# ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS

**Proceedings of the High-level Conference "Environmental Protection and Human Rights"**

organised by the Georgian Presidency of the Committee of Ministers
Strasbourg, 27 February 2020

**Manual on Human Rights and Environment (2nd edition)**

Ministry of Environmental Protection and Agriculture of Georgia

**Presidency of Georgia**
Council of Europe
November 2019 – May 2020

**Présidence de la Géorgie**
Conseil de l'Europe
Novembre 2019 – Mai 2020

COUNCIL OF EUROPE

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- **Proceedings of the High-Level Conference of 27 February 2020**
  *(organised under the aegis of the Georgian Presidency of the Committee of Ministers)*

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**Council of Europe**

**French edition:**
*PROTECTION ENVIRONNEMENTALE ET DROITS DE L'HOMME*

- *Actes de la Conférence de haut niveau « Protection environnementale et droits de l'homme »*
- *Manuel sur les droits de l'homme et l'environnement (2e édition)*



Layout: SPDP, Council of Europe

Printed at the Council of Europe

# Preface

What planet will we bequeath to the next generation? Will our children still be able to enjoy, in a livable world, the freedoms and rights we know today?

These questions have become a burning issue for our societies. Climate change and the health crises of our times have obvious consequences for respect for human rights, good governance and democratic participation.

It is our shared responsibility to play our part in addressing this.

The Council of Europe is fully aware of this and participates in efforts at the national and international level to encourage a global approach to environmental protection based on respect for human rights.

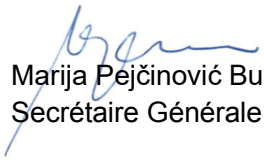
The European Convention on Human Rights helps to protect individuals and society as a whole through the judgments of the European Court of Human Rights in numerous cases concerning environmental damage. The European Social Charter is also of great importance for environmental issues through the protection of social rights, such as the right to protection of health.

The present work echoes these standards by reproducing the *Manual on Human Rights and the Environment,* prepared by the Steering Committee for Human Rights. This text is currently being updated to reflect developments in the relevant case law of the European Court of Human Rights, developments within the European Social Charter system and good practices emerging at national level.

This publication equally reports on the innovative and ambitious exchanges that took place during the High-Level Conference organised on 27 February 2020 under the aegis of the Georgian Chairmanship of the Committee of Ministers. The ***Declaration on Human Rights and the Environment*** **subsequently adopted by the outgoing** (Georgia) **and incoming** (Greece and Germany) **Chairmanships of the Committee of Ministers of the** Council of Europe gives new impetus to the Organisation's commitment to prepare a draft non-binding instrument on human rights and the environment,

for possible adoption by the Committee of Ministers by the end of 2021 at the latest.

But it is first and foremost at the national level that answers must be found. It is therefore my hope that the elements of reflection contained in this publication will be fully utilised by the 47 member states of the Organisation, in synergy with civil society, in their reflection and action to promote respect for human rights and the environment.



Marija Pejčinović Burić
Secrétaire Générale

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## OPENING OF THE CONFERENCE

### Mr Levan DAVITASHVILI

*Minister of Environment Protection and Agriculture of Georgia*

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Dear participants,
Ladies and gentlemen,

It gives me great pleasure to be here, today, and to attend this wonderful event on behalf of the Government of Georgia, represented by the Ministry of Environmental Protection and Agriculture. It is my privilege to address the distinguished attendees of this **Conference on the environmental protection and human rights** organised under the aegis of Georgian Presidency of the Committee of Ministers of the Council of Europe.

Georgian Government has set the human rights and environmental protection as the **first priority for the period of our Chairmanship**. The Minister of Foreign Affairs of Georgia, David Zalkaliani in its capacity as the president of the Committee of Ministers of the Council of Europe has already stated that the human rights issues will be attempted to address as the Georgian Presidency's priority "by focusing on achieved progress and remaining challenges".

Since the human rights protection has the significant importance for the Council of Europe the Government of Georgia expresses its desire to bring into attention of the European States one of the crucial aspects of fundamental human rights and freedoms, namely, the right to live in healthy environment, receiving and sharing environmentally related information and other important aspects of environmental protection. There are **clear inter-linkages between effectively exercising the human rights and fulfilling the obligations of the States concerning the protection of environment**.

Climate change, extinction of species, loss of biodiversity, pollution and the overall degradation of the earth´s ecosystems have a profound global impact on the enjoyment of human rights and require the widest possible cooperation by all Council of Europe Member States.

I would like to emphasize at the outset that we as the European State stand strongly for Europe's **fundamental values**, such as the human rights, democracy and the rule of law. We will continue intensive co-operation within the international instruments to ensure the sustainable development, protection of civil and social rights of the individuals by implementing Sustainable Development Goals.

The process of incorporating international standards in national legislation is one of the crucial milestones for establishing the effective systems of human rights and environmental protection. Georgia is a Party to approximately all the international instruments related to the environment. Our country has adopted significant amendments by reflecting implications of treaty based obligations, this amendments include provisions creating fundamental guarantees to the free access of environmental information, access to the court, raising awareness through the civil society on the respective subjects, implementing Forest Management reforms, improving soil, water and air quality.

Despite the progress, vulnerability of Environment and Climate remains as the challenge for Georgia as well as other Council of Europe States.
I would like to underline the **significant role of the European Court of Human Rights** as one of the fundamental human rights mechanisms in the sphere of environmental protection.

Despite the absence of a specific reference to the environment in the Convention of Human Rights, the **European Court of Human Rights has clearly established that various types of environmental degradation, ineffective assessment of environmental risks and obstacles while accessing the relevant information, can result in violations of substantive human rights**, such as the right to life, to private and family life, the prohibition of inhuman and degrading treatment, and the peaceful enjoyment of the home.

We are intending to **strengthen co-operation in environmental protection through the Council of Europe,** our main goal is to **balance development and nature needs**, to provide the healthy environment for current and future generations.

Today, we have the **opportunity to discuss on the topics of correlation** between human rights and environment, role of civil society and other important issues in this regard.

At the end of the conference, I will have the privilege to introduce the **draft declaration on the environmental protection** and human rights before the distinguished attendees and cover the main themes enshrines in this document.

Now, I will give the floor to the Secretary General of the Council of Europe **Ms Marija Pejčinović** Burić.

Thank you.

**Ms Marija PEJČINOVIĆ BURIĆ**

*Secretary General of the Council of Europe*

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Minister,
President of the Parliamentary Assembly,
Distinguished guests,
Ladies and gentlemen,

We live at a time of heightened awareness of the threats to the living world around us:

Climate change, environmental degradation, the loss of biodiversity.

These present a pressing, inter-related and profound challenge to the way we live.

So, it is unsurprising that businesses, governments and citizens alike are all struggling to formulate their own response to an issue of ever-greater concern.

That challenge falls to international organisations too, including the Council of Europe.

Our role is to uphold human rights, democracy and the rule of law in Europe.

So, we should not only acknowledge the impact of environmental change on these standards.

Rather, we should also ask ourselves whether we ourselves should take further action and, if so, what.

As it stands, the impact of environmental change is real and growing.

We can see it in our changing landscapes.

We can recognise it in the loss of our biodiversity.

And we can observe it in the increased migration and displacement of people in various locations throughout the world, which in turn concerns us here in Europe.

Within this Organisation, we have already proven our ability to act in this area.

Take for example, the Convention on the Conservation of European Wildlife and Natural Habitats.

Or the European Landscape Convention.

Or the judgments and decisions of the European Court of Human Rights and the European Committee of Social Rights, which have shown that both the European Convention on Human Rights and the European Social Charter can be interpreted to protect human rights in the face of threats to the environment in which we live.

Vous avez donc raison de demander aujourd'hui ce que nous pourrions faire de plus pour tirer le meilleur parti de nos connaissances, de nos instruments et de notre capacité d'action.

Notre Convention sur l'accès aux documents publics, qui devrait bientôt entrer en vigueur, garantira un contrôle public sur la prise de décisions relatives à l'environnement.

Mais il est peut-être également temps de réexaminer notre Convention sur la responsabilité civile des dommages résultant d'activités dangereuses pour l'environnement, afin d'assurer une protection plus efficace ?

Faudrait-il aussi revoir et actualiser notre Convention plus récente sur la protection de l'environnement par le droit pénal, de manière à préciser les obligations juridiques, durcir les sanctions pour atteinte à l'environnement ou améliorer la coopération internationale ?

Devrions-nous par exemple concevoir des programmes de coopération ciblés pour promouvoir l'interaction entre protection des droits de l'homme et environnement ?

Pourrions-nous aider les États membres à élaborer des politiques, des stratégies et des plans d'action nationaux ?

Enfin, le moment n'est-il pas venu d'étendre notre programme HELP avec un cours de formation en ligne qui aiderait les tribunaux nationaux et autres à mettre en œuvre les arrêts pertinents de la Cour européenne des droits de l'homme et les décisions du Comité européen des Droits sociaux ?

Le corpus juridique sera certainement appelé à se développer dans les années à venir. Sur la question de l'environnement, les citoyens exigent des actions.

Je félicite donc la Présidence géorgienne du Comité des Ministres d'avoir fait de ce thème une priorité et d'organiser cet événement pour en débattre.

De même, je félicite le Président de l'Assemblée parlementaire pour ses efforts déterminés en vue de placer cette question au cœur des préoccupations des membres de l'Assemblée.

Le Conseil de l'Europe doit aujourd'hui réfléchir au rôle qu'il peut jouer par lui-même et aux côtés d'autres organisations internationales.

L'enjeu est de taille et je me réjouis d'écouter vos observations lors de cette Conférence.

**Mr Rik DAEMS**

*President of the Parliamentary Assembly of the Council of Europe*

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Minister,
Secretary General,
Ladies and gentlemen,

The Belgian writer Willem Elsschot once said that dreams and reality are separated by laws and practical problems. Now, if our common dream is to link Environment to Human Rights, maybe the reality should be sought somewhere within the Article 2 of the European Convention on Human Rights. Indeed, if Article 2 of the Convention guarantees “the right to life”, should it not also guarantee the right “to live in a liveable environment”? It seems logical to me.

Dreams and reality are separated by laws and practical problems.

Laws are made and changed by Parliaments and practical problems, those are the daily business for Governments.

One could naively ask oneself: “Why didn’t we do it yet?”.
If I may be very straightforward, if extremism and populism, and other “-isms” have grounds to grow today, perhaps it is because we did not deliver. At least, because we - the political world, I mean, Governments and Parliaments, - did not deliver enough, and certainly not when required.

Now we see people in the streets, screaming out where’s the content to our action, or to paraphrase bluntly, “where is the beef to our action?”. And they are right. Where is it?

Therefore, Mr President of the Conference, Madam Secretary General, Minister, Ladies and Gentlemen,

We, the Parliament Assembly, welcome this conference, and congratulate the Georgian Presidency for organising it, because for us, this might be the kick-start for practical work to change our reality. And maybe to try to grasp that dream and turn it into reality linking it to Article 2 of the Convention? This is what I think we should do in the long term, because I do know that we cannot achieve this in one week.

I am not saying that we have not done anything so far, because I know that the Committee of Ministers started working on a Recommendation on Environment and Human Rights. And the Assembly, indeed, addressed the issue many times: already in 2009, we adopted a Recommendation to the

Committee of Ministers to launch work on a Protocol on Environment and Human Rights.

Even more, we adopted a similar Recommendation back in 2003 and in 1999. Twenty years ago.

Indeed, all of us are making an effort. But it is not enough, and it is not timely enough. That is the brutal reality.

If we want to be practical on this issue, why don't we look at the dream and the reality from the angle of changes to Article 2 of the Convention?

In my view, the immediate step before a Protocol is drafted could be the opening of a Convention linking Environment and Human Rights which will set up some common standards.

An even earlier step could be a Recommendation of the Committee of Ministers to member states on the same issue.
And the step before that – the very first one that would kick-off the process - could be the Ministerial Session in May 2020.

If we follow this plan, Mr President, the Ministerial Session to be organised by the Georgian Presidency would kick-off the process which will eventually allow us to transform our dream into reality, by outlining the different phases of our future work, including the adoption of a Recommendation, the negotiation of a Convention, and, possibly, as the final outcome, the drafting of a Protocol to the European Convention on Human Rights.

You know that I support the idea of the "trialogue" with the Parliamentary Assembly, the Committee of Ministers and the Secretary General of the Council of Europe working together. Indeed, I attach great importance to doing things together.

We have got valuable expertise in Parliaments and the Parliamentary Assembly, and on the intergovernmental side you have got equally valuable expertise in Governments and in the Committee of Ministers. Moreover, we invited Mr Timmermans, the Green Deal champion of the European Union, to contribute to our work, and I hope that he can come in April, or a future date, to share with us some of the valuable expertise of the European Union.

Let me end by outlining a possible timetable:
The launch of the process could be Georgia's legacy.
The Greek Presidency could complete the drafting of a Recommendation.
The German Presidency could, hopefully, complete the work on a draft Convention.

And then, we can see what we need to change in the European Convention on Human Rights through a protocol.
Personally, I believe that a Protocol is needed, but we will see.

This would give us a roadmap – a timetable for delivering concrete results for the people who are shouting “Where’s the content, where is the beef?”. Well, let us deliver, and let us delivertogether.

Allow me to end my speech with a quote by Paul-Henri Spaak, who was the first elected President of the Parliamentary Assembly. He said: “If we have to choose between a perfect world and a better world, we should choose the better world because the perfect world does not exist, and the better world is the one that we build ourselves.”. So, let us do this together.

Thank you very much.

**Mr David R. BOYD**

*United Nations Special Rapporteur on Human Rights and Environment*

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Ladies and gentlemen, it is a great honour to join you today.

Europe has a well-deserved reputation for leadership in the fields of both human rights and environmental protection. Portugal was the first country in the world to include the right to a healthy environment in its constitution, back in 1976. Spain was the second country in the world to do so, in 1978.

Therefore, it deeply disappointing that today Europe lags behind other regions in recognizing and protecting the right to a safe, clean, healthy and sustainable environment. The right to a healthy environment brings together human rights and sustainable development in a powerful union.

The right to a healthy environment is in the 1981 African Charter on Human and Peoples Rights. The right to a healthy environment is in the 1988 Additional Protocol to the American Convention on Human Rights, known as the San Salvador Protocol.

The right to a healthy environment is in the 2004 Arab Charter on Human Rights.

The right to a healthy environment is in the 2012 Association of Southeast Asian Nations Human Rights Declaration (although this latter document is not legally binding).

Europe is the only place in the world where the primary regional human rights instrument fails to include this fundamental human right.

In an effort to address this gap, in 1999 the Parliamentary Assembly of the Council of Europe called for the development of a new protocol on the right to a healthy and viable environment to be added to the European Convention on Human Rights.[1] The Council of Ministers rejected the idea, referring to

[1] Parliamentary Assembly 1999. *Recommendation 1431: Future action to be taken by the Council of Europe in the field of environmental protection*.

"certain difficulties, legal and conceptual." These difficulties were neither identified nor explained, and no protocol was developed.
In 2009, the Parliamentary Assembly of the Council of Europe again called for a new protocol to the European Convention, recognizing the right to a healthy and viable environment.[2] Again, the Council of Ministers rejected the idea, on the basis that the European human rights system "already indirectly contributes to the protection of the environment through existing convention rights and their interpretation in the evolving case law of the European Court of Human Rights."

There are several reasons why it is completely inadequate for the Council of Europe to rely on the indirect contributions of existing convention rights to address the scope and severity of the global environmental crisis faced by society today. First, it is very difficult to provide the necessary scientific and medical evidence to prove that an individual's health problems or premature death was caused by a specific environmental harm. Most diseases are multi-factorial, meaning there are multiple contributing factors. Second, the European Court has clearly and repeatedly stated that there is no right to nature protection in the European Convention.[3] Yet nature protection is an essential element of the right to a healthy environment, acknowledging that human health and well-being depend on healthy ecosystems and biodiversity. In 2017 the Inter-American Court on Human Rights stated: "a healthy environment is a fundamental right for the existence of humankind."[4] The Court added "the right to a healthy environment, unlike other rights, protects the components of the environment, such as forests, rivers and seas. … Thus, the right to a healthy environment as an autonomous right differs from the environmental content that arises from the protection of other rights, such as the right to life or the right to personal integrity.[5] Third, recognition of the right to a healthy environment serves as a legal and cultural North Star, highlighting the direction in which society needs to move.

The world faces an unprecedented global environmental crisis including the climate emergency, the dramatic decline of biological diversity, toxic pollution of air, water and soil, and the violation of planetary boundaries. This crisis has immense impacts on human rights. More than nine million people die

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[2] Parliamentary Assembly. 2009. *Recommendation 1885: Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment*.
[3] *Kyrtatos v. Greece*, 22 May 2003, European Court of Human Rights. *Fadeyeva v. Russia*, 9 June 2005, European Court of Human Rights.
[4] Inter-American Court on Human Rights. 2017. Advisory Opinion 23/17 of November 15, 2017, on the environment and human rights, requested by the Republic of Colombia, para. 59.
[5] Inter-American Court on Human Rights. 2017. Advisory Opinion 23/17 of November 15, 2017, on the environment and human rights, requested by the Republic of Colombia, paras. 62-63.

prematurely every year because of environmental harms, hundreds of millions of people suffer illnesses, and billions of people are threatened by the impacts of climate change, from more frequent and intense storms to droughts, wildfires and rising sea levels. Michelle Bachelet, UN High Commissioner for human rights, recently warned that "The world has never seen a human rights threat of this scope."[6] In response to this global environmental crisis, scientists are calling for rapid, systemic and transformative changes.[7]

This is where human rights enter the picture. Human rights have a proven track record of contributing to important societal transformations. The abolitionists invoked freedom and equality in successfully ending slavery. Women, the civil rights movement, Indigenous peoples, and persons with disabilities have all used human rights to catalyze societal transformations. Human rights are not an instant, easy, or omnipotent solution, but history proves that rights are among humanity's most powerful game-changers.

Among the Council of Europe, 91 percent of members (43 out of 47) already recognize the right to a healthy environment through either constitutional protection, legislative protection, or as parties to the Aarhus Convention.[8] This right enjoys constitutional and legislative protection in a majority of member States in the Council of Europe (29 out of 47). Forty of the 47 member States are parties to the Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters. The Preamble of the Aarhus Convention recognizes that "every person has the right to live in an environment adequate to his or her health and well-being." Article 1 states that the objective of this convention is "to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being."

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[6] The Guardian. 9 September 2019. "Climate change is greatest ever threat to human rights, UN warns."

[7] Intergovernmental Panel on Climate Change. 2019. *Special Report on Climate Change and Land: Summary for Policymakers*. https://www.ipcc.ch/srccl/chapter/summary-for-policymakers/ Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services. 2019. *Global assessment report on biodiversity and ecosystem services*.

[8] The four members of the Council of Europe that do not, as yet, recognize the right to a healthy environment in law are Andorra, Liechtenstein, San Marino and the United Kingdom. Although the UK is a party to the *Aarhus Convention*, it filed a reservation specifying that the right to a healthy environment is merely an aspiration, not a legal right: "The United Kingdom understands the references in article 1 and the seventh preambular paragraph of this Convention to the 'right' of every person 'to live in an environment adequate to his or her health and well-being' to express an aspiration which motivated the negotiation of this Convention and which is shared fully by the United Kingdom. The legal rights which each Party undertakes to guarantee under article 1 are limited to the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this Convention."

Globally, over eighty percent of States already recognize the right to live in a safe, clean, healthy and sustainable environment.[9] The right to a healthy environment enjoys constitutional protection in more than 100 States, is incorporated into the environmental legislation of more than 100 States, and is included in regional human rights and environmental treaties ratified by more than 125 States. In total, 156 States (out of 193) have already established legal recognition of the right to a healthy environment.[10]

Decades of national experience with the right to a healthy environment prove that it serves as a catalyst for a number of important benefits, including: stronger environmental laws and policies; improved implementation and enforcement of those laws and policies; increased levels of public participation in environmental decision-making; increased access to information and access to justice; and reduced environmental injustices.[11]

Academic research demonstrates that recognition of the right to a healthy environment contributes to improved environmental outcomes, including cleaner air, enhanced access to safe drinking water, and reduced greenhouse gas emissions.[12] Of particular importance are the positive effects of the recognition of the right to a healthy environment for vulnerable populations, including women, children, persons living in poverty, members of indigenous peoples and traditional communities, older persons, persons with disabilities, minorities and displaced persons.[13]

Ladies and gentlemen, it is time to change. It is time for Europe to respond to the global environmental crisis by adding a new protocol on the right to a healthy environment to the European Convention on Human Rights, as the new President Mr. Rik Daems, has recommended. It is time for Europe to demonstrate leadership by supporting a pioneering United Nations resolution

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[9] A comprehensive list of all States and the status of the right to a healthy environment (in constitutions, legislation, and legally binding regional treaties) is available from the Special Rapporteur on human rights and environment on request.

[10] This is referenced in recent UN resolutions. See for example, A/HRC/RES/37/8, A/HRC/RES/40/11, and UNEP/EA.4/RES.17.

[11] D.R. Boyd. 2012. *The Environmental Rights Revolution: Constitutions, Human Rights and the Environment*. University of British Columbia Press. J.R. May and E. Daly. 2015. *Global Environmental Constitutionalism*. Cambri
dge University Press. J.H. Knox and R. Pejan, eds. 2018. *The Human Right to a Healthy Environment*. Cambridge University Press.

[12] C. Jeffords and L. Minkler. 2016. "Do constitutions matter? The effects of constitutional environmental provisions on environmental outcomes", *Kyklos*, vol. 69, No. 2, pp. 294–335. C. Jeffords. 2016. "On the temporal effects of static constitutional environmental rights provisions on access to improved sanitation facilities and water sources", *Journal of Human Rights and the Environment*, vol. 7, No. 1, pp. 74–110. A. Ceparullo, G. Eusepi, and L. Giurato. 2019. Can constitutions bring about revolutions? How to enhance decarbonization success? *Environmental Science & Policy* 93: 200-207.

[13] See Special Rapporteur on human rights and environment A/HRC/34/49 (Biodiversity), A/HRC/37/58 (Children), A/HRC/37/59 (Framework Principles), A/HRC/40/55 (Clean Air), A/74/161 (Safe Climate).

recognizing the right to a healthy environment as Dunja Mijatović, the Commissioner for Human Rights, has recommended.

Recognition of the right to a healthy environment would help to prevent some of the hundreds of thousands of premature deaths caused annually in Europe by air pollution.[14] It would help to reduce the water pollution that impedes access to safe drinking water for millions of people. It would be an impetus for increasingly urgent and ambitious climate action.[15]

The right to a healthy environment is essential to the health, well-being and dignity of all human beings. Recognizing this fundamental human right should to be a matter of the utmost urgency for the Council of Europe.[16]

## Professor Elisabeth LAMBERT

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Monsieur le Président, Excellences, Mesdames et Messieurs,

Permettez-moi de féliciter très vivement la présidence géorgienne pour avoir organisé cet événement et avoir fait des questions environnementales une priorité de sa présidence.

Je voudrais également remercier très chaleureusement ceux qui m'ont confié la préparation du rapport qui vous a été donné en lecture et pour l'opportunité qui m'est faite de m'adresser à vous ce jour.

Le rapport que j'ai écrit entend dresser un état des lieux des acquis en matière environnementale obtenus au sein du Conseil de l'Europe, mais aussi des actions qui restent à accomplir et de proposer des pistes de réflexion sur les moyens de combler ce vide.

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[14] Special Rapporteur on human rights and environment, A/HRC/40/55 (Clean Air).
[15] Special Rapporteur on human rights and environment, A/74/161 (Safe Climate).
[16] J.H. Knox and D.R. Boyd. 2018. Report to the General Assembly on the human rights obligations related to the enjoyment of a safe, clean, healthy and sustainable environment. A/73/188.

***Excellences, Mesdames et Messieurs***, le temps est venu pour le Conseil de l'Europe de donner une nouvelle impulsion à la protection de l'environnement selon une approche des droits humains. Historiquement, si le Conseil de l'Europe et ses Etats membres ont semblé joué un rôle de leader avec l'adoption de plusieurs conventions phare, c'est désormais clairement une position de retardataire qui est donnée. A défaut de réponse européenne, des initiatives éclatées seront adoptées au niveau national et supranational, et la légitimité du Conseil de l'Europe dans ce domaine s'en trouvera affectée.

Politiquement et symboliquement, un signal fort est attendu à la hauteur des enjeux actuels. Ce signal ne saurait, à l'échelle du continent européen, être moins ambitieux que les projets élaborés dans d'autres enceintes plus larges. Ainsi, le projet de Pacte mondial sur l'environnement, le projet de traité onusien sur la responsabilité des entreprises transnationales, *le projet de Pacte international relatif au droit des êtres humains à l'environnement de 2017,* la charte mondiale de la nature et la Déclaration universelle des droits de l'humanité de 2015 pourraient servir de références principales, sans oublier les conventions du Conseil de l'Europe en la matière.

La Déclaration de 2015 a pour objectif, je cite, le 'maintien durable de la jouissance des droits fondamentaux, qu'ils soient individuels ou collectifs' et la reconnaissance de 'droits' et 'devoirs' 'qui contribuent à construire un horizon commun de responsabilité à l'échelle universelle, de manière à la fois trans-spatiale et transtemporelle'[17].

Je tenais à reprendre explicitement ces mots car ils sont essentiels pour comprendre la vision dans laquelle devraient s'inscrire les actions futures du Conseil de l'Europe.

Permettez-moi maintenant d'énoncer les trois enseignements majeurs qui peuvent être déduits des réflexions menées ces 15 dernières années.

- ***Premièrement***, **l'approche de la protection environnementale par les droits humains a toute sa pertinence** par le fait qu'elle doit permettre l'accès en justice des citoyens et associations et l'opposabilité du droit à un environnement sain ET écologiquement durable aux auteurs étatiques ou non-étatiques des atteintes à l'environnement. Cette approche par les droits humains est considérée comme prometteuse pour relever le défi écologique qui est devant nous, ***mais à condition de bien comprendre les particularités de ces questions***. Ainsi, comme l'énonce le rapport de 2011 du Haut-Commissaire onusien aux droits de l'homme, '(…) il est indispensable de protéger et de promouvoir un environnement sain, non seulement dans l'optique des droits de l'homme mais aussi pour protéger le patrimoine commun de l'humanité'.

[17] Déclaration Universelle des droits de l'humanité, page 9.

- ***Deuxièmement***, et je voudrais en venir aux particularités : les droits liés à la protection environnementale ne peuvent être rattachés ni aux droits civils et politiques, ni aux droits économiques et sociaux. Ils appartiennent aux « droits de solidarité » identifiés par Karel Vasak et même aux droits de la quatrième génération définis par le professeur Marcus-Helmons; car le droit à l'environnement a ceci d'unique qu'il est davantage qu'un droit de l'Homme avec une Humanité devenant titulaire de droits. On comprend alors pourquoi tant le régime de la CEDH que celui de la Charte sociale sont mal taillés pour ces droits environnementaux, chacun de ces régimes le restreignant dans des limites trop étroites. D'ailleurs, une reconnaissance du droit à un environnement sain ET durable selon une vision éco-centrée s'est considérablement accélérée dans vos Etats. De plus, contrairement au domicile ou même à la santé, l'objet protégé n'est pas seulement un bien individuel, mais aussi un bien commun puisque 'l'environnement n'appartient à personne et l'usage qui en est fait est commun à tous' pour citer un auteur[18], avec la reconnaissance de devoirs envers les générations futures. Au niveau des Nations Unies, des réflexions sur la prise en compte juridique des besoins et droits des générations futures se sont considérablement accélérées.

- ***Troisièmement,*** la protection de l'environnement souffre au niveau européen et international de l'absence de ***convention contraignante*** avec un mécanisme de plaintes contre les acteurs étatiques ET non-étatiques et une procédure de suivi, sur le modèle réussi que nous connaissons avec la CEDH. Au niveau national, on assiste à une diversité très grande et un éclatement des réponses judiciaires ; l'accès à la justice nationale environnementale souffre d'entraves très importantes sur notre continent. Un constat aujourd'hui fait l'unanimité : les entreprises multinationales peuvent porter atteinte aux normes environnementales tout autant que les Etats et devraient également répondre de telles violations engendrées par leurs activités. Il est besoin d'aller au-delà de la Recommandation 2016(3) et le Conseil de l'Europe offre un cadre approprié pour amplifier ce mouvement.

**Dès lors, il me semble découler de ces constats les conclusions et recommandations suivantes :**

- Se contenter de l'élaboration d'une déclaration non contraignante, ou d'un acte contraignant sans mécanisme de plaintes, serait perçu à juste titre, comme un échec.

[18] B. Jadot, 'L'environnement n'appartient à personne et l'usage qui en est fait est commun à tous', in F. Ost et S. Gutwirth (dir.), *Quel avenir pour le droit de l'environnement ?* 2019, Pub. Des Facs univ. Saint-Louis.

- La reconnaissance du droit uniquement à un environnement sain dans un protocole additionnel à la CEDH, en 2020, serait une approche *minimaliste et insuffisante*, dont le seul bénéfice serait d'admettre un droit autonome. Mais cette vision, parce que anthropocentrée, est dépassée et critiquée. Rappelons que la CEDH, pour des raisons historiques et parfaitement compréhensibles en lien aux droits reconnus, n'admet pas les requêtes contre les acteurs privés, n'admet pas *l'actio popularis*, n'admet pas l'Humanité comme détenteur de ces droits en ne visant que les générations présentes, et exige la condition stricte de victime, des conditions inadaptées au procès environnemental. La CEDH ne connait pas davantage le 'préjudice écologique' qui n'est pas réductible à l'addition d'intérêts individuels mais est la lésion d'un intérêt commun composé d'intérêts divers non humains et humains pris dans leur dimension collective. La Cour EDH n'applique pas non plus le principe de précaution.

- En 2003, un projet de Charte européenne sur les Principes généraux pour la protection de l'environnement et du développement durable avait été discuté. ***Peut-être était-ce trop tôt, mais n'attendons pas qu'il soit trop tard.*** En effet, un instrument spécifique et inclusif serait nécessaire, pour embrasser les acquis de conventions importantes du Conseil de l'Europe, telle la convention pour la protection de l'environnement par le droit pénal, pour intégrer les principes spécifiques de la matière (comme le principe de précaution), mais aussi pour reconnaitre d'autres droits : un droit autonome à un environnement de qualité dans une perspective intergénérationnelle et éco-centrée, mais aussi la reconnaissance de droits de la Nature (tel que le droit à sa préservation, le droit à sa restauration y compris par équivalence), le droit à l'éducation environnementale et le devoir de mieux protéger les défenseurs environnementaux. Il pourrait être utile de reconnaitre aussi des lignes directrices sur ce que devrait être un procès environnemental.

- Comme il peut être concevable que certains Etats européens ne soient pas prêts à franchir maintenant ce saut qualitatif, mais gardant à l'esprit l'urgence de la situation, on pourrait concevoir la mise en place ***d'un accord partiel élargi*** entre Etats désireux de s'engager dans cette voie, ce qui aurait pour avantage d'offrir une flexibilité et d'aller de l'avant.

Excellences, Mesdames et Messieurs, le *statu quo* n'est pas tenable, la CourEDH ne peut pas relever seule ce défi, ce que son Président nous a dit il y a un mois. Le saut qualitatif requis n'est pas un saut dans l'inconnu, beaucoup de vos Etats ont déjà accompli des progrès conséquents et des projets ont été formulés au niveau international.

Tenant compte de l'héritage du Conseil de l'Europe, mon rapport souhaite proposer une réflexion urgente sur l'opportunité d'élaborer **un nouvel instrument** avec des droits d'applicabilité directe invocables en justice contre tous les auteurs des atteintes environnementales et avec un mécanisme de suivi. Il serait opportun que le Comité des Ministres appelle à des négociations prochaines en vue d'identifier les normes à retenir, déjà dans une recommandation aux Etats, puis, il faut l'espérer, dans un instrument contraignant.

Je vous remercie pour votre attention et me tiens à votre disposition pour la suite.

## FIRST SESSION

## Environmental protection and protection of human rights: contradictory or complementary

### Mr Linos-Alexandre SICILIANOS

*President of the European Court of Human Rights*

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Monsieur le Président,
Mesdames, Messieurs,

Je souhaiterais tout d'abord vous adresser mes remerciements. C'est avec grand plaisir que j'ai accepté votre invitation pour intervenir lors de cette conférence.

Je me réjouis vivement que la Géorgie ait fixé au rang de ses priorités la promotion de l'interdépendance entre les droits de l'homme et la protection de l'environnement. Il est bon que votre présidence voie « dans la convention un instrument efficace qui doit être utilisé plus largement par les autorités nationales des États membres pour protéger les personnes et les communautés des dommages à l'environnement »[19].

[19] Comité des ministres du 22 novembre 2019, CM/Inf(2019)22

Vous le savez, nous célébrons, cette année, le 70ème anniversaire de la Convention européenne des Droits de l'Homme, signée, à Rome, le 4 novembre 1950.

À l'origine, la Convention est destinée à garantir les droits civils et politiques. Elle s'inscrit dans un mouvement plus global né avec l'adoption de la Déclaration universelle des droits de l'homme, en décembre 1948.

La question environnementale était alors très éloignée des préoccupations des rédacteurs de la Convention. Celle-ci ne comporte d'ailleurs pas de dispositions à ce sujet, comme la plupart des textes internationaux adoptés à l'époque. En effet, dans l'arrêt *Kyrtatos c. Grèce*, la Cour a précisé que rien ne renvoie dans la Convention à « une protection générale de l'environnement en tant que telle ».

Cependant, en l'espace de 70 ans, l'environnement est devenu un enjeu majeur.

C'est ainsi que, malgré l'absence de dispositions expresses dans la Convention, plusieurs affaires ayant trait à l'environnement ont été portées devant la Cour.

Notre institution n'a pas attendu que l'environnement devienne un problème urgent pour s'emparer de la question. Cela illustre d'ailleurs la capacité d'évolution et d'adaptation de la Convention.

Surtout, la jurisprudence développée en matière de protection de l'environnement par le prisme des droits de l'Homme, montre la complémentarité des deux sujets, pour répondre à la question posée ce matin. C'est ce point que je souhaiterais évoquer avec vous.

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**I. Nul ne saurait nier aujourd'hui l'interdépendance entre les droits de l'Homme et la protection de l'environnement, à la faveur de la doctrine de l'instrument vivant développée dans notre jurisprudence depuis l'arrêt *Tyrer*[20].**

À partir des années 1990, la Cour a commencé à reconnaître l'importance grandissante de la protection environnementale. Elle a noté, en particulier, que « la société d'aujourd'hui se soucie sans cesse davantage de préserver l'environnement »[21].

[20] CEDH, 25 avril 1978, Tyrer c. Royaume-Uni, n° 5856/72
[21] CEDH, 18 février 1991, Fredin c. Suède, n° 12033/86, §48

La question s'est d'abord posée sous l'angle de l'article 8, qui protège le droit au respect de la vie privée et familiale.

Le droit à un environnement sain et calme n'est pas expressément garanti par cette disposition. Mais, on le sait, une atteinte à l'environnement peut affecter gravement la vie privée et familiale ou le domicile d'une personne au sens de l'article 8, sans pour autant nuire à sa santé.

Ainsi, dans l'arrêt *Powell et Rayner c. Royaume-Uni*[22], les requérants, habitant à proximité de l'aéroport de Londres-Heathrow, estimaient excessifs les niveaux de bruit résultant de son exploitation, et insuffisantes les mesures prises par le gouvernement britannique pour les réduire. La Cour a pourtant conclu à la non-violation de l'article 8.

Elle a estimé que les autorités compétentes avaient édicté diverses mesures pour contrôler et réduire le bruit des avions, et réparer le préjudice qu'il entraînait. En l'espèce, le gouvernement britannique n'avait donc pas outrepassé sa marge d'appréciation ou rompu le juste équilibre à rechercher aux fins de l'article 8 de la Convention.

Quatre ans plus tard, dans une affaire différente, la Cour a fait évoluer sa jurisprudence. Dans *Lopez Ostra c. Espagne*[23], la requérante se plaignait des nuisances causées par une station d'épuration d'eaux et de déchets installée à quelques mètres de son domicile.

La Cour a jugé que l'État espagnol n'avait pas su faciliter un juste équilibre entre l'intérêt du bien-être économique de la ville - avoir une station d'épuration -, et la jouissance effective de la requérante au droit au respect de son domicile et de sa vie privée. Elle a donc conclu à la violation de l'article 8.

L'arrêt de chambre *Hatton et autres c. Royaume-Uni*[24]va dans la même direction. Dans cette affaire, les requérants, également des résidents dans les environs de l'aéroport d'Heathrow, se plaignaient de l'augmentation du bruit afférent aux vols de nuit. Ils estimaient que cela portait atteinte à leurs droits garantis par l'article 8. La chambre a conclu à la violation de cette disposition.

Cependant, la Grande chambre[25] n'a pas maintenu cette position et a conclu, elle, à l'absence de violation. Elle a jugé, en particulier, que le Royaume-Uni n'avait pas dépassé sa marge d'appréciation dans la recherche d'un juste équilibre entre, d'une part, le droit des personnes touchées par la réglementation litigieuse à voir respecter leur vie privée et leur domicile, et, d'autre part, les intérêts concurrents d'autrui et de la société dans son ensemble.

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[22] CEDH, 21 février 1990, Powell et Rayner c. Royaume-Uni, n° 9310/81
[23] CEDH, 9 décembre 1994, Lopez Ostra c. Espagne, n° 16798/90
[24] CEDH, chambre, 2 octobre 2001, Hatton et autres c. Royaume-Uni, n° 36022/97
[25] CEDH, 8 juillet 2003, GC, Hatton et autres c. Royaume-Uni, n° 36022/97

**II. Cette mise en balance des intérêts divergents, à laquelle la Cour procéda dans l'affaire Hatton, selon sa méthode habituelle, aurait-elle encore une pertinence actuellement, alors que l'urgence environnementale a été déclarée et que cette problématique a été érigée au rang de nos priorités ?**

Si elle a longtemps assuré une marge d'appréciation étendue aux États dans cette pesée des intérêts concurrents, la Cour recherche désormais davantage une protection à tous les niveaux.

À cet égard, dans un arrêt très récent, *Cordella et autres c. Italie*[26], les juges sont allés plus loin. Dans cette affaire, les requérants dénonçaient les effets des émissions nocives d'une usine sur l'environnement et sur leur santé. La Cour a jugé que la prolongation d'une situation de pollution environnementale mettait en danger la santé des requérants et celle de l'ensemble de la population résidant dans les zones à risque. Elle a donc conclu à la violation de l'article 8. Elle a également demandé aux autorités italiennes de mettre en œuvre, dans les plus brefs délais, un plan environnemental afin d'assurer la protection de la population.

On le voit, la pesée des intérêts opérée ici joue clairement en faveur de la protection de l'environnement. Celle-ci devient, en effet, un objectif légitime justifiant des ingérences dans l'exercice de certains droits individuels.

Une illustration de cela concerne l'article 1er du Protocole 1 de la Convention relatif au droit de propriété : l'affaire *Hamer c. Belgique*[27] concernait la démolition, en vertu d'une exécution forcée, d'une maison de vacances construite sans permis de construire. Notre Cour a observé que l'environnement constitue une valeur dont la défense suscite dans l'opinion publique, et par conséquent auprès des pouvoirs publics, un intérêt constant et soutenu. De fait, des impératifs économiques et même certains droits fondamentaux, comme le droit de propriété, ne devraient pas se voir accorder la primauté face à des considérations relatives à la protection de l'environnement.

Elle a ajouté que les pouvoirs publics assument alors une responsabilité qui devrait se concrétiser par leur intervention au moment opportun, afin de ne pas priver de tout effet utile les dispositions protectrices de l'environnement qu'ils ont décidé de mettre en œuvre.

La disposition sans doute la plus fondamentale de la Convention, à savoir l'article 2 relatif au droit à la vie, a également été utilisée dans le domaine de l'environnement. La Cour est allée jusqu'à imposer des obligations aux États, réduisant leur marge de manœuvre.

[26] CEDH, 24 janvier 2019, Cordella et autres c. Italie, n° 54414/13
[27] CEDH, 27 novembre 2007, Hamer c. Belgique, n° 21861/03

Elle a en effet développé la doctrine des obligations positives, qui lui a permis d'intensifier son contrôle. Cela signifie que les États doivent prendre toutes les mesures nécessaires à la protection de la vie des personnes relevant de leur juridiction.

Ainsi, dans l'affaire *Oneryildiz c. Turquie*[28], le décès de plusieurs personnes était intervenu après une explosion de méthane. Nous avons conclu à la violation de l'article 2, en l'absence de mesures prises par les autorités nationales pour empêcher la mort accidentelle de neuf proches du requérant.

Lorsque l'atteinte au droit à la vie n'a pas pu être empêchée, c'est notamment le cas lorsqu'une catastrophe industrielle ou environnementale est intervenue, les autorités nationales doivent apporter une réponse adéquate, judiciaire ou autre.

Dans l'affaire *Boudaïeva et autres c. Russie*[29], une coulée de boue eut lieu dans une ville russe, tuant huit personnes et causant des blessures et traumatismes psychiques aux requérants dont les habitations furent détruites. La Cour a donc conclu à la violation de l'article 2 d'une part, au motif que le gouvernement n'avait pas protégé la vie d'un certain nombre de personnes, d'autre part, pour défaut d'enquête judiciaire.

Comme je le disais en introduction, les dispositions de la Convention constituent un outil juridique efficace pour la protection de l'environnement.

Nous avons un autre exemple avec l'article 10, dont notre juridiction, gardienne de la liberté d'expression, a également fait usage. Celui-ci comporte aussi bien, je le rappelle, le droit de s'exprimer que celui de recevoir des informations. Ce dernier point est particulièrement important dans le domaine qui nous intéresse aujourd'hui.

Dans l'arrêt *Steel et Morris c. Royaume-Uni*[30], la Cour de Strasbourg a ainsi consacré l'intérêt général à autoriser de petits groupes militants non officiels et des particuliers à contribuer au débat public par la diffusion d'informations et d'opinions sur des sujets comme la santé ou l'environnement.

[28] CEDH, 2004, GC, Öneryildiz c. Turquie, n° 48939/99
[29] CEDH, 20 mars 2008, Boudaïeva et autres c. Russie, n° 15339/02, 21166/02, 20058/02, 11673/02 et 15343/02
[30] CEDH, 15 février 2005, Steel et Morris c. Royaume-Uni, n° 68416/01

**III. À travers tous ces exemples, on voit la Cour esquisser les traits d'une « démocratie environnementale », selon les termes de la professeure Laurence Boisson de Chazournes[31], et s'assurer que l'État respecte l'obligation de garantir le droit de la population à participer au processus décisionnel en matière d'environnement.**

La Cour a rappelé cette obligation dans l'affaire *Tătar c. Roumanie*[32]. Les requérants soutenaient, en particulier, que le processus technologique utilisé par une société pour l'exploitation d'une mine d'or située à proximité de leur domicile représentait un danger pour leur vie.

Suite à un accident écologique sur le site, libérant dans l'environnement des eaux de traitement contenant des cyanures, la Cour a conclu à la violation de l'article 8. La Cour a explicitement admis et souligné que, même si l'article 8 ne renferme aucune condition explicite de procédure, le processus décisionnel débouchant sur des mesures d'ingérence doit être équitable et respecter comme il se doit les intérêts de l'individu protégés par cet article.

Cela comporte, pour les autorités nationales, l'obligation de permettre l'accès de la population aux informations et communiquer sur les risques environnementaux lorsque cela s'avère nécessaire. Dans un arrêt de Grande chambre, *Roche c. Royaume-Uni*[33], la Cour a rappelé l'obligation positive de l'État d'offrir une procédure effective et accessible, permettant au requérant d'avoir accès à l'ensemble des informations pertinentes et appropriées et donc d'évaluer tout risque auquel il aurait pu être exposé.

En outre, il s'agit également de permettre aux particuliers de se constituer en association de défense de l'environnement. Dans l'affaire *Costel Popa c. Roumanie*[34], la Cour a jugé que le refus des autorités nationales d'enregistrer une association n'était pas justifié par un besoin social impérieux. Elle a conclu à la violation de l'article 11, autre disposition essentielle relative à la liberté de réunion et d'association.

En effet, l'exercice du droit de se constituer en association peut se révéler important pour se prévaloir d'un préjudice environnemental devant la Cour.

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[31] Professeure de droit international, Université de Genève ; Co-directrice du Geneva Center for International Dispute Settlement ; Membre, Institut de droit international
[32] CEDH, 27 janvier 2009, Tătar c. Roumanie, n° 67021/01
[33] CEDH, 19 octobre 2005, GC, Roche c. Royaume-Uni, n° 32555/96
[34] CEDH, 26 avril 2016, Costel Popa c. Roumanie, n° 47558/10

**IV. Il est clair que, pour assurer l'effectivité des droits garantis, dont la Cour est particulièrement soucieuse, le statut de victime doit être accordé. Ce sera mon dernier point.**

Certes, nous ne reconnaissons pas *l'actio popularis*. Toutefois, nous accordons plus largement le statut de victime au sens de l'article 34 de la Convention que les juridictions internes. Cela a permis à des requérants d'introduire des recours pour faire respecter le droit de l'environnement[35].

Nous exigeons cependant un lien suffisamment fort entre les droits garantis et l'atteinte subie, car notre Cour ne reconnaît pas encore un droit à un environnement sain et calme.

Mesdames, Messieurs,

L'environnement constitue le défi majeur du 21ème siècle. L'actualité nous rappelle constamment que nous sommes désormais entrés dans l'ère de l'anthropocène, où l'on voit la nature détruite par l'homme. En témoignent les récents feux en Australie ou la hausse des températures – le mois de janvier 2020 a été le plus chaud en Europe.

Les attentes des citoyens sont donc particulièrement fortes et les États ont une responsabilité importante à assumer envers les générations actuelles, et surtout, futures.

Je l'ai mentionné au début de mon intervention, la Convention est un instrument vivant qui a su évoluer pour s'adapter aux défis des sociétés contemporaines. Elle a su mobiliser tous les outils à sa disposition pour « ouvrir les portes aux questions environnementales », selon l'expression de Laurence Boisson de Chazournes.

Je n'ai aucun doute qu'elle poursuivra sur cette lancée.

Dans les années à venir, la Cour européenne pourra être amenée à se prononcer sur les questions nouvelles, telle que l'extraterritorialité de la protection de l'environnement, à l'instar de la Cour interaméricaine des droits de l'homme. Celle-ci a récemment rendu un avis consultatif reconnaissant ce principe[36].

Mais, j'ai déjà eu l'occasion de le dire lors de l'audience solennelle pour l'ouverture de l'année judiciaire, l'urgence environnementale est telle que la Cour ne pourra agir seule. Dans ce combat pour la planète, elle ne saurait être en situation de monopole. Cette responsabilité, nous devons la partager.

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[35] CEDH, 6 avril 2000, GC, Athanassoglou et autres c. Suisse, n° 27644/95

[36] Cour interaméricaine des droits de l'Homme, avis consultatif, 15 novembre 2017, OC-23/17

C’est pourquoi je voudrais conclure mon intervention en citant deux exemples récents. Le premier, venu des Pays-Bas, concerne l’arrêt rendu par la Cour suprême néerlandaise à la fin du mois de décembre 2019. Il a eu un retentissement mondial.

Dans cette affaire, la Cour suprême a imposé à l’État néerlandais de réduire les émissions de gaz à effet de serre d’au moins 25 % d’ici à la fin de 2020. Pour prendre cette décision qualifiée d’historique, la Cour suprême des Pays-Bas s’est appuyée expressément sur la Convention européenne des droits de l'homme et la jurisprudence de notre Cour.

En se rendant sur le terrain de la Convention, les juges néerlandais ont clairement rappelé que la Convention européenne des droits de l'homme peut apporter des réponses aux problèmes de notre temps.

Le second exemple concerne une décision encore plus récente rendue par le Conseil constitutionnel français. Pour la première fois, il a élevé au rang de principe à valeur constitutionnelle la protection de l’environnement[37].

Ces deux décisions montrent l’indéniable complémentarité entre protection de l’environnement et droits de l’Homme.

Aussi, je me réjouis particulièrement que la Géorgie souhaite intensifier les travaux consacrés à la protection de l’environnement au sein du Conseil de l’Europe.

Soyez assurés que, dans ce combat majeur, la Cour européenne est à vos côtés et prendra toute sa part.

Je vous remercie.

## Mr Giuseppe PALMISANO

*President of the European Committee of Social Rights*

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First of all, let me express my gratitude to the Georgian Presidency of the Committee of Minsters for organising this important high-level Conference on environmental protection and human rights, and for inviting me, in my capacity as President of the European Committee of Social Rights, to propose some reflections on this topic.

[37] Décision n° 2019-823, QPC, 31 janvier 2020

From a social rights perspective, that is from a “human rights in everyday life” perspective, I would say that the answer to the question raised in the title of this session of the Conference — “Environmental protection and protection of human rights: contradictory or complementary?” — is relatively simple, and even quite obvious. Environmental protection and protection of social rights are indeed complementary, and closely — mutually — linked to each other.

Such a complementarity and mutual relationship emerges clearly when considering, first, that the deterioration of the environment has an undeniable impact on the enjoyment of many social rights. Neglect by States of environmental issues therefore amounts to not complying with their obligation to fulfil such rights. Second, that not taking measures to avoid or reduce deterioration of the environment may amount, in itself, to infringing some specific social rights (such as the right to protection of health, or the right to adequate housing). By contrast, adequately respecting social rights obligations may indeed contribute to improving environmental protection by States.

The European Committee of Social Rights is well aware of this and, in its activity of monitoring and interpreting the European Social Charter, it has made an important contribution to clarifying and putting into practice such a complementarity and mutual relationship, to the benefit of both social rights and environmental protection.

This has been possible, in particular, with regard to the application and interpretation of the right to protection of health, which is enshrined in Article 11 of the European Social Charter.

Let me provide you with some examples.
Under Article 11 of the Charter, States are obliged to take appropriate measures to remove as far as possible the causes of ill health, and to prevent epidemic, endemic and other diseases. This means that health systems must respond appropriately to avoidable health risks, i.e. risks that can be controlled by human action.

Since the beginning of this Century, the Committee has repeatedly pointed out that avoidable risks include those which result from environmental threats, and that the right to protection of health does therefore include the right to a healthy environment.

Following such an approach, the Committee has clarified that measures should be designed to remove the causes of ill health resulting from environmental threats such as pollution.[38]

[38] Conclusions XV-2 (2001), Poland, Article 11§1; and Marangopoulos Foundation for Human Rights (MFHR) v. Greece, Complaint No. 30/2005, decision on the merits of 6 December 2006, § 202.

For example, the Committee found a violation of State's obligations with respect to the right to protection of health under the Charter in a situation where the State had not managed "to strike a reasonable balance between the interests of persons living in the lignite mining areas and the general interest"[39] or when the authorities had failed to take appropriate measures to remove, as far as possible, the causes of ill-health and to prevent, as far as possible, diseases in view of pollution of a river due to discharge of industrial waste[40]. Other cases concerned the failure of the authorities to take appropriate measures to address the environmental hazards and unhealthy living conditions faced by Roma communities[41] or the lack of protective measures to guarantee clean water in Romani neighbourhoods, as well as inadequacy of measures to ensure public health standards in housing in such neighbourhoods.[42]

Further, according to the Committee's conclusions, under Article 11, States are under an obligation to protect their population against nuclear hazards and against the consequences of nuclear accidents[43] as well as against health risks related to asbestos[44]. And a situation where availability of drinking water represents a problem for a significant proportion of the population is considered to be in breach of Article 11 of the Charter.[45]

As regards States' obligations related to tackling pollution or the protection of the environment more generally, which are clearly obligations of progressive realisation, the Committee clarified that States must nevertheless strive to attain this objective within a reasonable time, by showing measurable progress and making best possible use of the resources at their disposal.[46]

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[39] Marangopoulos Foundation for Human Rights (MFHR) v. Greece, Complaint No. 30/2005, decision on the merits of 6 December 2006, § 221.

[40] International Federation of Human Rights Leagues (FIDH) v. Greece, Complaint No. 72/2011, decision on the merits of 23 January 2013, §§ 153-154 and §§159-160.

[41] European Roma Rights Center (ERRC) v. Bulgaria, Complaint No. 46/2007, decision on the merits of 3 December 2008, §§ 49-51, violation of Article 11.

[42] European Roma and Travellers Forum (ERTF) v. Czech Republic, Complaint No. 104/2014, decision on the merits of 17 May 2016, §§ 124 and 127, violation of Article 11 and 16.

[43] Conclusions XV-2 (2001), France.

[44]Conclusions XVII-2 (2005), Portugal; Conclusions XVII (2005), Latvia.

[45] Conclusions 2017, Georgia, Article 11§3: "The Committee concludes that the situation in Georgia is not in conformity with Article 11§3 of the Charter on the ground that the measures taken to ensure access to safe drinking water in rural areas have been insufficient."

[46] Marangopoulos Foundation for Human Rights (MFHR) v. Greece, Complaint No. 30/2005, decision on the merits of 6 December 2006, § 204

More specifically, in order to combat air pollution States are required to implement an appropriate strategy which should include the following measures: develop and regularly update sufficiently comprehensive environmental legislation and regulations[47]; take specific steps to prevent air pollution at local level, such as modifying equipment, introducing threshold values for emissions and measuring air quality,[48] and, on a global scale, help or contribute to efforts towards reducing pollution[49]; ensure that environmental standards and rules are properly applied through appropriate supervisory machinery[50]; inform and educate the public, including pupils and students at school, about both general and local environmental problems.[51]

The European Committee of Social Rights has also stressed that when a preliminary scientific evaluation indicates that there are reasonable grounds for concern regarding potentially dangerous effects on human health, the State must take precautionary measures consistent with the high level of protection provided for in Article 11 aimed at preventing those potentially dangerous effects.[52]

In light of the above, I can say that something positive has indeed been done by the European Committee of Social Rights with a view to reinforcing environmental protection through the protection of social rights, and vice versa. Of course, much has still to be done, and should be done, especially if we consider the increasingly worrying environmental situation.

In fact, as our natural habitat is depleted and climate change advances as a result of poor governance, neglect and inaction, many other human social rights protected by the European Social Charter will be affected: the right to work and to earn a decent living, the right to safe and healthy working conditions, the rights of children, women, the family and older persons. Social protection may also be compromised, or even the right to protection against poverty and exclusion and the right to housing. We are already witnessing the dramatic consequences of natural disasters partly caused by climate change on the right to adequate housing and other fundamental social rights.

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[47] Conclusions XV-2 (2001), Addendum, Slovak Republic
[48] Conclusions 2005, Republic of Moldova, Article 11§3
[49] Conclusions XV-2 (2001), Italy, Article 11§3
[50] Marangopoulos Foundation for Human Rights (MFHR) v. Greece, Complaint No. 30/2005, decision on the merits of 6 December 2006, §§ 203, 209, 210 and 215
[51] Conclusions 2005, Republic of Moldova, Article 11§2
[52] International Federation of Human Rights Leagues (FIDH) v. Greece, Complaint No. 72/2011, decision on the merits of 23 January 2013, §§ 150-152

Climate change can be expected to have alarming effects on the labour markets and on employment levels. Global warming related migration and “climate refugees” will raise a host of additional social rights issues in pace with accelerated demographic change. Philip Alston, the UN Special Rapporteur on extreme poverty and human rights, forecasted that climate change would drive, in the best-case scenario, tens of millions of people into poverty.

So, what is the way forward? What can realistically be done by the Council of Europe to improve the protection of the environment by means of the protection of social rights?

From a European Social Charter and “human rights in everyday life” perspective, I would advance the following.

The monitoring arrangements under the Charter include a reporting system that is evolving from formal detailed reporting on all provisions to a targeted and strategic choice of issues that states are called upon to report on and that the European Committee of Social Rights will examine. This could — and in my opinion should, even must— in the future include issues related to the environment and social human rights.

Monitoring arrangements also include, as you know, collective complaints, a mechanism that allows social partners —trade unions and employers organisations, as well as civil society organisations— to take the initiative in raising issues about compliance by states of their social rights commitments. I hope that in the near future, collective complaints will seek to articulate and plead issues related to the environment and social human rights.

On this, I have to recall that only 15 countries have accepted the collective complaints procedures, but the 15 have recently encouraged others to enrol themselves in the collective complaints system that was designed to assist states to enhance implementation of social rights and assist them in their endeavours to comply with their social rights commitments, including the right to a healthy environment.

I would also add that, when conclusions under the reporting procedure and decisions concerning collective complaints in respect of social rights related to the environment start reaching a follow-up stage, involving the Governmental Committee and the Committee of Ministers of the Council of Europe, it is crucial that they live up to their responsibilities by recommending that the situation be brought into conformity with the European Social Charter and the findings of the European Committee of Social Rights.

And another step that the Committee of Ministers could take —picking the gauntlet thrown by its Georgian Chairmanship— in order to respond to the challenge that environmental issues pose to human rights, is to make arrangements for drafting a new protocol to the European Social Charter to incorporate (as has already been done in the Americas) environmental issues into human rights protection.

In this respect, I really believe that the European Social Charter would be the most appropriate legal framework to do this, more so than the European Convention on Human Rights, which, as we all know, focuses on civil and political rights with an "individual protection" approach.

To conclude, Mr President, ladies and gentlemen, supporting the human rights dimension of environmental issues and climate change within the European Social Charter framework would be the right thing to do and it would be applauded by all sensible stakeholders in Europe and worldwide.

## SECOND SESSION

## The role of elected representatives and civil society

**Ms Dunja MIJATOVIĆ**

*Commissioner for Human Rights*

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I would start by thanking Georgia for making Environment and Human Rights the priority of its Presidency and raising the profile of the theme of Environment and Human Rights within the Council of Europe and among in its member States.

The event could not be more timely.

I don't think that any of us here would deny that living in a degraded, unhealthy environment can violate our human rights in many ways. The rights that come to mind include the right to life, health, food, water, private life, or the peaceful enjoyment of the home.

But human rights are not just the victim of environmental degradation; they are also the key to rolling it back.

It would be futile to try to protect the environment without at the same time protecting human rights such as the freedoms of expression, association or assembly, the right to an effective remedy, or the right to education – to name just a few of the so-called 'enabling' rights.

I am happy to see that the awareness of the extent to which these two aspects are intertwined is rapidly growing – and I cannot stress enough the importance of recognising this link.

I would like to highlight here the precious work carried out by the mandate of the UN Special Rapporteur, including the Framework Principles on Human Rights and the Environment, to clarify the nature of this link and shed more light on its various aspects.

My office has also already contributed some work in this field in the past: taking action to protect disadvantaged communities' right to a healthy environment in some member states; or intervening before the European Court of Human Rights. Last year I issued Human rights Comment "Living in a clean environment: a neglected human rights concern for all of us", where, among other issues, I addressed the issue of environmental degradation and human suffering and concluded that our efforts to protect human rights should go hand in hand with protecting the environment.

My team and I have already started raising the profile of this important thematic file and reflecting on what my priorities could be and the further actions I could take.

**Environmental human rights defenders and journalists are one such clear priority.**

In many places around the world, including in Europe, they are attacked, persecuted and silenced. Often, they are collectively branded as 'extremists' and targeted by counter-extremism legislation and policy, or by smear campaigns.

