INDUSTRIAL POLLUTION AND HUMAN RIGHTS: 
A CASE STUDY OF CURAÇAO AND THE ISLA REFINERY

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By using the situation of the Isla refinery as a case study, this thesis focuses on the 'greening' of existing human rights in order for people to obtain redress for environmental harm.

The pollution by the Isla refinery on Curaçao, an island located in the Caribbean and a constituent country of the Kingdom of the Netherlands, has been a problem for many years. The refinery has systematically exceeded domestic environmental norms. Curaçaoans living downwind of the refinery experience many health issues due to toxic emissions. These problems are well known to both the Curaçao government and the government of the Kingdom of the Netherlands—however, neither seem to have taken any real action to put an end to the harmful effects of the refinery’s emissions.

This thesis shows that the people of Curaçao most affected by Isla’s toxic emissions could make a successful claim under Article 2, Article 8, and Article 1 of Protocol No. 1 before the ECtHR. As only the Kingdom, not its constituent countries, has international legal personality, it is ultimately the Kingdom who bears responsibility under international law in the case of an adverse ruling by the ECtHR. This calls for a greater and more effective role for the Kingdom government in safeguarding the human rights in the Caribbean parts of the Kingdom.
To Curacao,

my beautiful home,

kaminda mi lombrishi ta derá.
Acknowledgments

First and foremost, I would like to express my sincerest gratitude to my supervisor Prof. Dr. K.A.M. Henrard for her helpful comments and guidance throughout the process of writing this thesis. Thank you for giving me the opportunity to write about something I am really passionate about.

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I am also very grateful to all of the organizations who stood up for the rights of the people of Curaçao; without your work, I would have not been able to write this thesis.

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<th>Description</th>
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<tbody>
<tr>
<td>AAQS</td>
<td>Ambient Air Quality Standards</td>
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<tr>
<td>CAE</td>
<td>Clean Air Everywhere</td>
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<td>CoM</td>
<td>Committee of Ministers (Council of Europe)</td>
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<td>CRC</td>
<td>Convention on the Rights of the Child</td>
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<td>CRPD</td>
<td>Convention on the Rights of Persons with Disabilities</td>
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<tr>
<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>HRC</td>
<td>UN Human Rights Committee</td>
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<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social, and Cultural Rights</td>
</tr>
<tr>
<td>ICMW</td>
<td>International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families</td>
</tr>
<tr>
<td>PdVSA</td>
<td>Petróleos de Venezuela S.A.</td>
</tr>
<tr>
<td>RdK</td>
<td>Refineria di Korsou N.V.</td>
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<tr>
<td>SHZ</td>
<td>Stichting Humanitaire Zorg Curaçao</td>
</tr>
<tr>
<td>SMOC</td>
<td>Stichting Schoon Milieu op Curaçao</td>
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<tr>
<td>StAB</td>
<td>De Stichting Advisering Bestuursrechtspraak voor Milieu en Ruimtelijke Ordening</td>
</tr>
<tr>
<td>TSP</td>
<td>Total Suspended Matter</td>
</tr>
<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNECE</td>
<td>United Nations Economic Commission for Europe</td>
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<td>WHO</td>
<td>World Health Organization</td>
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CHAPTER 1   Introduction

1.1   Historical background

During the 17th century, when the Dutch were building their overseas colonial empire, the Dutch West India Company occupied several islands in the Caribbean, including the island of Curaçao. The Dutch developed the island into a centre for trade, mainly in enslaved Africans. Most of the slaves brought to the island were transported to their ultimate destinations in the Eastern Caribbean and Spanish colonies in the Americas. When Dutch colonial rule ended after World War II, the former colonies of the Netherlands, including Curaçao, were granted more autonomy through changes in the Constitutions of the islands in 1948. In 1954, a new constitutional order for the Kingdom of the Netherlands (“Kingdom”) was established. The islands of Aruba, Bonaire, Curaçao, Saba, Saint Eustatius and Sint Maarten together became known as ‘the Netherlands Antilles’, which became an autonomous country of the Kingdom, alongside former colony Suriname and the Netherlands.

The division of competences between the constituent countries and the Kingdom is set out in the 1954 Charter for the Kingdom of the Netherlands. In principle, each country “conducts their internal interests autonomously and their common interests on a basis of equality.” Article 3 of the Charter lists which matters shall be considered ‘Kingdom

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2 Ibid.
3 Ibid
6 The Netherlands Antilles, 3rd edn, supra .n. 4 , pp. 17 – 20.
8 See preamble for the Statuut voor het Koninkrijk der Nederlanden [Charter for the Kingdom of the Netherlands], Staatsblad 1998, 579.
10 See preamble for the Charter for the Kingdom of the Netherlands.
affairs’, meaning legislation and policies concerning these matters are made at the Kingdom level and apply to all of the constituent countries.¹¹

On 10 October 2010 (10-10-10), the Netherlands Antilles was dissolved and Curaçao became a separate autonomous country within the Kingdom of the Netherlands.¹² The Kingdom of the Netherlands now consists of four autonomous countries: the Netherlands, Aruba, Sint Maarten and Curaçao.¹³ Today, Curaçao is a popular tourist destination. It is home to many beautiful white-sand cove beaches, impressive coral reefs and the historic area of the capital of Curaçao, Willemstad, which is a protected UNESCO World Heritage Site.¹⁴ Right on the outskirts of its picturesque capital lies the out-dated oil refinery locally known as ‘Isla’. The oil refinery was built by Royal Dutch Shell in 1915, when Curaçao was still under Dutch colonial rule.¹⁵ The Netherlands profited greatly from the refinery, especially during World War II, when the refinery on Curaçao produced a large percentage of the gasoline and fuel required by the Allied forces.¹⁶ Shell ran the refinery with little regard for human health or the environment, massively polluting the soil and water surrounding the refinery. Infamous amongst locals is the heavily polluted ‘asphalt lake’, which was created during World War II by the refinery dumping its heavy oil residues in an enclosed part of the Schottegat bay.¹⁷

¹³ Suriname became a fully independent country in 1975 (source: T. Klak, Globalization and neoliberalism. (Lanham: Rowman & Littlefield, 1998), p.xxiii.) Aruba had seceded from the Netherlands Antilles earlier (1986) and St Maarten also became a separate autonomous country in the Dutch kingdom on 10-10-10. Bonaire, Saba and St Eustastius opted to establish closer ties with the Netherlands and became ‘special municipalities’ of the Netherlands, and are now known as the BES islands or Caribbean Netherlands. Source: Ministry of Foreign Affairs, Kingdom of the Netherlands: One Kingdom – Four Countries; European and Caribbean, The Hague, 2015, p.1.
¹⁶ A. ten Kate, Royal Dutch Shell and its sustainability troubles: Background report to the Erratum of Shell’s Annual Report 2010. Milieudefensie (Friends of the Earth Netherlands), p.45.
¹⁷ Ibid.
In 1985 Shell left Curaçao for economic reasons, selling the by then rickety refinery and its polluted grounds to the island of Curaçao for 4 Antillean Guilders – a bargain!\(^\text{18}\) Unfortunately, part of the “bargain” was that Shell could not be held liable for any of the environmental damage they caused during the 70 years they exploited the refinery.\(^\text{19}\)

Following the sale, the refinery was leased to Venezuelan state oil company *Petróleos de Venezuela S.A.* (PdVSA) for a period of 20 years, which was later extended for a period of 5 years.\(^\text{20}\)

To this day the refinery is still being operated by PdVSA, despite being heavily outdated and causing massive air pollution. The oil refinery operates under a Nuisance Permit which it was granted in 1997 for the entire duration of the leasing agreement with PdVSA.\(^\text{21}\)

Since 1997, the regulations and norms in the Nuisance Permit have not been updated.\(^\text{22}\) The Nuisance Permit is thus based on outdated environmental norms and air quality standards, which the refinery still struggles to meet.\(^\text{23}\) The measuring stations near the refinery that measure sulphur dioxide (SO\(_2\)) concentrations and total suspended matter (TSP) concentrations showed that in 2014 the allowed daily limit of SO\(_2\) concentrations was exceeded numerous times throughout the year. According to a GGD Amsterdam report, the SO\(_2\) and TSP concentrations had also increased in 2014 compared to 2013.\(^\text{24}\) Many people live under the toxic smoke of the refinery, which leads to numerous health problems. Exposure to high concentrations of TSP and SO\(_2\) has been, for example, linked to respiratory illness.\(^\text{25}\)

A study conducted by Ecorys-NEI in 2005 concluded that at least 18

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\(^{20}\) *Ibid*.

\(^{21}\) Hindervergunning Refinería ISLA (Curazao) S.A. 10 juli 1997.


people die prematurely each year as a result of exposure to the refinery’s emissions.\textsuperscript{26} Despite these and numerous other troubling reports, neither the government of Curaçao nor the Kingdom government has taken any action to stop the damage to the environment or to the health and well being of the people. Part of the government’s unwillingness to take action against the Isla is because the refinery has been one of the largest employers on the island and biggest contributors to the GDP.\textsuperscript{27}

The Isla refinery has recently become an important topic of discussion on both Curaçao and in the Netherlands. Isla’s pollution problem and the Curaçao government’s inability and unwillingness to crack down on the refinery has come up various times in the House of Representatives of the Netherlands, specifically in the context of human rights.\textsuperscript{28} Several organizations and political figures in both Curaçao and the Netherlands have claimed that the human rights of the people living under the toxic smoke of the Isla are being violated.\textsuperscript{29} Though most universal human rights instruments, including the European Convention on Human Rights (ECHR), do not expressly recognize the right to a healthy environment or clean air,\textsuperscript{30} the main argument behind these claims of human right violations is that there are certain human rights which implicitly protect people from harm arising from poor environmental conditions.

This study explores the extent to which the rights guaranteed by the ECHR can be interpreted to include protection from harm arising from poor environmental conditions and whether the people affected by the Isla’s pollution could successfully argue before the ECtHR that the government’s failure to take action against the refinery’s polluting activities constitutes a violation of their rights under the ECHR.

\textsuperscript{26} Ecorys-NEI,  \textit{Economic Value Of Strategic Options For Refineria Di Korsou} (Rotterdam, 2005), p. 89.
\textsuperscript{28} See for an example of a discussion on Isla in the House of Representatives of the Netherlands: Handelingen II 2015/16, 34 300, nr. 51.
\textsuperscript{29} The foundation SMOC (Schoon Milieu op Curaçao), for example, has argued that the human rights of those living downwind of the refinery are being violated.
1.2 Purpose of research and research questions

This research aims to contribute to the growing literature on the ‘right to a healthy environment’ and the relationship between human rights and a healthy environment. The paper mainly deals with the broader issue of human rights and environmental harm, using Curaçao’s Isla refinery as a case study. The study looks at pollution from the perspective of international human rights law to determine whether the people suffering as a result of poor environmental conditions could hold their State accountable under existing human rights instruments. More specifically, it looks at whether the people of Curaçao living under the toxic smoke of the Isla could use human rights bodies like the European Court of Human Rights (ECtHR) to allege that the government of Curaçao, part of the Kingdom of the Netherlands, is guilty of violating their human rights by not ensuring that the refinery sticks to environmental norms.

The main questions I will attempt to answer in this thesis are thus as follows:

- To what extent can the right to a healthy environment be seen as implicit in the rights guaranteed in the ECHR (specifically Article 2, Article 8 and Article 1 of Protocol No. 1)?
- Could the citizens of Curaçao living under the toxic smoke of the Isla refinery bring a successful claim before the ECtHR under these articles?

1.3 Structure

Following this introductory chapter, I will discuss the relationship between human rights law and a healthy environment and how living in a heavily polluted environment can affect the enjoyment of certain human rights in Chapter 2. In Chapter 3, I will discuss Curaçao and its status in the Kingdom of the Netherlands and the spheres of responsibility of the Kingdom government and the government of Curaçao in addressing human rights violations. This chapter will focus on the possibilities for the people of Curaçao to bring a claim before an international human rights tribunal such as the ECtHR. Chapter 4 will consist of an analysis of the ECtHR’s case law on human rights and the environment. This Chapter will address the extent to which certain human rights have been interpreted by the ECtHR to include protection from environmental harm. Chapter 5 serves to evaluate whether there is an arguable case that certain human rights guaranteed by the ECHR to the
people of Curaçao have been violated. Chapter 6 will contain some concluding observations.

1.4 Methodology

This thesis explores the possibility for the people of Curaçao to assert their claim that their human rights are being violated on account of the polluting emissions from the Isla refinery. The methodology of my research mainly employs an analysis of the relevant case law of the ECtHR and literature (scholarly articles and books) relating to environmental pollution and human rights violations. For the case study, I gathered and analysed primary and secondary sources such as documents and reports from organizations and government officials, as well as documents from civil cases brought against the Isla refinery and administrative cases brought against the government of Curaçao concerning the Isla refinery.
CHAPTER 2 The relationship between human rights and the environment

2.1 Linking human rights and the environment

Human rights law and environmental law are two different branches of international law that are often discussed separately. However, they are inherently interdependent and affect and influence each other in a multitude of ways.\(^{31}\) Human rights law recognizes fundamental rights which are inherent to all human beings, such as the right to life, food, health, and adequate living conditions.\(^{32}\) Environmental law is focused on environmental protection and conservation, which makes the realization of those fundamental human rights possible.\(^{33}\) A healthy environment is key to the survival and prosperity of all species, including mankind.\(^{34}\) If we do not protect and conserve our environment, we cannot fully exercise or properly enjoy our human rights.\(^{35}\) The rights to, for example, health, water, food and life itself cannot be guaranteed in a toxic environment where the air is polluted, the water is contaminated and extreme weather due to climate change has wiped out crops, livestock and fish stocks.\(^{36}\) From both a human rights perspective and an environmental law perspective, it is therefore essential that we protect and repair our environment.

