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13 Questions of Environmental Protection in the Practice of the European Court of Human Rights

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13.1 Theoretical Basis of Environmental Protection in the European Convention on Human Rights

Although the international community has been taking steps towards achieving the completeness of legislation in the field of international environmental law since 1972 (United Nations Conference on the Human Environment, the so-called Stockholm Conference), most international judicial forums – at least as regards human rights forums – still deal with environmental cases without explicit authorisation.[1] The Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: European Convention on Human Rights) and its Protocols do not even refer to the possibility of calling upon the right to environment. This standpoint is not only supported by the grammatical interpretation of the relevant conventions, but also by the fact that in their Recommendation 1614 the Parliamentary Assembly of the Council of Europe emphasizes the necessity that an additional protocol should be attached to the European Convention on Human Rights in accordance with the provisions of the Aarhus Convention, which acknowledges the procedural right of individuals in environmental cases.[2] This approach also points out that the Council of Europe (in this case the Parliamentary Assembly and the Committee of Ministers of the Council of Europe) did not really see the possibility of the development of the direct wording of the European Convention on Human Rights with regard to the right to healthy environment, but indirectly, through other classical, first generation rights, that are – thus – objectively enforceable. Undoubtedly, this approach seems to be acceptable not only for reasons of enforceability, but because of the Preamble of the Convention,

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1 G. Kecskés, 'A környezetvédelem és a kapcsolódó környezeti kérdések megjelenése a nemzetközi bírói fórumok gyakorlatában', *Kül-Világ*, 2011/1-2, p. 102.

2 Recommendation 1614 ("Environment and human rights") of 27 June 2003, *see* para. 10 of the Recommendation.

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which itself primarily sets the target of the enforceability of the basic human rights contained within the European Convention on Human Rights.[3] This broad interpretation of the Convention is not contrary to the long-standing concept of the European Court of Human Rights, according to which the text of the Convention must be used as a 'living instrument', affording the possibility of the continuous development of the Convention.[4] While dealing with the theoretical basis, the doctrine of margin of appreciation should not be left out. The doctrine of margin of appreciation is based on the principle of subsidiarity, which means that member states' forums have priority in any question, and compared with them the Court of Strasbourg plays a secondary role and acts only if the procedure of national forums is not effective or successful enough.[5] The basis of this principle is that in theory national authorities are much more capable of assessing local needs and possibilities than international forums.[6] Therefore, the Court does not define itself as a 'fourth-degree forum': it examines the practice of national courts, by way of exception, only in the case of obvious infringements, and, as Mark Villiger stated, in these cases it deals only with the procedures, but not with their result.[7] Taking into consideration the specialties of the so-called pilot-judgment procedure,[8] Villiger's standpoint cannot be followed by the Court in every single case. In environment-related issues the national authorities have wider margin of appreciation, which means that the authorities have the right to decide what kind of measures can be adequate for reaching their legitimate objective. However, in such cases they are still under the obligation to act in good time, in an appropriate and consistent manner, and these aspects of the national authorities' decision can be examined by the Court.[9]

The principle of subsidiarity may be gleaned from Articles 1, 13 and 35 of the Convention. According to Article 1, contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in this Convention. According to Article 13, everyone whose rights and freedoms as set forth in this Convention are violated shall have the right

3 *See* Preamble of the Convention. *See more*, San José, Daniel Garcia: *Environmental protection and the European Convention on Human Rights*, Council of Europe Publishing, 2005, p. 5.

4 The Court recurrently uses the expression, last time on 15 March 2012. *See* ECHR, *Austin and Others v. United Kingdom,* Judgment of the Grand Chamber on 15 March 2012 (application Nos. 39692/09, 40713/09 and 41008/09), *see* para. 53 of the judgment, which mentions several other examples for the use of the concept between 1978 and 2011.

5 D. Shelton, 'Subsidiarity and Human Rights Law', 27 *Human Rights Law Journal* 1-4, 2006, p. 8.

6 L.H. Hill & D. Pannick (eds.), *Human Rights Law and Practice*, Butterworths, London, 1999, p. 73.

7 M.E. Villiger, 'The Principle of Subsidiarity in the European Convention on Human Rights', *in*: M.G. Kohen (Ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law*, Leiden, Martinus Nijhoff Publishers 2007, p. 627.

8 *See e.g.,* M. Fyrnis, 'Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights', 12 *German Law Journal,* 2011, pp. 1231-1260.

9 *Öneryildiz v. Turkey*, ECHR (2004) No. 48939/99, Judgment of 30 November 2004, *see* para. 128 of the judgment.

