

Questions of a Comprehensive Protection of the Right to a Healthy Environment in Strasbourg

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Intergenerational equity expresses the responsibility of every generation to give over the Earth to future generations in a condition not worse than in which it was received from previous generations. It forms the basis of the well-known term ‘sustainable development’ which plays a major role in international environmental protection policy. Intergenerational equity is connected with the right to a healthy environment too, as this right intends to protect not only the present generation but future generation as well. Yet how does the European Court of Human Rights take into account the interests of future generations?

Keywords: human right to a healthy environment, intergenerational equity, intragenerational equity, sustainable development, environmental protection, human rights protection, ECtHR case law

1. Introduction

The European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms, hereinafter Convention or ECHR) is the most significant cornerstone of human rights protection in Europe. Despite the ongoing debate on the interdependent and indivisible relationship between human rights and the environment, the right to a healthy environment is not included explicitly among the human rights protected by the Convention. However, based on the living instrument character of the Convention, the European Court of Human Rights (hereinafter Strasbourg Court or ECtHR) derived this right from other provisions of the Convention. Is this kind of indirect regulation of the right to a healthy environment sufficient in a Convention which represents the basis of the European human rights protection? The first step towards answering this question is to examine the right to a healthy environment through all its aspects. The present paper argues that one significant aspect of the right to a healthy environment is intergenerational equity. Intergenerational equity does not only form the basis of the term sustainable development, but it is also strongly related with the right to a healthy environment, as this right intends to protect the present generation and the future generation as well. Yet how does the Strasbourg Court assure the right to a healthy environment? Does it consider – if possible at all – the interests of the future generation regarding the right to a healthy environment?

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2. Main Terms

In order to understand the connections between the interests of the future generation and the right to a healthy environment, a short clarification of the main terms such as environment, sustainable development, inter- and intragenerational equity and the right to a healthy environment is helpful.

2.1 Environment

There is no widely accepted definition of the term environment in international law. However, its content was determined *inter alia* by the Council of Europe. According to the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, signed 1993 in Lugano, “environment” includes natural resources such as air, water, soil, fauna and flora and the interaction between the same factors; property which forms part of the cultural heritage; and the characteristic aspects of the landscape.² As stated by the International Court of Justice “the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.”³ Therefore, not only the present generation but also the unborn – *i.e.* future – generation is related to the environment. Environmental pollution affects our present living space and could endanger that of the future generation as well. Hence, future generation is interested in nowadays environmental protection. Yet what is the connection between environmental protection and sustainable development and how is the future generation concerned thereby? The answers to these questions may be found by taking a closer look at relevant UN declarations.

At the 1972 United Nations Conference on the Human Environment, which was held in Stockholm and symbolizes the beginning of international environmental law, the so-called Stockholm Declaration was adopted. The second paragraph of this legally non-binding declaration states that “protection and improvement of the human environment affect the well-being of peoples and economic development throughout the world.”⁴ The 11th Principle of the declaration articulates that “the environmental policies of all States should enhance and not adversely affect the present or future development potential of developing countries, nor should they hamper the attainment of better living conditions for all.”⁵ The connection between environment and development was more strongly articulated in the 4th Principle of the Rio Declaration, which was adopted in 1992 at the United Nations Conference on Environment and Development in Rio de Janeiro. It states that “in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.”⁶

In line with the above, the conclusion could be the following: Protection of the environment and development are interdependent and indivisible – one cannot be effectively achieved without the other. However, this is only true if the development is sustainable.

² Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment Art. 2 (10).

³ Legality of the Threat or Use of Nuclear Weapons, Advisory opinion of 8 July 1996, ICJ Reports pp.19, paragraph 29.

⁴ Paragraph 2, Declaration of the United Nations Conference on the Human Environment.

⁵ Principle 11, Declaration of the United Nations Conference on the Human Environment.

⁶ Principle 4, Rio Declaration on Environment and Development.

2.2 Sustainable Development

The concept of sustainable development was developed by the international community in 1987 as an answer to increasingly prominent environmental issues. Sustainable development has no clear definition despite the fact that it dominates international environmental policy since the end of the 1980s.⁷ Two sources of international law form the basis of the debate on sustainable development: On the one hand, the Report of the World Commission on Environment and Development from 1987 (commonly known as Our Common Future Report or as Brundtland Report) and on the other hand, the 1992 Rio Declaration on Environment and Development. The Brundtland Report states that “sustainable development is a development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”⁸ As stated by Ludwig Krämer, the Brundtland-formula is hardly helpful as it defines a term – development with a special quality (sustainability) – with the term itself.⁹ So far, the content of sustainable development is not sufficiently specified and due to its inconsistent use the term has been significantly diluted. What is clear is that the concept of sustainable development is based on complementary and equal pillars of economic, social and environmental aspects as it was first conceived in the 2002 Johannesburg Declaration on Sustainable Development.¹⁰ However, there is a lack of consistency between the three components of sustainability, since the economic interests often override environmental considerations in the political decision making. The concept of sustainable development as it appears in the Rio Declaration is a typically anthropocentric term, because human beings are at the centre of concerns for sustainable development.¹¹ As sustainable development is indivisible from intergenerational equity,¹² not only the present human beings but the past and the future generation as well are in the focus of this concept.¹³