Human rights and the environment are thus inextricably connected. But environmental protection and conservation is not only vital for the realization of human rights – it also applies the other way around. Certain human rights, especially the rights to

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\(^{34}\) *Ibid.*, at p. 9.


information, public participation in decision-making and access to justice, have been used in the effort to protect and conserve the environment.\(^{37}\)

Although the fact that environmental degradation can lead to violations of certain human rights is now more widely accepted,\(^ {38}\) some scholars have argued that this approach is insufficient.\(^ {39}\) The main issue with this approach is that it is dependent on the willingness of an international tribunal to interpret existing human rights to provide protection from environmental harm.\(^ {40}\) These scholars have thus lobbied for the creation of a freestanding, universal human right to a healthy environment.

There are thus three main approaches to linking human rights and the environment:\(^ {41}\)

- The first approach views a healthy environment as a pre-condition for the enjoyment of human rights.\(^ {42}\)
- The second approach views certain human rights, such as access to information, participation in decision-making, and access to justice in environmental matters, as crucial to ensure proper environmental protection (procedural and participatory environmental rights).\(^ {43}\)
- The third and last approach recognizes a substantive right to a healthy environment as its own freestanding human right (substantive human right to a healthy environment).\(^ {44}\)

Each of these three approaches will be discussed in depth in this chapter.

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\(^{38}\) This will be discussed more in depth below.


\(^{42}\) Ibid., at p. 128.


\(^{44}\) Ibid.
2.2 A healthy environment as a pre-condition for the enjoyment of human rights

The relationship between human rights and the environment is one that has been recognized as early as the 1970s. At the United Nations Conference on the Human Environment, which was held in Stockholm in 1972, the link between human rights and the environment was addressed for the first time at an international level. The UN Conference on the Human Environment culminated in the Stockholm Declaration, which proclaims in the preamble that:

“both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights – even the right to life itself.”

The Stockholm Declaration thus unequivocally acknowledged the interrelationship between a healthy environment and human rights, stating, in so many words, that a healthy environment is a prerequisite to the enjoyment of basic human rights, including the right to life itself. The right to life is not guaranteed in a polluted environment. According to the World Health Organization (WHO), exposure to environmental pollution is one of the leading causes of death worldwide. In 2012, 8.9 million deaths across the planet were attributable to exposures to polluted soil, water and air.

But environmental pollution does not only affect the right to life. A habitable environment is crucial for human survival, and thus impacts all human rights. A polluted environment in which people must scramble for access to clean water and food does not only affect the human rights to clean water and food, but would also render other human rights and freedoms virtually meaningless. Human rights obligations of states thus include the obligation to ensure a certain quality of environment necessary for individuals' proper

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45 Collins, supra note 41, at p. 131.
46 Collins, supra note 41, at p. 124.
50 Ibid.
51 Collins, supra note 41, at. 127
52 Downs, supra note 35, at p. 351.
enjoyment of human rights – particularly the rights to life, health, respect for private and family life\textsuperscript{53} and adequate food and housing.\textsuperscript{54}

### 2.3 Procedural and participatory environmental rights

Whereas the first approach views protecting the environment as crucial for the proper enjoyment of human rights, the second approach views certain human rights, such as access to information, meaningful public participation in decision-making and access to justice, as indispensable for ensuring proper environmental conservation and preservation.\textsuperscript{55} These rights are often referred to as \textit{procedural} and \textit{participatory} environmental rights.

One of the most important developments for procedural and participatory environmental rights was the 1992 \textit{United Nations Conference on Environment and Development}, also known as the \textit{Earth Summit}, which took place in Rio de Janeiro, Brazil. The main purpose of the Conference was to “address urgent problems of environmental protection and socio-economic development.”\textsuperscript{56} During the Earth Summit, three major agreements were adopted: Agenda 21, the Rio Declaration on Environment and Development and the Statement of Forest Principles.\textsuperscript{57} The most significant of these agreements in the context of human rights and the environment was the \textit{Rio Declaration on Environment and Development} (hereafter: the \textit{Rio Declaration}).\textsuperscript{58} The Rio Declaration consists of 27 principles recognizing the importance of the global environment and environmental conservation. The Rio Declaration builds on the Stockholm Declaration and calls for cooperation among states in protecting and restoring the environment and achieving sustainable development.\textsuperscript{59} The Rio Declaration also addresses the link between human rights and the environment in Principle

\textsuperscript{53} Environmental pollution can violate the right to respect for private and family life if it creates a significant nuisance which impairs one's home or private and family life. This will be elaborated on in Chapter 4.

\textsuperscript{54} UNEP & CIEL, \textit{UNEP Compendium on Human Rights and the Environment: Selected international legal materials and cases}, supra n. 31, at p. 6.

\textsuperscript{55} Ibid., at p. 2.


\textsuperscript{59} \textit{Rio Declaration on Environment and Development} UN Doc. A/CONF.151/26 (vol. I) / 31 ILM 874 (1992) [further Rio Declaration].
10 by acknowledging the procedural and participatory rights of citizens in relation to control over their own environment. Principle 10 recognizes that:

“Environmental issues are best handled with 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.”

Given the important role that citizens, not just governments, play in environmental conservation and sustainable development, they should have access to environmental information, be able to participate in environmental decision-making and have access to justice in environmental matters. In order to achieve sustainable development and preserve a healthy environment, it is important that citizens possess these procedural and participatory environmental rights. This way, they are actively involved in and can actively contribute to the behavioural changes that need to be made for the betterment of the environment.

Principle 10 of the Rio Declaration was a stepping-stone to the 1998 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). The Aarhus Convention is arguably the most significant and advanced multilateral environmental agreement incorporating human rights protections and principles in the form of procedural and participatory environmental rights. The objective of the Aarhus Convention is stated in article 1:

“In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the

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60 D. Shelton, ‘Human Rights, Health & Environmental Protection’, supra note 37, at p. 4.
61 Principle 10 of the Rio Declaration.
64 E. Hollo, K. Kulovesi, and M. Mehling, Climate Change and the Law (Dordrecht: Springer, 2013), at p. 312
65 Article 1 of the Aarhus Convention.
rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.”

The inclusion of human rights protections and principles in environmental law, specifically the procedural and participatory rights such as access to information, access to justice and participation in decision-making, has been a momentous development. A great number of advanced national legal systems now grant these democratic rights in environmental matters to their citizens through their constitutions.

2.4 A separate human right to a healthy environment

There is no universal instrument which expressly recognizes the right to a healthy environment. No such right was recognized in the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), or the International Covenant on Economic, Social, and Cultural Rights (ICESCR). This is mainly because when these human rights documents were drafted environmental protection had not been on the global agenda yet.

The first time that the human right to a healthy environment was formally addressed on the international law stage was in Principle 1 of the Stockholm Declaration. Principle 1 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.”

Though not expressly acknowledging a freestanding ‘right to a healthy environment’ in itself, Principle 1 of the Stockholm Declaration did lay the foundation for the movement to establish a freestanding right to a healthy environment. Many regional instruments

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69 D. Shelton, ‘Human Rights, Health & Environmental Protection’, *supra* n. 37, at p. 6.  
adopted the right to a healthy environment or recognized certain rights to that effect after the UN Conference on the Human Environment, inspired by Principle 1 of the Stockholm Declaration. Some form of the right to a healthy environment is now recognized in regional instruments such as the Additional Protocol to the American Convention on Human Rights and the African Charter on Humans and Peoples Rights. Article 11 of the Additional Protocol to the American Convention on Human Rights, also known as the ‘Protocol of San Salvador’ recognizes that “[e]veryone shall have the right to live in a healthy environment” and requires state parties to “promote the protection preservation and improvement of the environment.” Article 24 of the African Charter states that: “[a]ll peoples shall have the right to a general satisfactory environment favourable to their development.” On a national level, the idea of a right to a healthy environment also gained popularity after the Stockholm Declaration. At least 90 states, almost half of the states on Earth, now explicitly recognize the right to a healthy environment in their constitutions.

Though there is still no explicit universal right to a healthy environment, some scholars have argued that there is “strong evidence” that the right to a healthy environment has been developing into principle of customary international law. The regional treaty provisions, such as those mentioned above, and several national constitutions which recognize the right to a healthy environment as well as the Rio Declaration and Stockholm Declaration may indeed show a level of state practice and opinio juris which indicate that a right to a healthy development is emerging as a principle of customary international law.


71 Ibid.


73 Ibid., at p. 60.


75 Collins, supra note 41, at p. 136.

76 A full discussion on the right to a healthy environment as a principle of customary international law is beyond the scope of this thesis. For the complete discussion on the right to a healthy environment as a principle of customary international law, see: J. Lee, ‘The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law’, Colum. J. Envt’l. L. 25 (2000) and L.M. Collins, supra n. 41.

2.5 **Human rights bodies and ‘environmental’ cases**

Human rights tribunals and treaty bodies are tasked with overseeing that the state parties to a particular treaty comply with the obligations undertaken by them therein. Human rights bodies have contributed significantly to the understanding of the relationship between human rights and the environment through their judgments and decisions.

When an individual suffers harm as a result of poor environmental conditions (i.e. the individual is exposed to polluted air, soil or water which negatively affects his/her health or well-being), they often bring their cases before international or regional human rights tribunals or treaty bodies. The main reason as to why these cases are brought before human rights bodies is because there are virtually no other avenues for persons suffering as a result of poor environmental conditions. There are no international or regional environmental tribunals to which individuals can turn when states do not comply with the commitments made by them within a certain environmental agreement. These types of bodies do exist in human rights law. Contrary to environmental treaties, human rights treaties generally establish complaint or petition procedures. The general idea behind complaint procedures in human rights treaties, such as that of the ECHR or the ICCPR, is that any individual, group of individuals or other state parties to the treaty can lodge a complaint with the human rights body established by that treaty alleging that a state party has breached one or more of the rights guaranteed by the treaty. These human rights

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79 D. Shelton, ‘Human Rights, Health & Environmental Protection’, *supra* n. 38, at p. 10.

80 D. Shelton, ‘Legitimate And Necessary’, *supra* n. 78, at p. 141.


bodies and tribunals can then give judgments or make determinations on whether there has been a violation of one (or more) of the provisions of the treaty.\textsuperscript{84}

As already discussed above, some regional human rights treaties recognize a separate, explicit right to a healthy environment. The human rights tribunals which monitor the compliance of state parties with treaties which include the right to a healthy environment as a separate human right, like the African Court on Human and Peoples' Rights, directly oversee compliance with this right.\textsuperscript{85} Other human rights bodies, like the ECtHR established by the ECHR, which does not contain an explicit right to a healthy environment, have identified through interpretation an environmental dimension to the rights enshrined in the convention concerned.\textsuperscript{86} These human rights bodies recognize that environmental pollution can violate existing human rights and deal with cases involving harmful developments in the environment which endanger rights that have been guaranteed in the agreements resorting under their jurisdiction.\textsuperscript{87} The acknowledgement of these environmental elements of existing human rights, which is apparent in the case law of several human rights tribunals,\textsuperscript{88} is often referred to as the ‘greening of human rights law’.\textsuperscript{89}

\textsuperscript{84} These judgments/decisions are not always binding. This will be elaborated on below.
\textsuperscript{86} \textit{Ibid}.
\textsuperscript{87} D. Shelton, ‘Legitimate and Necessary: Adjudicating Human Rights Violations Related To Activities Causing Environmental Harm Or Risk’, \textit{supra} note 78, at p. 145.
CHAPTER 3 A review of possibilities for the people of Curaçao to assert their claim of human rights violations

The previous chapter discussed how environmental pollution can lead to violations of existing human rights. There are several human rights bodies which have recognized this through their judgments and have interpreted existing human rights to afford protection from environmental harm. Having established that environmental pollution can violate human rights, the issue then centres on which human rights bodies the Curaçaoans could turn to in order to assert the claim that their human rights are being violated as a result of the pollution from the Isla refinery.

This chapter will discuss two of the main possibilities for international human rights adjudication: the United Nations human rights treaty bodies\textsuperscript{90} and the European Court of Human Rights established by the Council of Europe.