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to an effective remedy before a national authority. And according to Article 35, the Court deals with a case only after all domestic remedies have been exhausted.

However, Article 1 requires further interpretation, especially because of the cross-border impacts of environmental protection (more exactly: pollution). This jurisdiction usually coincides with the territory of the member states of the Convention, nevertheless – as the Court established – this statement cannot be considered to be irrebuttable, as it may happen that a state is unable to exercise its jurisdiction over the whole of its territory.[10] However, it may also happen that the decision of a party to the Convention has an effect on the territories beyond its borders (on the territory of other states, or territories considered to be *res communis omnium usus*), or on an individual abroad, in such a way that this jurisdiction may be interpreted under Article 1 of the Convention.[11] For the sake of completeness, it should be noted that though it cannot be considered as the exercise of the state's jurisdiction, the Court stated in various cases, mostly in connection with extradition, that member states of the Convention may be held responsible for their own measures taken, which caused the violation of the Convention outside their territory, in case the said infringement was foreseeable. (Particularly, if they extradite a person who is likely to be tortured or sentenced to death in the requesting country).[12] As far as I know, the European Court of Human Rights has not dealt with environmental protection related cases that may have raised extraterritorial questions (in essence: questions related to cross-border pollution). However, I see no reason why the Court should act differently from the principles already established in connection with other cases, if such a case should occur. In the following two cases – *L.C.B. v. United Kingdom*[13] and *McGinley and Egan v. United Kingdom*[14] – the Court was the closest to applying this principle in connection with the effects of nuclear experiments. The central question of the above-mentioned cases was whether, in line with the standpoint of the applicants, the United Kingdom may be held liable for the health damages caused by the explosions related to the nuclear experiments during the 1950s conducted on the Christmas Islands. The Court declared both applications inadmissible for reasons that are beyond the scope of this study.

10 *Ilaşcu and Others v. Moldova and Russia*, ECHR (2004) No. 48787/99, Judgment of the Grand Chamber on 8 July 2004, *see* paras 313 and 333 of the judgment.

11 *Al-Skeini and Others v. United Kingdom*, ECHR (2011) No. 55721/07, Judgment of the Grand Chamber on 7 July 2011, *see* paras 131-142 of the judgment.

12 *See*, *Umirov v. Russia*, ECHR (2012) No. 17455/11, Judgment on 18 September 2012 *see* para. 92 of the judgment. Firstly: ECHR (1989) No. 14038/88, *Soering v. United Kingdom*, Judgment on 7 July 1989.

13 *L.C.B. v. United Kingdom*, ECHR (1998) No. 23413/94, Judgment on 9 June 1998.

14 *McGinley and Egan v. United Kingdom*, ECHR (1998) Nos. 21825/93 and 23414/94, Judgment on 9 June 1998 (application Nos. 21825/93 and 23414/94).

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13.2 International Environment-Related Documents in the Case law of the Court

It can be stated that even in its international environmental-related judgments the European Court of Human Rights occasionally refers to other (binding and non-binding) international documents. In this chapter I will try to illustrate in a table which international environment-related documents the European Court of Human Rights referred to in its previous case law.[15]

Table 13.1

The referred document	Name of the case	Context
Aarhus Convention	*Taskin and Others v. Turkey* (10 November 2004), Application No. 46117/99.	Para. 99. ("Relevant international texts on the right to a healthy environment")
	Demir and Baykara v. Turkey (12 November 2008) the Judgment of the Grand Chamber, Application No. 34503/97.	Para. 83. ("In the Taşkın and Others *v.* Turkey case, the Court built on its case law concerning Art. 8 of the Convention in matters of environmental protection (an aspect regarded as forming part of the individual's private life) largely on the basis of principles enshrined in the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (ECE/CEP/43) (*see, Taşkın and Others v. Turkey*, no. 49517/99, §§ 99 and 119, 4 December 2003). Turkey had not signed the Aarhus Convention.")
	Tatar v. Romania (27 January 2009), Application No. 67021/01.	*B. Le droit et la pratique internationaux pertinents para 'c'* *Para. 118. ("Au niveau international, la Cour rappelle que l'accès à l'information, la participation du public au processus décisionnel et l'accès à la justice en matière d'environnement sont consacrés par la Convention d'Aarhus du 25 juin 1998, ratifiée par la Roumanie le 22 mai 2000 (voir p. 23, c).")*