Their freedom of peaceful assembly and freedom of expression are unduly curtailed, as I have noted in a recent human rights comment, for instance around climate change conferences.

Most often, however – and this is especially true of many young activists – environmental human rights defenders are played down, derided, or simply ignored in an attempt to prevent their important calls from reaching our ears.

This must change.

To help change that, I intend to meet with European environmental human rights defenders later this year – to hear about their problems and see together how I can use my mandate and my voice to shield them from harm and help them in their work.

I would also like to raise public awareness of the important work done in defining and interpreting standards on environment and human rights by the various Council of Europe bodies represented here today – and to take under closer scrutiny how member States translate these standards into laws, policies and measures, at the central and local levels.

At the same time, I want to pay keen attention to how public authorities mitigate the negative consequences that the transition may have for the rights of those affected, so that the transition to a more sustainable future does not contribute to **rising social inequalities and poverty**.

Key partners for me here will be the **national human rights institutions**. They should have the right and the capacity to mainstream the rights-based approach to environmental protection.

Lastly, I would like to say a word of caution not to disregard the consequences of the pollution produced on our continent for the human rights of people living elsewhere. Much of the waste produced by some of our member states is shipped off to others. This is often done with little oversight of the consequences for the inhabitants of those countries, many of whom live in poverty.

We Europeans often take pride at "exporting" our human rights standards to other parts of the world. I think that the human rights-based approach should also apply to all other things that we export.

*Ladies and Gentlemen*,

I would like to conclude with these **three messages**:

The *first* one is about procedural environmental rights.
To me, rights such as access to information and decision-making are the primary tools that empower citizens and defenders to protect the environment, we live in.

I regret that there are still six (6) Council of Europe member states that have not yet ratified the **Aarhus Convention**.[53]

Ratifying this key instrument is really the **absolute minimum**. I call on all member states that have not yet done so to ratify it promptly.

*Second*,
I encourage all Council of Europe member states to show their vocal support for the **explicit recognition, at the United Nations level, of the right to a healthy environment.**

[53] 1 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, https://www.unece.org/env/pp/treatytext.html

Most of our member states have already recognised this right in their laws and constitutions. It would go a long way to helping global awareness and advocacy if they could also speak on this with one voice.

*Third*,
I would like you to think about children and young people.

Because they are the ones who will bear the brunt of the damage if we fail to act.

But, as several members of the Parliamentary Assembly aptly stated, in a recent motion, “children are much more than passive victims of climate change – they are **powerful agents of change**”.

They want their voices to be heard and their rights to be respected.

Their calls for more ambitious action in reducing greenhouse gas emissions or fighting pollution are loud and clear.

They expect their governments to make this happen as soon as possible.

I sincerely hope that young Europeans who care about the environment and human rights may find in the Council of Europe an earnest and committed ally.

## Mr Harald BERGMANN

*Spokesperson on human rights, Congress of Local and Regional Authorities*

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Distinguished guests,
Ladies and gentlemen,

It is an honour to be here today and to address this very important topic from a local point of view. I am the mayor of the municipality of Middelburg in the Netherlands, and in this capacity, I am also member of the Congress of the Council of Europe which brings together local and regional representatives from all over Europe.

Today, about 10.000 mayors, signatories of a global covenant, are at the heart of a movement for climate change and energy, and many examples of climate emergency declarations can -unfortunately- already be listed.

I would like to start with a quote here from a comment made by Ban Ki Moon, which particularly resonates with me as a Mayor. The Secretary General of the United Nations declared, on 28 May 2013 at the meeting of the Global Taskforce of Local and Regional Government for the new development agenda beyond 2015, and I quote:

*"It is often said that like all politics, all development is ultimately local. The inputs of local leaders and municipal planners have never been more critical to guiding member states towards embracing policies that achieve green, sustainable and inclusive cities".*

I am well placed to confirm the relevance of this statement made by the Secretary General of the United Nations.

I would like to speak today about "localising" SDGs and why localisation matters - why, in the Congress view, local government and civil society response to climate change and sustainable environment is our best, if not, our last hope - and why Congress reviews its activities through the prism of the SDG's, notably on sustainable environment.

Localisation is a concept which refers to the process of defining, implementing and monitoring strategies at the local level for achieving global, national and subnational development goals and target.

Localisation entails adaptation, which is also best observed at the local level. Global climate change is translated into localized phenomena in response to local geography and other environmental, economic and socio-political factors. As an example of adaptation, in my municipality of Middelburg, unexpected warmer night-time temperatures were quite recently observed as a result of natural variability, in all probability intensified by the urban heat island effect and climate change. We decided to apply some adaptation proposals utilising wind energy, new building designs, and blue-green infrastructure possibilities. Retro-fitting urban areas to be greener and more adaptive is an essential part of establishing climate-proof cities, new urban extensions and greenfield developments present the opportunity to do things right from the start. This is exactly what we did in Middelburg and we will continue to develop strategies in that sense.

In this regard, I would like to point out that the Paris Agreement represented a milestone for recognizing the importance of local climate adaptation. Until this agreement, such efforts were paid little attention by many governments and environment practitioners.

Indeed, local authorities are best placed to drive the reduction of emissions through their unique position of being able to shape policy on land, buildings, water, waste and transport.

Many cities and urban centres are already in the forefront of this adaptation and mindset change and are developing local solutions. City councils are taking initiatives in attempts to boost renewable energy, tackle energy security, lower bills, generate employment and ultimately achieve inclusive and sustainable development.

However, alongside local authorities 'action, we need the citizens' Participation. We need an active engagement and commitment from civil society.

It is no longer sufficient to develop passive lists or reports to 'inform' citizens of changes in our environment.
We need to improve our engagement with citizens and find out how they can 'inform' us. Obtaining and using local knowledge will help us empower citizens, and it will also give us a better indication of what we need to do to be truly sustainable.

Ladies and Gentlemen,

To conclude, I would like to underline that environmental protection is part of good governance, whether it is implemented at international, national or subnational level, and all possible actors should be considered as key actors.

As members and committed stakeholders of the Council of Europe, we are all striving for good governance, based on shared values and principles, of which the right to a sustainable environment must be an integral part.

A safe, clean and healthy environment is essential for the enjoyment of human rights, the exercise of human rights is vital to the protection of the environment. This relationship of interdependence between the protection of environment, good governance and human rights will clearly be even more essential for the protection of people and the planet in the years to come. As local or regional representatives we have a responsibility and we are directly accountant to our citizens in that respect.

But we, humans, due to our contradictory nature can both be aware of the negative consequences of climate change and other environmental issues and, at the same time, can overlook the severity of the situation we are facing and the urgency, to not only act, but to act fast and with force.

We must overcome this paradox all together, at all levels of governance with the support and participation of the civil society.

And that is why I would like to pay tribute to the Georgian authorities who have placed the environmental challenge at the heart of their presidency.
Thank you for your attention.

## Mr Marc GIACOMINI

*Deputy Managing Director for Human Rights, Global and Multilateral Affairs, EEAS*

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Let me thank the Georgian Presidency of the Council of Europe and warmly welcome your initiative to organise this conference.

Climate change and the protection of the environment is one of the greatest challenges of our time and it requires a collective global response. Civil society, elected officials and citizens all have a role to play. The **Paris Agreement** is the world's first climate change agreement to include a reference to human rights. The EU and its Member States are strongly committed to its implementation. Moreover, the protection of the environment in connection with human rights is also enshrined in the EU treaty and in the UN Agenda 2030.

We recognise that addressing climate change will take time and will be costly. However, the cost of inaction is even greater.
We are ready to do our part. With the **European Green Deal** we will reconcile the economy with our planet. It presents a transformative vision extending from the way we produce to the way we consume. It sets out a model which must work for our planet must work for our people. It is a new growth strategy for the EU, a roadmap to become the first climate neutral continent by 2050. All EU actions and policies will have to contribute to the Green Deal and the Paris Compact obligations.

The objectives of the Green Deal cannot be achieved without the involvement of civil society. A few months back, the annual EU-NGO Human Rights Forum in Brussels gathered around 200 grass-root environmental human rights activists and indigenous peoples from across the world to explore how to increase the impact of EU action in building a fair environmental future.

From the list of recommendations put forward during the forum, I would like to highlight three which are relevant for all of us: First, a partnership with civil society on environmental matters should be built on **transparency** of information and **public participation** at all levels.

Secondly, threats and reprisals against environmental human rights defenders by private companies and public offices alike must end. This requires increased **protection but above all prevention**. This includes both introducing innovative local gender-focused and indigenous protection mechanisms and psychosocial support, but also offer capacity building to help human rights defenders **access justice** using international mechanisms and instruments for strategic litigation.

Thirdly, the need to raise more awareness in Europe about rights abused by European investors abroad, and to work towards a more balanced trade arrangements, in which the **European certification of products** respects human rights and offers incentives for a positive change in partner countries. These are values of social responsibility and due diligence outlined in the Guiding Principles for Business and Human Rights.

For centuries, the relationship between indigenous peoples and their environment has been eroded due to the dispossession or forced removal from their traditional lands and sacred sites. In 2018, more than 300 human rights defenders were targeted and killed for their work — the highest number on record so far. The majority were environmental human rights defenders. This is completely unacceptable.

In response, the EU has put in place a strong policy framework to promote and protect the **rights of indigenous peoples**, including those focusing their work on the protection of the environment. The EU has supported more than 30.000 human rights defenders many of them indigenous and environmental human rights defenders who are faced with increasing pressures and shrinking civic space.

In addition, the EU has renewed its **commitment** to accede to the **European Convention on Human Rights**. This is not only a treaty obligation for the EU; it is the expression of our common goal of strengthening the pan-European system of fundamental rights protection. Moreover, for us, the work of the Council of Europe is particularly relevant to protect and promote the nexus between the environment and human rights protection.

Despite the absence of a specific reference to the environment in the European Convention on Human Rights, it is clearly established that various types of environmental degradation can result in violations of human rights, such as the right to life, to food, safe water and sanitation and the peaceful enjoyment of the home. In the implementation of our European Green Deal, the EU will draw on the Council of Europe's expertise in strengthening the link between human rights and the environment.

*Closing remarks:*

From this debate I conclude that **we are fighting for the same purpose** which we should embrace with renewed vigour. The urgency to ensure sustainable development and address climate change require collective European leadership.

Together we can actively work to create **legal safeguards and remedies** with respect to human rights and the conservation of the environment.

These include the **protection of environmental human rights defenders** who are fighting in their local communities for human rights to be realised for the benefit of all.

To reach the **ultimate objective in achieving a fair environmental future for all**, the voices of civil society, indigenous peoples and the younger generation must be clearly heard. Our trade policies and investment projects must place the protection of human rights and the conservation of the environment at the forefront.

I am eager to learn how you plan to incorporate these principles in your decision making to ensure the effective implementation of international treaties and conventions. Thank you and I am looking forward to hear your questions!

## Mr Rolf WENZEL

*Governor, Council of Europe Development Bank (CEB)*

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Mr President,
Excellencies,
Distinguished Guests,
Ladies and Gentlemen,

I would like to join previous speakers in thanking the Georgian Presidency for having taken the initiative to organise this important conference, bringing together all relevant actors and stakeholders in environmental protection and human rights.

Those who spoke before me have sufficiently covered the interconnection between human rights and environmental protection.

Indeed, there is no doubt that hazardous human behaviour towards the natural environment poses a serious threat to the most fundamental of human rights: ***the right to life itself***.

Deforestation; air, water and soil pollution; water scarcity; loss of biodiversity; and poor waste management, to mention but a few major environmental issues of our time, make it impossible to lead a decent life or live at all.

So protecting the environment and those most vulnerable to climate change means protecting life and the right to a decent life for all.

This is why environmental sustainability has become a top priority for institutions which finance countries' sustainability policies and social projects, such as the Council of Europe Development Bank (CEB).

In our case, while environmental concerns have always been part of our criteria for selecting projects for financing, nevertheless these have been given additional importance in light of the increased urgency to act on climate change.

There are two types of projects in that regard: those with a purely environmental focus which make a clear contribution to the protection of the environment; and those which may not be classed as "purely environmental" in terms of their focus but which contain a strong climate change mitigation and adaption component. As such, these projects make their own valuable contribution to global action against climate change. For instance, from the CEB's recent lending activity,

- energy efficiency improvements to state or residential buildings (e.g. in Georgia, Serbia, Bulgaria, the Netherlands)
- green transportation (e.g. in the Slovak Republic, France)
- and renewable power generation and supply (e.g. in Serbia, Portugal).

In recent years, the CEB has stepped up efforts with respect to both categories of projects, paying special attention to those contributing indirectly to environmental protection.

This has now become part of our strategic planning, and I am pleased to say that our recently released Development Plan for the coming three years, i.e. 2020-2022, attaches particular importance to the environmental screening of all projects that we consider for financing – that is, in addition to their social value.

It also places emphasis on supporting vulnerable population groups, which are the most exposed to the negative consequences of climate change and are in need of the highest level of protection. The elderly, migrants and refugees, persons with disabilities, ethnic and other minority groups, and low-income families with children should be our priority in social development financing.

The CEB, as the only multilateral institution with a social mandate, has been especially mindful of the needs of vulnerable people. This is an integral part of the Bank's mission to strengthen social cohesion in Europe. Even more so now that climate change has become part of the equation.

The Sustainable Development Goals (SDGs), as outlined in the 2030 United Nations Agenda, conceptualise sustainable development and have provided us all with a concrete toolkit to advance in that respect. I am pleased to say that the SDGs have taken centre stage in the CEB's new Development Plan.

What we are trying to do is support the national SDG policy frameworks of our member countries and, more importantly, help them to mobilise the necessary funds in order to achieve their SDG-related targets.

We have identified a number of SDGs which are highly relevant to our mandate and hence to our operations and which will boost our efforts to "green" our social investments for the benefit of those in need (No Poverty; Reduce Inequalities; Gender equality; Climate Action; Good health and well-being; Quality education; Clean water and sanitation for all; Decent work and economic growth; Sustainable cities and communities; Peace, justice and strong institutions).

Allow me to mention here one such example of how the CEB has been "greening" its social investments: the Sant Pau Hospital in Barcelona, where the CEB has proudly financed a project which enables the hospital to be powered by a mix of geothermal and solar energy. In terms of climate control of buildings using geothermal energy, this is the biggest project in Spain and one of the biggest in Europe.

CEB operations, then, and the measures taken by the Bank in recent years provide a good example of how putting social development at the service of human rights can be hugely beneficial to individuals, groups, wider communities, and indeed entire countries.

The CEB, for its part, remains fully committed to protecting and promoting human rights through strengthening social cohesion, building inclusive communities, and meeting the social needs of all people while also protecting the environment.

Thank you.

**Ms Anna RURKA**

*President of the Conference of INGOs*

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Mr President, Distinguished speakers, distinguished guest, dear colleagues

It is an honour to address you today on the occasion of this high-level conference. I would like to thank the Georgian Chairmanship of the Committee of Ministers for this very long-awaited initiative. 2020 is a critical year for our Planet and the decision makers have a moral and legal responsibility to ensure gender equality and the equity, between nations, generations and individuals. The degradation and losses to our Planet are advancing faster than the progress and commitments made by the States.

The Conference of INGOs has been working on issues related to the environment for over 10 years, starting with the adoption of a declaration in 2009 in support of the Parliamentary Assembly report “Environment and health: better prevention of environment-related health hazards”. On 28 April 2010, the Conference of INGOs signed a joint declaration on “Biodiversity, climate changes and human rights” with the Parliamentary Assembly and the Congress of Local and Regional Authorities. In this document, the Presidents of these 3 pillars of the Council of Europe strongly encouraged the Committee of Ministers to invite the governments of its member states "to recognize the right to a healthy environment as an integral part of human rights and to make this right a positive obligation”.

Les ONG ont participé à la rédaction de la Convention européenne du Paysage et au développement des activités de la Convention de Berne et nous avons travaillé en relation étroite avec l'accord partiel EUR-OPA, une plateforme de coopération dans le domaine des risques majeurs. Avant chaque événement mondial important lié au climat, au développement durable, à l'environnement, la Conférence des OING adopte et publie des déclarations, des résolutions ou des recommandations aux États, dans lesquelles est souvent fait référence au droit à un environnement sain. La recommandation la plus récente, adoptée l’année dernier, porte sur les changements climatiques, migrations et droits humains.

Par ces travaux commencés il y a dix ans, la Conférence des OING a été en avant-garde des sujets proposés ou encore, comme nous l’avons vu, l’initiatrice des déclarations communes.

Le droit à l’environnement sain et durable est fortement lié aux droits économiques, sociaux et culturels. La cohésion socio-économique et politique de la vie démocratique a une dimension environnementale qui donne la possibilité à chaque être humain d’évoluer dans un environnement propice à son développement. Les travaux menés au sein de la conférence des OING consiste à articuler l’interrelation entre le climat, le territoire, les migrations, la participation civile et les droits humains.

Toutes les solutions issues des réformes publiques environnementales doivent être basées sur les données scientifiques fiables et tenir compte de la participation des citoyens et de la société civile à tous les niveaux de la prise de décision Cette délibération démocratique et cette prise de décision devraient impliquer la population la plus pauvre du monde, qui vit dans un environnement dégradé et à risque. La population la plus pauvre est touchée de manière disproportionnée par les catastrophes dues aux changements climatiques. Selon le rapport de l’Assemblée générale de l’ONU adopté en juillet 2019, le changement climatique pourrait faire basculer 100 millions de personnes dans l’extrême pauvreté d’ici 2030. Une vie dans un environnement dégradé, pollué et malsain, présente avant tout des risques sérieux pour la santé publique et est fortement corrélé avec la pauvreté, les

conflits, l'insécurité alimentaire, le manque d'accès aux services essentiels, mettant en danger le droit à la vie protégée par notre Convention.

La Conférence des OING a toujours soutenu le développement du cadre juridique relatif à l'environnement. Si un instrument nouveau devait voir le jour, il devrait obligatoirement prévoir un mécanisme de dialogue direct entre les ONG et les gouvernements à la lumière du Protocole relatif aux réclamations collectives et la Charte sociale européenne révisée. Nous devons renforcer l'approche holistique de nos politiques publiques et pour cela une approche « *bottom-up* » est nécessaire. C'est un impératif démocratique !

Le Conseil de l'Europe est une organisation unique réunissant des gouvernements, des parlements, des collectivités territoriales, la société civile, la Commissaire aux Droits de l'Homme et la Cour européenne des Droits de l'Homme, et à travers cela, les différents niveaux de gouvernance démocratique et les institutions indépendantes. C'est un espace unique pour une plateforme multipartite pour développer des solutions opérationnelles, partager des bonnes pratiques, et assister les Etats membres dans la mise en place des plans d'action bien concrets et progressifs. Dans ce sens, nous encourageons les Présidences successives du Comité des Ministres à définir les questions environnementales comme une priorité.

Il s'agit avant tout d'une volonté politique pour aller de l'avant et le consensus est déjà existant car cela concerne directement la réalisation des objectifs du développement durable. La dimension environnementale vue par le prisme des droits humains englobe également la protection des défenseurs de l'environnement, au même titre que les défenseurs des droits humains et des ONG environnementalistes. La société civile s'est emparée de la cause climatique d'une manière totalement nouvelle. C'est une cause totalement citoyenne qui vise la justice climatique et la justice sociale et qui pose des enjeux démocratiques majeurs pour notre avenir.

Nous célébrons aujourd'hui la Journée internationale des ONG.
Pensons-y!

Happy NGO Day to everyone! Thank you!

## THIRD SESSION

## The way forward

**Mr Christos GIAKOUMOPOULOS**
*Director General*
*Directorate General Human Rights and Rule of Law – (DGI)*

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Monsieur le Président,
Excellences,
Chers collègues,
Mesdames et Messieurs,

Notre Conférence arrive maintenant à un moment particulièrement intéressant, en cet après-midi de travail après l'hospitalité splendide dont les autorités géorgiennes nous ont gratifiés, et pour laquelle nous leur sommes tous reconnaissants.

Ce matin, des déclarations importantes ont été prononcées par les divers orateurs.

- A la suite des rapports très stimulants de M. Boyd et de Mme Lambert, une première session nous a permis de débattre de la complémentarité ou, au contraire, des éventuelles contradictions pouvant survenir dans la protection à la fois de l'environnement et des droits de l'homme.
- La deuxième session nous a ensuite permis de mettre en lumière le rôle dévolu aux élus et à la société civile dans ce double domaine, environnement et droits de l'homme qui, par définition, nous concerne et nous interpelle tous.
- Dans cette troisième session, il s'agit d'être prospectifs : quelle voie suivre au niveau d'une Organisation intergouvernementale comme la nôtre, le Conseil de l'Europe, qui réunit 47 Etats membres et dont la mission est d'élaborer des réponses communes face aux questions affectant plus de 800 millions d'Européens.
- Nos deux thèmes, Environnement et droits de l'homme, transcendent par nature les frontières nationales et se prêtent à ce titre parfaitement à une coopération transnationale.
- Mais cette coopération n'est aujourd'hui plus simplement une option compte tenu de l'urgence du défi climatique. C'est une obligation qui s'impose aux Etats pour répondre de manière efficace à ce défi qui nous affecte tous.

Le Conseil de l'Europe a clairement un rôle à jouer dans le développement de cette coopération, en s'appuyant sur ses normes et instruments, pour certains sans équivalent au niveau européen et même international, et en prenant des initiatives pour les adapter, les renforcer ou les compléter. Nous avons entendu des voix en faveur :

- d'un protocole additionnel à la Convention européenne des droits de l'homme ;
- d'un instrument juridiquement contraignant dédié à part entière à la protection de l'environnement ;
- de ratifications des instruments sectoriels existants ;
- de lignes directrices et des recommandations spécifiques à adresser aux gouvernements de nos États membres…

S'agissant de la Direction Générale des Droits de l'Homme et de l'Etat de droit, e Comité des Ministres a déjà donné un mandat spécifique pour 2020-2021 à l'une de nos principales instances intergouvernementales, le Comité directeur pour les droits de l'homme, le CDDH. Sa Vice-Présidente, qui est parmi nous, en parlera tout à l'heure.

La Vice-Présidente du Comité européen pour les problèmes criminels évoquera pour sa part la Convention sur la protection de l'environnement par le droit pénal, de 1998. Ce traité prévoit en particulier une liste de comportements constitutifs d'infraction, ainsi que des règles communes concernant la responsabilité et la procédure pénale, ainsi que la coopération internationale. Il s'agit à mon sens d'un instrument appelé à jouer un rôle central dans la lutte pour la protection de l'environnement et qu'il importe de revitaliser pour lui donner son plein effet.

Avant même d'évoquer les actions que le Conseil de l'Europe peut mener dans les mois à venir nous aurons la possibilité d'écouter la Présidente du Bureau de la Réunion des Parties de la Convention sur l'accès à l'information, la participation du public au processus décisionnel et l'accès à la justice en matière d'environnement (« la Convention d'Aarhus » ) de 1998, qui place notre problématique dans le contexte mondial.

Je ne peux m'empêcher de signaler que notre Convention du Conseil de l'Europe sur l'accès aux documents publics, ouverte à la signature en 2009, vise le même objectif de faciliter une participation citoyenne éclairée dans les débats d'intérêt public, par un accès approprié aux sources d'information détenues par les autorités administratives de nos Etats membres. Il s'agit à l'évidence d'un outil qui a toute sa place dans la problématique qui nous occupe aujourd'hui à travers l'information du public sur les questions environnementales et je voudrais appeler tous les Etats membres qui ne l'ont pas encore fait à ratifier cette Convention.

La Recommandation du Conseil de l'Europe sur les droits de l'homme et les entreprises est tout aussi pertinente. Elle demande que les Etats membres appliquent toutes les mesures jugées nécessaires pour exiger le respect des droits de l'homme par toutes les entreprises exerçant des activités sur le territoire de leur juridiction. Cela implique que les États membres exigent que les entreprises réalisant des activités commerciales significatives dans leur juridiction montrent une diligence raisonnable en matière de droits de l'homme à l'égard de ces activités, incluant des évaluations de l'impact sur les droits de l'homme de projets spécifiques, selon la taille de l'entreprise ainsi que la nature et le contexte de l'opération. La question de l'impact environnemental des activités des entreprises s'y rattache directement.

Il est évident que l'efficacité de toutes les actions envisagées par le Conseil de l'Europe dépendra de leur accompagnement en matière d'éducation et de formation professionnelle. C'est pourquoi, le programme de formation paneuropéenne, le programme HELP, a déjà planifié de préparer un cours en ligne dédié spécialement aux droits de l'homme et l'environnement qui sera mis à disposition de nos Etats d'ici l'année prochaine.

Je voudrais conclure en évoquant l'esprit de coopération qui préside aux travaux du Conseil de l'Europe.

Si nous voulons faire œuvre utile au sein de notre Organisation dans un domaine si vaste où toute initiative semble d'entrée en deçà des besoins réels, il faudra mener un travail collectif qui optimise nos ressources budgétaires et humaines, une synergie entre nos divers services et entités avec le soutien des Gouvernements, mais aussi des représentants de la société civile.

La présente Conférence constitue à mon sens une étape importante dans cette direction. Elle devrait nous mener, au-delà des déclarations générales, à établir une feuille de route pour les activités du Conseil de l'Europe pour quelques années à venir. Une feuille de route contenant des actions, notamment conventionnelles, tangibles qui adapteront le cadre juridique et opérationnel paneuropéen aux impératifs croissants de protection de notre planète. Un cadre qui renforcera les recours effectifs contre des violations, les volets pénal et civil, le volet social, l'accès aux informations, la prévention et, bien évidemment, l'éducation et la formation professionnelle.

Nous attendons donc, avec impatience, les interventions à venir sur tous ces sujets, ainsi que la déclaration finale de la présidence géorgienne qui semble vouloir esquisser un plan d'action pour le Conseil de l'Europe en matière de droits de l'homme et l'environnement.

Je vous remercie.

## Ms Maya BITADZE

*Deputy Mayor of Tbilissi, Chair of the Bureau of the Meeting of the Parties of Aahrus Convention, UNECE*

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*Apologised*

## Ms Katariina JAHKOLA

*Vice-Chair of the European Committee on Criminal Problems (CDPC)*

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Dear colleagues, Ladies and Gentlemen,

First of all, allow me to thank the Georgian Presidency of the Committee of Ministers of the Council of Europe for inviting me to present the work of the European Committee on Crime Problems, the CDPC, at this Conference.

It is a great pleasure for me to participate to the third session of this High-level Conference on Environmental Protection and Human Rights. This is an issue which is - or at least should be - for all of us citizens of the World of a high priority. I am impressed to see today so many distinguished public figures from the Council of Europe, from its different member States as well as from other International Organisations. This is clearly a good sign showing that the protection of the environment is at the heart of our policy debate.

Science is unequivocal. Nature is being destroyed faster than ever. There are huge concerns about the irreversible damage that environmental crimes are causing to the only planet we have. To give you just a few figures, illegal trafficking in wildlife threatens a third of the world's species and over 80% of global wastewater is released untreated filling the ocean mainly with plastic waste and killing more than 100,000 marine animals per year.

These crimes not only threaten our ecosystems and the survival of thousands of plant and animal species, they do cause many diseases that reduce life expectancy and ultimately, they cause the death of millions of human beings. According to the World Health Organisation, almost 20% of all deaths in the European continent are a result of living or working in an unhealthy environment.

In addition to the tremendous damage they cause, environmental crimes are hugely lucrative. Europol estimates the annual value of transnational environmental crime from 70 to 213 billion USD per year.

While these highly lucrative and dangerous activities have, in most cases, an international dimension, there is no single, strong international legal instrument which includes specific criminal offences and related criminal sanctions to counter environmental crimes across member states. The current legal framework is not enough, including the 1998 Council of Europe Convention on the protection of the environment through criminal law, which never entered into force. Perpetrators, including organised criminal groups, are taking advantage of the existing loopholes in environmental law to illegally discharge oil in rivers, to flood fields with illegal pesticides or to trade illegally with endangered species.

As Vice-Chair of the CDPC, let me inform you that the CDPC will not remain passive in front of such terrible crimes. We have already begun considering this emerging threat and we are currently discussing which future steps are necessary to protect the environment through criminal law in a more effective way. This is still a work-in-progress, thus I'm not able to anticipate the outcome.

However, one of the elements that is being discussed is how best to strengthen international judicial cooperation, including amongst law enforcement, to counter more effectively environmental crimes. Special attention will be given to environmental crimes linked to organised crime and to those crimes related to transboundary pollution.

No State in Europe is immune to environmental crimes, even when they do not occur in their territory. Environmental crimes know no boundaries. Hence, a pan-European response is needed. When combating environmental crime, I would like to emphasise the need for effective and wide-ranging measures, including preventive measures, as well as extensive multidisciplinary efforts and cooperation. In addition, we should join our forces and strengthen the capacities of our criminal law "tool-box" to stop environmental crimes and the damage they cause, and to eliminate safe havens for perpetrators. If the CoE and the EU are to be leaders in countering climate change, the dissuasive force of criminal law should be used to give a joint and coordinated Continent-wide response.

Fortunately, we are in the right place at the right time: momentum exists, especially from the youth, to change the *status quo.* The Council of Europe is the ideal forum to transform this momentum into reality.

Ladies and Gentlemen,

It is our individual duty as well as our shared responsibility to find effective solutions that will strengthen the criminal justice response to environmental crimes. The CDPC, which is the premier CoE standard setting body in the area of criminal law, will, I am sure, be up to the challenge.

Thank you for your attention.

## Ms Kristīne LĪCIS

*Vice-Chair of the Steering Committee for Human Rights (CDDH)*

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Mister President,
Excellencies,
Dear Colleagues,
Ladies and Gentlemen,

- This Conference raises crucial issues, and my primary and spontaneous wish would be to express my views as a lawyer, as a European citizen, as simply a human being…
- Today, the protection of the environment appeals our individual and collective consciousness in ways that we had not thought before.
- Whether or not you agree with Greta Thunberg's passion in her speeches or her movement, we cannot be indifferent to the expectations, demands and action that our youth puts in front of us.
- It is our duty to face and live up to their expectations.
- The protection of the environment is no longer vague or unenforced international regulation. Cases regarding the impact of pollution on the enjoyment of our human rights are already been litigated before the Strasbourg Court. Professor Lambert has rightly drawn our attention to the case *Cordella and Others v. Italy*. The application was lodged by 161 victims, but 265 000 people were potential victims of the same pollution. [54]

[54] European Court HR, Nos. 54414/13 & 54264/15, 24 January 2019.

- What future action should the Council of Europe take in the field of environmental protection? The idea of drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment is ambitious. [55] I might wish to intervene later on in discussions on this issue.
- However, my task here is to briefly present the envisaged work on environment and Human Rights in 2020 and 2021 within one of the most prominent intergovernmental entities in the Council of Europe: the Steering Committee for Human Rights (the CDDH).
- Indeed, this Committee of high-level legal experts has been entrusted by the Committee of Ministers last December with the task of updating the *Handbook on Human Rights and the Environment* and, if appropriate, developing a draft non-binding instrument of the Committee of Ministers (e.g. recommendation, guidelines) recalling existing standards in this field.
- This work should be based on developments in the member States, within the Council of Europe and in other fora.
- To this end, a Drafting Group on human rights and the environment will be set up by the CDDH in June this year. The idea is to involve in it not only member States and representatives of international organisations and civil society, but also, in the light of its transversal nature, all the relevant sectors in the Council of Europe, namely the Registry of the European Court of HR, the Secretariat of the Social Charter, the representatives of other interested steering committees and conventional bodies, the HR Commissioner, the Parliamentary Assembly, the Congress of [local and regional authorities], etc.
- Last November, the CDDH welcomed the initiative taken by the Georgian government to convene the present event which should "constitute an excellent basis for the CDDH's work". I am convinced on this. Our work will start next autumn by an updating of the Handbook and the we will see how far we could go in standard-setting in order to help our member States to promote and respect, at the same time, both HR and environment.

[55] The idea was launched by Parliamentary Assembly more than ten years ago Cf. Parliamentary Assembly Recommendations 1431 (1999) and 1885 (2009); it was also mentioned by dr. Boyd in his report.

## Ms Snežana SAMARDŽIĆ-MARKOVIĆ

*Director General, Directorate General of Democracy - (DG II)*

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Your Excellencies,
Dear Colleagues,
Ladies and Gentlemen,

Allow me first to share with you some thoughts related to the fundamental mission of my Directorate General and the topic we have been discussing for the last 2 days.

At DGII we are pursuing a long and strategic goal: Safeguarding and Realising a Genuine democracy. It was the dream of our founding fathers and it continues to have high relevance in front of new challenges that democratic societies face nowadays.

One of them is **environment and democratic participation**
Why?

Democratically governed societies cannot be achieved and maintained without effective nature conservation policies. Indeed, nature is the foundation of the functioning of the ecosystem services which provide the most fundamental conditions of human existence, namely water, food and clean air. It is therefore crucial to raise awareness of this dependence, and to protect nature and biodiversity, in order to maintain a healthy planet and contemporary societies, for present and future generations.

On the other hand, in order to build better democratic societies, we need good governance, participatory processes, dialogue, and inclusive societies. By encouraging dialogue between citizens and authorities at all levels, we aim to increase societies' resilience to climate change.

One of our best examples is The Bern Convention on the Conservation of European Wildlife and Natural Habitats that has, since 1984, improved this dialogue with its case-file system; a procedure which allows NGOs and private citizens to submit a complaint regarding breaches of the Convention. This system has proven a successful problem-solving and democratic participation instrument. Promoting a culture of participatory rights guarantees the existence of fair societies where people can be informed of the potential risks around them and act accordingly.

My second remark concerns **human rights and "landscape"**

The "right to landscape", as an extension of human rights to the environment, is becoming a combination of environmental and cultural rights, presenting new aspects to be considered.

The landscape concept implies recognising the rights and responsibilities of populations to play an active role in the process of acquiring knowledge, making decisions and managing the quality of the places where they live.

And within the framework of DGII, the European Landscape Convention is another powerful instrument, strongly linked to this because it promotes the protection, management and planning of landscapes and organises international co-operation on landscape issues.

The Convention has recently focused on public policies concerning water, landscape and citizenship in the face of global change, and thus aimed to raise awareness of these contemporary environmental issues. The Convention states that *"The Landscape has an important public interest role in the cultural, ecological, environmental and social fields…"*.

The Emerald Network of Areas of Special Conservation Interest and the European Diploma for Protected Areas also promote participation and diversity at a Pan-European level by encouraging good management of protected areas.

My third remark is related to **human dignity**

Disaster displacements are increasing, due to the impact of climate change and environmental degradation: the number of people moving is increasing worldwide.

The Directorate has thus a key role to play in protecting the dignity of displaced persons. In this respect, the European and Mediterranean Major Hazards Agreement has focused its activities on the resilience of vulnerable groups such as migrants, asylum seekers, refugees, people with disabilities and children. The Agreement encourages an inclusive and human rights approach, supports projects in the field and provides recommendations for the protection of vulnerable persons.

**Concerning the way forward, the main topic of this third session**,

I firmly believe that the Council of Europe and its Directorate General of Democracy has the relevant knowhow, instruments and networking to address the vital relationship between environmental challenges and democracy.

This includes both the aspect of democratic governance of our responses to climate change and other environmental challenges, as well as the impact of public concerns, anxieties and criticisms related to environmental issues for the functioning of our democracies.

Concern for the environment has become one of the main mobilising factors among citizens, and especially young people, yet many mistrust or refuse to act within, or interact with, institutions of representative democracy. This is a challenge, but also a potential opportunity for strengthening our democratic processes.

The Council of Europe, with its legal instrument and policies in various pertinent fields, has an important role to play in this regard.

As stated in the Directorate's priorities, "*Citizen participation is the lifeblood of democracy*", and this clearly also includes the environment that we all share.

To conclude, much has been done in the field of environmental protection and human rights through the Council of Europe's instruments of international co-operation, but clearly this is now no longer enough.

The challenges ahead are bigger than we expected, and the traditional media and social media are alarmingly alerting us on the need for further action.

I look forward to strengthening intergovernmental co-operation and cross-sectoral activities on these important topics within the Council of Europe, in collaboration with partner organisations and civil society, because the way forward depends on our collective endeavours.

It is undeniably initiatives such as this high-level conference that allows the Council of Europe to move forward.

We are all looking forward to the next chapter in this significant, and urgent, field of intergovernmental co-operation where citizens and their environment are at the centre of our focus.

Thank you for your attention.

**Ms Jana DURKOSOVA**

*Chair of the Standing Committee of the Bern Convention*

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Your Excellencies,
Dear Colleagues,
Ladies and Gentlemen,

I am grateful for having an opportunity to address this Conference on Environmental Protection and Human Rights on behalf of the Bern Convention.

- 40 years ago, the Bern Convention on the Conservation of European Wildlife and Natural Habitats started as a legal tool for promoting cooperation and harmonisation of biodiversity policies in whole Europe. It was a real pioneer in many specific issues such as the invasive alien species, eradication of the illegal killing of birds, relations between protected areas and climate change, etc.
- Over 40 years a lot has been achieved in terms of setting new European standards in nature conservation, developing specific Action Plans for the selected species, supporting trans-border partnerships, establishing experts groups so important for networking and for preparing recommendations and resolutions as well as an European Diploma so far granted to 74 protected areas from 29 countries. I would also like to mention a unique case – file system and establishing international cooperation initiatives, including with the society - non-governmental sector and the academic community.
- NGOs have always played an important role in the Bern Convention. They have participated actively in the expert groups as well as in the meetings of the Standing Committee. Their work has been to a large extent integrated in the decision-making process. *So the Bern Convention is both the unique platform for close co-operation between Governments on nature conservation issues and an important forum for a necessary win-win dialogue between Governments and NGOs; something that has proven to be invaluable throughout the years.*
- In the last two decades the Bern Convention has adjusted to new thinking, to new challenges such already mentioned climate change and provided an important legal instrument for nature conservation in and outside the EU and in African states sharing migratory species. In this respect I need to mention development of the EMERALD network of over 1 000 from 14 countries protected areas that is a younger “sister” to the EU NATURA 2000 ecological network.

- Unfortunately, in spite of all our efforts, it is clear today that the loss of biodiversity has been a major challenge for our society and our Planet. Biodiversity loss undermines all efforts to improve economic, social, health, and environmental well-being, worldwide as well as in Europe. This is due to the close link between nature and the many vital ecosystem services it provides for humans and for human rights.
- Indeed, human rights and environmental protection are closely interdependent. While a safe, clean and healthy environment is essential for the enjoyment of human rights, the exercise of human rights including the right to freedom of expression, education, participation and remedy is crucially vital to the protection of the environment.
- The European Convention on Human Rights is more relevant than ever in the current debate on climate change. Environmental damages directly threaten the right to life, to health, to water, to development, to housing, to work, to culture. Affected populations have the right to be protected from adverse environmental impacts, such as polluted water, soil and air, deforestation, and displacements that result from desertification or floods caused by climate change.
- At present the Bern Convention counts 51 Contracting Parties, including the European Union and other European states and 4 African countries. They keep joining their efforts to ensure effective and fair nature conservation at the Pan-European scale, therefore significantly contributing to the achievement of both the UN Biodiversity Targets and Sustainable Development Goals at the regional level. The Bern Convention implementation enhances democracy and the quality of life on our continent, thus working not only for the sake of wildlife but for the sake of humankind.
- To make progress it is imperative that the Bern Convention continues as a magnificent laboratory of ideas for the future of biodiversity conservation in Europe, being the only and very well-functioning multilateral agreement at the Pan-European level.
- I am very proud to represent the Bern Convention here. It is a very innovative and effective legal instrument to achieve our common aims to conserve the natural and landscape heritage of Europe and beyond. It is also an important regional implementation tool for the global UN Convention on Biological Diversity.
- Let me therefore thank you very warmly for the support that the contracting parties, the Council of Europe and NGOs provide to the Bern Convention. This support is crucial at this moment to ensure the Convention continues to protect nature and for the people's well-being. Thank you for your attention.

**Ms Krisztina KINCSES**

*Chair of the Council of Europe Conference on the European Landscape Convention*

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Ladies and gentlemen,

This year commemorates the 20th anniversary of the European Landscape Convention, the first international treaty devoted to sustainable development. There are now forty States, parties to the Convention, who have committed to the protection, management and planning of European landscapes and co-operation on these.

In undertaking this commitment, recognising the landscape as an essential component the natural environment, it ensures not simply the well-being of the landscape but also the well-being of people. The focus of the Landscape Convention is, ultimately, on human well-being, whose territorial dimension, the landscape, a mosaic of four dimensions of sustainable development (natural, cultural, social and economic), must be an important subject of national policies.

The Convention refers to and conveys the Council of Europe's values: sustainability, the principle of subsidiarity, the need to use democratic instruments. It defines concepts of landscape, landscape policy, landscape quality, landscape protection, and landscape management, because of the different approaches and shortcomings of national legal systems. Importantly, the premise of the Landscape Convention is to take all landscapes into consideration, regardless of these condition or legal status. It does not imply that the same measures and policies must be applied to all landscapes. Measures should be adapted to each landscape as well as a need to various forms of treatment at local level.

The Convention lays down general and specific measures leaving the Parties the choice of means to fulfil their obligations without any derogation but must recognise landscapes in law, as an essential component of people’s surroundings, an expression of the diversity of their shared cultural and natural heritage, and a foundation of their identity. In doing so, establishing procedures for the participation of the general public, local and regional authorities, and other parties with an interest in the definition and implementation of the landscape policies is fundamental. Importantly, as a general measure, the landscape, as a territorial dimension of the implementation of policies, and their area of impact, should be integrated in all policies which may have a direct as well as an indirect impact.

The Convention recognises that landscape has no frontiers and the future holds great potential for more cooperation between bordering countries. Preserving the special characteristics that exist across borders, ensuring comprehensive and sympathetic management happens on both sides, will require that landscape to be considered at an international level. However, in more general terms, landscape must become a mainstream political concern since it plays such an important role in the well-being of people, their quality of life, and their future. Well-conceived policies will help to combat climate change and poor air quality.

Giving people an active role in decision-making on landscape, will help them identify with the areas and towns where they live. A good experience in the participatory planning process will ensure their continued involvement helping to promote sustainable development and respect of the area concerned, appreciating and enjoying a landscape that has an important bearing on social initiatives and economic success.

However, to achieve this, a multi-disciplinary, cross sectoral approach is also required, giving greater recognition to the expertise in landscape design, planning, science and management which can contribute hugely to a more holistic approach. Failure to do this, will not simply be ineffective, inefficient and counter-productive but also not in the public interest.

We are at a crucial moment in time, largely brought about by climate change. We already know the effects this is having on the health of natural communities, but some of the greatest changes will be experienced in urban and peri-urban areas.

I believe that it is crucial to devise broad-ranging plans for the protection, management and planning of all landscapes, incorporating these plans in specific comprehensive strategic documents, in which the condition of the landscape and the triggering effects for change can be handled together. To do this it will be necessary to explore and understand causal effects and consequences, to determine responsibility, and to plan for change.

To this end, the Convention is contributing to the achievement of the Agenda 2030 for Sustainable Development, in particular with regards to:

- Good Health and well-being;
- Sustainable Cities and Communities;
- Climate action;
- Life on land, and
- Peace, Justice and Strong Institutions.

Let us work together, not simply for individual communities but for Europe as a whole.

Please, consider landscape in all decision-making processes; adapt and apply the recommendations of this treaty for our health, well-being and, most importantly, for future generations. And, please, guarantee the right to participation by the general public, local and regional authorities, and other relevant parties with an interest in the definition, implementation and monitoring of landscape policies, and set the frame of sustainability by laws based on cross sectoral co-ordination and the expert knowledge of a wide range of professions.

Thank you for your kind attention.

**Ms Anja OLIN PAPE**

*Chair of the joint Council on Youth (CMJ) and the Advisory Council on Youth (CCJ)*

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Human rights - environment and youth.

Beautiful people, excellencies! A long day is coming to an end, and as one of the last speakers I am here to represent the voice of young people, and being from Sweden, you can imagine who I turn to for inspiration. Greta, and millions of young people like her, are restlessly advocating for urgent action to combat the climate crisis.

The protest movement against climate change championed by young people is taking the world with storm.

It is quite clear, that no single country is doing enough to combat climate change. And the arenas where we are gathering to cooperate are not adequate for accelerating the actions needed. The political will and commitment must be enhanced and concretely turned into action, such as pushing forward an additional protocol for the European charter and binding conventions.

The environmental crisis does not respect any national boarders, and does not care about reelections, or quarterly reports for that matter. And frankly, neither does most young people. It is our lives who are at stake. And the only way forward is to find common, regional and universal solutions, today. Therefore, I would say it is crucial that steps are taken towards an institutionalized, binding agreement making a healthy environment a right for everyone.

I'm hoping that you all walk away today, with a reaffirmed commitment and will to strengthen the Council of Europe's response to the climate crisis. It is crucial that our multilateral arenas manages to deal with this issue in an effective and decisive way, because the consequences are not only a climate catastrophe, with all that that would entail, but also a complete loss of trust in democracy and multilateralism, something the Council of Europe relies on.

The momentum that young people are bringing to the discussion of environment must be met with dignity and respect. Young people speaking truth to power must be protected and promoted. The reality for many young human rights defenders across Europe is very different today. They face severe threats against their freedom of expression and association and the legal regulations in place are many times used to oppress, not to enable a constructive dialogue.

The staggering opposition and hate many of the young activists are facing today is similar to the resistance we have seen increase towards facts and research. The post-truth era, conspiracy theories and alternative facts are used as weapons against the common solutions, the public constructive dialogue and disables the joint forces of knowledge and engagement to finding the solutions of tackling the global catastrophic risks humanity is facing.

Democracy must be strengthened, and we have to ensure that facts and research is the foundation for the decisions that must be taken, not skew propaganda from those with the biggest economic interests. How can you as people with power ensure that a young generation fighting for our earth's survival are not lost to mistrust and anti-democratic movements? We have to at every cost find ways to engage with one another – and we have to meet the young people's demands for climate justice.

Young people's political engagement is increasing, and this opens up tremendous opportunities for finding the solutions we so desperately need. But in order to implement and enforce the solutions we already have at hand, and solutions to be discovered – we have to reinforce the mechanisms we have in place to resolve this.

Over the decades, the Youth Sector of the Council of Europe has been supporting thousands of young people to become active European citizens who advocate for human rights, rule of law and participate fully in democratic life. Many became multipliers of these values in their countries and communities. They and we are living proof of the deep and lasting impact of the learning and life-changing encounters in the European Youth Centers here in Strasbourg and Budapest.

As was said here earlier today, the council of Europe is the ideal forum to change the momentum that young people are bringing to this topic into action. It is now up to you to deliver, but it is not a question that should divide generations. It is an issue and fight that should unite us. The Council of Europe Advisory Council on Youth stands ready to work with you here in the organizations, and young people across Europe are ready to work with public authorities, politicians and governments to find the solutions we so desperately need.

## TESTIMONY BY THE SPECIAL GUEST

**Mr Laurent FABIUS**

*President of the Constitutional Council (France)*

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Madame la Secrétaire générale,
Monsieur le Ministre,
Mesdames et Messieurs les présidents,
Mesdames et Messieurs les directeurs,
Mesdames et Messieurs,

Il y a un an, l'honneur m'était fait d'être invité à m'exprimer lors de l'audience solennelle de la Cour européenne des droits de l'homme. A cette occasion, j'avais insisté sur l'importance de l'environnement comme défi grandissant partagé par les Cours gardiennes des droits et libertés fondamentales. La conférence de ce jour organisée par la Présidence géorgienne que je félicite pour son initiative montre combien le droit en général, et les droits de l'homme en particulier, ont un rôle crucial à jouer dans la lutte contre la crise écologique. On m'a rapporté la richesse des débats de la journée. Il m'a été demandé, en tant que président de la COP21 à l'origine de l'Accord de Paris sur le climat et actuel président du Conseil constitutionnel français, de livrer un témoignage sur la manière dont le droit peut œuvrer à la protection de la nature et de l'humanité dans son ensemble.

Pour traiter ce vaste sujet, j'envisagerai seulement quelques aspects :

1. Face à l'urgence écologique, les attentes à l'égard du droit sont fortes
2. Les innovations juridiques en faveur de la protection de l'environnement se multiplient
3. Il est nécessaire de nous mobiliser encore davantage pour relever les défis environnementaux

**1°) Face à l'urgence écologique, les attentes à l'égard du droit sont fortes**

L'histoire montre que les désastres, paradoxalement, sont souvent à l'origine de progrès du droit. Tel fut le cas par exemple avec le naufrage du Titanic en 1912 qui a conduit la communauté internationale à adopter la Convention Solas – *Safety of life at sea* -, laquelle définit les normes de sécurité et de sauvetage en mer. Dans le domaine des droits de l'homme, on se souvient qu'au lendemain de la Seconde guerre mondiale les Etats d'Europe soucieux d'empêcher que les atrocités commises se répètent se sont unis et soumis à un mécanisme obligatoire sans précédent de protection des droits de l'homme. La suite est connue, qui a montré le succès de ce que Robert Schuman qualifiait en 1950 de fondation de « la défense de la personne humaine contre toutes les tyrannies et contre tous les totalitarismes ». En matière environnementale – thème qui nous retient aujourd'hui – ayons à l'esprit que la multiplication des marées noires dans le monde à la fin des années 60 a donné lieu à l'adoption en 1973 de la Convention MARPOL pour la prévention de la pollution marine par les navires.

Ces précédents du recours au droit pour éviter que d'autres catastrophes se produisent expliquent qu'aujourd'hui, face à l'ampleur de la crise écologique, les appels en direction du droit se fassent de plus en plus puissants. Personne - en tous cas personne de raisonnable - ne peut plus contester que la situation soit inquiétante. Pour l'environnement, bien sûr : la destruction des espèces vivantes se produit à un rythme sans précédent depuis l'extinction des dinosaures ; le réchauffement climatique pourrait atteindre 7°C d'ici la fin du siècle si rien n'est fait pour limiter les émissions de gaz à effet de serre. Au-delà, c'est l'humanité tout entière qui est concernée. Les atteintes à l'environnement causées par les activités humaines entraînent des conséquences graves sur la santé, l'emploi, l'économie, la stabilité de régions entières. Ce sont souvent les populations les plus vulnérables qui en pâtissent le plus. Pour en sortir, beaucoup se tournent vers le droit. En France ou en Suisse, certains appellent à faire entrer le climat dans la Constitution pour mieux le protéger ; d'autres proposent même de reconnaître l'écocide comme nouveau crime contre l'humanité. Les actions en justice pour faire rempart aux dommages causés par l'homme à l'environnement augmentent. Dans le seul domaine climatique, on dénombrait fin 2019 près de 1.500 affaires dans le monde.

La saisine du juge est fréquemment motivée par la volonté d'accélérer et de renforcer les transformations du droit pour le mettre à niveau des défis environnementaux.

**2°) Les innovations juridiques en faveur de la protection de l'environnement se multiplient**

Les transformations du droit destinées à renforcer la protection de l'humanité face aux dommages environnementaux se trouvent fréquemment soumis au juge.

Elles concernent l'objet même de la protection, à savoir l'environnement, qui a parfois été hissé au rang de sujet de droit, à l'image du Gange et de l'Himalaya en Inde ou de la forêt amazonienne en Colombie. Le plus souvent, l'environnement a été intégré dans le giron des droits de l'homme, puisque, en protégeant l'environnement, ce sont aussi les droits de l'homme que l'on protège, à savoir la santé, la sécurité et, au-delà, la dignité de la personne. La Cour européenne des droits de l'homme l'a bien compris qui, comme l'a rappelé le Président Sicilianos ce matin, après avoir longtemps assuré une marge d'appréciation étendue aux Etats, recherche désormais davantage si les pouvoirs publics ont bien pris en compte les considérations de protection de l'environnement.

D'autres innovations juridiques concernent les rapports du droit à l'espace, et plus particulièrement la prise en compte de la spécificité des dommages environnementaux qui ne s'arrêtent pas aux frontières. Ainsi, dans la fameuse affaire Urgenda, la Cour suprême des Pays-Bas dans sa décision du 20 décembre 2019, a ordonné à l'Etat néerlandais de réduire ses émissions de gaz à effet de serre d'au moins 25 % d'ici la fin 2020, écartant l'argument qui prospérait jusque-là dans ce type de contentieux, selon lequel un Etat ne saurait être tenu responsable d'un phénomène global causé par l'action cumulée de tous les Etats du monde. Récemment, le Conseil contitutionnel français a été saisi d'une loi qui prévoyait que des pesticides interdits en France car jugés toxiques par l'Europe, ne pouvaient pas faire l'objet d'exportations à destination de pays non-européens. Les requérants reprochaient à ce texte de porter une atteinte disproportionnée à la liberté d'entreprendre, soulignant notamment que d'autres Etats continuaient, eux, à exporter ces produits non homologués. La décision que nous avons rendue avec mes collègues le 31 janvier dernier a été qualifiée d'avancée notable pour l'environnement. Pour le première fois, nous avons hissé la protection de l'environnement, « patrimoine commun des êtres humains », au rang de norme constitutionnelle élargissant *de jure* la marge de manœuvre du législateur pour limiter certains droits au nom de la protection de l'environnement. En l'occurrence, nous avons déclaré la loi conforme à la Constitution : en bref si un produit est un poison en Europe, il le reste si on l'exporte vers l'Afrique.

Il sera intéressant de suivre les évolutions à venir de la jurisprudence d'autres Cours pour mesurer si et dans quelle mesure elles aussi pourraient accepter d'appréhender la protection de l'environnement dans sa dimension internationale, ce qui renvoie à la question de l'extraterritorialité des décisions.

Quant à l'extension de la portée dans le temps des activités dommageables pour l'environnement, elle a pu justifier la reconnaissance par le juge d'une extension de la portée des devoirs de l'homme envers l'avenir. Cela ressort spécialement de la décision de la Cour suprême de Colombie d'avril 2018, par laquelle la Cour a ordonné au gouvernement colombien de mettre fin à la déforestation, lui rappelant son devoir de protéger la nature et le climat au nom des générations présentes et futures.

Une autre illustration du pouvoir créateur du juge en faveur de la protection de l'environnement apparaît dans la décision rendue il y a quelques heures par la cour d'appel d'Angleterre et du Pays de Galles à propos du projet d'extension de l'aéroport d'Heathrow. Pour les juges, je cite, « Le gouvernement, lors de la publication de [son projet] n'avait pas pris en compte ses propres engagements politiques fermes sur le changement climatique dans le cadre de l'Accord de Paris ». Cela, de l'avis des juges est « juridiquement fatal [au projet] dans sa forme actuelle ". On voit ici le juge, pour la première fois, se référer directement à l'Accord de Paris.

Les exemples qui précèdent montrent que, en matière de renforcement de la protection de l'environnement les juges peuvent beaucoup, mais ils ne peuvent certainement pas tout. A cet égard, le rejet le 17 janvier dernier du recours climatique déposé par 21 jeunes contre l'Etat fédéral américain est significatif. Les requérants considéraient que le gouvernement fédéral avait manqué à son devoir de les protéger contre les effets du dérèglement climatique, bafoué leur droit constitutionnel « à la vie, la liberté et la propriété » et ils demandaient la reconnaissance du « droit constitutionnel à un climat vivable ». Le rejet de leur requête est emblématique des limites du pouvoir du juge à faire injonction à l'Etat de modifier sa politique environnementale. La motivation retenue par la Cour est claire, je cite : « à contrecœur, nous concluons qu'un tel dossier dépasse notre pouvoir constitutionnel. L'imposant dossier de réparation constitué par les plaignants doit être présenté aux organes politiques du gouvernement ».

**3°) Il est nécessaire de nous mobiliser encore davantage pour relever les défis environnementaux**

Au-delà des juges, l'importance des enjeux environnementaux nécessite de mobiliser tous les acteurs du droit au premier rang desquels les Etats. Plus particulièrement, face à des problèmes transfrontaliers, une réponse globale et harmonisée est souhaitable. A l'échelle de l'Union Européenne, la nouvelle Commission européenne l'a bien compris, qui a posé récemment

les bases d'un Pacte vert, doté d'un volet juridique ambitieux. Ce Pacte vert envisage d'accroître le suivi de la mise en œuvre des politiques et législations européennes afin de s'assurer que les objectifs environnementaux sont atteints, et d'améliorer l'accès au juge pour les citoyens et les ONG qui souhaitent discuter la légalité des décisions comportant un impact sur l'environnement. Par son ambition, on ne peut qu'appuyer la Déclaration finale de la Présidence géorgienne de ce jour convaincue du « rôle clef du Conseil de l'Europe dans l'intégration de la dimension environnementale dans les droits de l'homme » et qui encourage les Etats membres à développer leur législation pour contribuer à un futur durable.

Certains proposent d'aller au-delà d'une protection indirecte de l'environnement par la ConventionEDH, cela pourrait prendre la forme d'un protocole additionnel à la Convention pour consacrer un droit à un environnement sain, ou encore d'une Convention globale dédiée à la protection de l'environnement. Je note que ce type de propositions d'adoption d'un instrument juridique contraignant destiné à relever et à harmoniser le niveau de protection de l'environnement se retrouve à l'échelle internationale. Dans le prolongement de l'adoption en 1966 à l'ONU des deux Pactes internationaux visant à renforcer, l'un, les droits civils et politiques, l'autre, les droits économiques, sociaux et culturels, il a été proposé d'adopter en ce sens un Pacte mondial pour l'environnement en faveur des droits environnementaux. Une telle proposition se justifierait d'autant plus que l'on constate que l'Accord de Paris, adopté en 2015 sous ma présidence à l'occasion de la CO21 n'est malheureusement pas respecté par nombre d'Etats signataires.

Face aux propositions d'adoption de nouveaux instruments régionaux ou internationaux contraignants dédiés à la protection de l'environnement, certains Etats ont manifesté des doutes et des réticences. L'argument parfois invoqué est la menace que ferait peser le droit supranational sur leur souveraineté. Mais l'urgence écologique mondiale ne va pas être résolue par elle-même, sans intervention des Etats. D'autres avancent que de tels instruments présenteraient un risque de régression par rapport au niveau général actuel de protection de l'environnement, du fait des aléas des négociations : l'argument apparaît peu convaincant, tant ce type de mécanismes vise justement à consolider les principes du droit de l'environnement vers une meilleure protection de l'environnement et des générations futures.

L'adoption de tels instruments n'est pas facile, mais elle pourrait être bénéfique pour les citoyens, pour les entreprises et pour les Etats. Pour les citoyens, en renforçant la garantie de leurs droits environnementaux vis-à-vis des Etats. Pour les entreprises, en permettant de créeér un espace normatif cohérent où des règles environnementales communes s'appliquent

à tous, en renforçant la prévisibilité et la sécurité juridiques. Pour les Etats, en créant une dymanique normative favorable à la protection de l'environnement, renforçant ainsi leur légitimité et leur stabilité, dans le contexte d'une mobilisation citoyenne croissante et dans le respect des spécificités locales, notamment culturelles et économiques. Pour construire le droit de demain de la protection de l'environnement, rappelons-nous l'histoire de la protection juridique des droits de l'homme qui a débuté en 1948, par un texte universel non contraignant, pour devenir, en 1950, un texte régional de droit dur.

