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REVIEW

'China REACH': Assessing the implications for non-Chinese companies producing and exporting new substances to China

Gareth Callagy

Nanomaterials and European Novel Food law:
The uncertain path to reasonable regulation

Julian Schenten

Access to documents: Interaction and gaps in the REACH
and Aarhus Convention systems

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Waving or drowning?
The legal impacts of the Cancun climate negotiations

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Current Environmental Perspectives in Controlling, Handling and
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Editorial

The present issue of *elni Review* (1/2011) covers a variety of recent international environmental law issues alongside two country-specific contributions on EEE-waste regulation in Zanzibar, Tanzania and chemical substances legislation in China respectively. The key focus of the current edition of the journal, is *chemical substances regulation*.

Three articles approach this topic from different points of view:

First off, *Gareth Callegy* provides an overview of the legal impacts of the “Chinese REACH” legislation; an amendment to Chinese law which recently entered into force. By comparing the legal obligations arising from Regulation (EC) No. 1907/2006 (REACH) and the Chinese pendant, he points out inter alia the legal issues which European registrants will face when marketing chemical substances to the “Middle Kingdom.”

Subsequently, *Julian Schenten* analyses the state of affairs as regards the regulation of Nanomaterials in the food sector. Focusing on Regulation (EC) No. 258/97 on Novel Food, he identifies the weaknesses in terms of health protection and points out necessary key features which reasonable regulation of such chemical substances should have.

The third article concentrating on chemicals is by *Vito Buonsante*; it creates a bridge between the REACH Regulation and access to documents claims. In this context the author examines the interaction and gaps in the REACH and Aarhus Convention systems as well as the role of the European Chemicals Agency (ECHA).

The other contributions cover a variety of up-to-date legal issues:

Head of Legal at Friends of the Earth England, Wales and Northern Ireland, *Gita Parihar*, shows the legal impacts of the Cancun UN climate negotiations which took place in December 2010. In doing so, she develops a line of reasoning which remains relevant beyond the Bangkok Climate talks in April 2011.

Asking in his title ‘A human right to a clean and healthy environment in Europe: Dream or reality?’, *Jan Van de Venis* provides an introduction to the development of a human right to a healthy environment on a global scale. He analyses the ways in which this human rights-based approach to environmental issues evolved, what tangible benefits such a right could bring, along with where it currently stands globally and, more specifically, in Europe under the European Convention on Human Rights.

The contribution that follows, *Tania Van Laer* examines whether EU law allows Member States to justify, on the basis of animal welfare, unilateral measures that impose trade restrictions. At the same time she considers the main

principles of the free movement of goods as well as the established view of the Court of Justice.

The final article outlines the electronic waste situation in Zanzibar, Tanzania. In the absence of consumer protection provisions and specific environmental guidelines to regulate the import of these products or manage their safe disposal, the small island state is failing to implement the principles of the Basel Convention. Against this background *About S. Jumbe* presents the current activities of the Department of Environment, Zanzibar, which is now in the advanced stages of preparing a legal document which contains a set of regulations on the import, handling, and disposal of used and waste electrical and electronics equipment.

Finally, the issue covers recent developments regarding the situation of access to justice in Ireland – the only EU country in which the parliament has not ratified the 1998 UNECE Aarhus Convention.

Contributions for the next issue of the *elni Review* are very welcome. Please send them to the editors by September 2011.

Julian Schenten/Gerhard Roller

May 2011

elni Forum 2011

24th May 2011
in Brussels, Belgium

“Access to Documents at European Level – Key issues and practical experiences”

Bondine Kloostra presents key issues on access to documents regarding environmental information, including a recent decision of the ECJ (Stichting Natuur en Milieu). Vito Buonsante and Ludwig Krämer will present their practical experiences in access to documents, including the access to documents held by the European Chemicals Agency (ECHA). Eva Kruzikova will provide the point of view of the EU Commission.

This event will be held at the EU Liaison Office of the German Research Organisations (KoWi), Rue du Trône 98, 1050 Brussels, 8th Floor.

For more information about participation, including registration forms, please visit <http://www.elni.org/elni-events.0.html>.

A Human Right to a Clean and Healthy Environment: Dream or Reality in Europe?

Jan van de Venis

1 Introduction

In a moot court case, one university student picked her words carefully and proclaimed:¹

“Everyone has the right to a clean and healthy environment within, across or outside national boundaries. This right must be protected by law. Everyone has the fundamental right to freedom, equality and adequate conditions of life in an environment of quality that permits a life of dignity and well-being. Everyone bears a solemn responsibility to protect and improve the environment for present and future generations and has the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

This student articulated her point very well. But do we have such a ‘human right to environment’ in Europe?

In this short article I will give an introduction to (the development of) the human right to (a healthy) environment and will briefly answer the questions set out above. This article introduces the topic of human rights and the environment on a global scale. It sets out to inform the reader where this human rights-based approach to environmental issues came from, what tangible benefits such a right could bring and where it currently stands globally and, more specifically, in Europe under the European Convention on Human Rights. It will therefore also analyse the recent Council of Europe’s Committee of Ministers refusal of a Parliamentary Assembly recommendation on acknowledging a right to environment under the European Convention.²

2 A short historical overview on linking human rights and the environment

The United Nations Charter of 1945 and the 1948 Universal Declaration on Human Rights mark the beginning of modern international human rights law. This was long before people started thinking of the concept of a rights-based approach to environmental concerns.