15 Based on *Manual on Human Rights and the Environment,* Council of Europe Publishing, 2012, pp. 151-158.

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The referred document	Name of the case	Context
	Grimkovskaya v. Ukraine (21 July 2011), Application No. 38182/03.	Para. 39. ("relevant international materials")Para. 69. ("It also notes that as of 30 October 2001 the Aarhus Convention, which concerns access to information, participation of the public in decision-making and access to justice in environmental matters has entered into force in respect of Ukraine")Para. 72. ("Bearing those two factors and the Aarhus Convention (*see,* para. 39) in mind, the Court cannot conclude that a fair balance was struck in the present case.")
United Nations Convention on the Law of the Sea	*Mangouras v. Spain* (28 September 2010) the Judgment of the Grand Chamber, Application No. 12050/04.	Paras. 44-45. ("C. Vessels and crews in international law")
Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment (ETS. No. 150.)	*Öneryildiz v. Turkey* (30 November 2004) the Judgent of the Grand Chamber, Application No. 48939/99.	Paras. 59-60. ("Relevant instruments of the Council of Europe")
Convention on the Protection of the Environment through Criminal Law (ETS. No. 172.)	*Öneryildiz v. Turkey* (30 November 2004) the Judgment of the Grand Chamber, Application No. 48939/99.	Paras. 59. and 61. ("Relevant instruments of the Council of Europe")
International Convention on Civil Liability for Oil Pollution Damage	*Mangouras v. Spain* (28 September 2010) the Judgment of the Grand Chamber, Application No. 12050/04.	Paras. 54. and 60. ("Civil liability and compensation for oil pollution damage") – on the part of interverners Para 75. as well
International Convention for the Prevention of Pollution from Ships	*Mangouras v. Spain* (28 September 2010) the Judgment of the Grand Chamber, Application No. 12050/04.	Para. 53. ("International Convention for the Prevention of Pollution from Ships of 2 November 1973 and the Protocol thereto adopted on 17 February 1978 ("MARPOL 73/78")") – on the part of interverners para 74. as well

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Table 13.1 *Continued*

The referred document	Name of the case	Context
Stockholm Declaration (1972)	*Tatar v. Romania* (27 January 2009), Application No. 67021/01.	*B. ("Le droit et la pratique internationaux pertinents") Para. 'a' Para. 111. ("Concernant ce dernier aspect, la Cour rappelle, dans l'esprit des principes no. 21 de la Déclaration de Stockholm et no. 14 de la Déclaration de Rio, le devoir général des autorités de décourager et prévenir les transferts dans d'autres États de substances qui provoquent une grave détérioration de l'environnement")*
Rio Declaration (1992)	*Tatar v. Romania* (27 January 2009), Application No. 67021/01.	*B. ("Le droit et la pratique internationaux pertinents") Para. 'b' Para. 111. ("Concernant ce dernier aspect, la Cour rappelle, dans l'esprit des principes no. 21 de la Déclaration de Stockholm et no. 14 de la Déclaration de Rio, le devoir général des autorités de décourager et prévenir les transferts dans d'autres États de substances qui provoquent une grave détérioration de l'environnement")*
	Okyay and Others v. Turkey (12 July 2005), Application No. 36220/97.	Para. 51. ("Relevant international texts on the right to a healthy environment")
	Taskin and Others v. Turkey (10 November 2004), Application No. 46117/99.	Para. 98. ("Relevant international texts on the right to a healthy environment")
Precautionary Principle	*Tatar v. Romania* (27 January 2009), Application No. 67021/01.	*Para. 120. ("En ce sens, la Cour rappelle l'importance du principe de précaution (consacré pour la première fois par la Déclaration de Rio)")*
Judicial practice of the International Court of Justice of Hague (Gabcikovo-Nagymaros Project Case)	*Tatar v. Romania* (27 January 2009), Application No. 67021/01.	*B. ("Le droit et la pratique internationaux pertinents") Para. 'd'*
Practice of the International Tribunal for the Law of the Sea	*Mangouras v. Spain* (28 September 2010) the Judgment of the Grand Chamber, Application No. 12050/04.	Para. 46. ("Case law of the International Tribunal for the Law of the Sea")

