

SUSTAINABLE MANAGEMENT
OF NATURAL RESOURCES

Legal Instruments and Approaches

Edited by
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Distribution for the UK and Ireland:

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Groenstraat 31
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Distribution for the USA and Canada:

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Sustainable Management of Natural Resources

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Cover photograph: George Oze – Alamy Stock Photo

ISBN 978-1-78068-759-9 (paperback)

ISBN 978-1-78068-783-4 (PDF)

D/2018/7849/95

NUR 823

British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

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Natalia KOBYLARZ^{*}

ABSTRACT

Since the 1960s, the ECHR organs have examined over 270 applications related to the protection or the degradation of the natural environment. This chapter offers a selective, systematised and up-to-date analysis of this vast body of case law and of applications pending the Court's examination. It explores the implications of the ECHR general principles for environmental litigation, in particular, the notions of "direct victim", "serious specific and imminent danger", "minimum level of disturbance", and "wide margin of appreciation". Whenever warranted, it applauds the Court's acceptance of surrogate protection of the environment through civil and political rights and the doctrine of positive obligations, or voices criticism of its conservative approach to giving precedence to economic considerations over the environmental harm. It then takes a forward-looking view on the work of the ECtHR, focusing on its dynamic and evolutive approach to the interpretation of the scope of the ECHR-protected rights and the cross-fertilisation of ideas which is occurring between the ECtHR and the IACtHR. Ultimately, it predicts that wise and widespread environmental litigation can

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make the ECtHR start to employ ecological rationality in explaining the value of nature in cases in which its protection paradoxically seems to collide with conventionally-perceived anthropocentric rights.

1. INTRODUCTION

The European Convention on Human Rights (“the ECHR” or “the Convention”) does not guarantee a substantive right to a healthy environment¹ and none of its provisions are specifically designed to ensure the general protection or the preservation of nature.² But the link between the environment and human rights intrinsically exists.

The theoretical bedrock of this assertion was laid down in the 1972 Stockholm Declaration on the Human Environment and was developed over the years by various authorities, including the Inter-American Court of Human Rights (“IACtHR”) in its most recent Advisory Opinion on the Environment and Human Rights.³ A thriving natural environment is, therefore, a precondition to the enjoyment of human rights; human rights law can be used as a tool to address environmental issues from both a substantive and procedural stance;⁴ and both are necessary for sustainable development.⁵

This nexus is also clearly manifested in the practice of the ECHR organs which have regularly been seized to respond to grievances related to the

¹ Recommendations have been made to the member states of the Council of Europe (via the Council of Europe’s Committee of Ministers) that an additional protocol to the ECHR be drawn up to create the right to a healthy environment as a basic human right and to enhance the environmental protection through procedural rights as set out in the Aarhus Convention (see, Recommendations of the Council of Europe’s Parliamentary Assembly nos. 1431 (1999); 1614 (2003), 1883 (2009) and 1885 (2009)). The Committee of Ministers has invariably considered such an additional protocol redundant since the ECHR system already indirectly contributes to the protection of the environment through existing Convention rights and their interpretation in the evolving case law of the ECtHR.

² *Inter alia*, *X. v. Federal Republic of Germany* (dec.), no. 7407/76, 13 May 1976; *Kyrtatos v. Greece*, no. 41666/98, § 52, ECHR 2003-VI; *Hamer v. Belgium*, no. 21861/03, § 79, ECHR 2007-V (extracts); *Turgut and Others v. Turkey*, no. 1411/03, § 90, 8 July 2008; and *Dubetska and Others v. Ukraine*, no. 30499/03, § 105, 10 February 2011.

³ Corte Interamericana de Derechos Humanos, Opinión Consultiva OC-23/17 “Obligaciones estatales en relación con el medio ambiente en el marco de la protección y garantía de los derechos a la vida y a la integridad personal – interpretación y alcance de los Artículos 4.1 y 5.1, en relación con los artículos 1.1. y 2 de la Convención Americana Sobre Derechos Humanos, § § 47-70, del 15 de noviembre 2017.

⁴ Manual on human rights and the environment, 2nd edition, 2012, Council of Europe Publishing, p. 8.

⁵ Transforming our world: the 2030 Agenda for Sustainable Development, Resolution adopted by the General Assembly on 25 September 2015.

protection or the degradation of the natural environment. Since the 1960s,⁶ the European Court of Human Rights (“the ECtHR” or “the Court”) and the previously existing European Commission of Human Rights, have issued, by the author’s count, approximately 270 such environment-related rulings. Some of these constitute foundational pronouncements of new principles which allow human rights law – which is traditionally ignorant of any environmental considerations – to address contemporary planetary conundrums.⁷ Others are day-to-day decisions which test these legal precedents in a wide range of real-life circumstances and which offer solutions to often systemic or repetitive problems.⁸ All in all, these environment-related rulings prove that the European system of human rights protection efficiently safeguards the environment by proxy of first-generation human rights, the scope of which is constantly evolving⁹ and which

⁶ The first environment-related case, *Schmidt v. Federal Republic of Germany* (dec.), no. 715/60, was decided by the Commission on 5 August 1960.

⁷ *Inter alia*, *López Ostra v. Spain*, 9 December 1994, Series A no. 303-C, concerning lack of response to pollution caused by a waste-treatment plant operating without licence; *Guerra and Others v. Italy*, 19 February 1998, Reports of Judgments and Decisions 1998-I, concerning failure to provide local population with information about risks of accident at a nearby chemical factory and about possible emergency procedures; *Chassagnou and Others v. France* [GC], nos. 25088/94 and two others, ECHR 1999-III, concerning obligation of land-owners to allow hunting on their property and obligatory membership of hunting associations; *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, ECHR 2003-VIII, concerning noise nuisance due to night flies operated at Heathrow Airport; *Öneryıldız v. Turkey* [GC], no. 48939/99, ECHR 2004-XII, concerning loss of life and property resulting from an accidental explosion at a rubbish tip close to illegal shanty town; *Taşkın and Others v. Turkey*, no. 46117/99, ECHR 2004-X, concerning pollution due to sodium cyanide leaching used for gold extraction from a mine located in an earthquake zone, operating under invalidated permit; *Fadeyeva v. Russia*, no. 55723/00, ECHR 2005-IV, concerning failure to resettle a family living in a severely polluted area and to design or apply effective measures to reduce industrial pollution; *Giacomelli v. Italy*, no. 59909/00, ECHR 2006-XII, 2 November 2006, concerning lack of prior EIA and failure to suspend unlawful operation of a waste plant generating toxic emissions; and *Tătar v. Romania*, no. 67021/01, 27 January 2009, concerning failure to assess risks and consequences of hazardous industrial activity of gold and silver mining with sodium cyanide and to keep the public informed.

⁸ *Inter alia*, *Nikas and Nika v. Greece*, no. 31273/04, 13 July 2006, concerning revocation of exemption from reforestation without summoning affected land owners of farming land unsuitable for forestation, implying prohibition of future construction, and lack of suspensive effect of judicial review; *Ledyayeva and Others v. Russia*, nos. 53157/99, 53247/99, 53695/00 and 56850/00, 26 October 2006, similar to *Fadeyeva*, cited above; *Şatır v. Turkey*, no. 36192/03, 10 March 2009, concerning revocation of title to private land without compensation on grounds that it was part of public forest estate; *Kolyadenko and Others v. Russia*, nos. 17423/05 and 5 others, 28 February 2012, concerning loss of home and property and risk to life resulting from a flash flood caused by opening, without warning, of reservoir during heavy rain; *Frank Eckenbrcht and Heinz Ruhmer v. Germany* (dec.), no. 25330/10, 10 June 2014, concerning noise nuisance from Leipzig Halle Airport; and *Cuenca Zarzoso v. Spain*, no. 23383/12, 16 January 2018, concerning noise and night-time disturbances from private bars in Valencia.