Responding to growing environmental pollution and consciousness, many treaties and laws on environmental protection were introduced in the second half of the twentieth century. However, only since the 1970s have the links between human rights and the environment been progressively recognised. The Stockholm Declaration of 1972³, with its “Principles” that proclaim rights, is generally seen as the starting point of the modern international framework for human rights-based environmental protection (in the same way that many will say the 1992 Rio Declaration has been on sustainable development⁴).

In the following decades, human rights and the environment were increasingly seen to be inherently interlinked, as people started to realise that a clean and healthy environment not only yields great benefits for humans, but is in fact essential to the enjoyment and realisation of other fundamental human rights.⁵

Despite their initially separate treatment, in terms of their protection under international law, over the years it has become increasingly acknowledged that human rights and the environment are inherently interlinked. To give one clear example: the right to life, personal integrity, family life, health and development of each human being depends on protecting the environment as the resource base for all life.

Ever since the 1972 Stockholm Declaration, the international community has progressively started addressing the links between human rights and environmental rights. This process led to the 1992 Rio Declaration, which acknowledged the right to a healthy and productive life in harmony with nature and the right of

¹ As part of the Master Programme ‘International Business and Globalisation’, Utrecht University, The Netherlands.

² The present paper is an edited and extended version of the article ‘Umwelt als Menschenrecht - Kann man gegen die negativen Folgen von Naturzerstörung künftig klagen?’ which was first published in the May 2010 issue of Umwelt Aktuell.

³ Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm on 16 June 1972, U.N.Doc./CONF.48/14/Rev.1 at 3 (1973), <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503>.

⁴ The United Nations Conference on Environment and Development, Rio Declaration on Environment and Development, June 1992, available at: <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163>.

⁵ For more in-depth information and research, please see the website www.RightToEnvironment.org which includes reference to the academic research and publications and working papers by Prof. Dinah Shelton, like ‘Health and Human Rights Working Paper Series No 1’, Human Rights, Health & Environmental Protection: Linkages in Law & Practise, A Background Paper for the World Health Organisation, Prof. Dinah Shelton, London, 2002.

access to environmental information and of public participation in environmental decision-making.⁶

However, the process of linking human rights and environmental issues seemed to lose momentum at the official international level, when the Declaration of the 2002 World Summit on Sustainable Development in Johannesburg⁷ only stated that consideration was being given to the possible relationship between environment and human rights.

Even so, recent case law based on international conventions such as the American Convention on Human Rights and African Charter on Human and People's Rights, together with other local, regional and international developments and initiatives – including the Millennium Development Goals⁸ and the Earth Charter⁹ – have reaffirmed that environmental and human rights are strongly linked and that the right to a healthy environment is a fundamental part of the right to life and to personal integrity.

3 Examples of (a healthy and clean) 'environment' codified as a human right

Currently, two regional human rights treaties acknowledge a right to environment:

- The African Charter on Human and Peoples' Rights (1981) confirms in Article 24: "*All peoples shall have the right to a general satisfactory environment favourable to their development.*"
- The American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988), Article 11 (of the Additional Protocol)¹⁰, with header: "Right to a healthy environment" proclaims: "*(1.) Everyone shall have the right to live in a healthy environment and to have access to basic public services and (2.) The States parties shall promote the protection, preservation and improvement of the environment.*"

The Aarhus Convention¹¹ grants the public rights regarding access to information, public participation and access to justice in governmental decision-

making processes on matters concerning the local, national and transboundary environment and focuses on interactions between the public and public authorities.

All states that sign up to the Aarhus Convention through its preamble recognise that "every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations." The Convention itself, however, does not reiterate this right.

Although research undertaken in 2002 by Prof. Dinah Shelton¹² shows that, besides the regional treaties mentioned, more than 100 constitutions throughout the world guarantee a right to a clean and healthy environment, impose a duty on the state to prevent environmental harm, or mention the protection of the environment or natural resources, this right had not yet been accepted commonly at the international level in the early 2000s. Prof. Shelton concluded: "In sum, the links between human rights, health, and environmental protection are today well-established in international law, accepted by states in agreements and implemented in practice."¹³

Since the early 2000s, research carried out for and by the United Nations¹⁴ has shown that international human rights law is beginning to recognise that individuals have a "human right to a healthy and clean environment".

This is supported by two more recent and explicit codifications of the "right to environment":

- The September 2007 United Nations Declaration on the Rights of Indigenous Peoples in Article 29:¹⁵ *Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and imple-*

6 Ibid.

7 Johannesburg Declaration on Sustainable Development, Adopted at the 17th plenary meeting of the World Summit on Sustainable Development, on 4 September 2002, available at: http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POI_PD.htm

8 More information can be found at: <http://www.un.org/millenniumgoals>

9 More information and download can be found at: <http://www.earthcharterinaction.org/content/pages/Read-the-Charter.html>

10 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (San Salvador, November 17, 1988, OAS T.S. 69.

11 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Aarhus, Denmark, 25 June 1998.

12 Health and Human Rights Working Paper Series No 1, Human Rights, Health & Environmental Protection: Linkages in Law & Practise, A Background Paper for the World Health Organisation, Prof. Dinah Shelton, London, 2002, p.26.

13 Ibid., p. 30.

14 Such as: The 2002 Office of the High Commissioner on Human Rights research "Human Rights and The environment", information and conclusions can be found here: <http://www2.ohchr.org/english/issues/environment/envirion/index.htm>; and The UN Secretary-General report on Relationship Between Human Rights and the Environment (2005), UN Doc. E/CN.4/2005/96 (19 January 2005). The report analyses some of the developments that have taken place at the international, regional and national level in recognition of the link between the protection of the natural environment and the enjoyment of human rights. The report concludes that, since the World Summit on Sustainable Development, there has been growing recognition of the connection between environmental protection and human rights.