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The referred document	Name of the case	Context
"international instruments"	*Kyrtatos v. Greece* (22 May 2003), Application No. 41666/98.	Para. 52. ("Neither Art. 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such; to that effect, other international instruments and domestic legislation are more pertinent in dealing with this particular aspect.")
"European standards"	*Öneryildiz v. Turkey* (30 November 2004) the Judgment of the Grand Chamber, Application No. 48939/99.	Para. 60. ("It can be seen from these documents that primary responsibility for the treatment of household waste rests with local authorities, which the governments are obliged to provide with financial and technical assistance. The operation by the public authorities of a site for the permanent deposit of waste is described as a "dangerous activity", and "loss of life" resulting from the deposit of waste at such a site is considered to be "damage" incurring the liability of the public authorities (*see*, *inter alia*, the Lugano Convention, Art. 2 §§ 1 (c)-(d) and 7 (a)-(b)).") and referring back to this as a European standard *in* para. 71.
"international environmental standards"	*Borysiewicz v. Poland* (1 July 2008), Application No. 71146/01.	Para. 53. ("However, the Court notes that the applicant has not submitted the results of those tests to the Court. Nor has she submitted, either in the domestic proceedings or in the proceedings before the Court, any alternative noise tests which would have allowed the noise levels in her house to be ascertained, and for it to be determined whether they exceeded the norms set either by domestic law or by applicable international environmental standards, or exceeded the environmental hazards inherent in life in every modern town")
"European and international law"	*Mangouras v. Spain* (28 September 2010) the Judgment of the Grand Chamber, Application No. 12050/04.	Para. 86. ("A tendency can also be observed to use criminal law as a means of enforcing the environmental obligations imposed by European and international law.")

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Table 13.1 *Continued*

The referred document	Name of the case	Context
Recommendation R(96) 12 of the Committee of Ministers of the Council of Europe	*Öneryildiz v. Turkey* (30 November 2004) the Judgment of the Grand Chamber, Application No. 48939/99.	Para. 59. ("Relevant instruments of the Council of Europe")
Recommendation R(97) 9 of the Committee of Ministers of the Council of Europe	*Brosset-Triboulet and Others v. France* (29 March 2010) the Judgment of the Grand Chamber, Application No. 34078/02.	Para. 55. ("Council of Europe texts")
	Depalle v. France (29 March 2010) the Judgment of the Grand Chamber, Application No. 34044/02.	Para. 54. ("Council of Europe texts")
Recommendation 1614 of the Parliamentary Assembly of the Council of Europe (2003)	*Grimkovskaya v. Ukraine* (21 July 2011), Application No. 38182/03.	Para. 40. ("relevant international materials")
	Okyay and Others v. Turkey (12 July 2005), Application No. 36220/97.	Para. 52. ("Relevant international texts on the right to a healthy environment")
	Taskin and Others v. Turkey (10 November 2004), Application No. 46117/99.	Para. 100. ("Relevant international texts on the right to a healthy environment")
Recommendation 1087 of the Parliamentary Assembly of the Council of Europe (1996)	*Guerra and Others v. Italy* (19 February 1998), Application No. 14967/89.	Para. 34. ("Work by the Council of Europe") – "public access to clear and full information must be viewed as a basic human right".
	Öneryildiz v. Turkey (30 November 2004) the Judgment of the Grand Chamber, Application No. 48939/99.	Para. 59. ("Relevant instruments of the Council of Europe")
Recommendation 1225 of the Parliamentary Assembly of the Council of Europe (1993)	*Öneryildiz v. Turkey* (30 November 2004) the Judgment of the Grand Chamber, Application No. 48939/99.	Para. 59. ("Relevant instruments of the Council of Europe")

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The referred document	Name of the case	Context
Recommendation 1430 of the Parliamentary Assembly of the Council of Europe (2005)	*Tatar v. Romania* (27 January 2009), Application No. 67021/01.	*B. ("Le droit et la pratique internationaux pertinents") Para. 'e'*
Recommendation 587 of the Parliamentary Assembly of the Council of Europe (21975)	*Öneryildiz v. Turkey* (30 November 2004) the Judgment of the Grand Chamber, Application No. 48939/99.	Para. 59. ("Relevant instruments of the Council of Europe")

While analysing this table, we may make two obvious statements. On the one hand, compared with the volume of the case law of the European Court of Human Rights, there is not a large number of international environment-related references, and even these few references are mostly related to two or three important cases, while in the others the European Court of Human Rights did not consider it necessary to specifically call upon the rules of international environmental law. In my opinion, this is a result of the fact that it was considered obvious (partly because of the previous case law and the already mentioned "classical" cases, and partly because of the already mentioned concept of the 'living instrument'), that the relevant provisions of international environmental law may be integrated somehow within the rights protected by the European Convention on Human Rights. It is also interesting to note that most of these references are merely mentioned, while there is only a small number of cases in which the Court appears to use any of these documents in its arguments. In my point of view, this is because the Court considered that in the previously mentioned cases the protection was gleaned from the spirit of the Convention, thus, the related international documents appeared in the judgment only as a reinforcement of the general argument.
On the other hand, it is also important to emphasize that only one international convention may be found in this compilation that has been called upon independently several times by the Court – the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters in 1992.

