crucial for preventing the same undesirable situations from taking place, and naturally it serves environmental rights and EJ.

Finally, access to justice as a third pillar of the Convention is certainly of vital importance for environmental rights and EJ. The Convention mentions access to justice under Article 9, which allows people to review the procedure before a judicial body as to whether their request for information is carefully considered or not.[135] In this way, the disadvantaged people who are the target groups of EJ can seek how much the information given reflects the reality. Thus, it would be ascertained whether or not there is 'institutional discrimination' as asserted by Bullard in environmental matters.

2.3 Environmental Rights and Environmental Justice in Regional Human Rights Systems

The question of the recognition of environmental rights and the maintenance of EJ has so far been reviewed in international context. Hereinafter, the argument will briefly be assessed according to the Inter-American and African systems respectively before considering the issue in the case law of the ECtHR which will be the heart of this paper.

2.3.1 *Environmental Rights and Environmental Justice in the Inter-American Human Rights System*

The preservation of human rights in the continent is under the control of the Organization of American States (OAS) with 35 member states.[136] The Inter-American system consists of two main institutions, the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR), and two treaties called the 1948 American Declaration on the Rights and Duties of Man (the American Declaration) and the 1969 American Convention on Human Rights (ACHR).[137]

The right to environment had not been included either in the American Declaration or in the ACHR when they were first adopted. However, the 'Right to a Healthy Environment' was subsequently

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[135] Aarhus convention (n 124) art 9

[136] Jo M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2nd edn, Cambridge University Press 2013) 2

[137] H Steiner and others, *International Human Rights in Context: Law, Politics, Morals* (3rd edn, OUP 2008) 1020

adopted in Article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural rights (the San Salvador protocol).[138] Before the adoption of this protocol, the IACHR and the IACtHR were dealing with environmental matters by referring to 'the right to life' and 'the preservation of health and well-being'.[139] For example, the case of *Yanomami*[140] played an essential role in the recognition of the right to a healthy environment in the San Salvador Protocol.[141] This case is related to the protection of the lifestyle and culture of the Yanomami indigenous community in their fight against the construction of a highway and mining project on Yanomami land.[142] The case of *Maya Indigenous Community*,[143] which was decided by the Commission after the adoption of the San Salvador Protocol, was another important case which shows the relevance of the Inter-American system in terms of indigenous people. Therefore, the case law has shown the positive approach of the Inter-American system towards environmental rights of disadvantaged groups.

The recognition of the right to a healthy environment in the Inter-American system enables EJ to be achieved. As discussed in the beginning of this section, the recognition of an environmental right is the primary concern for the maintenance of EJ because those who suffer from environmental injustices need such a legal foundation to support their allegations. The Yanomami community can be accepted as one of the targets of EJ. The IACHR thus concluded the case in accordance with the main aim of the EJ which proposes the fair distribution of environmental burdens and benefits. It is, therefore, important to note that positive developments can be seen in the Convention as well as in the case law of the Inter-American system for environmental rights and EJ.

2.3.2 *Environmental Rights and Environmental Justice in the African Human Rights System*

The African human rights system is one of the three regional human rights regimes and also the latest one to be established under the African Union (AU)[144] which was founded by the Constitutive Act in the Lome Summit in 2000.[145] The African Charter on Human and People's Rights (also known as the Banjul Charter, hereinafter the ACHPR) aims at the preservation and the

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[138] The Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights 1988 art 11
[139] Sueli Giorgetta (n 128) 178
[140] *Yanomami v Brazil* case 7615 Inter-Am CHR Report No 12/85
[141] Sueli Giorgetta (n 128) 178
[142] *Yanomami* (n 140)
[143] *Maya Indigenous Community of the Toledo District v Belize* [2004] IACHR Case 12.053 Report No 40/04
[144] 'African Human Rights System' (International Justice Resource Center) <http://www.ijrcenter.org/regional/african/> accessed 15 August 2014; The African Union is the new form of Organisation of African Unity (OAU)
[145] Javaid Rehman, *International Human Rights Law* (2nd edn, Pearson Education Limited 2010) 306

promotion of human rights in the Continent.[146] The ACHPR is the first single regional instrument which incorporates different human rights classes in a single treaty.[147] Furthermore, the African Commission on Human and Peoples' Rights established in 1987 and African Court on Human and Peoples' Rights founded in 1998 are the institutions of the system which are responsible for the interpretation and monitoring of the Charter.[148]

The African human rights system is prominent because it substantively protects the environment as a human right. The ACHPR is the first regional convention which directly mentions an environmental right as the 'Right to a General Satisfactory Environment' under Article 24.[149] The case of *Ogoniland*[150] is a clear indication of the success of the African human rights system in this context. This case is related to the oil production attempts of the Nigerian Government in the Ogoni area in which indigenous people lived. The African Commission held that the Federal Republic of Nigeria violated Article 24 of the ACHPR and some other fundamental rights including the 'right to life' and 'freedom from discrimination'.[151] It shows that the protection of the environment in the African Human Rights system is realised by its special provision and also by basic existing human rights provisions.