15 United Nations Declaration on the Rights of Indigenous Peoples, Adopted by United Nations General Assembly Resolution 61/295, 13 September 2007.

ment assistance programmes for indigenous peoples for such conservation and protection, without discrimination; and

- The 2010 United Nations General Assembly Resolution 4/15716: “Affirms that a democratic and equitable international order requires, inter alia, the realization ofThe right of every person and all peoples to a healthy environment and to enhanced international cooperation that responds effectively to the needs for assistance of national efforts to adapt to climate change, particularly in developing countries, and that promotes the fulfilment of international agreements in the field of mitigation.”

Traditional environmental and human rights NGOs are also making the connection and progressively asserting this right. Some good examples include:

- Amnesty International Banners in 2009 proclaimed: “A healthy environment is a human right. Demand Dignity.”¹⁷
- Greenpeace International (new) International Executive Director Mr. Kumi Naidoo in 2010 stated: “I accepted the role of International Executive Director at Greenpeace, because I believe that ensuring a green and peaceful planet is also a basic human right.”¹⁸

Still, this “right to environment” has not yet been accepted in a binding international human rights treaty. If one carefully analyses the development of this right over the past decades, a fair conclusion would be that the development of this right will continue and that, probably in a few years to one or two decades from now, the next logical step will be taken: the consideration and codification of the human right to (a clean and healthy) environment under international human rights law.

4 A right to environment under the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights or European Social Charter

4.1 Charter of Fundamental Rights of the European Union

Many of the rights codified in the Charter of Fundamental Rights of the European Union¹⁹ (“the Charter”) start with a clear human rights articulation: “Everyone has a right to...”. Such expressions make it clear that this article codifies a right that individuals can invoke.

Amongst the many rights codified in the Charter there are some with links to the environment, like Articles 31 and 32 on safety and health in working conditions and Article 35 on health care²⁰. The specific article on “Environmental protection”, Article 37, does not give a specific right to people, but is a mere proclamation of a duty of care for the EU: “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.”

In December 2009, with the entry into force of the Lisbon Treaty, the Charter was given binding legal effect to EU member states, equal to other EU Treaties.

All EU member states are parties to the European Convention on Human Rights (“the Convention”). Although EU member states, as parties to the convention, have an obligation to respect the ECHR even when they are applying or implementing EU law, this does not mean that this Convention and its judicial mechanism applies to EU acts. This could only be corrected by the EU, as such, becoming a party to the Convention.

With the entry into force of Protocol No. 14 to the European Convention on Human Rights, accession of the EU has now become possible. Negotiations between the EU and the Council of Europe promptly started in July 2010 and are expected to be completed by summer 2011.

The EU’s accession will strengthen the protection of human rights in Europe, by submitting the Union’s legal system to independent external control. It will also close gaps in legal protection by giving citizens

16 Resolution adopted by the General Assembly [on the report of the Third Committee (A/64/439/Add.2 (Part II))] 64/157. Promotion of a democratic and equitable international order. A/RES/64/157, 8 March 2010, under point 4, paragraph 1.

17 Demand Dignity Campaign in 2009. An example: <http://www.amnesty.org/en/library/asset/ASA20/009/2009/en/4acc7b8d-a4f1-4b0c-a33d-d07c8591c426/asa200092009en.pdf>.

18 See: <http://www.greenpeace.org/international/en/news/features/open-letter-hatoyama120210>.

19 http://europa.eu/legislation_summaries/justice_freedom_security/combating_discrimination/l33501_en.htm.

20 Article 37: Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all the Union’s policies and activities.

the same protection against acts of the EU as they presently enjoy from member states.

What this exactly will entail in the area of a rights based approach to environmental issues is not yet determined. However, Article 53 of the Charter makes it very clear that the level of protection provided by the Charter must be at least as high as that of the Convention²¹.

4.2 European Convention on Human Rights²²

As the astute reader will have concluded by now, the European Convention on Human Rights still lacks an explicit codification of the environment as a human right. Despite this, the European Court of Human Rights has developed clear case law over the last decades through which it has defined that certain (gross) environmental pollution or degradation can lead to the violation of specific human rights that are acknowledged under the European Convention.

Most of the victims bringing cases to the European Court on Human Rights have invoked either Article 2 (right to life), Article 6 (right to a fair trial), Article 8 (right to respect for private and family life), Article 10 (right to information) and / or Article 13 (right to an effective remedy).

Article 6 has been the basis for complaints that the applicants had been denied a remedy for threatened environmental harm. In the past, some environmental threats have been deemed too remote to give rise to a claim within the purview of Article 6, like in the case of *Balmer-Schafroth and Others v. Switzerland*, where applicants argued that they were entitled to a hearing over the government's decision to renew an operating permit for a nuclear power plant.

The European Court in that case found that the applicants had not established a direct link between the operating conditions of the power station and their right to protection of their physical integrity, because they failed to show that the operation of the power station exposed them.²³

Following the recent nuclear disasters in Fukushima, Japan, more and more (recent) nuclear incidents have

come out in the open.²⁴ I wonder whether the Court might change its mind in specific cases, now that this (growing) list of incidents is out in the open.