Curaçao is an interesting case because it is not a sovereign state. It is a constituent country within the Kingdom of the Netherlands. Curaçao does not have international legal personality, and as such, cannot sign international treaties. It is thus not a state party to any human rights treaties. A claim can only be brought before a UN human rights treaty body or the ECtHR against a contracting state bound by the obligations under the treaty or convention that the claimant alleges have been violated.\textsuperscript{91} It is thus necessary to explore how the people of Curaçao living under the toxic smoke of the refinery could make a claim before a UN human rights treaty body or the ECtHR stating that the rights guaranteed to them under the treaty or convention concerned are being violated. To this end, it is

\textsuperscript{90} The UN charter body, the Human Rights Council, will not be discussed because it does not deal with individual cases, but “consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms”. Source: ‘Human Rights Council Complaint Procedure’, Ohchr.org <http://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/HRCComplaintProcedureIndex.aspx> [accessed 5 July 2016].

important to look at the structure of the Kingdom of the Netherlands and the powers and responsibilities each of the constituent countries, and the Kingdom itself, has.

3.1 Structure of the Kingdom of the Netherlands

The Kingdom of the Netherlands is a sovereign state which consists of four autonomous countries: the Netherlands (including the islands of Bonaire, Sint Eustatius and Saba), Aruba, Curaçao and Sint Maarten. Each of these constituent countries conducts its ‘internal affairs’ autonomously, and has its own government and constitution.

The exact division of competences between the constituent countries and the Kingdom is set out in the 1954 Charter for the Kingdom of the Netherlands (“the Charter”). Certain matters listed in the first paragraph of Article 3 of the Charter, such as foreign relations and the defence of the Kingdom, are deemed ‘Kingdom affairs’ which means that decision-making on these matters happens at Kingdom level and applies to all of the autonomous countries. All other matters not listed in Article 3, such as environmental policy; criminal law and the enforcement of prison sentences; health care and education, are within the competence of the constituent countries. The government of the Kingdom consists of the Monarch and Council of Ministers of the Kingdom. The latter is made up of the Council of Ministers of the Netherlands, as well as one Minister

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92 The islands of Bonaire, Saba and Sint Eustatius are ‘special municipalities’ of the Netherlands.
94 Article 41 of the Charter for the Kingdom of the Netherlands.
97 Paragraph 1 of Article 3 of the Charter for the Kingdom of the Netherlands.
98 Hillebrink, supra n. 11, at p. 143.
99 By far the majority of affairs are autonomous competences of the constituent countries.
Plenipotentiary of Aruba, one Minister Plenipotentiary of Curaçao, and one Minister Plenipotentiary of Sint Maarten.\textsuperscript{103}

The Charter for the Kingdom of the Netherlands specifically states that the promotion and realization of human rights and freedoms is a matter within the competence of the constituent countries in the first paragraph of Article 43 of the Charter.\textsuperscript{104} The second paragraph of Article 43 provides that safeguarding of these rights and freedoms is a Kingdom affair. The second paragraph of article 43 is often referred to as the ‘safeguarding function’ of the Kingdom.\textsuperscript{105} In fulfilling its safeguarding function, the Kingdom government will follow the developments concerning the realization of human rights on the islands of Aruba, Curaçao and Sint Maarten.\textsuperscript{106} This task is facilitated by the Governor of the island.\textsuperscript{107} The Governor of Curaçao represents the King and as such is the head of the country’s government.\textsuperscript{108} The Governor also represents the Kingdom and as such must look after the Kingdom’s interests.\textsuperscript{109} If the Governor considers that there is an intolerable situation in the country, which endangers the norms in Article 43 of the Charter, he must communicate this to the Kingdom government.\textsuperscript{110} The Kingdom will make its own judgment.\textsuperscript{111} If the Kingdom observes that a constituent country is not fulfilling its duty under paragraph 1 of

\textsuperscript{103}‘Parlementaire Controle Koninkrijksregering’, Tweedekamer.nl [online].<https://www.tweedekamer.nl/kamerleden/commissies/kr/parlementaire_controle_koninkrijk> [accessed 3 July 2016].

\textsuperscript{104}Article 43 of the Charter for the Kingdom of the Netherlands:
1. Each of the Countries shall promote the realization of fundamental human rights and freedoms, legal certainty and good governance.
2. The safeguarding of such rights and freedoms, legal certainty and good governance shall be a Kingdom affair.

\textsuperscript{105}Ministry of Foreign Affairs, Kingdom of the Netherlands: One Kingdom – Four Countries; European and Caribbean, The Hague, 2015.


\textsuperscript{107}Article 2 of the Charter. Aruba, Curaçao and Sint Maarten each have a Governor who represents the King.


\textsuperscript{109}Article 15 of the Reglement voor de Gouverneur van Curaçao [Regulations for the Governor of Curaçao], Rijkswet van 7-7-2010, Stb. 2010, 341. The exact tasks which are entrusted to the Governor in his capacity as a representative of the Kingdom Government are set out in the Regulations for the Governor. Among other things, the Governor is tasked with monitoring compliance with treaty obligations in Curaçao (Article 20).


\textsuperscript{111}Ibid.
Article 43 of the Charter, the Kingdom may ‘intervene’ on the basis of the Kingdom’s safeguarding function. Article 43 does not define what type of measures the Kingdom may take in the context of its safeguarding function – the Explanatory Memorandum to the Charter makes clear that it is not possible to provide an exhaustive list of possible measures.\textsuperscript{112}

The Kingdom, in considering whether to take measures in a particular case on the basis of the ‘safeguarding function’ must show the utmost restraint.\textsuperscript{113} Not every violation of human rights will trigger the Kingdom’s safeguarding function. The country concerned should be afforded the time and opportunity to address any human rights violations itself.\textsuperscript{114} The Kingdom may only take measures on the basis of paragraph 2 of Article 43 if the Kingdom ascertains that there is a serious breach of fundamental rights and freedoms in a constituent country, and it appears that the country itself cannot redress this intolerable situation.\textsuperscript{115} The least intrusive measure to facilitate the return to a tolerable situation should be chosen first. If this measure does not produce the desired effect, a heavier measure may be imposed. The exact measures to be taken differ from case to case.\textsuperscript{116} The Explanatory Memorandum on the Charter only states that the measures should not go further than what is necessary to end the intolerable situation and should always be temporary.\textsuperscript{117}

On the international scene the Kingdom is the sole actor, since only the Kingdom has international legal personality. As such, only the Kingdom has the competence to “conclude, ratify and accede to international legal agreements”, such as human rights treaties and environmental agreements.\textsuperscript{118} However, the treaty does not automatically apply

\textsuperscript{112} W. van Helsdingen, Officiële toelichting [Explantory Memorandum] of Article 3 of the Charter, \textit{Charter for the Kingdom of the Netherlands}, 1957, p. 262. There are, however, a number of legal instruments available in the Charter for the Kingdom to effectuate its safeguarding function, namely Article 45, Article 50 and Article 51.

\textsuperscript{113} R.H.A. Plasterk, ‘Informatie met betrekking tot de waarborgfunctie van het Koninkrijk’, \textit{supra} n. 110.

\textsuperscript{114} \textit{Ibid}.

\textsuperscript{115} W. van Helsdingen, \textit{supra} n. 112. See also: \textit{Jaarverslag en slotwet Koninkrijksrelaties 2012 Kamerstukken II 2012/2013 33605-IV nr. 1, p. 14


\textsuperscript{117} W. van Helsdingen, \textit{supra} n. 112.

\textsuperscript{118} Ministry of Foreign Affairs, \textit{Kingdom of the Netherlands: One Kingdom – Four Countries; European and Caribbean}, The Hague, 2015.
to all individual countries.\textsuperscript{119} Once international treaties are signed by the Kingdom, it is up to the autonomous countries of the Kingdom to decide if they wish to be bound by it.\textsuperscript{120} Within the Kingdom, the constituent countries themselves are responsible for the implementation of and compliance with international treaties. However, under international law, only the Kingdom of the Netherlands is accountable as the contracting party to the treaty.\textsuperscript{121}

The following section will consider two different international human rights regimes which could be used by the people of Curaçao to assert their claim of human rights violations.

3.2 Applicability of human rights treaties and individual complaints procedures in Curaçao

3.2.1 UN human rights treaty bodies

There are nine core UN human rights treaties. Each of these human rights treaties have established a committee of experts which monitor state parties’ compliance with the treaties and accept individual complaints.\textsuperscript{122} The Kingdom of the Netherlands has ratified all of the core international human rights treaties, with the exception of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW).\textsuperscript{123} The Kingdom also has not ratified the Optional Protocol establishing an individual communications procedure to the International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Rights of the Child (CRC) and Convention on the Rights of Persons with Disabilities (CRPD).\textsuperscript{124} It is thus not possible to

\begin{footnotesize}
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\item \textsuperscript{119} Ibid.
\item \textsuperscript{120} ‘The Validity of Treaties’, Government.nl [online]. \\
\item \textsuperscript{121} Ministry of Foreign Affairs, Kingdom of the Netherlands: One Kingdom – Four Countries; European and Caribbean, The Hague, 2015.
\item \textsuperscript{122} ‘Human Rights Treaty Bodies’, Ohchr.org \\
<http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx> [accessed 7 July 2016]
\item \textsuperscript{123} ‘Ratification states by country or treaty – the Netherlands’, UN Human Rights Office of the High Commissioner, 2016 [online].  \\
\item \textsuperscript{124} Ibid.
\end{itemize}
\end{footnotesize}
bring an individual complaint against the Kingdom before the committees overseeing compliance with these treaties.\textsuperscript{125}

The right to a healthy environment is not explicitly protected in any of the United Nations’ human rights treaties. However, they do recognize rights such as the right to life and the right to health which, as we have seen in Chapter 2, can be affected by poor environmental conditions.\textsuperscript{126} In particular, the treaty bodies UN Human Rights Committee\textsuperscript{127} (HRC) and the UN Committee on Economic, Social and Cultural Rights\textsuperscript{128} have dealt with the environmental aspects of the rights guaranteed in the treaties they oversee through their individual communications and General Comments.\textsuperscript{129} Considering the Kingdom of the Netherlands has not accepted the Optional Protocol to the ICESCR for individual complaints, only the HRC will be discussed as a potential avenue for the people of Curaçao to assert their claim.

### 3.2.2 The International Covenant on Civil and Political Rights and the Human Rights Committee

The ICCPR was adopted by General Assembly resolution 2200A (XXI) in 1966 and entered into force on 23 March 1976.\textsuperscript{130} State parties to the ICCPR agree to guarantee the rights enshrined in the ICCPR to all individuals within their jurisdiction.\textsuperscript{131}

An individual complaints mechanism for the ICCPR was established by the Optional Protocol to the ICCPR.\textsuperscript{132} State parties to the Optional Protocol agree to recognize the competence of the HRC to hear complaints from individuals under the state’s jurisdiction alleging violations of the rights guaranteed by the ICCPR.\textsuperscript{133} The ICCPR and the Optional

\textsuperscript{125} Ibid.
\textsuperscript{127} The UN Human Rights Committee oversees implementation of the ICCPR.
\textsuperscript{128} The UN Committee on Economic, Social and Cultural Rights oversees implementation of CESCR
\textsuperscript{129} General comments are “authoritative interpretations of the general obligations and rights embodied in the different treaties” (source: C. Dommen, \textit{supra} n. 126, at p. 8)
\textsuperscript{130} See ICCPR.
\textsuperscript{131} Article 2 ICCPR.
\textsuperscript{132} \textit{Optional Protocol to the ICCPR} (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 302.
\textsuperscript{133} Article 1 of the Optional Protocol to the ICCPR.
Protocol to the ICCPR establishing the individual complaints procedure were signed and ratified by the Kingdom of the Netherlands and apply to all constituent countries of the Kingdom, including Curaçao. The people of Curaçao could thus bring an individual complaint before the HRC.

The individual making the complaint must be a “victim”, i.e. the individual must be “personally and directly” affected by an act of omission of the State. All domestic remedies must have been exhausted by the individual before the HRC will consider a complaint.

The HRC has dealt with cases concerning environmental harm with respect to, i.a., the right to life (Article 6 ICCPR), the right to freedom from interference with privacy and family (Article 17 ICCPR) and the rights of indigenous groups and minority groups. The cases on Article 6 and 17 ICCPR have concerned nuclear waste and nuclear radiation. The HRC has not considered any cases involving air pollution and the impact on the right to life or freedom from interference with privacy and family life, but a claim under these articles at the HRC could be possible for the people of Curaçao.