⁹ *Inter alia*, *Marckx v. Belgium*, 13 June 1979, § 41, Series A no. 31 and *Stafford v. the United Kingdom* [GC], no. 46295/99, § 68, ECHR 2002-IV.

are recognised as being interdependent and indivisible from economic and social rights.¹⁰

2. OVERVIEW OF THE ENVIRONMENT-RELATED CASE LAW OF THE ECtHR

The largest group of the environment-related judgments and decisions delivered by the ECHR organs, numbering nearly 110, concerns the balancing of states' ecologically sound policies with individuals' rights to the peaceful enjoyment of property or respect for home and private and family life. Cases in this group arose out of measures such as the expropriation of private land or the demolition of dwellings in areas of protected coastline in Turkey,¹¹ or in areas designated for reforestation in Greece.¹² They also concern restrictions put in place by the governments of various European states to ensure a sustainable use of natural resources¹³ or the protection of endangered species¹⁴ and biological diversity.¹⁵

The remaining cases illustrate the other side of the coin – that is to say, ecologically unfriendly operations and urban development resulting in pollution, environmental disasters, occupational illnesses or nuisance, in so far as they may threaten the right to life or the right to a respect for home and private and family life. Thus, the Court has ruled over forty times in respect of: toxic emissions caused by the operation of nuclear plants and power stations, for example, in Switzerland¹⁶ and Georgia;¹⁷ factories and smelters, mainly in Italy¹⁸ and Romania;¹⁹ gold and coal mines in Turkey²⁰ and Ukraine;²¹ and of waste-

¹⁰ Separate opinion of Judge Pinto de Albuquerque in *Konstantin Markin v. Russia* [GC], no. 30078/06, ECHR 2012 (extracts), and IACtHR's OC 23-17, cited above § 57.

¹¹ *N.A. and Others v. Turkey*, no. 37451/97, ECHR 2005-X.

¹² *Papastavrou and Others v. Greece*, no. 46372/99, ECHR 2003-IV.

¹³ *Pindstrup Mosebrug A/S v. Denmark* (dec.), no. 34943/06, 3 June 2008.

¹⁴ *Paratheristikos Oikodomikos Synetairismos Stegaseos Ypallilon Trapezis Tis Ellados v. Greece*, No. 2998/08, 3 May 2011.

¹⁵ *Annika Jacobson v. Sweden* (dec.), no. 59122/08, 22 May 2012 and *Valle Pierimpiè Società Agricola S.P.A v. Italy*, no. 46154/11, 23 September 2014.

¹⁶ *Balmer-Schafroth e.a v. Switzerland* [GC], no. 22110/93, 26 August 1997 and *Athanassoglou and Others v. Switzerland* [GC], no. 27644/95, ECHR 2000-IV.

¹⁷ *Jugheli and Others v. Georgia*, no. 38342/05, 13 July 2017.

¹⁸ *Guerra and Others*, cited above and *Smaltini v. Italy* (dec.), no. 43961/09, 24 March 2015.

¹⁹ *Băcilă v. Romania*, no. 19234/04, 30 March 2010.

²⁰ *Taşkın and Others*, cited above; *Öçkan and Others v. Turkey*, no. 46771/99, 28 March 2006; *Lemke v. Turkey*, no. 17381/02, 5 June 2007; and *Genç and Demirgan v. Turkey*, nos. 34327/06 and 45165/06, 10 October 2017.

²¹ *Dubetska and Others*, cited above.

treatment plants or dumpsters, in Italy,²² Norway²³ and Spain.²⁴ One group of ten cases concerns environmental disasters – natural and man-made – such as flash floods²⁵ or the explosion of methane generated by decomposing refuse in a city landfill.²⁶ The Court has also examined eight applications brought by people from countries such as the United Kingdom, France and Malta who claimed to be the victims of nuclear or military gas tests,²⁷ or who worked with hazardous substances.²⁸ A group of close to sixty rulings concern nuisance (mainly noise, smell or general disturbance) resulting from urban development. These cases range from judgments on the inconveniences of large-scale airport traffic across Europe²⁹ to more trivial problems such as fireworks displays in Malta³⁰ or the operation of private night bars in residential areas in Spain.³¹

An analysis of the Court's environment-related case law would not be complete without the last group of over forty judgments and decisions concerning various forms of ecological activism. These were mainly argued under the right to exercise free speech,³² or freedom of assembly³³ or under procedural rights to obtain information³⁴ or judicial review of policies threatening the environment.³⁵

²² *Giacomelli*, cited above and related, *Di Sarno and Others v. Italy*, no. 30765/08, 10 January 2012.

²³ *Moe and Others v. Norway* (dec.), no. 30966/96, 14 December 1999.

²⁴ *López Ostra*, cited above.

²⁵ *Murillo Saldias and Othes v. Spain* (dec.), no. 76973/01, 28 November 2006; *Kolyadenko and Others*, cited above and related, *Hadzhiyska v. Bulgaria* (dec.), no. 20701/09, 15 May 2012.

²⁶ *Öneryıldız*, cited above.

²⁷ *Tauria and 18 others v. France* (dec.), no. 28204/95, 4 December 1995; *McGinley and Egan v. the United Kingdom*, 9 June 1998, Reports of Judgments and Decisions 1998-III; *L.C.B. v. the United Kingdom*, 9 June 1998, Reports of Judgments and Decisions 1998-III; and *Roche v. the United Kingdom* [GC], no. 32555/96, ECHR 2005-X.

²⁸ *Howald Moor and Others v. Switzerland*, nos. 52067/10 and 41072/11, 11 March 2014 and *Brintat and Others v. Malta*, nos. 60908/11 and 4 others, 24 July 2014.

²⁹ *Inter alia*, *Hatton and Others*, cited above.

³⁰ *Zammit Maempel v. Malta*, no. 24202/10, 22 November 2011.

³¹ *Inter alia*, *Moreno Gómez v. Spain*, no. 4143/02, ECHR 2004-X.

³² *Inter alia*, *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (no. 2) [GC], no. 32772/02, ECHR 2009.

³³ *Inter alia*, *Zeleni Balkani v. Bulgaria*, no. 63778/00, 12 April 2007 and *Schneider v. Luxembourg*, no. 2113/04, 10 July 2007.

³⁴ *Sdružení Jihočeské Matky v. the Czech Republic* (dec.) 19101/03, 10 July 2006 and *Guseva v. Bulgaria*, no. 6987/07, 17 February 2015.

³⁵ *Štefanec v. the Czech Republic*, no. 75615/01, 18 July 2006; *Collectif national d'information et d'opposition à l'usine Melox – Collectif Stop Melox and Mox v. France*, no. 75218/01, 12 June 2007; *L'Érablière A.S.B.L. v. Belgium*, no. 49230/07, ECHR 2009 (extracts); *Lesoochranské zoskupenie Vlk v. Slovakia* (dec.), no. 53246/08, 2 October 2012; and *Valentina Viktorovna Oglobina v. Russia* (dec.), no. 28852/05, 26 November 2013.

On top of this, about a dozen communicated applications concerning the environment are currently pending before the Court³⁶ and some 200, involving over 4,000 applicants, are awaiting processing. At the moment, Italy and Turkey are the two countries which face the most environmental litigation before the ECtHR in the form of the “class action” applications concerning pollution caused by waste disposal or mining and the steel industry.

How many of these 270 environment-related rulings were actually on nature’s side can only be judged after a thorough analysis, not only of the operative part of each decision, but also of the reasoning in so far as it may contain newly formulated general principles – possibly leading to the evolution of the Court’s own jurisprudence and inspiring the development of domestic case law. It is also equally important to study the process by which the relevant judgments were executed and to look beyond the particular circumstances of each case because the general measures, which are ordered for environmental human rights violations, benefit not only individual applicants but also other members of current and future generations.