Most cases, involve clear environmental disruption or degradation, resulting into people getting hurt or even killed, were based on violations of the 'right to life' or 'right to family life', as codified in Articles 2 and 8 of the ECHR respectively.²⁵

Landmark cases include *Lopez Ostra v Spain*²⁶ and *Guerra v. Italy*²⁷. In both of these cases, the European Court of Human Rights concluded that Article 8 (the right to privacy and family life) of the Convention had been violated. The Court, in *Lopez Ostra v. Spain*, held for the first time that a failure by the state to control industrial pollution was a violation of Article 8 where there was a sufficiently serious interference with the applicants' enjoyment on their home and private life. The Court explicitly noted that regard has to be given to the fair balance between the competing interests of the individual and the community as a whole (balancing the first and second paragraphs of Article 8). It is important to note that, in some cases, the economic interests of a state (which is regarded as the interest of the community as whole) can overrule the interests of an individual.

Judges of the Court have remained reluctant to allow the 47 Council of Europe Member States a wide margin of appreciation in this regard. Generally put, this allows Member States to weigh economical development 'against' the protection of the environment. This more or less means that Member States have been allowed to favour economical development and to allow environmental degradation as long as the specific codified human rights mentioned were not violated. Why? Principally because judges have felt - and have stated so in case law²⁸ - bound by the fact that the European Convention currently lacks a specifically codified 'right to environment'. The results of not having a specific right under the Convention are clear: there is no room for the precautionary principle. Instead, Member States are afforded a broad margin of appreciation and only a human rights violation due to environmental disruption will be recognised if the disruption is so grave that it violates an already rec-

21 Article 53 (Level of protection) proclaims: Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

22 For signatures and ratifications of the European Convention on Human Rights, see <http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG>.

23 *Balmer-Schafroth v. Switzerland*, 1997-IV ECHR, Judgment of 26 Aug. 1997

24 For a list, see: <http://www.guardian.co.uk/news/datablog/2011/mar/14/nuclear-power-plant-accidents-list-rank>

25 Examples of such cases are 'Lopez Ostra v Spain' 16798/90 [1994] ECHR 46 (9 December 1994), 'Guerra v. Italy' 14967/89 [1998] ECHR 7 (19 February 1998) and 'Budayeva and Others vs. Russia', Application, 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 [2008] (20 March 2008).

26 *Lopez Ostra v Spain* 16798/90 [1994] ECHR 46 (9 December 1994).

27 *Guerra v. Italy* 14967/89 [1998] ECHR 7 (19 February 1998).

28 Like recently in *Leon and Agnieszka Kania v. Poland*, Application no 12605/03 (21.07.2009).

ognised right under the Convention, such as the right to life or family life.²⁹

4.3. *European Social Charter*³⁰

The European Social Charter also lacks an explicit codification of the environment as a human right. The right to protection of health is guaranteed in Article 11 of the Charter, and complements Articles 2 and 3 of the European Convention on Human Rights. Article 1 provides for a series of rights to enable persons to enjoy the highest possible standard of health attainable. These are reflected in measures to promote health and health care provision in case of sickness.³¹

The European Social Charter acknowledges that overcoming pollution is an objective that can only be achieved gradually. States must nevertheless take measures to achieve this goal within a reasonable time, with measurable progress and making maximum use of available resources. In order to guarantee a healthy environment, States must develop and regularly update sufficiently comprehensive legislation and regulations in the environmental field, introducing threshold values for emissions, measuring air quality, etc. to prevent air pollution.³²

So although no explicit right to environment is enshrined in the European Social Charter, the (interpretation of the) right to health does offer a certain level of environmental protection under the Charter. But does the case law based on the European Social Charter offer the same level of protection as that under the European Convention on Human Rights? No, it offers even more.

In the case of *Marangopoulos v. Greece*³³, the European Committee of Social Rights explicitly recognised the “right to a healthy environment” as embodied in the right to health and also linked this right to the right to life under the European Convention on Human Rights. The Committee found that Greece violated this right by failing to fight air pollution.

Given that EU air pollution levels are regularly exceeded in the urban centres of the EU Member States (all of which are also bound by the Council of Europe’s Social Charter), this decision should be considered a wake-up call for European governments,

M. Trilsch concludes in her in-depth analysis of this case.³⁴

Trilsch states: “It may be that the committee’s endorsement of the right to a healthy environment will even find its way into national constitutional rights interpretation.”...” Still, the most important aspect of the decision is its impact on the material content of the rights involved. The committee essentially removes the right to a healthy environment from the constrained realm of so-called third-generation rights and introduces it into the mainstream of human rights. This is done by linking it not only to the social right to health but also to the ‘classical’ human right to life. On a theoretical level, the decision henceforth may be understood as a strong affirmation of the indivisibility and interdependence of all human rights.” and “...Therefore, the committee’s decision can be understood as further advancing the progressive endorsement of environmental issues by the European human rights institutions.”

5 A ‘right to environment’ under the European Convention on Human Rights

In September 2009, the Parliamentary Assembly of the Council of Europe - by an almost unanimous vote - recommended the drafting of an additional protocol to the European Convention on Human Rights, which would codify ‘a right to a healthy and viable environment’³⁵

5.1 *The initiative of the Parliamentary Assembly of the Council of Europe*

The steps towards this recommendation were chosen carefully, as the Parliamentary Assembly had tried and failed twice before (in 1999 and 2003) to integrate a right to environment in the European Convention: in recommendation 1885, the Parliamentary Assembly recalled its Recommendation 1614 (2003)³⁶ on the environment and human rights and its Recommendation 1431 (1999)³⁷ on future action to be

29 For an extensive outline of the European Court on Human Rights case law in Environmental matters, see: *The Human Right to a Viable Environment*, Dr. Sangini Ramnewash-Oemrawsingh, Cambridge University Press, 2009.