However, one weakness of the HRC is that its decisions are non-binding. The HRC offers ‘Views’, not judgments, and the HRC does not have any enforcement

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136 Article 2 of the Optional Protocol to the ICCPR.
140 Claims under these articles before the HRC will not be discussed in depth. Chapter 4 will deal with the relationship between the right to life and the right to respect for private and family life with the environment in light of ECtHR case law.
mechanisms in place to guarantee compliance.\textsuperscript{142} In 2002, the HRC stated in its annual report that only roughly 30 per cent of states were willing to implement the HRC’s Views or offer the applicant an appropriate remedy.\textsuperscript{143} In its 2015 Annual Report, the HRC stated that many state parties still fail to implement the HRC’s Views.\textsuperscript{144}

A better forum, perhaps, for the people of Curaçao to bring a claim against the Kingdom would be the European Court of Human Rights. Unlike the HRC’s Views, the ECtHR’s judgments are binding upon the States concerned.\textsuperscript{145} However, the binding nature of the ECtHR’s judgments does not mean that they are always complied with. In order to ensure compliance with the judgments, the ECtHR, contrary to the HRC, has developed a machinery for enforcement supervision. The Committee of Ministers (CoM) oversees the execution of ECtHR judgments.\textsuperscript{146} Where the State does not take the necessary measures to comply with the ECtHR’s judgments, the CoM may adopt interim resolutions,\textsuperscript{147} or it may threaten to remove the State concerned from the Council of Europe under Article 8 of the Statute for the Council of Europe.\textsuperscript{148} The work of the CoM has been successful; in 2015 the CoM closed a record number of pending (unenforced) cases.\textsuperscript{149} In the absence of a similar enforcement supervision mechanism of the HRC – and considering the HRC’s limited case law in environmental matters – the ECtHR still remains the better choice for the people of Curaçao to assert their claim.

\textsuperscript{145} Article 46 of the ECHR.
\textsuperscript{146} Paragraph 2 of Article 46 the ECHR.
\textsuperscript{147} There are no detailed provisions on what these interim resolutions should be. The most common interim resolution is where the CoM encourages states to adopt measures to comply with the Court’s judgment and recommends what those measures could possibly be (Source: E. Lambert-Abdelgawad, \textit{The Execution Of Judgments Of The European Court Of Human Rights}, 2nd edn (Strasbourg: Council of Europe Publishing, 2008), p. 40 -41).
\textsuperscript{148} E. Lambert-Abdelgawad, \textit{supra} n. 147, at p. 45.
3.2.3 The European Convention on Human Rights and the European Court of Human Rights

The European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR” or “the Convention”) is an international treaty containing civil and political rights and freedoms. All Contracting Parties to the ECHR must accept the compulsory jurisdiction of the European Court of Human Rights (“ECtHR” or “the Court”), whose task is to oversee Contracting States’ compliance with their obligations under the Convention. The ECtHR has a robust body of case law relating to the environment and human rights, which will be elaborated on in the following chapter.

The Kingdom of the Netherlands is a contracting party to the ECHR. All constituent countries of the Kingdom are bound by it. Upon signing, a specific declaration was included by the Kingdom stating that the ECHR would apply to the Caribbean parts of the Kingdom as well. The ECHR is thus applicable in Curaçao and individuals from Curaçao may petition the Court directly.

In order for an individual to make a complaint under the ECHR, he or she must have “directly” and “personally” been the victim of the violation(s) he or she is alleging. Additionally, applicants must have exhausted all national remedies available to them. The violation must also be attributable to the State concerned. The question that arises in this context is whether the acts or omission from the governments of the constituent countries which violate rights guaranteed in the ECHR can be attributed to the Kingdom.

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150 The ECHR and ECtHR will be discussed more in depth in the next chapter.
151 ‘European Court of Human Rights (ECtHR)’, COE.int [online], <http://www.coe.int/t/democracy/migration/bodies/echr_en.asp> [accessed 3 July 2016].
152 Article 19 of the ECHR. Individuals may petition the Court directly (Article 34 ECHR).
153 This case law will be analysed and discussed in the next chapter.
156 Ibid. The ECtHR should be a last resort for individuals. All the admissibility criteria for submitting an individual complaint are set out in Article 35 ECHR.
157 Ibid.
The recent judgment by the Court in the case of *Murray v. the Netherlands* clarified this issue. *Murray* concerned a convicted killer, Mr. Murray, who was sentenced to life in prison by the Joint Court of Justice of the Netherlands Antilles after murdering a six year old girl on the island of Curaçao. Murray was diagnosed with a multitude of mental disorders, all of which were untreatable considering the lack of adequate psychological treatment available on the island. Considering his condition remained untreated, he was deemed too dangerous to return society, rendering his life sentence *de facto* irreducible. In line with its standing jurisprudence, the Court found a violation of Article 3 of the ECHR (prohibition of torture, degrading treatment or punishment). It was the Kingdom of the Netherlands who was held responsible as the contracting party to the ECHR. Though the ECtHR did not explicitly discuss the issue of State attribution, this judgment does illustrate that it does not matter to the ECtHR which part of the Kingdom the breach can be attributed to. The ECtHR did not concern itself with the Charter and the division of competences, and rightfully so; this is an internal issue. Ultimately, the Kingdom is the signing party to the ECHR, and as such, will be held responsible.

The ruling in this case led to a discussion in the Dutch House of Representatives on the Kingdom’s responsibilities in the Caribbean parts of the Kingdom. Some members of the House of Representatives wondered if the Kingdom should adopt a more active role in safeguarding the human rights in the Caribbean parts of the Kingdom. On an international level, the Kingdom’s safeguarding function may be used to ensure that the constituent countries comply with the Kingdom’s international (human rights) obligations (such as those under the ECHR). However, the safeguarding function, or at least the way it is used, is inadequate for the Kingdom to ensure compliance with these international obligations in the autonomous Caribbean parts of the Kingdom. Currently, the threshold to engage the safeguarding function is set too high. The international responsibility of the

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158 The Netherlands Antilles still existed at this time. The Netherlands Antilles were dissolved on 10-10-10.
162 Illustrated by the case *Murray v. the Netherlands*.
Kingdom for violations of international agreements pleads for a more active role by the Kingdom in the safeguarding of human rights.\textsuperscript{165}

In the case of the Isla refinery, the Kingdom has not used its safeguarding function, although Members of the Dutch House of Representatives have pleaded at various times for intervention by the Kingdom government.\textsuperscript{166}

The next chapter will analyse the ECHR articles the people of Curaçao could invoke in the case of the pollution from the Isla refinery and the ECtHR’s most notable case law on these articles and their relationship with the environment.

\textsuperscript{165} Ibid., p. 2559.

\textsuperscript{166} See Handelingen II 2015/16, 53, item 4. In February of 2016, a motion (Motie van het lid Van Laar c.s. over maatregelen om de uitstoot binnen drie maanden maximaal te verminderen Kamerstukken II 2015/2016 34300 IV, nr. 38) concerning the Isla Refinery was accepted in the Dutch House of Representatives. The motion acknowledged that the fundamental rights of the citizens of Curaçao were being violated due to toxic emissions from the Isla refinery and called upon the Dutch government to request the Curaçao government to take all reasonable measures to ensure that emissions are maximally reduced within the next three months. **NOTE:** This is a motion from the Dutch House of Representatives addressed to the Dutch government. The Dutch government is requested to deliberate with the Curaçao government in order to reduce the emissions from the Isla. The Kingdom government has to this day not taken any measures under its safeguarding function in the case of the refinery.
CHAPTER 4  An analysis of the case law of the European Court of Human Rights

4.1  The European Court of Human Rights and the environment

Although the ECHR does not contain an explicit right to a healthy environment, the case law of the Court shows that it has been willing to recognize that a variety of environmental irritations, such as, for example, air pollution and noise pollution, can undermine the human rights guaranteed in the Convention. The Court has, in its judgments, often stated that the Convention is a “living instrument” which “must be interpreted in the light of present-day conditions”. As it has become more widely acknowledged over the past decades that environmental degradation can lead to certain human rights violations, the Court has been increasingly willing to interpret the rights guaranteed in the ECHR against these present day threats to human rights.

This chapter will discuss some of the rights enshrined in the ECHR which are most often invoked in ‘environmental’ human rights cases before the ECtHR – namely the right to life (Article 2), the right to respect for private and family life and home (Article 8), and the right to property (Article 1 of Protocol No. 1) – in light of the Court’s most notable case law on these Articles and their relationship to the environment.

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The right to life is protected in Article 2 of the ECHR. Article 2 states that:\textsuperscript{170}

1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

   (a) in defence of any person from unlawful violence;
   (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
   (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

The right to life is not guaranteed absolutely. Paragraph 1 includes an exception to this right where someone is executed as punishment for a crime in States where the death penalty is provided for by law. Paragraph 2 of Article 2 sets out further situations (exceptions) in which deprivation of life by public authorities will not constitute a violation of the right to life. These exceptions are exhaustive.\textsuperscript{171}

The right to life in Article 2 of the ECHR primarily imposes a negative duty on the State (agents) not to take anyone’s life.\textsuperscript{172} But, as the Court acknowledged in \textit{L.C.B. v. UK},\textsuperscript{173} and several subsequent cases,\textsuperscript{174} the right to life also encompasses a positive obligation on states to “take appropriate steps to safeguard the lives of those within their jurisdiction.”\textsuperscript{175}

\textit{L.C.B.} concerned an applicant who was diagnosed with leukaemia around the age of four. The applicant argued that her childhood leukaemia had been caused by her father being exposed to high levels of radiation when he served as a catering assistant on

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\item Article 2 of the ECHR.
\item J. Yorke, \textit{The Right To Life And The Value Of Life} (Farnham, Surrey, England: Ashgate, 2010), p. 320
\item To name a few: \textit{Oneryildiz v Turkey}, Application no. 48939/99, judgment of 30 November 2004; \textit{Budayeva and others v. Russia}, Applications nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, judgment of 20 March 2008; and \textit{Kolyadenko and others v Russia}, Applications nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, judgment of 28 February 2012.
\end{itemize}
\end{footnotesize}
Christmas Island at the time that nuclear test were being conducted there (between 1952 and 1967) by the UK. The defendant argued that the State failed to warn her parents of the possible risk to her health caused by her father’s participation in nuclear tests and failed to monitor her health prior to her diagnosis with leukaemia.176 The Court found that the authorities could have reasonably believed at the time that the applicant’s father had not been exposed to dangerous levels of radiation. It also did not find a conclusive causal link between the nuclear blasts and the applicant’s leukaemia. Considering this, it could not have been expected of authorities to provide information to the applicant’s parents about the possible risks to the applicant’s health or to monitor the applicant’s health. The Court thus ruled that the State had not violated Article 2.177

Though Article 2 was found not to be violated in this case, *L.C.B.* does demonstrate that “dangerous activity” which threatens human life can potentially violate Article 2, even if no actual lives were lost. The positive obligation on States under Article 2 entails “above all a primary duty on the State to put in place a legislative and administrative framework [emphasis added] designed to provide effective deterrence against threats to the right to life.”178 The Court has found that this positive obligation on States applies in the context of a range of dangerous activities, whether they are public or private.179 Public authorities thus may have an obligation to take preventive measures to protect those whose lives are at risk as a result of dangerous activity. This obligation of the State to take preventive measures includes the State’s duty to enact regulations addressing the specific characteristics of the dangerous activity concerned.180 The regulations must govern the “licensing, setting-up, operation, security and supervision of the [dangerous] activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks.”181 States must also provide

176 Since the respondent State did not intentionally seek to deprive the defendant of her life, the Court stated that its duty was to “determine whether, given the circumstances of the case, the State did all that could have been required of it to prevent the applicant’s life from being avoidably put at risk.” *L.C.B. v. UK*, para 36.
177 *L.C.B. v. UK*, para 37 - 41.
178 *Önerilidiz v Turkey*, para. 89 - 90.
179 *Önerilidiz v. Turkey*, para. 71.
180 Based on *i.a.*, “the level of the potential risk to human lives” (source: *Önerilidiz v. Turkey*, para. 90).
181 *Önerilidiz v. Turkey*, para. 89 - 90.
information to the public who is at risk because of these dangerous activities so they are able to assess the risks they are under.182

As to the specific practical measures the State must take in the context of dangerous activity, the Court has held that the choice of measures falls within the State’s margin of appreciation since there are different approaches to protecting right to life which may be equally effective; the State may fulfil its positive duty in a number of different ways.183 The margin of appreciation is the degree of discretion the Court is willing to award national authorities in complying with their obligations under the Convention.184

Lastly, in cases where lives are lost and the State may potentially be (directly or indirectly) responsible, the State must ensure an adequate response, “judicial or otherwise”.185 The State must set up an effective judicial system which provides for an investigation procedure so the persons or institutions responsible can be identified and penalized accordingly.186 This aspect of Article 2 is often referred to as the “procedural limb” or “procedural aspect” of Article 2.187

4.3 Article 8: The right to respect for private and family life

Article 8 of the ECHR states that:

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

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national

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182 Ibid.
183 Budayeva and others v. Russia, para. 134. In evaluating whether the State has fulfilled its positive obligation the Court will take into consideration the particular circumstances of the case, having regard to i.a. “the domestic legality of the authorities’ acts or omissions, the domestic decision-making process, including the appropriate investigations and studies, and the complexity of the issue: Kolyadenko and others v Russia, para. 161.
185 Öneri Yildiz v. Turkey, para. 91.
186 Kolyadenko and others v Russia, paras 188 - 193.
187 See, for example, Budayeva and others v Russia; Öneri Yildiz v Turkey. The Court assesses the “procedural” and “substantive” limbs or aspects of Article 2.
security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Paragraph 1 of Article 8 bestows upon individuals the right to respect for his or her private and family life, home and correspondence. Article 8 has been invoked in several cases concerning environmental pollution.