The existence of an environmental right in the ACHPR and its implementation make the African system effective, especially for those who seek EJ. The *Ogoniland* shows that the African Commission has safeguarded the rights of minorities, which is important for EJ. For instance, the Commission expressed the need for positive obligation[152] by referring to the fact that the Nigerian Government had demolished the habitat of the Ogoni people.[153] The Commission has also mentioned the lack of access to information, which is one of the procedural environmental rights, and independent environmental assessment before the construction of hazardous activities on the land.[154] This official discrimination exhibited by the Nigerian government has shown Bullard to be correct because he described this situation as 'institutional discrimination'. Consequently, indigenous people who are relatively more vulnerable than a homogenous community are protected by the African system in accordance with the aims of EJ.

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[146] 'African Charter on Human and Peoples' Rights' (African Commission on Human and Peoples' Rights, 2014) <http://www.achpr.org/instruments/achpr/> accessed 15 August 2014

[147] Eghosa O Ekhator, 'Improving Access to Environmental Justice under the African Charter on Human and Peoples' Rights: The Roles of NGOS in Nigeria' (2014) 22 Afr. J. Int'L. & Comp. L. 63, 67

[148] Ibid

[149] Daniel Moeckli and others (eds), *International Human Rights Law* (OUP 2010) 625; See also the African Charter on Human and Peoples' Rights Art 24

[150] 155/96, *Social and Economic Rights Action Center and the Center for Economic and Social Rights (SERAC) v Nigeria,* 15th Activity Report of the Acomm HPR (2001-2002)

[151] Ibid

[152] SERAC v NIGERIA [57]

[153] Ibid [62]

[154] Ibid [53]

SECTION 3

ENVIRONMENTAL RIGHTS AND ENVIRONMENTAL JUSTICE IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

This section as the main part of the paper will broadly involve a discussion on environmental rights and EJ in the context of the ECHR and in the case law of the ECtHR as indicated in the introduction. In contrast to the brief examination of the Inter-American system and the African system mentioned in the second section, the concept of EJ and the factors which cause environmental injustices will be thoroughly assessed according to the case law of the ECtHR. This assessment will be carried out under each related right and in particular under Article 2 and 8. It should also not be forgotten that as the paper focuses on EJ and its implications, the cases, which will be used below, will be chosen according to their relevance to EJ rather than their general environmental concerns.

3.1 European Convention on Human Rights as the Backbone of the European Human Rights System

The European Convention for the Protection of Human Rights and Fundamental Freedoms, the ECHR,[155] was drafted by the member states of the Council of Europe (CoE) in 1950.[156] The CoE as an international organisation was an effort which aimed to unite Europe after the two world wars.[157] The ECHR was created as a response to the breaches of civil rights during World War Two in Europe.[158] Two institutions were established by the ECHR, namely the European Commission on Human Rights (the European Commission) and the European Court of Human Rights until the adoption of Protocol 11 in 1998 which abolished the European Commission and which created a permanent court.[159]

The ECHR, in essence, protects first generation rights.[160] The first section of it covers fundamental rights which are mentioned in the Universal Declaration of Human Rights.[161] The rights and

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[155] The European Convention 1950 (n 9)
[156] Michael Haas, *International Human Rights A Comprehensive Introduction* (2nd edn, Routledge 2014) 369
[157] D J Harris and others, *Law of the European Convention on Human Rights* (2nd edn, OUP 2009)
[158] Ibid
[159] Robin C A White and Clare Ovey, *Jacobs, White, and Ovey: The European Convention on Human Rights* (5th edn, OUP 2010) 10-12
[160] Ibid 8
[161] Ibid 8; The Universal Declaration on Human Rights 1948

freedoms are also preserved by Protocols 1, 4, 6, 7, 12 and 13 to the ECHR.[162] It is useful to remember for the sake of achieving a better understanding in the subsequent paragraphs that some rights in the ECHR are 'absolute rights' such as 'the right not to be tortured' while others are 'qualified rights' such as 'the right to respect for private and family life'.[163] As will be seen in the following cases, positive obligations[164] of the party states are also an important aspect which has been frequently encountered as the reason for violations of the rights and freedoms under the ECHR. Apart from this, social and economic rights unlike the African Charter are protected by another instrument of the CoE known as the European Social Charter[165] rather than the ECHR.

3.2 How does the European Convention on Human Rights Protect Environmental Rights?

The ECHR, like the Conventions of the Inter-American system and the African system, is created for the preservation of civil and political rights.[166] It can only be invoked when 'individual rights' are in question rather than environmental rights,[167] referred to as 'collective rights' which can be enjoyed by a group of people or a community.[168] The absence of a provision on the environment, environmental rights or a similar notion concerning the protection of the environment in the ECHR or in the Protocols[169] is an indication that the ECHR is for the protection of civil and political rights. After the Stockholm Conference 1972, a series of attempts have been made in the name of the recognition of an additional protocol for the right to environment in the ECHR, yet they have remained inconclusive because of the political unwillingness of the party states.[170] According to Shelton, there are three reasons behind this unwillingness:[171] first, a concern about diluting the