2.3 Intergenerational and Intragenerational Equity

Intergenerational equity is a much discussed topic of environmental law. It expresses the responsibility of the prevailing present generation to give over the Earth to the following – future – generation in the same condition as it was received from the past generation.¹⁴ In legal terms, the present generation is entitled to environmental rights ensured by the past generation and has an environmental obligation to provide the future generation with the same rights. Also described as “fairness to future generations”, intergenerational equity means in other words that the human species holds the environment in common with all members of our species: past, present and the future generations.¹⁵ Thus, “as members of the

⁷ Alexandre Kiss & Dinah Shelton, *Guide to International Environmental Law*, Martinus Nijhoff Publishers, Boston 2007, p. 97.

⁸ Chapter 2 paragraph 1, Report of the World Commission on Environment and Development: Our Common Future.

⁹ Ludwig Krämer, on the 25th April at the conference “*Model Institutions for a Sustainable Future*” in Budapest in 2014.

¹⁰ Paragraph 5, Johannesburg Declaration on Sustainable Development.

¹¹ Principle 1, Rio Declaration on Environment and Development.

¹² See chapter no. 2.1.

¹³ Principle 1, Rio Declaration on Environment and Development.

¹⁴ Experts like Edit Brown Weiss use the terms “past generations”, “present generations” and “future generations” in plural. In the present paper these terms are used in singular as there is always only one prevailing present generation who has rights and duties regarding the past generation and the future generation.

¹⁵ Weiss, *Our Rights and Obligations to Future Generations for the Environment* in Steve Vanderheiden (Ed.) *Environmental Rights* UK 2012, pp. 384-386.

present generation, we hold the earth in trust for future generations. At the same time we are beneficiaries entitled to use and benefit from it.”¹⁶

If the Brundtland definition of sustainable development¹⁷ is compared with the one of intergenerational equity, it becomes clear that a development can only be sustainable if intergenerational equity is provided. Thus, intergenerational equity is part of sustainable development; more precisely, it is the foundation for sustainable development.

The term intergenerational equity should not be confused with *intragenerational equity* which exists between people of the same generation as there are obligations and rights between the members of that generation. However, “meeting the needs of the present generation without compromising the ability of future generations to meet their own needs”¹⁸ is only possible if the equity between the members of the present generation works: People living today cannot be expected to fulfil intergenerational equity if they are not able to meet their own basic needs.¹⁹ Thus, intergenerational equity cannot be achieved without intragenerational equity.²⁰

In summary, it can be stated that the present generation as a collective has environmental rights and obligations based on intergenerational equity. At the same time, the members of the present generation as individuals or collective entities have environmental rights and obligations based on intragenerational equity. Subsequently, it is examined what kind of environmental rights and obligations are concerned by inter- and intragenerational equity.

2.4 The Right to a Healthy Environment

2.4.1 Overview

The right to a healthy environment has two dimensions: a collective and an individual one. On the one hand, the present generation as a *collective* is provided with the right to an environment with a conserved quality by the past generation. On the one hand, the members of the present generation as *individuals* are entitled to an environment with a certain quality (substantive part of the right) and to access to information, to participate in decision making, and to access to justice in environmental matters (three procedural rights).

2.4.2 The Collective Right

Obligated by inter- and intragenerational equity, the present generation shall conserve the diversity of the natural and cultural resource base, maintain the quality of the environment and provide the future generation with equitable access to this legacy.²¹ It has a positive obligation to preserve the quality of the environment and a negative obligation not to destroy or pollute the environment for the following

¹⁶ Weiss 2012, p. 385.

¹⁷ See chapter no. 2.2.

¹⁸ Chapter 2 paragraph 1, Report of the World Commission on Environment and Development: Our Common Future.

¹⁹ To define the „basic needs of a present generation” is decisive as well.

²⁰ E.g. paragraph 8 Budapest Memorandum, which was signed by the participants of the Conference of Model Institutions for a Sustainable Future held in Budapest, 24 - 26 April 2014. Signed *inter alia* by Judge C.G. Weeramantry, Dinah Shelton, Edith Brown Weiss and Ludwig Krämer.