Mesdames et Messieurs, je souhaite que, à l'échelle régionale, le soixante-dizième anniversaire de la ConventionEDH en 2020, et à l'échelle internationale, le cinquantième anniversaire de la déclaration de Stokholm en 2022 soient l'occasion de renforcer notre mobilisation en faveur de progrès du droit pour l'environnement. Les Cours gardiennes des droits et libertés fondamentales ont déjà montré leur capacité à se mobiliser en ce sens. Puissent les Etats les accompagner !

## Mr Levan DAVITASHVILI

*Minister of Environment Protection and Agriculture of Georgia*

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***CLOSING REMARKS***

Dear attendees,

Firstly, I would like to express my honest appreciation towards the views exchanged between the participants of this conference. I am very pleased to hear from you the valuable arguments in respect of the importance of interrelation between the human rights and environmental protection.

Now, as a reflection of our common interests in the form of final remarks, let me introduce the Draft Final Declaration on the Protection of Environment and Human Rights prepared within the framework of High-level Conference organised by the Georgian Presidency of the Committee of Ministers.

The Draft Declaration shares the spirits of international human rights protection instruments such as the **Universal Declaration of Human Rights** and the **European Convention on Human Rights** which maintain the paramount importance in ensuring the protection of fundamental human rights and freedoms.

As it was already mentioned in several occasions, the European Convention has led the member states of the Council of Europe to establish the standards relevant to the European Values in the spectrum of environmental issues. This statement was echoed in the draft Declaration and was expressed in the following form: "*The European Convention on Human Rights has already served to protect individuals and the society at large in many cases of environmental damage. The European Social Charter is also of great relevance to environmental issues through its protection of social rights."*

The Declaration on the Protection of Environment and Human Rights presented by the Presidency of the Committee of Ministers creates the certain strategy which covers awareness raising, targeted cooperation programs, Development of National Policies and Actions and Political Coordination among Member States.

The text of the Declaration contains the provision regarding National legislations, Actions and policies. The document stipulates in this respect *"that the primary responsibility for protecting the environment and human rights rests with Member States. In developing their legislations, policies, strategies and actions, Member States could build upon and implement the afore-mentioned legal instruments and activities of the Council of Europe"*.

The Government of Georgia fully acknowledges the importance of national legislation and for this reason it took several steps in respect of effective implementation to ensure the good governance. I would like to outline a new law - The **Environmental Assessment Code** adopted in 2017 which introduces the principles of the EU Environmental Impact Assessment (EIA) and Strategic Environmental Assessment (SEA) Directives, as well as the approaches of the Convention to the Environmental Impact Assessment in a Transboundary Context (Espoo Convention) and its Protocol on Strategic Environmental Assessment, as well as the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

According to the Code, all activities which are likely to have significant impacts on the environment and human health are the subject of Environmental Impact Assessment. The Code establishes a new comprehensive list of activities subject to the latter. The list of activities are grouped into two annexes based on expected risk and degree of impact to the environment.

At the legal level, let me underline that Environmental Assessment Code has a clear obligation on access to environmental information. The code ensures a higher degree of public participation in environmental decision-making, in particular, public is consulted during the entire process of EIA/SEA.

The newly established SEA system and transboundary environmental impact assessment procedure are contributing to the integration of environmental and human health related aspects in strategic planning and the improvement of transboundary cooperation.

Georgia has been implementing fundamental reforms since 2013. As a party to the Bern Convention on Conservation of European Wildlife and Natural Habitats Georgia has established the Emerald Network of areas of special conservation interest. Reform of forestry, hunting and fisheries sectors are ongoing.

The ongoing process of environmental development in Georgia was triggered by the fundamental amendments in its legislation. As the Environment related rights and obligations are enshrined in the Constitution of Georgia, together with the other relevant laws, it led the Constitutional Court of Georgia in 2013 to conclude that securing the reasonable balance between the use of natural resources and the right of citizens to live in healthy environment had the paramount importance.

The other part of the strategy mentions that the *"Council of Europe should fully employ its resources to raise awareness and devise effective action among decision-makers and the public at large on the critical interplay between the protection of the environment and human rights. This should be pursued in all relevant spheres of its intergovernmental, monitoring and cooperation activities".*

The role of environmental education is of vast importance in all raising the awareness in this sphere. Therefore, one of the main goals of Georgia is to facilitate environmental education and raise public awareness. For these purposes, in 2014 the Environmental Information and Education Centre was established.

Environmental education is crucial to achieve effective public participation for living sustainably and fostering environmentally responsible changes in society.

Georgia has adopted the 5-year National Strategy and Action Plan. The document is expected to advance the profile of environmental education within the educational system, facilitate coordination among stakeholders and raise environmental awareness so that each citizen has a responsible attitude towards the environment and can better contribute to the improvement of environmental awareness and hence, the sustainable development of the country.

Environmental education is one of the important means used to envisage good environmental governance in the country, therefore different programs are implemented to facilitate formal, non-formal and informal education targeting all stakeholders in order to raise environmental education and equip the communities with knowledge and skills needed for sustainable development.

The Draft Declaration finalises with the provision which reflects the idea that we, the member states of the Council of Europe and the organisation as whole in co-operation with the other international institutions are proposed to strengthen the coordination in the sphere of environmental protection through the forthcoming and existing programmes and treaties in order to secure better human rights protection standards in member States.

Once Again, I am pleased to thank all of the participants for attending this event. Georgia is strongly committed to organising main events subsequent to this conference for further enhancement of its opportunity under the Presidency of the Committee of Ministers of the Council of Europe in developing the better environment and human rights standards in member states and in Georgia respectively. Therefore, I would like to announce that in April 9, 2020, the International Conference on Human Rights and Environmental Protection - “Human Rights for the Planet”, will be held in Strasburg, France.

I truly believe that our effort to create better environment for the future generations together with achieving the sustainable development goals will be resulted in significant success.

In conclusion, on behalf of the Government of Georgia, I would like to wish you success in your work aimed at creating effective policy and mechanisms for promotion and protection of universal human rights, with strong emphasis on environmental standards.

I thank you.

## DECLARATION OF THE GEORGIAN PRESIDENCY

A healthy environment is a precondition for the preservation of life on our planet and, therefore, for the very enjoyment by every human being of his or her inherent rights and liberties under the Universal Declaration of Human Rights and the European Convention on Human Rights.

Climate change, extinction of species, loss of biodiversity, pollution and the overall degradation of the earth´s ecosystems have a profound global impact on the enjoyment of human rights and require the widest possible cooperation by all Council of Europe Member States.

The protection of the environment and the protection of human rights are interconnected: one cannot be achieved without the other, nor at the expense of the other. Life and well-being on our planet is contingent on humanity's collective capacity to guarantee both human rights and a healthy environment to future generations.

A sustainable future calls for immediate action in the present.

As the guarantor of our common Pan-European legal space, the Council of Europe has a key role to play in mainstreaming the environmental dimension into human rights and pursue a rights-based approach to environmental protection. Its unique legal instruments provide a solid basis for action on the Continent and beyond.

The Conference highlights, inter alia, the following measures that need to be further considered and pursued.

- ***European Convention on Human Rights and European Social Charter***

The European Convention on Human Rights has already served to protect individuals and the society at large in many cases of environmental damage. The European Social Charter is also of great relevance to environmental issues through its protection of social rights.

The interpretation of these fundamental human rights instruments, which echo the Universal Declaration of Human Rights, has already established a solid link between human rights and environmental protection underlining the obligation of States Parties to take positive action to protect the environment. The European Court of Human Rights and the European Committee of Social

Rights are encouraged to further substantiate their case-law and give priority consideration to complaints involving issues of environmental protection.

When such issues come to the attention of the Committee of Ministers under the Convention and the Charter, the implementation measures to be taken by Member States should be considered as a matter of priority. The case-law developments at the European level should thus inspire national governments and courts to protect the environment through the protection of human rights, including the right to life, health and shelter, as well as the right to private life and the right to receive and disseminate information.

- **Up-grading Pan-European legal standards**

Beyond the Convention on the Conservation of European Wildlife and Natural Habitats (Bern, 1979) and the European Landscape Convention (Florence, 2000), the Council of Europe has developed further legal standards that need to be implemented and upgraded in light of current urgent environmental and climate challenges.

The 1998 Convention on the Protection of the Environment through Criminal Law should be reviewed and updated in order to provide clearer legal obligations and stronger sanctions for environmental crime. The new text should also provide for more effective international cooperation, in particular when organised crime is involved.

The 1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment should also be reviewed to provide more effective protection.

A draft Recommendation of the Committee of Ministers on Human Rights and Environment shall be elaborated by the Steering Committee for Human Rights in 2020-2021 to anchor common approaches among Member States and to explore viable ways forward for further legal developments at both the national and European levels.

States which have not yet done so should consider signing and ratifying, inter alia, the 1998 Aarhus Convention of the United Nations on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters and the 2010 Tromsø Convention of the Council of Europe on Access to Official Documents which guarantee public scrutiny of decision-making on environmental issues.

- **Acting to support Member States in meeting their obligations**

The Council of Europe, as an Organisation aimed at ensuring greater unity among its Member States, could contemplate launching a Council of Europe Strategy on the Environment and Human Rights with the aim of supporting Member States in meeting their obligations in the field, including in respect of the United Nations Convention on Climate Change. This strategy should set clear and enforceable targets, and devise tools for exchanging good practices, challenges and lessons learnt.

Within the framework of this strategy the following actions should be envisaged:

- ***Awareness-raising and professional training***

The Council of Europe should fully employ its resources to raise awareness and devise effective action among decision-makers and the public at large on the critical interplay between the protection of the environment and human rights. This should be pursued in all relevant spheres of its intergovernmental, monitoring and cooperation activities.

The ongoing preparation of an on-line training course under the Council of Europe HELP Programme on human rights and environment is a welcome first step, but further concerted action on different fronts is called for. Other initiatives to promote effective action in this area are encouraged at an institutional level throughout the Council of Europe, including within the Parliamentary Assembly, the Congress of Local and Regional Authorities and the Conference of INGOs of the Council of Europe.

Synergies should be developed with other international organisations, in particular the United Nations, the European Union and the OECD. Partnerships with NGOs and the private sector should also be explored.

- ***Targeted Cooperation Programmes***

The Council of Europe could devise targeted co-operation programmes to support a rights-based approach in the definition and implementation of sustainability policies. Already now, environmental issues could usefully be addressed in the ongoing technical cooperation and assistance activities covering, inter alia, human rights, children and youth, gender, migration, internal displacement, education and the media, as well as in the framework of any action taken as a follow up to Committee of Ministers Recommendation CM/Rec(2016)3 to the Member States on Human Rights and Business.

The Council of Europe Development Bank may wish to explore ways to provide financial and technical support to projects which address environmental issues, taking into account their human rights dimension.

- ***Development of National Policies and Actions***

The primary responsibility for protecting the environment and human rights rests with Member States.

In developing their legislations, policies, strategies and actions, Member States could build upon and implement the afore-mentioned legal instruments and activities of the Council of Europe.

The attainment of a sustainable future is impossible without collaborative and inclusive working relationships of diverse actors including corporations, civil society, human rights defenders and independent human rights bodies. States should explore all possible partnerships with a view to mainstreaming the environmental dimension in the domestic activities for the promotion and protection of human rights. In particular, National Action Plans under the UN Guiding Principles on Business and Human Rights could set up suitable structures, mechanisms and processes to ensure responsible business conduct in respect of both human rights and environment.

- ***Political Coordination among Member States***

Effective coordination should be developed so that Member States of the Council of Europe have greater collective impact in international fora where environmental issues are addressed, building upon the Council of Europe's approach and added value.

As a first step, the Organisation could consider a common approach to contributing to the UN 2030 Agenda for Sustainable Development, starting with good health and well-being (Goal 3). Greater collective action at the European level would set a global precedent and reduce the foreseeable risk of irreparable harm to the human rights of future generations.

- ***Making Council of Europe's activities more environmentally-conscious***

In cooperation with other international institutions, the Council of Europe should set an example by revising its own working methods so as to measure and minimise the negative environmental impact of its activities.

## STATEMENTS BY HEADS OF DELEGATIONS

### ALBANIA

*Ambassador Albana DAUTLLARI, Permanent Representative of Albania to the Council of Europe*

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Thank You Mr. Chairman,

First of all, I would like to congratulate the Georgian Chairmanship for organizing this High-Level Conference as well as setting as priority the promotion of the interrelationship between human rights and environmental protection.

In this context I would like to bring to your attention that the Albanian Chairmanship of OSCE 2020 during its chairmanship will prioritize the environmental protection by supporting projects and initiatives in the area of disaster risk reduction, hazardous waste management, and the protection of the environment in conflict zones.

Albania shares the view that promoting awareness on the human rights implications of environmental problems, as well as the environmental implications of human rights problems is of outmost importance and as such should be in the focus of our national policies.

The harm of environment is a broadly-defined concept, whichmay cover many different types of affecting the environment and thus human rights. Regarding the concept of environmental crime, albanian legislation consideres all the activities that are harmful to humans and environments.

The Law *"On Environmental Protection in Albania"* sets out the framework for providing a high level protection for the environment, its preservation and improvement, prevention and reduction of the human health-associated risks and improvement of the life quality of today and next generations as well as ensuring sustainable development.

Even though Albania has ratified nearly all relevant global and regional environmental agreements and has done a lot to improve thenational legal framework in this field, still there are challenges to be addressed, and we need collective actions not only national ones.

As we heard from many speakers there is a need for a new mechanism and until we agree on a new protocol plus monitoring mechanism that recognizes the right to healthy environment, if we come to a consensus to have one, we consider important to raise awareness on the relationship between healthy nature, human rights and a better quality of life, and in our view Bern Convention does that, the convention gives citizens the possibility of raising their voice and participate in the conservation efforts.

But we need to promote more our convention and the mechanisms that we have within Coe.

In this context we share the same view and strongly support the aims of the Georgian Presidency to strengthen environmental protection through the existing programmes and treaties in order to secure better human rights protection standards in member States.

In concluding we look forward to the outcomes of this conference and hope that this issue will be on the list of the priorities of the next presidencies.

Thank you!

## CZECH REPUBLIC

*Ms Anita GRMELOVÁ, Deputy Minister of Foreign Affairs*

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Mr. Chairman, Madame Secretary General, Ladies and Gentlemen,

Let me express my sincere appreciation to our Georgian colleagues for the organisation of this conference.

The Czech Republic welcomes that one of the priorities of the Georgian chairmanship are human rights and environmental protection.

The Czech Republic pays special attention to the support of human rights and democracy. One of the thematic priorities of our Human rights policy concept is promoting human rights in the environmental context. Environmental protection plays a prominent role in our programmes. We appreciate that the interest of the public in the topic grows steadily.

The European Convention on Human Rights does not as such enshrine a right to a healthy environment. However, it is clear that the exercise of certain Convention rights, for example the right to life or to respect for private and family life, may be undermined by pollution and exposure to environmental hazards.

On the other hand, respect for human rights is a prerequisite for effective environmental protection. This is where environmental protection and political rights are complementary. It is difficult for the wider public to demand environmentally friendly policies when they are not allowed to exercise the freedom of expression, association or assembly.

The situation in the Czech Republic demonstrates the link between human rights and the environment. Under the communist regime, parts of the then Czechoslovakia became notorious for air pollution, acid rains, dead forests and rivers. The first local protests against the communist rule at the end of 1980s were actually motivated by the disastrous environmental situation. After the velvet revolution, things changed and the situation, which is still not perfect, improved massively.

We share the lessons we learnt with our partners in a number of countries. In Eastern Ukraine, we are working with civil society, local and national authorities to raise public awareness about air pollution and to come up with specific policies to improve the situation. In Bosnia and Hercegovina, we support projects promoting more environmentally friendly policies regarding water management and rivers protection, including through the increasing civic participation. In Armenia, we are empowering local civil society in addressing problems with industrial pollution.

Effective measures to protect the environment in the context of human rights can only be taken at the international level.

The UN plays an important role by promoting the 2030 agenda. The Czech Republic is strongly committed to its implementation.

In addition, the European Union is contributing to the transition to a climate-neutral and sustainable economy with The European Green Deal, which emphasises synergies of all European policies, ensuring a fair transition for all and integrating environmental principles into current policies, including the concept of human rights.

We are convinced that the Council of Europe, with its expertise in the field of human rights, can make a significant contribution to a qualitative shift in ensuring the synergy of human rights and environmental protection.

Thank you for your attention.

## DENMARK

*Ambassador Erik LAURSEN, Permanent Representative of Denmark to the Council of Europe*

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- Denmark very much welcomes the initiative to discuss the issue of environmental protection and human rights, which is becoming still more relevant.
- In these years, where we are committed to implementing the 2030 Agenda and its Sustainable Development Goals and the Paris Agreement, the reality is that we see environmental deterioration at an unprecedented scale.
- Climate change, biodiversity loss, air pollution, marine litter and deforestation are serious challenges, and conflicts arise over access to diminishing natural resources. This affects the human rights of citizens, their safety, health and livelihood; directly or indirectly.
- It is clear that environmental protection and protection of human rights are generally complementary.
- Environmental defenders – civilians, NGO's and journalists trying to protect the environment – are harassed and or even killed in relation to legal as well as illegal exploitation or destruction of natural resources. Illegal logging, mining and fishing, poaching and excessive use or pollution of water resources are examples.
- Such ases especially occur in countries or areas where laws are missing or weak, and enforcement is weak or non-existent.
- The recent UN resolution 73/333, resulting from the "Global Pact" process, includes recommendations to governments and various actors on actions and approaches to improve environmental law and governance. Discussions on strengthening of actions also take place in the UN Environment Assembly.
- It will be key that individual countries act. Appropriate national environment laws and policies and strengthen implementation and enforcement must be set up. We must effectively address pollution and key national resources, targeting the appropriate sectors, while keeping in mind the universal human rights, including the right to life and to a healthy environment.
- We therefore very much welcome if countries – including the few remaining Council of Europe member states - that have not yet done so, do take action to ratify the Århus Convention in time for its 20th Anniversary of entering into force. Access to information on environmental issues is a key for civil society.

- The Council of Europe has an important role to play – a key role that it has already proven to have. The European Court of Human Rights has over the years developed a body of case-law in environmental matters due to the fact that the exercise of certain Convention rights may be undermined by exposure to environmental hazards. The Court has for example developed case-law under the right to life and the action needed to be taken by a State to prevent deaths linked to environmental disasters.
- This focus given by the Court proves that environmental protection and human rights often go hand-in-hand.
- My country is committed to promoting a greener world; to protect our climate, nature and the health of our citizens, and we can only encourage all countries of the Council of Europe to join us and make all our countries front-runners in this regard.

Thank you.

## GERMANY

*Ms Almut WITTLING-VOGEL, Representative of the Federal Government for matters relating to human rights*

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Mr President, Ladies and Gentlemen,

First of all, I would like to thank the Georgian Presidency for organising this Conference. A Conference which deals with an issue of outstanding importance.

In the 1920s, toxic fumes from a smelter operated in Trail, Canada, crossed the US-Canadian border and caused considerable damage to persons and property in the State of Washington. The ensuing Trail Smelter arbitration between the Governments of the United States and Canada is an icon of the international environmental movement and has laid the ground for the recognition in international law of a duty of states to respect the environment.

Today, environmental pollution has increased considerably. Climate change has become the overarching challenge of our time.

At the same time, the discourse has changed. The global problem of greenhouse gas emissions is no longer seen as a matter solely between States. Individual citizens are claiming ownership. In the realm of law, this development is reflected in the increasing recourse to the language of human rights to claim environmental protection.

A hundred years after the Trail Smelter arbitration recognized a duty of states to respect the environment, we are thus confronted with the question: Is there a corresponding human right that states fulfill this duty?

I am afraid there is no easy answer to this question.

The European Court of Human Rights has held that the European Convention does not as such enshrine a right to a healthy environment. But – as the President of the Court has explained here today – the Court has recognized in numerous judgments that the exercise of certain Convention rights such as the right to life or the right to respect for private and family life and home may be undermined by the existence of harm to the environment and exposure to environmental risks. Provided that an individual is directly and seriously affected in his or her Convention rights.

In my view, this jurisprudence is very wise: The human rights perspective on environmental damage and climate crisis is essential. Respect for human rights can positively contribute to environmental protection. But not every environmental issue is a human rights issue. And we should not make it one. We should resist temptations of imposing on the European Court of Human Rights the burden of solving the climate crisis. Such an approach risks doing harm to the human rights system without resulting in tangible improvements in environmental protection.

Sustainable efforts to tackle global environmental degradation must take effect long before the repercussions are felt by individuals. We as Council of Europe Governments should live up to our responsibilities in this respect and take concrete steps to address the global problems of environmental degradation and climate change together!

## ESTONIA

*Mr Meelis MÜNT, Secretary General, Ministry of the Environment*

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**Second Session – The role of elected representatives and civil society**

Excellences,
Ladies and gentlemen, dear colleagues,

At the outset, please let me convey our gratitude to the Georgian Presidency for organizing this conference on environmental protection and human rights. It goes without saying that human rights and environmental protection are interconnected in multiple aspects. The rights to life, health, expression, or

topics like family life, non-discrimination, privacy, freedom of movement, healthy diet, etc. - they all are linked to the environment. Thereof, it is of the utmost importance for the Council of Europe to define clearly its priorities and areas of comparative advantage to deliver.

Aiming to deliver the best for the whole of society, the public authorities, local governments, civil society and businesses should hold interactive discussions in order to guarantee full compliance with human rights, including environmental rights. This comes to especial attention, admitting the fact that in many countries, including in several member states of the Council of Europe, the human rights and basic freedoms are violated particularly in cases where the environment, the public good and business interests clash.

In Estonia, clean nature and historic respect for our land, water, forests, etc. are very strong nominators for national consciousness. Historically, the attempts to start phosphorite mining in Estonia during the Soviet occupation in late 1980s were among the major triggers for environmental movement in Estonia, which ultimately brought us to the re-establishment of our independence in 1991.

Estonian civil society is in constant discussion with elected representatives, and we recently have had some good examples of how important this kind of interaction is, to solve disputes where, for example, practicing religion by nature believers meets economic benefits, even aimed to produce green energy, wind energy, for example. A particular case was solved in Estonia by a Supreme Court decision to withhold the economic activities in an old grove hill used for worship in order to preserve the legacy.

As we all are the beneficiaries of a clean and healthy environment, every stakeholder should contribute to protect the environment. In Estonia, the local community sector has started developing a Green Municipality Model to transform their activities to sustainable basis. The Congress of the Council of Europe could analyse this practice in depth.

Moreover, several Estonian technology companies have recently signed a Tech Green Pledge with the ambition to be carbon neutral in their action by 2030.

With its e-governance Estonia has a comprehensive information system, for example, the land cadastre and environmental register, etc., available for everyone to learn about the state of the environment in Estonia.

To conclude with, I would briefly mention the skyrocketing discussions on digital revolution, including on Artificial Intelligence. Both can contribute a lot to our goals on environment and human rights. However, we need bold mind and focused discussions here, as well. For example, if we are speaking about

the energy consumption by the server stations. It is interesting to know that bitcoin use and mining consumed 66.7 TWh (terawatt-hours) of energy in 2018. That is comparable to the total energy consumption of the Czech Republic, a country of 10.6 million people.

Thus, it is interesting to see how an obligation or will to produce green energy or strive to innovate new public goods may raise a question mark on particular activities' link to the basic human rights. I am sure, the Council of Europe is able to define its role and aims in those discussions, in order to contribute meaningfully to the global discussions of how to achieve the SDGs.

**Third Session – The way forward**

It is of utmost importance to reach an understanding that human existence without preservation of natural environment is impossible. If we consider the right to life a building foundation to everything else, we need to protect the environment in order to guarantee this right.

In the context of the Council of Europe, I would like to emphasize the following elements.

Prioritization. We need a strategic vision, long-term action plan of how to contribute to the global discussions, including the ones on SDGs, bearing in mind our core mandate and related issues where the Council has its comparative advantage of expertise to deliver the most.

As mentioned earlier today, human rights is our focus, but even here, we need prioritization. Over the recent years, we have seen that the freedom of speech and expression, right for associations and unions, as well as the rights and voices of indigenous people are especially under oppression. Maybe these are the key triggers, we should focus on firstly.

Working methods. To achieve this, we also need to adapt our working methods respectively – find more synergies, reform our structures and work horizontally, and revisit or sunset old-timer topics, if needed. This is what our people expect us to do.

Communication. Effective and diversified communication can only be built on successful outreach towards our public, with special focus on youth. We need to tell the human stories conveying our messages in an authentic voice. Adverse effects of climate change that affect us all are becoming increasingly prominent and imminent. However, if we are talking about the CO2 concentration in the atmosphere or about the notion of climate neutrality – the wider public does not easily understand these issues. Therefore, more elegant explanation and storytelling is needed. Such stories should be

explained to the wider public, maybe even included in the school curricula, if we think on the edge for change the children's Fridays For Future movement has created.

I would like to provide some examples from Estonia:

- Last spring, a Youth Environment Council was established in Estonia, acting as an advisory body to the Ministry of the Environment. Estonia has also joined hands with Kelly Sildaru, our 18-year-old freestyle skiing world, X-games and youth Olympic champion, to target youth through an awareness-raising campaign to change their behaviour and urge them to make environmentally conscious consumer choices and other decisions.

- Mentioning waste and circular economy – started as an initiative led by the Estonian civil society in 2008, a worldwide movement has evolved into an annual World Clean-up Day with over 20 million people from 180 countries participating in 2019. The foundation responsible also promotes their Keep It Clean plan and develops other circular economy and zero waste projects. It has also been involved in annual special focuses, in 2019, for example, on oceans and seas. It has triggered special campaigns by private businesses, for example, on January 31, this year, our telecom company Telia launched a digital clean-up day. It shows, that small can grow global, and that civil society can deliver, and that private business wants to act responsibly.

- One last example - last spring, Estonia started the #strawless campaign in order to ditch single-use plastic straws from public events. Musicians challenge their colleagues to join the campaign. Furthermore, the President of Estonia challenges the people to say no to the use of single-use straws. Again, it is growing all-European now.

To conclude, Estonia would like to underline, that the human rights aspect of decisions we take and activities we conduct concerning the environment is something that we should keep constantly in our minds. Success can be achieved by prioritization, with well-thought working methods and targeted communication of lively stories. Freedom of speech and expression, right for associations and unions, rights and voices of indigenous people, addressing youth, investing into education, continuous search for novel ideas – this is what we need as policy developers.

Thank you for your attention.

## FINLAND

*Ms Tanja JÄÄSKELÄINEN, Deputy Director General, Political Department, Ministry for Foreign Affairs*

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Excellencies, Ladies and Gentlemen,

This year we are celebrating the 70th anniversary of the European Convention on Human Rights, a living instrument and the backbone of human rights in Europe. The significant body of case-law by the European Court of Human Rights in environmental matters illustrates the Court's evolutive interpretation that has allowed the text of the Convention to be adapted to "present-day conditions".

The assessment of the green jurisprudence of the European Court of Human Rights shows that the Court has been able to protect both the rights of the individuals and the nature and the environment as a general interest. These two have not been in contradiction to each other. We welcome the discussion today, looking into what is needed to better protect our right to a healthy environment.

Environment and environmental protection are linked to our fundamental rights – right to a healthy environment as well as responsibility for it. These are also recognized in the Constitution of Finland. Finland is committed to reforming climate policies, and thus, the Finnish Government will work to ensure that Finland is carbon neutral by 2035 and carbon negative soon after that.

A crucial component of environmental protection and protection of human rights is promoting good governance in all relevant sectors, including by fostering public participation in decision-making processes, strengthening the rule of law and improving the effectiveness of access to justice. The Aarhus Convention is a cornerstone in this regard. Participation and influence in environmental matters require information. The Tromsø Convention on Access to Official Documents is of key importance for the right of access to official documents held by public authorities. In the field of biodiversity, the Bern Convention is an important instrument.

To conclude, I would like to thank Georgia for choosing "environment and human rights" as one of the top priorities of Georgia's Presidency of the Committee of Ministers of the Council of Europe. The Council of Europe and its member States need to take active measures regarding emerging and pressing phenomena such as environmental protection and human rights.

## FRANCE

*Mr Sébastien POTAUFEU, Deputy to the Permanent Représentative of France to the Council of Europe*

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L'urgence de la crise environnementale et climatique est une menace directe sur les droits de l'Homme et impose aujourd'hui que des mesures fortes soient prises à l'échelle nationale, régionale et internationale. C'est la raison pour laquelle la France a fait de la défense de l'environnement une de ses priorités depuis plusieurs années. Son engagement lors de la COP21 Climat et je tiens à saluer son président M. Fabius aujourd'hui présent, qui a abouti à l'accord de Paris en 2015, est là pour en témoigner.

La France dispose d'une Charte de l'environnement intégrée à son bloc de constitutionalité depuis 2005. Il y a quelques semaines, notre Conseil constitutionnel a en outre reconnu que la protection de l'environnement et la protection de la santé constituaient des objectifs de valeur constitutionnelle.

Au niveau international, notre pays est en faveur le du renforcement des grands principes du droit international de l'environnement au sein d'un texte de référence, qui aurait vocation à être adopté par le nombre le plus large possible d'États pays.

La France est favorable à l'affirmation politique d'un droit à un environnement sain dans le champ international. Celui-ci ne découle pas en l'état des conventions existantes en matière de droits de l'Homme, que ce soit aux Nations Unies ou au Conseil de l'Europe.

Il est utile que les discussions qui s'engagent aujourd'hui se poursuivent dans les prochains mois pour examiner les voies permettant de mieux faire connaître ce droit à un environnement sain à l'échelle du Conseil de l'Europe. Nous devrons identifier la plus-value de chaque piste envisagée pour déterminer la ou les plus pertinentes.

Nous avons la conviction que le Conseil de l'Europe a aussi un rôle important à jouer dans le combat national, paneuropéen et mondial pour la protection de l'environnement.

## GREECE

*Ambassador Panayotis BEGLITIS, Permanent Representative of Greece to the Council of Europe*

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SESSION 1: *Environmental protection and protection of human rights: Are they contradictory or complementary*

Monsieur le Ministre de la Protection de l'environnement et de l'agriculture de la Géorgie,
Mme la Secrétaire Générale,
M. le Président de l'Assemblée,
M. le Président de la Cour.

Permettez-moi, tout d'abord, de féliciter la Présidence Géorgienne pour son excellente initiative d'organiser cette Conférence de haut niveau, sur le lien entre les droits de l'homme et l'environnement.

L'idée que l'être humain a droit à un environnement sain est beaucoup plus controversée en Europe qu'elle ne devrait l'être, même parmi les Etats-Membres du Conseil de l'Europe. Pour cette raison nous considérons que le temps est venu pour ouvrir le débat, au sein de notre Organisation, tout en sachant que ce débat sera difficile et nous devrons faire beaucoup d'efforts pour surmonter, chacun de nous, nos propres réticences nationales, je dirais nos propres peurs, politiques, économiques, sociales, culturelles.

Pourtant, le droit à un environnement écologiquement sain et les autres droits de l'homme sont sans aucun doute interdépendants et indivisibles. La dégradation de l'environnement peut être à l'origine d'atteintes graves aux droits de l'homme: au droit à la vie, au respect de la vie privée et au respect de ses biens, droits qui sont protégés, comme nous le savons par les articles 2 et 8 de la Convention Européenne des droits de l'homme, ainsi que par l'article 1 du Premier Protocole additionnel de la Convention.

La protection de l'environnement complète les droits de l'homme reconnus. Elle contribue à l'instauration de conditions de vie plus égalitaires entre les citoyens ou du moins à atténuer les inégalités dans leurs conditions matérielles. En effet, les moyens matériels dont disposent les mieux nantis permettent d'échapper à l'air pollué, aux milieux dégradés et de se créer un cadre de vie sain et équilibré. Les plus démunis, par contre, n'ont guère de telles possibilités et doivent accepter de vivre dans des agglomérations devenues inhumaines.

Dans ces circonstances, la protection de l'environnement aura pour effet, non pas de restreindre, mais plutôt de compléter, d'enrichir et d'améliorer les droits de l'homme.

Comme c'est bien connu, la Convention, établie en 1950, ne fait pas mention au droit de vivre dans un environnement sain et viable, équilibré et respectueux de la vie et de la santé et il n'y pas dans le texte d'articles spécifiques pour la protection de ce droit. Le silence sur cette question de la Convention, compréhensible pour les premières décennies de l'après-guerre, doit, aujourd'hui, être rompu, au vu des grands défis que pose le progrès technologique.

Pendant cette longue période, la Cour européenne des droits de l'homme, à la fois sensible et soucieuse de la préservation de l'environnement et préoccupée par sa dégradation, s'est efforcée d'utiliser une approche indirecte, permettant de contourner le silence du texte de la Convention et de protéger, ainsi, le droit à l'environnement, grâce aux droits garantis par la Convention. Cette technique, hautement judicieuse, a conduit à des décisions audacieuses, pour la protection de l'environnement, sans toutefois, oublier quelques décisions aux tendances régressives. (Comme l'a, tout justement, montré, le Président de la Cour Sicilianos).

Maintenant, nous devons nous interroger, si la Cour peut continuer de statuer, de façon indirecte, sur le fil du rasoir, vu le vacuum de la Convention, ou au contraire, si nous sommes disposés à lui fournir les fondements juridiques nécessaires, revêtant la forme d'un Protocole, juridiquement contraignant, annexé à la Convention, pour des raisons de sécurité de droit.

Cette question a été posée, récemment, de façon pertinente, par le Président de l'Assemblée parlementaire, M. Daems et il appartient à la responsabilité des Etats-membres du Conseil de l'Europe de prendre position et de franchir le Rubicon.

Mon pays, la Grèce, en tant que prochaine Présidence du Conseil de l'Europe, se réjouit de cette initiative de M. Daems et nous sommes prêts à ouvrir cette piste de réflexion sur la possibilité de constitutionnaliser le droit à un environnement sain et viable. Pour des raisons historiques, je voudrais rappeler que la Grèce fait figure de pionnière, parce que, à peine sortie de la dictature militaire, elle a reconnu dans la première Constitution démocratique de 1975 (article 24), le droit à un environnement sain et viable, comme un nouveau droit de l'homme.

Nous avons, donc, l'expérience constitutionnelle nécessaire et nous n'avons pas peur d'assumer notre responsabilité, pendant notre Présidence.

## ITALY

*Ambassador Michele GIACOMELLI, Permanent Representative of Italy to the Council of Europe*

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**Thank you, Mister Chairman, and many thanks to the Georgian presidency** for providing us with this opportunity to debate an extremely interesting theme.

- A clean and healthy environment, including a healthy climate, is a **pre-requisite** for the **enjoyment**, without discrimination of **a range of recognized human rights** such as the right to life and personal security, the enjoyment of the highest attainable standard of physical and mental health, clothing and housing, and to the continuous improvement of living conditions.
- The many examples of past failures in climate mitigation and adaptation have contributed to the growing recognition of the need to apply **human rights-based approaches** in actions devoted to improve climate conditions.
- **I would like in particular to refer to the Paris Agreement under the UN Framework Convention for Climate Change whose preamble states that State parties "should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights"**.

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- **Italy**, both in its national capacity and as a EU member state, pays special attention to the link between human rights and environment **recognizing that climate change and environmental degradation are a threat to human rights.**
- **Italy is at the forefront in the fight against climate change**. In our national capacity and as supporter of the EU's ambitious green deal, we are resolutely implementing our vision for a **broad transformation of the economy through de-carbonization**, circular economy, efficiency and the rational and equitable use of natural resources.
- We feel a **special responsibility** for the success of COP 26. As part of the partnership with the United Kingdom, which will be president of CoP 26**, Italy will organize** a number of key preparatory events. In particular, we **will organize in Milan** from 28 September to 2 October **the Youth4Climate2020: deriving climate ambition**, the first ever edition of a youth event linked to a CoP on climate change,

and the **Pre-CoP Summit**. *(not to mention the current UK G7 Presidency and Italian G20 Presidency in 2021)*.

- In this framework, I would like to mention in particular the **right for everybody to safe and clean drinkable water**. It is vital for the dignity of each human being. Public Authorities must ensure access to water, providing the right governance and avoiding wasting a scarce resource. Water is and must remain a public good.

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- In our action to combat climate change, we have **traditionally had at heart the concepts of participation and inclusion in the decision-making process**. To that end, we believe it will be crucial to **engage all stakeholders and in particular younger generations, in recognition of their increasing call for global action to tackle climate change**.
- We believe that the **Council of Europe has the capacity to contribute to the common endeavor**, in particular through a better analysis of the impact of global climate change on the respect of human rights and in a possible definition of a set of common principles. The Council of Europe should also harness itself, in terms of human resources and capacities, to respond to this growing challenge.
- In this framework, we welcome the decision **to include the United Nations development goals among the priorities of the Council of Europe**, through the streamlining of the UNSDGs in all relevant activities of the Programme of work for the biennium 2020-2021
- We **look forward to continue to working with you all on these relevant issues**

**Thank you** for your attention

## LITHUANIA

*Ms Laima JUREVIČIENĖ, Ambassador, Permanent Representative of Lithuania to the Council of Europe*

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Lithuania thanks the Georgian Presidency of the CM for organizing this conference aimed at discussing the importance of environmental protection for securing certain rights under the European Convention on Human Rights.

Even though the Convention does not enshrine any right to a healthy environment as such, it has become evident that the exercise of certain Convention rights – especially, the right to life, protected under Article 2, and

the right to respect for private and family life under Article 8 – may be undermined by the existence of harm to the environment and exposure to environmental risks.

In this regard, Lithuania would like to draw attention to the construction of new nuclear power plants in Europe, in particular the one in Ostrovets (Belarus), which is being constructed in violation of international safety standards, just 45 kilometres away from Vilnius, our capital city. For that matter, we also recall the resolution of PACE [No. 2241] adopted in 2018 on "Nuclear safety and security in Europe", urging the States concerned to ensure that heightened safety and security requirements are fully taken into account.

Therefore, we strongly advocate that the highest international environmental, human health and safety standards should be observed. In particular, this applies to the extremely sensitive nuclear energy area, which has serious transboundary implications, including the ability to exercise certain human rights protected by the Convention. We should be more vocal and take care of everyone's tight to live in a healthy environment.

Thank you once again and we look forward to the outcomes of this conference and future actions in this area.

## REPUBLIC OF MOLDOVA

*Mr Fadej NAGACEVSCHI, Minister of Justice*

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Au cours des dernières décennies, la protection de l'environnement est devenue l'une des préoccupations principales de l'humanité. Les problèmes environnementaux sont un sujet d'actualité tant au niveau national qu'international. Etant donné que la crise écologique a envahi le monde entier, la nécessité de mettre en place un cadre juridique performant qui assure la protection de l'environnement et de la santé humaine s'est accrue. La consécration juridique des droits écologiques représente un premier pas important dans le développement réussi d'une société démocratique. Tout État démocratique a pour but de protéger et de garantir les droits écologiques de l'homme, menant en ce sens une politique écologique active.

La vérité est que les problèmes en matière d'environnement ne sont la priorité n°1 ni pour l'État, ni pour la population. Pour que la République de Moldova atteigne un développement durable, il est nécessaire de prendre en ce sens une série de mesures comme améliorer la législation en matière d'environnement et mettre en place un mécanisme juridique étatique clair qui protège le droit à un environnement sain; informer et impliquer le public sur

les problèmes liés à l'environnement; garantir l'accès libre à la justice en matière d'environnement etc.

La République de Moldova doit se conformer aux standards européens et adapter la législation nationale à la législation internationale.

Nous connaissons que tout le monde dépend directement de l'environnement dans lequel il vit. Un environnement sûr, propre et durable a un lien direct avec la matérialisation des droits de l'homme tels que, par exemple, le droit à la vie et à la santé. Sans un environnement sain, nul ne pourra vivre dans un environnement où le respect ses droits ne peut être assuré. Dans ce contexte, nous savons que les institutions du Conseil de l'Europe responsables de la mise en œuvre de la Convention européenne des droits de l'homme (CEDH) ont déjà créé un cadre jurisprudentiel qui établit les obligations des États membres dans le domaine de l'environnement.

Ainsi, même si le texte de la CEDH ne contient pas de réglementations expresses concernant l'environnement, la Cour européenne des droits de l'homme (CEDH) a établi à travers sa jurisprudence que différents types d'interventions humaines qui portent atteinte à l'environnement peuvent causer des résultats qui conduisent à la violation du droit à la vie en général, du droit au respect de la vie privée et familiale et de l'interdiction des traitements inhumains et dégradants. En outre, à la lumière de la jurisprudence de la Cour européenne des droits de l'homme, les États membres du Conseil de l'Europe, en plus d'effectuer une enquête sur les violations et d'indemniser les victimes, ont également l'obligation de prévenir ces violations en mettant en place des mesures de surveillance et d'évaluation des actions humaines sur l'environnement afin d'éviter les violations systémiques des droits de l'homme.[56]

Un autre cas éloquent est l'affaire *Otgon* contre la République de Moldova, qui porte sur l'indemnisation insuffisante accordée par les tribunaux nationaux pour la mauvaise qualité de l'eau[57].

Outre la législation nationale, le principe de l'accès libre à la justice en matière d'environnement est traité dans la législation internationale, notamment dans la Convention sur l'accès à l'information, la participation du public au processus décisionnel et l'accès à la justice en matière d'environnement, signée à Aarhus, Danemark, 23-25 juin 1998.

[56] Tatar c. Roumanie https://hudoc.echr.coe.int/fre-press#{%22itemid%22:[%22003-2615810-2848789%22]}

[57] Otgon c. Moldova: https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-5530239-6959944%22]}

Les droits et les intérêts écologiques des individus ne sont efficaces que si le public a une réelle possibilité de demander justice lorsque ces droits sont accidentellement ou délibérément enfreints. La Convention d'Aarhus prévoit que les personnes qui estiment qu'un droit écologique ou tout autre droit consacré dans cette convention a été enfreint peuvent s'adresser au tribunal ou à un autre organe indépendant et impartial établi par la loi, c'est-à-dire qu'elles ont le droit d'accès à la justice pour répondre à ce besoin. L'accès à la justice en matière d'environnement est un droit de l'homme fondamental qui peut être réalisé à chaque fois qu'un droit écologique a été enfreint. En ce sens, nous mentionnons le fait que tout individu a pleinement le droit de s'adresser aux tribunaux en cas de violation de ses droits environnementaux, tels que: l'accès aux informations sur l'environnement, la participation au processus décisionnel en matière d'environnement, la violation de la législation sur la protection de l'environnement, etc.

Le droit de saisir les autorités administratives et/ou judiciaires en matière d'environnement ne représente pas seulement une garantie pour exercer et assurer les droits environnementaux, mais représente également un droit procédural important, reconnu par la loi.

La connaissance approfondie des particularités pour assurer le droit d'accès à la justice en matière d'environnement déterminera en grande partie le bon fonctionnement des mécanismes de protection des droits de l'homme à un environnement sain, et à titre subsidiaire, déterminera la disparition complète de la question de l'accès à la justice en matière d'environnement.

L'accès à la justice en matière d'environnement est un problème actuel tant pour la République de Moldova que pour les pays européens. On observe que le nombre de litiges portés devant les tribunaux en matière d'environnement accroit de plus en plus. L'augmentation du nombre de litiges environnementaux est du à plusieurs facteurs, tels que: l'absence d'un cadre normatif efficace régissant la protection de l'environnement, la prédominance des intérêts économiques au détriment de ceux concernant la protection de la nature, le financement insuffisant par les organismes internationaux et nationaux des programmes et des actions pour la protection de l'environnement, le niveau faible de sensibilisation de la part des citoyens et des connaissances dans le domaine de l'écologie et de la culture écologique, le déficit de spécialistes-écologistes, l'absence d'une politique écologique active de la part de l'État, le manque de culture écologique, l'absence de centres de médiation des conflits environnementaux.

La protection de l'environnement est un problème d'importance globale, qui doit devenir une priorité nationale, car il vise directement les conditions de vie et la santé de la population, la réalisation des intérêts économiques, ainsi que les capacités de développement durable de la société.

La pollution et la dégradation de l'environnement sont devenues sur certains points irréversibles. En conséquence, la qualité de vie de la population, qui est la plus affectée en Europe, selon les paramètres de base - mortalité, natalité et la durée de vie moyenne, est mise en danger.

Actuellement, les effets polluants de la nature qui résultent de l'ingérence de l'homme ont atteint des niveaux alarmants dans tous les compartiments, y compris: l'air, l'eau, le sol, le sous-sol, le règne animal, le fond forestier et cynégétique, les zones protégées par l'État, la gestion des déchets.

Le processus d'intégration européenne représente un défi pour le secteur de l'environnement et comprend deux directions d'action principales: l'harmonisation de la législation nationale en matière d'environnement avec l'acquis communautaire du secteur et la réforme institutionnelle, ce qui implique le développement d'un mécanisme institutionnel capable de mettre en application le cadre législatif nouvellement adopté.

Une grande partie des actes normatifs sont basés sur des concepts dépassés, qui doivent être mis à jour, tandis que pour certains éléments et aspects environnementaux (la protection de l'air atmosphérique, du sol, des ressources minérales utiles), il est nécessaire d'élaborer de nouveaux documents de politique.

En ce qui concerne l'analyse de la situation de fait dans ce compartiment donné, nous concluons qu'il persiste dans l'activité des organismes de protection de l'environnement des problèmes de manque de spécialistes dans certains domaines, en particulier ceux chargés de l'évaluation des dommages causés à l'environnement par son atteinte, et pas des moindres sur les droits de l'homme, le droit à la vie et à la santé.

À l'heure actuelle, le cadre des politiques environnementales est en cours de développement, notamment à cause l'existence d'un cadre législatif obsolète, pas raccordé aux directives de l'Union européenne, y compris la législation départementale qui concerne les procédures de calcul du dommage causé par l'atteinte aux valeurs environnementales, du dommage causé à la vie et à la santé des individus, l'identification du lien de causalité entre la cause et l'effet.

De même, il s'agit l'absence d'une stratégie efficace dans l'activité des organes habilités de la mise en œuvre des mécanismes pour réprimer, dépister et sanctionner les irrégularités en matière d'environnement.

Même si la législation nationale dans le domaine écologique prévoit des moyens pour punir les personnes coupables de la pollution de l'environnement, notamment par la responsabilité pénale de la violation des exigences de la sécurité écologique entraînant des conséquences graves pour l'environnement et la population (art. 223 du Code pénal), cela n'est pas substantiellement applicable.

En ce sens, des carences ont été identifiées résultant de l'activité des organismes de protection de l'environnement, passant la responsabilité concernant les situations de pollution de l'eau, de gestion du sous-sol, de pollution de l'air à d'autres institutions.

En ce qui concerne le compartiment du respect de la législation sur l'épuration des eaux usées dans les localités urbaines et rurales, ainsi que le prétraitement des déchets liquides par les entreprises génératrices de déchets, la situation constatée est précaire.

Selon les constatations, les principales sources de pollution de l'eau des rivières sont les localités urbaines et rurales qui ne disposent pas de stations d'épuration, les eaux usées étant évacuées dans les bassins aquatiques.

Il faut mentionner que les problèmes concernant les stations d'épuration, en particulier l'établissement des circonstances qui ont conduit à la pollution de l'air à Chisinau et des localités voisines, ainsi qu'à l'aggravation de la situation écologique de la rivière Bâc ont fait l'objet d'auditions publiques lors de la réunion du 18.09.2019 de la Commission parlementaire pour l'environnement et le développement régional avec la participation des procureurs de la subdivision. Une autre source de pollution des eaux constitue l'activité des entreprises génératrices de déchets résultant de l'activité de production, en particulier de celles qui se trouvent dans les zones de protection des rivières ou des bassins aquatiques.

Selon les résultats de l'analyse du compartiment de la valorification industrielle des gisements minéraux utiles, un problème important constitue le non-respect par les bénéficiaires des secteurs du sous-sol des dispositions légales, contractuelles et des Plans d'exécution concernant la découverte des couches fertiles du sol, d'argile et autres substances minérales utiles qui doivent être stockés et utilisés ensuite pour la remise en culture des terres dégradées par les travaux miniers.

Contrairement à ces exigences obligatoires, les agents économiques extraient et vendent des gisements qui, selon le contrat et le projet de travaux, devaient être découverts et stockés dans des décharges séparées, pour être utilisés pour la remise en culture des terres dégradées par les travaux miniers.

La question de l'extraction illégale de substances minérales utiles des carrières locales non autorisées, qui comptent actuellement 385 secteurs, dont l'activité a entraîné la dégradation des terrains sur une superficie de 736 ha, reste alarmante.

Un autre problème est le non-respect du cadre normatif dans le processus de gestion des terrains du fonds forestier, la protection de la nature, la protection de la santé, les activités récréatives.

Les violations les plus fréquentes dans le domaine du respect du cadre normatif dans le processus de gestion des terrains du Fond forestier, la protection de la nature, la protection de la santé, les activités récréatives vise la pratique vicieuse d'attribution en location du fond forestier, la réalisation injustifiée d'échanges de terrains du fond forestier, qui a comme conséquence la réduction de la végétation forestière et la surface du fond forestier.

Un autre problème majeur identifié est l'édification illégale des constructions capitales sur les terrains du fond forestier.

Un autre aspect au sujet de la fraude forestière est le manque de délimitation et d'enregistrement du droit de propriété de l'État sur les terrains du fond forestier, ce qui a eu comme conséquence la réduction de l'espace du fond forestier par l'occupation illégale des surfaces de forêt.

En ce qui concerne la gestion du fond forestier, les enquêtes menées sur les cas de coupe illicite du fond forestier sont pertinentes.

La protection des terrains du Fond de l'eau a fait l'objet de l'analyse, car il a été constaté que les autorités de l'administration publique locale disposaient illégalement des terrains de la bande fluviale de protection des bassins aquatiques (qui se trouvent sous la gestion de l'Agence «Les Eaux de Moldova») en les transmettant en propriété ou en usage.

Un autre problème en matière d'environnement est posé par les émissions de $CO^2$ qui sont causées à la fois par les moyens de transport, que par les entreprises industrielles et énergétiques.

Les efforts des autorités déployés en vue de découvrir les multiples infractions de la catégorie des infractions écologiques et de punir les auteurs responsables, subissent des obstacles à l'établissement du lien de causalité entre l'action et les conséquences préjudiciables, or les lacunes dans les actes normatifs sont un motif d'interprétation ambiguë de la valeur du probatoire, en particulier lors du calcul des dommages selon la «Méthodologie d'évaluation des dommages causés à l'environnement résultant de la violation de la législation des eaux», approuvé par l'Ordre du Ministère de l'Écologie, des Constructions et du Développement du Territoire no. 163 du 07.07.2003, qui ne prévoit pas l'évaluation des conséquences préjudiciables à la suite de la pollution de l'eau, mais les „dommages dans des proportions considérables au règne animal ou végétal, aux ressources piscicoles, à la sylviculture, à l'agriculture ou à la santé de la population ou le décès de la personne" - qui est un élément déterminant à la qualification de l'acte selon les dispositions de l'article 229 du Code pénal.

Compte tenu des engagements assumés par la République de Moldova dans le cadre du Conseil de l'Europe, l'impact des interventions sur l'environnement à la lumière du respect des droits fondamentaux de l'homme a été et est pris en compte par le Ministère de la Justice par une série

d'actions mises en œuvre au cours de l'année 2019 et prévues pour l'année 2020.

Ainsi, l'importance considérable de la législation écologique dans la réglementation des relations dans la société est déterminée par le fait qu'elle a comme but d'assurer tant la protection de l'environnement, que l'être humain lui-même.

## MONACO

*Ambassador Rémi MORTIER, Permanent Représentative of Monaco to the Council of Europe*

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Monsieur le Ministre de l'Environnement,
Madame la Secrétaire Générale,
Chers collègues,

Je tiens avant tout à remercier la Présidence géorgienne pour cette Conférence fort opportune. Je tiens aussi à souligner l'importance et la pertinence de traiter de cette thématique dans l'enceinte du Conseil de l'Europe.

On ne saurait que trop rappeler l'interconnexion fondamentale entre la préservation de l'environnement et celle des droits de l'Homme, à commencer par le droit à la vie.

Je souhaiterais d'emblée insister sur la nécessité de faire cesser la dangereuse dichotomie entre l'être humain et son environnement.

La dégradation environnementale, dont le changement climatique et l'effondrement de la biodiversité sont les symptômes les plus alarmants, ont déjà des conséquences délétères concrètes sur la sécurité alimentaire, la santé, la vie de millions de femmes et d'hommes à travers le monde, impactant en premier lieu les plus vulnérables. Malheureusement, ces menaces ne feront que s'accentuer dans les années à venir, de même que les questions d'équité qu'elles soulèvent.

Ainsi, avec 3 degrés d'augmentation de la température mondiale, 4 milliards de personnes seront soumises à un stress hydrique, 742 millions à un risque de pénurie d'énergie, 2 milliards seront confrontées à d'importantes difficultés agricoles et plus d'un milliard à des dégradations majeures de leur lieu de vie. En outre, selon la Banque Mondiale, le monde comptera en 2050 plus de 140 millions de déplacés climatiques.

Ces chiffres illustrent combien tout effort de protection environnementale doit viser en premier lieu à atténuer la souffrance humaine et, en fin de compte, à promouvoir le bien-être et la dignité des populations. Loin d'être contradictoires, droits de l'Homme et préservation de l'environnement se nourrissent donc mutuellement.

La jurisprudence de la Cour européenne des droits de l'homme atteste d'ailleurs de l'interdépendance de ces deux domaines fondamentaux.
Cette vision holistique de la question constitue le fil rouge de l'action du Gouvernement Princier, tant à l'échelle nationale qu'au-delà de ses frontières.

Sous l'impulsion de S.A.S. le Prince Albert II, dont l'attachement à ces deux thématiques n'est plus à démontrer, Monaco a consacré le droit à un environnement sain dans sa législation nationale.

Convaincue que les menaces environnementales sont un frein à la réalisation de nombreux droits fondamentaux et objectifs de développement durable, la Principauté s'engage résolument pour protéger l'environnement et lutter contre le changement climatique. Ces actions sont toujours menées en accordant une importance particulière à la préservation de la qualité de vie et de la santé des personnes.

C'est notamment tout le sens de la campagne *Breathelife*, à laquelle Monaco adhère, qui vise à préserver la santé humaine ainsi que le climat des impacts néfastes de la pollution de l'air. De manière plus générale, Monaco apporte son soutien politique et financier à l'Organisation Mondiale de la Santé pour ses activités dans le domaine des déterminants environnementaux de la santé.

A l'international, nous sommes également fiers d'appuyer les travaux du Rapporteur Spécial des Nations Unies sur les droits de l'homme et l'environnement, M. David BOYD, dont je salue la présence aujourd'hui.
Lors de la COP25 [de la Convention-Cadre des Nations Unies sur les Changements Climatiques], en décembre dernier à Madrid, Monaco s'est associé à la Déclaration sur les enfants, la jeunesse et l'action climatique rappelant que la lutte contre le changement climatique est une affaire de droits humains.

Dans le cadre de son aide publique au développement, le Gouvernement Princier cible en priorité les Pays les Moins Avancés ainsi que les Petits Etats Insulaires en Développement, mais également les femmes et les enfants, qui subissent de manière disproportionnée les effets de la dégradation environnementale sur la jouissance de leurs droits.

Monsieur le Ministre / Madame la Secrétaire générale,

Les risques environnementaux, exacerbent déjà les tensions au niveau régional et ne tarderont pas à menacer la paix et la sécurité mondiales. Face à ces pressions, les dérives autoritaires seront susceptibles de porter atteinte à l'état de droit. C'est pourquoi je voudrais souligner l'importance des instances multilatérales dans ce contexte.

A l'échelle de notre continent, la légitimité du Conseil de l'Europe à s'emparer de ces questions semble évidente. Notre Organisation l'a fait dès la fin des années 70 avec la Convention de Berne [relative à la conservation de la vie sauvage et du milieu naturel de l'Europe], et je tiens ici à souligner l'importance de son programme travail sur le changement climatique et la biodiversité et, en particulier, sur le développement d'écosystèmes sains.

Les orateurs qui m'ont précédé ont rappelé que le Conseil de l'Europe avait mené de nombreuses études, disposait déjà de nombreux instruments et programmes permettant à nos Etats membres de prendre des mesures utiles pour protéger notre environnement.

Mais face à l'urgence climatique et ses effets sur l'environnement, notre Organisation se doit de faire plus, et la nécessité de mieux encadrer juridiquement le lien entre environnement et droit de l'Homme doit figurer à l'agenda de ses travaux. C'est pourquoi nous prenons note avec intérêt des idées qui ont été lancées aujourd'hui d'élaborer un nouveau Protocole additionnel à la Convention EDH ou encore celle d'une Convention modernisée sur la protection de l'environnement par le droit pénal. Ces pistes méritent d'être étudiées et nous suivrons avec attention les travaux qui pourraient être entrepris en ce sens.

Comme l'a très justement dit le Professeur Lambert dans son Rapport introductif, il importe que le Conseil de l'Europe ne demeure pas seulement le modèle le plus élaboré de la protection européenne des droits de l'Homme du 20ème siècle, mais devienne aussi une plateforme de référence des droits humains écologiques du 21ème siècle.

Je vous remercie.

## POLAND

*Ambassador Janusz STAŃCZYK, Permanent Representative of Poland to the Council of Europe*

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Mister Chair,
Distinguished Guests,
Ladies and Gentlemen,

The basic international law instrument in the field of human rights protection, the Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols do not regulate the right to clean environment and do not contain direct references to environmental protection.

Nevertheless, for many years, the applicants as well as the European Court of Human Rights in its judgments, have been increasingly referring in the complaints and in the jurisprudence to matters pertaining de facto to environmental protection.

That practice has developed mainly in the context of the right to respect for private life and housing (Article 8 of the Convention), the right to respect for property (under Article 1 of Protocol 1 to the Convention) and the right to a fair trial (Article 6 of the Convention).
This trend is also noticeable with respect to Polish cases before the Court. The Government of Poland received from the ECHR applications concerning the various aspects of environment protection.

Over the past two years, the European Court of Human Rights communicated two new applications to the Government of the Republic of Poland:

1) the first regarding the amount of compensation for damage caused by wild game in crops - the applicant relied on Art. 6 (right to a fair trial) and art. 14 of the Convention (prohibition of discrimination) and art. 1 of Protocol No. 1 to the Convention (protection of property)[58],
2) the second concerning noise, vibration and air pollution caused by the diversion of road traffic from the newly opened highway to the national road next to the applicants' houses - they referred to art. 8 of the Convention (right to respect for private and family life)[59].
Both cases are still pending before the Strasbourg Court, however it is important to notice the change that has occurred in citizens' awareness of

[58] Case *Xero Flor w Polsce sp. z o.o. v. Poland*, application no. 4907/18, communicated on 2 September 2019.
[59] Case *Kapa and Others v. Poland*, application no. 75031/13 and 3 other applications, communicated on 11 December 2017.

the rights related to the use of individual components of the environment, as well as the limitations of other human rights in relation to the way the state manages environmental components, which indicates the need for reliable analysis of the state's activities in this area.