13.3 The Appearance of Environmental Cases in the Practice of the European Court of Human Rights

As I already mentioned, in the first years of its operation, the European Court of Human Rights (and its Committee that existed at that time) consistently declared those applications

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inadmissible *ratione materiae*, which tried to call upon environmental aspects of a submitted case. For example, this happened to those applicants who objected to a marsh being used for military purposes in a nature reserve close to their home. According to their point of view, the question of the violation of the following rights may also be established: the right to life (Art. 2), the prohibition of torture or inhuman, degrading treatment or punishment (Art. 3), and the right to liberty and security of the person (Art. 5). In this particular case in its extremely short statement of reasons the European Court of Human Rights only referred to the fact that the obligation of the conservation of nature does not pertain to the rights guaranteed under the European Convention on Human Rights.[16] However, this approach started to change a few years later: for example in 1980 the Committee declared admissible a complaint in which the applicant stated that the opening of an airport (London Gatwick) and a highway close to his home may violate his right to respect for private and family life (Art. 8) and his right to property (Art. 1 of Protocol 1). However, in this particular case no substantive examination took place, because after the admissibility decision the government and the applicant concluded a friendly settlement, thus the case was struck out of the list without judgment.[17] Therefore, we may say that even the Committee accepted that the unfavourable environmental impacts may violate the exercise of the rights declared in the European Convention on Human Rights, thus relying upon the protection of the environment through individual rights incorporated into the Convention and its Protocols was made possible. For the sake of completeness, it should be mentioned that there was another case in which the Commission declared that the applicants cannot be regarded as victims of a nuclear tests, because they were unable to demonstrate that the potential consequences of the tests directly affected their personal situation (inadmissible *ratione personae*).[18]

In this context, there were more and more cases in which the question was whether it was possible to provide appropriate environmental conditions – by invoking public interest – based on Paragraph 2 of Articles 8-11 and Article 1 of Protocol 1.[19] By establishing the admissibility of such cases, the Committee created an indirect route for environmental protection. Therefore, it became possible that state measures be declared lawful by referring to environmental protection as public interest, even if the measure in question violated the applicants' rights (typically the right to respect for his private and family life or the right to property) guaranteed by the Convention. Although it should be noted that Daniel Garcia San José interprets this previous approach not as the collective enforceability

16 *X and Y. v. Federal Republic of Germany*, ECHR (1976) No. 7407/76, decision on admissibility on 13 May 1976.

17 *Arrondelle v. United Kingdom*, ECHR, decision on admissibility on 15 July 1980 (Appl. No. 7889/77).

18 *Tauira and 18 others v. France*, ECommHR, decision on admissibility on 4 December 1995 (Appl. No. 28204/95).

19 *Hakansson and Sturesson v. Sweden*, ECHR, decision on admissibility on 15 July 1987 (Appl. No. 11855/85).

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of environmental rights, but as the possibility of each and every party to practise their margin of appreciation. He argues that member states were granted the opportunity to include certain branches of environmental matters into the branch of public administration that may reasonably restrict some basic human rights.[20] In my opinion this approach is just the other side of the same question: it is a clear fact that member states have an extremely wide margin of appreciation regarding which provisions shall be taken under the definition of public administration (especially during the first years of international environmental protection). Nevertheless it is also undisputable that in this regard a European consensus has been gradually established, thus the protection of the environment as a reference to public interest quickly became accepted among the member states of the Council of Europe.

The first judgment of the European Court of Human Rights that dealt with environmental questions directly was adopted as late as 1990.[21] The applicants were Richard John Powell and Michael Anthony Rayner, who both lived close to Heathrow airport, but the traffic of the airport affected them differently, because Powell's residence was in a low, while Rayner's farm was in a high noise level area, which was also loaded by night flights. The Court stated that the British authorities shall consider both of the conflicting interests of the individuals and the community as a whole – and during this consideration the state has the margin of appreciation in deciding which interest may be preferred in accordance with the provisions of the Convention.[22] In this regard, the British government accepted several provisions restricting noise levels (including the restriction of night flights, measurement of noise level, or offering to purchase estates located closest to the airport),[23] therefore, the British government did not violate Article 8 (declaring the right to respect for private and family life) of the Convention. It is interesting that the Court declared that a large international airport shall be regarded as constituting an extremely important public interest by maintaining the economic development of a state even if it is close to densely populated areas.[24]

Furthermore, we can draw a parallel between this judgment and the *López Ostra case*,[25] because evaluating the two cases together clearly demonstrates the different aspects of the use of margin of appreciation. According to the relevant facts of the case, there were several leather factories in the city of Lorca, and their waste was neutralized by one power plant (located 20 metres from the residence of the applicant). When a malfunction took place in the power plant, the smell of carrion spread over the city of Lorca and several

20 D.G. San José, *Environmental protection and the European Convention on Human Rights,* Council of Europe Publishing, 2005, p. 9.
21 *Powell and Rayner v. United Kingdom*, ECHR (1990) No. 9310/81, Judgment on 21 February 1990.
22 *See* para. 41 of the judgment.
23 *See* para. 43 of the judgment.
24 *See* para. 42 of the judgment.
25 *López Ostra v. Spain*, ECHR (1994) No. 16798/90, Judgment on 9 December 1994.