30 For signatures and ratifications of the European Social Charter, see www.coe.int/socialcharter.

31 *The Right to Health and the European Social Charter*, ESC secretariat, March 2009, see: http://www.coe.int/t/dghl/monitoring/socialcharter/Theme%20factsheets/FactsheetHealth_en.pdf.

32 *Ibid.* p. 2.

33 *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, Complaint No. 30/2005, European Committee of Social Rights (E.C.S.R.) (2006).

34 M. Trilsch, *European Committee of Social Rights: The right to a healthy environment*, *International Journal of Constitutional Law*, Volume 7 Issue 3, 2009, p. 529-538.

35 Council of Europe, *Parliamentary Assembly Recommendation 1885 (2009)*. <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta09/erec1885.htm>

36 Council of Europe, *Parliamentary Assembly Recommendation 1614 (2003)*, “Environment and human rights”. <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta03/EREC1614.htm>

37 Council of Europe, *Parliamentary Assembly Recommendation 1431 (1999)*, “Future action to be taken by the Council of Europe in the field of environment protection”. <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta99/EREC1431.htm>

taken by the Council of Europe in the field of environment protection, which both proposed adding an environmental component to the European Convention on Human Rights.

The President of the Parliamentary Assembly of the Council of Europe at that time, Mr. Maria de Puig, had even transformed the realisation of a European right to environment into a personal quest: in 2008 he repeatedly called for a "right to environment" under the European Convention, arguing that protection of the natural environment had to be regarded as a fundamental human right and repeatedly stating that one of the objectives that he had set himself during his term of office was the integration of the right to a healthy environment in the European Convention on Human Rights by means of an additional protocol.³⁸

In recommendation 1885, and the process leading to the vote on this recommendation, the Parliamentary Assembly took great care to explain why this right to environment was rejected before by the Committee of Ministers of the Council of Europe.³⁹

The Assembly continued by recalling that "...setting down this right is consistent with the concern to adapt to the development of society and with the logical extension of the role performed by the Council of Europe in the field of environmental protection."⁴⁰

One of the additional arguments the Parliamentary Assembly brought to the table was "...the escalating environmental degradation whose effects reach far beyond national boundaries and underlines the need for states to display co-operation and share responsibility in the event of damage to the environment."⁴¹ And so the "Assembly recommends that the Committee of Ministers [...] draw up an additional protocol to the European Convention on Human Rights, recognising the right to a healthy and viable environment."⁴²

5.2 Support from United Nations Environment Programme (UNEP) Executive Director Mr. Achim Steiner

On 14 May 2010, close to the date on which the final decision was to be made by the Committee of Ministers, UNEP Executive Director Steiner sent a letter addressed to Ms. Calmy-Rey, at that time Head of the Department of Foreign Affairs and Chair of the Committee of Ministers of the Council of Europe, openly supporting and calling for the acceptance of a right to environment.⁴³

Mr. Steiner's strong plea shows that he was aware of the global developments concerning the right to environment: "*However, it is again, widely recognized that a healthy and clean environment is a fundamental prerequisite to the enjoyment of human rights, it elevates the entire spectrum of sustainability, conservation and environmental issues amidst the most fundamental values of society, on a level equal to other human rights. I therefore have confidence that the Committee of Ministers will decide to add the right to a healthy environment to the other rights codified in and protected under ECHR.*"⁴⁴

5.3 The rejection by the Committee of Ministers of the Council of Europe

The Committee of Ministers (the Committee), consisting of the (47) Ministers of Foreign Affairs of the 47 Council of Europe Member States⁴⁵, was to have its final say on this.

Before reaching this decision, the Committee was advised by three internal Council of Europe bodies. Two of them - the Committee of Senior Officials of the Council of Europe Conference of Ministers responsible for Spatial/Regional Planning (CEMAT) and the Steering Committee for Cultural Heritage and Landscape (CDPATEP) - advised in favour of a new additional protocol acknowledging this right. The third, the Steering Committee on Human Rights (CDDH), advised not to follow the recommendation of the Parliament and to deny this human right, despite the vast support for it in the Parliament. It seemed, though, that all arguments presented by CDDH in its advice had been dealt with by the Parliament in the process leading up to recommendation 1885 but, after having been considered, had proven invalid for the Parliamentary Assembly.

38 The press release stating so: <http://assembly.coe.int/ASP/Press/StopPressView.asp?ID=2025>

39 Council of Europe, Parliamentary Assembly Doc. 12003. <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc09/EDOC12003.htm> The Assembly indeed noted the case law in the environmental field developed by the European Court of Human Rights, commended the Manual on human rights and the environment - Principles emerging from the case-law of the European Court of Human Rights, published by the Council of Europe in 2006, for its valuable insight and recital of the principles emerging from that case law from 1980 to November 2005, and expressed the hope that this manual will be regularly updated. The Assembly noted: "This case law has afforded protection for the right to a healthy environment through a "knock-on effect" by upholding the individual rights in Articles 2 and 8 of the European Convention on Human Rights."