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[162] The European Convention 1950 (n 9)
[163] 'Making sense of Human Rights: A Short Introduction' (The Ministry of Justice of the UK, 2006) <https://www.justice.gov.uk/downloads/human-rights/human-rights-making-sense-human-rights.pdf> accessed 21 August 2014. For further information see also Natasa Mavronicola, 'What is an 'Absolute Right'? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights' [2012] HRLR 1
[164] Positive obligations as distinct from negative obligations require the party states to take action See Jean-Francois Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights* (Human Rights Handbooks no 7, Council of Europe 2007) 11
[165] The European Social Charter 1996
[166] Robin R Churchill, 'Environmental Rights in Existing Human Rights Treaties' in Alan Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection* (Clarendon Press 1998)
[167] Ann Sherlock and Francoise Jarvis, 'The European Convention on Human Rights and the Environment' (1999) 24 E.L. Rev Supp (Human Rights Survey) 15
[168] Yoram Dinstein, 'Collective Human Rights of Peoples and Minorities' (1976) 25 International and Comparative Law Quarterly 102
[169] Daniel G S José, *Environmental Protection and the European Convention on Human Rights* (Council of Europe Publishing 2005) 7
[170] Dinah Shelton (n 90) 132, 133
[171] Ibid

ECHR by new proposed human rights; second, claims over the lack of justiciability of environmental rights; and third, fears of party states stemming from their significant environmental problems that might cause legal troubles for them in the event of the right being recognised.[172] Furthermore, DeMerieux is of the opinion that the adoption of an environmental right in the ECHR is not vital because such a right might conflict with other fundamental rights.[173]

The approach of the ECHR towards the protection of the environment shows that the ECHR might be said to be closer to the 'Anthropocentric approach' which indicates that the protection of the environment is important for human life as already mentioned in Section 2. No claims concerning environmental rights can be made unless they are related to the protection of 'individual rights'.[174] To put it another way, the ECHR requires the applicants to demonstrate that they are victims of a violation of a right defined under the ECHR.[175] For instance, *X and Y v Federal Republic of Germany*[176] was known as the first 'environmental case' to be concluded by the European Commission as 'inadmissible' since the ECHR does not contain any 'substantive' provision about environmental rights.[177] In this case, the applicants applied to the Commission for the protection of nature rather than their individual rights and the case was not accepted because of the reason in question.[178] However, like the argument that proponents of the 'Anthropocentric approach' defend, the European Commission thereafter considered the protection of the environment as a requirement for the realisation of the individual rights and decided subsequent cases as admissible.[179] The cases of *Arrondelle v. the United Kingdom*,[180] *Baggs v. the United Kingdom*[181] and others which will be assessed through the section can be shown as examples in this respect.

The non-existence of a substantive environmental right in the ECHR has led environmental cases to be examined based on the interpretation of the existing human rights provisions[182] because the derogation of the environment may negatively affect these basic individual rights. However, before commencing the interpretation of the existing provisions under the ECHR, there is one more issue concerning the interpretation of the existing rights for environmental cases. This is the doctrine of margin of appreciation. The doctrine amounts to a kind of freedom of action given by the ECHR to

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[172] Ibid
[173] Margaret DeMerieux, 'Deriving Environmental Rights from the European Convention for the Protection of Human Rights and Fundamental Freedoms' (2001) 21 Oxford Journal of Legal Studies 521
[174] Ann Sherlock and Francoise (n 167) 15
[175] Ibid 27, 28
[176] App no 7407/76 (European Commission, 11 July 1973)
[177] Daniel Moeckl (n 149) 628
[178] Philippe Sands and others (n 80) 782
[179] Daniel G S José (n 169) 8
[180] App no 7889/77 (European Commission, 15 July 1980)
[181] App no 9310/81 (European Commission, 19 January 1985)
[182] Daniel Moeckl (n 149) 628

the member states in order to accomplish their duties under the ECHR.[183] The point which makes the doctrine important is the discrepancies between the national constitutions and the ECHR in terms of environmental protection. As Boyle states,[184] some member states have already adopted an environmental right in their constitution although the ECHR does not mention this right. For example, Article 56 of the Turkish Constitution refers to a 'healthy' and 'balanced environment'[185] while the Spanish constitution sees the environment as vital for the 'development of the person' and the 'environment' itself under section 45.[186] Article 42 of the Russian Constitution also mentions a 'favourable environment'.[187] Therefore, as will be seen later, results of the cases decided by the ECtHR may show a change because of the margin of appreciation.

In the light of the foregoing, the ECtHR has been accepted as an indirect provider of environmental rights which is protected by way of interpreting the existing individual rights.[188] The 'right to life' (Art 2), 'right to fair trial' (Art 6), 'right to respect for private and family life' (Art 8), 'freedom of expression' (Art 10) and 'right to property' (Art 1 of Protocol 1) of the ECHR have been used by the ECtHR in this context.[189] As will be seen, Articles 2 and 8 are the ones which are broadly referred to in environmental cases. Furthermore, Article 13 'right to an effective remedy'[190] and Article 14 'prohibition of discrimination'[191] are also important for EJ as they require people not to be discriminated against and enable them access to remedies.