3. IMPLICATIONS OF THE ECHR GENERAL PRINCIPLES FOR ENVIRONMENTAL LITIGATION

The Strasbourg system aims at ensuring the genuine and practical exercise of rights guaranteed by the Convention.³⁷ This is why the state parties must not only refrain from interfering with the exercise of these rights, but also (under the well-established and widely operating doctrine of positive obligations) take the necessary legal and/or practical measures to actively safeguard them.³⁸ Moreover, the protection of most Convention rights depends on the balancing of various interests which may be at stake in a democratic society. To this end, the ECtHR accepts that the protection of the environment is an increasingly important

³⁶ *Ningur Noyanalan and Others v. Turkey*, no. 26660/05; *Erol Cicek and Others v. Turkey*, no. 44837/07; *Locascia and Others v. Italy*, no. 35648/10; *Vecbaštika and Others v. Latvia*, no. 52499/11; *Ivan Kozul and Others v. Bosnia and Herzegovina*, no. 38695/13; *Cordella and Others v. Italy*, no. 54414/13; *Kapa and 3 others v. Poland*, no. 75031/13; *Aleksandar Mastelica and Others v. Serbia*, no. 14901/15; *Lina Ambrogi Melle and Others v. Italy*, no. 54264/15; *O’Sullivan Mc Carthy Mussel Development Ltd v. Ireland*, no. 44460/16.

³⁷ *Case “relating to certain aspects of the laws on the use of languages in education in Belgium”* (merits), 23 July 1968, Series A no. 6; *Marckx*, cited above, § 31; and *X and Y v. the Netherlands*, 26 March 1985, § § 23, 24 and 27, Series A no. 91.

³⁸ *Airey v. Ireland*, 9 October 1979, Series A no. 32, p. 17, § 32; *Guerra and Others*, cited above, § 60; and *Öneryıldız*, cited above, § § 89 and 90.

consideration in society³⁹ and that it should not be subservient to financial imperatives or, even to certain fundamental rights, such as ownership.⁴⁰ The rulings of the Convention organs, especially in the largest “balanced protection” category, clearly demonstrate – what may surprise the critics of the human rights approach to the protection of the environment – that, as much as the ECHR grants to humans a right to benefit from a decent environment, it also assigns ecological responsibilities to them. The Court will thus assent to conservation measures undertaken by states which otherwise interfere with someone’s Convention rights, as long as they do not result in an excessive individual burden.⁴¹

To recapitulate, the ECtHR holds the states responsible if environmental harm is caused by the authorities’ own actions, or – under the doctrine of positive obligations – by their omissions or by activities carried out by private parties (i.e. individuals or companies).⁴² But the issue will only arise if such harm directly affects the applicant’s Convention rights.⁴³ In the specific context of the right to respect for home and for private and family life, such harm would also have to interfere with the enjoyment of these rights to a distressing degree.⁴⁴

The way in which the Convention organs have, over the years, understood these notions is often criticised as allegedly incompatible with what is necessary to defend ecological sustainability. I will now address these issues one by one – not as inherent and irreparable deficiencies, but rather as ideas which need reconditioning to fit the expectations and the needs of modern European societies in so far as they are affected by environmental pollution and climate change. I will also try to demonstrate that the ECHR system is readily equipped

³⁹ *Inter alia*, *Fredin v. Sweden* (no. 1), 18 February 1991, § 48, Series A no. 192; *Fadeyeva*, cited above, § 103; *Hamer*, cited above, § 79; *Turgut and Others*, cited above, § 90; and *Rimer and Others v. Turkey*, no. 18257/04, § 38, 10 March 2009; *Ivan Atanasov v. Bulgaria*, no. 12853/03, § 66, 2 December 2010; *Matczyński v. Poland*, no. 32794/07, § 101, 15 December 2015; and *S.C. Fiercolect Impex S.R.L. v. Romania*, no. 26429/07, § 65, 13 December 2016.

⁴⁰ *Hamer*, cited above, § 79; *Turgut and Others*, cited above, § 90; *Varnienė v. Lithuania*, no. 42916/04, § 54, 12 November 2013; and *S.C. Fiercolect Impex S.R.L.*, cited above, § 65.

⁴¹ *Inter alia*, *Muriel Herrick v. the United Kingdom* (dec.), no. 11185/84, 11 March 1985; *Philip and Annie Lay v. the United Kingdom* (dec.), no. 13341/87, 14 July 1988; *Matos e Silva, Lda., and Others v. Portugal*, 16 September 1996, Reports of Judgments and Decisions 1996-IV; *Bahia Nova S.A. v. Spain* (dec.), no. 50924/99, 12 December 2000; *Coster v. the United Kingdom* [GC], no. 24876/94, 18 January 2001; *Papastavrou and Others*, cited above; *Posti and Rahko v. Finland*, no. 27824/95, ECHR 2002-VII; *Coopérative des agriculteurs de la Mayenne and Coopérative laitière Maine-Anjou v. France* (dec.), no. 16931/04, 10 October 2006; *Valico S.R.L. v. Italy* (dec.), no. 70074/01, 21 March 2006; *Hamer*, cited above; *Depalle v. France* [GC], no. 34044/02, ECHR 2010; and *Matczyński*, cited above.

⁴² *Inter alia*, *Hatton and Others*, cited above, § 98; *Fadeyeva*, cited above, §§ 89, 92 and 94; *Borysiewicz v. Poland*, no. 71146/01, § 51, 1 July 2008; and *Leon and Agnieszka Kania v. Poland*, no. 12605/03, § 100, 21 July 2009.

⁴³ *Inter alia*, *Fadeyeva*, cited above, § 68; *Borysiewicz*, cited above, § 51; *Leon and Agnieszka Kania*, cited above, § 100.

⁴⁴ *Inter alia*, *López Ostra*, cited above, para. 51.

to undertake a more significant role in the field of environmental litigation – even if, as in any other area of concern, it is not at all inclined to practice any strategic judicial activism.

3.1. DIRECT VICTIM REQUIREMENT VS. GENERAL INTEREST IN A HEALTHY ENVIRONMENT

The requirement that the harm complained of must have a direct effect on the alleged victim's Convention rights excludes from the Court's jurisdiction any *actio popularis*.⁴⁵

This means that the Court refuses to examine the merits of any case that aims at defending the environment in general without specifying that there is an individual civil right at stake guaranteed by the Convention or its protocols. The ECtHR has admittedly rejected the argument, which was put forward in a number of public-interest applications, concerning illegal development of conservation areas or deforestation, that there was a civil right to an undisturbed panoramic view;⁴⁶ to private life in the surroundings of scenic beauty or wild habitats;⁴⁷ or to the peaceful enjoyment of one's possessions in a pleasant environment.⁴⁸ But the Court has entertained cases in which, in addition to a collective concern for the nature, applicants were also defending their specific interests in patrimony, in participation in a decision-making process or in gathering of information with a view to its subsequent provision to the public. Article 6 of the Convention can indeed guarantee the right to a fair judicial review of decisions concerning urban or industrial development, or the management of nature sites if it is shown, *inter alia*: (i) that the resulting loss of important features (such as a picturesque view) was likely to affect the applicant's economic interest (for example, to cause a drop in the market value of his or her real property);⁴⁹ and (ii) that the procedure of which the applicant complains could effectively bring about the restoration of the previous characteristics⁵⁰ or offer the applicant compensation.⁵¹ A "civil right" (within the meaning of Article

⁴⁵ *Klass and Others v. Germany*, 6 September 1978, § 33, Series A no. 28 and *Crash 2000 Ood and Others v. Bulgaria* (dec.), no. 49893/07, § 84, 17 December 2013.

⁴⁶ *Ünver v. Turkey* (dec.), no. 36209/97, 26 September 2000.

⁴⁷ *Kyrtatos*, cited above, § § 46 and 53 and *Valentina Viktorovna Oglobina*, cited above, § § 20-22 and 28.

⁴⁸ *Ünver*, cited above.

⁴⁹ *Dactylidi v. Greece* (dec.), no. 52903/99, 28 February 2002; *Sofia Kyrtatou and Nikos Kyrtatos v. Greece* (dec.), no. 41666/98, 13 September 2001; and *Karin Anderson and Others v. Sweden*, no. 29878/09, § § 46 and 47, 25 September 2014.