Again, the right in paragraph 1 is not absolute. The second paragraph sets out the conditions under which interference by public authorities with the rights laid down in paragraph 1 may be allowed. Such an interference must be provided for by law and necessary in a democratic society for one (or more) of the “legitimate aims” enumerated in paragraph 2, such as the economic well-being of the country. The interference must also be proportionate to the legitimate aim pursued.

However, before considering possible justifications by the States under paragraph 2, the Court must first establish whether there has been an “interference” by the State with one of the interests protected in paragraph 1. In order to do so, the Court will first examine whether the complaint falls within the scope of application of Article 8. The Court has held that environmental pollution can violate Article 8 if it creates a significant nuisance which impairs one’s home or private and family life. For a complaint concerning the effects of environmental pollution to fall within the scope of Article 8, those effects must directly affect the interests protected in paragraph 1. Thus, Article 8 cannot be invoked every time general environmental degradation occurs – the applicant’s private life, family life or home must be directly impaired by it.

The effects of the environmental pollution on the individual’s private life, family life or home must also be sufficiently serious in order to fall within the scope of Article 8. There

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188 Environmental cases usually concern right to private and family life and home, not correspondence.
189 Recognized by the Court in Fadeyeva v. Russia, para. 68.
190 Handyside v. UK, Application no. 5493/72, judgment of 7 December 1976, para. 49.
193 Fadeyeva v. Russia, Application no. 55723/00, judgment of 9 June 2005, para. 68 – 69.
194 As in Kyrtatos v. Greece, Application no. 41666/98, judgement of 22 May 2003.
195 Fadeyeva v. Russia, para. 69.
is thus a certain “level of severity” that must be reached in cases concerning environmental harm in order to engage protection under Article 8. The Court seems to have first developed this requirement in the case of López Ostra v. Spain, although no explicit mention of a level of severity is made in that case. López Ostra is a case which concerned an applicant who lived in Lorca, a town in Spain, with her husband and two daughters. Her home was located a mere few metres away from a waste treatment plant. The applicant complained before the Court that the Spanish authorities’ failure to take measures against the noise, smells and polluting fumes from the plant – which caused numerous health problems to the people of Lorca, including the applicant’s daughter – violated her right to respect for private life and home (Article 8 ECHR) and amounted to degrading treatment (Article 3 ECHR). In Fadeyeva v. Russia, a case which just like López Ostra concerned air and noise pollution (this time from a steel plant), the Court mentions a level of severity which must be attained in order for complaints to fall within the scope of Article 8 and refers back to paragraph 51 of López Ostra, which states:

Naturally, 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, however, seriously endangering their health [emphasis added].

In Fadeyeva v. Russia, the Court further clarifies the ‘level of severity’ requirement and states that the assessment of the minimum level of severity that must be reached “is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance, and its physical or mental effects”, as well as “the general context of the environment.” Over the years, the Court has increasingly stressed the level of severity requirement, especially in cases concerning noise pollution. In Hatton v. UK (2003), a case concerning noise nuisances from night flights, the level of severity requirement was not even

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198 Fadeyeva v. Russia, para. 69 – 70.
199 Fadeyeva v. Russia, para. 69.
mentioned. The Court now regularly declares complaints inadmissible because the level of severity in order to engage Article 8 has not been reached.\footnote{See \textit{Frankowski and Others v. Poland}, Application no. 25002/09, admissibility decision of 20 September 2011, Fägerskiöld v. Sweden; and Borysiewicz v. Poland.} This shows that an individual making a complaint under Article 8 concerning environmental harm must first prove that a certain level of severity is reached before there is even a formal examination on the merits.\footnote{Practical Guide on Admissibility Criteria (Council of Europe/European Court of Human Rights, 2014), p. 82 [online]. <http://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf> [accessed 4 July 2016].}

The Court has, however, established that it is not necessary for the applicant to have suffered actual damage to his or her health in order for the complaint to fall within the scope of Article 8. In the case of \textit{López Ostra}, the Court did not require that the applicant establish a clear and direct causal link between the pollution and her daughter’s health problems, considering the difficulties of proving such a link.\footnote{\textit{López Ostra v. Spain}, para. 51. See also paragraph 79 of \textit{Fadeyeva v. Russia}.} In \textit{Fadeyeva v. Russia}, the Court did take into account that there was very strong evidence that the applicant’s health had suffered from prolonged exposure to the steel plant’s emissions in order to establish whether the level of severity was reached to bring the complaint within the scope of Article 8, but also stated that “\textit{[e]ven assuming that the pollution did not cause any quantifiable harm to her health, it inevitably made the applicant more vulnerable to various illnesses. Moreover, there can be no doubt that it adversely affected her quality of life at home.}”\footnote{\textit{Fadeyeva v. Russia}, para. 88.}

When assessing whether there has been a violation of the rights protected in Article 8, it should be borne in mind that Article 8, just like Article 2, includes positive obligations. This has been acknowledged by the Court as far back as \textit{Marckx v. Belgium}.\footnote{\textit{Marckx v. Belgium}, Application no. 6833/74, judgment of 13 June 1979, para. 31.} In \textit{Guerra v. Italy}, which concerned a high-risk chemical factory, the Court made clear this positive obligation also applies in an environmental context:

\begin{quote}
The Court considers that Italy cannot be said to have “interfered” with the applicants’ private or family life; they complained not of an act by the State but of its failure to act. However, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private or family life.
\end{quote}

\footnote{Remove duplicate citation.}
The State may thus be required to take certain measures in order to ensure protection of the rights enshrined in paragraph 1 of Article 8.\textsuperscript{206} This obligation applies whether the environmental harm is caused directly by the State or whether it is caused by a private actor.\textsuperscript{207} There must, however, be a sufficient link between the pollution and the State in order to engage State responsibility. In establishing this link, the Court will consider, i.a., whether the State was or should have been aware of the pollution and its effects.\textsuperscript{208}

The Court has also recognized in its case law that the positive obligation under Article 8 may imply that public authorities have a duty to provide the public with information so the public can effectively access the environmental risks they live under.\textsuperscript{209} In \textit{Taşkin and others v. Turkey}, the Court emphasized that “the importance of public access to […] information […] is beyond question [emphasis added].”\textsuperscript{210}

The Court has stated that whether a case concerning Article 8 is scrutinised in terms of a positive duty by the State which was not fulfilled, or in terms of an actual direct interference by the State in the interests protected in paragraph 1 which must be justified under paragraph 2, the principles applied are generally the same. In both cases, the Court will consider whether a fair balance was struck between the interest of the individual and the interest of the community as a whole,\textsuperscript{211} and in both cases the Court grants States a certain degree of discretion, or margin of appreciation.\textsuperscript{212} The margin of appreciation stems from the principle of subsidiarity.\textsuperscript{213} In its early case law,\textsuperscript{214} the Court highlighted that its role in safeguarding human rights is subsidiary to that of the national systems. This was echoed in the case of \textit{Hatton v. UK} concerning noise pollution from an airport:

\begin{itemize}
\item \textit{Fadeyeva v. Russia}, para. 89.
\item \textit{Hatton v. UK}, Application no. 36022/97, judgment of 8 July 2003, para. 98.
\item \textit{Dubetska and others v. Ukraine}, Application no. 30499/03, judgment of 10 May 2011, paras. 108, 128.
\item \textit{Guerra v Italy}, Application no. 14967/89, judgment of 19 February 1996, paras. 59 – 60.
\item \textit{Taşkin and others v. Turkey}, Application no. 46117/99, judgment of 10 November 2004, para. 119.
\item \textit{López Ostra v. Spain}, para. 51.
\item \textit{Hatton v. UK}, para. 98.
\item “Relating to certain aspects of the laws on the use of languages in education in Belgium” v. Belgium (MERITS), Applications no. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, judgment of 23 July 1968, para. 10 and \textit{Handyside v. UK}, para. 48.
\end{itemize}
The Court reiterates the fundamentally subsidiary role of the Convention. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions.\textsuperscript{215}

When ruling on cases concerning environmental harm, the Court has granted the States a rather \textit{wide} margin of appreciation.\textsuperscript{216} When States are granted a wider margin of appreciation, the Court will less easily find that there has been a breach of the right in question. The Court has held, numerous times, that local authorities are in a better position to assess what the best policy is in environmental matters, which is why they are accorded a wide margin of appreciation in decision-making in this sphere.\textsuperscript{217} In \textit{Fadeyeva v. Russia}, the Court stated: “[T]he complexity of the issues involved with regard to environmental protection renders the Court’s role primarily a subsidiary one.”\textsuperscript{218}

In cases concerning Article 8, the Court will thus consider whether the State acted within its margin of appreciation in order to establish whether there was a violation of the right enshrined in paragraph 1.

4.4 **Article 1 to Protocol No. 1: The right to peaceful enjoyment of one’s possessions**

Article 1 of Protocol No. 1 to the ECHR states that:

\begin{quote}
Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.
\end{quote}

Article 1 of Protocol No. 1 to the Convention confers upon individuals the right to the peaceful enjoyment of their possessions. However, as we have seen with the previous two rights, the right to peaceful enjoyment of one’s possessions in Article 1 of Protocol No. 1 is

\textsuperscript{215} Hatton v. UK, para. 97.
\textsuperscript{216} Hatton v. UK, para. 97 - 100.
\textsuperscript{217} Powell and Rayner, Application no. 9310/81, judgment of 21 February 1990, para. 44 and Hatton v. UK, para. 100.
\textsuperscript{218} Fadeyeva v. Russia, para. 105.
not absolute. The second sentence of paragraph 1 sets out the conditions under which an individual may be deprived of his possessions. Paragraph 2 states that States may enforce laws to control to use of property under certain circumstances.

At first glance, it is difficult to establish a link between the right to peaceful enjoyment of possessions and the environment. However, the Court has recognised that environmental pollution may interfere with the right to peaceful enjoyment of possessions if it results in a serious reduction in the value of the property which is not compensated by the State. In certain cases, where the value of a property is reduced to the point of making it impossible to sell, or where it is unusable, this may amount to a partial expropriation or de facto expropriation.

As the Court stated in Brumarescu v. Romania:

[In determining whether there has been a deprivation of possessions [...], it is necessary not only to consider whether there has been a formal taking or expropriation of property but to look behind the appearances and investigate the realities of the situation complained of. Since the Convention is intended to guarantee rights that are “practical and effective”, it has to be ascertained whether the situation amounted to a de facto expropriation.

In determining whether there has been a violation of Article 1 of Protocol No. 1, the Court must first assess whether the individual’s complaint falls within the scope of application of Article 1 of Protocol No. 1. In order for a complaint to fall within the scope of application of this article, there must have been interference with the peaceful enjoyment of his possessions. In the Gasus Dosier- und Fördertechnik GmbH v. The Netherlands judgment, the Court stated that:

[The notion “possessions” [...] in Article 1 of Protocol No. 1 (P1-1) has an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as “property rights”, and thus as “possessions”, for the purposes of this provision.

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221 Brumarescu v. Romania, Application no. 28342/95, judgment of 28 October 1999, para. 76.
The meaning of possessions in Article 1 of Protocol No. 1 is thus not dependent on the meaning which it has been given in the relevant domestic legislation – for the purposes of the ECHR the meaning of possessions is autonomous.\textsuperscript{223} If the individual’s complaint falls within the scope of Article 1 of Protocol No. 1, it will then be assessed whether there was an “interference” with his right under this Article.

As the other Convention rights discussed above, the effective exercise of the right to peaceful enjoyment of one’s possessions does not merely entail negative duty on the State not to interfere with this right, but may also include positive obligations on States to take protective measures.\textsuperscript{224} The protection of the right in Article 1 of Protocol No. 1 needs to be practical and effective in order for individuals to be able to exercise this right properly.\textsuperscript{225} This may require States to guarantee “certain environmental standards”,\textsuperscript{226} even though Article 1 of Protocol No. 1 does not confer upon individuals the right to peacefully enjoy their possessions in a “pleasant environment”.\textsuperscript{227}

In certain cases, States may thus be expected to take measures to ensure that the right to peaceful enjoyment of one’s possessions is not violated. In Önerbildiz v. Turkey, the applicant’s home was destroyed by an explosion which took place on the rubbish tip next to his house. The explosion destroyed the applicant’s home and killed nine of his relatives. The Court established that there was a causal link between the gross negligence attributable to the State and the destruction of the applicant’s house and subsequently found that the State breached their positive obligations under Article 1 of Protocol No. 1 by not doing everything in their power to prevent the applicant’s property from being destroyed.\textsuperscript{228}

Where an interference with an individual’s right to peaceful enjoyment of his possessions has been established, it will then be considered whether the interference can be justified. In order to be justified, the interference must be proportionate to the legitimate aim

\textsuperscript{223} Depalle v. France, Application no. 34044/02, judgment of 29 March 2010, para. 62.
\textsuperscript{224} Önerbildiz v. Turkey, para 134. See also Bielectric S.r.l. v. Italy, Application no. 36811/97, judgment of 4 May 2000.
\textsuperscript{225} Önerbildiz v. Turkey, para 130.
\textsuperscript{227} Rayner v. UK, Application no. 9310/81, Commission decision of 16 July 1986.
pursued in the public interest.\textsuperscript{229} In order for an interference to be considered proportional “a fair balance must be struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights.”\textsuperscript{230} Here again, the State is afforded a certain margin of appreciation in striking a balance between these interests.\textsuperscript{231} Lastly, the State’s interference with the peaceful enjoyment of an individual’s possessions must also be provided for by law.\textsuperscript{232}

\textsuperscript{229} James and others v. the UK, Application no. 8793/79, judgement of 21 February 1986, para. 50.
\textsuperscript{230} Sporrong and Lönnroth, Application no. 7151/75; 7152/75, judgment of 23 September 1983, para. 69.
\textsuperscript{231} James and others v. the UK, para 46.
\textsuperscript{232} Iatridis v. Greece, Application no. 31107/96, judgment of 26 March 1999, para. 58.
CHAPTER 5   Case Study: Curaçao and the Isla refinery

For many years, the Isla oil refinery on Curaçao has been at the centre of a major debate on the impact of its emissions on human health and the local environment. Several environmental organizations on Curaçao and Dutch politicians have claimed that the human rights of those living downwind of the infamous oil refinery are being violated.233

This chapter will discuss the oil refinery, its history of pollution and determine whether there is an arguable case that the rights of the people of Curaçao under the ECHR are being violated.