*In this respect, we found useful the Council of Europe's "Guide on Human Rights and the Environment" (2nd edition). The purpose of this Guide is to deepen the understanding of the relationships between the protection of human rights under the Convention and the environment, and thus contribute to strengthening environmental protection at national level. In pursuit of this goal, the Guide provides necessary information on the ECHR's environmental jurisprudence.*

There may be more to come at the intersection of human rights protection system and environmental protection. The jurisprudence of the European Court of Human Rights may bring a sizable contribution to the cause of environment protection.

Given the lack of a specific instrument in the field, the Court will, inevitably and increasingly, move to this area indirectly through relying on the rights and freedoms guaranteed by the 1950 Convention.

After all, the beneficiaries of the protection in both areas – that of human rights and that of environment are the same, ourselves. This being said, it seems that the time is ripe for more specific legal instrument in the field of environment protection to complement the European Convention.

## ROMANIA

*Mr Mircea FECHET, State Secretary, Ministry of Environment, Water and Forests*

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Excellencies,
Distinguished guests,

I would like to begin by thanking Georgian Presidency and all those who make this conference possible. I also want to thank all of the participants in this conference.

It is a great pleasure and a privilege to be here and to attend this event which I am convinced that will raise awareness on the human rights implications of environmental problems.

For a long time, environmental issues have been on the edge of human rights law and the human rights have been on the edge of environmental policy. Gradually, in the last decades the relationship between human rights and the environment have strengthened and become clearer.

The shift is evident in many ways. *Firstly, at the national level*, more and more countries have included a right to a healthy environment in their constitution and others recognize environmental protections on the basis of other rights, such as rights to life and health. **The *Romanian Constitution acknowledges explicitly the right of any person to live in a healthy environment*** (art. 35).

Secondly, at global level, were adopted more human rights agreements recognizing the right to a healthy environment, human rights bodies have developed an environmental jurisprudence and more and more civil society organizations are actively using human rights norms to address environmental issues. A final example of the mainstreaming of human rights and the environment is the United Nations *Global Pact for the Environment***,** which aims to provide an overarching framework to international environmental law.

Having this in mind, we have to recognize also the fact that, at European level, neither ***The European Convention on Human Rights*** **(ECHR) nor the European Social Charter, does not explicitly recognize the right to a healthy environment,** making the European human rights instruments less satisfactory than other regional instruments.

However, the European Court of Human Rights has interpreted the provisions of the European Convention on Human Rights in the context of environmental issues, in particular to protect individuals against the consequences of environmental harm. In this regard, we consider that until an official recognition of the *explicit right to a healthy environment*, at European level, regardless the form, the European Convention on Human Rights and other existing treaties (*e.g. the Convention on the Conservation of European Wildlife and Natural Habitats, the European Landscape Convention, Aarhus Convention, etc*.) represent efficient instruments and should be use more extensively by national authorities as a tool in order to secure more detailed standards of environmental protection in member States, that being one of the means for securing better protection of human rights under the Convention.

*Ladies and gentlemen,*

Let me conclude by saying that ***there is a greater appreciation now than ever before of the nexus between human rights and environmental protection.***

However, long-term efforts and coordination are needed in order to promote recognition at the national and European levels of an autonomous individual and collective right to a healthy environment.

Thank you!

## SWITZERLAND

*Mr Marc WEY, Minister, Deputy Permanent Représentative of Switzerland to the Council of Europe*

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Monsieur le Président,

Ma délégation tient à vous féliciter de votre initiative et à remercier celles et ceux qui ont préparé cette rencontre et y ont contribué par leurs travaux. Notre organisation se devait de rassembler ses capacités pour tracer la voie d'une **convergence encore plus puissante** de la protection des droits de l'homme et de la défense de l'environnement.

La complémentarité entre la protection de l'environnement et les droits de l'homme se manifeste notamment dans la **jurisprudence de la Cour européenne des droits de l'homme et la pratique d'organes internationaux tels que le Comité des droits de l'homme des Nations Unies.** En particulier, en protégeant l'environnement par sa jurisprudence, la Cour européenne offre aux requérants la possibilité de faire valoir leurs droits dans le cadre d'une procédure de recours individuelle aboutissant à des arrêts contraignants.

Le **manuel sur les droits de l'homme et l'environnement**, établi par le Conseil de l'Europe et révisé voici 8 ans déjà, doit nous servir à faire connaître cette jurisprudence : les travaux du **CDDH** méritent tout notre soutien, de sorte à produire une édition mise à jour le plus tôt possible.
Des **questions** persistent : Ainsi, devant la justice, la qualité de victime et les liens de causalité peuvent être difficiles à déterminer dans le domaine de l'environnement. En outre, de par sa nature, la jurisprudence touchant aux droits de l'homme met bien souvent l'homme au centre de ses considérations, et non pas l'environnement.

L'idée d'un **protocole additionnel à la Convention européenne des droits de l'homme** touchant à l'environnement est intéressante. La Suisse est en faveur d'une analyse approfondie, par exemple au sein du CDDH, en se rappelant que l'engagement en faveur de la protection de l'environnement et du climat dans les enceintes multilatérales établies à cette fin reste irremplaçable.

C’est en ce sens que la Suisse s’investit en faveur de la promotion et du renforcement des normes de protection des droits de l’homme dans les **enceintes multilatérales compétentes en matière d’environnement, de climat et de développement durable**. Des exemples récents sont les négociations multilatérales à Madrid sur le programme de travail de Lima relatif au genre et son Plan d’Action ou celles sur les transferts de droits d’émission prévus dans l’Accord de Paris. Une prochaine étape s’offrira dans le cadre de la Conférence de Glasgow de 2020 sur les changements climatiques (COP26). Au **Conseil des droits de l’homme des Nations Unies**, la Suisse, en coopération avec ses États partenaires, présentera cette année sa résolution périodique sur les droits de l’homme et l’environnement. Elle facilite également des consultations régionales dans les mois à venir afin d'examiner si le moment est venu pour l'Assemblée générale des Nations unies de reconnaître un droit à un environnement sûr, propre, sain et durable.

La complémentarité entre la protection de l’environnement et les droits de l’homme se montre également progressivement dans l’**ordre juridique suisse**. Bien que la Constitution fédérale ne contienne pas de droit fondamental à un environnement sain, d’autres garanties constitutionnelles peuvent s’avérer applicables. Une jurisprudence établie peut justifier par exemple une indemnisation en cas d’émissions nocives, notamment du trafic aérien, sur la base de la garantie constitutionnelle de la propriété. Au niveau cantonal, la Constitution du canton de Genève garantit même explicitement le droit à un environnement sain.

La Suisse **continuera à s’engager** en faveur de l’intégration des droits de l’homme dans tous les aspects touchant au climat et à l’environnement. Elle appelle tous les autres États à en faire de même – la protection de l’environnement et du climat et celle des droits de l’homme sont en effet complémentaires et doivent aller de pair.

Je vous remercie.

## OTHER STATEMENTS

## PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE

### Committee on Social Affairs, Healthy environment: need for enhanced action by the Council of Europe

*Mr Simon MOUTQUIN, Full member of the Committee on Social Affairs, Health and Sustainable Development (Belgium, SOC)*

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**Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe**

Motion for a recommendation for consideration with a view to adoption by the Committee for tabling

The Parliamentary Assembly has repeatedly highlighted the close link between public health and the state of the environment, notably by reaffirming “a fundamental right of citizens to live in a healthy environment” and “a duty of society as a whole and each individual in particular to pass on a healthy and viable environment to future generations” (Recommendation 1885 (2009)). Whilst environmental degradation escalates, the scientific evidence is mounting of its detrimental effects on the health of Europeans, in particular children.

By endorsing the Sustainable Development Goals in 2015 as a roadmap to 2030, the world has committed to embracing a more balanced sustainable development model and “green” rights. Whilst the Council of Europe’s major legal instruments and jurisprudence indirectly recognise the obligation and responsibility of member States to defend the right to life against environmental harms, the explicit recognition of the right to a healthy environment is lacking as a basis for more resolute action at both European and national levels.

Given growing public pressure and political will to ensure European leadership in championing fundamental rights with a “green” perspective, the Parliamentary Assembly should follow up on its earlier recommendations, support the recent proposals by the Commissioner for Human Rights and build the case for more ambitious action by the Council of Europe in this field, including, as appropriate, the drafting of an Additional Protocol to the European Convention on Human Rights and/or other standard-setting activity.

## MADAGASCAR

*Ms Christine RAZAFINDRAVONY MARIFIDY, Chairperson of the Committee on Handicrafts and Tourism*

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Merci Monsieur le Président

C'est un grand honneur pour moi, en tant que Députée de Nosy-Be et de Présidente de la Commission Parlementaire du Tourisme et de l'Artisanat de Madagascar, de pouvoir participer à cette Conférence consacrée à des sujets non seulement importants mais vitaux pour les Hommes et notre environnement.

Croyez bien que Madagascar partage avec vous la conscience de l'absolue nécessité de devoir régler à bref délai les problèmes qui se posent devant nous en matière d'environnement bien sûr mais aussi de Droits de l'Homme.

Parmi les mesures prises ou envisagées sous l'impulsion de Monsieur Andry Rajoelina, Président de la République nouvellement élu, le programme de reboisement « 50 millions d'arbres à Madagascar » participe des premiers efforts nationaux accomplis en ce qui concerne l'environnement. Il en est de même en, ce qui concerne la lutte jamais achevée en faveur des Droits de l'Homme pour laquelle vous vous réunissez aujourd'hui.

Mais vous imaginez aisément l'ampleur des difficultés à résoudre par ce pays si attachant mais dont le potentiel et les richesses naturelles restent encore à être traduites dans la réalité économique et sociale de ses habitants.

Je peux vous promettre que ces préoccupations en matière d'environnement et de Droits de l'Homme et de développement durable seront bien sûr au centre de mon action à Madagascar et particulièrement à Nosy-Be, première destination touristique de l'ile, nécessitant d'autant plus notre veille pour minimiser les effets néfastes sur l'environnement naturel et socio-économique.

En effet, Nosy-Be, qui est dotée d'un statut d'autonomie, gagnerait encore en attractivité avec un développement maîtrisé accompagné d'un Tourisme durable et solidaire.

Ma présence à Strasbourg a d'ailleurs pour objectif la recherche d'un soutien institutionnel et local aux actions de formation et d'échange destinées à élever le niveau de compétence collective à Madagascar.

Mon ambition personnelle elle, est de faire de Nosy-Be un exemple de développement touristique réussi, en harmonie avec les populations locales tout en préservant notre capital environnemental à Madagascar !

Vous remerciant de votre éventuel soutien et de votre attention.

## HOLY SEE

*Dr Paolo CONVERSI, Official, Section for Relations with States, Secretariat of State*

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Mr. President,

The Holy See congratulates you on your organization of this important Conference, aimed at promoting the interrelationship between human rights and environmental protection.

We all know how strong the interaction between human rights and the environment is: fundamental human rights have now become an important part of the concept of integral human development and this latter can no longer be separated from the environment. Already in 1992, the World Development Report of the World Bank indicated that «The protection of the environment is an essential part of development. Without adequate environmental protection, development is undermined; without development, resources will be inadequate for needed investments, and environmental protection will fail».

The acknowledgement of the interdependence and the indivisibility of fundamental human rights represents one of the driving forces for integral development. The Preamble of the 1948 Universal Declaration of Human Rights stated that «the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world». From this perspective, the question of the environment cannot fail to play a central role, even more if it is understood according to the multifaceted concept of integral ecology, so well analyzed in the Pope Francis' Encyclical *Laudato Si*.

Integral ecology is closely connected to a series of complex aspects, such as the development model, the control and management of natural resources and the issue of poverty. It has the objective not only of protecting of present and future of humanity through safeguarding of the environment, but also that of promoting the dignity of all human beings. It demands not only the upholding of several essential rights, such as the right to life, to health and to adequate nutrition, but also the many obligations of humankind, as for

instance the duty to preserve an equilibrium in nature and to preserve this common heritage, or the duty to take into account integral ecology while orienting and pursuing scientific and technical progress.

Mr. President,

Pope Francis has often underlined that «interdependence obliges us to think of *one world with a common plan*» (*Laudato Sì*, n. 164). We are part of a single interdependent human family: the decisions and behaviors of one of the members of this family have profound consequences on the other members; and this is even truer when we take into account environmental degradation where there are no borders or political walls where there is no place to hide or to protect one member from the other. There is no room for the globalization of indifference, for the economy of exclusion or for a culture of waste.

We should remain hopeful in the great opportunities that can come from the implementation of the interplay between integral ecology and human rights. «Although the post-industrial period may well be remembered as one of the most irresponsible in history, nonetheless there is reason to hope that humanity at the dawn of the twenty-first century will be remembered for having generously shouldered its grave responsibilities» (*Laudato Sì*, n. 165).

The implementation of a correct interaction between fundamental human rights and environmental protection can also facilitate for us the achievement of three complex and interdependent objectives: to alleviate the impacts of environmental degradation, to combat poverty and to promote the dignity of the human person. Human ingenuity has much potential to offer in this direction. It requires, however, putting into practice a significant commitment toward the transition to low carbon economies through activities that promote renewable energies, energy efficiency, dematerialization, the development of a circular model of the economy and adequate management of transport, forests and waste. It also necessitates paying attention to food security, implementing appropriate, sustainable and diversified food security programs and combating food waste, as well as developing alternative methods of financing, with particular attention to the implementation of strategies to combat speculation and ineffective subsidies. All of these actives are clear examples of the complementarity between fundamental human rights and environmental protection.

The involvement of all interested parties and the participation of local populations, including indigenous peoples, in decision-making processes, is another very important way to strengthen this complementarity.

Mr. President,

Of the many things that must be reoriented, readjusted or undergo a change in direction, perhaps the first step is to recognize that humanity needs to change. Here, we enter in the fundamental areas of education and training for sustainable lifestyles and responsible awareness. The predominant lifestyle of many, marked by an attitude that all is disposable, is unsustainable and must not be in our models of education and development.

«This much-needed change of course cannot take place without a substantial commitment to education and training. Nothing will happen unless political and technical solutions are accompanied by a process of education which proposes new ways of living. A new culture. This calls for an educational process which fosters in boys and girls, women and men, young people and adults, the adoption of a culture of care – care for oneself, care for others, care for the environment – in place of a culture of waste, a "throw-away culture" where people use and discard themselves, others and the environment. By promoting an "awareness of our common origin, of our mutual belonging, and of the future to be shared with everyone", we will favour the development of new convictions, attitudes and lifestyles. "A great cultural, spiritual and educational challenge stands before us, and it will demand that we set out on the long path of renewal" (*Laudato Sì*, 202). We still have time» (Pope Francis to the UNON in Nairobi, 26 November 2015).

Indeed, this is a "global challenge": of promoting a "culture of care", one that is able to rediscover «the different levels of ecological balance: the inner one with oneself, the one in solidarity with others, the natural one with all living beings, the spiritual one with God». This can only happen if there is a "cultural" change of course, towards the implementation of an integral ecology, capable of accurately balancing the environment / human rights / development link.

Thank you.

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# Introductory Report to the High-Level Conference

## *"Environmental Protection and Human Rights"*

*Strasbourg, 27 February 2020*

prepared at the request of the
Steering Committee for Human Rights (CDDH)

by

**Ms Elisabeth LAMBERT**

CNRS Research Director
SAGE Research Unit
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***"A convergence of crises constitutes the greatest single danger that humanity has ever faced. In essence, the impending menace is this: Humanity is unable to attain humanity."***

*(Stéphane Hessel and Edgar Morin,*
The Path to Hope*, Other Press, 2012, Chap. 1).*

***"The resilience of the community of life and the well-being of humanity depend upon preserving a healthy biosphere with all its ecological systems […]"***

*(Earth Charter, Preamble, earthcharter.org)*

## EXECUTIVE SUMMARY

This report begins by outlining, by way of introduction, how legal doctrine has changed with regard to the interaction between human rights and the environment, moving towards an ecocentric approach and the middle way of "project Nature". The second section offers an overview of previous work by the Council of Europe, reflecting its traditionally twofold approach:

- on the one hand, the Organisation has blazed a trail with binding treaties containing key principles for nature protection – treaties that not enough member states have ratified (and some of which have not even come into force yet), which ought now to be reconsidered or taken up in new forms;

- on the other hand, owing to the failure of various initiatives for an additional protocol to the European Convention on Human Rights concerning the right to a "healthy environment", not only the decisions of the European Committee of Social Rights on the right to health but also the Court's judgments relating to various articles of the European Convention show a very cautious stance, restricted to environmental health protection, and reflecting a now outmoded anthropocentric approach with too large a margin of appreciation allowed to states for economic interests.

- In the third section, the author propounds five priority areas for thinking about the environmental/ecological rights of the future. It is suggested that we should recognise an individualised right, both personal and collective, to a "decent" or "ecologically viable" environment, a broader concept than that of the right to a "healthy environment" and one that embraces an ecocentric view and an intergenerational approach. This right should be interpreted in the light of the specific features of the

environmental field, such as the precautionary approach and the concept of environmental commons. It would be timely for Council of Europe member states to think about formulating the rights of Nature, with the latter represented by a limited *actio popularis* or a group action restricted to environmental associations. It is also proposed to end the impunity of non-state actors by making provision for a system of complaints against businesses. Other substantive rights, such as the right to environmental education and greater protection of environmental activists, might be considered. Lastly, the right of access to environmental justice should be strengthened, and a model for environmental proceedings might be developed at the European level. All the rights and principles discussed are already recognised in positive law in various sets of legislation and legal systems at the national, regional and UN levels. Bearing in mind existing rights, developments at different levels, and current expectations regarding the environment emergency, the author suggests urgently considering the advisability of adopting a binding European pact on environmental human rights including these various rights, responsibilities and principles, together with a monitoring mechanism, preferably judicial with a European Environmental Court, or, failing that, an Ombudsman or a High Commissioner for the Environment. Since a certain number of states might not be willing to embark on this path at present, the drafting of an enlarged partial agreement would offer some very useful flexibility and pave the way for some tangible results, which might have a positive ripple effect.

# 1. INTRODUCTION

## A. Terms of reference and methodology

The terms of reference were to explore in broad outline the role that the Council of Europe and its member states might play in providing fresh impetus for a human rights approach to environmental protection and in particular to clarify the specific subjects on which these states and the Organisation should be working. The report was also to explain how existing tools and mechanisms might be used to achieve this.

The method consists mainly in a critical synopsis of the environmental work done by the Council of Europe, and indirectly at the national level, to date and a careful reading of legal doctrine in this field in the French- and English-speaking worlds. Reference is also made, where deemed relevant to the 47 states of the Council of Europe, to projects or developments in other regional contexts and particularly at the UN level.

## B. Conceptual background: towards ecological human rights

The 1972 Stockholm Declaration and Conference undoubtedly mark the beginning of legal recognition of the interaction between human rights and the environment. As the former United Nations rapporteur, J. H. Knox, puts it, although the two areas developed separately, their interdependence has become more and more evident in the last two decades.[60] The first principle of the Stockholm Declaration clearly set the scene by recognising that "[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations".[61] A pivotal aspect here is the now clearly acknowledged link between human dignity and protection of the environment.[62] Similarly, in its 1997 Gabčíkovo-Nagymaris judgment, the

[60] Knox J. H. and Pajan R. (2018), Introduction, *The Human Right to a Healthy Environment*, Cambridge University Press, Cambridge, p. 1. Also, UN General Assembly, Human Rights Council (2009), "Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights", A/HRC/10/61, 15 January 2009, para. 18. Further, UN Human Rights Council, Resolution 16/11 of 24 March 2011 on human rights and the environment.

[61] Declaration of the United Nations Conference on the Human Environment, 16 June 1972, Stockholm.

[62] Daly E. and May J. R. (2019), "Exploring environmental justice through the lens of human dignity", *Widener Law Review* Vol. 25, p. 177.

International Court of Justice (ICJ) recognised that "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn".[63]

Although the two areas, each with its own focus (Nature for environmental law, and human beings for human rights), were long thought of as separate, this approach is now strongly contested. There is broad agreement concerning the unavoidable interdependence of humans and Nature, since human beings have vital need of ecosystems and the latter need human beings in order to survive. This view rejects the previous approach premised on man's domination of his environment based on a utilitarian and anthropocentric Cartesian rationale[64] whereby Nature was solely an object of law, an approach radically challenged by the deep ecology movement, for which Nature is a subject, and subsequently giving way to a third, intermediate, approach called "project Nature" by François Ost[65] intended to define an ethics of responsibility to protect the environment. Its logical outcome is a duty to respect all forms of life as a fundamental ethical principle. This new outlook more generally entails a transition from "environmental" to "ecological" human rights,[66] replacing the anthropocentric view with an ecocentric view, brought into being by the World Charter for Nature in 1982.[67] Consequently, "we have to adopt a holistic view of life", for, "by severing our umbilical cord with the Earth, we are threatening our own existence".[68] Therefore, the concept of "humanity" becomes particularly significant, since "it will no longer be possible for us to injure Nature wantonly, as this would mean injuring an integral part of ourselves".[69]

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[63] ICJ, *Gabčíkovo-Nagymaris Project*, judgment of 25 September 1997, Reports 1997, para. 53.

[64] See, among many other sources, Barrière O. et al. (eds) (2019), *Coviability of Social and Ecological Systems: Reconnecting Mankind to the Biosphere in an Era of Global Change*, Springer, Cham.

[65] Ost F. (2003), *La nature hors la loi : l'écologie à l'épreuve du droit*, La Découverte, Paris.

[66] Taylor P. E. (1998), "From environmental to ecological human rights: a new dynamic in international law?", *Georgetown International Environmental Law Review* Vol. 10, pp. 309-397. Since the 1990s there has been an abundance of literature on the need to move beyond the anthropocentric view.

[67] UN General Assembly (1983), Resolution 37/7, World Charter for Nature, A/RES/37/7.

[68] Cabanes V. (2016), *Un nouveau droit pour la terre. Pour en finir avec l'écocide*, Anthropocène, Seuil, Paris, pp. 262 & 264.

[69] Rothenberg D. (1989) "Introduction: Ecosophy T – from intuition to system", in Naess A., *Ecology, Community and Lifestyle*, Cambridge University Press, Cambridge, p. 2.

This new "ecological law" trend[70] has resulted in a large amount of literature[71] and even the launch of a new think tank, the Ecological Law and Governance Association (ELGA), at the University of Siena in October 2017,[72] with the Oslo Manifesto as its basis.[73] At the same time, the United Nations instituted the Harmony with Nature initiative in 2009, leading to the adoption of ten resolutions and the hosting of interactive dialogues.[74] Also, according to the 2011 report of the High Commissioner for Human Rights, "[…] the need to protect and promote a healthy environment is indispensable not only for the sake of human rights, but also to protect the common heritage of mankind".[75] Yet the anthropocentric approach is not entirely a thing of the past, since it is only human beings who are conscious of the need to protect the environment and the fact that interdependence between humans and the natural environment is inevitable, which is why "extractive anthropocentrism" is being overtaken by "immersive anthropocentrism": "man is immersed *in* Nature, mainly because he *is* a body; man's duties ought to follow…naturally".[76]

According to a study produced as part of an extensive academic programme, the problems in moving towards "ecological law" are more political than legal.[77] This "ecological human rights" approach builds on the previous human rights approach by adding a new component to protect the natural environment in its own right; it is therefore stressed

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[70] Garver G. (2019), "Confronting remote ownership problems with ecological law", *Vermont Law Review* Vol. 43, p. 428. Berry T. (1999), *The Great Work: Our Way into the Future,* Bell Tower, New York.

[71] Jennings B. (2016), *Ecological Governance: Toward a New Social Contract with the Earth*, West Virginia University Press, Morgantown. Taylor P. E. (1998).

[72] https://www.iucn.org/news/world-commission-environmental-law/201801/launch-ecological-law-and-governance-association-elga-environmental-law-ecological-law (accessed 18 December 2019).

[73] https://www.elga.world/oslo-manifesto/ (accessed 18 December 2019). Para. 6: "In other words, ecological law reverses the principle of human dominance over nature, which the current iteration of environmental law tends to reinforce, to a principle of human responsibility for nature."

[74] http://harmonywithnatureun.org/.

[75] UN General Assembly, Human Rights Council (2011), "Analytical study on the relationship between climate change and human rights", Report of the United Nations High Commissioner for Human Rights, A/HRC/19/34, 16 December 2011, para. 24.

[76] Papaux A. (2016), "Droits de l'homme et protection de l'environnement : plaidoyer pour davantage d'anthropocentrisme et d'humanité", in Ziegler A. R. and Küffer J. (eds), *Minorities and the Law:* Liber Amicorum *for Professor Barbara Wilson*, Schulthess, Zurich, pp. 375-387. He even infers that "human rights in environmental matters suffer from a lack rather than an excess of anthropocentrism", since human beings should step in to protect nature from the activities of other human beings (pp. 385-386).

[77] Taylor P. E. (1998), p. 336.

that the human rights approach is considered a promising means of meeting the ecological challenge that we are facing.[78]

### C. The environment emergency: following up the draft Global Pact for the Environment

The environment emergency is now real, and this report is not going to cite at length the extremely well-researched and alarming scientific and policy papers on the state of the planet and the degradation of our natural environment. In Mireille Delmas-Marty's words, "the awakening could be very sudden if we wait for the dream to turn into a nightmare of direct confrontation between states and between human beings forced to live together, in ever greater numbers, on an ever less habitable planet".[79]

At the same time, a review of the legal studies published over the past fifteen years concerning cases involving the intersection between human rights and the environment offers a number of lessons: (1) the courts' limited ability to accommodate the need for better environmental protection (the Dutch Supreme Court judgment of 20 December 2019 in the Urganda case is a noteworthy exception[80]), (2) a widely varying and fragmented judicial response because of insufficiently detailed and, above all, insufficiently binding rules,[81] (3) the fresh merit of a human rights approach,[82] particularly owing to the options of legal action and remediation claims, and lastly (4) the very significant limitations of the existing framework because of a view that is too anthropocentric and too focused on civil and political rights,[83] which is something that we shall find with the ECHR.

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[78] Weston B. H. and Bollier D. (2014), *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons*, Cambridge University Press, Cambridge.
[79] Delmas-Marty M. (2019), *Sortir du pot au noir. L'humanisme juridique comme boussole*, Buchet/Chastel, Paris, p. 56.
[80] https://www.urgenda.nl/en/themas/climate-case/
[81] See, for example, Voigt C. and Makuch Z. (eds) (2018), *Courts and the Environment*, Elgar Publishing, Cheltenham, p. xiv.
[82] Daya-Winterbottom T. (2018), "The legitimate role of rights-based approaches to environmental conflict resolution" (Chapter 3), in Voigt C. and Makuch Z. (eds), *Courts and the Environment*, Elgar Publishing, Cheltenham. Also, Bratspies R. M. (2017), "Claimed not granted: Finding a human right to a healthy environment", *Transnational Law and Contemporary Problems* Vol. 26, p. 274.
[83] Shelton D. (2012), "Human rights and the environment", in Daya-Winterbottom T. (ed.) *The Salmon Lectures: Justice and the Environment* (2nd edn), Thomson Reuters, Wellington, pp. 6-7.

Against this background, in May 2018 the United Nations General Assembly passed a resolution with 143 votes in favour (5 against and 7 abstentions) to adopt by 2022 a Global Pact for the Environment (or a political declaration). In the preamble to this draft pact, the parties acknowledge "the growing threats to the environment and the need to act in an ambitious and concerted manner at the global level to better ensure its protection". It is obvious that the adoption of such a pact by consensus at international level will probably prove much harder than a European initiative in this field, and the latter could provide an extremely positive impetus.

It is now important to appraise the past work of the Council of Europe in order to understand the overall vision behind it, its advantages and its limitations, and thus determine the kind of future action that might be required.

## 2. ENVIRONMENTAL PROTECTION IN THE PAST: COUNCIL OF EUROPE CONVENTIONS

In line with the twofold approach of the 1970s, Council of Europe work on environmental human rights has focused on two separate fields: environmental protection on the one hand and human rights on the other, even though some conventions from the 1970s onwards acknowledged the interdependence of human beings and their natural environment.

### A. Regional treaties on environmental protection

In chronological order, **the first convention to be signed was the Bern Convention on the Conservation of European Wildlife and Natural Habitats of 19 September 1979**. This convention, whose aim is "to conserve wild flora and fauna and their natural habitats", has 51 ratifications, since the European Union and five non-member states of the Council of Europe are also parties to it; of the Council of Europe member states, San Marino and the Russian Federation have not ratified it. The level of protection depends on the "ecological, scientific and cultural requirements" which must be weighed against "economic requirements", for example. States undertake to adopt the requisite policies and standards to ensure this protection. Exceptions are permitted, including in the interests of public health. A standing committee ensures application of the convention.

**The Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment of 21 June 1993** has been signed but not ratified by nine countries. Its preamble states that "one of the objectives of the Council of Europe is to contribute to the quality of life of human beings, in particular by promoting a natural, healthy and agreeable environment". This convention has the merit of covering all environmentally hazardous activities performed "professionally" by both public and private entities.[84] Article 4 stipulates that "[t]his Convention shall not apply to damage caused by a nuclear substance". It has the further advantage of recognising no-fault liability[85] and acknowledging the specific nature of "pure" ecological damage ("impairment of the environment"). Its other virtue is that it considerably broadens *locus standi* to include environmental associations and foundations (Article 18), even if they can only obtain compensation for personal injury. Article 14 provides for the right of access to "information relating to the environment held by public authorities", but Article 16 also provides for conditions of access to information held by operators. The convention also applies the "polluter pays" principle, as pointed out in the preamble. This "polluter pays" principle is central to Directive 2004/35/EC of 21 April 2004 "on environmental liability with regard to the prevention and remedying of environmental damage", which requires states to make provision for corporate liability.[86] This convention is therefore particularly substantive and would be worth giving further attention.

**The Strasbourg Convention on the Protection of the Environment through Criminal Law of 4 November 1998** is undoubtedly one of the Council of Europe's most noteworthy achievements in this field. The preamble to the 1998 Convention provides that "the life and health of human beings, the environmental media and fauna and flora must be protected by all possible means" and works on the assumption that "whilst the prevention of the impairment of the environment must be achieved primarily through other measures, criminal law has an important part to play in protecting the environment". Criminal offences cover harm to both human beings and the environment, whether living or not, and deliberate or not, and therefore the approach here is overarching, acknowledging the interaction between human beings and their natural environment. The

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[84] Martin G. J. (1994), "La responsabilité civile pour les dommages à l'environnement et la Convention de Lugano", *Revue juridique de l'environnement* Nos. 2-3, pp. 121-136.
[85] Thieffry P. (1994), "Environmental liability in Europe: The European Union's projects and the Convention of the Council of Europe", *The International Lawyer* Vol. 28, No. 4, pp. 1083-1085.
[86] Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

principle of specific remediation by "reinstatement of the environment" is provided for in Article 8. Above all, Article 9 provides that states must make provision for criminal (or administrative) sanctions on legal entities (in addition to the liability of natural persons) – a crucial contribution since we know that businesses are responsible for the largest share of environmental damage. Lastly, Article 11 allows each state party to "grant any group, foundation or association which, according to its statutes, aims at the protection of the environment, the right to participate in criminal proceedings concerning offences established in accordance with this Convention" and thus introduces *actio popularis*. Described as the "first binding international instrument dedicated to harmonising the whole of criminal law on the environment',[87] as well as the "only general convention",[88] and welcomed as "a very important development in the international law of the environment",[89] it is unfortunate that it has a total of 13 signatures not followed by ratifications and only one ratification (by Estonia),[90] despite the fact that it is open to ratification by non-European states as well, that it would enter into force with three ratifications and that it has been adopted by the European Union through Directive 2008/99/EC.[91]

Although they have not come into force, the Strasbourg Convention and the Lugano Convention have affected the development of European and national law.[92] However, the work to be done in this field, as with the prosecution of multinationals committing environmental violations, is enormous, given how some environmental offences, by their seriousness, clearly threaten the existence of humanity and life on earth and therefore require an effective criminal response.[93] Its effectiveness is contingent on a clearer definition of offences and sanctions (and on these

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[87] Szönyi Dandachi A. (2003), "La convention sur la protection de l'environnement par le droit pénal", *Revue juridique de l'environnement* No. 3, pp. 281-288, p. 282.
[88] Jaworski V. (2014), "Les instruments juridiques internationaux au service du droit pénal de l'environnement", *Revue juridique de l'environnement* Vol.39, pp 115-128, footnote 6.
[89] Collantes J. L. (2001), "The Convention on the Protection of the Environment through Criminal Law: Legislative obligations for the States", available at: https://huespedes.cica.es/gimadus/06/THE%20CONVENTION%20ON%20THE%20PROTECTION%20OF%20THE%20ENVIRONMENT%20THROUGH%20CRIMINAL%20LAW.htm, accessed 12 December 2019.
[90] As at 12 December 2019.
[91] Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, in force since 26 December 2010.
[92] Canivet G. and Guihal D. (2004), "Protection de l'environnement par le droit pénal : l'exigence de formation et de spécialisation des magistrats", address given on 26 April 2004.
[93] Sizaire V. (2019), *"Peut-il exister un droit pénal de l'environnement ?", Délibérée* No. 8, pp 42-49 (available at cairn.fr), p. 45.

aspects the Strasbourg Convention is definitely too vague; provision must be made, for example, for deterrent financial penalties depending on a business's turnover and the seriousness of offences in order to finance restoration of nature), standardisation of offences at national level and closer judicial co-operation at the international level, since pollution has no borders. Quite apart from any action on the part of the European Union, this work ought to be taken up by the Council of Europe quickly. As one author writes, "international treaties requesting states to punish the most serious environmental crimes in the same way are too few to count on even one hand."[94] The same author suggests recognising universal jurisdiction for punishment of the most serious environmental offences, since humanity as a whole is affected.[95] Moreover, it should be noted that attempts have been made for a number of years to have the crime of ecocide included in the Rome Statute of the ICC, and this is still under discussion. The content of the Strasbourg Convention ought to be supplemented accordingly, and Council of Europe member states should provide support by ratifying it. Failing that, its content should be incorporated into the European Environmental Pact that is proposed below.

**The Florence Landscape Convention of 20 October 2000 and its protocol of 1 August 2016**

Twenty years ago, the Council of Europe made an innovation by adopting a convention devoted solely to the protection, management and planning of landscape in Europe and to co-operation between states on landscape issues, with an extremely broad definition of the concept of landscape again emphasising the interaction between human beings and natural environments. Article 1(a) defines landscape as "an area, as perceived by people, whose character is the result of the action and interaction of natural and/or human factors". Landscape, whether everyday or outstanding, is acknowledged as "an important part of the quality of life for people everywhere"[96] and therefore understood as "a contribution to a better quality environment",[97] entailing "rights and responsibilities for everyone".[98] In conjunction with the 1998 Aarhus Convention, reference is made to information and public participation. In the Florence Convention, the Council of Europe acknowledges "the social function of

[94] Ibid., p. 47.
[95] Ibid., p. 49.
[96] Preamble to the Convention.
[97] Prieur M. (2003), *"La convention européenne du* paysage", *Revue européenne de droit de l'environnement* No. 3, pp. 258-264, p. 258.
[98] Preamble to the Convention.

landscape"[99] and natural environments. While the convention does not recognise a right "to landscape", it actively paves the way for it. The term "landscape" also enables the concept of sustainable development to be approached through its four dimensions: natural, cultural, social and economic.[100]

The Florence Convention, prepared by the Congress of Local and Regional Authorities and adopted on 19 July 2000, in force since 1 March 2004, has 40 ratifications and one signature not followed by ratification. The additional protocol has been ratified by 38 states and has also been in force since 1 March 2004. Implementation of the convention is monitored by a committee of experts, namely the Steering Committee for Culture, Heritage and Landscape (CDCPP), which makes recommendations to the Committee of Ministers, which remains the decision-making body.

Lastly, **the Tromsø Convention on Access to Official Documents of 18 June 2009**, although not specific to the environment, may also be relevant, but it has not yet entered into force.

**Assessment**

It can be seen from this very brief summary that this standard-setting is evidence of a real determination, from the 1970s onwards, to regulate environmental damage. Two guiding principles are worth emphasising: firstly, the concern to approve mandatory standards (not just recommendations) binding on states and, secondly, recognition of the interaction between human interests and nature protection. It seems important to pursue this dual hallmark of the Council of Europe.

However, this standard setting has significant limitations: civil society and individuals, both of which now play a key role in environmental protection in the international and national arena,[101] all too often cannot avail themselves of its provisions, which are not directly applicable in domestic legal systems. This is because, apart from the fact that they have been

[99] Priore R. (2000), "La convention européenne du paysage ou de l'évolution de la conception juridique relative au paysage en droit comparé", *Revue européenne de droit de l'environnement* Vol. 4, No. 3, pp. 281-299.
[100] Dejeant-Pons M. (2006), "The European Landscape Convention", *Landscape Research* Vol. 31, No. 4, pp. 363-384.
[101] Le Club des Juristes (2015), "Increasing the effectiveness of international environmental law: Duties of States, rights of individuals", report, available at http://www.globalforumljd.com/resources/report-increasing-effectiveness-international-environmental-law-duties-states-rights, accessed 24 January 2020.

ratified by far too few states, these treaties have a serious flaw in that there is no recognition of rights conferred on individuals or associations, and there are no effective independent compliance or monitoring mechanisms; as a result, their implementation has proved to be extremely limited. In this respect, ***the fundamental rights approach is actually better***. Moreover, beyond the Council of Europe, the think tank, Le Club des Juristes, has noted a profusion of sectoral conventions on the environment but very few treaties with monitoring mechanisms.[102] Hence in 2015 it recommended adopting a binding treaty with a monitoring mechanism, which would give a role to civil society and grant individuals the right to take legal action to enforce the duty of states to protect the environment more effectively.[103] In its 2019 report, UNEP confirmed that there was as yet no global environmental rights treaty and that current treaties were "often of limited if any utility to individuals".[104] ***The Council of Europe could therefore meet this need by preparing a mandatory instrument binding on states and businesses with a European compliance or monitoring mechanism and legally enforceable rights for individuals and civil society, drawing on some of the achievements of the conventions mentioned above.***

### B. The human rights approach: the European Social Charter and the European Convention on Human Rights

"Neither the Convention nor the Charter are designed to provide a general protection of the environment as such and [they] do not expressly guarantee a right to a sound, quiet and healthy environment. However, the Convention and the Charter indirectly offer a certain degree of protection with regard to environmental matters."[105]

[102] Ibid., p. 97. There are apparently over 500 treaties concerning environmental matters, some 300 of which are regional.
[103] Ibid., p. 107.
[104] May J. R. and Daly E. (2019), *Global Judicial Handbook on Environmental Constitutionalism* (3rd edn), UNEP, p. 8: "There is as of yet no global environmental rights treaty. Moreover, multilateral and bi-lateral treaties that address environmental concerns are often of limited if any utility to individuals".
[105] Council of Europe (2012), *Manual on Human Rights and the Environment* (2nd edn), p. 7.

### *(1) European Social Charter*

Even in its revised version, the European Social Charter does not include the right to a healthy environment. Only Article 11 of the Revised Charter recognises that "[e]veryone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable".[106] On this basis, the Committee of Social Rights has interpreted the right to health as including access to a "healthy environment" and therefore requires states, when submitting their periodic reports, to identify measures taken with a view to ensuring such an environment for individuals (and not just workers). Only recently, the Committee has stated that issues such as the creation and protection of a healthy environment are central to the Charter's system of guarantees.[107]

The Committee has typically focused on the following subjects: ambient and indoor air pollution, water quality, waste management, exposure to chemicals and ionising radiation, food poisoning and food safety more generally,[108] noise pollution and asbestos. The Committee endeavours to obtain factual data on levels of pollution and the implementation of national action plans.[109] It has found that the measures taken in this field comply with the Charter (Article 11.3) for a number of states parties, whilst frequently noting insufficient information from states[110] and sometimes deferring its conclusions pending receipt of further information.[111] This is above all an opportunity for the Committee to take note of the benefits of specific regulations and certain goals that states have set themselves in the environmental field, such as the Norwegian Government's goal of

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[106] See corresponding Article 11: "With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed *inter alia*: (1) to remove as far as possible the causes of ill-health; […]."

[107] European Committee of Social Rights, *ATTAC ry, Globaali sosiaalityö ry and Maan ystävät ry v. Finland*, decision on admissibility and on immediate measures, Complaint No. 163/2018, 22 January 2019, para. 12.

[108] With education and "healthy eating" components as well: European Committee of Social Rights, Conclusions XVIII-2, 30 June 2007, XVIII-2/def/LUX/11/2/EN. Food safety has been covered since 2001 following the Creutzfeldt-Jakob disease scandal. European Committee of Social Rights, Conclusions XXI-2, concerning Luxembourg, 26 March 2018, XXI-2/def/LUX/11/3/EN.

[109] European Committee of Social Rights, Conclusions 2013, 6 December 2013, 2013/def/FRA/11/3/EN.

[110] For example, European Committee of Social Rights, Conclusions XX-2, for Germany, 16 January 2014, XX-2/def/DEU/11/3/EN.

[111] European Committee of Social Rights, Conclusions 2017, concerning Lithuania, 24 January 2018, 2017/def/LTU/11/3/EN.

halting all emissions of toxins by 2020,[112] and to stress the importance of epidemiological surveillance plans.

Leaving aside the periodic reports, only two complaints have been lodged with the Committee regarding the right to a "healthy environment", both concerning Greece: *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, No. 30/2005, and *International Federation for Human Rights (FIDH) v. Greece*, No. 72/2011. The former case challenged the Greek Government's failure to take steps to protect workers and local residents from pollution caused by lignite mines. Having stated that the Charter was a living instrument that must be interpreted in the light of current conditions (para. 194), the Committee noted that Article 11 on the protection of health must be construed as including the right to a healthy environment, in line with the approach adopted by many states party to the Charter and by other international bodies (para. 195). It went on to say that it was guided in its interpretation of this right by the principles established by the European Court of Human Rights, the Inter-American Court of Human Rights, the African Commission on Human and Peoples' Rights, the UN Committee on Economic, Social and Cultural Rights and the Court of Justice of the European Union (para. 196). The Committee then referred to studies by WHO and "independent researchers" on the harmful effects of lignite on human health. In *FIDH v. Greece*,[113] the complainants alleged that pollution of the water of the River Asopos was having harmful effects on local residents. The Committee noted that the right to a healthy environment was included in the Social Charter, as acknowledged in that previous decision, and that the right to protection of health under Article 11 of the Charter complemented Articles 2 and 3 of the European Convention on Human Rights (para. 50) – given that health care was a prerequisite for human dignity – as well as Article 8 of the Convention (para. 51). The Committee emphasised a government's duty to take preventive measures and held that lack of scientific certainty should not be used as a reason for postponing measures (para. 145).

While the duty of states to ensure "a healthy environment" and access to healthy food is clearly part of the Committee's practice on the basis of Article 11.3 of the Charter, there remains the question of its resources for proper monitoring.[114] As shown by the Conclusions, monitoring is not

[112] European Committee of Social Rights, Conclusions 2013, 8 January 2014, 2013/def/NOR/11/3/EN.
[113] European Committee of Social Rights, decision on the merits, Complaint No. 72/2011, 23 January 2013.
[114] The Committee has specifically said that it has taken data from the European Environment Agency and the United Nations Development Programme on a number of occasions.

thorough enough. Besides, as we shall see for the European Convention on Human Rights, environmental protection is confined to consideration of damage to human health as a result of environmental degradation.

### *(2) Refusal to adopt an additional protocol to the European Convention on Human Rights recognising the right to a healthy environment*

Like the European Social Charter, the Convention does not explicitly recognise the right to a healthy environment, *which is what makes the European human rights instruments* ***less satisfactory*** *than all the other regional instruments*. Article 24 of the African Charter on Human and Peoples' Rights of 28 June 1981 states that "all peoples shall have the right to a general satisfactory environment favourable to their development" and makes this a group right. The African Court on Human and Peoples' Rights, in an obiter dictum in a judgment of May 2017, acknowledged that indigenous peoples had the right to a healthy environment guaranteed by Article 24.[115] Furthermore, Articles 18 and 19 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), adopted on 11 July 2003, grants women "the right to live in a healthy and sustainable environment" and "the right to fully enjoy their right to sustainable development". Elsewhere, Article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (San Salvador Protocol) of 17 November 1988 recognises that "everyone shall have the right to live in a healthy environment". Article 28(f) of the ASEAN Human Rights Declaration signed on 18 November 2012 proclaims the right to a "safe, clean and sustainable environment" as part of the right to an adequate standard of living. For its part, Article 38 of the Arab Charter on Human Rights, which entered into force on 15 March 2008, recognises the right to a "healthy" environment. Lastly, Article 1 of the Aarhus Convention refers to "the right of every person of present and future generations to live in an environment adequate to his or her health and well-being".

All the attempts to supplement the European Convention on Human Rights with an Additional Protocol along these lines have failed for reasons that it is important to remember. We have to go back to the Council of Europe Ministerial Conference on the Environment in Vienna in 1973 for the precursors to these attempts, and in particular to the 1977

[115] App. No. 006/2012, *African Commission on Human and Peoples' Rights v. Kenya*, 26 May 2017, para. 199, concerning the Ogiek Community of the Mau Forest (indigenous minority), who had received an eviction notice from the state on the grounds that the forest was a reserved water catchment zone and was government land.

initiative by the German Government, taking up a text by Professor Steiger, to draft an additional protocol guaranteeing everyone the right to enjoy a healthy environment. The Parliamentary Assembly was to resume this initial attempt on three occasions. In Recommendation 1431 (1999), for instance, the Assembly asked the Committee of Ministers to: "11.2 instruct the appropriate bodies within the Council of Europe to examine the feasibility of: […] b. drafting an amendment or an additional protocol to the European Convention on Human Rights concerning the right of individuals to a healthy and viable environment". In response, the Committee of Ministers stated that "the recognition of the individual and legally enforceable nature of the human right to a healthy and viable environment meets at present certain difficulties, legal and conceptual".[116] Moreover, as the Aarhus Convention was not yet in force, there would have been no point in arguing for a new environmental instrument. In 2003, the Assembly, believing the national, European and international context to be conducive to the environmental cause, recommended that the Committee of Ministers "draw up an additional protocol to the European Convention on Human Rights concerning the recognition of individual procedural rights intended to enhance environmental protection, as set out in the Aarhus Convention".[117] However, the rapporteur for the Committee on Legal Affairs and Human Rights expressed serious reservations, considering "that the European Convention on Human Rights and its Court would be given tasks beyond their competence and means",[118] whilst acknowledging that the focus should be on procedural rights and that states should meanwhile be given time to recognise such rights under national laws. In its comments on Parliamentary Assembly Recommendation 1614 (2003), the Bureau of the Committee for the Activities of the Council of Europe in the field of Biological and Landscape Diversity (CO-DBP) noted: "the Convention on Human Rights does not make any specific reference to the protection of the environment, an international concern that emerged at a stage ulterior to the coming into force of the Convention. Therefore, the European Court of Human Rights cannot deal effectively with a number of 'new generation' human rights, including the right to a sound environment." The initiative was repeated in 2009 with Recommendation 1885 (2009) entitled "Drafting an

[116] Committee of Ministers, Doc. 8892, Reply to Recommendation 1431 (1999) – Future action to be taken by the Council of Europe in the field of environment protection, 20 November 2000.

[117] Parliamentary Assembly, Recommendation 1614 (2003) "Environment and human rights", preamble, 27 June 2003, para. 3.

[118] Parliamentary Assembly, Doc. 9833, 19 June 2003, "Environment and human rights", Opinion of the Committee on Legal Affairs and Human Rights, Rapporteur: Mr Erik Jurgens.

additional protocol to the European Convention on Human Rights concerning the right to a healthy environment", with the same reply from the Committee of Ministers.[119]

The most commonly adduced counter-argument at the time (uncertainty as to the actual existence of a right conferred on individuals, or, at the very least, a right that was not adequately defined) now seems redundant. Another argument – that the European Convention on Human Rights, together with the Court, was probably unable to accommodate such cases and this specific right[120] – seems the most relevant and still applicable. It should be added that, as will be shown in detail below, the pointlessness of such recognition cannot be inferred from an environmental case-law developed by the European Court (another reason given for opposing the idea of an additional protocol).

### *(3) The European Convention on Human Rights as interpreted by the European Court*

**Not only does the European Convention on Human Rights fail to recognise the right to a "healthy environment", but the Court has also refused to recognise it explicitly**,[121] despite declaring admissible a certain number of applications that concerned it directly and sometimes finding breaches of the Convention. The Court has noted on various occasions that the Convention does not expressly recognise the right to a healthy environment,[122] which "has not become an autonomous right in

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[119] Committee of Ministers Reply to Recommendation 1883, Doc. 12298, "The challenges posed by climate change", 19 June 2010.

[120] Parliamentary Assembly, Doc. 8560, "Future action to be taken by the Council of Europe in the field of environment protection", Report of the Committee on the Environment, Regional Planning and Local Authorities, Rapporteur: Mr Rise, 5 October 1999: "The extension of the European Convention on Human Rights to environmental rights must, however, be considered in the light of the characteristics of environmental rights."

[121] Even though some judges have thought that they could find indications of this right: European Court HR, GC, *Hatton and Others v. the United Kingdom*, No. 36022/97, 8 July 2003, Joint dissenting opinion of Judges Costa, Ress, Türmen, Zupančič and Steiner, para. 2. See also the partly concurring, partly dissenting opinion of Judge Pinto de Albuquerque, in *Konstantin Markin v. Russia*, No. 30078/06, 22 March 2012.

[122] European Court HR, *Apanasewicz v. Poland*, No. 6854/07, 3 May 2011, para. 94, whilst accepting that an issue might arise under Article 8 (and accepting that there had been a violation of Article 8 in this case). Also, European Court HR: Fifth Section, *Flamenbaum and Others v. France*, Nos. 3675/04 and 23264/04, 13 December 2012, para. 133; Third Section, *Lars and Astrid Fägerskiöld v. Sweden*, decision as to admissibility, No. 37664/04, 26 February 2008; Third Section, *Chiş v. Romania*, decision as to admissibility, No. 55396/07, 9 September 2014, para. 29; Fourth Section, *Frankowski and Others v. Poland*, decision as to admissibility, No. 25002/09, 20 September 2011; Second Section, *Aydin and Others v. Turkey*, decision, No. 40806/07,

the case law" of the Court,[123] despite the fact that it has enshrined certain rights through the latter. The Court "still refuses to enshrine it explicitly by judicial means and […] still firmly maintains the principle of indirect protection through substantive rights and subsidiary protection through procedural rights'.[124] Since there is no explicit recognition, a "certain conceptual approximation"[125] has been noted in legal doctrine; accordingly, the right may be to an environment that is "clean and quiet",[126] "healthy and protected"[127] or "balanced and healthy".[128]

Attention is drawn to the factsheet entitled *Environment and the European Convention on Human Rights*[129] for a list describing the content of European Court of Human Rights judgments and decisions in the environmental field. The present report is intended to complement this review by the Court itself and the *Manual on Human Rights and the Environment* updated by the CDDH[130] by offering a critical assessment of the contributions and limitations of such cases, drawing on what is now extremely well documented in legal doctrine.

After some unsuccessful attempts at the outset (resulting in findings of inadmissibility), the first environmental application was declared admissible by the European Commission of Human Rights on 15 July 1980.[131] The European Court of Human Rights delivered its first environmental judgment in the field of procedural rights in 1983.[132] As for the figures, one author has noted that "while some 70% of applications have been found admissible *ratione materiae*, only 38% have led to findings of a breach of the Convention (30% for Article 8, which is the

15 May 2012, para. 24; Second Section, *Otgon v. the Republic of Moldova*, judgment, No. 22743/07, 25 October 2016, para. 15; Fourth Section, *Fieroiu and Others v. Romania*, decision, No. 65175/10, 23 May 2017, para. 18.

[123] Baumann P. (2018), "Le droit à un environnement sain au sens du droit de la Convention européenne des droits de l'homme", Université de Nantes, 16 November 2018, available at theses.fr, p. 34.

[124] Ibid., p. 490.

[125] Ibid., p. 9.

[126] European Court HR, *Fägerskiöld v. Sweden*, No. 37664/04, 26 February 2008.

[127] European Court HR, *Tătar v. Romania*, No. 67021/01, 27 January 2009, para. 107.

[128] European Court HR, *Băcilă v. Romania*, No. 19234/04, 30 March 2010, para. 71.

[129] European Court HR, Factsheet, *Environment and the European Convention on Human Rights*, June 2019.

[130] Council of Europe (2012), *Manual on Human Rights and the Environment*.

[131] European Commission of Human Rights, *E. A. Arrondelle v. the United Kingdom*, decision, No. 7889/77, 15 July 1980.

[132] European Court HR, *Zimmermann and Steiner v. Switzerland*, No 8737/79, 13 July 1983.

most frequently enforced right in this field)",[133] whereas the overall rate for findings of violations across all judgments is much higher (84%).[134]

Because no explicit right to a healthy environment has been acknowledged and because protection is afforded only indirectly, such as through Article 8, this means that there are a lot of limitations, which are out of keeping with social realities today. For instance, serious general damage to the environment per se that does not at the same time violate other individual rights in the Convention cannot be held to be in breach of the Convention. This fundamental limitation, created by an anthropocentric outlook, has been justifiably criticised by legal writers.[135] As one parliamentarian has written: "Interference with the environment that does not endanger life, health or property is scarcely covered by the existing instruments. Moreover, the restriction imposed by Article 8(2) of the Convention involves a danger of overemphasising the community's economic well-being."[136] In fact, and this is the second fundamental limitation, the weighing against economic interests, which in practice results in the latter being given priority, means that "a high severity threshold is required, which automatically leads the Court to consider only the worst possible situations."[137] Thirdly, and this explains the low percentage of findings of violations in these cases, we also find "allowance of a considerable domestic margin of appreciation affecting the extent of supervision by the European Court of Human Rights and, in addition, the fact that findings of violation are almost systematically contingent on violation of the domestic law of the state concerned".[138] When a domestic response has been offered in an attempt to mitigate environmental damage, the Court therefore sets such a high threshold that there is virtually no hope that a breach of the Convention will be found, leading legal writers to conclude that the Court has reached the end of the road with regard to environmental protection.[139] For eminent

[133] Baumann P. (2018), p. 34.
[134] European Court HR, *ECHR: Overview 1959-2018*, March 2019, p. 3.
[135] Maljean-Dubois S. (2017), "International litigation and State liability for environmental damages: recent evolutions and perspectives", in Yeh J. R. (ed.), *Climate Liability and Beyond*, National Taiwan University Press, Taipei, Part I.
[136] PACE, Doc. 9791, "Environment and human rights", Report of the Committee on the Environment, Agriculture and Local and Regional Affairs, Rapporteur: Ms Agudo, 16 April 2003, para. 28.
[137] Misonne D. and Ost F. (2013), "L'illusion du juste équilibre ou la variabilité de la jurisprudence du juge européen portant sur la balance des intérêts entre environnement et enjeux économiques", in *Pour un droit économique de l'environnement, Mélanges en l'honneur de Gilles J. Martin*, Frison-Roche, Paris, p. 361. Baumann P. (2018), p. 34.
[138] Baumann P. (2018), p. 34.
[139] Pedersen O. W. (2018), "The European Court of Human Rights and international environmental law", in Knox J. H. and Pejan R. (eds), *The Human Right to a Healthy Environment*, Cambridge University Press, Cambridge, p. 89, p. 90: "[…] it suggests that

experts on the Convention such as Frédéric Sudre, this case law shows a "debasement of the proportionality test",[140] since the Court is satisfied with a procedural test alone. The explanation would seem to lie in "the specificity of the judicial treatment of environmental cases under the European Convention on Human Rights",[141] a specificity that directly affects how environmental protection is enforced.[142] This treatment is described as "residual protection, with a penalty being imposed only in the event of an obvious misinterpretation or particularly glaring errors of procedure".[143] Furthermore, and this is another serious limitation, the Court is entirely impervious to the key principles of environmental law, starting with the precautionary approach.

Paul Baumann divides the past into two periods, the first, fairly progressive, continuing until 2003, a year which marked a standstill.[144] The case law, which was sometimes progressive but has recently been more retrograde,[145] has been called "disconcerting".[146] In the *Kyrtatos v. Greece* judgment of 22 May 2003, for instance, it is expressly stated that "[n]either Article 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",[147] thereby upholding a position that is now familiar[148] and leading some authors to call this a "sacrosanct" boundary.[149] For the same writer, when the Court justifies its decision of inadmissibility in *Aydin and Others v.*

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the Court's case-law may well be at a standstill or, at the least, that the Court has reached the end point of how far it is willing to expand the Convention to cover environmental issues".

[140] Sudre F. (2015), "Convergence des jurisprudences de la Cour européenne des droits de l'homme et du Comité européen des droits sociaux et droit de l'homme à un environnement sain", in *Mélanges en l'honneur du Professeur H. Oberdorff*, LGDJ, Issy-les-Moulineaux, pp. 25-36, p. 36.

[141] Sudre F. (2017), "La Cour européenne des droits de l'homme et le principe de précaution", *Revue française de droit administratif*, Dalloz, p. 1039.

[142] Baumann P. (2018), p. 38.

[143] Ibid., p. 490.

[144] Ibid., p. 36.

[145] Pedersen O.W. (2018), p. 87.

[146] Marguénaud J.-P. (2013), "Faut-il adopter un Protocole n°15 relatif au droit à l'environnement ?", in Robert L. (ed.), *L'environnement et la Convention européenne des droits de l'homme*, Bruylant, Brussels, p. 79.

[147] European Court HR, *Kyrtatos v. Greece*, No. 41666/98, 22 May 2003, para. 52, author's emphasis. Shelton D. (2018), "Complexities and uncertainties in matters of human rights and the environment: Identifying the judicial role", in Knox J. H. and Pejan R. (eds), *The Human Right to a Healthy Environment*, p. 104.

[148] *Ivan Atanasov v. Bulgaria*, No. 12853/03, 2 December 2010.

[149] Michallet I. (2013), "Cour européenne des droits de l'homme et biodiversité", in Robert L. (ed.), *L'environnement et la Convention européenne des droits de l'homme*, p. 95.

*Turkey* concerning the building of a dam and hydroelectric power stations on the grounds that "the project will not have caused any significant damage to the environment", "the Court's contentions nevertheless show that it does not have any real expertise in the matter, and destruction of biodiversity cannot, when it comes to measuring the seriousness of environmental damage, be compared to pollution".[150] In Camila Perruso's view, such cases have two basic limitations. Firstly, as already stated above, natural elements cannot be protected per se, yet we must recognise that "natural elements also belong, when decompartmentalised, to the very concept of 'human beings'". "Secondly, existing human rights cannot be used to defend the rights of future generations directly", despite the fact that "intergenerational equity […] has become a moral imperative in a context of environmental crisis".[151] We shall in fact return to this specific feature of ecological human rights, which is ignored by the Convention. On top of all these limitations, there are others relating to *locus standi* and remedies. The fact that only an individual victim can lodge an application with the Court is wholly unsuited to environmental litigation, as "groups of individuals are in a better position to lodge applications for environmental protection than a single individual […]".[152] Furthermore, the specific nature of remedying environmental damage has not been grasped by the European Court of Human Rights or the Committee of Ministers: a pecuniary response is not appropriate.[153] We know, for example, that "restoration" is absolutely essential, and this includes "seeking an ecological equivalent of the resources permanently lost"[154] when the damage for which the ruling has been obtained is irreversible. Consequently, pecuniary compensation must be very much the exception.