3.3 Has the ECtHR ever Interpreted the Environment-related cases as Discriminatory or Considered any Causes of Environmental Injustices in its Case Law?

3.3.1 *The Cases under the Right to Life (Article 2)*

Oneryildiz v Turkey[192] was an environment-related case concluded by the ECtHR. In this case, the applicant who was dwelling in a slum quarter in Umraniye/Istanbul with his twelve relatives[193] filed a complaint against Turkey alleging that the Turkish authorities were responsible for the

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[183] Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Human Rights Files no 17, Council of Europe Publishing 2000) 5
[184] Alan Boyle (n 93) 8,9
[185] The Constitution of the Republic of Turkey 1982 art 56; Ibid 9
[186] The Spanish Constitution 1978 art 45; Alan Boyle (n 93) 8
[187] The Constitution of the Russian Federation 1993 art 42; Alan Boyle (n 93) 9
[188] Daniel Moeckl (n 149) 628
[189] Ibid
[190] The European Convention 1950 (n 9) art 13
[191] Ibid art 14
[192] App no 48939/99 (ECtHR, 30 November 2004)
[193] Ibid para [9]

methane explosion which destroyed his home and which caused the deaths of his relatives.[194] The ECtHR held that Article 2, Article 1 of Protocol 1 and Article 13 had been violated by Turkey.[195]

Neither the applicant nor the ECtHR referred to the notion of environmental justice directly in this case. The ECtHR, however, emphasised the positive obligations of the state and referred to the right to life in Article 2 which considers the lives of 'everyone' in the country.[196] Referring to the importance of everyone's life could demonstrate the idea that justice is for all. Another significant point of the case was that the area of the applicant's home was already used as a landfill site before the slum dwellers moved there.[197] In other words, the slum dwellers knowingly built their homes around the landfill site. Starting from the question of 'which came first'[198] that was the moot point of EJ in the US, it is quite clear that the landfill in *Oneryildiz v Turkey* case came first and it was not intentionally established in the area where those people lived. However, despite the fact that there was no intended discrimination of the slum dwellers, the applicant claimed that they should have been informed by the officials about possible harmful effects of the landfill because the social and educational backgrounds of the slum dwellers did not enable them to predict such dangers.[199] The ECtHR once again underlined the importance of 'positive obligations' of the state by requiring the state to provide more adequate information.[200] In relation to this case, Hilson claims that specific information about the risk, i.e. the possible methane explosion, had to be given when the slum dwellers were making their choice around the landfill site.[201] The decision of the Court and Hilson's argument show that access to environmental information is one of the pillars of procedural environmental rights and also a fundamental requirement of EJ. Although there are no specific environmental rights in the ECHR, the ECtHR contributed to EJ in the above case through Article 2.

Another significant case with regard to environmental rights derived from the right to life is the case of *Budayeva and others v Russia*.[202] The applicants who were the inhabitants of a town named Tyrnauz[203] were the victims of a mudslide.[204] They claimed that Russia had breached Articles 2 and

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[194] Ibid para [2]
[195] Ibid para [165]
[196] Ibid para [71]
[197] Ibid para [10]
[198] See 1.1.3 above
[199] *Oneryildiz* (n 192) para [86]
[200] Ibid para [90]
[201] Christopher Hilson, 'Risk and the European Convention on Human Rights: Towards a New Approach' (2008-9) 11 Cambridge Yearbook of European Studies 353
[202] App no 15339/02, 21166/02, 20058/02, 11673/02, 15343/02 (ECtHR, 20 March 2008)
[203] Ibid para [13]
[204] Ibid para [14]

3 asserting that their relatives had died in the mudslide due to the lack of positive action by the state.[205] The ECtHR found a violation of the right to life.[206]

The case of *Budayeva and others v Russia* shows how the ECtHR can achieve EJ. There are several reasons why this case contributed to EJ. Firstly, the ECtHR considered the importance of access to information in this case as already developed in *Oneryildiz v Turkey* case. The applicants asserted that no warning in a way that everyone could understand was given.[207] Although there was a central warning system, as the Government claimed, the town in which the applicants lived was not covered by this system.[208] They further claimed that there were no signs or similar warnings in the area to inform them.[209] Secondly, it would seem that the Government remained knowingly silent about the disaster. The Mountain Institute and the Head of the Elbrus District Administration had warned the Minister and the Prime Minister of the KBR a few times about the forthcoming disaster.[210] Consequently, the ECtHR held that the Government should have taken appropriate measures to inform the public by way of warnings before the disasters occurred and that the measures taken by the government had to cover inherent risks as well.[211] As can be seen, the approach of the Government towards the protection of the local people from an environment-related problem was not fair and the burdens of environmental problems were imposed on the people in Tyrnauz.