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gases were discharged into the air causing health problems to the inhabitants. Based on several complaints and the report of the local environmental and health authority, the city council withdrew the licence of operation of the power plant, but did not order its closure. According to the standpoint of the applicant, besides the violation of the right to respect for private and family life (Art. 8), inhuman treatment prohibited by Article 3 also took place. In this case the Court found that Article 8 had been violated, but stated that no violation of Article 3 occurred; despite the fact that the applicant and his family lived under extremely bad conditions.. As far as I know, the Court has never declared any form of environmental pollution to be torture or inhuman or degrading treatment or punishment. Comparing the two cases, it is clear that in both cases we can generally talk about the violation of the right to private and family life (in connection with noise pollution, and the unbearable smell) on the one hand, and on the other hand we can find public interest, based on which the right of the applicant may be impaired (the economic development of the state and the city of Lorca). In the *case of Powell and Rayner,* the British authorities did everything to reduce negative impacts, thus the Court found that they acted lawfully using their margin of appreciation, however, in the *López Ostra case* the Spanish authorities did not deal with the arising interests, obviously failed to consider the two conflicting interests, thereby breaching their obligation concerning the margin of appreciation.

13.4 Connections between the Right to Life (Art. 2) and Environmental Protection

According to the right to life declared in Article 2 of the European Convention on Human Rights (according to the case law of the Court), states are obliged to take positive measures to protect the life of people living under their jurisdiction. In this respect, the most cited environment-related case is the *Öneryildiz case*.[26] According to its facts, there was a methane explosion in a landfill in Turkey, close to which several people lived (although without permission). Because of the explosion, 93 people died (including three relatives of the applicant). The applicant claimed that the local Turkish authorities did not do anything to prevent the explosion despite a report made by an expert two years before, which previously called the attention of the city council to the risk of an accident. Having regard those mentioned above, the Court found that the authorities knew (or should have known) about the inhabitants nearby being in danger and should have avoided the emergency situation according to their obligation to act, which stems from Article 2 of the Convention.[27]

26 *Öneryildiz v. Turkey*, ECHR (2004) No. 48939/99, Judgment of the Grand Chamber on 30 November 2004.
27 *See e.g.,* paras 71 and 73 of the judgment.

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This positive obligation to act on the part of the state also exists in times of natural disasters according to the conclusions of the *Budayeva and Others case*.[28] In this case, on 18 June 2000, following heavy rainfalls mud flooded a Russian town, and the applicants stated that the authorities did not call their attention previously to the danger, moreover, they did not receive help to escape. On the next day, after the applicants returned to their houses, another, bigger mud avalanche arrived, which took further lives (the house of the applicant collapsed and her husband died). The Court found an obvious casual link between the omission of the authorities and the several deaths that occurred, thus, the applicants referred to the violation of the right to life (Art. 2) with success. Therefore, it may be established that the positive obligation to act in connection to the right to life does not only exist in connection with actions caused by humans, but also disasters, where there is an obligation on the side of the states to set up an appropriate warning and protection mechanism.[29] In my opinion, the two cases may be considered different in that states have a broader level of margin of appreciation in the case of measures necessary in order to prevent and abolish (natural) disasters caused by acts of God, than in the case of disasters caused indirectly by human actions or omission.

Moreover, it is important to mention that, though the Court considers that there is an obvious positive obligation of state authorities to guarantee the right to life, this positive obligation shall not be interpreted as an obligation for the state authorities to collect and spread environmental information based on Article 10 (freedom of expression) of the Convention. In *Guerra and Others case*[30] the applicants stated that the authorities failed to inform the inhabitants about the dangers of a nearby plant and about an accident that took place there and the procedure that followed it. With this, the applicants contended that the state violated the right to information declared under Article 10 of the Convention, however, the Court stated that providing such an obligation may cause extraordinary difficulties, because it is difficult to define who should be informed by whom and about what.[31]

13.5 The Relation between the Right to Private and Family Life and the Right to Property and Environmental Protection

The European Court of Human Rights declared in several cases that various environmentally harmful activities may violate the right to respect for private and family life of the applicant. In the Court's opinion, violation of private life and private house does not only

28 *Budayeva and Others v. Russia*, ECHR (2008) Nos. 5339/02, 21166/02, 20058/02, 11673/02 and 15343/02, Judgment on 20 March 2008.