5.1 The Isla oil refinery

5.1.1 History of the Isla oil refinery

The refinery, situated right on the outskirts of the capital, has a long history on Curaçao. Back in May 1915, the Anglo-Dutch multinational oil and gas company Royal Dutch Shell plc (“Shell”) acquired the former “Asiento” plantation and started construction on what would become the Isla refinery.234 The refinery was meant to process the crude oil discovered in the basin of Lake Maracaibo, located about 400 kilometres from Curaçao.235 In the beginning, the refinery was a relatively small facility with 300 employees. But the refinery grew quickly. Numerous expansions were made in the next ten years. As a result of these expansions, the workforce increased rapidly. In 1952, at its peak, the refinery employed 12,631 people.236

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233 SMOC is one of the environmental organizations which has continuously held that the refinery’s toxic emissions and its effects on those living near it constitute human rights violations. See for example: ‘Memorandum Van SMOC: ‘Schending Mensenrechten en Ondeugdelijk Bestuur’, Stichtingsmoc.nl, 2016 <http://www.stichtingsmoc.nl/2016/02/memorandum-van-smoc-schending-mensenrechten-en-ondeugdelijk-bestuur/> [accessed 7 July 2016]. For an example of Dutch politicians addressing Isla refinery problem, see supra n. 166.


235 Ibid.

236 Ibid.
However, the “good times” did not last. Shell’s refinery on Curaçao operated at significant losses during the late 70s and early 80s, due to the nationalization of the Venezuelan oil industry and the oil crises of the 70s.\textsuperscript{237} This led to Shell backing out of the Isla refinery in 1985.\textsuperscript{238} That same year, Shell entered into negotiations with the governments of Curaçao, the former Netherlands Antilles, the Netherlands and Venezuela about the future of the refinery. On September 24th, ownership of the refinery was transferred from Shell to Curaçao. The government created the company *Refineria di Korsou N.V.* (RdK) as owner of the refinery’s facilities. The government of Curaçao is the sole shareholder of RdK.\textsuperscript{239} The government of Curaçao immediately leased the refinery’s facilities to *PdVSA*, a Venezuelan State-owned oil company.\textsuperscript{240} On October 1st, 1985, PdVSA’s subsidiary *Refineria Isla (Curazao) S.A.* (now known as *Refineria Isla Curaçao B.V.*), officially took over the operation of the Isla refinery.\textsuperscript{241} The current lease with PdVSA expires in 2019.\textsuperscript{242}

### 5.1.2 The oil refinery and its pollution problems

The oil refinery’s pollution problem can be traced back to its ownership by Shell. Shell operated the refinery with little regard for the environment, and sold the polluted grounds, including the infamous ‘asphalt lake’ created during World War II, to the island of Curaçao for four Antillean Guilders (ANG).\textsuperscript{243} Unfortunately, when the government of Curaçao bought the refinery from Shell in 1985, the agreement between Shell, the Netherlands

\begin{itemize}
\item \textsuperscript{239} ‘Our History | Refineria Isla Curaçao B.V.’, supra n. 234.
\item \textsuperscript{240} ‘Petróleos de Venezuela S.A.’, PdVSA [online]. \<http://www.pdvsa.com/> [accessed 4 July 2016].
\item \textsuperscript{242} Regering van Curaçao, *Plan van Aanpak Isla Raffinaderij: Strategische opties voor de raffinaderij en Schottegatgebied* (Willemstad, 2012), p. 2.
\item \textsuperscript{243} A. ten Kate, Royal Dutch Shell and its sustainability troubles: Background report to the Erratum of Shell’s Annual Report 2010. Milieudefensie (Friends of the Earth Netherlands), p. 45.
\end{itemize}
Antilles and Curaçao included a provision which stated that Shell could never be held responsible for any environmental damage they caused while operating the refinery.

After the sale in 1985, the refinery’s damage to the environment and the residential areas surrounding the facility did not stop. The refinery produces toxic emissions on an ongoing basis which cloud Curaçao’s blue skies. This is arguably the biggest problem with the refinery and the issue that has most often been invoked when speaking of potential human rights violation of those living directly downwind of the refinery. The wind on Curaçao almost constantly blows in the same direction, meaning the people of the neighbourhoods Wishi and Marchena directly downwind of Isla continuously live under Isla’s toxic smoke.

5.1.3 Nuisance Permit

The Isla refinery operates under a Nuisance Permit which it was granted on July 10, 1997 based on article 3, paragraph 1 of the Nuisance Ordinance. The Isla refinery was granted a Permit for the duration of the lease agreement between Refiniria di Korsou N.V. and PdVSA for operating an oil refining facility. The Nuisance Permit contains norms, or Ambient Air Quality Standards (AAQS), for the concentration in the air at ground level of toxic emissions.
sulphur dioxide (SO₂), Total Suspended Particulate (TSP), carbon monoxide (CO), nitrogen dioxide (NO₂), lead and Ozone (O₃).²⁴⁹

The WHO describes SO₂ as a colourless gas with a pungent smell which “can affect the respiratory system and the functions of the lungs, and causes irritation of the eyes.”²⁵⁰

The Nuisance Permit contains two norms for SO₂ immissions;²⁵¹ a max annual average of 80 μg/m³ (micrograms per cubic meter of air) and a maximum of 365 μg/m³ a day that cannot be exceeded more than one day a year.²⁵² The highest allowed annual average concentration of sulphur dioxide stated in the Nuisance Permit is a joint average, meaning that the immissions of all sources together²⁵³ may not be higher than 80 μg/m³ per year.²⁵⁴ The government has so far made no distribution of the maximum contribution to the SO₂ immission applicable to each of the major emission sources.²⁵⁵

Environmental organizations on Curaçao, most notably Stichting Schoon Milieu op Curaçao (SMOC), Stichting Humanitaire Zorg Curaçao (SHZC) and Clean Air Everywhere (CAE) have stated that the refinery regularly exceeds the annual average limit of SO₂ immissions in the Nuisance Permit. This led to SMOC and SHZC starting a civil case against the refinery in 2006.²⁵⁶ In 2010 the Joint Court of Justice of the Netherlands Antilles and Aruba established the unlawfulness of SO₂ emissions from the Isla refinery which exceed the maximum allowed annual average of 80 μg/m³. The Joint Court of Justice ruled that, according to calculations by Stichting Advisering Bestuursrechtspraak voor Milieu en Ruimtelijke Ordening (StAB), it was probable that the annual average for SO₂ concentrations in the air at ground level downwind of the refinery, at least in the years prior to the court

²⁴⁹ Attachment F to the Nuisance Permit Isla, p. 5.
²⁵¹ Immission: concentration of an air pollutant in the air at ground level.
²⁵² Attachment F to the Nuisance Permit Isla, p. 5.
²⁵³ Curaçao, being a relatively small island, has only three major sources which are relevant in this context: the Isla refinery, the Build, Own, Operate power plant and electricity and water supplier, Aqualectra. See: Taskforce Milieuproblematiek Isla/BOO, Rapport Taskforce Milieuproblematiek Isla/BOO (Willemstad, 2016), p. 9.
²⁵⁴ The focus of this thesis is on Isla’s pollution problem and the government’s response. It is undisputed that there are other major emission sources, particularly the BOO power plant, who also contribute a significant amount to air pollution problem on Curaçao.
²⁵⁵ Joint Court of Justice of the Netherlands Antilles and Aruba, judgment of 12 January 2010, ECLI:NL:OGHNAA:2010: BK9395, para 3.3. See also Nuisance Permit Isla.
case, had been systematically exceeded by Isla together with other emission sources. It also found that Isla’s share in the total concentration of SO₂ at ground level was very substantial and during certain years exceeded the combined annual average by itself. Where only Isla’s contribution to the maximum annual average concentration for sulphur dioxide led to the surpassing of the limit of 80 μg/m³, Isla could, in view of the health damage that exceeding the maximum limit caused, be considered to have acted unlawfully towards those living downwind of the refinery.²⁵⁷

The Court in First Instance also ordered an expert report in order to weigh the interests the residents living downwind of the Isla refinery had in Isla discontinuing the infliction of damage to their health and the interests of Isla and general (socio)economic interests of the island. The Joint Court concluded that the expert reports showed that the measures required to reduce Isla’s emissions to an acceptable level did not require a particularly large investment from ISLA. The investments Isla would have had to make were relatively small and would not compromise the survival of the refinery. Given this, the interests of residents downwind of the refinery outweighed the economic interests.²⁵⁸ In its judgment, the Joint Court prohibited Isla to contribute more than 80 μg/m³ to the annual average concentration of SO₂ at ground level. As an incentive for Isla to comply with this norm, the Joint Court ruled that a penalty of ANG 75 million (about € 36.8 million) would be imposed on Isla if they violated the norm again.²⁵⁹

A GGD Amsterdam report from 2015 showed that the AAQS for sulphur dioxide was exceeded again in 2013 and 2014.²⁶⁰ SMOC and SHZC have requested the Court in First Instance to order and expert report, establishing that the Isla refinery violated the norm again in 2013 and 2014, and as such, must pay the ANG 75 million penalty.²⁶¹

Despite the continuing pollution problems with the refinery, the local government has seemed reluctant to take measures in order to ensure that the refinery complies with

²⁵⁷ Ibid., at para 3.6.
²⁵⁸ Ibid., at para 3.11.
²⁵⁹ Ibid., at ‘beslissing’.
environmental norms. The next section of this chapter will look at the rights enshrined in the ECHR discussed in the previous chapter and will examine whether the government has done enough to secure these ECHR rights to the people living under Isla’s toxic emissions.

5.2 Potential violations of rights under ECHR

5.2.1 Article 8: The right to respect for private and family life

This subsection will analyse whether there is an arguable case that the State authorities have failed to protect the right to private life, family life and home of the people living under the Isla refinery’s pollution.

Nature and extent of the interference with rights protected in Article 8

As discussed in the previous chapter, it is well established that Article 8 applies to environmental harm. It cannot, however, be invoked any time environmental degradation occurs. The environmental pollution must directly affect an individual’s private life, family life or home. The effect of the pollution on the individual’s private life, family life or home must also reach a certain level of severity in order to fall within the scope of Article 8. In assessing whether a claim under Article 8 reaches the minimum level of severity, the Court will consider, among other things, the effects on the individuals’ health and the intensity and duration of the situation.

In the case of the Isla refinery, there have been numerous reports which have touched on the refinery’s emissions and its effect on the health of the individuals living downwind of the refinery. The first study into the health of the Curacaoans living in the vicinity of the oil refinery was conducted in the 1970s by pulmonologist C.J.J. Westerman. In his doctoral thesis ‘Chronic non-specific lung disease in Curaçao’, he found that Curacaoans living under the air pollution from the oil refinery have “a higher incidence of chronic chest diseases.” A 1999 GGD report ‘Health complaints & air pollution from the

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262 Kyratios v. Greece, para. 53.
263 Fadeyeva v. Russia, para 68-69.
264 Ibid.
Isla refinery’ also examined the acute health effects of exposure to the refinery’s emissions. These included red and irritated eyes; itchy skin; shortness of breath; headaches; and nausea. Additionally, the annual concentration of sulphur dioxide is often above the 80 μg/m³ maximum, which is considered ‘safe’ according the domestic legislation. The government themselves have recognised the health effects of concentrations of sulphur dioxide above this level. Attachment F of the Nuisance Permit issued to Isla by the government states:

[F]or concentrations ranging from 105 μg/m to 265 μg/m of sulphur dioxide (annual average) increased symptoms of respiratory and lung disease may occur. For concentrations ranging from 115 μg/m to 120 μg/m of sulphur dioxide (annual average) increased frequency and severity of respiratory diseases in school children may occur as well as an increase in mortality from bronchitis and lung cancer.