40 Ibid. point 7.

41 Ibid. point 8.

42 Ibid. point 10.1.

43 United Nations Environment Programme, DRC/ROE/OUT 2010, 14 May 2010. Letter uploaded at: <http://www.righttoenvironment.com/ip/uploads/downloads/UNEP%20Steiner%20calls%20for%20RightToEnvironment%20in%20ECHR%20www.sufyr.org.pdf>

44 Ibid. p. 2.

45 In addition to all EU Member States, this includes countries like Switzerland, Turkey and Russia.

On 18 June 2010 the Committee of Ministers rejected recommendation 1885.⁴⁶ It frankly did so by recalling its replies to Recommendations 1614 (2003) on “Environment and human rights” and 1862 (2009) on “Environmentally induced migration and displacement: a 21st century challenge” in which it noted *inter alia* “...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 European Court of Human Rights. 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. At present, the position of the Committee of Ministers on this issue remains unchanged.”⁴⁷

The Committee of Ministers concluded its justification for rejecting the recommendation by referring to the “...substantial work already carried out by the Council of Europe in the field of the environment, which has led to the adoption of important legal instruments such as...”, and then cited several environmental conventions.⁴⁸

5.4 Analysing the rejection by the Committee of Ministers

Regardless of any preference in favour of or against a right to environment, perhaps – and most certainly for lawyers – the most unsatisfactory and worrying element of this rejection of recommendation 1885 is that there is no legal reasoning or argumentation whatsoever.

There is nothing on why “environment” should or should not be a human right. Nothing on the development of this right and on the changes in that regard since the early 2000s. Nothing on why this right has been confirmed and acknowledged by other (regional)

human rights treaties and declarations and by United Nations bodies, such as the General Assembly very recently, but why – nonetheless – it should be kept out of the European Convention on Human Rights.

Nothing on why “environment” should, or should not be, amongst the most fundamental values of society in the Council of Europe. No reasoning, like Mr. Steiner’s, when he wrote to the Chair of the Committee explaining how a right to environment elevates the entire spectrum of sustainability, conservation and environmental issues amidst the most fundamental values of society, on a level equal to other human rights. In plain words the Committee of Ministers were just saying: we did not want it in 1999 or 2003, and we do not want it now. For the Committee, it was enough to rely on existing rights (following the evolving case law of the European Court of Human Rights), on the basis that the Convention system indirectly contributes to the protection of the environment. The Committee proceeded by stating that it had prepared a manual on “Human Rights and the Environment” which it would update. The Committee’s clear message was simple: “We do a lot for the environment through other conventions. Nothing more is required.”

The Committee did not even address the comments of CEMAT and CDPATEP⁴⁹ who both advised the Committee of Ministers to draw up an additional protocol to the European Convention on Human Rights, recognising the right to a healthy and viable environment. CDPAPET gave strong arguments supporting its recommendation in favour of this right⁵⁰: “...in its broadest sense, the environment concerns both human beings and their surrounding natural features, to the extent that they form a single whole that is ecologically balanced or is conducive to personal development... ... So there is more at stake here than just a human right in the strict sense, but rather a right of species, which protects both human beings and the environment in which they live (on all the territory – urban, peri-urban, rural and natural areas). It therefore also constitutes a right to heritage, whether this be natural, cultural or landscape, which includes cultural habits and customs.” and “The recommendations of various Council of Europe bodies have always supported recognition of a human right to a healthy environment rich in biological and landscape diversity, and even to the emergence of a right to sustainable development. Bearing in mind also the appended document and conceptual analysis, the CDPATEP therefore sees only benefits in an additional protocol to the European Convention on Hu-

46 CM Documents, CM/AS(2010)Rec1883-1885 final, 18 June 2010. <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1638385&Site=COE>

47 Ibid. point 9. The Committee continued: “The Committee of Ministers would however recall that Parliamentary Assembly Recommendation 1614 (2003) led to the preparation by the Steering Committee for Human Rights (CDDH) of a Manual on Human Rights and the Environment – Principles emerging from the case law of the European Court of Human Rights in 2006. The aim of the manual was to increase the understanding of the relationship between the protection of human rights under the European Convention on Human Rights and the environment and thereby to contribute to strengthening environmental protection at the national level. In response to the proposal made by the Assembly (paragraph 6), the Committee of Ministers has taken note of the agreement within the CDDH, within the framework of the DH-DEV, to update and extend the manual, in the light of notably the case law of the Court and of the European Committee of Social Rights, of relevant standards set out by other international organisations, and of good practices adopted at national level in order to give effect to the principles emerging from the Court’s case law.”

48 Ibid. point 11.

49 Ibid. under appendix 6 to the reply.

50 Ibid. point 6. And 7.

man Rights concerning the right to a healthy environment.” None of these arguments were debated, or even countered, by the Committee.

The Committee almost literally copied the reiterative (just like in 1999 and 2003) advice of CDDH⁵¹, which also ignores human rights law or developments in that regard, but concludes “...that the convention already offers a certain degree of protection in relation to environmental issues. That being so, the CDDH considered that it would not be advisable to draft an additional protocol on this subject.”

According to the Council of Europe system and structure, the Steering Committee for Human Rights (CDDH)⁵²: “...is composed of representatives of forty-six member States of the Council of Europe. It defines policy and co-operation with regard to human rights and fundamental freedoms. It fixes the priorities as concerns the implementation of the activities of its committees of experts and groups of specialists. The CDDH assumes in particular tasks which aim to develop and promote human rights, as well as to improve procedures for their protection, constantly bearing in mind the evolution of the case-law of the European Court of Human Rights.”

So CDDH members are experts, defining policy with regards to human rights and fundamental freedoms, assuming tasks which aim to develop and promote human rights, as well as to improve procedures for their protection, constantly bearing in mind the evolution of the case law of the European Court of Human Rights.

Based on this, one would have expected a thorough analysis and detailed advice from CDDH, with reasoning on the development of the case law and on the (global and regional) development of this right to environment. In fact, bearing the background in mind - including the global development of the right to environment, the recent explicit recognition by the European Committee of Social Rights of the Right to a healthy environment⁵³, the accurate process and preparation by the Parliament, the almost unanimous vote for the recommendation in Parliament and the positive advice on the recommendation of CEMAT and CDPATEP – CDDH should have supported recommendation 1885 or have presented a (very) well argued “No” based on human rights law.