3.3.2 *The Cases under the Right to Respect for Private and Family Life (Article 8)*

Article 8 of the ECHR, together with Article 2, has also been invoked to protect environmental rights and the quality of the environment.[212] However, because Article 8 does not include any specific references to the environment, it does not cover any environmental case and issue.[213] Article 8 can only be invoked if environmental factors directly and significantly interfere with 'private life', 'family life' and 'home'.[214] The ECtHR firstly takes into account a 'causal link' between an environmental factor concerned and its negative effect on persons, and then examines

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[205] Ibid para [26]
[206] Ibid para [205]
[207] Ibid para [29], [63], [72], [81]
[208] Ibid para [125]
[209] Ibid para [126]
[210] Ibid [148]
[211] Ibid [131], [132], [152]
[212] Margaret DeMerieux (n 173) 561
[213] *Manuel on Human Rights and the Environment* (2nd edn, Council of Europe Publishing 2012) 45
[214] Ibid 45

whether a 'certain threshold of harm' has been met.[215] The cases decided under Article 8 generally concern noise pollution, 'airborne pollutants' and 'hazardous waste'.[216]

The cases concerning hazardous waste and industrial pollution will first be assessed because their content is similar to EJ cases. For instance, the case of *López Ostra v Spain*[217] was the first case in which the ECtHR found a violation of Article 8 in the context of the environment.[218] This case was brought by an applicant living in the town (Lorca) against Spain on the basis that the officials failed to prevent the operation of an illegal waste treatment plant which was built next to the applicant's home.[219] In spite of the experts' reports proving the risks of the plant [220] and the margin of appreciation given to the state, Spain failed to 'strike a fair balance' between the applicant's rights and the interests of the town.[221] The fact that the victims were local people enables this case to be assessed in the context of EJ. As mentioned above, the Spanish Constitution[222] contains a provision to protect the environment for the development of people. Nevertheless, the state gave priority to economic interests and did not strike a fair balance between these interests and the welfare of local people[223] which is important for EJ.

Similarly, the case of *Guerra and others v Italy*[224] was a similar environmental case which could be evaluated in terms of EJ. As in *López Ostra,* the applicants were residents of a town which was about one kilometre away from a chemical factory.[225] The factory was similarly confirmed to emit detrimental gases which posed a 'high risk' to the health of the local people.[226] There are two issues that should be examined here in the context of EJ. First, even though there was a provision as to the access to environmental information in domestic law and in the CoE Resolutions,[227] the officials failed to provide adequate information. Second, despite an explosion in 1976 affecting 150 people,[228] local people had been subjected to unhealthy living conditions until 1994 when the

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[215] Ibid 45, 46
[216] Grant Wilson, 'Human Rights and the Environment: The Case Law of the European Court of Human Rights in Environmental Cases' (Justice and Environment, 2011) <http://www.justiceandenvironment.org/_files/file/2011%20ECHR.pdf> accessed 24 August 2014
[217] App no 16798/90 (ECtHR, 09 December 1994)
[218] Margaret DeMerieux (n 173) 529
[219] *López Ostra v Spain* para [7]
[220] Ibid para [11], [18]
[221] Ibid para [58]
[222] See 3.2 above
[223] Ibid
[224] App no 116/1996/735/932 (ECtHR, 19 February 1998)
[225] Ibid para [12]
[226] Ibid para [13]
[227] Ibid para [29], [34]
[228] Ibid para [57]

factory was closed.[229] Therefore, the ECtHR decided that the state had failed to comply with its positive obligation to preserve local peoples' families, private life and homes under Article 8.[230]

Another case, that of *Taskin v Turkey*[231] is a clear example of how a state ignored the interests of local people in the light of general economic interest, and how the ECtHR dealt with this. The applicants were villagers who were opposed to permission which was given for the operation of a gold mine using cyanide in Bergama, Izmir.[232] The ECtHR concluded that there was a violation of Article 8.[233] However, the legal process before the ECtHR was not straightforward. The permission required for the operation of the gold mine was first granted in 1989[234] yet it had been cancelled by the Supreme Administrative Court in 1997.[235] However, the necessary permissions were granted for the operation of the mine with the help of the Prime Minister and the Ministry of Environment based on a report of the TUBITAK (specialized agency) in 2000.[236] The efforts of the Prime Minister to enable the mine to operate after the decision of the Supreme Court had been regarded as unlawful and defined as a resistance against law by Azrak.[237] The decision of the Turkish Council of Ministers in allowing the operation of the gold mine was not made public in 2002.[238] This decision conflicted with the importance of a right of access to information which is a requirement for EJ. This case is important for EJ because the ECtHR takes into account the Aarhus Convention and Article 10 of the Rio Declaration.[239] The Aarhus Convention refers to the Rio Declaration when requiring access to information.[240] The ECtHR has assessed the Supreme Court's decision emphasising that geographical proximity of the mine to the area where people lived posed a threat for peoples' rights,[241] and concluded that the applicants' right to respect for private and family life in Article 8 had been violated.[242]

Despite the decisions of the ECtHR and the domestic courts, the gold mine had been actively operated until 2009.[243] The people of Bergama have played a vital role in winning victories in the ECtHR and in the domestic level against the gold mine as stressed by Coban.[244] The resistance of the local people in *Taskin v Turkey* who tried to prevent the unequal distribution of environmental