⁵⁰ *Dactylidi*, cited above; *Sofia Kyrtatou and Nikos Kyrtatos*, cited above; *Gorraiz Lizarraga and Others v. Spain*, no. 62543/00, § § 46 and 47, ECHR 2004-III and, by contrast *Fotopoulou v. Greece* (dec.), no. 66725/01, 10 April 2003.

⁵¹ *Ivan Atanasov*, cited above, § § 94-96.

6 of the ECHR) can also exist irrespective of any pecuniary loss incurred. For example, in a case concerning lack of access to a court to challenge a permit to dump refuse on land adjacent to that on which the applicants lived and drew water from, the Court agreed that the ability to use water in the applicants' well for drinking purposes was one facet of their ownership right.⁵² In another case, the ECtHR agreed that the applicant legal entity was entitled to the right to protect the quality of the private lives of its members, who resided in municipalities threatened by an allegedly harmful project. An important element of that case was that the association's statutory aim was limited (in space and in substance), to protecting the environment in the region concerned.⁵³

The question of legal standing within the context of collective (and intergenerational) rights will soon be tackled again by the ECtHR in an important public-interest case concerning the archaeological site of Mesopotamia, the existence of which is threatened by the plan to construct a dam on the Tigris River.⁵⁴ The case was lodged by archaeologists, architects and historians who, in addition to common concern for cultural heritage, claim to have a personal interest in the preservation of the site under the right to respect for private life, the right to freedom of information and the right to education of future generations. The existence of the right to a cultural heritage as such has not been recognised under the ECHR. The link with the right to a healthy environment is thus more than apparent, starting with the procedural issue of *locus standi* and ending with the cardinal question of whether the Convention imposes on states a positive obligation to preserve heritage – whether cultural or natural – under, for example, the doctrine of public trust.

To hope for a breakthrough judgment in this case is not a wishful thinking. The ECtHR has always referred to the “living” nature of the Convention, which must be interpreted in the light of present-day conditions⁵⁵ and has considered that a failure on the part of the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement.⁵⁶

Moreover, the Court does not consider the provisions of the ECHR to constitute the sole framework of reference for the interpretation of the rights and freedoms enshrined in it. It takes into account elements of international law other than the Convention (including soft law) and it does not distinguish between sources of law on the basis of whether or not they have been signed or ratified by the respondent state in question.⁵⁷

⁵² *Zander v. Sweden*, 25 November 1993, § § 26 and 27, Series A no. 279-B.

⁵³ *L'Erablière A.S.B.L.*, cited above.

⁵⁴ *Ahunbay and Others v. Turkey*, no. 6080/06, lodged on 3 March 2006; compare with *Sylogos v. the United Kingdom* (dec.), no. 48259/15, 31 May 2016.

⁵⁵ *Marckx*, cited above, § 41 and *Vo v. France* [GC], no. 53924/00, § 82, ECHR 2004-VIII.

⁵⁶ *Stafford*, cited above, § 68.

⁵⁷ *Demir and Baykara v. Turkey* [GC], no. 34503/97, § § 76-84, ECHR 2008.

In the *Tigris Dam Case* (and in similar environment-related cases), the ECtHR can draw, among other sources, on the jurisprudence of the IACtHR which has expertly established a connection between individual and collective rights, and even acknowledged intergenerational rights in the context of ecological sustainability specifically defended through the assertion of the rights of indigenous communities.⁵⁸

A general interest in having a healthy environment may also be defended under the ECHR through the proxy of participatory or procedural rights which have been taken up by the Court not only in respect of applicants with a personal interest,⁵⁹ in keeping with the 1998 Aarhus Convention.⁶⁰ Article 6 of the ECHR has therefore been applied to proceedings which were brought by environmental-protection associations to challenge the authorisation of activities dangerous to public health and the environment. In one such case, the Court held that, while the purpose of the impugned proceedings had fundamentally been to protect a general interest, there was a sufficient link between the “civil right” which the applicant association was claiming and its right to enable the public to be informed and to participate in the decision-making process.⁶¹ Independently of Article 6, a general environmental interest often comes into play within the

⁵⁸ Although the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (known as the “Protocol of San Salvador”) expressly recognises a right to a healthy environment, alleged violations of this right cannot not give rise to an individual petition governed by the American Convention. In result, there are no decisions of the American Convention organs making findings directly under the right to a healthy environment. The IACtHR has nevertheless found violations of the first-generation human rights guaranteed by the American Convention in relation to land grabbing linked to concessions for large-scale animal husbandry, mining, logging, construction of hydroelectric dam or for crude oil exploitation on the lands of indigenous and tribal peoples. The IACtHR has thus identified a whole panoply of rights of indigenous and tribal peoples that states must respect and protect when they undertake measures of economic development. Such rights include the right to a safe and healthy environment; the right to prior consultation and to free and informed consent; the right to derive reasonable benefit from development activities; and the right of access to justice and reparation. See, *inter alia*, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001; *Moiwana Community v. Suriname*, Judgment of June 15, 2005; *Yakye Axa Indigenous Community v. Paraguay*, Judgment of June 17, 2005; *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of March 29, 2006; *Claude-Reyes et al. v. Chile*, Judgment of September 19, 2006; *Saramaka People v. Suriname*, Judgment of November 28, 2007; *Xákmok Kásek Indigenous Community v. Paraguay*, Judgment of August 24, 2010; *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment of June 27, 2012; *Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v. Panama*, Judgment of 14 October 2014; *Kaliña and Lokono Peoples v. Suriname*, Judgment of November 25, 2015; and the IACtHR’s OC 23-17, cited above § 57.

⁵⁹ *Inter alia*, *Guerra and Others*, cited above; *Taşkın and Others*, cited above; *Di Sarno and Others*, cited above.

⁶⁰ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

⁶¹ *Collectif national d’information et d’opposition à l’usine Melox – Collectif Stop Melox and Mox*, cited above; contrast with *Lesoochranske zoskupenie Vlk*, cited above, § 77, 78, and 88.

context of Article 10 of the ECHR which guarantees the freedom to impart and seek information,⁶² and of Article 11 of the ECHR which grants the right to freedom of assembly.⁶³

The “direct victim requirement” also implies that the ECtHR will not entertain applications in which a legal entity relies on a Convention right, such as to respect for private life or for home, which is inherently attributable to natural persons only.⁶⁴ However, the Court may readily grant victim status to people directly threatened by an environmentally harmful project, even if they defended their interests before national courts not personally but instead through an intermediary of an environmental-protection association that was set up for the specific purpose of protecting its members from the consequences of the project in question.⁶⁵ The Court thus acknowledges the important role of non-governmental organisations in environmental litigation. The underlying premise is that “in modern-day societies, when citizens are confronted with particularly complex administrative decisions, recourse to collective bodies such as associations is one of the accessible means, sometimes the only means, available to them whereby they can defend their particular interests effectively”.⁶⁶

3.2. SERIOUS SPECIFIC AND IMMINENT DANGER REQUIREMENT VS. PRECAUTIONARY PRINCIPLE

Irrespective of the above considerations, the doctrine of “direct harmful effect” can also appear to hinder the operation of the precautionary principle of international environmental law, in so far as it requires a direct and immediate link between the impugned situation and somebody’s Convention right,⁶⁷ or, within the context of Article 6, that the applicants concerned be personally

⁶² *Appleby and Others v. the United Kingdom*, no. 44306/98, ECHR 2003-VI; *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, ECHR 2013 (extracts); *VgT Verein gegen Tierfabriken v. Switzerland*, no. 24699/94, ECHR 2001-VI; *Verein gegen Tierfabriken Schweiz (VgT)* (no. 2), cited above; and *Guseva*, cited above.

⁶³ *Chassagnou and Others*, cited above; *Geert Drieman and Others v. Norway* (dec.), no. 33678/96, 4 May 2000; *Zeleni Balkani*, cited above; and *Costel Popa v. Romania*, no. 47558/10, 26 April 2016.