²¹ Weiss 2012, pp. 388-389.

generation. At the same time the present generation has the right to an environment with a conserved quality, provided by the past generation (substantive part of the right to a healthy environment). Subjects of this environmental right are the generations, more precisely the collective entities of a given generation *e.g.* peoples or group of individuals. Therefore the right has a collective character. Since this right focusses on human beings, the questions arise if it is a human right and whether a collective environmental right can be a human right at all?

In order to answer this question a closer look at the relationship between human rights and the quality of environment is needed. This link is widely accepted. The protection of human rights is based on the respect for human life, and the quality of human life rests upon maintaining a liveable planet. Both environmental protection and human rights protection aim to ensure better life conditions. Environmental pollution could endanger or infringe human rights such as the right to life. Thus, maintaining a high quality of environment is inseparable from human rights protection. The essence of this viewpoint was articulated by Christopher Gregory Weeramantry, judge and former vice president of the International Court of Justice. In his often quoted separate opinion in the judgment concerning the Gabčíkovo-Nagymaros project²² he wrote that the protection of the environment as the right to development is a „vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights [...]”²³

As a consequence, the existence of a safe and healthy environment constitutes a precondition of several human rights (*inter alia* the fundamental rights to life, to health, to private life and family and to property).²⁴ Thus, an enforceable collective right to a healthy environment would contribute not only to a better environmental protection but also to a higher level of protection and to a more efficient enforcement of human rights. Furthermore, it is not unusual for the human rights concept to have a collective or a group as the subject of a right, especially in the given case: The right to a healthy environment just as the right to development or the right to peace are widely accepted as third-generational human rights, which are also called ‘solidarity rights’.²⁵ These rights are usually associated not only with individuals but with a group of people or collective entities.²⁶ On these grounds, the collective right to a healthy environment in my opinion constitutes a human right.²⁷

²² Hungary suspended the completion of the 1977 Budapest Treaty on the Gabčíkovo-Nagymaros barrage system alleging that it entailed grave risks to the environment and the water supply in 1989. Slovakia denied these allegations and insisted that Hungary carry out its treaty obligations. Slovakia put into operation an alternative project only on Slovak territory, whose operation had huge effects on Hungary's access to the water of the Danube. Hungary and Slovakia notified jointly to the International Court of Justice regarding the implementation and the termination of the mentioned treaty in 1993. The International Court of Justice found that both Hungary and Slovakia had breached their legal obligations. See the Judgement of the ICJ at <http://www.icj-cij.org/docket/files/92/7375.pdf> (10. March 2015).

²³ Part A (b) “*Environmental Protection as a Principle of International Law*” in Separate opinion of Christopher Gregory Weeramantry in *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary/Slovakia).

²⁴ See in more details Donald K. Anton & Dinah L. Shelton, *Environmental Protection and Human Rights*, Cambridge University Press, 2011.

²⁵ According to Karel Vasak, who used this term first in 1977, the human rights could be divided into three groups: civil and political rights as first generational human rights; economic, social and cultural rights as second generational human rights; and solidarity or third-generational human rights.

²⁶ *E.g.* Karel Vasak, United Nations Educational, Scientific and Cultural Organisation Courier, 1977; Stephen Turner, *A substantive environmental right: an examination of legal obligations of decision makers towards the environment*, Kluwer Law International, The Netherlands 2009, p. 16.

²⁷ This collective right can also have a procedural side. To entitle collectives with procedural environmental rights is not new in the international law. The Aarhus Convention for example sets out the right to access to “environmental information” of non-governmental organizations.

2.4.3 The Individual Right

The 1st Principle of the Stockholm Declaration states that „man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.” This definition highlights that the right to a healthy environment intends to protect not only the present but the future generation as well. However, not all environmental issues concern the interests of the future generation and raise intergenerational questions.²⁸ Furthermore, not only collectives of a generation, but also individuals are entitled to environmental rights as environmental issues can affect individual human rights as well.

A look at various forms of international regulation of the right to a healthy environment shows that individuals as subjects of this human right are entitled to an environment with a certain quality. In addition to this substantive aspect, the right to a healthy environment includes three procedural rights: access to information, access to justice and participation in decision making in environmental matters.²⁹ The three procedural aspects of the right to a healthy environment were explicitly formulated *inter alia* in the 10th Principle of the Rio Declaration.³⁰ They were expanded in the 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (commonly known as Aarhus Convention), which entered into force in 2001. This convention is the most far-reaching international treaty with minimum standards for the procedural aspects of the right to a healthy environment. It is a milestone regarding the regulation not only because of the expansion of the three procedural rights but also because of its enforceable character.³¹

3. Right to a Healthy Environment in the ECHR

The European Convention on Human Rights is one of the most influential international treaties established under the aegis of the Council of Europe. It entered into force in 1953 and became the most significant cornerstone of the human rights protection in Europe. The human rights ensured in the Convention are guaranteed by the Strasbourg-based European Court of Human Rights: private persons are entitled to start a procedure against a signatory state of the Convention before this court regarding human rights infringements. The importance of the Convention is also shown by the fact that only those states can become members of the Council of Europe which have ratified the Convention and accepted the right for individual application and the jurisdiction of the Strasbourg Court.