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[229] Ibid para [18]
[230] Ibid para [60]
[231] App no 46117/99 (ECtHR, 10 November 2004)
[232] Ibid para [11], [17]
[233] Ibid para [126]
[234] *Taskin* para [14]
[235] Ibid [26]
[236] Ibid [45], [46]
[237] Mehmet Horus, '20. Yilinda Bergama Davasi' [2009] Elektrik Muhendisligi 80, 81
[238] Ibid para [75]
[239] Ibid para [98], [99]
[240] Ibid
[241] Ibid para [112]
[242] Ibid para [126]
[243] Mehmet Horus (n 237) 83
[244] Aykut Coban, 'Community-based Ecological Resistance: The Bergama Movement in Turkey' (2004) 13 Environmental Politics 438

burdens resembles an early US case, *CANT v LES*,[245] which was decided in favour of EJ defenders. Just as with Warren County,[246] Bergama has become a symbol of resistance.[247]

Finally, the ECtHR decided the cases of *Powell and Rayner v the UK*[248] and *Hatton and others v the UK*[249] under Article 8. Both of the applications were filed by applicants that resided near Heathrow Airport and both complained about noise pollution from flights above a certain acceptable level of noise pollution.[250] For EJ, it is important to analyse whether the airport was deliberately built in the area where the applicants lived and what made the cases different from the cases discussed above. The airport was built in 1946 and expanded with the growing demand for air transport.[251] Night flights, which had been main cause of noise pollution, had been reduced at certain times in 1988, 1993 and 1998.[252] Furthermore, in contrast to installations and factories which damage people who are within the context of EJ, the airport is important not only for the UK's economy but also for the employment of workers.[253] Therefore, the ECtHR did not find a violation of Article 8 in these two cases.[254] The Court took into account the margin of appreciation of the state in striking a fair balance between interests of individuals and community.[255] More recently, in a similar case, *Bor v Hungary*,[256] the ECtHR found in favour of the applicant.[257] The ECtHR in this case emphasised the inadequacy of the domestic law and stressed the importance of fair balance once again.[258] When comparing the cases of *Bor v. Hungary* and the above cases filed against Heathrow Airport, it can be seen that the size of the enterprise is relevant in striking a fair balance. The ECtHR underlined the significance of measures which the domestic courts had to take for the prevention of 'disproportionate individual burdens' in *Bor v Hungary*[259] while it had not emphasised individual burden and held that a fair balance between competing interests had been struck in the *Heathrow* Airport cases.

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[245] *CANT* (n 62)
[246] See 1.2.1 above
[247] Mehmet Horus (n 237) 83
[248] App no 9310/81 (ECtHR, 21 February 1990)
[249] App no 36022/97 (ECtHR, 8 July 2003)
[250] *Powell and Rayner v the UK* para [8]; *Hatton and others v the UK* para [11]
[251] *Powell and Rayner v the UK* para [11],
[252] *Hatton and others v the UK* para [29]
[253] *Powell and Rayner v the UK* para [12]
[254] Ibid para [46]; *Hatton and others v the UK* para [130]
[255] *Hatton and others v the UK* para [98], [100]
[256] App no 50474/08 (ECtHR, 18 June 2013)
[257] Ibid para [28]
[258] Ibid para [24], [26], [27]
[259] Ibid para [27]

3.3.3 *Other Relevant Rights for EJ*

Apart from Articles 2 and 8, the applicants in environmental cases have also alleged the violation of other fundamental rights under the ECHR. For example, the right to a fair trial[260] is one of the civil rights which can be invoked in environmental cases and in indigenous complaints, which will be discussed in the next section.[261] The right to a fair trial is important in the determination of 'civil rights' and liabilities, and 'criminal charges' against persons.[262] This right under Article 6 can also be invoked in environmental cases in which people are subjected to environmental burdens.

More importantly, Article 10 of the ECHR[263] is also a vital right which can be invoked in environmental cases.[264] Nevertheless, Article 10 does not promote 'access to information'[265] as fully as the Aarhus Convention. *Guerra and others v Italy* was an example in which the applicants alleged the violation of Article 10.[266] However, 'freedom to receive information' does not require positive obligations, and therefore Article 10 was not taken into consideration in this case.[267] Article 13 (Right to an Effective Remedy)[268] is another significant right in terms of 'access to justice'[269] and naturally for those who are seeking EJ. Furthermore, Article 1 of Protocol 1 of the ECHR which provides 'protection of property'[270] can be invoked as seen in the case of *Oneryildiz v Turkey*.[271]

In sum, the cases regarding the right to life, including *Oneryildiz v Turkey*[272] and *Budayeva and others v Russia*[273] showed that even though the ECtHR had not mentioned an obvious 'institutional discrimination' or a similar expression, or environmental injustices explicitly, the party states had shown negligence in the protection of people's lives. The failures of the states have therefore caused the unequal distribution of environmental burdens. In contrast, the ECtHR has referred to the importance of a 'fair balance' between the interests of individuals and community and the margin of appreciation in the event that comprehensive economic concerns are in question as seen