There is strong evidence that Isla’s contribution to the average concentration of sulphur dioxide has consistently exceeded the 80 μg/m³ norm, as was recognised by the Joint Court of Justice in the civil case discussed above, with annual concentrations of sulphur dioxide downwind of the refinery measuring as high as 276 μg/m. In 2010, air quality measuring stations were installed at Beth Chaim, a Jewish cemetery located directly next to the refinery, and Kas Chikitu, located in the neighbourhood of Marchena downwind of the refinery. These measuring stations show that in 2013 and 2014 the annual average concentration of sulphur dioxide was exceeded once again. The GGD Amsterdam compiled the measurements from the measuring stations and reported concentrations of 152 μg/m in 2013 and 170 μg/m in 2014 at the measuring station in Beth Chaim and 96 μg/m in 2013 and 122 μg/m in 2014 at the measuring station in Kas Chikitu.

267 Attachment F of the Nuisance Permit Isla, p. 24.
271 Ibid.
However, the most poignant revelation concerning the refinery and its effects on the health and well being of the people of Curaçao came in 2005. On 26 October 2005, Ecorys-NEI, an economic research and consultancy company,\textsuperscript{272} published a report which concluded that an average of 18 people die prematurely each year as a consequence of being exposed to the refinery’s emissions.\textsuperscript{273}

Considering all of this, it is possible to conclude that the health, well being and the quality of life at home of those living downwind of the refinery are being directly negatively affected to an extent that is severe enough to bring it within the scope of Article 8.\textsuperscript{274}

\textit{Attribution of the interference to the State}

It is unclear whether the pollution in this case must be classified as a direct interference by the State or a failure to fulfil its positive obligation under Article 8 in the case of polluting activity by private industry. It is difficult to classify the refinery’s activities as either public or private. Although the government of Curaçao is the owner of the facility through its government-owned company RdK, the facility is operated by Refineria di Korsou BV, a private subsidiary of PdVSA.

The facts of the case are similar to those of \textit{Dubetska and others v. Ukraine}, which concerned pollution from two State-owned facilities, one of which was leased to a private company.\textsuperscript{275} This case was not analysed in terms of a direct interference by the State with Article 8, but in terms of positive obligation to protect an individual’s rights under Article 8.\textsuperscript{276}

Considering this, it is possible to conclude that in a situation such as the one we are dealing with, where the State leases a State-owned facility to a private company, the Court will examine whether the State complied with its positive obligation under Article 8 instead

\textsuperscript{272} Source: <http://www.ecorys.com/>
\textsuperscript{273} Ecorys-NEI, \textit{Economic Value Of Strategic Options For Refineria Di Korsou} (Rotterdam, 2005), p. 89.
\textsuperscript{274} \textit{Fadeyeva v. Russia}, para. 88.
\textsuperscript{275} \textit{Dubetska and others v. Ukraine}, para. 11.
\textsuperscript{276} \textit{Ibid.}, para 108 – 123.

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of analysing the case in terms of a direct State interference.\footnote{Considering the principles applied in a case of direct interference or failure to fulfil a positive obligation are generally similar, it is not of much importance to make this distinction. However, the Court does generally require a “sufficient link” to be established between the pollution and the state in cases where it deals with cases concerning a state’s failure to fulfil its positive obligation. See: \textit{Dubetska and Others v. Ukraine}, para 108, 123 and \textit{Fadeyeva v. Russia}, para 92.} As such, a sufficient link between the pollution and the State must be established. In order to establish this link, the Court will consider whether the pollution issues were long-standing and well known to State authorities, whether they knew or should have known that it was affecting the individual’s right under Article 8.\footnote{\textit{Ibid.}, para. 108.}

In the case at hand, the pollution and its effects on the individuals living downwind from the State-owned facility were well known to State authorities even before the air quality measuring stations were installed in 2010. Before 2010, under the Nuisance Permit, the Isla was obligated to conduct its own measurements and report them to the Environmental Service of Curaçao.\footnote{Paragraph 7.6 of the Nuisance Permit Isla.} The reported concentrations of SO\textsubscript{2} were regularly above the annual allowed limit.\footnote{Joint Court of Justice of the Netherlands Antilles and Aruba, judgment of 30 November 2007, ECLI:NL:OGHNA:2007:BJ7611.} The government is also aware of the impact this has on the health of the people living downwind of the refinery, considering the above mentioned 1999 GGD Amsterdam report ‘\textit{Health complaints & air pollution from the Isla refinery}’ and the Ecorys-NEI study which concluded that 18 people die prematurely each year as a consequence of being exposed to the refinery’s emissions, ten of those from the exposure to SO\textsubscript{2}.\footnote{Ecorys-NEI, \textit{Economic Value Of Strategic Options For Refineria Di Korsou} (Rotterdam, 2005), p. 89.} In 2012, the government also recognised the numerous issues with the out-dated refinery and developed a ‘\textit{Plan of Action}’, acknowledging the need to reduce the emissions and modernize the refinery.\footnote{Regering van Curaçao, \textit{Plan van Aanpak Isla Raffinaderij: Strategische opties voor de raffinaderij en Schot tegatgebied}. (Willemstad, 2012).}

Considering the aforementioned, it can be assumed that the government is aware of the long-standing issue with the refinery’s pollution and its impact on the people most affected by it. These factors show a sufficient link between the pollution and “to raise an issue of the State’s positive obligation under Article 8.”\footnote{\textit{Fadeyeva v. Russia}, para. 92.}
The balance between the individual’s interest and the interest of the community as a whole

The State has a wide margin of appreciation in cases where the violation of Article 8 lies in environmental conditions.284 They are granted a certain amount of freedom in choosing what measures to take in order to protect the rights enshrined in Article 8.285 The Court will ultimately consider whether a fair balance was struck between the interest of the individual and the interest of the community as a whole.286 In assessing whether a fair balance was struck, the Court will look at a number of factors, including the domestic legal regime concerning industrial pollution and whether domestic regulations were actually enforced.287

Efforts to regulate the pollution by Isla were put in place in 1997 when the Nuisance Permit was issued. As discussed above, this Nuisance Permit contains Ambient Air Quality Standards in Attachment F under 6.3. Under Chapter V of the Nuisance Ordinance Act 1994 (Hinderverordening Curaçao 1994), the Executive Council (Government) may order the Isla refinery to stop its violation of the AAQS included in its Nuisance Permit (art. 34) or put an end to Isla’s violations at Isla’s expense (art. 36). The Executive Council may also impose a penalty for each day the violation continues.288 The wording of the Nuisance Ordinance leaves room for discretion on how and whether to enforce on the part of the Executive Council. However, there exists a principle duty of enforcement considering the common interest in enforcement when a regulation is violated.289

It appears that the government has never taken any of these measures under Chapter V, even though there has been strong evidence that the refinery systematically exceeds the prescribed annual average concentration of SO₂.290 The government has never taken any enforcement action or administrative action against Isla in order to get Refineria Isla Curaçao B.V. to uphold the norms contained in the Nuisance Permit. Environmental

284 Hatton v. UK, para. 97 - 100.
285 Dubetska and others v. Ukraine, para. 141.
286 López Ostra v. Spain, para. 51.
287 Dubetska and others v. Ukraine, para. 140 – 145.
288 Chapter V of the Nuisance Ordinance 1994.
organization SMOC has repeatedly requested the Executive Council to take administrative action against the refinery, but these requests have been denied.\textsuperscript{291}

Not only the government’s lack of enforcement must be highlighted, but also the general quality of the domestic legal regime concerning pollution. Part of the reason why the government has not enforced the 80 µg/m\textsuperscript{3} norm is because it is hard to enforce – it is a joint maximum and when it is exceeded it is hard to determine which of the major immision sources should be held responsible. The BOO (Build, Own and Operate) power plant, which is located on the same grounds as Isla and also operates under a Nuisance Permit, is another major source of emission and contributor to the annual average levels of sulphur dioxide. As mentioned above, the government has so far made no distribution of the maximum contribution to the SO\textsubscript{2} immision applicable to each of the major emission sources. In response to the 2015 GGD Amsterdam report which established that the 80 µg/m\textsuperscript{3} norm was exceeded again in 2013 and 2014, the spokesperson for the refinery, Kenneth Gijsberta, simply pointed the finger at BOO.\textsuperscript{292} Gijsberta stated that according to the refinery’s own measurements, its contribution to the concentration of sulphur dioxide was well below 80 µg/m\textsuperscript{3}.\textsuperscript{293} It is indeed not possible to tell from the GGD Amsterdam report whether Isla or BOO exceeded the 80 µg/m\textsuperscript{3} norm. What is clear, however, is that the norm was exceeded and that the government has not taken any action to protect its citizens from the repercussions this entails for their health and well being. The Nuisance Permits are in need of thorough revision so the polluters can more easily be held accountable for their contribution to the annual average concentration for sulphur dioxide, and to ensure it stays below the 80 µg/m\textsuperscript{3} annual norm.

The main explanation, however, for why the government has failed to take action against namely the Isla refinery is because of its contribution to the island’s economy. The refinery has, historically, been one of the largest contributors to the GDP and biggest

\textsuperscript{291} Joint Court of Justice of Aruba, Curaçao, Sint Maarten and of Bonaire, Sint Eustatius and Saba, judgment of 28 May 2012, ECLI:NL:OGHACMB:2012:BX0658.
\textsuperscript{293} Ibid.
employers on the island. However, the number of jobs Isla provides has decreased significantly over the years, partly because of extensive automation processes. A 2013 government report stated:

At present, direct and indirect employment at the refinery is estimated at some 2,250 persons (employees, contractors and employees of suppliers). The refinery contributes an estimated 5.3% to the island’s GDP, some NAf 265 million per annum. Studies have however revealed that the refinery’s contribution to GDP is gradually decreasing and is estimated to fall to about 4.7% by 2018.

On an island with around 150,000 inhabitants, the refinery is still an important employer. However, it would be difficult for the government to successfully argue that the economic interest of the island in having an oil refinery justified the non-enforcement of the standards set in their own domestic legislative framework and the lack of any measures on their part to minimize the impact on the health and well being of the individuals living near the refinery. In the case of Hatton v. UK, where the Court found that the State had acted within its margin of appreciation, it considered that the national authorities had not failed to comply with its own domestic legislation. In the case at hand, such an element of “domestic irregularity” is present, considering the government of Curaçao has failed to enforce its own environmental norms. This element is important in considering whether the State struck a fair balance between the competing interests.

Ultimately, it is a matter for the ECtHR to decide whether, considering the specifics set out above and the margin of appreciation left to States, whether the State did or did not succeed in striking a fair balance between the interest of the island’s economic well-being –
that of having an oil refinery – and the individuals’ proper enjoyment of their right to respect for their home and their private and family life.\textsuperscript{301}

5.2.2 Article 2: The right to life

So far, the ECtHR rulings concerning the right to life and the environment have been limited to cases concerning exposure to nuclear radiation, natural disasters and dangerous industrial activities which culminated in accidents, such as explosions or floods, in which lives were lost.\textsuperscript{302} There has been one case on industrial emissions and the right to life brought before the ECtHR, \textit{Smaltini v. Italy}\textsuperscript{303}, which was declared inadmissible. There are currently, as of writing, two other cases pending before the Court concerning industrial emissions and the right to life.\textsuperscript{304} It is unclear what exact approach the Court will take in examining the merits.

\textit{Smaltini} concerned an Italian national who lived near a large steel plant. She was diagnosed with leukaemia in September 2006.\textsuperscript{305} In November 2006, she lodged a complaint with the public prosecutor against a manager of the steel plant, alleging that her illness had been caused by exposure to the emissions from the plant. In 2009, the investigating judge in the case discontinued the proceedings after findings in an expert report ordered by the preliminary judge concluded that there was no causal link between the emissions from the plant and Ms Smaltini’s leukaemia.\textsuperscript{306} Ms Smaltini alleged that this decision by the judge violated her right to life under Article 2. She thus did not challenge the substantive aspect of Article 2, but the procedural aspect.\textsuperscript{307} The Court found that, during the domestic proceedings, an export report had been up made at the applicant’s request which established that there was no causal link between the pollution and her illness. The applicant had not produced evidence to the contrary. Ms Smaltini had thus not proven that the procedural

\textsuperscript{301} López Ostra v. Spain, para. 58.
\textsuperscript{303} Smaltini v. Italy, Application no. 43961/09, admissibility decision of 24 March 2015.
\textsuperscript{304} Locascia and Others v. Italy, Application no. 35648/10 [pending] and Joined cases Cordella and Others v. Italy, Application no. 54414/13 & Ambrogi Melle and Others v. Italy Application no. 54264/15 [pending].
\textsuperscript{305} Smaltini v. Italy, para. 6.
\textsuperscript{306} Smaltini v. Italy, para. 7 – 22.
\textsuperscript{307} Smaltini v. Italy, para. 51.
aspect of her right to life had been violated. Her application was declared inadmissible for being manifestly ill-founded.308

The Court, in Smaltini, again confirmed the State’s positive obligations concerning dangerous industrial activities, and referred back to cases such as Öneriğiz v. Turkey and Kolyadenko and others v Russia.309 Although Smaltini was not formally examined on the merits, this case shows that the positive obligation States have in the case of dangerous industrial activities which resulted in disasters/accidents, is also applicable in the case of dangerous industrial activities and emissions which cause harm to individuals and endanger their lives. This makes sense; similarly to Öneriğiz, the lives of the people living near the Isla refinery are being put at risk. Perhaps not because of an impending explosion, but because of the refinery’s toxic emissions which are endangering the health and lives of the people living directly downwind of it.