²⁸ *E.g.* noise pollution does not infringe the rights of the future generation to a healthy environment.

²⁹ *E.g.* Art. 11 European Social Charter (1961); Principle 1 Stockholm Declaration (1972); Principle 23 World Charter for Nature (1981); Art. 24 African Charter on Human and Peoples` Rights (1981); I (1) Report of the World Commission on Environment and Development: Our Common Future (1987); Art.11 (1) Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988); Hague Declaration on the Environment (1989); I Art. 1-2 European Charter on Environment and Health (1989); Reports on Human Rights and Environment of Fatma Zohra Ksentini (1991-1994); UN Resolution A/RES/45/94 (1990); Principle 10 Rio Declaration (1992); Draft Declaration of Principles on Human Rights and the Environment (1994); Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (1998); UN Secretary-General report on Relationship Between Human Rights and the Environment (2005); Art. 29 United Nations Declaration on the Rights of Indigenous Peoples (2007).

³⁰ “Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”

³¹ An eight membered „Compliance Committee” checks the compliance of the Aarhus Convention, whose members are elected individually and represent no country or organisation.

At the time when the Convention was created, the states have not yet faced significant environmental problems which would have made the regulation of such a fundamental right necessary in the framework of the Convention. Therefore, the right to a healthy environment is not included explicitly among the human rights protected by the Convention. The idea to amend the Convention regarding the right to a healthy environment only arose in 1999.

Even though the ECHR does not provide an explicit right to a healthy environment, the Court dealt with many cases on “social” issues such as the environment. Obviously, the human rights declared in the Convention serve as a framework for the ECtHR case law. The Strasbourg Court, however, interprets the text of the Convention in the light of present-day circumstances. The interpretation of the Convention as a “living instrument” guarantees the effective and not illusory protection of human rights and fundamental freedoms.³² Thanks to this dynamic reading of the Convention, the right to a healthy environment just like other social rights was derived from the Conventions provisions.³³ As judge Pinto de Albuquerque stressed, social rights as any other human rights have a minimum core which can and should be determined and enforced by the courts.³⁴ What is the minimum core of the right to a healthy environment? Is intergenerational equity a part of it?

As discussed earlier³⁵ the individual subjects of the right to a healthy environment are entitled to an environment with a certain quality and to three procedural rights: access to information, access to justice and participation in decision making in environmental matters. According the established jurisprudence of the ECtHR the individual right to a healthy environment was directly derived *inter alia* from the right to life (article 2 ECHR)³⁶ and the right to respect for private and family life (article 8 ECHR).³⁷ *E.g.* in the

³² The living instrument character of the Convention was first expressed by the Court in 1978 in the case *Tyrer v. United Kingdom*: “The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.” Paragraph 31, *Tyrer v. The United Kingdom* (App. no. 5856/72) ECtHR (1978).

³³ *E.g.* *Fredin v. Sweden* (App. no. 18928/91) ECtHR (1994); *López Ostra v. Spain* (App. no. 16798/90) ECtHR (1994); *Balmer-Schafroth and Others v. Switzerland* (App. no. 22110/93) ECtHR (1997); *Guerrya and others v. Italy* (App. no. 14967/89) ECtHR (1998); *L.C.B. v. United Kingdom* (App. no. 23413/94) ECtHR (1998); *Hertel v. Switzerland* (App. no. 25181/94) ECtHR (1998); *Chassagnou and others v. France* (App. nos. 25088/94, 28331/95 and 28443/95) ECtHR (1999); *McGinley and Egan v. United Kingdom* (App. nos. 21825/93 and 23414/94) ECtHR (2000); *Athanassoglou and others v. Switzerland* (App. no. 27644/95) ECtHR (2000); *Chapman v. United Kingdom* (App. no. 27238/95) ECtHR (2001); *Hatton and Others v. The United Kingdom* (App. no. 36022/97) ECtHR (2003); *Öneryildiz v. Turkey* (App. no. 48939/99) ECtHR (2004); *Fadeyeva v. Russia* (App. no. 55723/00) ECtHR (2005); *Taşkin and Others v. Turkey* (App. no. 46117/99) ECtHR (2005); *Steel and Morris v. The United Kingdom* (App. no. 68416/01) ECtHR (2005); *Budayeva and Others v. Russia* (App. nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02) ECtHR (2008); *Verein gegen Tierfabriken v. Switzerland* (App. no. 32772/02) ECtHR (2009); *Tatar v. Romania* (App. no. 67021/01) ECtHR (2009); *Deés v. Hungary* (App. no. 2345/06) ECtHR (2010); *Grimkovskaya v. Ukraine* (App. no. 38182/03) ECtHR (2011); *Flamenbaum and others v. France* (App. nos. 3675/04 and 23264/04) ECtHR (2012); *Herrmann v. Germany* (App. no. 9300/07) ECtHR (2012).