⁶⁴ *Federation of Heathrow Anti-noise Group v. the United Kingdom*, (dec.), no. 9310/81, 15 March 1984; *Association des Résidents du Quartier Pont Royal, la commune de Lambersart and Others v. France* (dec.), no. 18523/91, 8 December 1992; *Asselbourg and 78 others and Greenpeace Association-Luxembourg v. Luxembourg* (dec.), no. 29121/95, ECHR 1999-VI; *Aly Bernard and 47 others and Greenpeace – Luxembourg v. Luxembourg* (dec.), no. 29197/95, 29 June 1999; *L’Association des Amis de Saint-Raphael et de Frejus and Others v. France*, no. 45053/98, 29 February 2000; and *Greenpeace e. V. and Others v. Germany* (dec.), no. 18215/06, 12 May 2009

⁶⁵ *Gorraiz Lizarraga and Others*, cited above, § 39.

⁶⁶ *Ibid.*, § 38.

⁶⁷ *Ivan Atanasov*, cited above, § 66 in fine.

exposed to a serious, specific and imminent danger.⁶⁸ Such stringent tests, especially if taken against the Court's own observation that the exercise of the right of individual petition cannot have the aim of preventing a violation of the Convention,⁶⁹ led to scholarly disapproval of international human rights litigation in the field of environmental protection, as being deprived of the essential preventive and, even less so, precautionary character.⁷⁰ The "serious, specific and imminent danger" requirement under Article 6, which came to be known as the "Balmer test", was even criticised by some of the Court's own judges, as unattainable.⁷¹

The Court has indeed emphasised that it is only in wholly exceptional circumstances that the risk of a future violation may confer the status of "victim" on an applicant. It is only if the applicant produces reasonable and convincing evidence of the probability of the occurrence of a violation concerning him or her personally. Mere suspicions or conjectures are not enough for the Court in this respect.⁷² But when stripped of all wording aimed at posing a deterrent, what rests is the principle that the Court will examine the merits of cases in which applicants can assert, arguably and in a detailed manner, that for lack of adequate precautions taken by the authorities their Convention rights are at, not too remote, risk of being harmed.⁷³

The case record shows that, on the one hand, the ECtHR will dismiss applications if it considers that the risks invoked in them are too unspecific or too remote to justify the applicants' assertion that they are the victims of a violation of the Convention. Such were the risks which were supposed to be inherent in, for example, the production of steel from scrap iron even before the steelworks in question had been built⁷⁴ or in the undetermined consequences to health of electromagnetic emissions caused by a mobile phone antenna.⁷⁵ In sum, the Court does not require scientific certainty but it does require a degree of validation of a claim that a particular activity threatens the environment and

⁶⁸ *Balmer-Schafroth e.a.*, cited above, § 40; *Tauria and 18 others*, cited above; *Asselbourg and 78 others and Greenpeace Association-Luxembourg*, cited above; *Athanasoglou and Others*, cited above, § 51.

⁶⁹ *Tauria and 18 others*, cited above and *Aly Bernard and 47 others and Greenpeace – Luxembourg*, cited above.

⁷⁰ Boyle, Alan: Human Rights and the Environment: Where Next? in the *European Journal of International Law*, Vol. 23, No. 3, 2012, pp. 613-642.

⁷¹ Dissenting opinion of Judge Petiti and six other judges in *Balmer-Schafroth e.a.*, cited above and dissenting opinion of Judge Costa and four other judges in *Athanasoglou and Others*, cited above.

⁷² *Tauria and 18 others*, cited above; *Asselbourg and 78 others and Greenpeace Association-Luxembourg*, cited above; and *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 101, ECHR 2014.

⁷³ *Asselbourg and 78 others and Greenpeace Association-Luxembourg*, cited above.

⁷⁴ *Ibid.* and *Aly Bernard and 47 others and Greenpeace – Luxembourg*, cited above.

⁷⁵ *Luginbühl v. Switzerland* (dec.), no. 42756/02, 17 January 2006.

somebody's Convention rights. The ECtHR was very much divided on this issue when the "Swiss nuclear plants cases" were the first to develop and to fail the "Balmer test" on the grounds that the risks of the use of nuclear energy were only hypothetical.⁷⁶ In all such cases, the Court still engaged in a multifaceted analysis of the case material and the applicants' arguments. For example, in the steelworks cases mentioned above and in the most recent "nuclear" case against the Czech Republic,⁷⁷ it carefully looked at the conditions of operation imposed by the authorities and only then concluded that the norms dealing with the discharge of air-polluting wastes or the risk of a nuclear accident, respectively, did not appear to be so inadequate as to constitute a serious infringement of the principle of precaution.

On the other hand, the Court does not eschew the precautionary environment rulings if the alleged future or potential harm is rendered less speculative. State responsibility under the ECHR was very well engaged where the dangerous effects of an activity to which the individuals were likely to be exposed had been determined as part of an environmental impact assessment procedure in such a way as to establish a sufficiently close link with a Convention-protected right.⁷⁸ This was also the case where the absence of any such internal document or decision confirming the risk was counterbalanced by a record of a relatively recent incident on the site which had caused environmental harm.⁷⁹ It is also important to bring up the case in which the Court defied the "Balmer test" altogether. This case concerned the non-enforcement of a judicial order to stop the activities of thermal power plants, which had been proved to be causing hazardous emissions.⁸⁰ The applicants, however, lived at a great distance from the source of the pollution, and even though it was confirmed that their homes were in the affected zone, there were no specific emissions indicators for their home region. The ECtHR nevertheless held that the right to the protection of the applicants' physical integrity was brought into play, despite the fact that the risk which they ran was not as serious, specific and imminent as that run by those living in the immediate vicinity of the plants. To justify this conclusion, the Court attached importance to the fact that the applicants had standing before the domestic court; that the domestic court had ruled in their favour on the merits; and that the national constitution provided for the right to a healthy and balanced environment.

⁷⁶ *Balmer-Schafroth e.a.*, cited above, § 40 and *Athanassoglou and Others*, cited above, § 51.

⁷⁷ *Folkman and Others v. the Czech Republic* (dec.), no. 23673/03, 10 July 2006.

⁷⁸ *Taşkın and Others*, cited above, § 113; *Öçkan and Others*, cited above; *Lemke*, cited above; *Hardy and Maile v. the United Kingdom*, no. 31965/07, 14 February 2012; and *Genç and Demirgan*, cited above.

⁷⁹ *Tatar*, cited above, § § 93-97; contrast with *Tauria and 18 others*, cited above.

⁸⁰ *Okuy and Others v. Turkey*, no. 36220/97, ECHR 2005-VII.

The analysis of the above cases leads to the following conclusions. Firstly, the Court's understanding of the precautionary principle (the substance of which is altogether very much debatable) certainly does not reflect its soft law/activist variant, which endorses a lower threshold for its applicability, namely that of "potential adverse effects."⁸¹ It does not, however, differ from the most common and most authoritative definition under the Rio Declaration⁸² or the case law of the International Court of Justice,⁸³ which unequivocally enshrine the serious and irreversible nature of environmental damage into the elements of the precautionary principle. Secondly, the ECtHR's applicability tests have, in practice, become more relaxed, which may open the door for human rights rulings which are more preventative. And thirdly, the Court does not apply these tests summarily and will always look at all the circumstances of a case. With the current progress in the field of science and with domestic regulations ensuring better access to information and requiring environmental impact assessments, it is becoming easier for applicants to submit convincing causality arguments and for the Court, to undertake legitimate risk assessments in precautionary-type of cases.

3.3. MINIMUM LEVEL OF DISTURBANCE REQUIREMENT VS. LESSER ENVIRONMENTAL HARM

Article 8 of the ECHR protects the right to respect for one's home, which in the context of environmental degradation or nuisance has been interpreted by the Court as closely interconnected with the notions of private and family life. The right to a home guarantees not just the right to the use of the actual physical area concerned, but also to the enjoyment of that area without disturbance. Such disturbance includes noise, emissions, smells or other forms of nuisance if they prevent people from enjoying the amenities of their homes. The adverse effects of environmental pollution must attain a certain minimum level of disturbance if they are to fall within the scope of this provision.⁸⁴ This means that – sometimes, disastrously for the environment – the ECHR will only be triggered when the level of environmental protection falls below that necessary to maintain any of the guaranteed rights while lesser violations of human rights go unscrutinised. But the notion of minimum threshold is also present in international environmental law. There is a vast consensus that harm which does not amount

⁸¹ 1982 United Nations World Charter for Nature.