29 *See* para. 135 of the judgment.

30 *Guerra and Others v. Italy*, ECHR (1998) No. 14967/89, Judgment of the Grand Chamber on 19 February 1998.

31 *See* para. 53 of the judgment.

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mean house-trespass but the undisturbed enjoyment of the neighbourhood as far as it is possible. It follows that the violation of the right to private and family life may not only be committed by physically entering a house, but by noise pollution, emission of various gases and smells, or other, similar ways. As it was established by the Court, the right to clean and silent environment cannot be found in the Convention, but if noise pollution or other harmful activity directly and seriously infringes the applicants rights, the matter shall come within the scope of Article 8 of the Convention.[32] Thus, the Court shall examine both the direct causal link between the activity in question and the negative effect on the applicant, and whether this negative impact reaches a certain level which can be considered a violation. This latter level depends on the circumstances of the case, such as the intensity and period of time of the negative effect, including its physical and mental effects.[33] As I already mentioned (when comparing the *Powell and Rayner case* and the *López Ostra case*), the Court shall consider the behavior of the state's authorities while exercising their margin of appreciation.

From the related abundant case law, I am going to present the *Deés case*[34] in detail because of its direct link to Hungary. The applicant complained that he suffered serious detriment due to the increase of heavy traffic in the area of his home, furthermore, his house almost became uninhabitable because of the noise, pollution and smell caused by the heavy traffic.[35] The Court of Strasbourg clearly declared that the measures of Hungarian authorities to decrease traffic were not effective enough (the applicant submitted a claim for compensation in 1999, and in 2003 the noise pollution was still above the limit), and declared the violation of Article 8.[36]

Although the right to property was not part of the European Convention on Human Rights originally (only Art. 1 of Protocol 1 incorporated it into the Convention), in my point of view the restriction of the right to property according to environmental viewpoints is similar to the possible restrictions of the right to private and family life, thus I think it is appropriate to discuss them together. Protocol 1 of the Convention explicitly allows the restriction of property (or even the deprivation of property), in the public interest and in accordance with the conditions provided by the law and with the general principles of international law. From the perspective of this study, the examination of the expression of 'in the public interest' is necessary. As I already mentioned, now the Court of Strasbourg

32 *Leon and Agnieszka Kania v. Poland*, ECHR (2009) No. 12605/03, Judgment on 21 July 2009, *see* para. 98 of the judgment.

33 *Fadeyeva v. Russia*, ECHR (2005) No. 55723/00, Judgment on 9 June 2005, *see* para. 69 of the judgment.

34 *Deés v. Hungary*, ECHR (2010) No. 2345/06, Judgment on 9 November 2010.

35 The applicant called upon Art. 6 of the Convention because of the length of the legal procedure before the competent Hungarian authorities, however this aspect of the case is irrelevant in the light of the present study.

36 *See e.g.,* G. Kecskés, 'Deés *v.* Magyarország ügy az Emberi Jogok Európai Bírósága előtt', *Jogi iránytű,* 2011/1, p. 1-2. or L. Fodor, 'Az Emberi Jogok Európai Bíróságának ítélete a zajterhelés csökkentésére tett intézkedésekről és a bírósági eljárás időtartamáról', *Jogesetek Magyarázata*, No. 2011/3, pp. 86-92.

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lists the enforcement of environmental aspects in the category of public interest. As in the *Hamer case*[37] the parents of the applicant built a summer house on woodland without a building permit in 1967. Many years later, in 1994, the authorities ordered the restoration of the initial situation, and subsequently they destroyed the house (the applicants were not willing to do it). The Court firstly recorded that though the environmental aspect is not listed explicitly in the Convention, it is nevertheless considered by the society and the authorities to be of value. Economic reasons (including questions of property) shall not precede environmental aspects, thus in the actual case – though the applicant's right to property was undoubtedly restricted, this was clearly justified by public interest. Furthermore, in environmental cases state authorities have a wide margin of appreciation when taking the necessary measures.[38] This means that the competent government (and not the Court) has the possibility to take into consideration the protection of the environment as well as other important factors such as financial and economic considerations.[39]