³⁴ Separate opinions of judge Pinto de Albuquerque concerning cases *Konstantin Markin v. Russia* (App. no. 30078/06) ECtHR (2012); *Mouvement Reelien Suisse v. Switzerland* (App. no. 16354/06) ECtHR (2012); *Fáber v. Hungary* (App. no. 40721/08) ECtHR (2012); *Ahmet Yildirim v. Turkey* (App. no. 3111/10) ECtHR (2013); *Tarantino and others v. Italy* (App. nos. 25851/09, 29284/09 and 64090/09) ECtHR (2013); *Lagutin and others v. Russia* (App. nos. 6228/09, 19123/09, 19678/07, 52340/08 and 7451/09) ECtHR (2014).

³⁵ See chapter no. 2.4.3.

³⁶ Infringement of Art. 2 *e.g.* *Öneryildiz v. Turkey* (App. no. 48939/99) ECtHR (2004); *Budayeva and Others v. Russia* (App. nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02) ECtHR (2008).

³⁷ Infringement of Art. 8 *e.g.* *López Ostra v. Spain* (App. no. 16798/90) ECtHR (1994); *Guerra and others v. Italy* (App. no.14967/89) ECtHR (1998); *Taşkin and Others v. Turkey* (App. no. 46117/99) ECtHR (2005); *Moreno Gómez v. Spain* (App. no. 4143/02) ECtHR (2004); *Fadeyeva v. Russia* (App. no. 55723/00) ECtHR (2005); *Roche v. United Kingdom* (App. no. 32555/96) ECtHR (2005); *Öçkan and others v. Turkey* (App. no. 46771/99) ECtHR (2006); *Ledyayeva and others v. Russia* (App. nos. 53157/99, 53247/99, 53695/00 and 56850/00) ECtHR (2006); *Giacomelli v. Italy* (App. no. 59909/00) ECtHR (2006); *Lemke v. Turkey* (App. no. 17381/02) ECtHR (2007); *Tatar v. Romania* (App. no. 67021/01) ECtHR (2009); *Branduse v. Romania* (App. no. 6586/03) ECtHR (2009); *Bacila v. Romani* (App. no.19234/04) ECtHR (2010); *Deés v. Hungary* (App. no.

well-known *López Ostra* case³⁸, which concerned noise pollution and a waste-treatment plant, the Court expressed for the first time that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without seriously endangering their health. In the case of *Guerra and Others*³⁹ the Court observed that the direct effect of toxic emissions on the right to respect for private and family life means that article 8 is applicable.

Dealing with environmental issues, the Strasbourg Court also stated in its case law a violation of the prohibition of torture (article 3 ECHR)⁴⁰, the right to a fair trial (article 6 [1])⁴¹, the freedom of expression (article 10)⁴², the freedom of assembly and association (article 11)⁴³, the right to an effective remedy (article 13)⁴⁴ and the protection of property (article 1 of the Protocol No.1).⁴⁵ Generally speaking, these human rights might be concerned, if the right to a healthy environment is infringed.⁴⁶ On the other hand, the prohibition of discrimination (article 14) generally protects social rights as well, because it covers not only the enjoyment of the rights explicitly foreseen in the Convention but also those rights that fall within the implicit ambit of the Convention.⁴⁷ However, the Court has not yet stated discrimination according to the article 14 ECHR, when dealing with environmental matters.

The Convention does not contain the right to a healthy environment explicitly. Additionally, its protection has procedural obstacles as well. According to article 34 of the ECHR any person, non-governmental organisation or group of individuals can lodge an application with the Court claiming to be the victim of a violation done by one of the signatory states of the rights set forth in the Convention or the Protocols. However, to be a victim is not enough. According to the admissibility criteria set forth in the article 35 of the ECHR, the applicant has to suffer a significant disadvantage.⁴⁸ The condition of direct and personal

2345/06) ECtHR (2010); *Dubetska and others v. Ukraine* (App. no. 30499/03) ECtHR (2011); *Grimkovskaya v. Ukraine* (App. no. 38182/03) ECtHR (2011).

³⁸ *López Ostra v. Spain* (App. no. 16798/90) ECtHR (1994).