Looking at the text of the documents discussed above, it seems as if the Committee of Ministers – just like in 1999 and 2003 – blindly followed CDDH in its reiterative opinion, which lacks any argumentation based

on (developments in) human rights law. This is a highly worrying trend. Especially because (it seems) CDDH and the Committee are the two bodies in power who can steer the development of human rights. They are also charged with improving procedures for their protection under the European Convention on Human Rights. Based on the same developments and arguments set out for CDDH in the previous paragraphs, the Committee should have supported recommendation 1885 or have presented a well substantiated “No” based on human rights law.

6 How would people and nature in Europe and beyond benefit from a right to environment as a substantive human right under the European Convention on Human Rights?

Having a human right to environment enshrined as a substantive (i.e. standalone) human right under the European Convention on Human Rights would elevate the entire spectrum of environmental issues within the Council of Europe - including sustainability, air, soil and water pollution and conservation of species and habitats - to a place among the most fundamental values of society, on a level equal to other human rights and superior to ordinary legislation. This is the level where it belongs and from which it can contribute to the paradigm shift or change in consciousness of humanity, remembering that we are part of nature and dependent on planet Earth.

Other benefits of having such a right would be:

- It would create rights and duties, responsibilities, more awareness and better practices on these issues for Member States, business and individuals;
- Victims of environmental disruption would have access to international procedures to hold their governments accountable when they lack the will to prevent or halt violations that threatens their health and well-being;
- This human right could make a real difference for individuals, since people suffering from violations, could turn to a court to stop these violations and/or be compensated or – better still – prevent violations from happening;
- In many instances based on other human rights, petitioners have been afforded redress under the European Convention on Human Rights and governments have taken measures to remedy the violation. So a rights-based approach would, compared to the existing laws, focus less on states and more on the people who get hurt or could get hurt by the disruption of the environment;

As stated above, in the absence of a guaranteed right to environment, other constitutionally protected rights (e.g. property rights) are currently often given auto-

51 Ibid. under Appendix 1 to the reply.

52 See http://www.coe.int/t/e/human_rights/cddh.

53 See Chapter 3. Marangopoulos Foundation for Human Rights (MFHR) v. Greece, Complaint No. 30/2005, European Committee of Social Rights (E.C.S.R.) (2006).

matic priority instead of being put on par with environmental concerns such as conservation of habitats or clean air, water and soil. This right would help to realise greater environmental protection and it would contribute to a (more) adequate standard of living for all humans (i.e. including the poor, women and children and future generations). Having a right to environment acknowledged in the European Convention on Human Rights would therefore benefit many missions, campaigns and goals, whether their focus is on human rights, development, aid, children, environmental or other issues.

7 Conclusions and recommendations

We still do not have a right to environment codified in or protected under the European Convention on Human Rights. Both the case law of European Court of Human Rights and European Committee on Social Rights offer a certain level of human rights based environmental protection, the first leaving States a broad margin of appreciation, the latter proclaiming a “right to a healthy environment”.

I say that we, people of Europe, cannot accept the outcome of the process that started with Parliamentary Assembly recommendation 1885. I call on the Parliamentary Assembly to redo the process and again recommend the drafting of a additional protocol to the European Convention on Human Rights, which would codify ‘a right to a healthy and viable environment’.

Meanwhile, pressure should be put on both CDDH and the Committee of Ministers to act now in accordance with the developments in international human rights law and case law of both the European Court of Human Rights and European Committee on Social Rights. Pressure should be put on these bodies by the Parliamentary Assembly, States, NGOs, academics, lawyers, human rights and environmental activists and other individuals, as we all have a right to a clear and transparent process of decision-making, based on facts and developments - not on wishes and reiterations - leading to the acknowledgement of the right to environment under the European Convention.

To the judges of the European Court of Human Rights, I call for the abandonment of the restricted interpretation of existing rights and, like the European Committee on Social Rights in *Marangopoulos v. Greece*⁵⁴, acknowledge, define and interpret the “right to a healthy environment” under the European Convention. The judges should join the European Committee of Social Rights, and explicitly recognise the “right to a healthy environment” as embodied in the

right to health and linked to the right to life under the European Convention on Human Rights.

It is time that Europe stopped lagging behind and catches up with the rest of the world in the area of human rights and the environment. As the global development of this right has shown, the time has come, both at the international and European level, to codify and respect this human right in its own right – as a basis for all other human rights and life itself,

‘Everyone has a right to an environment that is not harmful to their health or well-being and to have the environment protected, for the benefit of present and future generations.’

⁵⁴ *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, Complaint No. 30/2005, European Committee of Social Rights (E.C.S.R.) (2006).

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Editors in charge of the current issue:
Gerhard Roller and Julian Schenten

Editor in charge of the forthcoming issue:
Martin Führ (fuehr@sofia-darmstadt.de)

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Authors of this issue

Vito Buonsante, staff attorney at ClientEarth, an organisation of activist lawyers committed to securing a healthy planet. He works on the implementation of REACH and other toxics related legislation. More info: <http://www.clientearth.org/toxic-chemicals/>; info@clientearth.org.

Gareth Callagy, Chemical engineer and Regulatory affairs project manager at REACH24H Consulting Group. Specializes in REACH (EC 1907/2006) and Chinese legislation regarding new chemical substance notification, China GHS, hazardous chemical substance management and new cosmetic ingredient registration; gareth.c@reach24h.com.