⁸² 1992 Rio Declaration on Environment and Development, Principle 15 and also, the 1992 United Nations Framework Convention on Climate Change, Article 3(3).

⁸³ *Gabčíkovo-Nagymaros Project Case (Slovakia v. Hungary)*, ICJ Judgment of 25 September 1997 and *Pulp Mills on the River Uruguay Case (Argentina v. Uruguay)*, ICJ Judgment of 20 April 2010.

⁸⁴ *López Ostra*, cited above, § 51.

to a significant or “appreciable” degree should be tolerated, for example, in a liability regime or that a general obligation of prevention arises only in respect of activities that entail the risk of substantial harm.⁸⁵ In the ECHR system, an important safeguard in this respect lies in the Court’s practice of assessing that minimum threshold of disturbance in the light of all the circumstances of the case, such as the intensity and duration of the nuisance in question, and its physical or mental effects on the individual’s health or quality of life.⁸⁶ The ECtHR will take account of the general context of the environment and in principle, no issue will arise if the detriment complained of is negligible in comparison with the environmental hazards inherent to life in every modern city.⁸⁷ On the other hand, a case will not be dismissed on the sole grounds that the pollution or other nuisance in question does not produce a serious health impact or is not life threatening.⁸⁸ Another advantage for applicants is that, in establishing the particulars of each case, the Court is not bound by any strict evidentiary rules. The Court has generally applied the very high standard of proof “beyond reasonable doubt”. It is nevertheless accepted that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact, and it has been the Court’s practice to allow flexibility in that respect, taking into consideration the nature of the substantive right at stake and any evidentiary difficulties involved.⁸⁹ The ECtHR, in its free assessment of evidence, will thus rely, *inter alia*, on the findings of the domestic courts and other competent authorities; environmental standards under domestic law; relevant scientific studies (whether commissioned by state authorities or private entities); and the applicant’s medical certificates and personal accounts of event.⁹⁰

It is noteworthy that the ECtHR considered that, for example, in the “pollution” category, the minimum disturbance threshold had been met and the ECHR had been breached in nineteen (i.e. in almost half) of such cases examined by the Court.⁹¹ Three additional pollution cases were found to have violated Article 6 only on account of the non-enforcement of a judicial decision to stop

⁸⁵ Barboza, J. (2011) *The Environment, Risk and Liability in International Law*, Martinus Nijhoff Publishers, pp. 10, 11, 14 and 15; see also, *Trail Smelter Case* (United States, Canada), 16 April 1938 and 11 March 1941, *Reports of International Arbitral Awards*, Vol. III, p. 1965.

⁸⁶ *Fadeyeva*, cited above, § 68-69.

⁸⁷ *Ibid.*, § 69; *Mileva and Others v. Bulgaria*, nos. 43449/02 and 21475/04, § 90, 25 November 2010; and *Marchiş and Others v. Romania* (dec.), no. 38197/03, § 33, 28 June 2011.

⁸⁸ Among others, *López Ostra*, cited above, § 51; *Taşkın and Others*, cited above, § 113; *Marchiş and Others*, cited above, § 28; and *Brândușe v. Romania*, no. 6586/03, § 67, 7 April 2009.

⁸⁹ *Fadeyeva*, cited above, § 79.

⁹⁰ *Dubetska and Others*, cited above, § 107.

⁹¹ *Inter alia*, *López Ostra*, cited above; *Guerra and Others*, cited above; *Taşkın and Others*, cited above; *Fadeyeva*, cited above; *Öçkan and Others*, cited above; *Ledyayeva and Others*, cited above; *Giacomelli*, cited above; *Lemke*, cited above; *Tătar*, cited above; *Brândușe*, cited above; *Băcilă*, cited above; *Deés v. Hungary*, no. 2345/06, 9 November 2010; *Dubetska and Others*, cited above;

the hazardous activities in question.⁹² In these judgments the ECtHR ordered the states concerned to pay compensation to the individual victims. Moreover, in the course of the implementation of these judgments by the Committee of Ministers (the supervisory mechanism of execution of judgments of the Council of Europe), additional obligations were imposed on the respective states requiring them to undertake the legal and practical measures (whether individual or general) necessary to ensure the ending of the situation that gave rise to a violation – if that was necessary in the circumstance of the case – and that similar violations were prevented in the future. Such measures included orders to: enforce outstanding judicial decisions;⁹³ assess environmental risks and develop practices aimed at the rapid provision of adequate information regarding environmental hazards;⁹⁴ reduce and control traffic;⁹⁵ set up a general framework for protection against industrial pollution, the rehabilitating polluting sites, creating sanitary zones around them, and resettling victims;⁹⁶ reform the legal system in order to ensure effective judicial review;⁹⁷ remove any aerials causing radiation;⁹⁸ shut down polluting mines;⁹⁹ lower levels of toxic emissions by making technical improvements to thermal plants, installing filters, or operating them at minimum capacity;¹⁰⁰ improve the waste management;¹⁰¹ and monitor

Grimkovskaya v. Ukraine, no. 38182/03, 21 July 2011; *Di Sarno and Others*, cited above; *Dzemyuk v. Ukraine*, no. 42488/02, 4 September 2014; *Otgon v. the Republic of Moldova*, no. 22743/07, 25 October 2016; *Jugheli and Others*, cited above; and *Genç and Demirgan*, cited above.

⁹² *Zander*, cited above; *Okay and Others*, cited above; *Iera Moni Profitou Iliou Thiras v. Greece*, no. 32259/02, 22 December 2005.

⁹³ Interim Resolution CM/ResDH(2007)4 adopted by the Committee of Ministers on 14 February 2007 in respect of the judgment in the case of *Okay and Others*, cited above.

⁹⁴ Resolution CM/ResDH (2002)146 adopted by the Committee of Ministers on 17 December 2002 in respect of the judgment in the case of *Guerra and Others*, cited above and Resolution CM/ResDH(2016)349 adopted by the Committee of Ministers on 8 December 2016 in respect of judgments in the cases of *Tătar* and *Băcilă*, both cited above.

⁹⁵ Action Plan submitted by Hungary on 15 June 2012 in respect of the judgment in the case of *Deés*, cited above.

⁹⁶ Report CM/Inf/DH (2007)7 submitted by Russia on 13 February 2007 in respect of the judgments in the cases of *Fadeyeva* and *Ledyayeva and Others*, both cited above.

⁹⁷ Resolution adopted by the Committee of Ministers on 21 March 1994 in respect of the judgment in the case of *Zander*, cited above.

⁹⁸ Resolution CM/ResDH (2010)193 adopted by the Committee of Ministers on 2 December 2010 in respect of the judgment in the case of *Iera Moni Profitou Iliou Thiras*, cited above.

⁹⁹ Action Plan submitted by Turkey on 20 April 2012 in respect of the judgments in the case of *Taşkın and Others*, *Öçkan and Others*; and *Lemke v. Turkey*, all cited above.

¹⁰⁰ Interim Resolution CM/ResDH (2007)4 adopted by the Committee of Ministers on 14 February 2007 in respect of the judgment in the case of *Okay and Others*, cited above.