³⁹ *Guerra and others v. Italy* (App. no. 14967/89) ECtHR (1998) paragraph 57.

⁴⁰ Infringement of Art. 3 e.g. *Brândușe v. Romania* (App. no. 6586/03) ECtHR (2009).

⁴¹ Infringement of Art. 6 (1) e.g. *Fredin v. Sweden* (App. no. 12033/86) ECtHR (1991); *Matos e Silva Lda. and others v. Portugal* (App. no. 15777/89) ECtHR (1996); *Burdov v. Russia* (App. no. 33509/04) ECtHR (2009); *Dactylidi v. Greece* (App. no. 52903/99) ECtHR (2003); *Kyrtatos v. Greece* (App. no. 41666/98) ECtHR (2003); *Taşkın and Others v. Turkey* (App. no. 46117/99) ECtHR (2005); *Steel and Morris v. The United Kingdom* (App. no. 68416/01) ECtHR (2005); *Okyay and Others v. Turkey* (App. no. 36220/97) ECtHR (2005); *Öçkan and others v. Turkey* (App. no. 46771/99) ECtHR (2006); *Lemke v. Turkey* (App. no. 17381/02) ECtHR (2007); *Hamer v. Belgium* (App. no. 21861/03) ECtHR (2007); *Borysiewicz v. Poland* (App. no. 71146/01) ECtHR (2008); *Leon and Agnieszka Kania v. Poland* (App. no. 12605/03) ECtHR (2009); *Deés v. Hungary* (App. no. 2345/06) ECtHR (2010).

⁴² Infringement of Art. 10 e.g. *Piermont v. France* (App. nos. 15773/89 and 15774/89) ECtHR (1995); *Hertel v. Switzerland* (App. no. 25181/94) ECtHR (1998); *Thoma v. Luxembourg* (App. no. 38432/97) ECtHR (2001); *Vides Aizsardzibas Klubs v. Latvia* (App. no. 57829/00) ECtHR (2003); *Verein gegen Tierfabriken v. Switzerland* (App. no. 32772/02) ECtHR (2009).

⁴³ Infringement of Art. 11 e.g. *Chassagnou and others v. France* (App. nos. 25088/94, 28331/95 and 28443/95) ECtHR (1999).

⁴⁴ Infringement of Art. 13 e.g. *Dactylidi v. Greece* (App. no. 52903/99) ECtHR (2003); *Hatton and Others v. The United Kingdom* (App. no. 36022/97) ECtHR (2003).

⁴⁵ Infringement of Art. 1 Protocol No. 1 e.g. *Matos e Silva Lda. and others v. Portugal* (App. no. 15777/89) ECtHR (1996); *Chassagnou and others v. France* (App. nos. 25088/94, 28331/95 and 28443/95) ECtHR (1999); *Burdov v. Russia* (App. no. 33509/04) ECtHR (2009); *Öneryildiz v. Turkey* (App. no. 48939/99) ECtHR (2004); *N.A. and others v. Turkey* (App. no. 37451/97) ECtHR (2005); *Z.A.N.T.E.-Marathonisi A.E. v. Greece* (App. no. 14216/03) ECtHR (2009); *Turgut v. Turkey* (App. no. 1411/03); *Satir v. Turkey* (App. no. 36192/03) ECtHR (2010).

⁴⁶ The list of articles is not taxative. E.g. the violation of the right to liberty and security (ECHR Art. 5) has been examined as well in the case *Mangouras v. Spain* (App. no. 12050/04) ECtHR (2010). The Court found no infringement.

⁴⁷ Separate opinion of judge Pinto de Albuquerque regarding the case of *Konstantin Markin v. Russia* (App. no. 30078/06) ECtHR (2012).

⁴⁸ Art. 35 (3) b) ECHR "The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that: [...] (b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the

concern and the lack of a preventive approach (need of significant disadvantage) can lead to the conclusion that the collective right to a healthy environment of the present generation is not ensured in the Convention. The requirement of a significant disadvantage seems to be too strict for establishing an effective protection of the right to a healthy environment. In addition, the need of direct and personal concern excludes a crucial group from the potential applicants: non-governmental organisations which are not directly and personally concerned.

Establishing an *actio popularis* in cases where collectives of the present generation are concerned might look utopian. The Court expressed several times that there is no possibility for an *actio popularis* in the framework of the Convention.⁴⁹ The Court explicitly noted that, the Convention does not “envisage the bringing of an *actio popularis* for the interpretation of the rights set out therein or permit individuals to complain about a provision of national law simply because [it] considers, [...] that it may contravene the Convention.”⁵⁰

Even the Aarhus Convention, which regulates the pillars of the procedural rights of the right to a healthy environment in details, rejected to introduce an *actio popularis* in connection with environmental issues. However, it strengthened the status of environmental non-governmental organisations (NGOs)⁵¹ which is an example to follow. NGOs play a decisive role in environmental protection as they express collective interests and speak on behalf of many with specific skills often not available to individuals. To strengthen the *locus standi* of NGOs before the Strasbourg Court would be an intermediate solution between the maximalist approach of the *actio popularis* and the minimalist approach according to which only those who are directly concerned have the right to individual actions.