13.6 Environmental Aspects in Procedural Law

As I already referred to it in the *case of Guerra and Others*, though environmental aspects cannot be interpreted by the Court as widely as an obligation for state authorities to give specific information, but the obligation of assuring the right of participation of the people concerned (and of providing the necessary information about the exercise of the right of participation) while decision-making in environmental matters is different. In the *Hatton and Others case*[40] on the noise pollution of airports (Heathrow Airport in London) the Court explicitly examined for example whether state authorities assured the right of participation to nearby inhabitants according to the new flight regulations accepted in 1993. As the Court found that adequate, it did not find a violation of the right to private and family life. Although Article 8 of the Convention does not include explicit (or implicit) procedural regulations for cases when authorities do not provide in advance information to the people concerned about the potential polluting activity and risks of a working plant, failing to do so may violate the right to private and family life as well.[41] On the other hand, even this approach itself shall not lead to the Court examining *actio popularis* type applications.[42] Nevertheless, if the possibility of effective participation (and the judicial review

37 *Hamer v. Belgium*, ECHR (2007) No. 21861/03, Judgment on 27 November 2007.
38 *See* paras 78-79 of the judgment.
39 *Fredin v. Sweden*, ECHR (1991) No. 12033/86, Judgment on 18 February 1991, judge Vilhjalmsson's concurring opinion.
40 *Hatton and Others v. United Kingdom*, ECHR (2003) No. 36022/97, Judgment of the Grand Chamber on 8 July 2003.
41 *Tatar v. Romania*, ECHR (2009) No. 67021/01, Judgment on 27 January 2009, *see* para. 112. of the judgment.
42 *Ilhan v. Turkey*, ECHR (2000) No. 22277/93, Judgment on 27 June 2000, *see* paras 52-53 of the judgment.

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of the possible decisions) are not guaranteed for the participants during a national procedure, this may amount to a violation of the right to a hearing by a judicial body included in the right to fair trial guaranteed under Article 6 of the Convention.[43]

The question of environmental protection was raised from a criminal procedural approach in front of the Court's Grand Chamber in 2010, in connection with the *Mangouras case*,[44] which may also be an example for how the concept of the 'living instrument' mentioned previously shall be applied. The applicant was the captain of a ship which caused an extremely serious environmental pollution by leaking 70,000 tons of oil into the Atlantic Ocean. A criminal procedure was initiated against the captain of the ship and he was in pre-trial detention for 83 days, until the owner of the ship posted the extremely high bail, 3 million euros. The European Court of Human Rights stated that the use of the instruments of criminal law in connection with environmental pollution crimes is a new tendency nowadays, and regarding the exceptional nature of the matter and the extremely serious pollution caused, the amount of the bail shall not be considered unrealistic, thus the violation of the right to liberty and security enshrined in Article 5 paragraph 3 of the Convention did not occur. It may be submitted that a few years earlier in a similar case the Court of Strasbourg would most likely have declared the violation of the Convention. This change evidences the increasing appreciation of environmental assets under international law (and human rights) as well.

13.7 Summary

One of the important characteristics of the case law of the European Court of Human Rights is to handle the Convention as a 'living instrument'. Taking into consideration that (international) environmental questions appeared on the international stage not more than 20 years after the adoption of the Convention in 1950, even nowadays the improvement of the environment-related case law of the Court of Strasbourg is only feasible with the application this concept. The moderate progress that characterises the activity of the Court (and the previously existing European Commission of Human Rights) can be well documented in the environment-related cases: while such applications were rejected *ratione materiae* without examination for a long period of time, nowadays the Court deals with these cases from three different aspects – in spite of the fact that its underlying document has not changed in this respect.

Firstly, the Court 'actively' examines the environment-related cases in light of the right to life – including both disasters caused by humans as well as those occurring as a consequence

43 *L'Erabliere A.S.B.L. v. Belgium*, ECHR (2009) No. 49230/07, Judgment on 24 February 2009.

44 *Mangouras v. Spain*, ECHR (2010) No. 12050/04, Judgment of the Grand Chamber on 28 September 2010.

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of natural disasters. Secondly, it is the right of the Court to 'passively' examine measures in accordance with the legality of state authorities' activities, as a possible restriction of each right provided by the Convention (firstly the right to private and family life and the right to property). Thirdly, procedural issues are getting an increasingly higher role in the case law of the Court – including the issues of the right to fair trial (Art. 6) and the right to an effective remedy (Art. 13). Furthermore, by now some procedural aspects of criminal liability fall under the competence of the Court, but in my opinion, their classification into a separate category is not justified because of the small amount of related cases at present. It is interesting to mention that with respect to the freedom of expression (Art. 10) the Court does not really have a case law that may be assessed, although we may feel that guaranteeing information rights is particularly relevant in procedural terms; which is why I think that in this respect we cannot exclude the possibility of a change in the practice of the Court in the near future.