It is worth noting that the Court's lack of ambition and courage in environmental matters is almost unanimously recognised by legal writers.[155] The desire to move beyond the current view by introducing rights of Nature and an autonomous right to a healthy environment has even prompted research into rewriting the Court's case law.[156] The

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[150] Ibid., p. 96.
[151] Perruso C. (2019), "Le droit à un environnement sain en droit international", thesis, Université de Paris 1/University of Sao Paulo, 15 October 2019, p. 406.
[152] Ibid., p. 407.
[153] Ibid.
[154] APCEF (2016), Ecological Damage Committee, chaired by L. Neyret, *La réparation du préjudice écologique en pratique*, p. 27.
[155] Cournil C. (2016), "'Verdissement' des systèmes régionaux de protection des droits de l'homme : circulation et standardisation des normes", *European Journal of Human Rights* No. 1, p. 8.
[156] Heiskanen H.-E. (2018), *Towards greener human rights protection: Rewriting the environmental case-law of the European Court of Human Rights*, academic dissertation,

present assessment suggests that the European Court has acknowledged the existence of a right to environmental health and safety[157] rather than a right to a healthy environment or, still less, a right to protection of the environment. In R. Bentirou Mathlouthi's view, this is at most a "right to an environment in good health".[158] We cannot but agree with P. Baumann that "there is no getting away from the fact that the European Court did not want to take the necessary steps to deal properly with these cases either".[159]

We must therefore conclude that the attempts by the European Committee of Social Rights and the European Court of Human Rights to make good the lack of a right to a healthy environment are unconvincing and today seem wholly incommensurate with the environment emergency and the expectations of civil society. According to P. Baumann, "the situation regarding the right to a healthy environment in European case law seems unlikely to change in the absence of an additional protocol specifically on this subject".[160] Is it even desirable to reopen the debate today, or is it already too late?

We must therefore explore the huge task that the Council of Europe ought to tackle.

University of Tampere, 11 May 2018, 204 pp. This author believes that the Court could have opted for a more environment-friendly interpretation, p. 175.

[157] Bentirou Mathlouthi R. (2018), *Le développement d'un consensus sur la sécurité environnementale à la lumière des synergies "écologiques" des jurisprudences européennes*, thesis, Communauté Université Grenoble Alpes and Université de Neuchâtel, 19 January 2018, p. 174.

[158] Ibid., p. 467.

[159] Baumann P. (2018), p. 36.

[160] Ibid., p. 37.

## 3. DEVISING FUTURE ECOLOGICAL/ENVIRONMENTAL RIGHTS: THE TASK FOR THE COUNCIL OF EUROPE AND ITS MEMBER STATES

Within the limited scope of this report, the focus will be on the most significant shortcomings that the Council of Europe and its member states could address in the months ahead. Procedural and, above all, substantive elements must be considered. There are five priorities.

### A. The need to recognise an individual right to a "decent" or "good-quality" environment taking an ecocentric and intergenerational approach

At the European level, the substantive limb is without any doubt the *poorest* relation of the right to a healthy environment.[161] With the benefit of hindsight, explicit recognition of a right to a "healthy environment" would have two advantages: firstly, it would be an incentive for stronger domestic environmental laws and a more protection-focused approach by the Court, and, secondly, it would make it easier for victims to lodge applications for remedies.[162] It has not been shown that there is any frivolous litigation.[163] Recognising an autonomous right to a healthy environment would have the benefit of allowing a violation to be found irrespective of whether another right had been breached[164] and would therefore raise the profile of the right.

However, such an advance would be meagre and, above all, already out of date,[165] since, in the light of what has been said above, the expression "right to a decent environment" or to a "good-quality environment" should be preferred to the more restrictive term "right to a healthy environment", which covers only environmental damage affecting human health or well-being. The right to a "decent" environment adopted by the Committee of Ministers in 2004[166] was a formulation already used by the OECD since

[161] Bentirou Mathlouthi R. (2018), p. 466.
[162] Boyd D.R. (2018), "Catalyst for change: Evaluating forty years of experience in implementing the right to a healthy environment", in Knox J.H. and Pejan R., *The Human Right to a Healthy Environment*, Cambridge University Press, pp. 17-41, pp. 26-27. The success rate is apparently over 50%.
[163] Ibid., p. 37.
[164] Perruso C. (2019), p. 405.
[165] Baumann P. (2018), pp. 491-492. Boyle A. (2012), "Human rights and the environment: Where next?", *European Journal of International Law* Vol. 23, No. 3, pp. 613-642, p. 616.
[166] Reply from the Committee of Ministers, Doc. 10041, "Environment and human rights", 24 January 2004: "The Committee of Ministers recognises the importance of a healthy, viable and decent environment […]."

1984.[167] A "decent" environment means understanding the link between fundamental rights, our environment and sustainable development, and it also covers protection of the natural environment[168] in line with today's ecological outlook. In its celebrated advisory opinion of 2017, the Inter-American Court of Human Rights held that this right protected the components of the natural environment, such as forests, rivers and other natural elements.[169]

Recognition of the right to a good-quality environment in ecocentric (rather than solely anthropocentric) terms has quickly gathered pace over the past thirty years among member states of the Council of Europe.[170] According to David R. Boyd, a real constitutional "revolution" has actually taken place since the 1970s,[171] with **Portugal** being the first country to recognise a constitutional right to a "healthy and ecologically balanced human environment" in its 1976 constitution. According to Article 112 of the **Norwegian** Constitution: "Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well." Article 1 of the **French** Charter for the Environment refers to the right to "a balanced environment which shows due respect for health".

At present, about half the countries of the world recognise the right to a healthy environment or, more broadly, a "good-quality" one.[172] Although the extent of recognition varies, and it has a whole range of practical consequences, the inclusion of this right has had the positive effect of strengthening the legislative and judicial arsenal at national level[173] and prompting the public authorities to take a number of environmental and

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[167] OECD (1984), "Responsibility and liability of States in relation to transfrontier pollution", *Environmental Policy and Law* Vol. 13, p. 122.
[168] Boyle A. (2015), "Human rights and the environment: Where next?", in Boer B. (ed.) *Environmental Law Dimensions of Human Rights*, Oxford University Press, p. 208.
[169] Inter-American Court of Human Rights, Advisory opinion, OC-23/17, 15 November 2017, para. 62.
[170] For an exhaustive list of related instruments, see: Rodriguez-Rivera L.E. (2018), "The human right to environment in the 21st century: A case for its recognition and comments on the systemic barriers it encounters", *American University International Law Review* Vol. 34, p. 143, which concludes that this recognition "is robust, to say the least" (p. 203).
[171] Boyd D. R. (2012), *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment*, UBCPress, Vancouver/Toronto.
[172] May J. R. and Daly E. (2019), p. 7.
[173] Boyd D. R. (2018), pp. 17-23.

public health measures.[174] This constitutionalism, which goes beyond recognition of a good-quality environment for human beings, "is playing an important role in recognising the human rights implications of environmental degradation and climate disruption".[175] A compilation of good practices has been produced by the United Nations rapporteur.[176] Article 1 of the draft Global Pact for the Environment produced by an international group of experts calls for recognition of the right to live in an "ecologically sound environment" and Article 2 affirms a duty to take care of the environment.

There is no longer any doubt that this right is now being clearly defined in the legal community. For example, the right to a good-quality environment must be understood as embracing, amongst other things, the right to live in a pollution-free environment.[177] In this respect, the report of 8 January 2019 by the United Nations Special Rapporteur, David R. Boyd, is particularly instructive,[178] considering the "right to breathe clean air" to be "one of the vital elements of the right to a healthy and sustainable environment, along with access to clean water and adequate sanitation, healthy and sustainable food, a safe climate, and healthy biodiversity and ecosystems".[179] Poor air quality leads to over half a million deaths in Europe every year (para. 26), and "more than 90 per cent of the world's population lives in regions that exceed WHO guidelines for healthy ambient air quality" (para. 25). According to David R. Boyd, the right to clean air is just as legitimate as the right to clean water, since "both are essential to life, health, dignity and well-being".[180] The UN Committee on the Rights of the Child has therefore already acknowledged that "States should take measures to address the dangers and risks that local environmental pollution poses to children's health in all settings".[181] According to the Special Rapporteur's report, it follows

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[174] UN General Assembly (2018), "Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment", A/73/188, 19 July 2018, and references to various studies in footnote 18 and following.
[175] May J. R. and Daly E. (2019), p. 8.
[176] UN General Assembly (2015), "Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox. Compilation of good practices", A/HRC/28/61, 3 February 2015. See also A/73/188 (footnote 115 above).
[177] Prieur M. (2005), "Les nouveaux droits", *Actualité juridique droit administrative*, p. 1157.
[178] UN General Assembly (2019), "Issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment", Report of the Special Rapporteur, A/HRC/40/55, 8 January 2019.
[179] Ibid., p. 4.
[180] Ibid., p. 9.
[181] Committee on the Rights of the Child (2013), General Comment No. 15(2013) on the right of the child to the enjoyment of the highest attainable standard of health, para. 49.

from this recognition of the right to breathe clean air that states have seven obligations: "monitor air quality and impacts on human health; assess sources of air pollution; make information publicly available, including public health advisories; establish air quality legislation, regulations, standards and policies; develop air quality action plans at the local, national and, if necessary, regional levels; implement an air quality action plan and enforce the standards; and evaluate progress and, if necessary, strengthen the plan to ensure that the standards are met".[182] The substantive limb should also cover the right of every individual (and not just workers in their occupational environment[183]) not to be exposed to harmful substances. The issue of air pollution has also been discussed at the Parliamentary Assembly of the Council of Europe.[184] [185]

In 1990 one European state suggested recognising "(1) the right to ecologically clean foodstuffs; (2) the right to ecologically harmless consumer goods; (3) the right to engage in productive activities in ecologically harmless conditions; (4) the right to live in ecologically clean natural surroundings; and (5) the right to obtain and disseminate reliable information on the quality of foodstuffs, consumer goods, working conditions, and the state of the environment".[186]

Other examples from outside Europe could serve as inspiration. The South African Constitution offers an example of the incorporation of human rights-based individual and collective rights into environmental protection, stating: "Everyone has the right: a) to an environment that is not harmful to their health or well-being; and b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that: i) prevent pollution and ecological degradation; ii) promote conservation; and iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."[187] Another example is provided by the Constitution of the Dominican Republic, according to which, "Every person has the right, both individually and

[182] UN General Assembly (2019), A/HRC/40/55, p. 11, para. 61.
[183] UN General Assembly, Human Rights Council (2018), "Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes", A/HRC/39/48, 3 August 2018.
[184] PACE (2019), Doc. 14888, "Air pollution: a challenge for public health in Europe", report, 9 May 2019.
[185] See also Post H. H. G. (2019), "The state of a human right to a healthy environment", *Israel Yearbook on Human Rights* Vol. 49, pp. 171 ff.
[186] It was Ukraine: cited in Shelton D. (1991), "Human Rights, environmental rights and the right to environment", *Stanford Journal of International Law* Vol. 28, p. 137, fn. 135.
[187] See May J. R. and Daly E. (2019), pp. 19-20.

collectively, to the sustainable use and enjoyment of the natural resources; to live in a healthy, ecologically balanced and suitable environment for the development and preservation of the various forms of life, of the landscape and of nature." Reference may also be made to Article 5 of the 2015 Universal Declaration of the Rights of Humankind, where it is stated, "Humankind, like all living species, has the right to live in a healthy and ecologically sustainable environment." The report on the Declaration points out that the expression "ecologically sustainable" draws attention to the vital link between humankind and nature and creates a continuum with protection of nature itself".[188] In his 2018 report, the United Nations Special Rapporteur, John Knox, therefore concluded: "Given the importance of clean air, safe water, healthy ecosystems and a stable climate to the ability of both current and future generations to lead healthy and fulfilling lives, global recognition of the right to a safe, clean, healthy and sustainable environment should be regarded as an urgent moral imperative."[189]

Such recognition would have the great advantage of acknowledging an individual and collective right to protection of the human environment, of enabling states, and if possible, businesses, too (see below), to be held liable and of making it possible to obtain restoration of the natural environment. This right has to be directly applicable and able to be invoked by individuals and civil society at the domestic and European levels without having to possess the status of victim, if it is not to remain a dead letter. This individual right to live in a good-quality environment must be complemented by the duty of public and private institutions and natural and legal persons to protect the environment.[190]

This recognition ought to take the form of a ***specific instrument***, since ecological/environmental rights do not obey the same logic as civil and political rights on the one hand and social and economic rights on the other. Recognition of this right from the ecocentric standpoint explained above should therefore be accompanied by inclusion of principles specific to this field, such as the principle of prevention, the precautionary

[188] Lepage C. et al. (2015), Report on the 2015 Universal Declaration of the Rights of Humankind, p. 36, available at https://www.vie-publique.fr/sites/default/files/rapport/pdf/154000687.pdf (in French), accessed 15 January 2020.
[189] UN General Assembly (2018), A/73/188, p. 19 and references to various studies in footnote 18 and following.
[190] See Article 2 of the draft Global Pact for the Environment.

approach (Principle 15 of the Rio Declaration[191]) and the "polluter pays" principle, all of which are closely linked with the concept of environmental justice[192] and a reconfiguration of markets to take account of respect for living organisms.[193] The principle of non-regression should also be added, with the dual purpose of preventing backsliding in environmental standards and achieving steady improvement.[194]

As for other specific features needing acknowledgment, there is one that is now extremely well-researched, namely the issue of who holds this right to a good-quality environment, since the bearers are not only the present generation but also **future generations**. The question of protecting future generations arose after the Second World War, with the realisation that humanity, to use Jean-Paul Sartre's words, was now "in possession of its own death".[195] The International Court of Justice has recognised that "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn".[196] At United Nations level generally, discussion of legal acknowledgment of the needs and rights of future generations is gathering pace.[197] The 1982 World Charter for Nature recognised the concept of future generations for the first time.[198] In 1997, UNESCO adopted its Declaration on the Responsibilities of the Present Generations Towards Future Generations;[199] Article 5 provides (in paragraph 1) that present generations should therefore "preserve living conditions, particularly the quality and integrity of the environment" and (in paragraph 2) "ensure that future generations are not exposed to pollution which may endanger their health or their existence itself". However, as Catherine Le Bris has pointed out with respect to

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[191] "Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

[192] Pedersen O. W. (2010), "Environmental principles and environmental justice", *Environmental Law Review* Vol. 12, No. 1, pp. 26-49.

[193] Garver G. (2019), p. 431.

[194] Baumann P. (2018), p. 492. Prieur M. and Sozzo G. (eds) (2012), *La non-régression en droit de l'environnement*, Bruylant, Brussels.

[195] Sartre J.-P. (1945), "La fin de la guerre", *Les Temps Modernes* No. 1, 1 October 1945, p. 165.

[196] ICJ (1996), Legality of the threat or use of nuclear weapons, Advisory opinion of 8 July 1996, ICJ Reports, pp. 241-242, para. 29.

[197] UN General Assembly (2013), "Intergenerational solidarity and the needs of future generations", Report of the Secretary-General, A/68/322, 5 August 2013.

[198] UN General Assembly, World Charter for Nature, 28 October 1982, available at https://digitallibrary.un.org/record/39295/files/A_RES_37_7-EN.pdf, accessed 15 January 2020.

[199] UNESCO, Declaration on the Responsibilities of the Present Generations Towards Future Generations, 12 November 1997.

international covenants – and the argument can be transposed here to the European Convention on Human Rights – these texts are designed solely to protect individuals at the present time rather than future generations, even if UN Committees refer to intergenerational equity in their comments.[200] More recently, Article 11 of the 2015 Universal Declaration of the Rights of Humankind recognises that: "The present generations have a duty to ensure respect for the rights of humankind, as that of all living species. Respect for the rights of humankind and of man, which are indivisible, apply in respect to successive generations." Further, according to Article 14, "The present generations have a duty to guide scientific and technical progress towards the preservation and health of humans and other species." Nor is the concept wanting at the European level: Article 1 of the Aarhus Convention acknowledges "rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention" "[i]n order to contribute to the protection of the right of every person of present and future generations". Some European states have also made provision for the rights of future generations; for instance, the state must be mindful of its "responsibility towards future generations" according to the *German Constitution* (Article 20a). In the same vein, Article 45, paragraph 2, of the *Spanish Constitution* states that "the public authorities shall watch over rational use of all natural resources with a view to protecting and improving the quality of life and preserving and restoring the environment, by relying on an indispensable collective solidarity", with provision in the following paragraph for "criminal or, where applicable, administrative sanctions" as well as an obligation "to repair the damage caused". Similarly, Article 112 of the *Norwegian Constitution* provides as follows: "Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well." The same article also makes provision for an obligation by the state to provide citizens with "information on the state of the natural environment".

[200] Le Bris C. (2018), "Humanité : des générations présentes aux générations futures", in Grosbon S. (ed.), *Résistance et résilience des pactes internationaux des droits de l'Homme à l'épreuve d'une société internationale post-moderne*, Pedone, Paris, pp. 76-77.

Yet the *intergenerational dimension* is crucial in the environmental field.[201] It is time to reread Hans Jonas, who in 1984 wrote in his celebrated book, *The Imperative of Responsibility*, "Act so that the effects of your action are compatible with the permanence of genuine human life."[202] Article 3 of the 2015 Universal Declaration of the Rights of Humankind states: "The principle of continuity of human existence guarantees the preservation and protection of humankind and the earth, through prudent human activities respectful of nature, particularly of life, human and non-human, taking every step to prevent all transgenerational consequences, serious or irreversible". According to Article 8: "Humankind has the right to the preservation of common goods, especially air, water and ground, and universal and effective access to vital resources. Future generations are entitled to the transmission thereof." The concept of ***commons***, familiar to jurists, is also pivotal, since "the environment is nobody's property and the use made of it is common to all".[203] The commons and human rights approach would also necessitate new forms of governance on various scales, including self-organisation and a bottom-up rule-making process.[204] We are in fact seeing a proliferation of citizen initiatives, such as the Citizens' Convention on Climate at present in France.

It may therefore be concluded that it would be timely for the Council of Europe to promote recognition at the national and European levels of an autonomous individual and collective right to a decent environment embracing an intergenerational outlook and an ecocentric approach, backed up by the requisite duties and principles.

### B. The newer issue of the rights of Nature and Nature's legal representation

This second priority has a substantive limb and a procedural limb. As Valérie Cabanes writes, "two stages in legal doctrine seem necessary to restore the Earth's balance: the first, already under way, is to recognise our interdependence with all living things on Earth in law; the second, more groundbreaking, would be to grant rights to the Earth's ecosystems in order to ensure their inviolability".[205] Everyone has to agree that Europe has so far failed to contribute to recognising the rights of Nature. Since

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[201] See also UN General Assembly (2013), A/68/322.

[202] Jonas H. (1984), *The Imperative of Responsibility: In Search of Ethics for the Technological Age*, University of Chicago Press, p. 11.

[203] Jadot B. (2019), "L'environnement n'appartient à personne et l'usage qui en est fait est commun à tous", in Ost F. and Gutwirth S. (eds), *Quel avenir pour le droit de l'environnement ?,* Presses de l'Université Saint-Louis, Brussels.

[204] Weston B. H. and Bollier D. (2014).

[205] Cabanes V. (2016), p. 267.

Christopher Stone's 1972 paper,[206] the question has arisen as to whether Nature should be granted legal personality, something the Ecuadorian Constitution has made a reality by becoming, in 2008, the first constitution to grant rights to Nature, in its preamble and in Articles 71 and 72.[207]

The Western approach has traditionally been to consider nature an "object in the service of human beings". Taking the intermediate perspective proposed by F. Ost and outlined in the introduction above, the 2015 Declaration adopted a "third way", "an eco-anthropocentric outlook", interpreting Nature as a "project" *with rights but without legal personality*. This third way seems better suited to the continent of Europe. Recognition of the rights of Nature (such as the right of preservation and the right of restoration, including by equivalence), in keeping with the standards previously developed by the Council of Europe, ought to be considered in the light of the most recent developments, and it is important to set out in detail the resulting duties for both public and private sectors. In addition, the question of how to organise the legal representation of Nature ought to be tackled.[208] *Actio popularis* does not exist in the European Court of Human Rights, as reiterated in *Bursa Barosu Başkanliği and Others v. Turkey*,[209] and this is regarded as a serious obstacle to environmental protection.[210] Only personal interests are accepted by the European Court (or else a sum of personal interests), which is often totally inappropriate, since "these personal interests, presented to the court as such, afford representation for Nature only through the interests of the person bringing the proceedings".[211] While the reluctance of a (judicial or quasi-judicial) European monitoring body to accept *actio popularis* (namely, the capacity of an individual to act in the collective interest, which cannot be reduced to the sum of individual interests) is understandable, it might be possible at least to confer standing on environmental organisations or associations better able to present environmental cases, which very frequently transcend individual interests. Some researchers have recently suggested thinking about the advisability of introducing *actio popularis* for environmental cases, at least

[206] Stone C. (1972), "Should trees have standing? Toward legal rights for natural objects", *Southern California Law Review* Vol. 45, pp. 450-501.
[207] Lefort-Martine T. (2018), *Des droits pour la Nature ? L'expérience équatorienne*, L'Harmattan, Paris.
[208] Camproux Duffrène M.-P. and Sohnle J. (eds) (2015), *La représentation de la nature devant le juge : approche comparative et prospective*, special issue, No. 22, Vertigo.
[209] European Court HR, *Bursa Barosu Başkanliği and Others v. Turkey*, No. 25680/05, 19 June 2018.
[210] Shelton D. (2018), p. 104.
[211] Camproux M.-P. (2015), Foreword, in Camproux Duffrène M.-P. and Sohnle J. (eds) (2015), para. 22.

domestically,[212] or relaxing the conditions for *locus standi*, as already allowed in some European states;[213] at the supranational level, consideration might be given to a *limited actio popularis* restricted to people in the vicinity of the environmental damage.[214] This approach would also entail first recognising "ecological damage", as has been the case in French law since the law of 8 August 2016,[215] with Article 1246 of the Civil Code whereby "any person responsible for ecological damage is liable for the remediation thereof". Such damage is defined as "consisting in significant harm to elements or functions of ecosystems or collective benefits derived from the environment by human beings" (Civil Code, Article 1247). Convictions have been obtained on this basis. Ecological damage has also been recognised in other countries, including the United States. With regard to *locus standi*, since "ecological damage is not the sum of injury to individual interests but the injury to a common interest consisting of various human and non-human interests considered collectively […] the connection between the interest injured and the representative of this interest is specific".[216] Thus, in French law, a non-exhaustive list of bodies with standing has been laid down in Article 1248 of the Civil Code, "such as the state, the French Agency for Biodiversity, local authorities, [etc.]".

"Shifting the balance of legal protection in favour of nature"[217] can also take other forms, such as limitations on the right of ownership and recognition of the environmental commons (public goods), mentioned above and requiring special legal arrangements (the category of humanity's environmental commons being narrower[218]).

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[212] Truihlé E. and Hautereau-Boutonnet M. (eds) (2019), *Le procès environnemental. Du procès sur l'environnement au procès pour l'environnement*, Final research report (Mission de recherche droit et justice), p. 12.

[213] In Belgium, France, the Netherlands and Portugal: ibid., p. 83.

[214] Ibid. p. 81. In *Cordella and Others v. Italy*, the application was lodged by 161 victims, but 265 000 people were potential victims of the same pollution: European Court HR, Nos. 54414/13 & 54264/15, 24 January 2019.

[215] Camproux Duffrène M.-P. (2020), "Réflexion critique sur l'attribution de droits aux écosystèmes. Pour une approche par les communs", in Vidal C. and. Marguénaud J.-P (eds), *Droits des êtres humains et droits des autres entités : une nouvelle frontière ?*, Mare et Martin, Paris, forthcoming.

[216] Ibid.

[217] Lefort-Martine T. (2018), p. 11. Article 72 of the Ecuadorian Constitution recognises that nature has the right to be restored. According to Article 71, nature "has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes. All persons, communities, peoples and nations can call upon public authorities to enforce the rights of Nature."

[218] Le Bris C. (2017), "Les biens communs environnementaux et la protection des intérêts de l'humanité", in Makowiak J. and Jolivet S. (eds), *Les biens communs environnementaux : quel(s) statut(s) juridique(s)* ?, PULIM, Limoges, p. 109.

## C. Ending the impunity of non-state actors responsible for environmental damage

There is one fact on which everyone today is agreed: multinational corporations have the potential to breach fundamental rights and environmental standards just as much as states and ought also to be accountable for violations of this kind caused by their activities.

Internationally there have been some developments which have made it possible to lay down guidelines. In Resolution 17/4 of 16 June 2011, for instance, the UN Human Rights Council approved the Guiding Principles on Business and Human Rights. These principles were prepared by Professor Ruggie, appointed Special Rapporteur in April 2008, and hinge on the need to "protect, respect and remedy". They apply to all states and all business enterprises, both transnational and others, regardless of size, sector, location, ownership or structure. In addition, the OECD Guidelines for Multinational Enterprises, as updated on 25 May 2011 by the 42 OECD member countries, include detailed recommendations in line with the UN Guiding Principles, with a whole section on human rights (Chapter IV) and a special section entitled "Environment" (Chapter VI). There is broad agreement on these common principles internationally and in Europe, although they are not formally binding. According to the OECD's official commentary on the "Environment" chapter: "The text of the Environment Chapter broadly reflects the principles and objectives contained in the Rio Declaration on Environment and Development, in Agenda 21 (within the Rio Declaration). It also takes into account the (Aarhus) Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters […]. Sound environmental management is an important part of sustainable development, and is increasingly being seen as both a business responsibility and a business opportunity."[219] Enterprises are urged to introduce "a system of environmental management" covering "environmental, health and safety impacts".[220] In addition, General Comment No. 24 adopted in 2017 as a supplement to the International Covenant on Economic, Social and Cultural Rights reiterates these state obligations.[221] In 2018, the twelfth framework principle on human rights and the environment, prepared under the authority of J. H. Knox, provided that "States should ensure the effective enforcement of their

[219] OECD (2011), *OECD Guidelines for Multinational Enterprises*, p. 44, paras. 60 and 61.
[220] Ibid., p. 42, para. 1.
[221] UN Economic and Social Council (2017), *General comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, 10 August 2017.

environmental standards against public and private actors", which entailed their "preventing, investigating, punishing and redressing violations of the standards by private actors as well as governmental authorities".[222]

However, there is no effective complaints mechanism at European or international level enabling proceedings to be brought against private companies. At best, there are the National Contact Points set up by countries under the OECD Guidelines for friendly settlement in a number of "specific instances". But this non-mandatory settlement mechanism has a number of flaws and has quickly shown its limitations.[223] For this reason, a draft treaty on the responsibility of multinationals, supported by the European Economic and Social Committee, is currently under discussion. In an opinion of 11 December 2019, the Committee stated: "Human rights infringements can be better prevented when there is an internationally agreed binding standard, designed to be implemented and protected by states. The EESC welcomes an approach recognising that it is the duty of states to protect, promote and fulfil human rights and that businesses have to respect those rights."[224] It very rightly added: "Despite much-welcomed major progress, especially in Europe, in relation to non-binding guidelines for respecting human rights in the business context […], **a binding treaty is important for those businesses that are not yet taking their responsibilities seriously**."[225] The draft global treaty emphasises the right to redress and remedy for victims of damage caused by multinationals and asks states to provide for criminal, civil and administrative corporate liability. In 2018, Canada became the first country to establish an independent Ombudsperson for Responsible Enterprise.

At the same time, the Council of Europe has begun to involve itself in this field: in 2014 the Committee of Ministers called on states to "take appropriate steps to protect against human rights abuses by business enterprises".[226] In particular, it adopted Recommendation CM/Rec(2016)3, in which it encourages states to implement the UN

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[222] United Nations (2018), *Framework Principles on Human Rights and the Environment*, p. 18.
[223] OECD (2019), *Annual Report on the OECD Guidelines for Multinational Enterprises 2018*.
[224] https://www.business-humanrights.org/en/eu-european-economic-and-social-committee-supports-prposed-treaty-on-business-human-rights (accessed 14 January 2020).
[225] Ibid., para. 1.7 (author's emphasis).
[226] Declaration of the Committee of Ministers on the UN Guiding Principles on Business and Human Rights, 16 April 2014.

Guiding Principles on Business and Human Rights and share good practice and National Action Plans. The implementation of the Recommendation is to be examined by 2021 "with the participation of the relevant stakeholders". The concept of "due diligence" is very widely accepted today in a large number of European countries.

It is now ***necessary to go further***, since these guides to good practice, not being binding, have proved largely ineffective. As early as 2007, Professor Olivier de Schutter, for the European Coalition for Corporate Justice, called for fresh discussion in the European Union to make progress with implementation of corporate accountability.[227] He suggested, amongst other things, appointing a special rapporteur or working group mandated to receive complaints relating to abuses committed by transnational corporations.[228] In 2018 a United Nations report noted advances in a number of states with regard to publicising the duty of due diligence for business and the need to scale up action.[229]
The author of the present report therefore believes that, given its endorsement of the OECD principles in 2016, the progress made in a number of states and its expertise in complaints mechanisms in the field of fundamental rights, the Council of Europe is an appropriate framework in which to provide some real momentum for this major concern.

### D. Recognising other substantive rights

Other rights ought also to be acknowledged at European level. Since the present report is intended simply as an introduction, only a brief list will be offered here. Given the importance of the state of **scientific knowledge** for preservation of the environment and human health, particularly when applying the precautionary principle (for example, with regard to marketing, or prohibiting, potentially toxic chemicals), and the danger of leaving such scientific output mostly in the hands of manufacturers, thought should be given to requiring states not only to monitor scientific output (as recognised by the European Court of Human Rights) but also to support such output by independent institutions. It is equally important to think about limits on scientific research that might infringe the rights of present and future generations. Article 13 of the draft Global Pact for the Environment provides an excellent starting point here

[227] Schutter O. (de) (2007), *Towards Corporate Accountability for Human and Environmental Rights Abuses*, European Coalition for Corporate Justice (ECCJ), Discussion Paper 1.
[228] Ibid., p. 10.
[229] UN General Assembly (2018), "Working Group on the issue of human rights and transnational corporations and other business enterprises", A/73/163, 16 July 2018.

by adding an obligation for states to co-operate.[230] The **right to environmental education** is also starting to emerge. It is provided for in the draft version of the 2015 Universal Declaration of the Rights of Humankind, Principle 18 of which stated, "Closely linked to the rights to life, dignity, freedom, equality, democracy, peace and justice, humankind's right to the environment, like the rights of individuals, peoples and Nature shall be taught, instructed and put into practice in all States." The question of **better protection for environmentalists**/whistle-blowers and civil society more generally is just as essential. Too many activists are being prosecuted with the aim of intimidating them, which has led some states to pass anti-SLAPP (strategic lawsuit against public participation) legislation.

### E. Bolstering the procedural limb and giving thought to a model of procedural environmental law

The procedural limb is certainly the most developed at the European level as a result of the advances in the Aarhus Convention, to which the European Court of Human Rights has actually referred in part,[231] with an increasingly procedural approach to rights over the past ten years.[232] Already in 1992 the Rio Declaration proclaimed, in Principle 10, a right of public participation and access to environmental information held by public authorities, together with a right of redress and remedy.[233] These three pillars were bolstered by the Aarhus Convention, which has been ratified by 40 of the 47 states party to the European Convention on Human Rights. In his report on the right to breathe clean air, the Special Rapporteur added that when it came to enforcing this right, the right of

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[230] "The Parties shall promote, to the best of their ability, the improvement of scientific knowledge of ecosystems and the impact of human activities. They shall co-operate through exchanges of scientific and technological knowledge and by enhancing the development, adaptation, dissemination and transfer of technologies respectful of the environment, including innovative technologies."

[231] A jurist of the Court registry has noted that such references have their limits: Winisdoerffer Y. (2013), "L'intégration des principes définis par la Convention d'Aarhus dans la jurisprudence de la Cour européenne des droits de l'homme", in Berg L. et al. (eds), *Cohérence et impact de la jurisprudence de la Cour européenne des droits de l'homme, Liber Amicorum Vincent Berge*r, Wolf Legal Publishers, Oisterwijk, p. 457.

[232] Gerards J.H. and Brems E. (eds) (2017), *Procedural Review in European Fundamental Rights Cases,* Cambridge University Press, Cambridge.

[233] Principle 10: "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

access to information and the public right to participate, especially for vulnerable people (the elderly, children, women) must be guaranteed, as must protection of environmental defenders.[234]

As for the Council of Europe, considering the narrow approach of the European Court of Human Rights, a right of access to some environmental information (concerning risks to life, health and well-being) has been recognised in *Tătar v. Romania* and *Branduse v. Romania*, amongst others, as well as *Öneryildiz v. Turkey*.[235] However, a right of access to environmental information in the broad sense is not accepted. Public participation in the decision-making process has been recognised in *Taşkin and Others v. Turkey* and *Giacomelli v. Italy*,[236] for example, but here again only to the extent that activities seriously affect human health or life. Right of access to the courts is also restricted, by the constraints of Article 6(1), to "civil rights and obligations".

The merit of the Aarhus Convention (Article 9) is to allow legal proceedings on the basis of *actio popularis*. This is a basic difference from human rights courts and is crucial for recognition of a right to a decent environment.[237] However, Article 9(3) of the Aarhus Convention does not provide for an unqualified right of access. Comprehensive studies on implementation of access to justice in environmental matters have been produced by the EU and nationally (state by state), to which the reader is referred.[238] According to a number of well-researched studies, significant hurdles remain, particularly regarding access to national courts for environmental NGOs and individuals.[239] It would therefore be advisable not only to have the rights established by the Aarhus Convention recognised by the 47 Council of Europe member states but also to bolster the pillar on access to environmental justice.

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[234] A/HRC/40/55, page 11, para. 62.

[235] European Court HR: *Tătar v. Romania*, No. 67021/01, 27 January 2009; *Öneryildiz v. Turkey*, No. 48939/99, 30 November 2004.

[236] European Court HR, *Taşkin and Others v. Turkey*, No. 46117/99, 10 November 2004.

[237] Boyle A. (2015), p. 218.

[238] https://e-justice.europa.eu/content_access_to_justice_in_environmental_matters-300-en.do, accessed 15 January 2020. Truihlé E. and Hautereau-Boutonnet M. (eds) (2019), Chapters 1 and 2.

[239] European Commission (2019), "Report on European Union implementation of the Aarhus Convention in the area of access to justice in environmental matters", Commission staff working document, SWD(2019) 378 final, Brussels, 10 October 2019, p. 28. Pallemaerts M. (2013), "Environmental human rights: Is the EU a leader, a follower, or a laggard?", *Oregon Review of International Law* Vol. 15, pp. 7-42, p. 27). Inventory of EU Member States' measures on access to justice in environmental matters, European Commission (11 January 2013), available at https://ec.europa.eu/environment/aarhus/studies.htm

More generally, we are witnessing the emergence of *environmental courts and tribunals*, numbering some 1 200 in 44 states if we include all the courts at local and national levels.[240] "Environmental divisions" are also appearing in national courts. It is important to consider whether urgent legal proceedings for environmental matters (urgent environmental applications) should be introduced.[241] Even more than in protection of fundamental rights, legal proceedings are viewed here really as a vehicle for enforcing environmental standards[242] in terms of prevention, punishment and remediation. The rules governing legal proceedings and the jurisdiction of national courts ought to be broadened. Similarly, thought should be given to "procedural environmental law", since environmental proceedings call for specific arrangements in order to ensure effective court action.[243] A "model for environmental proceedings" has therefore been the subject of academic research and concrete proposals,[244] which the Council of Europe might draw on in preparing common standards in this field.

These various themes are some key aspects of the "qualitative leap" that might be taken by the Council of Europe in the months ahead.

## 4. HOW TO FACILITATE THIS QUALITATIVE LEAP BY THE COUNCIL OF EUROPE IN ADDRESSING THE ENVIRONMENT EMERGENCY

A Working Group on Environment (GT-DEV-ENV) set up within the CDDH met just once in 2011 owing to the limited budgetary resources available.[245] It therefore confined itself to supervising the updating of the *Manual on Human Rights and the Environment* that was to appear in 2012[246] and making a few very broad recommendations to states concerning the importance of providing and updating information on their national legislation and practice in the following five areas: "embedding environmental rights in the national policy and legal framework; establishing control over potentially harmful environmental activities; requiring environmental impact assessments; securing public

[240] UNEP (2016), *Environmental Courts and Tribunals: A Guide for Policy Makers*.
[241] Truihlé E. and Hautereau-Boutonnet M. (eds) (2019), p. 13.
[242] Ibid., p. 21; and p. 24: procedural law is described as "acting as substantive law for the environment".
[243] Ibid., pp. 20-21.
[244] Ibid.
[245] CDDH, GT-DEV-ENV(2011)02, 24 February 2011.
[246] Council of Europe (2012).

participation and access to information on environmental matters; making environmental rights judiciable and the environment a public concern".[247]

A **"qualitative leap"** is needed at this juncture, now that the evidence of environmental damage is accumulating and posing an irremediable threat to human health and our natural environment. The term "qualitative leap" is borrowed from René-Jean Dupuy, who in 1989 wrote that "the transition from man to family, regional, national and international groupings is the result of quantitative progress; to achieve the ideal of humanity requires a qualitative leap. Once it is made, humanity itself must enjoy rights, otherwise men will lose theirs".[248]

In view of the ecocentric conceptual approach now unanimously accepted and, given the intellectual and standard-setting heritage of the Council of Europe, the author of this report would like to suggest urgently considering the advisability of developing **a new instrument enshrining human rights (and responsibilities) with an ecocentric and intergenerational approach**. This instrument would take the form of **a new treaty or binding pact specific to this field**, incorporating existing achievements, covering various procedural and substantive environmental rights, including those referred to in the previous section, and supporting the environmental principles and specificities also mentioned, such as the precautionary principle. The pact must contain rights that are directly applicable and can be exercised in the courts by their holders.[249]

The writer of this report will not revisit the minimum proposal of simply recognising an explicit right to a "healthy environment", which is far too restrictive, as explained at length above. There are some who might want to settle for adding a right to a decent or ecologically viable environment (itself a broader concept than that of the right to a healthy environment) to the European Convention on Human Rights in order to use the existing mechanism with the European Court. That would, of course, be a first step but would probably still not be enough in the current context. It is important to bear in mind that rights relating to environmental protection cannot be linked to either the civil and political rights ("freedoms from") or the social and economic rights ("rights to") recognised after the Second World War. They come under the "solidarity rights" identified by Karel Vasak in the late 1970s and may be compared to the right to peace, the

[247] CDDH, GT-DEV-ENV(2011)02, para. 10.
[248] Dupuy R.-J. (1989), *La clôture du système international. La cité terrestre*, PUF, Paris, p. 156.
[249] May J. R. and Daly E. (2019), *Global Judicial Handbook on Environmental Constitutionalism*, p. 57.

right to development, etc., in that they go beyond the traditional framework of the nation state, like the phenomenon of globalisation.[250] In fact, the right to environment is also a composite right, in that, without it, the other rights become weaker. But the right to environment has the specificity of being "both a human right and beyond a human right".[251] The right to environment would actually seem to be on the borderline between third- and fourth-generation rights, the latter having been identified by Professor Marcus-Helmons as rights "that must protect human dignity from certain abuses of science",[252] with humankind now the right holder. It therefore becomes clear why environmental protection rights are ill-suited for use in either the ECHR or the Social Charter system, since both confine them within limits that are too narrow. Recognising this fact, Yann Aguila from Le Club des Juristes has therefore proposed a third international human rights pact in the form of a universal environmental charter.[253]

Politically and symbolically, the Council of Europe is expected to send a powerful signal rising to current challenges. **For the continent of Europe**, this signal **cannot be less ambitious than similar projects developed in other, broader, bodies**. The **draft Global Pact for the Environment, the draft UN treaty on responsibility of transnational corporations** (both currently under discussion), **the World Charter for Nature** and the 2015 **Universal Declaration of the Rights of Humankind** could therefore be taken as the main models, not to mention the Council of Europe conventions in this field. The 2015 Declaration takes as its starting point the recognition that "humankind is facing a **major and unprecedented risk"**,[254] that "the existence and the future of humanity are inseparable from its natural environment"[255] and that "the rights of humankind serve both present and future generations as well as nature and the living world in general".[256] The Declaration has the goal of

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[250] Gaillard E. (2012), Chapter 1, "Pour une approche systémique, complexe et prospective des droits de l'homme", in Colard-Fabregoule C. and Cournil C. (eds), *Changements environnementaux globaux et droits de l'homme*, Bruylant, Brussels, pp. 45-67, p. 47.
[251] Ibid., p. 52.
[252] Marcus-Helmons S. (2000), "La quatrième génération des droits de l'homme", in *Mélanges en hommage à Pierre Lambert, Les droits de l'homme au seuil du troisième millénaire*, Bruylant, Brussels, p. 551.
[253] Le Club des Juristes (2015).
[254] Universal Declaration of the Rights of Humankind, Final report delivered on 25 September 2015, p. 5 (in French). The text of the declaration can be consulted on the official website: http://droitshumanite.fr/the-declaration/?lang=en, accessed 15 January 2020.
[255] Universal Declaration of the Rights of Humankind, preamble, Recital 7.
[256] Universal Declaration of the Rights of Humankind, Final report, p. 9 (in French).

"permanently securing enjoyment of fundamental rights, whether individual or collective" and of recognising "rights" and "duties" that "help to build a shared vision of universal responsibility, transcending both time and space".[257] Such rights presuppose a new legal paradigm, since they introduce the concept of duties towards future generations.[258] Unlike home, reputation, work or even life, the object protected is not only a private good but also a public good,[259] which the state must preserve. Environmental proceedings seldom concern individual interests (as must be the case before the European Court of Human Rights) but much more often relate to collective human interests and even shared damage (since ecological damage covers both human and non-human interests, which cannot be reduced to the sum of individual interests). According to Michel Prieur, rights in this field are therefore mixed, being both individual and collective. While, with the human rights approach, "it is not the earth that is at issue but rather the human adventure on our small blue planet, human rights will be unable to avoid the second trap: thinking in terms of (almost exclusively) individualist answers to problems that are experienced (mainly) as collective and, to an even greater extent, global. **It is therefore clear that an *ad hoc* response (because *individual*), even if amplified by the existence of various subjects of law, cannot attain a scale such as to achieve noteworthy results in the environmental field**."[260]

Similar initiatives have already occurred in the past, with, for example, Recommendation 1431 (1999) of the Parliamentary Assembly of the Council of Europe entitled "Future action to be taken by the Council of Europe in the field of environment protection", paragraph 11.2 of which recommended that the Committee of Ministers: "instruct the appropriate bodies within the Council of Europe to examine the feasibility of: a. developing, possibly through a European charter for the environment, general obligations of states to apply the precautionary principle and promote sustainable development, protect the environment and prevent transfrontier pollution". Perhaps this initiative was before its time. In 2003, a draft European Charter on General Principles for Protection of the Environment and Sustainable Development was being discussed, a draft supported by the researcher, Alexandre Charles Kiss. The arguments in favour of this independent charter were that it would "identify the fundamental principles and values that have guided Council of Europe

[257] Ibid.
[258] Gaillard E. (2012), p. 65.
[259] PACE (2003), "Environment and human rights", Report of the Committee on the Environment, Agriculture and Local and Regional Affairs, Rapporteur: Ms Agudo (Spain/SOC), Doc. 9791, para. 27.
[260] Papaux A. (2016), p. 2.

action in this field, explore new concepts and propose innovative work", as well as providing "better visibility and coherence for our Organisation in environmental matters". These arguments are now more relevant than ever. The draft was intended to cover the field fully by including, for example, the "environmental rights and duties of individuals and communities", the precautionary approach, environmental education, science, natural and biological diversity, etc.[261]

**The future treaty or pact ought to include a European complaints mechanism relating to both states AND private firms**, widely open to states, individuals and civil society, preferably with recognition of a limited *actio popularis* and/or a group action restricted to environmental associations, supplemented by a **mechanism for monitoring** measures taken by a defendant following a finding of non-compliance. Alan Boyle has highlighted the contrast between human rights treaties and the Aarhus Convention, with only the latter allowing NGOs and environmental activists to bring legal proceedings without requiring standing as victims themselves. In his view, transposing the Aarhus Convention model makes sense if the aim is to use human rights instruments to recognise the right to a decent environment and protect the environment in itself.[262] The monitoring body would help to clarify the rules governing the specific redress required for damage to the environment and human health. The draft Global Pact for the Environment also provides for such a mechanism in the shape of a committee of experts. The ineffectiveness of environmental law is in fact a major challenge.[263] A binding mechanism (and the European Court of Human Rights is an exemplar for Europe here) guarantees the effectiveness of rights and the lawfulness of political action. As is pointed out in the opening sentences of the introduction to the third edition (2019) of UNEP's *Global Judicial Handbook on Environmental Constitutionalism*: "Courts matter. They are essential to the rule of law. Without Courts, laws can be disregarded, executive officials left unchecked, and people left without recourse. And the environment and the human connection to it can suffer."[264] Unsurprisingly, therefore, if a parallel justice system (in the form of "people's tribunals" or "civil tribunals",[265] such as the International

[261] CM/Notes/835/9.1, Draft European Charter on General Principles for Protection of the Environment and Sustainable Development, 4 April 2003.
[262] Boyle A. (2015), p. 218.
[263] Maljean-Dubois S. (ed.) (2017), *The Effectiveness of Environmental Law*, Intersentia, Cambridge.
[264] May J. R. and Daly E. (2019), p. 7.
[265] Cournil C. (2016), "Réflexions sur les méthodes d'une doctrine environnementale à travers l'exemple des tribunaux environnementaux des peuples", *Revue juridique de*

Monsanto Tribunal in 2016 – whose presiding judge was a former Vice-President of the European Court of Human Rights, Françoise Tulkens – or the International Tribunal for the Rights of Nature in 2015) has grown up to expose impunity in cases of environmental damage, it is specifically to attempt to make up for the shortcomings of the official justice system. *Consequently*, it would be desirable to establish a select specialist judicial body, namely a ***European Environmental Court*** or, failing that, a European ***High Commissioner or Ombudsman*** assisted by experts and supported by an independent secretariat responsible for handling complaints. It is obvious that what has been achieved in terms of protecting fundamental rights in Europe would not have been the same at all without the European Court of Human Rights. This will also hold true for the environmental field.[266]

There ought to be an instrument that has a positive ripple effect and is open to ratification by both non-European states and the European Union. It is conceivable that some European states may not be ready for this qualitative leap at present but, given the urgency of the situation, it might be possible to introduce ***an enlarged partial agreement*** between states wishing to embark on this path. This would have the advantage of allowing a flexible accession procedure, offering the budgetary flexibility of this type of instrument and providing reference to the Council of Europe's existing corpus whilst incorporating some of the additional rights and principles listed above and introducing a monitoring system to ensure effectiveness. For the reasons outlined earlier, settling for the development of an additional protocol to the European Convention on Human Rights, or a non-binding declaration, or a binding treaty with no complaints mechanism, would rightly be perceived by the European community as a failure.

## CONCLUSION

To paraphrase Marc Pallemaerts on the European Union, while in the past the Council of Europe has seemed to be a leader with the adoption of a number of flagship conventions, seen from abroad, it is now clearly a laggard in environmental matters. The moment has come for the Council of Europe to provide new impetus here, at the same time as

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*l'environnement* Vol. 41, special issue, pp. 201-218, p. 218, for whom these tribunals "are forums for publicising and spreading legal opinion on the environment".

[266] On the initiative of Corinne Lepage, the Brussels Charter was signed on 30 January 2014 by a number of associations calling for the "establishment of a European Environmental Criminal Court": Professor Abrami, Vice-Chair of the International Academy of Environmental Sciences, *Les Annonces de la Seine* No. 11, 27 February 2014, p. 16. Initiatives are currently afoot in the International Criminal Court to extend the ICC's jurisdiction to the crime of ecocide.

acting as a leader in the field of fundamental rights protection. If it fails to do so, piecemeal initiatives will be taken at national level, and the legitimacy of the Council of Europe will be seriously affected as a result.

Our colleague, Émilie Gaillard, wrote in 2015: "At the beginning of the 21st century, it is becoming increasingly obvious that we need a new Enlightenment specifically to shed a different light on our relationship to the world and the future. […] In other words, while the law of the past was put together in total ignorance of the future, today's law must undergo a transformation if it is to take account of the future, however far away or unrelated to humankind. […] It is important to show the advance of a new humanism that seeks to guarantee the survival of humanity and the chances of healthy life across time."[267] We may conclude with Mireille Delmas-Marty, in the opening words of her most recent book, that "[t]o call yourself a humanist, it is not enough to put humankind and its values at the heart of your concerns."[268] Further concrete steps are now required…

Let us end by pointing out the extent to which all the rights, duties and principles discussed in this report wholly reflect standards that already belong to positive law in a number of legal systems or are reflected in standard-setting instruments. The member states of the Council of Europe are therefore not being asked to make *a leap of faith* but are simply being requested to **intelligently combine these existing achievements and good practice so that the Council of Europe will not only stand as the most sophisticated model of European human rights protection in the 20th century but also become a benchmark for ecological human rights in the 21st century.**

[267] Gaillard E. (2015), "Vers un nouvel humanisme ? Entre un humanisme de séparation et un humanisme d'interdépendance, transnational et transtemporel (générations futures)", Chapter XVIII, in Bréchignac C., Broglie G. (de) and Delmas-Marty M. (eds), *L'environnement et ses métamorphoses*, Hermann, Paris, pp. 217-229, p. 219.
[268] Delmas-Marty M. (2019), p. 9.

# MANUAL ON
# HUMAN RIGHTS AND
# THE ENVIRONMENT

**2nd edition**

**(2012)**

# LIST OF ABBREVIATIONS

| | |
|---|---|
| CDDH | Steering Committee for Human Rights |
| CIS | Commonwealth of Independent States |
| CITIES | Convention on International Trade in Endangered Species of Wild Fauna and Flora |
| COE | Council of Europe |
| DH-DEV | Committee of Experts for the Development of Human Rights |
| EC | European Community |
| ECJ | European Court of Justice |
| ECS | Environmental Cross-cutting Strategy |
| ECSR | European Committee for Social Rights |
| EEA | European Environment Agency |
| EEL | European Environmental Law |
| EIA | Environmental Impact Assessment |
| ETS | European Treaty Series |
| EU | European Union |
| FAO | Food and Agricultural Organization |
| GAOR | General Assembly Official Records |
| GC | Grand Chamber |
| HUDOC | Human Rights Documentation (Online Database) |
| ICJ | International Court of Justice |
| IEEP | Institute for European Environmental Policy |
| ILC | International Law Commission |
| IMPEL | European Union Network for the Implementation and Enforcement of Environmental Law |
| IPPC | International Planet Protection Convention |
| ITLOS | International Tribunal for the Law of the Sea |
| IUCN | International Union for Conservation of Nature |
| MRT | Moldovan Republic of Transdniestria |
| NGO | Non-Governmental Organisation |
| PACE | Parliamentary Assembly of the Council of Europe |
| REC | Regional Environmental Center for central and eastern Europe |
| SEA | Strategic Environmental Assessment |
| UN | United Nations |
| UNCED | United Nations Conference on Environment and Development |
| UNECE | United Nations Economic Commission for Europe |
| UNEP | United Nations Environment Programme |
| UNESCO | United Nations Educational, Scientific and Cultural Organization |
| UNFCCC | United Nations Framework Convention on Climate Change |
| WTO | World Trade Organization |

# Preliminary Remarks

## What is the aim of this manual?

The main aim of this manual is to increase the understanding of the relationship between the protection of human rights under the European Convention on Human Rights ("the Convention") and the environment and thereby to contribute to strengthening environmental protection at the national level. To achieve this aim, the manual seeks to provide information about the case-law of the European Court of Human Rights ("the Court") in this field. In addition, it will highlight the impact of the European Social Charter and relevant interpretations of the European Social Charter ("the Charter") by the European Committee of Social Rights ("the Committee").

## Who is the target audience of this manual?

The manual is intended to be of practical use for public authorities (be they national, regional or local), decision-makers, legal professionals and the general public.

## Is the environment protected under international law?

The environment is protected by international law despite the absence of a general framework convention. Multifarious international treaties govern specific environmental issues, like climate change or biodiversity. Because of these treaties and customary international law various legal obligations to protect the environment are placed upon states, e.g. duties to inform, co-operate or limit emissions.

## Is the environment protected under the European Convention on Human Rights and the European Social Charter?

Neither the Convention nor the Charter are designed to provide a general protection of the environment as such and do not expressly guarantee a right to a sound, quiet and healthy environment. However, the Convention and the Charter indirectly offer a certain degree of protection with regard to environmental matters, as demonstrated by the evolving case-law of the Court and decisions of the Committee on Social Rights in this area.

The Court has increasingly examined complaints in which individuals have argued that a breach of one of their Convention rights has resulted from adverse environmental factors. Environmental factors may affect individual Convention rights in three different ways:

- First, the human rights protected by the Convention may be directly affected by adverse environmental factors. For instance, toxic smells from a factory or rubbish tip might have a negative impact on the health of individuals. Public authorities may be obliged to take measures to ensure that human rights are not seriously affected by adverse environmental factors.
- Second, adverse environmental factors may give rise to certain procedural rights for the individual concerned. The Court has established that public authorities must observe certain requirements as regards information and communication, as well as participation in decision-making processes and access to justice in environmental cases.
- Third, the protection of the environment may also be a legitimate aim justifying interference with certain individual human rights. For example, the Court has established that the right to peaceful enjoyment of one's possessions may be restricted if this is considered necessary for the protection of the environment.

## WHICH RIGHTS OF THE CONVENTION AND THE SOCIAL CHARTER CAN BE AFFECTED BY ENVIRONMENTAL FACTORS?

The Court has already identified in its case-law issues related to the environment which could affect the right to life (Article 2), the right to respect for private and family life as well as the home (Article 8), the right to a fair trial and to have access to a court (Article 6), the right to receive and impart information and ideas (Article 10), the right to an effective remedy (Article 13) and the right to the peaceful enjoyment of one's possessions (Article 1 of Protocol No. 1).

The issue of passive smoking has been raised in connection with the right to prohibition of inhuman or degrading treatment (Article 3 of the Convention)[269] but at present there is no sufficient case-law to be able to draw up any clear principles on environmental protection at the European level.

Likewise, the Committee has interpreted the right to protection of health (Article 11) under the European Social Charter as including the right to a healthy environment.

[269] *Florea v. Romania*, judgment of 14 September 2010. In two earlier previous cases on passive smoking the applicants had not alleged a violation of Article 3 in view of inhuman or degrading treatment but had referred to Article 2 (right to life) and Article 8 (right to respect for family life). See *Aparicio Benito v. Spain* (No. 2), decision of 13 November 2006 and *Stoine Hristov v. Bulgaria* judgment of 16 January 2009.

# INTRODUCTION

The environment and environmental protection have only recently become a concern of the international community. After World War Two, the reconstruction of the economy and lasting peace were the first priorities; this included the guarantee of civil and political as well as social and economic human rights. However, in the subsequent half century the environment has become a prominent concern, which has also had an impact on international law. Although the main human rights instruments (the 1948 Universal Declaration of Human Rights, the 1950 European Convention on Human Rights, the 1961 European Social Charter, the 1966 International Covenants, all drafted well before full awareness of environmental issues arose, do not refer to the environment, today it is commonly accepted that human rights and the environment are interrelated.[270]

As recently as 1972, the first UN Conference on the Human Environment, which took place in Stockholm, shed light on the relationship between respect for human rights and the protection of the environment. Indeed, the preamble to the Stockholm Declaration proclaims that "both aspects of man's environment, the natural and manmade, are essential to his well-being and to the enjoyment of basic human rights – even the right to life itself". Further on, Principle I of the Stockholm Declaration stressed that "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations".

The 1992 Rio de Janeiro Conference on Environment and Development (UNCED) focused on the link that exists between human rights and the environment in terms of procedural rights. Principle 10 of the Declaration adopted during the Rio Conference provides that:

> *"environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-*

[270] Even to the point that it is suggested that environmental rights belong to a "third generation of human rights". See Karel Vasak, "Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights", *UNESCO Courier* 30:11, Paris: United Nations Educational, Scientific, and Cultural Organization, November 1977.

*making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."*

Work has continued ever since on the issue of human rights and the environment in the framework of the UN. In this regard the final report on "Human rights and the environment" of Special Rapporteur Ms F.Z. Ksentini is notable. It contains a "draft declaration of principles on human rights and the environment[271] another milestone is the Johannesburg Summit of 2002, which recalls and refines the principles of the Rio Declaration of 1992.

Currently, no comprehensive legally binding instrument for the protection of the environment exists globally. Meanwhile, various specific legally binding instruments and political documents have been adopted at the international and European levels to ensure environmental protection. For example, at the European level the right to a healthy environment has been recognised for the first time in the operative provisions of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention). However, the scope of the Aarhus Convention is the guarantee of procedural rights, but not the right to a healthy environment as such. The substantial right is presumed to exist by the Convention. Recently, the Almaty Guidelines and the Protocol on Pollutant Release and Transfer Registers have enhanced protection of the Convention.[272]

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[271] Human Rights and the Environment, Final Report, Ms F.Z. Ksentini, Special Rapporteur, UN Doc.E/CN.4/Sub.2/1994/9.

[272] The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted in Aarhus, Denmark, on 25 June 1998) was elaborated within the United Nations Economic Commission for Europe (UN/ECE). It has been ratified to date (31 December 2010) by 42 of the Council of Europe member States as well as Belarus. The European Union has also ratified it. The Aarhus Convention entered into force in 2001. For more information: www.unece.org/env/pp/

Almaty Guidelines on promoting the application of the principles of the Aarhus Convention in International Forums, Annexed to Report of the Second Meeting of Parties, UN Doc. ECE/MP.PP/2005/2/Add.5 of 20 June 2005, available at: www.unece.org/env/documents/2005/pp/ece/ece.mp.pp.2005.2.add.5.e.pdf

Protocol on Pollutant Release and Transfer Registers to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, signed 21 May 2003, entry into force 8 October 2009. Currently, 26 Council of Europe member states have become parties to it.

Furthermore, human rights treaties such as the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter have been interpreted as including obligations pertaining to the protection of the environment, despite the fact that none contain a right to the environment explicitly. However, a number of cases raising environmental issues have come before the Court who consequently pronounced on them. It referred to rights included in the 1950 Convention on which issues, such as noise levels from airports, industrial pollution, or town planning, undeniably had an impact.

Conscious of these developments, the Committee of Ministers of the Council of Europe decided in 2004, following a recommendation of the Parliamentary Assembly,[273] that it is an appropriate time to raise awareness of the Court's case-law, which has led to the drafting of the first version of this manual.[274] Subsequently in 2009, the Committee of Ministers decided,[275] upon the recommendation of the Parliamentary Assembly,[276] to update the manual in the light of the relevant new case-law. Moreover, when approving the first version of the manual, the Steering Committee for Human Rights (CDDH) had already decided that subsequent versions should also reflect the relevant standards set out by other international organisations and the Council of Europe bodies, notably the European Committee of Social Rights (ECSR).[277] Therefore, the present version of the manual has been extended to include references to other environmental protection instruments, a collection of examples of national good practices and an environmental law bibliography, in addition to the updated sections on the case-law of the European Court of Human Rights.