As stated before the collective right to a healthy environment is based on the concept of intergenerational equity. However, the interests of the future generation do not play a decisive point in the ECtHR's case law neither. The concept of intergenerational equity has appeared only once so far in 2012 in the case *Herrmann v. Germany*.⁵² In his separate opinion, judge Pinto de Albuquerque mentioned intergenerational equity as guarantee for the sustainable enjoyment of nature by future generations.⁵³

As a conclusion it can be stated that only the individual aspect of the human right to a healthy environment gained ground in the protection system of the ECHR. But would it at all be possible to establish the collective right to a healthy environment under the aegis of the ECHR? The following chapter aims to propose ideas for the debate on the aforementioned question.

4. Possible Solutions

How could the collective right to a healthy environment be established under the aegis of the ECHR? On the one hand, this could be achieved by applying the living instrument character of the Convention as it was done with the individual right to a healthy environment. On the other hand, the European human

Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.”

⁴⁹ E.g. *L'Erablière A.S.B.L. v. Belgium* (App. no. 49230/07) ECtHR (2009).

⁵⁰ Case of *Burden v. United Kingdom* (App. No. 13378/05) ECtHR (2008) paragraph 33.

⁵¹ Attila Pánovics, *Environmental Rights and the Enforcement of the Right to Water* in Marcel Szabó & Veronika Greksza (Eds.), *Right to Water and the Protection of Fundamental Rights in Hungary*, Studia Europaea, Budapest 2013, pp. 163-165.

⁵² Case of *Herrmann v. Germany* (App. no. 9300/07) ECtHR (2012).

⁵³ Paragraph 10 of the separate opinion of judge Pinto de Albuquerque regarding the case of *Herrmann v. Germany* (App. no. 9300/07) ECtHR (2012).

rights system could be amended by an additional protocol as it was done *inter alia* with the protection of property.

With the help of the living instrument approach, the Strasbourg Court could derive the collective dimension of the right to a healthy environment from the provisions of the Convention as well. Reaching this goal, significant precedents dealing with environmental matters should be overruled: *e.g.* the Strasbourg Court expressed several times that an environmental NGO, as any other victim, could only be an applicant if the NGO itself suffered a significant disadvantage, although NGOs, being involved in matters of public interest, have the role of public watchdogs.⁵⁴ In order to be able to lodge a petition under the Article 34 of the ECHR, “a person, non-governmental organisation or group of individuals must be able to claim to be the victim of a violation.”⁵⁵ As discussed before strengthening the *locus standi* of the environmental NGO-s would be among the first steps on the way to a collective right to a healthy environment. According to the ECtHR, a precedent can only be overruled:⁵⁶

- in case of emerging consensus, either in the domestic legal systems of Council of Europe Member States or under specialised international instruments,
- in favour of upholding a different legal standard,
- when there is new scientific knowledge impacting on the issue at stake, or
- when further development is needed because of uncertainty or in order to enlarge the ambit of protection ensured by the Convention.

The first possibility could be excluded as the international community seems to be unwilling to accept explicit written obligations regarding the right to a healthy environment. The Rio+20 Conference on Sustainable Development is an example of that tendency. A final document entitled “The Future We Want” was adopted there, but it achieved no breakthrough and lacks any innovative approach. Contrary to the high expectations, only well-known aims and principles were repeated in this soft law document.⁵⁷

The possibility to set aside a precedent when it needs further development in order to enlarge the ambit of protection (the fourth possibility) is undoubtedly in play. Because of the interdependent relationship between environment, sustainable development, intergenerational equity and the right to a healthy environment,⁵⁸ the human right to a healthy environment plays a major role in environmental protection. The further development of this right is in global need, as the continued degradation and erosion of the environment would cause irreversible changes that could endanger the living standards.⁵⁹

However, it is not easy to overrule a precedent. The Court expressed several times that it should not depart from its previous case law “without cogent reasons if the circumstances of the new case are not

⁵⁴ *E.g. Animal Defenders International v. the United Kingdom* (App. no. 48876/08) ECtHR (2013); *Vides Aizsardzibas Klubs v. Latvia* (App. no. 57829/00) ECtHR (2004); *Társaság a Szabadságjogokért v. Hungary* (App. no. 37374/05) ECtHR (2009); *Youth Initiative for Human Rights v. Serbia* (App. no. 48135/06) ECtHR (2013); *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria* (App. no. 39534/07) ECtHR (2013).