¹⁰¹ Decision DH-DD (2016)507 adopted by the Supervision of the Execution of the Court's judgments on 8 June 2016 and Action Plan submitted by Italy on 14 May 2014 in respect of the judgment in the case of *Di Sarno and Others*, cited above.

the conformity of a polluting plant with environmental requirements.¹⁰² These examples demonstrate that the enforcement of the ECtHR's judgments facilitates general changes in the behaviour of public bodies and may thus lead to overall environmental improvements.¹⁰³

3.4. WIDE MARGIN OF APPRECIATION VS. ENVIRONMENTALLY HARMFUL POLICY DECISIONS

The last contentious issue revolves around the wide “margin of appreciation”¹⁰⁴ that the Court affords national authorities – for example under Article 8 of the ECHR and Article 1 of Protocol No. 1 to the ECHR (right to property) in determining their best environmental policies and in choosing between different ways and means of meeting their international obligations. This doctrine is based on the assumptions that domestic authorities have direct democratic legitimacy and that, in view of the difficulty implicit in the social and technical aspects of environmental issues, they are better placed than an international court to decide what exactly should be done to stop or reduce environmental harm or nuisance.¹⁰⁵ Similarly, under the positive limb of Article 2 of the ECHR (right to life), the ECtHR has held that an 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.¹⁰⁶ But even with this approach, the Court can compare particular national choices with the European consensus or with international trends,¹⁰⁷ and can still review the merits of authorities' decision in order to ensure that they had not acted in an arbitrary manner or committed a manifest error of judgment in weighing the competing interests of the individual and of the community as a whole.¹⁰⁸ The doctrine of the margin of appreciation is also counterbalanced by the ECtHR's practice of scrutinising the domestic procedure with a view to verifying whether the public authorities were independent, diligent and (under

¹⁰² Action Report submitted by Italy on 1 August 2014 and Resolution CM/Res/DH (2014)214 adopted by the Committee of Ministers on 12 November 2014 in respect of the judgment in the case of *Giacomelli*, cited above.

¹⁰³ Pedersen, O.W. (2010) *The Ties that Bind: The Environment, the European Convention on Human Rights and the Rule of Law*, in *European Public Law*, Vol. 16, No. 4, p. 571, 2010.

¹⁰⁴ *Handyside v. the United Kingdom*, 7 December 1976, § 48-50, Series A no. 24.

¹⁰⁵ *Powell and Rayner v. the United Kingdom*, no. 9310/81, § 44 in fine, 21 February 1990; *Hatton and Others*, cited above, § 97; *Giacomelli*, cited above, § 80; and *Mileva and Others*, cited above, § 98.

¹⁰⁶ *Öneryıldız*, cited above, § 71 and *Budayeva and Others v. Russia*, nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, § 128, ECHR 2008 (extracts).

¹⁰⁷ *Tănase v. Moldova* [GC], no. 7/08, § 176, ECHR 2010; *Kiyutin v. Russia*, no. 2700/10, § 65, ECHR 2011 and *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 85, ECHR 2002-VI.

¹⁰⁸ *Hatton and Others*, cited above, § § 98 and 99.

Articles 8 or 1 of Protocol No. 1) they took all the competing interests into consideration.¹⁰⁹ In fact, the Court will usually start with an examination of the quality of the decision-making process; then, if necessary, it will also review the material conclusions of the domestic authorities.¹¹⁰ Inspecting the procedures at issue, the ECtHR will examine whether the authorities have conducted sufficient studies to evaluate the risks of a potentially hazardous activity;¹¹¹ whether, on the basis of the information available, they have developed adequate policy *vis-à-vis* polluters; and whether all necessary measures have been taken to enforce this policy in good time.¹¹² The Court will likewise examine the extent to which the individuals affected by the policy at issue were able to contribute to the decision-making, including access to the relevant information¹¹³ and their ability to challenge the authorities' decisions in an effective way.¹¹⁴ As the Convention is intended to protect effective rights, not illusory ones, a fair balance between the various interests at stake may be upset not only where the regulations to protect the guaranteed rights are lacking, but also where they are not duly complied with.¹¹⁵ The procedural safeguards available to the applicant may be rendered inoperative and the state may be found liable under the ECHR where a decision-making procedure is unjustifiably lengthy or where a decision taken as a result remains for an important period unenforced.¹¹⁶ Overall, the onus is on the state to justify, using detailed and rigorous data, a situation in which certain individuals bear a heavy burden on behalf of the rest of the community.¹¹⁷

Even bearing the wide margin of appreciation in mind, the ultimate question before the Court remains whether a state has succeeded in striking a fair balance between the competing interests of the individuals affected and the community as a whole without imposing an excessive burden on the applicant.¹¹⁸ The ECtHR has undertaken that proportionality test in respect of over one hundred environment-related applications, with different outcomes.

In the light of the growing number of national law suits regarding air quality in Europe's larger cities, it is important to note the "margin of appreciation" rulings in which the ECtHR has been called on to weight the effects of heavy aeroplane or car traffic on individual residents against the economic interests of the country as a whole.

¹⁰⁹ *Fadeyeva*, cited above, § 128 and *Hatton and Others*, cited above, § 99.

¹¹⁰ *Ibid.*, § 105

¹¹¹ *Hatton and Others*, cited above, § 128 and *Giacomelli*, cited above, § 86.

¹¹² *Ledyayeva and Others*, cited above, § 104 and *Giacomelli*, cited above, § § 92 and 93.

¹¹³ *Öneryıldız*, cited above, § 108.

¹¹⁴ *Guerra and Others*, cited above, § 60; *Hatton and Others*, cited above, § 127; and *Taşkın and Others*, cited above, § 119.

¹¹⁵ *Moreno Gómez*, cited above, § § 56 and 61.

¹¹⁶ *Taşkın and Others*, cited above, § § 124 and 125.

¹¹⁷ *Fadeyeva v. Russia*, cited above, § 128.

¹¹⁸ *Hatton and Others*, cited above, § § 100, 119 and 123.

The Court has, for the most part, declined to find violations in cases concerning aircraft traffic that were argued not in relation to any exhaust fumes pollution but with reference to noise nuisance caused to the residents of areas near various airports.¹¹⁹ The Court usually reasoned that: the level of discomfort was not high; there was no disparity with domestic law; the individuals concerned had a real choice of leaving the area in question; noise-mitigating measures and compensation schemes had been put in place by the authorities; and the authorities were monitoring the situation.¹²⁰ The Court has also expressed the view, which has not resonated well with environmentalists, that no exception to the doctrine of wide margin of appreciation is warranted in environmental cases; it has attached great importance to the consideration that the intensified operation of airports, including at night, contributes to the general economy.¹²¹

In relation to road traffic, the ECtHR has so far been presented with four applications. In the case which was brought against Germany by Greenpeace together with individual residents of Hamburg,¹²² the proportionality test was favourable to the state. The Court accepted that soot and respirable dust particles could have a serious detrimental effect on health – particularly in densely populated areas with heavy traffic. The case-file demonstrated, however, that the authorities had attended to the problem, having taken a series of reasonable and potentially efficient measures to curb emissions by diesel vehicles. The Court concluded that the authorities had not erred in refusing to order the compulsory installation of filters in diesel vehicles, which the applicants recommended as the most effective measure. The importance of the principles established by the ECtHR in this case in respect of the victim status and the minimum level of disturbance takes precedence over the finding of “no violation” under the proportionality test. Notably, violations were found in cases that were to some extent linked, which were brought by a Hungarian living near a motorway toll gate¹²³ and a Ukrainian who had a motorway re-routed through her street.¹²⁴ Lastly, an important application concerning noise and exhaust fumes emissions

¹¹⁹ *Arrondelle v. the United Kingdom* (dec.), 7889/77, 15 July 1980; *Baggs v. the United Kingdom* (dec.), 9310/81, 14 October 1985; *Powell and Rayner*, cited above; *Hatton and Others*, cited above; *Ashworth and Others v. the United Kingdom* (dec.), no. 39561/98, 20 January 2004; *Balzarini and 435 others v. Italy* (dec.), no. 3717/03, 28 October 2004; *Giani v. Italy* (dec.), no. 77633/01, 28 October 2004; *Nasalli Rocca v. Italy* (dec.), no. 8162/02, 31 March 2005; *Flamenbaum and Others v. France*, nos. 3675/04 and 23264/04, 13 December 2012; *Frank Eckenbrcht and Heinz Ruhmer v. Germany* (dec.), no. 25330/10, 10 June 2014; and *Elżbieta Plachta and 3 others v. Poland* (dec.), no. 25194/08, 25 November 2014.