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[260] The European Convention 1950 (n 9) art 6
[261] Timo Koivurova, 'Jurisprodence of the European Court of Human Rights Regarding Indigenous Peoples: Reteospect and Prospect' (2011) 18 International Journal on Minority and Group Rights 1, 6
[262] The European Convention 1950 (n 9) art 6
[263] Ibid Art 10
[264] Ann Sherlock and Francoise (n 167) 20
[265] Ibid
[266] *Guerra and others* (n 223) para [47]
[267] Ibid para [53], [54]
[268] The European Convention 1950 (n 9) art 13
[269] Martin Kuijer, 'Effective Remedies As A Fundamental Right' (Seminar on human rights and access to justice in the EU, Barcelona, April 2014); See also *Oneryildiz* (n 192)
[270] The European Convention 1950 (n 9) art1 of Protocol 1
[271] *Oneryildiz* (n 192) para [119]
[272] Ibid
[273] *Budeyeva* (n 202)

in the *Powell and Rayner v the UK*[274] and the *Hatton and others v the UK.*[275] However, the result of *Bor v Hungary* contrasts with the result of *Heathrow* and demonstrates how the economic size of an organisation can impact on the determination of 'fair balance'.

3.4 Has the ECtHR Taken into Consideration 'Indigenous People' and the 'Have-nots' When Environmental Cases Are in Question?

Racial groups, indigenous people, minorities and the have-nots as target groups of EJ are the ones which might easily be more affected by environmental degradations than economically developed groups as mentioned above.[276] There are legal differences between the definitions of the above terms describing specific groups of people.[277] However, what is important here is to show their general vulnerability within the context of EJ and the case law of the ECtHR.

At an international level, Article 27 of the International Covenant on Civil and Political Rights (ICCPR),[278] the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities[279] and the ILO Indigenous and Tribal Peoples Convention[280] protect minorities and indigenous people. At a regional level, the CoE has two important documents in this regard: the European Charter for Regional or Minority Languages[281] and The Framework Convention for the Protection of National Minorities.[282] Most importantly, Protocol 12 to the ECHR (the Protection of Human Rights and Fundamental Freedoms)[283] can be accepted as an important development in this respect.[284] Although Article 14 of the ECHR (Prohibition of Discrimination)[285] seems effective in protecting minorities, it guarantees the non-discrimination in the enjoyments of the rights under the ECHR, and therefore it is not an 'independent right' as pointed out by Koivurova.[286] Nonetheless, Article 8 of the ECHR plays an important role for the preservation of 'minorities' life style' as concluded by the European Commission.[287]

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[274] *Powell* (n 248)
[275] *Hatton* (n 249)
[276] See 1.1.3 above
[277] Lucia Fresa, 'A New Interpretation of the Term 'Indigenous People': What Are the Legal Consequences of Being Recognised as 'Minorities' Instead of as 'Indigenous People' For the Indigenous People of the World? (Centro Italiano Studi Per La Pace, 1999-2000)
[278] International Covenant on Civil and Political Rights Art 27
[279] The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities 1992
[280] The Indigenous and Tribal Peoples Convention 1989
[281] The European Charter for Regional or Minority Languages 1992
[282] The Framework Convention for the Protection of National Minorities 1995
[283] The European Convention 1950 (n 9) Protocol 12
[284] Timo Koivurova (n 261) 29
[285] The European Convention 1950 (n 9) art 14
[286] Timo Koivurova (n 261) 29
[287] Ibid 25

However, the ECtHR has not decided any cases which can be accepted as 'landmark' cases for the benefit of indigenous people.[288] The case of *G. and E. v. Norway*,[289] for example, showed that traditional lifestyles of indigenous people can be protected under Article 8. However, the European Commission held that some part of the land in which indigenous people lived could be sacrificed in the name of the economic wellbeing of the country.[290] Similarly, *Noack and others v. Germany*[291] also supports the above argument that the protection of indigenous people under the ECHR is not adequate. The applicant alleged that the relocation of their village because of the creation of a lignite mine would damage their community, culture and basic assets.[292] They made an application under Articles 8 and 14, Article 1 of Protocol 1, Article 2 of Protocol 4 and Article 9.[293] However, the Court decided that the new area chosen for the people was only 20 kilometres away and this relocation would not have a major effect on their lifestyles.[294] It declared that the application was inadmissible.[295] As can be seen in these two cases, the ECtHR and the Commission make decisions in favour of the economic well-being of the party states in spite of their negative environmental damage as indicated by Shelton.[296]

As has been seen, environmental rights recognised in the African and Inter-American system has contributed to embracing the 'holistic nature of the land and environmental rights' of the minority groups.[297] The IACtHR in *Maya Indigenous*[298] emphasised the importance of the aforesaid ILO Convention although the state concerned (Belize) was not party to the ILO Convention.[299] Because the protection of indigenous people is one of EJ's concerns, the two regional systems, the Inter-American and the African systems, are effective in this respect. However, the absence of an environmental right in the ECHR leads such a holistic approach not to be adopted for the preservation of land-environmental rights of indigenous people. *G. and E. v. Norway* and *Noack and others v. Germany* also demonstrate the inadequacy of the ECtHR in the context of this holistic approach.