This subsection will analyse whether the government of Curaçao has fulfilled its positive obligations under Article 2 in the case of the industrial emissions from Isla. In order to do so, I will use the approach the Court has used in its cases such as Öneriğiz concerning dangerous industrial activity.

Substantive aspect of Article 2

As discussed in the previous chapter, Article 2 of the ECHR guarantees the right to life which includes a positive duty on States to take the necessary steps to safeguard the right to life. The ECtHR has held that States have a positive obligation under Article 2, whether the activity is public or private.310 This positive obligation entails “above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life.”311 In the context of dangerous activities, the positive duty under Article 2 places an obligation on the State to enact regulations with regard to the features of the activity in question.312 The regulations put in

308 Smaltini v. Italy, para. 59 – 61.
309 Smaltini v. Italy, para. 49.
310 Öneriğiz v. Turkey, para. 71.
311 Öneriğiz v Turkey, para. 89 – 90.
312 Öneriğiz v. Turkey, para. 90.
place by the government of Curaçao, namely the Nuisance Permit and Nuisance Ordinance, were discussed above. There are thus regulations in force designed to control the dangerous polluting activities of the refinery. However, it is also important to determine whether the legal measures put in place “call for criticism” and whether these regulations are actually implemented in practice.\textsuperscript{313}

To this end, it is important to first look at whether the State knows or ought to know that there exists a threat to the right to life on account of Isla’s toxic emissions.\textsuperscript{314} Above, under the subsection on Article 8, it has been considered that the pollution from the State-owned refinery and effects on the individuals living downwind from the refinery is well known to State authorities. At the least, considering the reports mentioned above, they ought to have known about it. That the pollution is of such a magnitude that it is a direct threat to life is also clear from the 2005 Ecorys report which concluded that an estimated 18 people die each year from exposure to the refinery’s toxic emissions.

They consequently have a positive obligation under Article 2 of the Convention to take the measures necessary to protect the individuals living downwind of the refinery.\textsuperscript{315} However, it appears that the government has never taken any such measures, even though it is explicitly authorized do so under Chapter V of the Nuisance Ordinance. The legal measures put in place also call for criticism, as established above. The Nuisance Permits are vague and unclear, and need revising.

The substantive aspect of Article 2 also requires States to place particular emphasis on the public’s right to information. Some efforts have been made by the government of Curaçao in order to fulfil this obligation under Article 2. The measuring stations installed in 2010 measure the hourly averages of SO2 ug/m3, TSP ug/m3, H2S ug/m3, PM10ug/m3 in the air and the measurements can be viewed by everyone at www.luchtmetingenCuracao.org. The Ministry of Health, Environment and Nature has also discussed with GGD Amsterdam the possibility of installing additional measuring equipment, which would also measure the concentration of (heavy) metals, PAH compounds and volatile hydrocarbons in the air and also publish hourly averages on the

\textsuperscript{313} Öneryildiz v. Turkey, para. 97.  
\textsuperscript{314} Öneryildiz v. Turkey, para. 98.  
\textsuperscript{315} Öneryildiz v. Turkey, para. 101.
same website.\textsuperscript{316} In January 2016, GGD Amsterdam sent a team to Curaçao in order to install the new measuring equipment.\textsuperscript{317} In 2015, the ministry also commissioned the GGD Amsterdam, the RIVM and the Institute for Risk Assessment Sciences to conduct a feasibility study on an elaborate health study in Curaçao.\textsuperscript{318} The government has also worked with TNO in order to conduct investigations into a ‘green substance’ which attaches itself to houses, fences, streetlights and mailboxes downwind of the refinery.\textsuperscript{319} The first phase of the investigation is finished.\textsuperscript{320} The government has stated that once the second stage of the investigation is finished and more is known about the composition of the green substance, they will distribute flyers to the public with information on the origin and health risks of the substance, and how to deal with it.\textsuperscript{321} The government thus seems to have taken some steps in order to inform the public about the risks of living under the Isla refinery’s smoke, though most of these measures were taken after intense pressure from environmental organizations such as SMOC and SHZC.\textsuperscript{322}

\textit{Procedural aspect of Article 2}

Under the procedural aspect of Article 2, “where lives have been lost in circumstances potentially engaging the responsibility of the State, that provision entails a duty for the State to ensure, by all means at its disposal, an adequate response – judicial or otherwise […]”\textsuperscript{323} The 2005 report from ECORYS-nei estimated that 18 people a year die as a result from exposure to the refinery’s emissions. This is, however, an estimate. No actual victims have

\textsuperscript{316} Court of First Instance of Curaçao, judgment of 16 November 2015, ECLI:NL:OGEAC:2015:24, para. 3.5.
\textsuperscript{318} Court of First Instance of Curaçao, judgment of 16 November 2015, ECLI:NL:OGEAC:2015:24, para. 3.7.
\textsuperscript{319} \textit{Ibid.}, para 3.1 - 3.4.
\textsuperscript{321} Court of First Instance of Curaçao, judgment of 16 November 2015, ECLI:NL:OGEAC:2015:24, para. 3.11.
\textsuperscript{322} Most of these steps have been taken recently. The government did not conduct air quality measurements until 2010, after having been taken to Court several times by SMOC since 2005. These long administrative proceedings culminated in judgment of 28 May 2012 (ECLI:NL:OGHACMB:2012:BX0658) of the Joint Court of Justice of Aruba, Curaçao, Sint Maarten and of Bonaire, Sint Eustatius and Saba. \textsuperscript{323} \textit{Öneyildiz v. Turkey}, para. 91.
been identified. It could then not have been expected of the State to ensure an appropriate response under the procedural aspect of Article 2.

**Margin of appreciation**

It must be mentioned that in fulfilling their positive duties under Article 2, States have a certain margin of appreciation. As stated in *Kolyadenko and others v. Russia*:

“[A]n impossible or disproportionate burden must not be imposed on the authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources; this results from the wide margin of appreciation States enjoy, as the Court has previously held, in difficult social and technical spheres.”

In this context, it is unlikely that the government could successfully argue that an impossible or disproportionate burden would be imposed on them if they enforced their own regulations and took administrative action against the refinery (or the other major polluter, BOO), which they have the authority to do under the Nuisance Ordinance. In any case, it would be difficult for the government to argue that they ‘acted’ within their margin of appreciation, when it seems like they have not acted at all.

5.2.3 **Article 1 of Protocol No. 1: Right to peaceful enjoyment of one’s possessions**

This subsection will analyse whether the state has fulfilled its positive obligations under Article 1 of Protocol No. 1.

In *Kolyadenko and others v. Russia*, the ECtHR states that “at times, there may be a significant overlap between the concept of ‘home’ under Article 8 of the Convention and that of ‘property’ under Article 1 of Protocol No. 1.” When speaking of damage done to their home, or being deprived of the ability to enjoy their home, an individual can thus bring a claim under Article 1 of Protocol No. 1 or Article 8. However, Article 1 of Protocol 1 also applies to other possessions, which have also potentially been affected the refinery’s toxic emissions. It is thus important to look at the possibility of a separate claim under Article 1 of Protocol No. 1

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324 *Kolyadenko and others v Russia*, para. 207.
The main issue is whether the State's reluctance to enforce its own environmental norms resulted in a reduction of the value of the possessions of those living near the refinery which amounted to an interference with their right to peaceful enjoyment of possessions. The facts surrounding this potential violation are the same as set out above.

It would be fair to say that the pollution from the Isla refinery has made the neighbourhoods surrounding the refinery an undesirable place to live. The nuisance caused by the refinery is also not limited to pollution caused by the emissions; sometimes there is also considerable nuisance from the lighting at night as well as the noise.

Important to note, however, is that since the refinery's construction began in 1915, most people living in the neighbourhoods affected will have acquired their property after the Isla refinery was built. The situation is thus different from that in Spire v. France, where the applicant had acquired her property before the construction of a nuclear power station on a rural area opposite her home. The construction of the power plant lead to a decrease in value of her property. Considering the refinery has been there since the early 1900’s, it is not clear whether the property’s value would have actually dropped from the time it was bought due to the refinery’s presence and pollution. However, it could be argued that the extent of the refinery’s pollution could not have been predictable when the property was bought by at least some of the residents of the neighbourhoods surrounding the refinery. The residents could have had a reasonable expectation that the refinery would stick to the domestic environmental norms. Some residents thus might have an arguable case under Article 1 of Protocol No. 1.

In recent years there has also been a ‘green substance' which has been caked onto people’s homes, as well as their fences, air conditioners, cars and boats, to name a few. This substance is expected to be highly corrosive, judging from a report which examined a similar green substance in the neighbourhoods surrounding the refinery and the BOO power

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328 Court of First Instance of Curaçao, judgment of 16 November 2015, ECLI:NL:OGEAC:2015:24, para. 3.1.
plant.\textsuperscript{329} If this green substance can be attributed directly to the refinery, this might also give the residents of the impacted neighbourhoods a claim under Article 1 of Protocol No. 1, given the damage to their possessions is serious enough to render it unusable or unsellable.

So far, no studies have been conducted into what effect the refinery’s pollution has had on the market value of the houses surrounding the refinery. It is also still unclear what the exact effects the green substance are. More information is needed in order to judge the success of a claim under Article 1 of Protocol No. 1.

**Concluding observation**

Considering the aforementioned, it would be fair to conclude that there is an arguable case that the rights enshrined in Articles 2 and 8, and potentially Article 1 of Protocol No. 1, of those living downwind of the Isla refinery are being violated on account of the refinery’s polluting emissions.

CHAPTER 6 Conclusion

The aim of this thesis was to establish to which extent a right to a healthy environment could be seen as implicit in the rights recognized in the ECHR and whether the people of Curaçao could bring a successful claim before the ECHR that the government of Curaçao’s failure to take action against the Isla refinery and its pollution constituted a violation of their human rights.

As chapter 2 of this study considered, environmental pollution has serious consequences and can violate existing human rights. Though there is no internationally recognized right to a healthy environment, there are certain human rights tribunals (such as the ECtHR) which have evolved to recognize that environmental factors may violate human rights. Chapter 3 of this thesis addressed the possible avenues for the people of Curaçao to obtain redress for the environmental harm they experienced (and continue to experience) due to the Isla refinery. Only the Kingdom of the Netherlands has international legal personality and can conclude international agreements, such as the ECHR. As the signatory, the Kingdom ultimately bears responsibility on an international level. The people of Curaçao could thus bring a claim for human rights violations against the Kingdom of the Netherlands. This is also illustrated by the Murray v. Netherlands case. Considering the ECtHR’s binding judgments and demonstrable willingness to consider air pollution to violate ECHR rights, the ECtHR is arguably the best avenue for the people of Curaçao to assert their claim. Chapter 4 analysed the ECtHR’s existing case law of the relationship between the environment and ECHR rights – specifically Articles 2, 8 and 1 of Protocol No. 1. The ECtHR has recognized in its judgments that environmental conditions can affect these rights. Chapter 5 showed that there is a strong case that these rights guaranteed under the ECHR are being violated. The government of Curaçao has remained unjustifiably passive in the case of the Isla refinery and its continued violations of domestic environmental norms.
In conclusion, although the ECHR does not contain the right to a healthy environment *per se*, the serious effects of the air pollution from the Isla refinery on the people of Curaçao’s life, homes, health and private and family life could constitute a violation of the rights guaranteed under the ECHR. Ultimately, if this case is ever brought before the ECtHR, it is the Kingdom who will be held responsible. It would seem that this fact calls for a more active role on the part of Kingdom government in safeguarding fundamental human rights and freedoms in its constituent countries. Unfortunately, the Kingdom government has kept aloof from the whole situation.

The Kingdom’s safeguarding function could be used more effectively in order to prevent poor human rights situations from escalating to the point where they are brought before ECtHR. However, it is not easy to say at what point exactly the Kingdom government should intervene. If the Kingdom decides to intervene wherever there is some evidence of a human rights violation in a constituent country like Curaçao, this would lead to accusations of the Kingdom meddling in the internal affairs of the autonomous country. This is something most politicians on Curaçao would not find acceptable and would arguably put a strain on Curaçao’s relationship with the Kingdom. It is thus necessary to work out how the safeguarding function could be used by the Kingdom to address human rights violations before they are brought before an international court like the ECtHR.

In the case of the Isla refinery, there is more than enough evidence that the human rights of the people living downwind from the Isla refinery are being violated. The pollution and its effect on the people’s health have been known for years and the Curaçao government has shown to be either unwilling or unable to effectively address the situation. There seems to be sufficient cause to warrant intervention by the Kingdom. If and when the Kingdom government decides to intervene, the measures taken should first be aimed at ensuring the Curaçao government enforces its own environmental standards.

One way or another, the problem with the Isla refinery needs to be addressed. The question is whether it will reach the ECtHR before the Curaçao government or Kingdom government effectively address the situation.
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