The manual aims at assisting people – at the local, regional or national level – in solving problems they encounter in pursuit of a sound, quiet and healthy environment, thereby contributing to strengthening environmental protection at the national level. It strives primarily to describe the extent to which environmental protection is embedded in the European Convention on Human Rights and the European Social Charter. It will

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[273] Recommendation (2003) 1614 of the Parliamentary Assembly, adopted on 27 June 2003.

[274] Terms of reference to draft this manual were received by the Steering Committee for Human Rights (CDDH) – a body composed of governmental representatives from the 46 member States – from the Committee of Ministers in a decision of 21 January 2004 (869th meeting). The CDDH entrusted this task to a subordinate intergovernmental body of experts: the Committee of Experts for the Development of Human Rights (DH-DEV). Website: www.coe.int/T/E/Human_rights/cddh/

[275] Document CDDH(2009)019, § 19.

[276] Recommendation 1885 (2009) of the Parliamentary Assembly, adopted on 30 September 2009.

[277] Document CDDH(2005)016, § 4.

also refer to other international instruments with direct relevance for the interpretation of the Convention and Charter.

The manual consists of two parts. The first part contains an executive summary of the principles which govern environmental protection based on human rights. Most of the principles are derived from the relevant case-law of the Court of Human Rights and a few from the relevant decisions and conclusions of the Committee of Social Rights. The second part recapitulates these principles explaining them in more detail. The explanations refer to concrete case-law, illustrating the context against which the principles have been considered. The cases referred to are not exhaustive, although the drafters have sought to select those that are most relevant. The second part is divided into two sections. Whereas section A will solely focus on the Court's case-law, section B will shed light on the European Social Charter and the decisions and conclusions of the European Committee on Social Rights. The principles explained in section A are divided into seven thematic chapters. For the purpose of clarity the first chapters deal with substantive rights (chapters I to III), while the following chapters cover procedural rights (chapters IV to VI). The last chapter of this section deals with the territorial scope of the Convention's application.

Efforts have been made to keep the language as simple and clear as possible, while at the same time remaining legally accurate and faithful to the Court's reasoning. In instances where technical language has proved unavoidable, the reader will find concise definitions in an appended glossary (Appendix I). A list of the most relevant judgments and decisions of the Court pertaining to environmental questions is also enclosed at the end of the manual (Appendix II). In addition, a second list containing European Court of Human Rights' judgments that refer explicitly to other international environmental protection instruments has been included (Appendix III). Moreover, some examples of good practices at the national level complement the substantial chapters of this manual. This list of national good practices provides some useful advice to policymakers at national and local levels who wish to contribute to environmental protection. The examples often follow the principles derived from the Court's case-law as well as other standards at the European and international level (Appendix IV). Furthermore, as the manual cannot provide an in-depth analysis of each specific aspect of the Court's case-law and the Committee's decisions, especially, with regard to all international environmental instruments, whose proper understanding is indispensible for the interpretation of the Convention and the Charter, an updated web bibliography and a list of relevant readings has been included (Appendix V and VI). Lastly, an index has been added for quick reference (Appendix VII).

Importantly, nothing in this manual seeks to add or subtract to rights under the Convention and Charter as interpreted by the Court and the Committee. It is simply a guide to the existing case-law and decisions at the time of publication.[278]

Before considering the main part of the manual, some comments are necessary on the definition of "environment". In the absence of a universal framework convention no generally accepted legal definition exists at present. It appears, however, that most proposed definitions are rather anthropocentric. For instance, the International Court of Justice held in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons that "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn".[279]

Among the environment related conventions elaborated within the framework of the Council of Europe,[280] only one endeavours to define the scope of the concept "environment". The following broad definition can be found in the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano, 21 June 1993) which provides in its Article 2 (10):

"Environment includes:

- natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors;
- property which forms part of the cultural heritage; and
- the characteristic aspects of the landscape".

At the time of the elaboration of the European Convention on Human Rights and the European Social Charter the environment was not a concern and therefore they do not contain a definition of the environment. However, the question of the precise definition of the environment is not of vital importance to understand the case-law of the Court and the decisions of the Committee. Neither the European Convention on Human Rights nor the European Social Charter protects the environment as such, but various individual rights provided for in these treaties which might be affected by the environment. Hence, it is rather the impact on

[278] The principles contained in this revised manual are based on case-law and decisions until July 2011.

[279] *Legality of the Threat or Use of Nuclear Weapons*, Advisory opinion of 8 July 1996, ICJ. Reports (1996) 226, § 29.

[280] Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment (ETS No 150); Convention on the Protection of Environment through Criminal Law (ETS No. 172); European Landscape Convention (ETS No. 176).

the individual than the environment that both the Court and the Committee are concerned with.

# PART I

# EXECUTIVE SUMMARY

## SECTION A

## PRINCIPLES DERIVED FROM THE CASE-LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

# CHAPTER I:
# RIGHT TO LIFE AND THE ENVIRONMENT

a) The right to life is protected under Article 2 of the Convention. This Article does not solely concern deaths resulting directly from the actions of the agents of a State, but also lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction. This means that public authorities have a duty to take steps to guarantee the rights of the Convention even when they are threatened by other (private) persons or activities that are not directly connected with the State.

b) The Court has found that the positive obligation on States may apply in the context of dangerous activities, such as nuclear tests, the operation of chemical factories with toxic emissions or waste-collection sites, whether carried out by public authorities themselves or by private companies. In general, the extent of the obligations of public authorities depends on factors such as the harmfulness of the dangerous activities and the foreseeability of the risks to life.

c) In addition, the Court requires States to discharge their positive obligation to prevent the loss of life also in cases of natural disasters, even though they are as such, beyond human control, in contrast to the case of dangerous activities where States are required to hold ready appropriate warning and defence mechanisms.

d) In the first place, public authorities may be required to take measures to prevent infringements of the right to life as a result of dangerous activities or natural disasters. This entails, above all, the primary duty of a State to put in place a legislative and administrative framework which includes:

   - making regulations which take into account the special features of a situation or an activity and the level of potential risk to life. In the case of dangerous activities this entails regulations that govern the licensing, setting-up, operation, security and supervision of such activities:

- placing particular emphasis on the public's right to information concerning such activities. In cases of natural disasters this includes the maintenance of an adequate defence and warning infrastructure;
- providing for appropriate procedures for identifying shortcomings in the technical processes concerned and errors committed by those responsible.

e) Secondly, where loss of life may be the result of an infringement of the right to life, the relevant public authorities must provide an adequate response, judicial or otherwise. They must ensure that the legislative and administrative framework is properly implemented and that breaches of the right to life are repressed and punished as appropriate.

f) This response by the State includes the duty to initiate promptly an independent and impartial investigation. The investigation must be capable of ascertaining the circumstances in which the incident took place and identifying shortcomings in the operation of the regulatory system. It must also be capable of identifying the public officials or authorities involved in the chain of events in issue.

g) If the infringement of the right to life is not intentional, civil, administrative or even disciplinary remedies may be a sufficient response. However, the Court has found that, in particular in the case of dangerous activities, where the public authorities were fully aware of the likely consequences and disregarded the powers vested in them, hence failing to take measures that are necessary and sufficient to avert certain risks which might involve loss of life, Article 2 may require that those responsible for endangering life be charged with a criminal offence or prosecuted.

# CHAPTER II
# RESPECT FOR PRIVATE AND FAMILY LIFE AS WELL AS THE HOME AND THE ENVIRONMENT

a) The right to respect for private and family life and the home are protected under Article 8 of the Convention. This right implies respect for the quality of private life as well as the enjoyment of the amenities of one's home ("living space").

b) Environmental degradation does not necessarily involve a violation of Article 8 as it does not include an express right to environmental protection or nature conservation.

c) For an issue to arise under Article 8, the environmental factors must directly and seriously affect private and family life or the home. Thus, there are two issues which the Court must consider – whether a causual link exists between the activity and the negative impact on the individual and whether the adverse have attained a certain threshold of harm. The assessment of that minimum threshold depends on all the circumstances of the case, such as the intensity and duration of the nuisance and its physical or mental effects, as well as on the general environmental context.

d) While the objective of Article 8 is essentially that of protecting the individual against arbitrary interference by public authorities, it may also imply in some cases an obligation on public authorities to adopt positive measures designed to secure the rights enshrined in this article. This obligation does not only apply in cases where environmental harm is directly caused by State activities but also when it results from private sector activities. Public authorities must make sure that such measures are implemented so as to guarantee rights protected under Article 8. The Court has furthermore explicitly recognised that public authorities may have a duty to inform the public about environmental risks. Moreover, the Court has stated with regard to the scope of the positive obligation that it is generally irrelevant of whether a situation is assessed from the perspective of paragraph 1 of Article 8 which, *inter alia,* relates to the positive obligations of State authorities, or paragraph 2 asking whether a State interference was justified, as the principles applied are almost identical.

e) Where decisions of public authorities affect the environment to the extent that there is an interference with the right to respect for private or family life or the home, they must accord with the conditions set out in Article 8 paragraph 2. Such decisions must thus be provided for by law and follow a legitimate aim, such as the economic well-being of the country or the protection of the rights and freedoms of others. In addition, they must be proportionate to the legitimate aim pursued: for this purpose, a fair balance must be struck between the interest of the individual and the interest of the community as a whole. Since the social and technical aspects of environmental issues are often difficult to assess, the relevant public authorities are best placed to determine what might be the best policy. Therefore they enjoy in principle a wide margin of appreciation in determining how the balance should be struck. The Court may nevertheless assess whether the public authorities have approached the problem with due diligence and have taken all the competing interests into consideration.

f) In addition, the Court has recognised the preservation of the environment, in particular in the framework of planning policies, as a legitimate aim justifying certain restrictions by public authorities on a person's right to respect for private and family life and the home.

# CHAPTER III
# PROTECTION OF PROPERTY AND THE ENVIRONMENT

a) Under 1 of Protocol No. 1 to the Convention, individuals are entitled to the peaceful enjoyment of their possessions, including protection from unlawful deprivation of property. This provision does not, in principle, guarantee the right to continue to enjoy those possessions in a pleasant environment. Article 1 of Protocol No. 1 also recognises that public authorities are entitled to control the use of property in accordance with the general interest. In this context the Court has found that the environment is an increasingly important consideration.

b) The general interest in the protection of the environment can justify certain restrictions by public authorities on the individual right to the peaceful enjoyment of one's possessions. Such restrictions should be lawful and proportionate to the legitimate aim pursued. Public authorities enjoy a wide margin of appreciation in deciding with regard both to the choice of the means of enforcement and to the ascertaining whether the consequences of enforcement are justified in the general interest. However, the measures taken by public authorities must be proportionate and strike a fair balance between the interests involved, and here environmental preservation plays an increasingly important role.

c) On the other hand, protection of the individual right to the peaceful enjoyment of one's possessions may require the public authorities to ensure certain environmental standards. The effective exercise of this right does not depend merely on the public authorities' duty not to interfere, but may require them to take positive measures to protect this right, particularly where there is a direct link between the measures an applicant may legitimately expect from the authorities and his or her effective enjoyment of his or her possessions. The Court has found that such an obligation may arise in respect of dangerous activities and to a lesser extent in situations of natural disasters.

# CHAPTER IV:
# INFORMATION AND COMMUNICATION ON ENVIRONMENTAL MATTERS

### *Right to receive and impart information and ideas on environmental matters*

a) The right to receive and impart information and ideas is guaranteed by Article 10 of the Convention. In the particular context of the environment, the Court has found that there exists a strong public interest in enabling individuals and groups to contribute to the public debate by disseminating information and ideas on matters of general public interest.

b) Restrictions by public authorities on the right to receive and impart information and ideas, including on environmental matters, must be prescribed by law and follow a legitimate aim. Measures interfering with this right must be proportionate to the legitimate aim pursued and a fair balance must therefore be struck between the interest of the individual and the interest of the community as a whole.

c) Freedom to receive information under Article 10 can neither be construed as imposing on public authorities a general obligation to collect and disseminate information relating to the environment of their own motion.

### *Access to information on environmental matters*

a) However, Articles 2 and 8 of the Convention may impose a specific positive obligation on public authorities to ensure a right of access to information in relation to environmental issues in certain circumstances.

b) This obligation to *ensure access to information* is generally complemented by the positive obligations of the public authorities to *provide information* to those persons whose right to life under Article 2 or whose right to respect for private and family life and the home under Article 8 are threatened. The Court has found that in the particular context of dangerous activities falling within the responsibility of the State, special emphasis should be placed on the public's right to information. Additionally, the Court held that States are duty-bound based on Article 2 to "adequately inform the public about any life threatening emergencies, including natural disasters."

c) Access to information is of importance to individuals because it can allay their fears and enables them to assess the environmental danger to which they may be exposed.

d) Moreover, the Court has established criteria on the construction of the procedures used to provide information. It held that when public authorities engage in dangerous activities which they know involve adverse risks to health, they must establish an effective and accessible procedure to enable individuals to seek all relevant and appropriate information. Moreover, if environmental and health impact assessments are carried out, the public needs to have access to those study results.

## CHAPTER V
## DECISION-MAKING PROCESSES IN ENVIRONMENTAL MATTERS AND PUBLIC PARTICIPATION IN THEM

a) When making decisions which relate to the environment, public authorities must take into account the interests of individuals who may be affected. In this context, it is important that the public is able to make representations to the public authorities.

b) Where public authorities have complex issues of environmental and economic policy to determine, the decision-making process must involve appropriate investigations and studies in order to predict and evaluate in advance the effects on the environment and to enable them to strike a fair balance between the various conflicting interests at stake. The Court has stressed the importance of public access to the conclusions of such studies and to information which would enable individuals to assess the danger to which they are exposed. However, this does not mean that decisions can be taken only if comprehensive and measurable data are available in relation to each and every aspect of the matter to be decided.

# CHAPTER VI
# ACCESS TO JUSTICE AND OTHER REMEDIES IN ENVIRONMENTAL MATTERS

a) Several provisions of the Convention guarantee that individuals should be able to commence judicial or administrative proceedings in order to protect their rights. Article 6 guarantees the right to a fair trial, which the Court has found includes the right of access to a court. Article 13 guarantees to persons, who have an arguable claim that their rights and freedoms as set forth in the Convention have been violated, an effective remedy before a national authority. Moreover, the Court has inferred procedural requirements from certain provisions of the Convention, such as Articles 2 and 8 and Article 1 of Protocol 1. All these provisions may apply in cases where human rights and environmental issues are involved.

b) The right of access to a court under Article 6 will as a rule come into play when a "civil right or obligation", within the meaning of the Convention, is the subject of a "dispute". This includes the right to see final and enforceable court decisions executed and implies that all parties, including public authorities, must respect court decisions.

c) The right of access to a court guaranteed by Article 6 applies if there is a sufficiently direct link between the environmental problem at issue and the civil right invoked; mere tenuous connections or remote consequences are not sufficient. In case of a serious, specific and imminent environmental risk, Article 6 may be invoked if the danger reaches a degree of probability which makes the outcome of the proceedings directly decisive for the rights of those individuals concerned.

d) Environmental associations which are entitled to bring proceedings in the national legal system to defend the interests of their members may invoke the right of access to a court when they seek to defend the economic interests of their members (e.g. their personal assets and lifestyle). However, they will not necessarily enjoy a right of access to a court when they are only defending a broad public interest.

e) Where public authorities have to determine complex questions of environmental and economic policy, they must ensure that the decision-making process takes account of the rights and interests of the individuals whose rights under Articles 2 and 8 may be affected. Where such individuals consider that their interests have not been given sufficient weight in the decision-making process, they should be able to appeal to a court.

f) In addition to the right of access to a court as described above, Article 13 guarantees that persons, who have an arguable claim that their rights and freedoms as set forth in the Convention have been violated, must have an effective remedy before a national authority.

g) The protection afforded by Article 13 does not go so far as to require any particular form of remedy. The State has a margin of appreciation in determining how it gives effect to its obligations under this provision. The nature of the right at stake has implications for the type of remedy which the state is required to provide. Where for instance violations of the rights enshrined in Article 2 are alleged, compensation for economic and non-economic loss should in principle be possible as part of the range of redress available. However, neither Article 13 nor any other provision of the Convention guarantees an individual a right to secure the prosecution and conviction of those responsible.

h) Environmental protection concerns may in addition to Articles 6 and 13 impact the interpretation of other procedural articles, such as Article 5 which sets out the rules for detention and arrest of person. The Court has found that in the case of offences against the environment, like the massive spilling of oil by ships, a strong legal interest of the public exist to prosecute those responsible. The Court recognised that maritime environmental protection law has evolved constantly. Hence, it is in the light of those "new realities" that the Convention articles need to be interpreted. Consequently, environmental damage can be of a degree that justifies arrest and detention, as well as imposition of substantial amount of bail.

## CHAPTER VII
## PRINCIPLES FROM THE COURT'S CASE-LAW: TERRITORIAL SCOPE OF THE CONVENTION'S APPLICATION

The Court has not decided on cases relating to environmental protection which raise extra-territorial and transboundary issues. The Court has produced, in different contexts, ample case-law elaborating the principles of the extra-territorial and transboundary application of the Convention. The principles that are potentially the most relevant for environmental issues are briefly explained. However, as they have been developed under very different factual circumstances, it will be up to the Court to determine if and, where appropriate, how they can be applied to cases concerning the environment.

## SECTION B

## PRINCIPLES DERIVED FROM THE EUROPEAN SOCIAL CHARTER AND THE REVISED EUROPEAN SOCIAL CHARTER

# CHAPTER I
# RIGHT TO PROTECTION OF HEALTH AND THE ENVIRONMENT

a) Article 11 on the right to protection of health has been interpreted by the Committee as including the right to a healthy environment. The Committee has noted the complementarity between the right to health under Article 11 of the Charter and Articles 2 and 3 of the European Convention on Human Rights. As a consequence, several Committee conclusions on State reports regarding the right to health, specifically indicate that the measures required under Article 11, paragraph 1 should be designed to remove the causes of ill health resulting from environmental threats such as pollution.

b) States are responsible for activities which are harmful to the environment whether they are carried out by the public authorities themselves or by a private company.

c) Overcoming pollution is an objective that can only be achieved gradually. Nevertheless, States must strive to attain this objective within a reasonable time, by showing measurable progress and making best possible use of the resources at their disposal. The measures taken by States with a view to overcoming pollution are assessed with reference to their national legislation and undertakings entered into with regard to the European Union and the United Nations and in terms of how the relevant law is applied in practice.

d) In order to combat air pollution States are required to implement an appropriate strategy which should include the following measures:

- develop and regularly update sufficiently comprehensive environmental legislation and regulations;

- take specific steps, such as modifying equipment, introducing threshold values for emissions and measuring air quality, to prevent air pollution at local level and to help to reduce it on a global scale;

- ensure that environmental standards and rules are properly applied, through appropriate supervisory machinery;

- inform and educate the public, including pupils and students at school, about both general and local environmental problems.

e) In a State where a part of its energy source derives from nuclear power plants, this State is under the obligation to prevent related hazards for the communities living in the areas of risk. Moreover, all States are required to protect their population against the consequences of nuclear accidents taking place abroad and having an effect within their territory.

f) Under Article 11 States must apply a policy which bans the use, production and sale of asbestos and products containing it.

# Part II

# Environmental protection principles

## SECTION A

## INTRODUCTION - PRINCIPLES DERIVED FROM THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") was signed in 1950 by the founding States of the Council of Europe. This international organisation is based in Strasbourg and currently has 47 member states.[281] All member states have ratified the Convention and therefore accept the jurisdiction of the Court which ensures compliance with the Convention.

The strength of the Convention is based on the fact that it sets up an effective control system in relation to the rights and freedoms which it guarantees to individuals. Anyone who considers himself or herself to be a victim of a violation of one of these rights may submit a complaint to the Court provided that certain criteria set out in the Convention have been met.[282] The Court can find that states have violated the Convention and, where it does, can award compensation to the victims and obliges the states in question to take certain measures of either an individual or general character.

The Convention enshrines essentially civil and political rights and freedoms. Since the adoption of the Convention, other rights have been added by means of different protocols (Nos. 1, 4, 6, 7, 12 and 13), but none contains an explicit right to the environment.

Nevertheless, the Court has emphasised that the effective enjoyment of the rights which are encompassed in the Convention depends notably on a sound, quiet and healthy environment conducive to well-being. The subject-matter of the cases examined by the Court shows that a range of environmental factors may have an impact on individual convention rights, such as noise levels from airports, industrial pollution, or town planning.

As environmental concerns have become more important nationally and internationally since 1950, the case-law of the Court has increasingly reflected the idea that human rights law and environmental law are

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[281] Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, "the former Yugoslav Republic of Macedonia", Turkey, Ukraine, United Kingdom.

[282] Admissibility criteria are listed in Article 35 of the Convention.

mutually reinforcing. Notably, the Court is not bound by its previous decisions, and in carrying out its task of interpreting the Convention, the Court adopts an evolutive approach. Therefore, the interpretation of the rights and freedoms is not fixed but can take account of the social context and changes in society.[283] As a consequence, even though no explicit right to a clean and quiet environment is included in the Convention or its protocols,[284] the case-law of the Court has shown a growing awareness of a link between the protection of the rights and freedoms of individuals and the environment. The Court has also made reference, in its case law, to other international environmental law standards and principles (see Appendix III)

However, it is not primarily upon the European Court of Human Rights to determine which measures are necessary to protect the environment, but upon national authorities. The Court has recognised that national authorities are best placed to make decisions on environmental issues, which often have difficult social and technical aspects. Therefore, in reaching its judgments, the Court affords the national authorities in principle a wide discretion – in the language of the Court a wide "margin of appreciation" – in their decision-making in this sphere. This is the practical implementation of the principle of subsidiarity, which has been stressed in the Interlaken Declaration of the High Level Conference on the Future of the European Court of Human Rights.[285] According to this principle, violations of the Convention should be prevented or remedied at the national level with the Court intervening only as a last resort. The principle is particularly important in the context of environmental matters due to their very nature.

The following section is solely dedicated to the Court's case-law.[286] It will describe the scope of environmental protection based on Articles 2, 6(1), 8, 10, 13 and Article 1 of Protocol 1 of the Convention.[287] At first it will discuss which substantial rights based on the right to life (Chapter I), the right to respect for private and family life (Chapter II) and the right to protection of property (Chapter III). Thereafter, procedural rights relating to information and communication (Chapter IV), decision-making procedure (Chapter V) and the access to justice and other remedies

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[283] The Court often refers to the Convention as a "living instrument".

[284] *Hatton and Others v. the United Kingdom* [GC], judgment of 8 July 2003, § 96; *Dubetska and Others v. Ukraine*, judgment of 10 February 2011, also *Ioan Marchiş and Others v. Romania*, decision of 28 June 2011, § 28.

[285] Preamble part PP6 and § 2 of the Interlaken Declaration of 19 February 2010, available at: www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/euroc.Par.0133.File.tmp/final_en.pdf.

[286] The section only considers case-law of the Court up to July 2011. However, Appendix II includes also more recent jurisprudence.

[287] For reference to Article 3 ECHR see footnote 269.

(Chapter VI). Finally, some general remarks on the territorial scope of the application of the Convention are made (Chapter VII).

More information regarding the Convention and the Court and notably the full text of the Convention as well as the practical conditions to lodge an application with the Court are to be found on the Court's website at: www.echr.coe.int/echr/. There is also a database (HUDOC) providing the full text of all the judgments of the Court and most of its decisions at: http://hudoc.echr.coe.int/.

# CHAPTER I

# RIGHT TO LIFE AND THE ENVIRONMENT

## ARTICLE 2
## RIGHT TO LIFE

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
   a) in defence of any person from unlawful violence;
   b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
   c) in action lawfully taken for the purpose of quelling a riot or insurrection.

**a) The right to life is protected under Article 2 of the Convention. This Article does not solely concern deaths resulting directly from the actions of the agents of a State, but also lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction.[288] This means that public authorities have a duty to take steps to guarantee the rights of the Convention even when they are threatened by other (private) persons or activities that are not directly connected with the State.**

1. The primary purpose of Article 2 is to prevent the State from deliberately taking life, except in the circumstances it sets out. This provision is negative in character, it aims to stop certain State actions. However, the Court has developed in its jurisprudence the "*doctrine of*

[288] *L.C.B. v. the United Kingdom*, judgment of 9 June 1998, § 36; *Paul and Audrey Edwards v. the United Kingdom*, judgment of 14 March 2002, § 54; *Öneryıldız v. Turkey* [GC], judgment of 30 November 2004, § 71; *Budayeva and Others v. Russia*, § 128.

*positive obligations*". This means that in some situations Article 2 may also impose on public authorities a duty to take steps to guarantee the right to life when it is threatened by persons or activities not directly connected with the State. For example, the police should prevent individuals about to carry out life-threatening acts against other individuals from doing so, and the legislature should make a criminal offence of any action of individuals deliberately leading to the loss of life. The Court's case-law has shown that this obligation is not limited to law enforcement agencies. Given the fundamental importance of the right to life and the fact that most infringements are irreversible, this positive obligation of protection can apply in situations where life is at risk. In the context of the environment, Article 2 has been applied where certain activities endangering the environment are so dangerous that they also endanger human life.

2. It is not possible to give an exhaustive list of examples of situations in which this obligation might arise. It must be stressed however that cases in which issues under Article 2 have arisen are exceptional. So far, the Court has considered environmental issues in four cases brought under Article 2, two of which relate to dangerous activities and two which relate to natural disasters. In theory, Article 2 can apply even though loss of life has not occurred, for example in situations where potentially lethal force is used inappropriately.[289]

**b) The Court has found that the positive obligation on States may apply in the context of dangerous activities, such as nuclear tests, the operation of chemical factories with toxic emissions or waste-collection sites, whether carried out by public authorities themselves or by private companies.[290] In general, the extent of the obligations of public authorities depends on factors such as the harmfulness of the dangerous activities and the foreseeability of the risks to life.[291]**

3. In *L.C.B. v. the United Kingdom*, the applicant's father had been exposed to radiation whilst serving in the army during nuclear tests in the 1950s. The applicant herself was born in 1966. She later contracted leukaemia and alleged that the United Kingdom's failure to warn and advise her parents of the dangers of the tests to any children they might have, as well as the State's failure to monitor her health, were violations of the United Kingdom's duties under Article 2. The Court considered that its task was to determine whether the State had done all that could be

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289 E.g. *Makaratzis v. Greece* [GC], judgment of 20 December 2004, paragraph 49.
290 *Öneryıldız v. Turkey* [GC], paragraph 71.
291 *Öneryıldız v. Turkey* [GC], paragraph 73; *L.C.B. v. the United Kingdom*, paragraphs 37-41.

required of it to prevent the applicant's life from being avoidably put at risk.[292] It held that the United Kingdom would only have been required to act on its own motion to advise her parents and monitor her health if, on the basis of the information available to the State at the time in question, it had appeared likely that exposure of her father to radiation might have caused a real risk to her health. In the instant case, the Court considered that the applicant had not established a causal link between the exposure of her father to radiation and her own suffering from leukaemia. The Court therefore concluded that it was not reasonable to hold that, in the late 1960s, the United Kingdom authorities, on the basis of this unsubstantiated link, could or should have taken action in respect of the applicant. The Court thus found that there was no violation of Article 2.

4. On the other hand, the Court found a violation of Article 2 in the case of *Öneryıldız v. Turkey*. In this case, an explosion occurred on a municipal rubbish tip, killing thirty-nine people who had illegally built their dwellings around it. Nine members of the applicant's family died in the accident. Although an expert report had drawn the attention of the municipal authorities to the danger of a methane explosion at the tip two years before the accident, the authorities had taken no action. The Court found that since the authorities knew – or ought to have known – that there was a real and immediate risk to the lives of people living near the rubbish tip, they had an obligation under Article 2 to take preventive measures to protect those people. The Court also criticised the authorities for not informing those living next to the tip of the risks they were running by living there. The regulatory framework in place was also considered to be defective.

**c) In addition, the Court requires States to discharge their positive obligation to prevent the loss of life also in cases of natural disasters, even though they are as such, beyond human control, in contrast to the case of dangerous activities where States are required to hold ready appropriate warning and defence mechanisms.[293]**

5. In *Budayeva and Others v. Russia*, the Court was asked to consider whether Russia had failed its positive obligation to warn the local population, to implement evacuation and emergency relief policies or, after the disaster, to carry out a judicial enquiry, despite the foreseeable threat to the lives of its inhabitants in this hazardous area. The application resulted from a severe mudslide after heavy rain falls, which had cost numerous lives. The Court also found that there had been a causal link

[292] *L.C.B. v. the United Kingdom*, paragraphs 36 and 38.
[293] *Budazeva and Others v. Russia*, judgment of 22 March 2008, paragraph 135.

between the serious administrative flaws in this case and the applicants' death.

6. The earlier case of *Murillo Saldias v. Spain*[294] also supports the existence of such positive obligation in the event of natural disasters. In this case the applicants complained that the State had failed to comply with its positive obligation to take necessary preventive measures to forestall the numerous deaths that occurred during a flooding of a campsite following strong rain. The Court did not explicitly affirm a positive obligation, however it found that the applications were inadmissible not because the article did not apply *ratione materiae* to natural disasters, but because one of the applicants had already obtained satisfaction at the national level and that the remaining applicants had failed to exhaust the available domestic remedies.

**d) In the first place, public authorities may be required to take measures to prevent infringements of the right to life as a result of dangerous activities or natural disasters. This entails, above all, the primary duty of a State to put in place a legislative and administrative framework which includes:** [295]

- **making regulations which take into account the special features of a situation or an activity and the level of potential risk to life. In the case of dangerous activities this entails regulations that govern the licensing, setting-up, operation, security and supervision of such activities:**[296]
- **placing particular emphasis on the public's right to information concerning such activities. In cases of natural disasters this includes the maintenance of an adequate defence and warning infrastructure;**[297]
- **providing for appropriate procedures for identifying shortcomings in the technical processes concerned and errors committed by those responsible.**[298]

7. In the *Öneryıldız* and *Budayeva* judgments the Court stated that this is the primary duty flowing from the positive obligation in Article 2. The legislative and administrative framework should provide effective deterrence against threats to the right to life. Although this has previously been applied in the context of law enforcement, the significance is that in both these cases, the Court transposes this principle to environmental

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294 *Murillo Saldias v. Spain,* decision of 28 November 2006.
295 *Öneryıldız v. Turkey,* § 89; *Budayeva and Others v. Russia*, § 129.
296 *Öneryıldız v. Turkey*, § 90; *Budayeva and Others v. Russia*, § 129 and 132.
297 *Öneryıldız v. Turkey,* § 90; *Budayeva and Others v. Russia*, § 129 and 132.
298 *Öneryıldız v. Turkey*, § 90; *Budayeva and Others v. Russia*, § 129 and 132.

hazards. In *Öneryıldız* the Court applies it in the context of dangerous activities and in *Budayeva* the Court applies it to natural disasters. Moreover, in the case of dangerous activities the significance of the necessary legislative and administrative framework will usually require that the responsible public authorities make regulations concerning dangerous activities. In modern industrial societies there will always be activities which are inherently risky. The Court said that regulation of such activities should make it compulsory for all those concerned to take practical measures to protect people whose lives might be endangered by the inherent risks.

8. The most significant difference between cases of natural disasters and dangerous activities is that the Court tends to provide States with a broader margin of appreciation for the former due to their unforeseeable nature, which is beyond human control.[299] Moreover, the Court stated that:

> "(…) *the scope of the positive obligations imputable to the State in the particular circumstances would depend on the origin of the threat and the extent to which one or the other risk is susceptible to mitigation"*.
>
> Accordingly, it held:
>
> *"In the sphere of emergency relief, where the State is directly involved in the protection of human lives through the mitigation of natural hazards, these considerations should apply in so far as the circumstances of a particular case point to the imminence of a natural hazard that had been clearly identifiable, and especially where it concerned a recurring calamity affecting a distinct area developed for human habitation or u*se.[300]"

**e) Secondly, where loss of life may be the result of an infringement of the right to life, the relevant public authorities must provide an adequate response, judicial or otherwise. They must ensure that the legislative and administrative framework is properly implemented and that breaches of the right to life are repressed and punished as appropriate.[301]**

**f) This response by the State includes the duty to promptly to initiate an independent and impartial investigation. The investigation must be capable of ascertaining the circumstances in which the incident took place and identifying**

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[299] *Budayeva and Others v. Russia*, §§ 134-135.
[300] *Budayeva and Others v. Russia*, § 137.
[301] *Öneryıldız v. Turkey*, § 91; *Budayeva and Others v. Russia*, § 138.

**shortcomings in the operation of the regulatory system. It must also be capable of identifying the public officials or authorities involved in the chain of events in issue.[302]**

**g) If the infringement of the right to life is not intentional, civil, administrative or even disciplinary remedies may be a sufficient response.[303] However, the Court has found that, in particular in the case of dangerous activities, where the public authorities were fully aware of the likely consequences and disregarded the powers vested in them, hence failing to take measures that are necessary and sufficient to avert certain risks which might involve loss of life, Article 2 may require that those responsible for endangering life be charged with a criminal offence or prosecuted.[304]**

9. The obligations which public authorities have in relation to the right to life are not just preventive; they do not just have the obligation to do their best to ensure that human life is protected. When life is lost, they are also required to find out why it was lost, who was responsible and what lessons can be learned. This is sometimes referred to as the "procedural aspect" of Article 2 because it imposes on States investigative obligations after the loss of life occurred. The aim of such obligation is to ensure that the legislative and administrative framework that is required to protect life does not exist on paper only. The Court also recognises that the victims' families have a right to know why their relatives have died and that society has an interest in punishing those responsible for the loss of human life.

10. The reason why public authorities are required to carry out an investigation is that they are usually the only bodies capable of identifying the causes of the incidents in question. The requirements that the investigation be prompt, independent and impartial seek to ensure its effectiveness. In *Öneryıldız v. Turkey*, where lives had been lost, the Court held that the authorities should of their own motion launch investigations into the accident which led to these deaths. It also found that in carrying out this investigation the competent authorities must first find out why the regulatory framework in place did not work, and secondly identify those officials or authorities involved in whatever capacity in the chain of events leading to the loss of life.

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302 *Öneryıldız v. Turkey,* § 94; *Budayeva and Others v. Russia*, § 142.
303 *Öneryıldız v. Turkey*, § 92; *Budayeva and Others v. Russia*, § 139.
304 *Öneryıldız v. Turkey*, § 93; *Budayeva and Others v. Russia*, § 140.

11. Furthermore, the Court emphasised in the Öneryıldız case that Article 2 does not automatically entail the right for an individual to have those responsible prosecuted or sentenced for a criminal offence. In cases where life has been lost, the need to deter future failure may in certain situations require criminal prosecution of those who are responsible in order to comply with Article 2, for instance where the taking of human life is intentional. However, in the specific field of environmental risks, loss of life is more likely to be unintentional. In such cases, States do not automatically have to prosecute those responsible. For example, where the loss of life was the result of human error or carelessness other less severe penalties may be imposed. However, in *Öneryıldız v. Turkey* the Court found that where the public authorities knew of certain risks, and knew that the consequences of not taking action to reduce those risks could lead to the loss of life, then the State may be under an obligation to prosecute those responsible for criminal offences. This may be the case even where there are other possibilities for taking action against those responsible (e.g. by initiating administrative or disciplinary proceedings).

12. The above principles developed with respect to dangerous activities have also been transposed by the Court in *Budayeva and Others v. Russia* and *Murillo Saldias and Others v. Spain* to situations of disaster relief.

# CHAPTER II
# RESPECT FOR PRIVATE AND FAMILY LIFE AS WELL AS THE HOME AND THE ENVIRONMENT

## ARTICLE 8
## RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

### a) The right to respect for private and family life and the home are protected under Article 8 of the Convention. This right implies respect for the quality of private life as well as the enjoyment of the amenities of one's home ("living space").[305]

13. In a number of cases the Court has found that severe environmental pollution can affect people's well-being and prevent them from enjoying their homes to such an extent that their rights under Article 8 are violated. According to the Court the right to respect for the home does not only include the right to the actual physical area, but also to the quiet enjoyment of this area within reasonable limits. Therefore, breaches of this right are not necessarily confined to obvious interferences such as an unauthorised entry into a person's home, but may also result from intangible sources such as noise, emissions, smells or other similar forms

[305] *Powell and Rayner v. the United Kingdom*, judgment of 21 February 1990, § 40; *Brânduşe v. Romania,* judgment of 7 April 2009 (in French only), § 67.

of interference.[306] If such interferences prevent a person from enjoying the amenities of this home that person's right to respect for his home may be breached. In the context of cases raising issues linked to environmental degradation or nuisance the Court has tended to interpret the notions of private and family life and home as being closely interconnected, and, for example, in one case it referred to the notion of "private sphere"[307] or in another case "living space".[308] A "home", according to the Court's rather broad notion, is the place, i.e. physically defined area, where private and family life develops.

**b) Environmental degradation does not necessarily involve a violation of Article 8 as it does not include an express right to environmental protection or nature conservation.[309]**

**c) For an issue to arise under Article 8, the environmental factors must directly and seriously affect private and family life or the home.[310] Thus, there are two issues which the Court must consider – whether a causual link exists between the activity and the negative impact on the individual and whether the adverse have attained a certain threshold of harm. The assessment of that minimum threshold depends on all the circumstances of the case, such as the intensity and duration of the nuisance and its physical or mental effects, as well as on the general environmental context.[311]**

14. It should first be recalled that environmental factors may raise an issue under Article 8 and trigger its applicability without the Court necessarily finding a violation of the Convention afterwards. Indeed, the Court starts its examination of a case by determining whether or not Article 8 is applicable to the circumstances of the case (i.e. whether or not the problem raised comes within the scope of Article 8), and only if it finds it to be applicable does it examine whether or not there has been a violation of this provision.

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[306] *Moreno Gómez v. Spain*, judgment of 16 November 2004, § 53; *Borysiewicz v. Poland*, judgment of 1 July 2008, § 48; *Giacomelli v. Italy*, judgment of 2 November 2006, § 76; *Hatton and Others v. the United Kingdom*, judgment of 8 July 2003, § 96; *Dees v. Hungary*, judgment of 9 November 2010, § 21.

[307] *Fadeyeva v. Russia*, judgment of 9 June 2005, paragraphs 70, 82 and 86.

[308] *Brânduşe v. Romania,* § 64 "l'espace de vie".

[309] *Fadeyeva v. Russia*, § 68; *Kyrtatos v. Greece*, judgment of 22 May 2003, § 52; *Dubetska and Others v. Ukraine*, § 105.

[310] *Hatton and Others v. the United Kingdom*, § 96.

[311] *Fadeyeva v. Russia*, § 69.

15. In the *Kyrtatos v. Greece*[312] case, the applicants brought a complaint under Article 8 alleging that urban development had led to the destruction of a swamp adjacent to their property, and that the area around their home had lost its scenic beauty. The Court emphasised that domestic legislation and certain other international instruments rather than the Convention are more appropriate to deal with the general protection of the environment. The purpose of the Convention is to protect individual human rights, such as the right to respect for the home, rather than the general aspirations or needs of the community taken as a whole. The Court highlighted in this case that:

> "neither Article 8 nor any of the other articles of the Convention are specifically designed to provide general protection of the environment as such.[313]"

In this case, the Court found no violation of Article 8.

16. On the other hand, the Court has found that "severe environmental pollution" such as excessive noise levels generated by an airport,[314] fumes, smells and contamination emanating from a waste treatment plant[315] and toxic emissions from a factory[316] can interfere with a person's peaceful enjoyment of his or her home in such a way as to raise an issue under Article 8, even when the pollution is not seriously health threatening.[317]

17. In *Leon and Agnieszka Kania v. Poland*[318] the Court had to consider whether the long proceedings to close a private company which emitted high levels of noise violated Article 8. The Court first reiterated that:

> "there is no explicit right in the Convention to a clean and quiet environment, but that where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8."

Nevertheless, the Court concluded that it had not been established that the noise levels considered in the present case were so serious as to reach the high threshold established in cases dealing with environmental

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312 *Kyrtatos v. Greece,* judgment of 22 May 2003.
313 *Kyrtatos v. Greece,* § 52.
314 *Hatton and Others v. the United Kingdom* [GC].
315 *López Ostra v. Spain*, judgment of 9 December 1994; *Giacomelli v. Italy.*
316 *Guerra and Others v. Italy* [GC], judgment of 19 February 1998; *Tătar v. Romania*, judgment of 27 January 2009 (in French only); *Ledyayeva and Others v. Russia*, judgment of 26 October 2006, *Fadeyeva v. Russia.*
317 *Taşkın and Others v. Turkey,* judgment of 10 November 2004, § 113; *Ioan Marchiş and Others v. Romania*, § 28.
318 *Leon and Agnieszka Kania v. Poland,* judgment of 21 July 2009*,* §§ 98-104.

issues. Therefore, the Court held that Article 8 of the Convention had not been violated.

18. In contrast, in the *López Ostra v. Spain* case, the applicant complained that the fumes and noise from a waste treatment plant situated near her home made her family's living conditions unbearable. After having had to bear the nuisance caused by the plant for more than three years, the family moved elsewhere when it became clear that the nuisance could go on indefinitely and when her daughter's paediatrician recommended them to relocate. The national authorities, while recognising that the noise and smells had a negative effect on the applicant's quality of life, argued that they did not constitute a grave health risk and that they did not reach a level of severity breaching the applicant's fundamental rights. However, the Court found that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect adversely their private and family life, even though it does not seriously endanger their health. In this case, the Court found a violation of Article 8.

19. Likewise, in *Brânduşe v. Romania* the Court did not require an actual impact on the health of the applicant to find Article 8 applicable.[319] In the case the Court was required to determine firstly whether Article 8 of the Convention applied in the case of an applicant who considered the cell in which he was serving a prison sentence to be his "living space", and secondly whether the bad odours from a nearby rubbish tip breached the gravity threshold to fall within the scope of Article 8. The Court agreed with the applicant that Article 8 applied to his cell as the cell represented the only "living space" available to the prisoner for several years. Moreover, the Court clearly held that the quality of life and well-being of the applicant had been affected in a manner that had impaired his private life and was not just the consequence of the deprivation of his liberty. Thereby it found that the pure absence of any health impact is not sufficient alone to dismiss the applicability of Article 8. In the end the Court found a violation of this article.

20. Another example is the *Fadeyeva v. Russia* case. In this case the applicant lived in the vicinity of a steel plant. The Court observed that in order to fall under Article 8, complaints relating to environmental nuisances have to show, firstly, that there has been an actual interference with the individual's "private sphere", and, secondly, that these nuisances have reached a certain level of severity. In the case in question, the Court found that over a significant period of time the concentration of various toxic elements in the air near the applicant's house seriously exceeded

[319] *Brânduşe v. Romania,* § 67.

safe levels and that the applicant's health had deteriorated as a result of the prolonged exposure to the industrial emissions from the steel plant. Therefore, the Court accepted that the actual detriment to the applicant's health and well-being reached a level sufficient to bring it within the scope of Article 8 of the Convention. Here the Court concluded that there had been a violation of Article 8.

21. In *Dubetska and Others v. Ukraine*, like in *Fadeyeva v. Russia,* the Court stressed with regard to the minimum threshold necessary to invoke Article 8 that no issue will arise if the detriment complained of is negligible in comparison to the environmal hazards inherent in life in every modern city.[320] In *Dubetska and Others v. Ukraine* the applicants', living in a rural area, complained that they suffered chronic health problems and damage to their homes and the living environment as a result of a coal mine and a factory which were operated nearby. The Court recognised that while there is no doubt that industrial pollution may negatively affect public health in general and worsen the quality of an individual's life, it is often impossible to quantify its effect in each individual case. It is often hard to distinguish the effect of environmental hazards from the influence of other relevant factors. The Court further held that living in an area marked by pollution in clear excess of applicable safety standards exposed the applicants to an elevated risk to health. In the present case, the Court found that the specific area in which the applicant lived was both according to the legislative framework (provision of minimum distances from industrial plants) and empirically unsafe for residual use. Consequently, the Court found a violation of Article 8 as the authorities had not found an effective solution to the applicant's situation for 12 years either by curbing the pollution or resettling them as envisaged by national court judgments. [321]

22. In *Grimkovskaya v. Ukraine*, the Court reaffirmed that the hazard at issue necessary to raise a claim under Article 8 must attain a level of severity resulting in a "significant impartment if the applicant's ability to enjoy her home, private or family life" and that the assessment of all circumstances of the case is needed to decide on the threat level.[322] In this case, the Ukrainian authorities routed in 1998 a motorway through a street which had been constructed as a residential street. It had no drainage system, pavement or proper surfacing able to withstand high volumes of heavy goods traffic. In addition, potholes which appeared were occasionally filled up by the road authorities with cheap materials including waste from coal-mines which were high in heavy metal content.

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[320] *Dubetska and Others v. Ukraine*, § 105; also, *Ioan Marchiş and Others v. Romania*, § 33.
[321] *Dubetska and Others v. Ukraine*, §§ 105-106, 111, 118.
[322] *Grimkovskaya v. Ukraine*, § 58.

The applicant claimed that her house had become unusable and the people living in it suffered from constant vibrations provoked by the traffic and from noise and pollution. While the Court found that there was insufficient evidence to prove all the applicant's allegations (e.g. the detailed impact on the health of the inhabitants), it relied on evidence showing that in general the level of emissions was above the statutory limits and that some of the applicant's son's health issues could not be plausibly explained (e.g. lead and copper salts poisoning) to conclude that the

> *"cumulative effect of noise, vibrations and air and soil pollution generated by the […] motorway significantly deterred the applicant from enjoying her rights guaranteed by Article 8*.[323]"

However, the Court found a violation only with regard to procedural aspects of the decision-making and complaints procedure.

23. Yet, the case of *Tătar v. Romania* is also remarkable. In this case the applicants, who lived near a gold ore extraction plant, had lodged several complaints with the authorities about the risks to which they were being exposed because of the use by the company of a technical procedure involving sodium cyanide. In 2000, despite the fact that the authorities had reassured the applicant that sufficient safety mechanisms existed, a large quantity of polluted water spilled into various rivers, crossing several borders and affecting the environment of several countries. In this particular case the Court was confronted with the problem that there was no internal decision or other official document stating explicitly how much of a threat the company's activities posed to human health and the environment.[324] The Court noticed that the applicant failed to obtain any official document from the authorities confirming that the company's activities were dangerous. Moreover, the Court found that the applicants had failed to prove that there was a sufficient causal link between the pollution caused and the worsening of their symptoms. Nevertheless, on the basis of environmental impact studies of the spilling submitted by the respondent State, the Court concluded that a serious and substantial threat to the applicants' well-being existed. Consequently, the State was under a positive obligation to adopt reasonable and sufficient measures to protect the rights of the interested parties to respect for their private lives and their home and, more generally, a healthy, protected environment.[325] This applied to the authorities just as much before the plant had begun operating as after the accident.

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[323] *Grimkovskaya v. Ukraine*, § 62.
[324] *Tătar v. Romania*, § 93.
[325] *Tătar v. Romania*, § 107.

24. In this respect it is notable that the Court emphasised the importance of the precautionary principle (which had been established for the first time by the Rio Declaration), whose purpose was to secure a high level of protection for the health and safety of consumers and the environment in all the activities of the Community.[326] It held that the national authorities' positive obligations to ensure respect for private and family life applied with even more force to the period after the accident of 2000.[327] The applicants must have lived in a state of anxiety and uncertainty, accentuated by the passive approach of the national authorities and compounded by the fear stemming from the continuation of the activity and the possibility that the accident might occur again. Consequently, the Court found that there had been a violation of Article 8 of the Convention.

25. However, the precautionary principle does not protect against every potential harm that is conceivable. In the case of *Luginbühl v. Switzerland,*[328] the applicant claimed that emissions caused by a mobile phone antenna could impact her health and so lead to a violation of Article 8 of the Convention. The Court noted that the Swiss authorities had published a scientific study on the effects of mobile phones on the environment and the health of individuals, and that the issue of the noxiousness had not been proven scientifically for the time being. The Court concluded that the complaint under Article 8 should be rejected, as well as the complaint under Article 2 of the Convention. Hence, the Court requires at least some scientific validity of the claim that a certain activity is dangerous to the environment and/or health.

26. In addition, considering the *Taşkin and Others v. Turkey*[329] case, it appears that the Court has a two-track approach to Article 8. In this case the Court was called upon whether national authorities had incorrectly prolonged the operation permit of a gold mine which was employing a particular technique that could have a negative impact on the environment and the applicant's health. On the one hand, if the possible environmental damage is severe enough that it seems likely that individuals' well-beings and the enjoyment of their homes are adversely affected, the Court refrains from a more in-depth analysis of the link between the pollution and the negative impact and the gravity of the impact on the individual. However, in case of "dangerous activities" the Court requires a "sufficiently close link" to be established with the private and family life of an applicant to accept the invocation of Article 8.

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326 *Tătar v. Romania*, § 120.
327 *Tătar v. Romania*, § 121.
328 *Luginbühl v. Switzerland*, decision of 17 January 2006.
329 *Taşkın and Others v. Turkey*, § 113.

**d) While the objective of Article 8 is essentially that of protecting the individual against arbitrary interference by public authorities, it may also imply in some cases an obligation on public authorities to adopt positive measures designed to secure the rights enshrined in this article.[330] This obligation does not only apply in cases where environmental harm is directly caused by State activities but also when it results from private sector activities.[331] Public authorities must make sure that such measures are implemented so as to guarantee rights protected under Article 8.[332] The Court has furthermore explicitly recognised that public authorities may have a duty to inform the public about environmental risks.[333] Moreover, the Court has stated with regard to the scope of the positive obligation that it is generally irrelevant of whether a situation is assessed from the perspective of paragraph 1 of Article 8 which, *inter alia*, relates to the positive obligations of State authorities, or paragraph 2 asking whether a State interference was justified, as the principles applied are almost identical.[334]**

27. According to the Court's case-law,[335] not only should public authorities refrain from interfering arbitrarily with individuals' rights, but they should also take active steps to safeguard these rights.[336] Such duties may arise also with regard to the relations between private parties.

28. In *Hatton and Others v. the United Kingdom*, which concerned aircraft noise generated by an international airport, the Court considered that whilst the activity was carried out by private parties Article 8 nonetheless applied because the State was responsible for properly regulating private industry in order to avoid or reduce noise pollution. In this case, the Court therefore concluded that the State had a responsibility to control air traffic and thus aircraft noise. However, the Court did not find a violation since, overall, the State could not be said to have failed to strike a fair balance between the interests of the

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330 *Guerra and Others v. Italy* [GC], § 58.
331 *Hatton and Others v. the United Kingdom* [GC], §; *Tătar v. Romania*, § 87; *Dees v. Hungary*, § 21.
332 *Moreno Gómez v. Spain*, § 61.
333 *Guerra and Others v. Italy* [GC], § 60; *Tătar v. Romania*, § 88; *Lemke v. Turkey*, judgment of 5 June 2007 (in French only), § 41.
334 *Tătar v. Romania*, § 87. *Giacomelli v. Italy*, §; *Leon and Agnieszka Kania v. Poland*, § 99.
335 E.g. *Guerra and Others v. Italy* [GC].
336 The so-called "doctrine of positive obligations". *Hatton and Others v. the United Kingdom* [GC], §§ 100,119, 123; *Dubetska and Others v. Ukraine*, § 143.

complainants and the interests of others and of the community as a whole in the regulatory scheme it had put in place (see (e) below).

29. The *Moreno Gómez v. Spain* case concerned noise disturbance caused by discotheques and bars. The Spanish authorities were expected to take measures to keep noise disturbance at reasonable levels. Whilst they had made bylaws to set maximum noise levels and provided for the imposition of penalties and other measures on those who did not respect these levels, they failed to ensure that these measures were properly implemented. In this context, the Court stressed that the authorities should not only take measures aimed at preventing environmental disturbance, such as noise in the case at issue, but should also secure that these preventive measures are implemented in practice – thus ensuring their effectiveness in protecting the rights of individuals under Article 8. In this case the Court found a violation of Article 8.

30. Similarly, public authorities are expected to control emissions from industrial activities so that local residents do not suffer smells, noise or fumes emanating from nearby factories. An example illustrating this is the case of *Guerra and Others v. Italy*. In this case a chemical factory situated not far from where the applicants lived, was classified as high-risk. In the past, several accidents had occurred resulting in the hospitalisation of many people living nearby. The applicants did not complain of the action of the public authorities, but, on the contrary, of their failure to act. The Court concluded that the public authorities had not fulfilled their obligation to secure the applicants' right to respect for their private and family life, on the ground that the applicants had not received essential information from the public authorities that would have enabled them to assess the risks which they and their families might run if they continued to live in the area. Here the Court ruled that there had been a violation of Article 8.

31. The case of *Ledyayeva and Others v. Russia*,[337] dealt with situation similar to the case of *Fadeyeva v. Russia*, in which the Court had found that the operation of a polluting steel plant in the middle of a densely populated town placed the State under an obligation to offer the applicant an effective solution to help her move away from the dangerous area or to reduce the toxic emissions. In the more recent Ledyayeva case the Court noted that the government had not put forward any new fact or argument that would persuade it to reach a conclusion different from that of the Fadeyeva case. Accordingly, the Court found that the Russian authorities had failed to take appropriate measures to protect the applicants' right to respect for their homes and their private lives against severe environmental nuisances. In particular, the authorities had not

[337] *Ledyayeva and Others v. Russia,* judgment of 26 October 2006.

resettled the applicants outside the dangerous area or provided compensation for people seeking new accommodation. Nor had they devised and implemented an efficient policy to induce the owners of the steel plant to reduce its emissions to safe levels within a reasonable time. The Court found that there had been a violation of Article 8 of the Convention. With this judgment the Court underlined again its position from *Fadeyeva v. Russia* that a State's responsibility in cases relating to the environment "may arise from a failure to regulate [the] private industry."[338]

32. Moreover, in *Dubetska and Others v. Ukraine*[339] the Court applied the same principles regardless of the fact that the polluting state-owned factory was privatised in 2007. To determine whether or not the State could be held responsible under Article 8 of the Convention, the Court examined whether the situation was a result of a sudden and unexpected turn of events or, on the contrary, was long-standing and well known to the State authorities; whether the State was or should have been aware that the hazard or the nuisance was affecting the applicant's private life and to what extent the applicant contributed to creating this situation for himself and was in a position to remedy it without a prohibitive outlay.[340]

33. The case of *Dees v. Hungary* underlines the extent of the obligation to remedy violation resulting from a private third party. In this case, the volume of traffic routed through the applicant's town increased substantially in 1997 because of the attempt of many trucks to avoid rather high toll charges which had recently been introduced on a neighbouring, privately owned motorway. The government was aware of the increased burden on the citizens and tried to remedy it as early as 1998 through several measures including the construction of three bypass roads, a 40 km/h speed limit at night, the erection of several traffic lights and, in 2001, a ban of vehicles of over 6tons on the town's road. Those measures were enforced through the increased presence of the police. Nevertheless, the Court found that the authorities failed in their duty to stop the third-party breaches of the right relied on by the applicant, since the measures taken consistently proved to be insufficient and, consequently, the applicant was consistently exposed to excessive noise disturbance over a substantial period of time. The Court held that this created a disproportionate individual burden for the applicant. Hence, it found a breach of Article 8.

34. However, in *Grimkovskaya v. Ukraine* the Court did not find a violation of Article 8 because the nuisances caused by the noise and

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[338] *Fadeyeva v. Russia,* § 89.
[339] For a short description of this case, see § 0 of the manual.
[340] *Dubetska and Others v. Ukraine* § 108.

pollution emitted from a nearby motorway were not effectively remedied by the authorities. It recognised the complexity of States' task in handling infrastructural issues holding that Article 8 cannot be constructed as requiring States to ensure that every individual enjoys housing that meets particular environmental standards. Consequently, it would be going too far to render the government responsible for the very fact of allowing cross-town traffic to pass through a populated street or establish the applicants right to free, new housing at the State's expense, especially since the applicant had not proven that she could not relocate without the State's help. Nevertheless, the Court found a violation of the procedural obligations of Article 8 because minimal safeguards had not been respected by the authorities. The Court considered that, *inter alia*, the efficient and meaningful management of the street through a reasonable policy aimed at mitigating the motorway's harmful effects on the Article 8 right of the street's residents belonged to those minimal safeguards (see also chapter V).[341]

35. With regard to the authorities' obligation to inform the public on environmental matters, see chapter IV.

**e) Where decisions of public authorities affect the environment to the extent that there is an interference with the right to respect for private or family life or the home, they must accord with the conditions set out in Article 8 paragraph 2.[342] Such decisions must thus be provided for by law and follow a legitimate aim, such as the economic well-being of the country or the protection of the rights and freedoms of others. In addition, they must be proportionate to the legitimate aim pursued: for this purpose, a fair balance must be struck between the interest of the individual and the interest of the community as a whole.[343] Since the social and technical aspects of environmental issues are often difficult to assess, the relevant public authorities are best placed to determine what might be the best policy.[344] Therefore they enjoy in principle a wide margin of appreciation in determining how the balance should be struck.[345] The Court may nevertheless assess whether the public authorities have approached the problem with due diligence and have taken all the competing interests into consideration.[346]**

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341 *Grimkovskaya v. Ukraine*, §§ 65-66, 68, 73.
342 *Hatton and Others v. the United Kingdom* [GC], § 98.
343 *López Ostra v. Spain*, § 51; *Öckan and Others v. Turkey,* § 43.
344 *Powell and Rayner v. the United Kingdom*, paragraph 44; *Giacomelli v. Italy*, § 80
345 *Hatton and Others v. the United Kingdom* [GC], §§ 97, 98 and 100.
346 *Fadeyeva v. Russia*, § 128.

36. The Convention recognises that the obligation of the State not to take measures which interfere with private and family life or the home is not absolute. Therefore, in certain situations, interference by public authorities may be acceptable under the Convention. However, it has to be justified.