Aboud S Jumbe, Environmental Scientist working for the Department of Environment, First Vice President's Office, Zanzibar, and heads an environmental policy, planning, and research unit. More info: <http://tz.linkedin.com/in/aboudjumbe>; aboud.jumbe@gmail.com.

Tony Lowes is one of the founders and a Director of Friends of the Irish Environment, an Irish environmental NGO established in 1997. FIE is a member of the national Irish Environmental Network and the European Environmental Bureau; admin@friendsoftheirishenvironment.org

Gita Parihar, Head of Legal at Friends of the Earth England, Wales and Northern Ireland. She provides legal advice to Friends of the Earth International at the unfccc climate negotiations and also brings public interest environmental cases in the UK on behalf of individuals and community groups; gita.parihar@foe.co.uk.

Julian Schenten, Lawyer specialising in IP, IT and information law as well as the regulation of Nanomaterials; Research assistant at the Society for Institutional Analysis (sofia), University of Applied Sciences in Darmstadt, Germany; schenten@sofia-darmstadt.de.

Jan van de Venis, Attorney-at-law at Amsterdam based law firm JustLaw and chairs the board of Stand Up For Your Rights, an NGO that focuses on human rights linked to a sustainable future of people on planet Earth. More info: <http://nl.linkedin.com/in/janvandevenis>, www.JustLaw.nl or www.StandUpForYourRights.org info@justlaw.nl.

Tania Van Laer is practising lawyer at LDR lawyers and researcher at the Centre for Environmental & Energy Law at the University of Ghent; tania.vanlaer@ldr.be.

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The institute's mission is to analyse and evaluate current and future environmental problems, to point out risks, and to develop and implement problem-solving strategies and measures. In doing so, the Öko-Institut follows the guiding principle of sustainable development.

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The Environmental Law Division covers a broad spectrum of environmental law elaborating scientific studies for public and private clients, consulting governments and public authorities, participating in law drafting processes and mediating stakeholder dialogues. Lawyers of the Division work on international, EU and national environmental law, concentrating on waste management, emission control, energy and climate protection, nuclear, aviation and planning law.

Contact

Freiburg Head Office:

P.O. Box 17 71
D-79017 Freiburg
Phone +49 (0)761-4 52 95-0
Fax +49 (0)761-4 52 95 88

Darmstadt Office:

Rheinstrasse 95
D-64295 Darmstadt
Phone +49 (0)6151-81 91-0
Fax +49 (0)6151-81 91 33

Berlin Office:

Schicklerstraße 5-7
D-10179 Berlin
Phone +49(0)30-40 50 85-0
Fax +49(0)30-40 50 85-388

www.oeko.de

The University of Applied Sciences in Bingen was founded in 1897. It is a practiceorientated academic institution and runs courses in electrical engineering, computer science for engineering, mechanical engineering, business management for engineering, process engineering, biotechnology, agriculture, international agricultural trade and in environmental engineering.

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Contact

Prof. Dr. jur. Gerhard Roller
University of Applied Sciences
Berlinstrasse 109
D-55411 Bingen/Germany
Phone +49(0)6721-409-363
Fax +49(0)6721-409-110
roller@fh-bingen.de

www.fh-bingen.de

The Society for Institutional Analysis was established in 1998. It is located at the University of Applied Sciences in Darmstadt and the University of Göttingen, both Germany.

The sofia research group aims to support regulatory choice at every level of public legislative bodies (EC, national or regional). It also analyses and improves the strategy of public and private organizations.

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Contact

Darmstadt Office:

Prof. Dr. Martin Führ - sofia
University of Applied Sciences
Haardtring 100
D-64295 Darmstadt/Germany
Phone +49(0)6151-16-8734/35/31
Fax +49(0)6151-16-8925
fuehr@sofia-darmstadt.de

www.h-da.de

Göttingen Office:

Prof. Dr. Kilian Bizer - sofia
University of Göttingen
Platz der Göttinger Sieben 3
D-37073 Göttingen/Germany
Phone +49(0)551-39-4602
Fax +49(0)551-39-19558
bizer@sofia-darmstadt.de

www.sofia-research.com



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elni

In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. elni is a registered non-profit association under German Law.

elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.

Coordinating Bureau

Three organisations currently share the organisational work of the network: Öko-Institut, IESAR at the University of Applied Sciences in Bingen and sofia, the Society for Institutional Analysis, located at the University of Darmstadt. The person of contact is Prof. Dr. Roller at IESAR, Bingen.

elni Review

The elni Review is a bi-annual, English language law review. It publishes articles on environmental law, focusing on European and international environmental law as well as recent developments in the EU Member States. elni encourages its members to submit articles to the elni Review in order to support and further the exchange and sharing of experiences with other members.

The first issue of the elni Review was published in 2001. It replaced the elni Newsletter, which was released in 1995 for the first time.

The elni Review is published by Öko-Institut (the Institute for Applied Ecology), IESAR (the Institute for Environmental Studies and Applied Research, hosted by the University of Applied Sciences in Bingen) and sofia (the Society for Institutional Analysis, located at the University of Darmstadt).

elni Conferences and Fora

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researchers, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brussels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

Publications series

elni publishes a series of books entitled "Publications of the Environmental Law Network International". Each volume contains papers by various authors on a particular theme in environmental law and in some cases is based on the proceedings of the annual conference.

elni Website: elni.org

The elni website www.elni.org contains news about the network. The members have the opportunity to submit information on interesting events and recent studies on environmental law issues. An index of articles provides an overview of the elni Review publications. Past issues are downloadable online free of charge.

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elni, c/o Institute for Environmental Studies and Applied Research
FH Bingen, Berliner Straße 109, 55411 Bingen/Germany

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