¹²⁰ *Hatton and Others*, cited above, § 118, 120, 123, 125, 127 and 128.

¹²¹ *Ibid.*, § 122 and 126.

¹²² *Greenpeace e. V. and Others*, cited above.

¹²³ *Deés*, cited above.

¹²⁴ *Grimkovskaya*, cited above.

stemming from heavy day and night motorway traffic in Poland is currently pending examination before the ECtHR.¹²⁵

4. CONCLUSION

Faced with a large number of environment-related cases, the ECHR organs have gradually expanded the protection of the civil and political human rights to encompass various forms of environmental risk and harm. Nowadays, the system efficiently safeguards the natural environment, albeit in a surrogate and somewhat covert manner, through the rights of humans to the environment. Regarding the balancing of community and personal interests, it recognises the growing importance of obligations of states and individuals to preserve the natural environment for current and future generations. Through the procedural rights and duties that are considered essential for the practical realisation of substantive rights, European human rights law reinforces the fundamental principles and concepts of international and community environmental law, such as citizens' participation in a decision-making process, access to information and justice, environmental impact assessment and good governance. Within this procedural context, it sometimes becomes indirectly involved in public-interest campaigns for the defence of non-human species, ecological processes and lesser threats to humans. The ECtHR is a readily operative and effective last-resort mechanism for redressing environmental damage, halting ecologically unsound projects, and deterring environmentally unfriendly policies.

It is, nevertheless obvious that the ECHR has its limits in that it does not stipulate a substantive right to a healthy environment and thus does not provide the Court with infinite jurisdiction over anything from the ozone layer to the Siberian tiger.¹²⁶ But this anthropocentric and restrained protection of the environment is not deficient simply because it cannot serve all purposes. The direct protection of the environment's components (other than humans), lies primarily within the realm of environmental law. It is therefore wrong to diminish the role of human rights law only because it cannot wholly incorporate environmental protection.¹²⁷

¹²⁵ *Kapa and 3 others*, cited above, communicated to the parties in December 2017.

¹²⁶ On environmental goods, Miller, D. (1999) *Social Justice and Environmental Goods*, in *Fairness and Futurity*. Dobson, A. (ed.) *Essays on Environmental Sustainability and Social Justice*, Oxford University Press, pp. 152-153.

¹²⁷ Donald A.K. and Shelton, L. Dinah (2011) *Environmental Protection and Human Rights*, Cambridge University Press, p. 130

Nature may well have a value in and of itself and giving it rights may no longer be a fanciful legal notion.¹²⁸ It still cannot practically be protected independently of a human being, if only because of the fact that at the centre of the cause and of the solution of the problems such as pollution, climate change and deforestation are individuals with legal standing and with substantive rights guaranteed by national and international law (and with obligations derived therefrom).¹²⁹ The natural environment thus needs the agency of a human, whether as its guardian *ad litem*¹³⁰ or to defend it through the exercise of his or her own rights. Moreover, to leave the rights with the people is not to say that they should have supremacy over the natural environment. Human rights law could, both conceptually and practically, redefine human self-interest in view of the environmental necessity of modern times, and make this interest rational and intergenerational. Human rights law could therefore become eco-centric and no longer give precedence to economic considerations over the environmental damage.¹³¹

Such a paradigm shift could be achieved by the ECtHR, not through a single giant leap, but through incrementalism – its usual practice of muddling through various legal problems – in a way, forced on its judges by applicants. Wise and widespread environmental litigation is therefore essential in making the Court employ ecological rationality in explaining the value of nature in cases in which its protection paradoxically seems to collide with conventionally-perceived individual rights. Just as much as the environmental law suffers from a lack of coherence and is immature,¹³² “green” human rights case law is also a work in progress – it is sometimes encouraging and sometimes deceiving. But the Court’s jurisprudence is dynamic and susceptible to change because the notion that the ECHR is a living instrument is firmly established and because the cross-fertilisation of ideas is definitely occurring between the different human rights

¹²⁸ For example, Constitution of Ecuador, Articles 10 and 71-74 and *Wheeler c. Director de la Procuraduría General Del Estado de Loja*, Juicio No. 11121-2011-0010, for review in English: *The Ecuadorian Exemplar: The First Ever Vindications of Constitutional Rights of Nature*, Erin Daly, *Review of European Community & International Environmental Law*, Volume 21, Issue 1, pages 63–66, April 2012, and New Zealand’s *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017*, Public Act 2017 No 7, 20 March 2017, Article 14.

¹²⁹ Donald A.K. and Shelton, L. Dinah (2011) *Environmental Protection and Human Rights*, Cambridge University Press.

¹³⁰ New Zealand’s *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017*, Public Act 2017 No 7, 20 March 2017, Article 18 (2) “Te Pou Tupua is to be the human face of Te Awa Tupua and act in the name of Te Awa Tupua.”

¹³¹ Hiskes, R.P. (2008) *The Human Right to a Green Future*, in *Environmental Rights and Intergenerational Justice*, Cambridge University Press.

¹³² Pedersen, O.W. (2013) *Modest Pragmatic Lessons for a Diverse and Incoherent Environmental Law*, *Oxford Journal of Legal Studies*, Vol. 33, Issue 1, pp. 103-131.

systems.¹³³ For all these reasons, notwithstanding the limits of the human rights law and the importance of other platforms of ecological justice, environment cases should continue to be brought before the European Court of Human Rights.

¹³³ The development of international human rights law through the activities and case law of the European and the Inter-American Courts of Human Rights, Speech given by Judge Antonio A. Cançado Trindade, then President of the IACtHR on the occasion of the opening of the judicial year of the ECtHR, 22 January 2004.

Sustainable Management of Natural Resources

Legal Instruments and Approaches

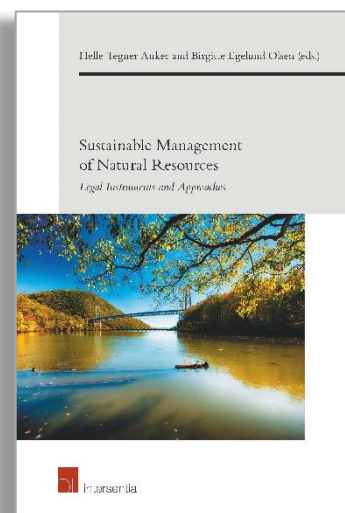
This book is the fifth volume in the European Environmental Law Forum (EELF) Book Series. The EELF is a non-profit initiative established by environmental law scholars and practitioners from across Europe aiming to support intellectual exchange on the development and implementation of international, European and national environmental law in Europe. One of the activities of the EELF is the organisation of an annual conference.

The fifth EELF Conference dedicated to 'Sustainable Management of Natural Resources – Legal Instruments and Approaches' was held in Copenhagen from the 30th of August to the 1st of September 2017 at the Faculty of Science, University of Copenhagen, in collaboration with the Department of Law, Aarhus University.

This book is a collection of peer reviewed contributions addressing various legal aspects of sustainable management of natural resources. Natural resources are in this book understood in broad terms encompassing biodiversity, water, air and soil, as well as raw materials. Based on the contributions, it can be asserted that despite many efforts there is still a long way to go in order to achieve sustainable management of natural resources. Making ecosystem integrity ultimately the bottom-line for sustainable development requires not only dedication in the design and coherence of (environmental) legislation at international, EU and national level, but also a strong commitment to the implementation and enforcement of the legislation. Thus, it is necessary to carefully consider how different legal instruments and approaches may pave the way for the sustainable management of natural resources.

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Helle Tegner Anker and
Birgitte Egelund Olsen (eds.)

European Environmental Law Forum
volume 5

October 2018 | ISBN 978-1-78068-759-9

x + 258 pp. | paperback

65 euros | 78 US dollars | 62 GB pounds
series price: 55 euros | 66 US dollars
53 GB pounds



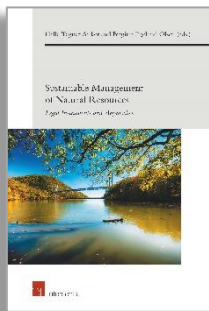
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