37. First, the interference must be in accordance with the law and the relevant law must be accessible and its effects foreseeable. In most of the relevant cases pertaining to the environment in which the Court has found a violation of Article 8, the breach did not result from the absence of legislation protecting the environment, but rather the failure of the authorities to respect such legislation. For instance, in *López Ostra v. Spain*[347] the operation of the waste-treatment plant was illegal because it was run without the necessary licence. In *Guerra and Others v. Italy*[348] the applicants were unable to obtain information from the public authorities despite the existence of a national statutory obligation. Likewise, in *Taskin and Others v. Turkey*[349] and *Fadeyeva and Others v. Russia*[350] the Court found violations because industrial activities were conducted illegally or in violation of existing national environmental standards. In *Fadeyeva v. Russia* the Court explicitly expounded that "in accordance with the law" means that "[a] breach of domestic law […] would necessarily lead to a finding of a violation of the Convention."[351] In contrast, in *Hatton and Others v. the United Kingdom*[352] there was no such element of irregularity under United Kingdom law and the applicants did not contest that the interference with their right accorded with relevant national law. In any event the Court has tended to look at the question of the lawfulness of the actions of public authorities as a factor to be weighed among others in assessing whether a fair balance has been struck in accordance with Article 8 paragraph 2 and not as a separate and conclusive test.[353]

38. The interference must also follow a legitimate aim serving the interests of the community such as the economic well-being of the country.[354] Even then, there is an additional requirement that the measures taken by the authorities be proportionate to the aim pursued. In order to assess the proportionality of the measures taken, the Court will assess whether a fair balance has been struck between the

[347] For a short description of this case, see § 0 of the manual.
[348] For a short description of this case, see § 0 of the manual.
[349] For a short description of this case, see § 0 of the manual.
[350] For a short description of this case, see § 0 of the manual.
[351] *Fadeyeva v. Russia*, § 95. Moreover, in *López Ostra v. Spain* and *Taşkın and Others v. Turkey* national courts had already ordered the facilities to be closed, which was not implemented.
[352] For a short description of this case, see § 0 of the manual.
[353] *Fadeyeva v. Russia*, § 98.
[354] E.g. the running of an international airport: *Powell and Rayner v. the United Kingdom* and *Hatton and Others v. the United Kingdom* [GC].

competing interests of the community and the individuals concerned. In this context, the public authorities enjoy a certain flexibility – in the words of the Court, a "margin of appreciation"– in determining the steps to be taken to ensure compliance with the Convention. Since many aspects of the environment belong to a social and technical sphere that is difficult to assess, the Court acknowledges that national authorities are better placed than the Court itself to decide on the best policy to adopt in given circumstances. On the basis of this assumption, States therefore enjoy a certain leeway ("margin of appreciation") as to the measures which they may adopt to tackle detrimental environmental factors. The Court will take account of this margin of appreciation when it reviews whether a fair balance has been struck between the competing interests. These principles are applicable in a similar way in cases where the question arises of whether the State has a positive obligation to take measures to secure the individual's right under paragraph 1 of Article 8.[355] In such instances, the measures taken by the authorities must also be in accordance with the law, proportionate and reasonable.

39. For example, in *López Ostra v. Spain* concerning the operation of a waste-treatment plant and its impact on the nearby inhabitants, the Court concluded that the State had not struck a fair balance between the interest of the town's economic well-being in having a waste-treatment plant and that of the applicant and her family's living conditions and health, i.e. the effective enjoyment of her right to respect for her home and her private and family life, which were drastically affected by the waste treatment plant's operation. In the case of *Fadeyeva v. Russia,*[356] the Court also concluded that despite the wide margin of appreciation left to the State, the Russian authorities had failed to strike a fair balance between the interests of the community and the applicant's effective enjoyment of her rights under Article 8, leading to a violation of this provision. In this respect the Court noted that the public authorities had not offered the applicant any effective solution to help her move away from the dangerous area and there was no information that the public authorities had designed or applied effective measures to stop the polluting steel plant from operating in breach of domestic environmental standards.[357]

40. In contrast, the wide margin of appreciation allowed the United Kingdom to sufficiently balance the environmental impact of the extension of Heathrow Airport against its economic gains. The Court found in *Hatton and Others v. the United Kingdom* that the additional night flight would not violate Article 8 because their frequency had been regulated, the

[355] *López Ostra v. Spain*, § 51; *Borysiewicz v. Poland*, judgment of 1 July 2008, § 50.
[356] For a short description of this case, see § 0 of the manual
[357] *Fadeyeva v. Russia*, §§ 133 and 134.

environmental impact had been assessed in advance and measures such as sound-proofing houses had been taken.

41. In *Giacomelli v. Italy* the Court clearly set out in which respect it assesses whether States have acted within their margin of appreciation.[358] In the case the applicant complained of the noise and harmful emissions from a waste storage and treatment plant. The Court considered, recalling the cases of *Hatton and Others v. the United Kingdom* and *Taskin and Others v. Turkey*[359] that there were two aspects to the examination which it could carry out. Firstly, it could assess the substantive merits of the government's decision to authorise the plant to operate to ensure that it was compatible with Article 8. Secondly, it could assess the decision-making process to check that due regard had been given to the individual's interests. With regard to the substantive aspect, the Court stressed that the State had to be granted a wide margin of appreciation and that it was primarily for the national authorities to assess the necessity of interference, although the decision-making process leading to the interference had to be fair and show due regard for the interests of the individual protected by Article 8.[360] Consequently, the Court considered the type of policy or decision involved, the extent to which the views of individuals were taken into account throughout the decision-making process, and the procedural safeguards available.[361] Nevertheless, the Court further stated that this does not prevent authorities from making decisions, e.g. providing operating licences, if they do not possess measureable data for each and every aspect of a project.[362]

42. Accordingly, in *Giacomelli v. Italy* the Court criticised the whole decision-making process whereby the waste treatment plant had been set up and operated. It noted that it had been impossible for citizens concerned to take part in the licensing procedure and make their own submissions to the judicial authorities and, where appropriate, obtain an order for the suspension of the dangerous activity. Even supposing that, much later, the measures required to protect the applicant's rights had been taken, the fact remained that for several years her right to respect for her home had been seriously impaired by the dangerous activities of the plant built thirty metres from her house.[363]

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[358] *Giacomelli v. Italy*, § 79.
[359] *Taşkın and Others v. Turkey,* § 15.
[360] See, *mutatis mutandis*, *McMichael v. the United Kingdom*, judgment of 24 February 1995, § 87.
[361] See also *Hatton and Others v. the United Kingdom* [GC], § 104.
[362] *Giacomelli v. Italy,* § 82.
[363] *Giacomelli v. Italy,* paragraph 96.

43. Court's position on States' margin of appreciation has been reaffirmed also in the cases of *Öckan and Others v. Turkey*[364] and *Lemke v. Turkey,*[365] in which the Court found that there had been a violation of Article 8 because of the threat posed to the applicants' health by the operations of a gold mine using cyanidation.[366] Here again the Court emphasised the importance of proper decision-making processes, including appropriate surveys and studies, which had to be accessible to the public (on this point, see chapters IV and V below).

44. Likewise, did the Court find a violation of Article 8 in *Băcilă v. Romania*? In this case an applicant complained about the emissions of a lead and zinc plant in the town of Copşa Mică. Analyses carried out by public and private bodies established that heavy metals could be found in the town's waterways, in the air, in the soil and in vegetation, at levels of up to twenty times the maximum permitted. The rate of illness, particularly respiratory conditions, was seven times higher in Copşa Mică than in the rest of the country. The Court found that the authorities had failed to strike a fair balance between the public interest in maintaining the economic activity of the biggest employer in a town (the lead and zinc plant) and the applicant's effective enjoyment of the right to respect for her home and for her private and family life.[367]

45. The *Dubetska and Others v. Ukraine* case highlights the relationship between the margin of appreciation awarded to States and the requirement to strike a fair balance when weighing different interests. On the one hand the Court reaffirmed the State's margin of appreciation. For instance, the Court stated that it would be going too far to establish an applicant's general right to free new housing at the State's expense as the complaint under Article 8 could also be remedied by duly addressing the environmental hazards. On the other hand, it reiterated that the Convention is thought to protect effective rights and not illusory ones; therefore, the striking of a fair balance between the various interests at stake may be upset, not only where the regulations to protect guaranteed rights are lacking, but also where they are not duly complied with.

46. In the present case the Court found a violation of Article 8 because the government's approach to tackling pollution has been marked by numerous delays and inconsistent enforcement as well as the fact that the applicants were not resettled despite being only a few in number. In summary, the Court did not require a specific state action, but it required

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[364] *Öckan and Others v. Turkey,* judgment of 28 March 2006.
[365] *Lemke v. Turkey,* judgment of 5 June 2007 (in French only).
[366] Identical circumstances to those of the case *Taşkın and Others v. Turkey*, judgment of 10 November 2004, already mentioned in the manual.
[367] *Băcilă v. Romania*, judgment of 30 March 2010

that the measures taken were effective in ceasing an interference in an individual's rights.[368]

47. Another interesting statement in the present case, alike to *Fadeyeva v. Russia,* relates to the burden of proof of the State when justifying an interference with an individual's right for the benefit of the general public. The Court held that "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".[369]

**f) In addition, the Court has recognised the preservation of the environment, in particular in the framework of planning policies, as a legitimate aim justifying certain restrictions by public authorities on a person's right to respect for private and family life and the home.[370]**

48. As explained earlier, the Convention provides protection when the right to respect for private and family life and for the home are breached as a result of environmental degradation. However, in some cases the protection of the environment can also be a legitimate aim allowing the authorities to restrict this right. In *Chapman v. the United Kingdom* the authorities refused to allow the applicant, a gypsy, to remain in a caravan on land which she owned on the ground that this plot was situated in an area which, according to the planning policies in force, was to be preserved and where, for this purpose, dwellings were prohibited. The Court found that, whilst the authorities' refusal interfered with the applicant's right to respect for private and family life and home (notably because of her lifestyle as a gypsy), it nevertheless pursued the legitimate aim of protecting the rights of others through preservation of the environment, and was proportionate to that aim. The Court thus concluded that Article 8 of the Convention had not been violated.

49. Notwithstanding the fact that they pursue the legitimate aim of preserving the environment, any restrictions by the authorities should meet the same requirements as with other legitimate aims (see paragraphs 0 to 0).[371]

[368] *Dubetska and Others. v. Ukraine*, §§ 143-145, 150-152, 155.
[369] *Dubetska and Others. v. Ukraine*, § 145; *Fadeyeva and Others v. Russia*, § 128.
[370] *Chapman v. the United Kingdom* [GC], judgment of 18 January 2001, § 82.
[371] *Chapman v. the United Kingdom* [GC], §§ 90-91.

# CHAPTER III
# PROTECTION OF PROPERTY AND THE ENVIRONMENT

## ARTICLE 1 OF PROTOCOL NO. 1
## PROTECTION OF PROPERTY

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

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

**a) Under Article 1 of Protocol No. 1 to the Convention, individuals are entitled to the peaceful enjoyment of their possessions, including protection from unlawful deprivation of property. This provision does not, in principle, guarantee the right to continue to enjoy those possessions in a pleasant environment.[372] Article 1 of Protocol No. 1 also recognises that public authorities are entitled to control the use of property in accordance with the general interest.[373] In this context the Court has found that the environment is an increasingly important consideration.[374]**

50. The concept of "possessions" referred to in the Protocol has an autonomous meaning which is not limited to the ownership of physical goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions" for the purpose of this Convention. It always needs to be examined whether the circumstances of the case, considered as a whole, confer on the applicant a title to a

[372] *Taşkın and Others v. Turkey,* decision of 29 January 2004, "law" part (available in French only).
[373] *Fredin v. Sweden*, judgment of 18 February 1991, § 41.
[374] *Fredin v. Sweden*, § 48; *Depalle v. France* [GC], judgment of 29 March 2010, § 81; *Brosset-Triboulet and Others v. France* [GC], judgment of 29 March 2010, § 84.

substantive interest protected by Article 1 of Protocol No. 1.[375] The concept is not limited to existing possessions but may also cover assets, including claims, in respect of which the applicant can argue that he or she has at least a reasonable and legitimate expectation of obtaining effective enjoyment of a property right.[376] A legitimate expectation of being able to continue having peaceful enjoyment of a property right of a possession must have a "sufficient basis in national law".[377]

51. Article 1 of Protocol No. 1 guarantees the right to the peaceful enjoyment of one's possessions. This right, however, is not absolute and certain restrictions are permissible. In certain circumstances, public authorities may order deprivation of property. However, any deprivation of one's property must be justified as being based on law and carried out in the public interest and a fair balance must be struck between the individual's interest and the public interest.[378] In assessing whether a fair balance has been struck, the payment of compensation to the individual concerned is of relevance. In other cases, public authorities may also impose restrictions on the right to the peaceful enjoyment of one's possessions which amount to a control of their use, provided that such control is lawful, in accordance with the public interest and proportionate.

52. The Court has found that the above-mentioned general features of Article 1 of Protocol No. 1 apply in cases raising environmental issues based on the premise that the protection of one's possession needs to be "practical and effective". However, the Court has held that Article 1 of Protocol No. 1 does not necessarily secure a right to continue to enjoy one's property in a pleasant environment. On the other hand, it has also noted that certain activities which could affect the environment adversely could seriously reduce the value of a property to the extent of even making it impossible to sell it, thus amounting to a partial expropriation, or limiting its use creating a situation of *de facto* expropriation. Therefore, the Court attempts to look behind the appearance and investigate the realities of the situation in question.[379]

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[375] *Iatridis v. Greece* [GC], judgment of 25 March 1999, § 54; *Öneryıldız v. Turkey* [GC], judgment of 30 November 2004, § 124; *Hamer v. Belgium,* § 75; *Depalle v. France* [GC] § 62; *Brosset-Triboulet and Others v. France* [GC], § 65.

[376] *Hamer v. Belgium*, § 75; *Depalle v. France* [GC], § 63; *Brosset-Triboulet and Others v. France* [GC], § 66.

[377] *Kopecký v. Slovakia*, judgment of 28 September 2004, § 52; *Brosset-Triboulet and Others v. France*, § 66, Cf. Concurring Opinion of Judge Casadevall, § 3; *Depalle v. France* [GC], § 63.

[378] *Brosset-Triboulet and Others v. France* [GC], § 80.

[379] *Taşkın and Others v. Turkey*, decision of 29 January 2004, "law" part (available in French only).

**b) The general interest in the protection of the environment can justify certain restrictions by public authorities on the individual right to the peaceful enjoyment of one's possessions.[380] Such restrictions should be lawful and proportionate to the legitimate aim pursued. Public authorities enjoy a wide margin of appreciation in deciding with regard both to the choice of the means of enforcement and to the ascertaining whether the consequences of enforcement are justified in the general interest.[381] However, the measures taken by public authorities must be proportionate and strike a fair balance between the interests involved,[382] and here environmental preservation plays an increasingly important role.**

53. Any restrictions by the public authorities on an individual's right to the peaceful enjoyment of his or her possessions must be in the general interest, i.e. in pursuit of a legitimate aim, which can be the protection of the environment. The Court has decided accordingly, for instance, with regard to the protection of the countryside, forests and the coastal areas. Measures taken in pursuit of such a legitimate aim must be in accordance with the law and the relevant law must be accessible and its effects foreseeable. Furthermore, the measures taken must be proportionate to the aim pursued, i.e. a fair balance must be struck between the individual and the general interests at stake. In assessing the fairness of this balance, the Court recognises that the relevant national authorities are in a better position than the Court to judge how to weigh the various interests at stake. The Court therefore grants the State a "margin of appreciation", i.e. it will not seek to disturb the decision of the national authorities, unless the interference with the individual's rights is disproportionate. Additionally, the Court reiterated that regional planning and environmental conservation policies, where the community's general interest is pre-eminent, confer on the State a margin of appreciation that is greater than when exclusively civil rights are at stake.[383]

54. In the case of *Fredin v. Sweden*, the Court considered a restriction on the use of property justified. This case concerned the revocation of a licence to operate a gravel pit situated on the applicants' land on the basis of the Nature Conservation Act. The Court found that the revocation of

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[380] *Pine Valley Developments Ltd and Others v. Ireland*, judgment of 29 November 1991, § 57.
[381] *Fredin v. Sweden*, § 51; *Z.A.N.T.E. - Marathonisi A.E. v. Greece*, judgment of 6 December 2007 (in French only) § 50; *Brosset-Triboulet and Others v. France* [GC], §§ 81 and 86; *Depalle v. France* [GC], § 83.
[382] *Chapman v. the United Kingdom* [GC], § 120; *Brosset-Triboulet and Others v. France* [GC], § 86; *Depalle v. France* [GC], § 83.
[383] *Brosset-Triboulet and Others v. France* [GC], § 87; *Depalle v. France* [GC], § 84.

the licence interfered with the applicants' peaceful enjoyment of their property. However, it also held that it had a legal basis and served the general interest in protecting the environment. The Court underlined that the applicants were aware of the possibility which the authorities had of revoking their licence. While the authorities were under an obligation to take into account their interests when examining whether the licence should be renewed, which they were to do every ten years, this could not have founded any legitimate expectation on the applicants' part of being able to continue exploitation for a long period of time. In addition, the applicants were granted a three-year closing-down period, which was subsequently extended by eleven months at their request. The Court concluded that the revocation was not disproportionate to the legitimate aim pursued, i.e. the protection of the environment, and therefore that Article 1 of Protocol No. 1 was not violated.

55. The *Pine Valley Developments Ltd and Others v. Ireland* judgment and the *Kapsalis and Nima-Kapsali v. Greece*[384] decision both concerned the withdrawal of permissions to build on land purchased for construction. In both cases the Court found that these decisions amounted to a control of the use of property, but that it was lawful in domestic law and that the aim of environmental protection which had been pursued by the authorities when deciding on the withdrawal was both legitimate and in accordance with the general interest. In the *Pine Valley Developments Ltd and Others v. Ireland* case, the interference was aimed at securing the correct application of the planning/environmental legislation not only in the applicants' case but for everyone else. The prevention of building was a proper way of serving the aim of the legislation at issue which was to preserve the green belt. Moreover, the applicants were engaged in a commercial venture which, by its very nature, involved an element of risk and they were aware not only of the zoning plan but also that the local authorities would oppose any departure from it. The Court concluded that the annulment of the building permission could not be considered disproportionate to the legitimate aim of preservation of the environment and thus that there was no violation of Article 1 of Protocol No. 1.[385] In the *Kapsalis and Nima-Kapsali v. Greece* case, the Court held that in fields such as urban planning or the environment, the assessment of the national authorities should prevail unless it is manifestly unreasonable.[386] In the case at hand, the withdrawal of the planning permission was validated by the Administrative High Court following a thorough examination of all aspects of the problem and there was no indication that its decision had been either arbitrary or unforeseeable. Indeed, two other

384 *Kapsalis and Nima-Kapsali v. Greece*, decision of 23 September 2004.
385 *Pine Valley Developments Ltd and Others v. Ireland*, §§ 57-59.
386 *Kapsalis and Nima-Kapsali v. Greece*, § 3, "law" part.

building permissions on land situated in the same area as the applicants' own plot had already been annulled by the courts prior to the annulment of the applicants' own permission. Moreover, the decision to allow building in the zone where the applicants' plot was situated had not been finalised when they had purchased it; the authorities could not be blamed for the applicants' negligence in verifying the status of the plot which they were buying. Therefore, the Court considered that the withdrawal of the planning permission was not disproportionate to the aim of protection of the environment and as a result concluded that the complaint should be dismissed as being manifestly ill-founded.

56. The case of *Hamer v. Belgium*[387] related to the demolition of a holiday home, built in 1967 by the applicant's parents without a building permit. In 1994, the police had drawn up two reports: one concerning the cutting of trees on the property in breach of forestry regulations and the other on the construction without a permit of a house in an area of forest for which no permit could have been granted. The applicant had been ordered to restore the site to its original state. The Court acknowledged that the authorities had interfered with the applicant's right to respect for her property under Article 1 of Protocol No. 1, which, however, could be justified in the present case.

57. As to the proportionality of the impugned measure, the Court pointed out that the environment was an asset whose protection was a matter of considerable and constant concern to the public and hence to the authorities. Economic imperatives and even some fundamental rights such as the right to property should not be given precedence over environmental protection, particularly if the state had adopted legislation on the subject. As a result, the authorities had a responsibility, which should be translated into action at the appropriate time so as not to divest the environmental protection measures they had decided to implement of any useful effect. Thus, restrictions on the right to property could be permitted provided that a fair balance was struck between the collective and individual interests at stake.[388]

58. Furthermore, the impugned measure had pursued the legitimate aim of protecting an area of forest in which building was prohibited, but what the Court had to decide was whether the advantage deriving from the proper development of the land and the protected forest area where the house was situated could be regarded as proportionate to the inconvenience caused.[389] In this connection, the Court noted that the owners of the holiday home had been in undisturbed and uninterrupted

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[387] *Hamer v. Belgium,* judgment of 27 November 2007 (in French only*).*
[388] *Hamer v. Belgium*, §§ 79-80.
[389] *Hamer v. Belgium*, §§ 81-82.

possession of it for a total of thirty-seven years and the authorities, who had known, or should have known, about the existence of the house for a long time, had failed to take the requisite measures and had hence helped to perpetuate a situation which could only undermine efforts to protect the forested area in question. Furthermore, no measure other than complete restoration seemed appropriate given the irrefutable damage that had been done to an area of forest in which building was prohibited. Moreover, in contrast with other cases in which the authorities had been found to have given their implicit consent,[390] this house had been built without permission. Consequently, the Court found that the applicant had not undergone a disproportionate infringement of her right to property and hence that there had been no violation of Article 1 of Protocol No. 1.

59. In the similar case of *Turgut and Others v. Turkey,*[391] the domestic courts had decided to register a piece of land for which the applicants had held a title deed for at least three generations in the name of the Treasury on the ground that the land was public forest. The decision to annul their title to property without compensation was, in the applicants' view, a disproportionate infringement of their right to respect for their property. The Court applied the same reasoning as in the Hamer case cited above, taking the view that the purpose of dispossessing the applicants, namely to protect nature and forests, fell within the scope of the public interest referred to in the second sentence of the first paragraph of Article 1 of Protocol No. 1,[392] and that protecting nature and forests and, more generally speaking, the environment was a valuable activity.[393] The Court found, nonetheless, that there had been a violation of Article 1 of Protocol No. 1 because the failure to compensate the applicants rendered the deprivation of property an excessive infringement. This reason was reaffirmed in *Satir v. Turkey* which equally dealt with the question of land expropriation without compensation.[394]

60. Nevertheless, in contrast to the above two more recent Grand Chamber judgments of *Depalle v. France* and *Brosset-Triboulet and Others v. France*[395] underline that even massive infringements on the right to property can be justified through environmental protection. In both

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[390] The cases of the "Turkish coast". See, for example, *N.A. and Others v. Turkey*, judgment of 11 October 2005.
[391] *Turgut and Others v. Turkey*, judgment of 8 July 2008 (in French only).
[392] See, mutatis mutandis, *Lazaridi v. Greece*, judgment of 13 July 2006 (in French only), paragraph 34 and *Şakir Tuğrul Ansay and Others v. Turkey*, Decision of inadmissibility of 2 March 2006 (in French only).
[393] *Turgut v. Turkey*, § 90.
[394] *Satir v. Turkey*, judgment of 10 March 2009 (French only), §§ 33-35.
[395] *Depalle v. France* [GC] and *Brosset-Triboulet and Others v. France* [GC], judgments of 29 March 2010.

cases the Court did not find a violation of Article 1 of Protocol No. 1. Both cases concerned an order for the applicants to demolish their homes that had been built on the seashore in an area of maritime public property where there was no formal right of property or right of temporary occupancy. It had been only by virtue of successive *ad hoc* decisions that the owners had been authorised, over half a century before, to occupy the dyke on the shoreline and to build houses temporarily, and none of these decisions had explicitly had the effect of recognising any property right over the state-owned public property.[396] The authorities ordered the applicants to restore the site to its original state "by demolishing the constructions built on the public property", at their own cost and without compensation. Their decision was taken in the context of a desire to implement an active policy of environmental protection. Hence, the role of the Court was to ensure that a "fair balance" was achieved between the demands of the general interest of the community (environmental protection, free access to the shore) and those of the applicants, who wanted to keep their houses. In determining whether this requirement was met, the Court recognised that the State enjoyed a wide discretion in its decision-making, particularly in a case like the present one, concerning regional planning and environmental conservation policies where the community's general interest was pre-eminent.[397]

61. The Court held that the applicants could not justifiably claim that the authorities' responsibility for the uncertainty regarding the status of their houses had increased with the passage of time. On the contrary, they had always known that the decisions authorising occupation of the public property were precarious and revocable. The tolerance shown towards them by the State did not alter that fact.[398]

62. It went without saying that after such a long period of time demolition would amount to a radical interference with the applicants' "possessions".[399] However, this was part and parcel of a consistent and rigorous application of the law given the growing need to protect coastal areas and their use by the public, and also to ensure compliance with planning regulations.[400] The Court added lastly that the lack of compensation could not be regarded as a disproportionate measure used to control the use of the applicants' properties, carried out in pursuit of the general interest. The principle that no compensation was payable, which originated in the rules governing public property, had been clearly

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[396] *Depalle v. France,* § 86.
[397] *Depalle v. France* [GC]*,* §§ 83-84 ; *Brosset-Triboulet and Others v. France* [GC], § 84 and 86-87.
[398] *Depalle v. France* [GC], § 86; *Brosset-Triboulet and Others v. France* [GC], § 89.
[399] *Depalle v. France* [GC]*,* § 88; *Brosset-Triboulet and Others v. France* [GC], § 92.
[400] *Depalle v. France* [GC]*,* §§ 81 and 89.

stated in every decision authorising temporary occupancy of the public property issued to the applicants over decades.[401]

63. Having regard to all the foregoing considerations, the Court held that the applicants would not bear an individual and excessive burden in the event of demolition of their houses without compensation. Accordingly, the balance between the interests of the community and those of the applicants would not be upset. The Court considered that there had not been a violation of Article 1 of Protocol No. 1.

64. The case of *Valico S. R. L. v. Italy*[402] related to a decision by the national authorities to impose a fine on a company for not complying with rules on the construction of buildings designed to protect the landscape and the environment. The Court examined the complaint under Article 1 of Protocol No. 1 and found that the disputed measure was prescribed by law and pursued the legitimate aim of protecting the landscape and developing the land rationally and in a manner showing due regard for the environment, all of which was in accordance with the general interest. As to the balance between the demands of the general interest and the need to protect the applicant company's fundamental rights, the Court found that even if the impugned change of the construction location, which had not been authorised by the authorities, had not damaged the environment, the simple fact of failing to satisfy the conditions imposed by the authorities responsible for spatial planning and development had constituted a breach of the relevant domestic legal regulations. Furthermore, while the penalty imposed on the applicant company might at first seem excessive, the change in the location of the building had substantially altered the original plans. This was also a large-scale project and the severity of the deterrent penalty had to be in keeping with the importance of the issues at stake. Lastly, there had been no order to demolish the building in question. In view of all of the foregoings, the Court found that the Italian authorities had struck the right balance between the general interest on the one hand and respect for the applicant company's right to property on the other. Accordingly, it considered that the interference had not imposed an excessive burden such as to make it disproportionate to the legitimate aim pursued and dismissed the applicant's complaint.

65. In another case (*Papastavrou and Others v. Greece)*[403] the applicants and the authorities were in dispute over the ownership of a plot of land. Following a decision of the prefect, it was decided that the area where the disputed plot was located should be reforested. The applicants

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[401] *Depalle v. France* [GC], § 91; *Brosset-Triboulet and Others v. France* [GC], § 94.
[402] *Valico S. R. L. v. Italy*, decision of 21 March 2006 (in French only).
[403] *Papastavrou and Others v. Greece*, judgment of 10 April 2003, §§ 22-39.

unsuccessfully challenged this decision before domestic courts and therefore brought their case before the European Court of Human Rights. They argued that the prefect's decision had not been taken in accordance with the public interest, alleging that the geological characteristics of that area made it unfit for reforestation. The Court recognised the complexity of the issue and the fact that the prefect's decision was based solely on a decision of the Minister of Agriculture made some 60 years earlier, without any fresh reassessment of the situation. It also noted that there was no possibility of obtaining compensation under Greek law. The Court thus concluded that the public authorities had not struck a fair balance between the public interest and the applicants' rights. Accordingly, there had been a violation of Article 1 of Protocol No. 1.

66. In the case of *Z.A.N.T.E. - Marathonisi A.E. v. Greece,*[404] which concerned the compensation in connection with a dispute relating to a small islet which the applicant company had purchased, the Court pointed to the wide margin of appreciation that States were granted when implementing spatial planning policies and held that the interference with the applicant company's right to its property satisfied the requirement of being in the general interest. However, on the matter of compensation, the authorities had argued wrongly that:

> *"it was impossible for the prohibition of building on the disputed land to infringe the right to protection of property as construction on the land in question was, at all events and by its very nature, impossible."*

The Court inferred from this that the authorities had applied an irrefutable presumption which took no account of the distinctive features of each piece of land not covered by an urban zone and found that the lack of compensation would give rise to a violation of Article 1 of Protocol No. 1.[405]

**c) On the other hand, protection of the individual right to the peaceful enjoyment of one's possessions may require the public authorities to ensure certain environmental standards. The effective exercise of this right does not depend merely on the public authorities' duty not to interfere, but may require them to take positive measures to protect this right, particularly where there is a direct link between the measures an applicant may legitimately expect from the authorities and his or her effective enjoyment of his or her possessions.[406] The Court has**

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[404] *Z.A.N.T.E. - Marathonisi A.E. v. Greece, judgment of* 7 December 2007 (in French only).
[405] *Z.A.N.T.E. - Marathonisi A.E. v. Greece*, §§ 50-52.
[406] *Öneryıldız v. Turkey* [GC], § 134; *Budayeva and Others v. Russia*, judgment of 22 March 2008, § 172.

**found that such an obligation may arise in respect of dangerous activities and to a lesser extent in situations of natural disasters.[407]**

67. Pursuant to the Court's interpretation of Article 1 of Protocol No. 1, in certain circumstances, public authorities must not only refrain from directly infringing the right to protection of property, but they may also be required to take active steps to ensure that this right is respected in practice. In the context of dangerous activities where the right of property is at risk, public authorities may therefore be expected to take measures to ensure that this right is not breached.

68. In *Öneryıldız v. Turkey,*[408] the applicant's home was destroyed by an explosion which took place on the rubbish tip next to where his family's house had been built illegally. The Court noted that the authorities had tolerated its existence for a number of years. It considered therefore that the applicant could claim protection from Article 1 of Protocol No. 1 despite the fact that his dwelling had been illegally built. The Court also found that there was a causal link between the gross negligence attributable to the authorities and the destruction of the applicant's house. Because the Court considered that the treatment of waste, as a matter relating to industrial development and urban planning, is regulated and controlled by the State, it brought the accidents in this sphere within the State's responsibility. Therefore, the authorities were required to do everything within their power to protect private proprietary interests. Consequently, finding that certain suitable preventive measures existed, which the national authorities could have taken to avert the environmental risk, that had been brought to their attention, the Court concluded that the national authorities' failure to take the necessary measures amounted to a breach of their positive obligation under Article 1 of Protocol No. 1.

69. Similarly in the case of *Budayeva and Others v. Russia,*[409] the Court needed to consider to what extent the authorities were expected to take measures to protect property from natural disasters. However, the Court distinguished that:

> *"natural disasters, which are as such beyond human control, do not call for the same extent of State involvement. Accordingly, its positive obligations as regards the protection of property from weather*

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[407] *Öneryıldız v. Turkey* [GC], §§ 134 and 135; *Budayeva and Others v. Russia*, §§ 172-182.

[408] For a short description of the case, see § 0 of the manual.

[409] *Budayeva and Others v. Russia*, judgment of 22 March 2008.

*hazards do not extend necessarily as far as in the sphere of dangerous activities of a man-made nature*."

The latter require national authorities to do everything in their power to protect lives.[410] Differentiating between the positive obligations under Article 2 of the Convention and those under Article 1 of Protocol No. 1 to the Convention the Court went on to state:

> *"While the fundamental importance of the right to life requires that the scope of the positive obligations under Article 2 includes a duty to do everything within the authorities' power in the sphere of disaster relief for the protection of that right, the obligation to protect the right to the peaceful enjoyment of possessions, which is not absolute, cannot extend further than what is reasonable in the circumstances. Accordingly, the authorities enjoy a wider margin of appreciation in deciding what measures to take in order to protect individuals' possessions from weather hazards than in deciding on the measures needed to protect lives.[411]"*

In this case the Court noted that the mudslide had been exceptionally powerful and that there had been no clear causal link between the State's failure to take measures and the extent of the physical damage. It also observed that the damage could not be unequivocally attributed in its entirety to State negligence as the alleged negligence had been no more than an aggravating factor contributing to the damage caused by natural forces. Moreover, it held that the procedural duty with regard to an independent inquiry or judicial response is also not comprehensive compared to Article 2.[412] Additionally, the Court considered that "the positive obligation on the State to protect private property from natural disaster cannot be construed as binding the State to compensate the full market value of destroyed property."[413] Consequently, it found that there had been no violation of Article 1 of Protocol No. 1.

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[410] *Budayeva and Others v. Russia*, § 174.
[411] *Budayeva and Others v. Russia,* § 175.
[412] *Budayeva and Others v. Russia,* §§ 176, 178 and 182.
[413] *Budayeva and Others v. Russia,* § 182.

# CHAPTER IV
# INFORMATION AND COMMUNICATION ON ENVIRONMENTAL MATTERS

## ARTICLE 10
## FREEDOM OF EXPRESSION

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. […]

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

### *Right to receive and impart information and ideas on environmental matters*

**a) The right to receive and impart information and ideas is guaranteed by Article 10 of the Convention. In the particular context of the environment, the Court has found that there exists a strong public interest in enabling individuals and groups to contribute to the public debate by disseminating information and ideas on matters of general public interest.**

70. Freedom of expression is a cornerstone of democracy. It enables debate and the free exchange of ideas. The right to distribute information on environmental matters can be seen as just one example of the rights that Article 10 seeks to protect. Clearly, this right protects individuals from direct actions of the public authorities, such as censorship. However, this

right may also be relevant when a private party takes legal action against another private party to stop the distribution of information.

71. The issue of the right of environmental activists to distribute material was raised in *Steel and Morris v. the United Kingdom*[414]. This case involved two environmental activists who were associated with a campaign against McDonald's. As part of that campaign, a leaflet called "What's wrong with McDonald's?" was produced and distributed. McDonald's sued the two applicants for libel. The trial lasted 313 days and the applicants did not receive any legal aid even though they were unemployed or earning low wages at the time. McDonald's won substantial damages against them. The European Court of Human Rights recognised that large multinational companies like McDonald's had the right to defend their reputation in court proceedings but stressed at the same time that small and informal campaign groups had to be able to carry on their activities effectively. The Court considered it essential, in the interests of open debate, that in court proceedings involving both big companies and small campaign groups there is fairness and equality of arms between them. Otherwise, there might be a possible "chilling effect" on the general interest in promoting the free circulation of information and ideas about the activities of powerful commercial entities. By not granting legal aid to the applicants, the United Kingdom had not guaranteed fairness in the court proceedings. This lack of fairness and the substantial damages awarded against them meant, according to the Court, that the applicants' freedom of expression had been violated.

**b) Restrictions by public authorities on the right to receive and impart information and ideas, including on environmental matters, must be prescribed by law and follow a legitimate aim. Measures interfering with this right must be proportionate to the legitimate aim pursued and a fair balance must therefore be struck between the interest of the individual and the interest of the community as a whole.[415]**

72. As is clear from the text of paragraph 2 of Article 10, freedom of expression is not an absolute right. However, when public authorities take steps which may interfere with freedom of expression, their actions must fulfil three requirements. These are cumulative, meaning all three must be present for the restriction to be permitted under Article 10. Firstly, there must be a legal basis for their action and the relevant domestic law must

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414 *Steel and Morris v. the United Kingdom*, judgment of 15 February 2005, § 89; *Vides Aizsardzības Klubs v. Latvia*, judgment of 27 May 2004, § 40.
415 *Vides Aizsardzības Klubs v. Latvia*, paragraph 40.

be accessible and its effects foreseeable. Secondly, their action must pursue one of the interests set out in Article 10 paragraph 2. Finally, their action must be necessary in a democratic society. This third requirement implies that the means used by the authorities must be proportionate to the interest pursued. The Court has frequently stated that the adjective "necessary" in paragraph 2 implies the existence of a "pressing social need".[416] The level of protection ultimately given to the expression in question will depend on the particular circumstances of the case including the nature of the restriction, the degree of interference and the type of information or opinions concerned.

73. Given that the information that environmental groups or activists will want to distribute is often of a sensitive nature, the level of protection will as a rule be high. By way of an example, in *Vides Aizsardzības Klubs v. Latvia*, the applicant was an environmental association which alleged that a local mayor had not halted building works which were causing damage to the coastline. The mayor sued the association. The Latvian court found that the association had not proven its allegations and ordered it to publish an apology and pay damages to the mayor. The European Court of Human Rights noted that the association had been trying to draw attention to a sensitive issue. As a non-governmental organisation specialised in the relevant area, the applicant organisation had been exercising its role of a public "watchdog". That kind of participation by association was essential in a democratic society. In the Court's view, the applicant organisation had expressed a personal view of the law amounting to a value judgement. It could not therefore be required to prove the accuracy of that assessment. The Court held that, in a democratic society, the public authorities were, as a rule, exposed to permanent scrutiny by citizens and, subject to acting in good faith, everyone should be able to draw the public's attention to situations that they considered unlawful. As a result, despite the discretion afforded to the national authorities, the Court held that there had not been a reasonable relationship of proportionality between the restrictions imposed on the freedom of expression of the applicant organisation and the legitimate aim pursued. The Court therefore concluded that there had been a violation of Article 10.

74. In the cases of *Verein gegen Tierfabriken v. Switzerland*[417] the Court had to consider whether the national authorities' refusal to register an

[416] E.g. *The Observer and Guardian v. the United Kingdom*, judgment of 26 November 1991, § 59.

[417] *Verein gegen Tierfabriken v. Switzerland*, judgment of 28 June 2001; *Verein gegen Tierfabriken v. Switzerland*, judgment of 4 October 2007; *Verein gegen Tierfabriken v. Switzerland* (No. 2), judgment of 30 June 2009.

advertisement of an animal protection association fulfilled the requirement of Article 10. The applicant association had made a television commercial in response to various advertisements produced by the meat industry, which showed, *inter alia*, a noisy hall with pigs in small pens, gnawing nervously at the iron bars. The voiceover compared the conditions in which pigs were reared to concentration camps, and added that the animals were pumped full of medicines. The film concluded with the exhortation: "Eat less meat, for the sake of your health, the animals and the environment!" The Court held that the refusal to register an advertisement that was necessary to be aired in Switzerland amounted to interference and continued to assess whether the interference might be justified through the condition set out in paragraph 2 of Article 10. It analysed whether it was prescribed by law, motivated by legitimate aims and was necessary in a democratic society.[418] Thereby the law must be sufficiently precise, accessible and its consequences must be foreseeable.[419] The Court underlined that the phrase "necessary in a democratic society" requires a "pressing social need".[420] The Court held that, because the content of the advertisement was not commercial but "political" and it pertained to the general European debate on the protection of animals and the manner in which they are reared, the extent of the margin of appreciation of whether public authorities can ban the advertisement is reduced. This is because it is not a given individual's purely commercial interests that are at stake, but the participation in a debate affecting the general interest.[421] In consequence, the Court considered the ban disproportionate.

**c) Freedom to receive information under Article 10 can neither be construed as imposing on public authorities a general obligation to collect and disseminate information relating to the environment of their own motion.**

75. In *Guerra and Others v. Italy*,[422] the applicants complained – among other things – that the authorities' failure to inform the public about the hazards of the factory and about the procedures to be followed in the event of a major accident, infringed their right to freedom of information as guaranteed by Article 10. However, the Court found that no obligation on States to collect, process and disseminate environmental information of their own motion could be derived from Article 10. Such an obligation would prove hard for public authorities to implement by reason of the

[418] *Verein gegen Tierfabriken v. Switzerland*, judgment of 28 June 2001, §§ 48-49.
[419] *Verein gegen Tierfabriken v. Switzerland*, judgment of 28 June 2001, §§ 55-57.
[420] *Verein gegen Tierfabriken v. Switzerland*, judgment of 28 June 2001, § 67.
[421] *Verein gegen Tierfabriken v. Switzerland*, judgment of 28 June 2001, §§ 70-71.
[422] For a short description of the case, see paragraph 0 of the manual.

difficulty for them to determine among other things how and when the information should be disclosed and who should be receiving it.[423] However, freedom to receive information under Article 10 as interpreted by the Court prohibits public authorities from restricting a person from receiving information that others wish or may be willing to impart to him or her.

### *Access to information on environmental matters*

**d) However, Articles 2 and 8 of the Convention may impose a specific positive obligation on public authorities to ensure a right of access to information in relation to environmental issues in certain circumstances.[424]**

**e) This obligation to *ensure access to information* is generally complemented by the positive obligations of the public authorities to *provide information* to those persons whose right to life under Article 2 or whose right to respect for private and family life and the home under Article 8 are threatened. The Court has found that in the particular context of dangerous activities falling within the responsibility of the State, special emphasis should be placed on the public's right to information.[425] Additionally, the Court held that States are duty-bound based on Article 2 to "adequately inform the public about any life threatening emergencies", including natural disasters."[426]**

76. As mentioned under the previous principle, the Court stated in the *Guerra and Others v. Italy* case[427] that Article 10 was not applicable because this article basically prohibits public authorities from restricting a person from receiving information that others wish or may be willing to impart to him or her. The Court did find in this case, however, that Article 8 had been violated by the failure to make information available which would have enabled the applicants to assess the risks they and their families might run if they continued to live near the factory.[428]

77. Likewise in *Tătar v. Romania*, a case in which the authorities had prolonged the operation permit of a gold mine that did not fulfil all required health and environmental standards, the Court examined whether the

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423 *Guerra and Others v. Italy* [GC], § 51.
424 *Öneryıldız v. Turkey* [GC], § 90; *Guerra and Others v. Italy* [GC], § 60.
425 *Öneryıldız v. Turkey* [GC], § 90.
426 *Budayeva and Others v. Russia*, judgment of 22 March 2008 § 131.
427 For a short description of the case, see § 0 of the manual.
428 *Guerra and Others v. Italy* [GC], § 60.

national authorities had adequately informed the villagers of nearby settlements about potential health risks and environmental impact.[429]

78. As to the right to information in circumstances where life is at risk, the Court considered in *Öneryıldız v. Turkey*[430] that similar requirements arose under Article 2 as those it had found were applicable under Article 8 in the Guerra and Others case, and that in this context particular emphasis had to be placed on the public's right to information. Importantly, the Court sharpened the scope of the duty to inform derived from *Guerra and Others v. Italy*. The Court found a duty to inform exists in situation of "real and imminent dangers" either to the applicants' physical integrity or the sphere of their private lives. The Court held that the fact that the applicant was in the position to assess some of the risks, in particular health risks, does not absolve the public authorities from their duty to proactively inform the applicant. Therefore, the Court found that there was a violation of Article 2. The Court concluded in the present case that the administrative authorities knew or ought to have known that the inhabitants of certain slum areas were faced with a real and immediate risk both to their physical integrity and their lives on account of the deficiencies of the municipal rubbish tip. In addition to not remedying the situation, the authorities failed to comply with their duty to inform the inhabitants of this area of potential health and environmental risks, which might have enabled the applicant to assess the serious dangers for himself and his family without diverting State resources to an unrealistic degree. However, the Court also found that even if public authorities respect the right of information this may not be sufficient to absolve the State of its responsibilities under Article 2, unless more practical measures are also taken to avoid the risks.

79. The Court reaffirmed this position in *Budayeva and Others v. Russia*[431] However, it added that the obligation on the part of the State to safeguard the lives of those within its jurisdiction includes substantive and procedural aspects, which *inter alia*, contains a positive obligation to not only take regulatory measures and to ensure that any occasion of death during life-threatening emergencies is adequately investigated, but also to adequately inform the public about any life-threatening emergencies. In this case the authorities had failed to share information about the possibility of mudslides with the population. This was reaffirmed in *Brânduşe v. Romania*.[432]

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[429] *Tătar v. Romania,* judgment of 27 January 2009, §§ 101 and 113.
[430] For a short description of the case, see §§ 0 of the manual. *Öneryıldız v. Turkey* [GC], §§ 67 and 84-87.
[431] *Budayeva and Others v. Russia,* §§ 131-132.
[432] *Brânduşe v. Romania,* judgment of 7 April 2009 (available in French only), § 63.

**f) Access to information is of importance to individuals because it can allay their fears and enables them to assess the environmental danger to which they may be exposed.**

80. In *McGinley and Egan v. the United Kingdom*, the applicants were soldiers in the Pacific when the British Government carried out nuclear tests there. They argued that non-disclosure of records relating to those tests violated their rights under Article 8 because the records would have enabled them to determine whether or not they had been exposed to dangerous levels of radiation, so that they could assess the possible consequences of the tests to their health. The Court found that Article 8 was applicable on the ground that the issue of access to information which could either have allayed the applicants' fears or enabled them to assess the danger to which they had been exposed was sufficiently closely linked to their private and family lives to raise an issue under Article 8. It further held that where a government engages in hazardous activities which might have hidden adverse consequences on human health, respect for private and family life under Article 8 requires that an effective and accessible procedure be established which enables persons involved in such activities to seek all relevant and appropriate information. If there is an obligation of disclosure, individuals must not be required to obtain it through lengthy and complex litigation.[433] In the instant case, however, the Court found that the applicants had not taken the necessary steps to request certain documents which could have informed them about the radiation levels in the areas in which they were stationed during the tests, and which might have served to reassure them in this respect. The Court concluded that by providing a procedure for requesting documents the state had fulfilled its positive obligation under Article 8 and that therefore there had been no violation of this provision.

81. In the *Guerra and Others v. Italy* case, the Court explicitly noted that the applicants had not had access to essential information that would have enabled them to assess the risks that they and their families might run if they continued to live in a town particularly exposed to danger in the event of an accident at a factory located nearby. The Court concluded that the Italian authorities had failed to guarantee the applicants' rights under Article 8 for not having communicated relevant information on the dangers of the factory. More generally, the Court has emphasised the importance of public access to the conclusions of studies and to information which would enable members of the public to assess the

[433] *Roche v. the United Kingdom* [GC], judgment 19 October 2005, § 165.

danger to which they are exposed.[434] The Court held likewise in *Giacomelli v. Italy,*[435] *Tătar v. Romania*,[436] and *Lemke v. Turkey.*[437]

**g) Moreover, the Court has established criteria on the construction of the procedures used to provide information. It held that when public authorities engage in dangerous activities which they know involve adverse risks to health, they must establish an effective and accessible procedure to enable individuals to seek all relevant and appropriate information.[438] Moreover, if environmental and health impact assessments are carried out, the public needs to have access to those study results.[439]**

82. In the *Brânduşe v. Romania* case, the Court noted that the government had not stated what measures had been taken by the authorities to ensure that the inmates in the local prison, including the applicant, who had asked for information about the disputed rubbish tip in close proximity of the prison facility, would have proper access to the conclusions of environmental studies and information by means of which the health risks to which they were exposed could be assessed.[440] Consequently, the Court found that there was a violation of Article 8 based partially on the authorities' failure to secure the applicant's right to access to information.

83. Similarly, in the case of *Giacomelli v. Italy,*[441] which concerned a waste treatment factory, but also in *Lemke v. Turkey,*[442] which concerned the operation of a gold mine, the Court pointed out that

> *"a governmental decision-making process concerning complex issues of environmental and economic policy must in the first place involve appropriate investigations and studies […]. The importance of public access to the conclusions of such studies and to information enabling members of the public to assess the danger to which they are exposed is beyond question (see, mutatis mutandis, Guerra and Others, cited above, paragraph 60, and McGinley and Egan v. the United Kingdom, judgment of 9 June 1998).[443]"*

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[434] *Taşkın and Others v. Turkey*, § 119.
[435] *Giacomelli v. Italy*, judgment of 2 November 2006, § 83.
[436] *Tătar v. Romania,* § 113.
[437] *Lemke v. France*, § 41.
[438] *McGinley and Egan v. the United Kingdom*, judgment of 9 June 1998, §§ 97 and 101.
[439] *Brânduşe v. Romania,* judgment of 7 April 2009, § 63.
[440] *Brânduşe v. Romania,* judgment of 7 April 2009, §§ 63 and 74. Similarly *Guerra and Others v. Italy* [GC], § 60.
[441] *Giacomelli v. Italy*, judgment of 2 November 2006, § 83. For a short description of the case, see § 0 of the manual
[442] *Lemke v. Turkey*, judgment of 5 June 2007. For a short description of the case, see § 0 of the manual
[443] *Giacomelli v. Italy*, paragraph 83 and *Lemke v. Turkey*, § 41.

84. This conviction was also echoed in the case of *Tătar v. Romania,*[444] where the Court had to decide whether the prolonged authorisation of the operation of gold mine complied with the authorities' obligations resulting from Article 8. With regard to the right to access to information, the Court noted that the national legislation on public debates had not been complied with as the participants in those debates had not had access to the conclusions of the study on which the contested decision to grant the company authorisation to operate was based. Interestingly, in this case, the Court referred once more to international environmental standards. It pointed out that the rights of access to information, public participation in decision-making and access to justice in environmental matters were enshrined in the Aarhus Convention[445] and that one of the effects of the Council of Europe's Parliamentary Assembly Resolution 1430 (2005) on industrial hazards was to extend the duty of States to improve dissemination of information in this sphere.[446]

[444] *Tătar v. Romania*, judgment of 27 January 2009.

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

[446] *Tătar v. Romania*, §§ 93, 101, 113-116 and 118.

# CHAPTER V
# DECISION-MAKING PROCESSES IN ENVIRONMENTAL MATTERS AND PUBLIC PARTICIPATION IN THEM

**a) When making decisions which relate to the environment, public authorities must take into account the interests of individuals who may be affected.[447] In this context, it is important that the public is able to make representations to the public authorities.[448]**

**b) Where public authorities have complex issues of environmental and economic policy to determine, the decision-making process must involve appropriate investigations and studies in order to predict and evaluate in advance the effects on the environment and to enable them to strike a fair balance between the various conflicting interests at stake.[449] The Court has stressed the importance of public access to the conclusions of such studies and to information which would enable individuals to assess the danger to which they are exposed.[450] However, this does not mean that decisions can be taken only if comprehensive and measurable data are available in relation to each and every aspect of the matter to be decided.[451]**

85. The Court has recognised the importance of ensuring that individuals are involved in the decision-making processes leading to decisions which could affect the environment and where their rights under the Convention are at stake.

86. In *Hatton and Others v. the United Kingdom,*[452] for instance, which related to the noise[453] generated by aircraft taking off and landing at an international airport and the regulatory regime governing it, the Court examined the question of public participation in the decision-making

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[447] *Hatton and Others v. the United Kingdom* [GC], judgment of 8 July 2003, § 99; *Chapman v. the United Kingdom* [GC], judgment of 18 January 2001, § 92.
[448] *Hatton and Others v. the United Kingdom* [GC], § 128.
[449] *Hatton and Others v. the United Kingdom* [GC], § 128; *Taşkın and Others v. Turkey,* judgment of 10 November 2004, § 119.
[450] *Taşkın and Others v. Turkey*, § 119.
[451] *Hatton and Others v. the United Kingdom* [GC], §§ 104 and 128; *G. and E. v. Norway*, admissibility decision of 3 October 1983; *Giacomelli v. Italy,* judgment of 2 November 2007, § 82.
[452] For a short description of the case, see § 0 of the manual.
[453] *Taşkın and Others v. Turkey*, § 119.

process in the context of Article 8 considering that it had a bearing on the quiet enjoyment of the applicants' private and family life and home. It deemed that in cases involving decisions by public authorities which affect environmental issues, there are two aspects to the inquiry which may be carried out by the Court. First, the Court may assess the substantive merits of the government's decision, to ensure that it is compatible with Article 8. Secondly, it may scrutinise the decision-making process to ensure that due weight has been accorded to the interests of the individual. This means that in such cases the Court is required to consider all procedural aspects of the process leading to the decision in question, including the type of policy or decision involved, the extent to which the views of individuals were taken into account throughout the decision-making procedure and the procedural safeguards available, i.e. whether the individuals concerned could challenge the decision before the courts or some other independent body, if they believed that their interests and representations had not been properly taken into account.

87. The Court concluded in the *Hatton and Others v. the United Kingdom* case that there had not been fundamental procedural flaws in the preparation of the scheme on limitations for night flights and, therefore, no violation of Article 8 in this respect, in view of the following elements. The Court noted that the authorities had consistently monitored the situation and that night flights had been restricted as early as 1962. The applicants had access to relevant documentation and it would have been open to them to make representations. If their representations had not been taken into account, it would have been possible for them to challenge subsequent decisions or the scheme itself in court.

88. The principles summarised in *Hatton and Others v. the United Kingdom* have been consistently applied throughout the Court's case-law. They are repeated almost verbatim in numerous judgments, for instance *Giacomelli v. Italy,*[454] *Lemke v. Turkey,*[455] *Tătar v. Romania,*[456] *Taşkın and Others v. Turkey,*[457] *McMichael v. the United Kingdom,*[458] *Brânduşe v. Romania,*[459] *Dubetska and Others v. Ukraine*[460] *and Grimkovskaya v. Ukraine.*[461]

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454 *Giacomelli v. Italy,* §§ 82-84 and 94.

455 *Lemke v. Turkey,* judgment of 5 September 2007, § 41.

456 *Tătar v. Romania,* judgment of 27 January 2009, §§ 88, 101 and 113.

457 *Taşkın and Others v. Turkey,* §§ 118-119.

458 *McMichael v. the United Kingdom,* judgment of 24 February 1995, § 87, also *McGinley and Egan v. the United Kingdom,* judgment of 9 June 1998, § 97.

459 *Brânduşe v. Romania,* judgment of 7 July 2009, §§ 62-63.

460 *Dubetska and Others v. Ukraine,* §§ 66-69.

461 *Grimkovskaya v. Ukraine,* §§ 66-69.

89. However, considering the facts of the subsequent cases the scope of the required decision-making procedure has become more evident. For example, considering *Giacomelli v. Italy* the Court acknowledges that national authorities have failed to respect the procedural machinery provided for to respect the individual rights in the licensing of a waste treatment plant. In particular, they did not accord any weight to national judicial decisions and did not conduct an "environmental impact assessment" which is necessary for every project with potential harmful environmental consequences as prescribed also by national law.[462]

90. The Court's finding of a violation of Article 8 in *Grimkovskaya v. Ukraine*[463] resulted from the authority's negligence of minimal procedural safeguards which are necessary to strike a fair balance between the applicant's and the community's interest. Firstly, the Court noted that the decision to route the motorway through the city was not preceded by an adequate feasibility study, assessing the probability of compliance with applicable environmental standards and enabling interested parties to contribute their views. It criticised the absence of public access to relevant environmental information. Secondly, the Court required that at the time of taking the routing decision, the authorities should have put in place a reasonable policy for mitigating the motorways effects on the residents. This should have happened not only as the result of repeated complaints by the residents. This did not happen. Lastly, the Court criticised the lack of the ability to challenge the authorities' decision before an independent authority (see Chapter VI below).[464]

91. The Court stressed in *Dubetska and Others v. Ukraine*[465] that it examined whether the authorities conducted sufficient studies to evaluate the risks of a potentially hazardous activity and whether, on the basis of the information available, they have developed an adequate policy vis-à-vis polluters and whether all necessary measures have been taken to enforce this policy in good time. The Court was particularly interested in the extent to which the individuals affected by the policy at issue were able to contribute to the decision-making. This included them having access to the relevant information and the ability to challenge the authorities' decision in an effective way. Moreover, the Court stated that the procedural safeguards available to the applicant may be rendered inoperative and the state may be found liable under the Convention

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462 *Giacomelli v. Italy,* §§ 94-95.
463 For a short description of the case, see § 0 of the manual
464 *Grimkovskaya v. Ukraine,* §§ 66-69.
465 For a short description of the case, see § 0 of the manual

where a decision-making procedure is unjustifiably lengthy or where a decision taken as a result remains for an important period unenforced. [466]

92. The cases of *Tătar v. Romania*[467] and *Taşkın and Others v. Turkey*[468] explicitly recognise and stress that despite the fact that Article 8 does not contain an explicit procedural requirement, the decision-making process leading to measures of interference must be fair and afford due respect to the interests of the individual as safeguarded by the article.[469] At the same time both cases, which concerned the operation of mines, underlined that only those specifically affected have a right to participate in the decision-making. An *actio popularis* to protect the environment is not envisaged by the Court.[470]

93. Moreover, even though the Court has not yet used the word "environmental impact assessment (EIA)" to describe the procedural aspect of Article 8 – it has only found that states neglected to conduct "EIAs" that were prescribed by national law (see *Giacomelli v. Italy* above) – the Court appears to require more and more EIAs to fulfil the evaluation requirements set out by it. This is supported by the Court's finding in *Tâtar v. Romania* which was based partially on the conclusion that the national authorities had failed in their duty to assess, in advance, possible risks of their activities in a satisfactory manner and take adequate measures capable of protecting specifically the right for private and family life and, more generally, the right to the enjoyment of a healthy and protected environment.[471] Overall, the Court is ever more willing to precisely rule on the proper procedures to take environmental matters into account.

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466 *Dubetska and Others v. Ukraine,* §§ 143-144.
467 For a short description of the case, see § 0 of the manual
468 For a short description of the case, see § 0 of the manual
469 *Tătar v. Romania,* § 88; *Taşkın and Others v. Turkey,* § 118.
470 The incompatibility of *actio popularis* with the Convention system has been confirmed also in *Ilhan v. Turkey*, judgment of 27 June 2000, §§ 52-53.
471 *Tătar v. Romania,* § 112.

# CHAPTER VI
# ACCESS TO JUSTICE AND OTHER REMEDIES IN ENVIRONMENTAL MATTERS

## ARTICLE 6 PARAGRAPH 1
## RIGHT TO A FAIR TRIAL

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

## ARTICLE 13
## RIGHT TO AN EFFECTIVE REMEDY

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

**a) Several provisions of the Convention guarantee that individuals should be able to commence judicial or administrative proceedings in order to protect their rights. Article 6 guarantees the right to a fair trial, which the Court has found includes the right of access to a court. Article 13 guarantees to persons, who have an arguable claim that their rights and freedoms as set forth in the Convention have been violated, an effective remedy before a national authority. Moreover, the Court has inferred procedural requirements from certain provisions of the Convention, such as Articles 2 and 8 and Article 1 of Protocol 1.[472] All these provisions may apply in cases where human rights and environmental issues are involved.**

**b) The right of access to a court under Article 6 will as a rule come into play when a "civil right or obligation", within the meaning of the Convention, is the subject of a "dispute".[473] This includes the right to see final and enforceable court decisions executed and implies that all parties, including public authorities, must respect court decisions.[474]**

94. Article 6, guaranteeing the right to a fair trial, is one of the most litigated of all the rights of the Convention. Therefore, a great deal of case-law exists on the requirements of Article 6 paragraph 1 "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". The case-law elaborates a number of other requirements relating to the issue of fairness, including equality of arms which entails that both parties should be given the opportunity to present their cases and adduce evidence under conditions that do not substantially disadvantage one another, and that each party should have the opportunity to comment on the arguments and evidence submitted by the other party. Other requirements also flow from the case-law on the issue of fair trial, for instance that the parties should normally be entitled to appear in person before the courts upon request and that courts should give reasoned decisions.

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[472] E.g. *Öneryıldız v. Turkey* [GC]*,* §§ 89-96; *Hatton and Others v. the United Kingdom* [GC], § 98.

[473] *Balmer-Schafroth and Others v. Switzerland* [GC], judgment of 26 August 1997, § 32; *Athanassoglou and Others v. Switzerland* [GC], judgment of 6 April 2000, § 43.

[474] *Kyrtatos v. Greece*, § 32; *Taşkın v. Turkey,* paragraph 134; *Lemke v. Turkey*, judgment 5 June 2007, §§ 42 and 52.