⁵⁵ *Case of Burden v. United Kingdom* (App. No. 13378/05) ECtHR (2008) paragraph 33.

⁵⁶ Paragraph 7 of the separate opinion of judge Pinto de Albuquerque regarding the case of *Herrmann v. Germany* (App. no. 9300/07) ECtHR (2012).

⁵⁷ The final document of the Rio+20 Conference on Sustainable Development is available at <http://sustainabledevelopment.un.org/rio20.html> (10 January 2015).

⁵⁸ See chapter no. 2.

⁵⁹ OECD *Environmental Outlook to 2050: The Consequences of Inaction*. See at www.oecd.org/env/indicators-modelling-outlooks/49846090.pdf (10 March 2015).

materially distinct from the previous case because of legal certainty, foreseeability and equality before the law.”⁶⁰ However, can we still talk about a precedent if the circumstances are materially distinct?

Another solution for a complete protection of the human right to a healthy environment (with the collective and the individual rights) could be an additional protocol to the Convention as it was done in the case of the right to property.⁶¹ This idea is not new, however has not been successful yet. Since 1999, various non-governmental organisations and the Parliamentary Assembly of the Council of Europe have constantly, but unsuccessfully put pressure on the Committee of Ministers, in order to persuade it to amend the Convention with the right to a healthy environment by a protocol. The Committee of Ministers stated that several member states have already enshrined the protection of the environment as a human right and/or as a state objective in their constitutions and that the programmatic provision on environmental protection has also been included in the Charter of Fundamental Rights of the European Union.⁶² Even though the Charter contains one of the longest catalogues of human rights, it does not contain the right to a healthy environment. Article 37 of the Charter states the following: „A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.”⁶³ This provision only declares the high level of protection and improvement of the quality of the environment and sustainable development as general principles.⁶⁴ It provides the individual with no actual enforceable right guaranteeing that a high level of environmental protection and an improvement of the quality of the environment are considered in the framework of the policies of the Union, and even less with an actual right to a healthy environment. Therefore, article 37 does not contain a fundamental right but is rather an aim of the European Union.⁶⁵

The Committee of Ministers articulated also several times that it recognises the importance of a healthy environment and considers that it is relevant for the protection of human rights. However, the Committee proclaims that „although the European Convention on Human Rights does not expressly recognise a right to the protection of the environment, the convention system already indirectly contributes to the protection of the environment through existing convention rights and their interpretation in the evolving case law of the ECtHR.”⁶⁶ On both occasions, the Committee of Ministers did not consider it advisable to draw up an additional protocol to the convention in the environmental domain. And here the debate was only about the individual right.

A third solution would be the establishment of a new European human rights convention containing a catalogue of third-generational human rights such as the right to a healthy environment with its individual and collective dimensions. Since Europe has the most effective human rights regime⁶⁷ and effectively

⁶⁰ E.g. Paragraph 32 of the case *Cossey v. the United Kingdom* (App. no. 10843/84) ECtHR (1990).

⁶¹ Art. 1. (Protection of Property) Protocol no. 1. of the Convention for the Protection of Human Rights and Fundamental Freedoms.

⁶² Doc. 10041 (24 January 2004) Reply from the Committee of Ministers part 3.

⁶³ Art. 37 of the Charter of Fundamental Rights of the European Union.

⁶⁴ András Osztovits (Ed.), Gabriella Gerzsenyi, *Az Európai Unióról és az Európai Unió működéséről szóló szerződések magyarázata* [Commentary on the Treaty on European Union and the Treaty on the Functioning of the European Union] Complex 2011, pp. 2508 - 2511.

⁶⁵ Jürgen Schwarze (Hrsg.) *EU- Kommentar* 3. Auflage Nomos Verlagsgesellschaft, Baden-Baden 2012, p. 2708.

⁶⁶ Joint reply adopted by the Committee of Ministers on 16th June 2010 at the 1088th meeting of the Ministers' Deputies on “Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment” <https://wcd.coe.int/ViewDoc.jsp?id=1638385&Site=CM> (10 March 2015).

⁶⁷ Andreas Follesdal & Brigit Peters & Geir Ulfstein (Eds.), *Constituting Europe. The European Court of Human Rights in a National European and Global Context*, Cambridge University Press, 2013.

protects first and second generational human rights, the idea of a new human rights catalogue on this regional level does not seem to be so unrealistic.

In my point of view, the time has come for the international community to take the next step in the regulation of the right to a healthy environment in a binding way. For all three ways proposed previously, the first milestone would be to reconcile the interests of the states. Unfortunately, the time when the political decision makers will reach this landmark is not yet foreseeable, thus the proposed solutions might seem utopian.