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[288] Timo Koivurova (n 261) 3
[289] App no 9278/81 and 9415/81 (ECtHR, 3 October 1983)
[290] Dinah Shelton, 'Human Rights and the Environment: Jurisprudence of Human Rights Bodies' (Joint UNEP-OHCHR Expert Seminar, Geneva, January 2002)
[291] App no 46346/99 (ECtHR, 25 May 2000)
[292] Ibid
[293] Ibid
[294] Ibid
[295] Ibid
[296] Dinah Shelton (n 290)
[297] Karen Hulme, 'International Environmental Law and Human Rights' in Scott Sheeran and Sir N Rodley (eds), *Routledge Handbook of International Human Rights Law* (Routledge 2013) 292
[298] *Maya* (n 143)
[299] 'Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System' (OAS, 2010) <http://www.oas.org/en/iachr/indigenous/docs/pdf/AncestralLands.pdf> accessed 31 August 2014

3.5 How Can Environmental Justice Be Integrated into the Case Law?

The adoption of a new protocol to the ECHR will substantively help in the protection of the environment and for those who are exposed to the side effects of environmental degradation mainly based on human activities. The question of adopting a new protocol to the ECHR as to environmental rights has received extensive treatment in the scholarly literature. Nevertheless, it seems that such a protocol will not be adopted. It is, therefore, important to note that the existing fundamental rights under the ECHR are the only arguments which can be used to protect the environment and its inhabitants. Indeed, these existing rights and freedoms under the ECHR overlap with the main concerns of EJ, such as 'public health' and 'dwelling'.[300] As discussed above, Articles 2 and 8 are the rights under the ECHR which have been mostly invoked in the environmental cases.[301]

Accordingly, the fact that the 'ECHR is a living instrument', its interpretation in accordance with the 'present-day conditions'[302] shows the effectiveness and flexibility of the ECHR. The usage of the Aarhus Convention by the ECtHR in its case law is a clear example that the ECHR is a living instrument. Protocol 12 to the ECHR is also an important step to counter potential discrimination of minorities and other vulnerable people. However, the doctrine of the margin of appreciation and attempts to strike a fair balance between interests of the community and individuals may sometimes cause disruption to the maintenance of EJ as seen in the cases of *Hatton*, *G. and E. v. Norway* and *Noack and others v. Germany*.

Strengthening the protection of indigenous people and others who have been negatively influenced by environmental damage is vital.[303] According to Boyle,[304] existing human rights law should consider the protection of the environment and the maintenance of sustainable development, whose importance for EJ was stated above.[305] In order to make the ECHR/ECtHR more effective in the context of EJ, indigenous people and the environment together should be effectively taken into account.

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[300] Robert D Bullard and others (n 52) 77
[301] See 3.3 above
[302] George Letsas, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy' (2012) University College London, 2 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2021836> accessed 29 August 2014
[303] Alan Boyle (n 109) 625
[304] Ibid 625; See also *Taskin* (n 231)
[305] See 1.5 above

CONCLUSION

The purpose of EJ is to provide justice in environment-related circumstances for people, mostly disadvantaged groups. This is in contrast to traditional environmentalism which only focuses on the protection of the environment. It is, therefore, possible that the protection of those vulnerable people versus environmental damages can be achieved in the field of human rights both in a universal and regional context. Environmental rights as well as human rights have particularly contributed to the above achievement. The legal developments which were commenced with the Stockholm Conference regarding the recognition of environmental rights have made a progress over the last forty years. Regional human rights regimes such as the Inter-American and the African systems have also shown their willingness by recognising environmental rights as human rights in their treaties. In contrast to the two regional systems, the ECHR which is important for the European human rights system does not involve any provision to secure environmental rights in a substantive manner. The ECtHR has, however, interpreted the existing provisions including the 'right to life' and the 'right to respect for private and family life' in the name of the conservation of the environment and its inhabitants.

This dissertation has assessed the effectiveness of the ECHR and the case law of the ECtHR within the context of EJ. It is here argued that the case law of the Court has, to a certain extent, adopted a satisfactory approach towards the protection of people from environmental harm. However, it has not been a hundred per cent effective in terms of EJ. Indigenous people who are one of the main concerns of EJ have not been able to fairly reap the benefits of the protection of the Court.

To sum up, environmental right as a substantive right will possibly not be adopted by the ECHR in the future. Therefore, the existing rights and freedoms will remain sole sources in terms of the protection of environmental rights of people. The ECtHR refers to current legal developments when deciding cases, and thus it is known as a 'living instrument'. Nonetheless, the margin of appreciation left to party states may cause that the cases to be decided against the people who have been exposed to environmental burdens. Indigenous people and similar groups can be given as examples in this respect. The cases regarding the environment and its vulnerable inhabitants in the jurisdiction of the ECtHR do not, of course, closely resemble EJ cases in the US. The people who suffered from environmental injustices in the US were generally black people, and therefore race is accepted as an important factor for environmental inequalities. However, the demographic structure in Europe is not the same as the US. Thus, race has not been a characteristic feature of environmental injustices in the Europe. Economically disadvantaged people and minority groups can naturally be assessed in terms of EJ in the case law of the ECtHR. The promotion of EJ in the case law of the ECtHR does inevitably require the protection of those people.

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