95. The Court has found that the right of access to a court is also one of the components of the right to a fair trial protected by Article 6. The text of the Convention alone does not contain an express reference to the right of access to a court. However, the case-law of the Court has established that the right of access to court – that is the right to institute proceedings before courts in civil and administrative matters – is an inherent part of the fair trial guarantees provided by Article 6. In one of its early judgments,[475] the Court held that Article 6 "secures to everyone the right to have any claim related to his civil rights and obligations brought before a court or tribunal".

96. In order for Article 6 paragraph 1 to be applicable in civil cases, there must be a "dispute"[476] over a "civil right or obligation". Such a dispute must be genuine and serious. It may be related not only to the actual existence of the right but also to its scope and the manner in which it is exercised.[477] The outcome of the proceedings must be directly decisive for the rights in question. The Court has given the notion of "civil rights and obligations" an autonomous meaning for the purposes of the Convention: whilst it must be a right or an obligation recognised in the national legal system, the Court will not necessarily follow distinctions made in national legal systems between private and public law matters or limit the application of Article 6 to disputes between private parties. The Court has not sought to provide a comprehensive definition of what is meant by a "civil right or obligation" for these purposes.

97. In cases concerning environmental pollution, applicants may invoke their right to have their physical integrity and the enjoyment of their property adequately protected. These rights are recognised in the national law of most European countries and constitute therefore "civil rights" within the meaning of Article 6 paragraph 1.[478] The Court has recognised that an enforceable right to live in a healthy and balanced environment as enshrined in national law constituted a "civil right" within the meaning of Article 6 paragraph 1.[479] In *Zander v. Sweden*, the Court recognised that the protection under Swedish law for landowners against the water in their wells being polluted constituted a "civil right" within the meaning of Article 6 paragraph 1. Since it was not possible for the applicants to have the government's decision reviewed by a court, the Court found a violation of this article. In *Taşkın and Others* and *Öçkan and Others v. Turkey* the Court found Article 6 paragraph 1 applicable as

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475 *Golder v. the United Kingdom*, judgment of 21 February 1975, § 36.

476 "*contestation"* in the French text.

477 *Taşkın and Others v. Turkey*, § 130.

478 See *Balmer-Schafroth and Others v. Switzerland* [GC], § 33; *Athanassoglou and Others v. Switzerland* [GC], §; *Taşkın and Others v. Turkey,* § 90.

479 *Okyay v. Turkey* [GC], judgment of 12 July 2005, §§ 67-69.

the Turkish Constitution (Article 56) recognised the right to live in a healthy and balanced environment.[480] In other cases the "rights" of individuals to build on or develop their land, or to protect the pecuniary value of their land by objecting to the development of neighbouring land, have been considered as "civil rights" for the purposes of Article 6.[481]

98. In contrast, Article 6 is not applicable where the right invoked by the applicant is merely a procedural right under administrative law which is not related to the defence of any specific right which he or she may have under domestic law.[482]

99. The right of access to a court which is derived from Article 6 paragraph 1 is not an absolute right. Restrictions may be compatible with the Convention if they have a legitimate purpose and are proportionate to their aim. On the other hand, legal or factual restrictions on this right may be in violation of the Convention if they impede the applicant's effective right of access to a court.

100. In addition, the Court has established that the right to the enforcement of a court decision forms an integral part of the right to a fair trial and of access to a court under Article 6 paragraph 1. The right to institute proceedings before courts would be illusory and deprived of any useful effect if a national legal system allowed a final court decision to remain inoperative.[483] This holds true in cases related to the environment where issues under Article 6 arise. In the *Taşkın and Others v. Turkey* judgment, the Court found a violation under Article 6 paragraph 1 on the ground that the authorities had failed to comply within a reasonable time with an administrative court judgment, later confirmed by the Turkish Supreme Administrative Court, annulling a mining permit by reason of its adverse effects on the environment and human health.[484] In *Kyrtatos v. Greece,*[485] the Court found that by failing for more than seven years to take the necessary measures to comply with two final court decisions quashing building permits on the ground of their detrimental consequences on the environment, the Greek authorities had deprived the provisions of Article 6 paragraph 1 of any useful effect.

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480 *Öçkan and Others v. Turkey,* § 52*; Taşkın and Others v. Turkey,* §§ 130-134.

481 E.g. *Allan Jacobsson v. Sweden (No. 1)*, judgment of 19 February 1998, § 42; *Fredin v. Sweden (No. 1)*, judgment of 18 February 1991, § 63; *Ortenberg v. Austria*, judgment of 25 November 1994, § 28.

482 *Ünver v. Turkey*, decision of 26 September 2000, § 2, "law" part.

483 E.g. *Hornsby v. Greece*, judgment of 19 March 1997, § 40.

484 *Taşkın and Others v. Turkey*, judgment of 10 November 2004, §§ 135 and 138.

485 For a short description of the case, see § 15 of the manual.

**c) The right of access to a court guaranteed by Article 6 applies if there is a sufficiently direct link between the environmental problem at issue and the civil right invoked; mere tenuous connections or remote consequences are not sufficient.[486] In case of a serious, specific and imminent environmental risk, Article 6 may be invoked if the danger reaches a degree of probability which makes the outcome of the proceedings directly decisive for the rights of those individuals concerned.[487]**

101. Not all national legal systems recognise a specific right to live in a healthy and balanced environment that is directly enforceable by individuals in the courts. In many disputes relating to environmental matters, applicants invoke their more general rights to life, physical integrity or property. In such cases, they have a right of access to a court with all the guarantees under Article 6 of the Convention if the outcome of the dispute is directly decisive for their individual rights. It may be difficult to establish a sufficient link with a "civil right" in cases where the applicants only complain of an environmental risk but have not suffered any damage to their health or property.

102. In the cases of *Balmer-Schafroth and Others v. Switzerland* and *Athanassoglou and Others v. Switzerland*, the Court examined in detail whether the applicants could successfully invoke the right of access to a court in proceedings concerning the granting of operating licences for nuclear power plants. The applicants lived in villages situated in the vicinity of nuclear power stations. In both cases, they objected to the extension of operating licences. They invoked risks to their rights to life, physical integrity and protection of property which they claimed would result from such an extension. According to them, the nuclear power plants did not meet current safety standards and the risk of an accident occurring was greater than usual. In both cases, the Federal Council dismissed all the objections as being unfounded and granted the operating licences. Before the Court, the applicants complained in both cases of a lack of access to a court to challenge the granting of operating licences by the Swiss Federal Council as under Swiss law, they had no possibility of appealing against such decisions. The Court recognised in both cases that there had been a genuine and serious dispute between the applicants and the decision-making authorities on the extension of operating licences for the nuclear power plants. The applicants had a "right" recognised under Swiss law to have their life, physical integrity and

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[486] *Balmer-Schafroth and Others v. Switzerland* [GC], § 40.
[487] *Balmer-Schafroth and Others v. Switzerland* [GC], § 40; *Taşkin and Others v. Turkey*, § 130.

property adequately protected from the risks entailed by the use of nuclear energy. The Court found that the decisions at issue were of a judicial character. It had therefore to determine whether the outcome of the proceedings in question had been directly decisive for the rights asserted by the applicants, i.e. whether the link between the public authorities' decisions and the applicants' rights to life, physical integrity and protection of property was sufficiently close to bring Article 6 into play.

103. In the *Balmer-Schafroth and Others v. Switzerland* case the Court found that the applicants had not established a direct link between the operating conditions of the power station and the right to protection of their physical integrity as they had failed to show that the operation of the power station had exposed them personally to a danger that was not only serious but also specific and, above all, imminent. In the absence of such a finding, the effects on the population of the measures which could have been taken regarding security had therefore remained hypothetical. Consequently, neither the dangers nor the remedies had been established with the degree of probability that made the outcome of the proceedings directly decisive within the meaning of the Court's case-law for the right relied on by the applicants. The connection between the Federal Council's decision and the right invoked by the applicants had been too tenuous and remote. The Court ruled therefore that Article 6 was not applicable.

104. The Court reached the same conclusion in the *Athanassoglou and Others v. Switzerland* case.[488] The Court emphasised that the applicants were alleging not so much a specific and imminent danger in their personal regard as a general danger in relation to all nuclear power plants. The Court considered that the outcome of the procedure before the Federal Council was decisive for the general question as to whether the operating licence of the power plant should be extended, but not for the "determination" of any "civil right", such as the rights to life, physical integrity and protection of property, which Swiss law conferred on the applicants in their individual capacity. The Court thus found Article 6 not to be applicable.

[488] *Athanassoglou and Others v. Switzerland* [GC], § 54.

**d) Environmental associations which are entitled to bring proceedings in the national legal system to defend the interests of their members may invoke the right of access to a court when they seek to defend the economic interests of their members (e.g. their personal assets and lifestyle). However, they will not necessarily enjoy a right of access to a court when they are only defending a broad public interest.[489]**

105. According to the case-law of the Court, environmental associations may invoke the right of access to a court provided that the proceedings which they bring concern "civil rights" falling within the scope of Article 6 paragraph 1 of the Convention and thus go beyond the general public interest to protect the environment.

106. The Court addressed this issue in the case of *Gorraiz Lizarraga and Others v. Spain*. One of the applicants in this case was an association which had brought proceedings against plans to build a dam in Itoiz, a village of the province of Navarre, which would result in three nature reserves and a number of small villages being flooded. The *Audiencia Nacional* partly allowed their application and ordered the suspension of the work. The parliament of the Autonomous Community of Navarre later passed Law No. 9/1996 on natural sites in Navarre, which amended the rules applicable to conservation areas in nature reserves and effectively allowed work on the dam to continue. Following an appeal on points of law, the Supreme Court reduced the scale of the dam. The State and the Autonomous Government argued that they were unable to execute that judgment in the light of the Autonomous Community's Law No. 9/1996. The *Audiencia Nacional* asked the Constitutional Court to rule on a preliminary question by the applicant association as to the constitutionality of certain provisions of this law. The Constitutional Court found the law in question to be constitutional.

107. Relying on Article 6 paragraph 1, the applicants submitted that they had not had a fair hearing. They had been prevented from taking part in the proceedings concerning the referral to the Constitutional Court of the preliminary question, whereas the State and State Counsel's Office had been able to submit observations to the Constitutional Court. The government contested the applicability of Article 6 arguing that the dispute did not concern pecuniary or subjective rights of the association, but only a general question of legality and collective rights. The Court rejected this view. Although the dispute was partly about the defence of the general interest, the association also complained about a concrete

[489] *Gorraiz Lizarraga and Others v. Spain*, judgment of 27 April 2004, §§ 46 and 47.

and direct threat to its personal possessions and the way of life of its members. Since the action was, at least partly, "pecuniary" and "civil" in nature, the association was entitled to rely on Article 6 paragraph 1. The Court stressed that the judicial review by the Constitutional Court had been the only means for the applicants to challenge, albeit indirectly, the interference with their property and way of life. However, the Court found that there had been no violation of Article 6 paragraph 1.

**e) Where public authorities have to determine complex questions of environmental and economic policy, they must ensure that the decision-making process takes account of the rights and interests of the individuals whose rights under Articles 2 and 8 may be affected. Where such individuals consider that their interests have not been given sufficient weight in the decision-making process, they should be able to appeal to a court.[490]**

108. The Court has emphasised the importance of the right of access to a court also in the context of Article 8 of the Convention. When complex issues of environmental and economic policy are at stake, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests of the individuals concerned. In *Hatton and Others v. the United Kingdom*[491] and in *Taşkın and Others v. Turkey,*[492] the Court recognised that environmental and economic policy must also be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process. Hence, a fair decision-making process in environmental matters, required under Article 8, includes the right to access to court. This principle was confirmed additionally in *Öçkan and Others v. Turkey, Dubetska and Others v. Ukraine, Grimkovskaya v. Urkaine,* and *Tătar v. Romania.*

109. Interestingly, in *Tătar v. Romania* the Court indicated that it should not only be possible to seek redress in court against an improper decision-making process, but also against individual scientific studies requested by the public authorities and to seize a court if necessary documents have not been made available publicly.[493] In this respect the right to access to a court based on Articles 2 and 8 appears broader than that of Article 6. The rights in Articles 2 and 8 do not require that the

[490] *Taşkın and Others v. Turkey,* judgment of 10 November 2004, § 119.
[491] For a short description of the case, see § 0 of the manual.
[492] *Taşkın and Others v. Turkey,* § 119. For a short description of the case, see § 0 of the manual.
[493] *Tătar v. Romania,* §§ 113, 116-117 and 119.

outcome of the court proceedings need to be decisive for the rights of the applicant or that there must be the possibility of grave danger.[494]

110. In the case of *Giacomelli v. Italy* the Court pointed out again that the decision-making process had to be fair and show due regard for the interests of the individual protected by Article 8. It stressed again that the individuals concerned need to have had the opportunity to appeal to the courts against any decision, act or omission where they considered that their interest or their comments have not been given sufficient weight in the decision-making process.[495] In this case, the Court criticised the entire decision-making process and noted that it was impossible for any citizens concerned to submit their own observations to the judicial authorities and, where appropriate, obtain an order for the suspension of a dangerous activity.[496]

111. The case of *Grimkovskaya v. Urkaine*[497] enlightens the scope of the protection afforded by the procedural rights of Article 8. In this case the absence of the individual's ability to challenge an official act or omission affecting her rights before an independent authority was one of the three factors that led to the Court's finding of a violation of Article 8. The Court held that the applicant's civil claim against the local authorities was prematurely dismissed by the domestic courts. The reasoning contained in their judgments was too short and it did not include a direct response to the applicant's main arguments, on the basis of which she had sought to establish the local authorities' liability. Hence it was not the lack of access to an independent complaints authority, but the manner in which this authority dealt with the applicant's complaint that led the Court to find a breach of Article 8. Notably, the Court explicitly referred to the standards of the Aarhus Convention to consider whether it provided a meaningful complaints mechanism.[498]

**f) In addition to the right of access to a court as described above, Article 13 guarantees that persons, who have an arguable claim that their rights and freedoms as set forth in the Convention have been violated, must have an effective remedy before a national authority.[499]**

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[494] *Öçkan and Others v. Turkey*, judgment of 28 March 2006 (in French only), §§ 39 and 44. *Tătar v. Romania,* 27 January 2009 (in French only), §§ 88 and 119.
[495] *Giacomelli v. Italy,* § 82.
[496] *Giacomelli v. Italy,* § 94.
[497] For a short description of the case, see § 0 of the manual.
[498] *Grimkovskaya v. Ukraine,* §§ 69-72.
[499] *Leander v. Sweden*, judgment of 26 March 1987, § 77.

**g) The protection afforded by Article 13 does not go so far as to require any particular form of remedy. The State has a margin of appreciation in determining how it gives effect to its obligations under this provision. The nature of the right at stake has implications for the type of remedy which the state is required to provide. Where for instance violations of the rights enshrined in Article 2 are alleged, compensation for economic and non-economic loss should in principle be possible as part of the range of redress available. However, neither Article 13 nor any other provision of the Convention guarantees an individual a right to secure the prosecution and conviction of those responsible.[500]**

112. The objective of Article 13 of the Convention is to provide a means whereby individuals can obtain appropriate relief at the national level for violations of their Convention rights so as to avoid having to bring their case before the European Court of Human Rights. States enjoy a certain margin of appreciation as to how they provide remedies within their own legal systems. However, whatever form is chosen, the remedy must be effective.

113. The Court has held that the protection afforded by Article 13 must extend to anyone with an "arguable claim" that his or her rights or freedoms under the Convention have been infringed.[501] It is not necessary for a violation of a right to have been established. The individuals concerned must, however, be able to demonstrate that they have grievances which fall within the scope of one of the Convention rights and which can be regarded as "arguable" in terms of the Convention. The Court has not defined the concept of arguability which is to be interpreted on a case-by-case basis.

114. The Court has developed the following general principles for the application and interpretation of Article 13:[502]

- where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he or she should have a remedy before a national authority in order both to have the claim decided and, if appropriate, to obtain redress;
- the authority referred to in Article 13 does not have to be a judicial authority. However, if it is not, its powers and the guarantees which it affords are relevant in determining whether

[500] *Öneryıldız v. Turkey* [GC], § 147.
[501] *Klass and Others v. Germany*, judgment of 6 September 1978, § 64; *Silver and Others v. the United Kingdom*, judgment of 25 March 1983, § 113.
[502] E.g. *Leander v. Sweden*, § 77.

the remedy before it is effective; this means that it should be composed of members who are impartial and who enjoy safeguards of independence and it should be competent to decide on the merits of the claim and, if appropriate, provide redress;

- although no single remedy may itself entirely satisfy the requirements of Article 13, a combination of remedies provided for under domestic law may do so;
- Article 13 does not require that remedies should include the possibility of challenging a State's laws before a national authority on the ground that they are contrary to the Convention or equivalent domestic norms.

115. The nature of the right in respect of which a remedy is sought might have implications for the type of remedy which the state is required to provide under Article 13. In the case of alleged violations of the right to life (Article 2), the Court has established high standards for evaluating the effectiveness of domestic remedies. These include the duty to carry out a thorough and effective investigation, a duty that also follows, as a procedural requirement, from Article 2 (see above chapter I under principle e) - g)). Failure to act by government officials whose duty it is to investigate will undermine the effectiveness of any other remedy that may have existed at the material time. There must be a mechanism for establishing the liability of State officials or bodies for acts or omissions. The families of victims must, in principle, receive compensation that reflects the pain, stress, anxiety and frustration suffered in circumstances giving rise to claims under this article.[503]

116. In cases concerning environmental matters, applicants may typically seek remedies under Article 13 for alleged breaches of the right to life (Article 2 of the Convention), the right to respect for private and family life (Article 8 of the Convention) or the right to the protection of property (Article 1 of Protocol No. 1 to the Convention) (see chapters I, II and III of the manual).

117. In *Hatton and Others v. the United Kingdom,*[504] the Court considered whether the applicants had had a remedy at national level to enforce their Convention rights under Article 8. As stated before, the applicants complained of excessive night-time noise from airplanes landing and taking off from Heathrow Airport. They argued that the scope of judicial review provided by English courts had been too limited. At the time, the courts were only competent to examine whether the authorities

[503] *Keenan v. the United Kingdom*, judgment of 3 April 2001, §§ 123-130.
[504] For a short description of the case, see § 0 of the manual.

had acted irrationally, unlawfully or manifestly unreasonably (classic English public-law concepts). The English courts had not been able to consider whether the claimed increase in night flights represented a justifiable limitation on the right to respect for private and family lives or for the homes of those who lived near Heathrow Airport. The Court accordingly held that there had been a violation of Article 13.

118. In *Öneryıldız v. Turkey*[505] the Court examined the adequacy of criminal and administrative investigations that had been carried out following a methane-gas explosion on a waste-collection site. The national authorities carried out criminal and administrative investigations, following which the mayors of Ümraniye and Istanbul were brought before the courts, the former for failing to comply with his duty to have the illegal dwellings surrounding the said tip destroyed and the latter for failing to make the rubbish tip safe or order its closure. They were both convicted of "negligence in the exercise of their duties" and sentenced to very low fines and the minimum three-month prison sentence, which was later commuted to a fine. The applicant complained of important shortcomings in the criminal and administrative investigations. After finding a violation of Article 2, the Court examined the complaints also under Article 13. It noted that remedies for alleged violations of the right to life should allow for compensation of any pecuniary and non-pecuniary damages suffered by the individuals concerned. However, neither Article 13 nor any other provision of the Convention guarantees an applicant the right to secure the prosecution and conviction of a third party or the right to "private revenge". The Court found violations of Article 13 both with regard to the right to life (Article 2) and the protection of property (Article 1 of Protocol No. 1).

119. As regards the complaint under Article 2, the Court considered that the administrative law remedy available appeared sufficient to enforce the substance of the applicant's complaints regarding the death of his relatives and was capable of affording him adequate redress. However, the Court underlined that the timely payment of a final award should be considered an essential element of a remedy under Article 13. It noted that the Administrative Court had taken four years, eleven months and ten days to reach its decision and even then the damages awarded (which were only for non-pecuniary loss) were never actually paid to the applicant. The Court concluded that the administrative proceedings had not provided the applicant with an effective remedy in respect of the State's failure to protect the lives of his relatives.

[505] For a short description of the case, see § 0 of the manual.

120. As regards the complaint under Article 1 of Protocol No. 1, the decision on compensation had been unduly delayed and the amount awarded in respect of the destruction of household goods never paid. The Court therefore ruled that the applicant had been denied an effective remedy also in respect of the alleged breach of Article 1 of Protocol No. 1.

121. In the case of *Budayeva and Others v. Russia*, the applicants complained of the lack of any effective remedy through which to make their claims, as required by Article 13 of the Convention. The Court found that the principles developed in relation to the judicial response to accidents resulting from dangerous activities also applied in the area of disaster relief.[506] It pointed out in particular that "in relation to fatal accidents arising out of dangerous activities which fall within the responsibility of the State, Article 2 requires the authorities to carry out of their own motion an investigation, satisfying certain minimum conditions, into the cause of the loss of life. Without such an investigation, the individual concerned may not be in a position to use any remedy available to him for obtaining relief. This is because the knowledge necessary to elucidate facts, such as those in issue in the instant case, is often in the sole hands of state officials or authorities. Accordingly, the Court's task under Article 13 is to determine whether the applicant's exercise of an effective remedy was frustrated on account of the manner in which the authorities discharged their procedural obligation under Article 2" (see *Öneryıldız v. Turkey*, paragraphs 90, 93-94 and 149). The Court considered that "these principles must equally apply in the context of the State's alleged failure to exercise their responsibilities in the area of disaster relief".[507] In this case, the Court observed that the state's failings had given rise to a violation of Article 2 because of the lack of an adequate judicial response, as required in the event of alleged infringements of the right to life. When assessing the procedural aspect of the right to life, the Court addressed not only the lack of a criminal investigation but also the absence of other means for the applicants to secure redress for the alleged failure. Accordingly, it did not consider it necessary to examine the complaint separately under Article 13.

[506] *Budayeva and Others v. Russia*, § 142.
[507] *Budayeva and Others v. Russia*, §§ 192 and 193.

**h) Environmental protection concerns may in addition to Articles 6 and 13 impact the interpretation of other procedural articles, such as Article 5 which sets out the rules for detention and arrest of person. The Court has found that in the case of offences against the environment, like the massive spilling of oil by ships, a strong legal interest of the public exists to prosecute those responsible. The Court recognised that maritime environmental protection law has evolved constantly. Hence, it is in the light of those "new realities" that the Convention articles need to be interpreted. Consequently, environmental damage can be of a degree that justifies arrest and detention, as well as imposition of substantial amount of bail.**

122. The case of *Mangouras v. Spain*[508] is a telling example of the Court's reflex on an increased international concern for environmental protection. It is concerned with the correct interpretation of Article 5 paragraph 3 of the Convention. The applicant was the captain of the ship Prestige, which had been sailing off the Spanish coast in November 2002 when its hull had sprung a leak, spilling its cargo of fuel oil into the Atlantic Ocean and causing an ecological disaster whose effects on marine flora and fauna had lasted for several months and spread as far as the French coast. The case related to the applicant's complaints concerning his pre-trial detention for offences including an offence against natural resources and the environment and the bail (3 million euro) set to ensure that he would attend his trial. On the matter of whether the sum set for bail was proportionate to the applicant's personal circumstances and the seriousness of the offence (offences against the environment and, in particular, the marine environment), the Chamber considered that:

> *"the amount of bail in the instant case, although high, was not disproportionate in view of the legal interest being protected, the seriousness of the offence and the disastrous consequences, both environmental and economic, stemming from the spillage of the ship's cargo.*[509]*"*

The Court considered that there is growing and legitimate concern both in Europe and internationally about offences against the environment. It noted in this regard the states' powers and obligations to prevent marine pollution and bring those responsible to justice.[510] The Court made

[508] *Mangouras v. Spain*, judgment of 8 January 2009.
[509] *Mangouras v. Spain*, § 44.
[510] *Mangouras v. Spain*, § 41.

explicit reference to the law of the sea which justified the raised perseverance of the domestic courts to bring those responsible to justice.

123. The Grand Chamber[511] agreed with the Chamber on all points. It stressed that the amount of bail can take into account the seriousness of the damage caused and the professional environment of the accused, i.e. the ability of insurances and his employer to provide for the bail. The Grand Chamber also took note of the tendency to use criminal law as means of enforcing the environmental obligations imposed by European and international law. Moreover, the Court considered that "these new realities have to be taken into account in interpreting the requirements of Article 5 paragraph 3". The Grand Chamber agreed that if there are very significant implications in terms of both criminal and civil liability, like in the present case for instance "marine pollution on a seldom-seen scale causing huge environmental damage," the authorities can adjust the bail accordingly. In support of this position the Court took into account the practice of the International Tribunal for the Law of the Sea in fixing its deposits.[512] The Court found that there had been no violation of Article 5 paragraph 3 of the Convention.

124. The case is remarkable as the Court, taking into account developing international environmental regulations, revised its existing case-law, i.e. it found that a bail should not always be determined on the individual capacity of the accused to provide for it. The case, once again, underlines the direct impact of the development of international environmental standards and legal norms on the protection of human rights as afforded by the Court.

[511] *Mangouras v. Spain* [GC], judgment of 28 September 2010, § 81.
[512] *Mangouras v. Spain* [GC], §§ 86-88.

# Chapter VII
# Principles from the Court's case-law: Territorial Scope of the Convention's Application

## ARTICLE 1
## OBLIGATION TO RESPECT HUMAN RIGHTS

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

**a) In general, the Convention applies to a state's own territory. The notion of "jurisdiction" for the purpose of Article 1 of the Convention must be considered to reflect the term's meaning in public international law.[513] Hence, the jurisdictional competence under Article 1 is territorial. Jurisdiction is presumed to be exercised normally throughout the States' territory.[514]**

125. However, the presumption of the exercise of jurisdiction within one's territory is not irrevocable. When a Contracting Party is not capable of exercising authority on the whole of its territory by a constraining *de facto* situation, such a situation reduces the scope of jurisdiction in that the undertaking given by the State under Article 1 must be considered by the Court only in the light of the Contracting State's positive obligations towards persons within its territory.[515]

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[513] *Gentilhomme, Schaff-Benhadji and Zerouki v. France*, judgment of 14 May 2002 (French only) § 20; *Banković and Others v. Belgium and 16 Other Contracting States* [GC], *decision of admissibility of 12.12.2001*, §§ 59-61; *Assanidzé v. Georgia* [GC], judgment of 8 April 2004, § 137.

[514] *Al-Skeini and Others v. The United Kingdom* [GC], judgment of 7 July 2011; *Banković and Others v. Belgium and 16 Other Contracting States* [GC], decision of 12 December 2001, § 61.

[515] *Ilaşcu and Others v. Moldova and Russia* [GC], §§ 313, 333.

**b) The concept of "jurisdiction" in Article 1 of the Convention is not necessarily restricted to the national territory of the High Contracting Parties. In exceptional circumstances, the acts of Contracting Parties performed or producing effects outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1.[516]**

126. A key case with regard to the notion of the jurisdiction is *Loizidou v. Turkey*, in which the Court stated that

> *"jurisdiction" under Article 1 of the Convention is not restricted to the national territory of the Contracting States. Accordingly, the responsibility of Contracting States can be involved by acts and omissions of their authorities which produce effects outside their own territory.[517]"*

127. In *Al-Skeini and Others v. The United Kingdom,* the Court, engaging in a comprehensive review of its past case-law, identified a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction outside a State's own territorial boundaries. It stressed, however, that:

> *"in each case, the question whether exceptional circumstances exist which require and justify a finding by the Court that the State was exercising jurisdiction extra-territorially must be determined with reference to the particular facts.[518]"*

**c) The Court has not decided on cases relating to environmental protection which raise extra-territorial and transboundary issues. The Court has produced, in different contexts, ample case-law elaborating the principles of the extra-territorial and transboundary application of the Convention, which could be**

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[516] The Court found that to be the case, for instance, when a Contracting Party exercises effective overall control over a foreign territory, or authority and control over an individual outside its own territory. See, *inter alia*, *Al-Skeini and Others v. The United Kingdom* [GC], § 131 and following; *Issa and Others v. Turkey,* judgment of 16 November 2004, §§ 68 and 71; *Isaak v. Turkey*, decision of admissibility of 28 September 2006; *Ilaşcu and Others v. Moldova and Russia* [GC], §§ 314 and 318. It may also be noted that, although this is not a form of extraterritorial jurisdiction, that in a number of cases concerning extradition or expulsion, the Court found that a Contracting Party may be responsible for acts or omissions on its own territory which have an effect in breach of the Convention outside its territory, if such consequences are foreseeable.

[517] *Loizidou v. Turkey (merits)* [GC], judgment of 18 December 1996, § 52. The position was reiterated in a number of other cases: e.g. *Cyprus v. Turkey (merits)* [GC], judgment of 10 May 2001, §§ 76, 77, 81. *Al-Skeini and Others v. The United Kingdom* [GC], § 131, *Issa and Others v. Turkey,* judgment of 16 November 2004, § 68, *Ilaşcu and Others v. Moldova and Russia* [GC], § 314.

[518] *Al-Skeini and Others v. The United Kingdom* [GC], § 132.

**potentially relevant for environmental issues. However, as they have been developed under very different factual circumstances, it will be up to the Court to determine if and, where appropriate, how they can be applied to cases concerning the environment.**

128. The Court came close to considering the extraterritorial application in environmental cases with the nuclear test cases against the United Kingdom, e.g. *L.C.B v. The United Kingdom*[519] and *McGinley and Egan v. The United Kingdom.*[520] In those cases the Court had to consider the health impact of British nuclear testing upon service members and their children on the Christmas Islands in the Pacific and which were conducted partially after the transfer of sovereignty over those islands to Australia in 1957. In both cases, the application of the Convention outside the territory was not discussed. The applications were considered inadmissible for other reasons.

**d) In addition, it may be recalled that the Court in its case-law has made reference to international environmental law standards and principles, which by their very nature may have transboundary characteristics.[521]**

[519] *L.C.B v. The United Kingdom*, judgment of 9 June 1998.
[520] *McGinley and Egan v. The United Kingdom,* judgment of 9 June 1998.
[521] For examples see Appendix III of this manual.

## SECTION B

## INTRODUCTION - PRINCIPLES DERIVED FROM THE EUROPEAN SOCIAL CHARTER AND THE REVISED EUROPEAN SOCIAL CHARTER

The European Social Charter (referred to below as "the Charter") was adopted in 1961. It sets out social and economic rights and freedoms and establishes a supervisory mechanism guaranteeing their respect by the States Parties. Following its revision in 1996, the revised European Social Charter came into force in 1999 and it is gradually replacing the initial treaty. At present, the two treaties coexist and are interlinked. Forty-three member States[522] have either ratified the Social Charter or its revised version. Upon ratification States Parties indicate in accordance with Article A of the Charter which provisions they intend to accept.

The European Committee of Social Rights (referred to below as "the Committee") rules on the conformity of national law and practice with the Charter. Its fifteen independent members are elected by the Council of Europe Committee of Ministers for a period of six years, renewable once. The Committee delivers its rulings in the framework of two procedures: a reporting procedure and a collective complaints procedure.

On the basis of yearly reports submitted by the States Parties concerning a selection of the accepted provisions and indicating how they implement the Charter in law and in practice, the Committee determines whether or not the national situations are in conformity with the Charter.[523]

Under an Additional Protocol to the Charter, which came into force in 1998, national trade unions and employers' organisations as well as certain European trade unions and employers' organisations and certain international NGOs are entitled to lodge complaints of violations of the

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[522] States Parties of the 1961 Charter: Austria, Belgium, Croatia, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, «the former Yugoslav Republic of Macedonia», Turkey and the United Kingdom. States Parties of the 1996 Revised Charter: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Cyprus, Estonia, Finland, France, Georgia, Hungary, Ireland, Italy, Lithuania, Malta, Moldova, Montenegro, Netherlands, Norway, Portugal, Romania, Russian Federation, Serbia, Slovak Republic, Slovenia, Sweden, Turkey and Ukraine.
The following States have neither ratified the 1961 Charter nor the 1996 Revised Charter: Liechtenstein, Monaco, San Marino and Switzerland. However, Liechtenstein and Switzerland have signed the 1961 Charter and Monaco and San Marino have signed the 1996 Revised Charter.

[523] Article 24 of the Charter as amended by the 1991 Turin Protocol.

Charter with the Committee. In addition, national NGOs may lodge complaints if the State concerned makes a declaration to this effect.

At present, 66 collective complaints[524] have been examined by the European Committee of Social Rights. Once the Committee has reached a decision on a collective complaint, it then systematically examines the issues raised by the complaint in all the States Parties to the Charter when it next considers the reports on the relevant provision.[525]

The Committee, which is a quasi-judicial body,[526] has over the years developed a "case-law"[527] which consists of all the sources in which the Committee sets out its interpretation of the Charter provisions.[528] These include conclusions arising from the reporting procedure, statements of interpretation contained in the volumes of conclusions and the decisions on collective complaints.

The Charter has inspired the formulation of many of the provisions of the EU Charter of Fundamental Rights. Having entered into force with the Treaty of Lisbon on 1 December 2009, at present no cases concerning the EU Charter provisions have yet been brought before the European Court of Justice which is responsible for their interpretation.

More information regarding the Charter and the Committee and notably the full text of the 1961 Charter and the 1996 Revised Charter as well as the practical conditions to lodge a collective complaint with the Committee are to be found on the following website: www.coe.int/T/DGHL/Monitoring/SocialCharter/.

There is also a database providing the full text of all the conclusions, statements of interpretation and decisions of the Committee at: http://hudoc.esc.coe.int/esc2008/query.asp?language=en .

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[524] In August 2011.

[525] Régis Brillat, *The Supervisory Machinery of the European Social Charter: Recent Developments and their Impact*, in Social Rights in Europe, pp. 36-37 (Gráinne de Búrca & Bruno de Witte eds., Oxford Univ. Press, 2005).

[526] Régis Brillat, *The Supervisory Machinery of the European Social Charter: Recent Developments and their Impact*, in Social Rights in Europe pp. 32-37 (Gráinne de Búrca & Bruno de Witte eds., Oxford Univ. Press, 2005).

[527] "Case-law" is the term used by the Committee itself, see Régis Brillat, *The Supervisory Machinery of the European Social Charter: Recent Developments and their Impact*, in Social Rights in Europe pp. 32-37 (Gráinne de Búrca & Bruno de Witte eds., Oxford Univ. Press, 2005).

[528] Since 2008 the interpretation by the Committee of the different provisions of the revised Charter is presented in a "Digest of the case-law" (September 2008) prepared by the Secretariat:
www.coe.int/t/dghl/monitoring/socialcharter/Digest/DigestSept2008_en.pdf
The content is however not binding on the Committee but is intended to give an indication to national authorities of how they are expected to implement the Charter provisions.

# Chapter I
# Right to protection of health and the environment

## ARTICLE 11
## RIGHT TO THE PROTECTION OF HEALTH

**Part I**

Everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable.

**Part II**

With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures designed *inter alia*:

1. to remove as far as possible the causes of ill-health;
2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;
3. to prevent as far as possible epidemic, endemic and other diseases.

**a) Article 11 on the right to protection of health has been interpreted by the Committee as including the right to a healthy environment.[529] The Committee has noted the complementarity between the right to health under Article 11 of the Charter and Articles 2 and 3 of the European Convention on Human Rights.[530] As a consequence, several Committee conclusions on State reports regarding the right to health, specifically indicate that the measures required under Article 11, paragraph 1 should be designed to remove the causes of ill health resulting from environmental threats such as pollution. [531]**

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[529] *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, Decision of 6 December 2006 (Merits), §§ 195-196.

[530] 2005 Conclusions XVII-2, Volume 1, General Introduction, § 5; *Marangopoulos v. Greece*, § 202.

[531] Mirja Trilsch, *European Committee of Social Rights: The right to a healthy*

129. The inclusion of environmental protection under Article 11 was outlined by the Committee in its decision on complaint *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*.[532] The Committee took the opportunity of this complaint to reaffirm that the Charter is a living instrument, whose purpose is to protect rights not merely theoretically but also in fact.[533] The rights and freedoms set out in the Charter should therefore be interpreted in the light of current conditions.[534] By taking into account the growing link made by States Party to the Social Charter and other international bodies between the protection of health and a healthy environment, the Committee identified environmental protection as one of the key elements of the right to health under Article 11 of the Charter.[535]

**b) States are responsible for activities which are harmful to the environment whether they are carried out by the public authorities themselves or by a private company.**

130. In the Marangopoulos case, the Greek Government claimed that the mining operations were undertaken by a private entity for whose actions the State could not be held accountable. The Committee, however, pointed out that, regardless of the company's legal status, Greece was required to ensure compliance with its undertakings under the Charter.[536]

131. The Committee's jurisdiction *ratione temporis* had to be considered since the complaint concerned air pollution which partly preceded 1 August 1998 when the Protocol establishing the collective complaint procedure had not yet entered into force as regards Greece. However, the Committee decided to hold Greece accountable in light of international norms on State responsibility, notably Article 14 of the 2001 Articles on the Responsibility of States for Internationally Wrongful Acts produced by the International Law Commission,[537] which provides that when a State is under an international obligation to take preventive action against a certain event, and this event occurs, the State remains in

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*environment,* International Journal of Constitutional Law, Vol. 7 p. 535 (July 2009).

[532] *Marangopoulos v. Greece* is the first and at present the only collective complaint decision concerning the right to a healthy environment.

[533] The Committee adopted this dynamic interpretative approach in its very first collective complaint decision from 1999, *International Commission of Jurists v. Portugal*, Decision of 6 December 2006 (Merits), § 32. This decision echoes the approach and the language used by the European Court of Human Rights in its judgment *Tyrer v. The United Kingdom*, judgment of 25 April 1978, § 31.

[534] *Marangopoulos v. Greece*, § 194.

[535] *Marangopoulos v. Greece*, § 195.

[536] *Marangopoulos v. Greece,* § 192.

[537] See "Glossary". Appendix I.

breach over the entire period during which the event continues. The Committee found that there might be a breach of the obligation to prevent damage arising from air pollution for as long as the pollution continues, and that the breach might even be compounded, progressively, if sufficient measures were not taken to put an end to it.[538]

**c) Overcoming pollution is an objective that can only be achieved gradually. Nevertheless, States must strive to attain this objective within a reasonable time, by showing measurable progress and making best possible use of the resources at their disposal.[539] The measures taken by States with a view to overcoming pollution are assessed with reference to their national legislation and undertakings entered into with regard to the European Union and the United Nations[540] and in terms of how the relevant law is applied in practice.**

132. While acknowledging in the Marangopoulos case that the use of lignite and, by extension, its mining serve legitimate objectives under the Charter (such as energy independence, access to electricity at a reasonable cost, and economic growth), the Committee, nonetheless, identified several areas in which the State's efforts fell short of Greece's national and international undertakings to overcome pollution, which, in turn, had resulted in a failure to protect the health of the population. The Committee assessed Greece's overall efforts to overcome pollution in the light of its international undertakings for emission control and found that the National Allocation Plan for greenhouse gas emissions drawn up by Greece in accordance with EU law[541] was much less demanding than the binding targets for Greece under the Kyoto Protocol.[542] Based on these and other facts before it, the Committee, therefore, found no real evidence of Greece's commitment to improving the situation as regards to air pollution within a reasonable time.[543] In this decision, the Committee set a precedent for examining a State party's compliance with its international environmental obligations. The same line of reasoning can now be found in the Committee's conclusions on State reports with regard to the protection of health.[544]

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[538] *Marangopoulos v. Greece*, § 193.
[539] *Marangopoulos v. Greece*, § 204.
[540] Conclusions XV-2, Italy, Article 11 § 3, "Reduction of environmental risks".
[541] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community.
[542] *Marangopoulos v. Greece,* §§ 204 and 206.
[543] *Marangopoulos v. Greece,* §§ 203 and 205.
[544] Conclusion XV-1, Article 11 § 1, for all States. See also Régis Brillat, *The Supervisory*

**d) In order to combat air pollution States are required to implement an appropriate strategy which should include the following measures:[545]**

- **develop and regularly update sufficiently comprehensive environmental legislation and regulations;[546]**
- **take specific steps, such as modifying equipment, introducing threshold values for emissions and measuring air quality, to prevent air pollution at local level[547] and to help to reduce it on a global scale;[548]**
- **ensure that environmental standards and rules are properly applied, through appropriate supervisory machinery;[549]**
- **inform and educate the public, including pupils and students at school, about both general and local environmental problems.[550]**

133. In *Marangopoulos*, the Committee found that, although the Greek Constitution made protection of the environment an obligation of the State and, at the same time, an individual right, national environmental protection legislation and regulations were well developed and regularly updated, provision was made for the public to be informed and to participate in the decision-making process as required by the Aarhus Convention and limit values had been set for exposure to pollutants arising from lignite mining, the relevant measures were not applied and enforced in an effective manner and the environmental inspectorates were not sufficiently equipped.[551] Noting also shortcomings in the area of health education courses and the organisation of monitoring of health risks,[552] the Committee concluded that, notwithstanding the margin of discretion granted to national authorities in such matters, Greece had not managed "to strike a reasonable balance between the interests of persons living in the lignite mining areas and the general interest," and

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*Machinery of the European Social Charter: Recent Developments and their Impact*, in Social Rights in Europe, p. 39 (Gráinne de Búrca & Bruno de Witte eds., Oxford Univ. Press, 2005). Among the member states who have also obligations under the Kyoto Protocol Italy has been recently analysed (Conclusions of the 15th cycle: XV 2, Italy, Article 11, § 3)

[545] *Marangopoulos v. Greece,* § 203.

[546] Conclusions XV-2, Addendum, Slovakia, Article 11, "Reduction of environmental risks".

[547] Conclusions 2005, Volume 2, Moldova, Article 11 paragraph 3, "Reduction of environmental risks".

[548] Conclusions XI-2, Italy, Article 11 § 3, "Reduction of environmental risks".

[549] *Marangopoulos v. Greece,* §§ 203, 209, 210 and 215.

[550] Conclusions 2005, Volume 2, Moldova, Article 11 § 2, "health education in schools".

[551] *Marangopoulos v. Greece*, §§ 205 and 208-216.

[552] *Marangopoulos v. Greece,* §§ 219-220.

thus that there had been a violation of Greece's obligations with respect to the right to protection of health under the Charter.[553]

**e) In a State where a part of its energy source derives from nuclear power plants, this State is under the obligation to prevent related hazards for the communities living in the areas of risk. Moreover, all States are required to protect their population against the consequences of nuclear accidents taking place abroad and having an effect within their territory.[554]**

134. The Committee has held that the dose limits of radiation on the population should be established in accordance with the 1990 Recommendation of the International Commission for Radiation Protection. For EU member States there is a need to transpose into domestic law "Community Directive 96/29/Euratom on the protection of the health of workers and the general public against the dangers arising from ionising radiation". The assessment of conformity with Article 11 paragraph 3 will vary from one country to another depending on the extent to which energy production is based on nuclear power.[555]

**f) Under Article 11 States must apply a policy which bans the use, production and sale of asbestos and products containing it.[556]**

135. The Committee has held that States under Article 11 paragraph 3 must also adopt legislation requiring the owners of residential property and public buildings to search for any asbestos and where appropriate remove it, and imposing obligations on enterprises concerning waste disposals.[557]

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[553] *Marangopoulos v. Greece,* paragraph 221.
[554] Conclusion XV-2, Volume 1, Denmark, Article 11 § 3, "Reduction of environmental risks".
[555] Conclusions XV-2, Volume 1, France, Article 11 § 3, "Reduction of environmental risks".
[556] Conclusions XVII-2, Volume 2, Portugal, Article 11 § 3, "Reduction of environmental risks".
[557] Conclusions XVII-2, Volume 2, Latvia, Article 11 § 3, "Reduction of environmental risks".

# Appendices to the manual

# Appendix I: Glossary

### 1.1. Actio popularis

The Latin term *actio popularis* refers to actions taken to obtain remedy by a person or a group in the name of the general public. Those persons or groups are neither themselves victims of a violation nor have been authorised to represent any victims.

### 1.2. Applicant

Any person, non-governmental organisation or group of persons that brings a case before the European Court of Human Rights. The right to raise a complaint with the Court is guaranteed by Article 34 of the European Convention on Human Rights. It is subject to the conditions set out in Article 35 of the Convention.

### 1.3. Aarhus Convention

The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 1998 (commonly referred to as the Aarhus Convention). The Convention is considered one of the cornerstones of environmental procedural rights in Europe. However, it does not contain substantial environmental rights, but assumes their existence. As of October 2011, there are 45 Parties to the Convention (37 Council of Europe member states), 27 Parties to the Protocol on Pollutant Release (26 Council of Europe member states) and Transfer Registers and 26 Parties to the amendment on public participation in decisions on the deliberate release into the environment and placing on the market of genetically modified organisms (26 Council of Europe member states).

### 1.4. Civil rights

The Court has not sought to provide a comprehensive definition of what is meant by a “civil right or obligation” for for the purposes of the Convention. However, it recognised that with regard to environmental pollution, applicants may invoke their rights to have their physical integrity and the enjoyment of their property adequately protected since they are recognised in the national law of most European countries. In addition, an enforceable right to live in a healthy and balanced environment if enshrined in national law can serve to invoke Article 6 Paragraph 1.

### 1.5. Common but differentiated responsibilities principle

This principle is built upon the understanding that states, because they are in different stages of development, have contributed and are contributing to different degrees to environmental pollution and have also

distinct technological and financial capabilities. At the same time it recognises that only comprehensive and co-ordinated actions can address the global environmental degradation appropriately. This principle was first stressed in the Rio Declaration (Principle 7) in 1992.

### 1.6. Complainant

Under the European Social Charter a collective complaints mechanism exists (Part IV Article D). Three types of institutions are qualified to submit complaints: international organisations of employers and trade unions, other international non-governmental organisations which have consultative status with the Council of Europe and have been put on a special list; representative national organisations of employers and trade unions within the jurisdiction of the Contracting Party against which they intent to lodge a complaint.

### 1.7. Continuing violation

A continuing violation of the Convention[558] or of the Charter[559] exists whenever a conduct for which the State is responsible is persistent and by virtue of the ongoing conduct the state is breaching its obligations. This also includes sustained inaction of the state where it has a positive obligation to act. However, instantaneous acts that might carry ensuing effects do not in themselves give rise to any possible continuous situation in breach of a provision of the Convention or Charter.

### 1.8. Co-operation/provision of information principles

These two principles stem from general public international law. In essence, they require states to inform and consult other states that might be affected by various projects, e.g. the construction of a dam or factory. It has been enshrined in numerous bi- and multilateral treaties. It has been reaffirmed, for example, in the ICJ cases of Pulp Mills and Gabcikovo Nagymaros.[560]

### 1.9. Dangerous activities

The Court uses this notion in the context of Articles 2 and 8 of the Convention, as well as Article 1 of Protocol No. 1 to the Convention. So

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[558] *Loizidou v. Turkey*, judgment of 18 December 1996, Application No. 15318/89, § 41, see also *Veeber v. Estonia*, judgment of 7 November 2002, Application No. 37571/97 and *Dudgeon v. Ireland*, judgment of 22 October 1981, Application No. 7525/76, § 40.

[559] *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, decision on admissibility of 10 October 2005, Complaint No. 30/2005, paragraphs 15-17.

[560] Case concerning Pulp Mills on the River Uruguay (*Argentina v. Uruguay*), Judgment of 20 April 2010, ICJ General List 135, available at: www.icj-cij.org/docket/files/135/15877.pdf, *Gabcikovo-Nagymaros Project* (*Hungary v. Slovakia*), Judgment of 25 September 1997, ICJ Reports (1997) 7.

far, the Court has not given a general definition of the concept. In the context of Article 2 of the Convention, the Court has qualified toxic emissions from a fertiliser factory, waste collection sites or nuclear tests as "dangerous activities", whether carried out by public authorities or private companies, but the concept could encompass a wider range of industrial activities.

At the international and European level, several instruments refer to the related concept of "hazardous activities". However, although aiming at the protection of human health and the environment, these instruments primarily focus on the technical and procedural aspects of the control of "dangerous" or "hazardous activities" and do not address the question of adverse effects on the effective enjoyment of human rights. Consequently "hazardous" or "dangerous activities" are generally described in relation to the handling of dangerous substances as such.[561] The substances deemed "hazardous" or "dangerous" are usually listed in appendices to those instruments. These substance-related criteria may be coupled with a quantity criterion.[562] If not appearing in the lists, a substance may also be qualified "hazardous" on the basis of indicative criteria, namely the nature of its characteristics. Another way of identifying hazardous substances is to cumulatively apply the substance and the characteristics criteria.[563]

### 1.10. Effective remedy

Article 13 of the Convention states that "everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity". Article 13 seeks to ensure that states fulfil their obligations under the Convention without the need for citizens to take their case to the European Court of Human Rights. It essentially means that anyone who believes that his or her human rights as guaranteed by the Convention

[561] Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment of 21 June 1993 (ETS No. 150); Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa of 30 January 1994; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal of 22 March 1989.

[562] Convention on the Transboundary effects of industrial accidents, Helsinki 1992; Council Directive 96/82/EC of 9 December 1996 on the control of major-accident hazards involving dangerous substances – Seveso II.

[563] Basel Convention article 1 a) and annex III referring to a list of hazardous characteristics corresponding to the hazard classification system included in the United Nations Recommendations on the Transport of Dangerous Goods (ST/SG/AC.10/1Rev.5, United Nations, New York, 1988).

have been violated must be able to bring the matter to the attention of the authorities and, if a violation has occurred, to have the situation corrected.

### 1.11. Environment

There is no standard definition of the environment in international law. In addition, neither the Convention nor the Charter nor the "case-law" of the Court and the Committee attempt to define it. The Court's and the Committee's purpose is the protection of human rights enshrined in their respective instruments and to examine individual cases in order to assess whether there has been a violation of one of these rights in specific circumstances. Because of the nature of this task, the Court and the Committee have not had to give a general definition of the environment. In the framework of the Council of Europe, the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment endeavours to define the scope of the concept of the environment. It holds that the environment includes natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors, property which forms part of the cultural heritage; and the characteristic aspects of the landscape. Moreover, the International Court of Justice has attempted to define the notion in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons. It held that "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn".[564] Considering the various definitions, it appears to be commonly accepted that the environment includes a wide range of elements including air, water, land, flora and fauna as well as human health and safety and that it is to be protected as part of the more global goal of ensuring sustainable development (see also Rio Declaration).

### 1.12. Equitable utilisation/equitability principle

The principles of "equitable utilisation" and "equitability" are closely related. They hold that states need to co-operate with a view to controlling, preventing, reducing or eliminating adverse environmental effects which may result from the utilisation of shared natural resources. Moreover, the benefits from the use of those resources must be shared equitably. The Lac Lanoux arbitral award confirmed this principle.

### 1.13. European Committee of Social Rights ("the Committee")

The European Committee of Social Rights ascertains whether countries have honoured the undertakings set out in the Charter. Its fifteen

[564] *Legality of the Threat or Use of Nuclear Weapons*, Advisory opinion of 8 July 1996, ICJ Reports (1996) 226, § 29.

independent, impartial members are elected by the Council of Europe Committee of Ministers for a term of six years, renewable once. Every year the States Parties submit a report indicating how they implement the Charter in law and in practice. The Committee examines the reports and decides whether or not the situations in the countries concerned are in conformity with the Charter. Its decisions, known as "conclusions", are published every year. In addition, it hears individual complaints (see *Complainant*). If a state takes no action on a Committee decision to the effect that it does not comply with the Charter, the Committee of Ministers addresses a recommendation to that state, asking it to remedy the situation in law and/or in practice.

### 1.14. European Convention on Human Rights ("the Convention")

The full title is the "Convention for the Protection of Human Rights and Fundamental Freedoms", usually referred to as "the Convention". It was adopted in 1950 and entered into force in 1953. The full text of the Convention and its additional Protocols is available in 29 languages at www.echr.coe.int. The chart of signatures and ratifications as well as the text of declarations and reservations made by states parties can be consulted at http://conventions.coe.int. Currently, it has 47 members.

### 1.15. European Court of Human Rights ("the Court")

The European Court of Human Rights was set up in Strasbourg by the Council of Europe member states in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights. Since 1 November 1998 it has sat as a full-time Court composed of an equal number of judges to that of the High Contracting Parties to the Convention. The Court examines the admissibility and merits of applications submitted to it. It sits in a single-judge formation, in committees of three judges, in Chambers of seven judges and in exceptional cases as Grand Chamber of seventeen judges. The Committee of Ministers of the Council of Europe supervises the execution of the Court's judgments.

### 1.16. European Social Charter ("the Charter")

The Charter is a Council of Europe treaty which guarantees social and economic human rights pertaining to housing, health, education, employment, legal and social protection, free movement of persons, and non-discrimination. It was adopted in 1961 and revised in 1996. Besides setting out rights and freedoms, it establishes a supervisory mechanism guaranteeing their respect by the states parties. The European Committee of Social Rights is the body responsible for monitoring compliance by the states parties.

### 1.17. Fair balance

The Convention and the Charter (see especially Part V Article G) provide for the limitation of certain rights for the sake of the greater public interest. The European Court of Human Rights has said that when rights are restricted there must be a fair balance between the public interest at stake and the human right in question. The Court is the final arbiter on when this balance has been found. It does however give states a "margin of appreciation" in assessing when the public interest is strong enough to justify restrictions on certain human rights. See also *margin of appreciation*; *public interest*.

### 1.18. Harmon doctrine

The theory that states have exclusive or sovereign rights over the waters flowing through their territory which they can use regardless of their infringement of the rights of other states.

### 1.19. Home

Article 8 of the Convention guarantees to every individual the enjoyment of his/her home. The right to respect for the home does not only include the right to the actual physical area, but also to the quiet enjoyment of this area. The Court has not limited the concept of "home" to its traditional interpretation but has described it with the broad notion of "living space", i.e. the physically defined area, where private and family life develops. For example, the Court has considered that a prison cell fulfils the requirements and comes within the protection of Article 8 (see *Giacomelli v. Italy*).)

### 1.20. ILC Articles on the Responsibility of States for Internationally Wrongful Acts

The UN International Law Commission adopted in 2001 59 Draft Articles on the Responsibility of States for Internationally Wrongful Acts which have been subsequently endorsed by the General Assembly (GA Res. 56/84 (2001)). According to the articles every internationally wrongful act of a State entails international responsibility of that State (Article 1). A conduct (act or omission) must constitute a breach of international law and be attributable to a State to engage its responsibility (Article 2). However, exceptionally, acts that are generally internationally wrongful may be justified (Chapter V), for instance in case of consent of the impacted State, self-defence, acts which are considered "counter-measures", force majeure, distress, and necessity.[565]

[565] The articles were used by the ICJ in the case concerning Pulp Mills on the River Uruguay (*Argentina v. Uruguay*), Judgment of 20 April 2010, ICJ General List 135, available at: www.icj-cij.org/docket/files/135/15877.pdf, § 273. Legal Consequences of

### 1.21. Interference

Any instance where the enjoyment of a right set out in the Convention and Charter is limited. Not every interference will mean that there has been violation of the right in question. An interference may be justified by the restrictions provided for in the Convention itself. Generally, for an interference to be justified it must be in accordance with the law, pursue a legitimate aim and be proportionate to that aim. See also *legitimate aim*; *prescribed by law*; *proportionality*.

### 1.22. Johannesburg Declaration

The Johannesburg Declaration is the final document of the 2002 UN Environmental Summit, sometimes also referred to as Rio+10 Conference. The Summit improved the Rio Declaration by including the goal of poverty eradication (Principle 11), referred to the private sector (Principle 24) and stressing its liability (Principle 26).

### 1.23. Legitimate aim

Some rights of the Convention and the Charter can be restricted. However, the measures imposing such restrictions should meet a number of requirements for the Court not to find a violation of the right in question. One of them is that they should be necessary in a democratic society, which means that they should answer a pressing social need and pursue a legitimate aim (see Article 8, 9, 10 and 11 of the Convention and Article G Part V of the Charter). Article 8 of the Convention, for instance, lists the broad categories of aims which can be considered as legitimate to justify an interference with the right to private and family life, including national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health or morals, the protection of the reputation or rights of others. Despite not being part of this explicit list, the Court found that the protection of the environment can be subsumed under the aim of the protection of the rights of others.[566]

### 1.24. Margin of appreciation

Once it is established that measures imposing restrictions on the Convention/Charter are prescribed by law and are necessary in a democratic society in pursuing a legitimate aim, it has to be examined whether the measures in question are proportionate to this legitimate aim.

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the *Construction of a Wall in the Occupied Palestinian Territory*, Advisory opinion of 9 July 2004, ICJ Reports (2004) 136, § 140.

[566] See especially Part I, Section A: Chapter III. For instance*, Pine Valley Developments Ltd and Others v. Ireland*, Judgment of 9 February 1993, Application No. 12472/87, §§ 57-59.

It is in the context of this examination that the Court has established that the authorities are given a certain scope for discretion, i.e. the "margin of appreciation", in determining the most appropriate measures to take in order to reach the legitimate aim sought. The reason is that national authorities are often better placed to assess matters falling under the Articles concerned. The scope of this margin of appreciation varies depending on the issue at stake, but, in environmental cases, the Court has found it to be wide. However, this margin of appreciation should not be seen as absolute and preventing the Court from any critical assessment of the proportionality of the measures concerned. Indeed, it has found a number of violations for instance under Article 8 in cases which concerned pollution.

### 1.25. Natural disaster

The Court has not defined the notion of "natural disaster". However, it has used the concept in distinction to dangerous activities in order to describe the scope of the positive obligations resulting from Articles 2 and 8 which are upon a state to protect individuals. It found that as natural disasters are not man-made and in general beyond a state's control, its obligations are therefore different in this situation. Public authorities are still under the obligation to inform, prevent and mitigate impact of natural disasters, to which the Court also refers to as natural hazard, as far as foreseeable and reasonable.[567]

### 1.26. "No harm" principle

The principle of "no harm" (*sic utere tuo ut alienum non laedas*) is at the core of international environmental law. According to the principle no state may act in a manner which inflicts damages on foreign territory, the population of the territory or foreign property.[568] The International Court of Justice has reaffirmed the application of this principle to the environment in its Advisory Opinion on Nuclear Weapons.[569] Moreover, the Trail Smelter case affirmed the existence of a positive obligation to protect other states (and hence their population) from damage by private companies.[570] The principle has also been included in Principle 2 of the

[567] See *Budayeva and others v. Russia*, judgment of 20 March 2008, Application No. 15339/02, paragraph 158.
[568] However, only serious damages may invoke international state responsibility under public international law.
[569] *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, Advisory opinion of 8 July 1996, ICJ Reports (1996) 226, at paragraph 29
[570] *Trail Smelter (USA v. Canada),* Arbitral Award of 16 April 1938 and 11 March 1941, UN Reports of International Arbitral Awards, Vol. III pp. 1905-1982.

1992 Rio Declaration and 2001 ILC the Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities.[571]

### 1.27. Polluter/user pays principle

The polluter/user pays principle stems from general international law. The essence of the polluter pays principle is that those who generate pollution whether it be air, sea, or other, and waste, should also be responsible for the costs of containment, avoidance or abatement of that pollution, regardless of where it occurs, and the removal and disposal of that waste if it is linked to the actions of the polluter/user. It is, *inter alia*, contained in Principle 16 of the Rio Declaration.

### 1.28. Positive obligations

The Court's case-law in respect of a number of provisions of the Convention states that public authorities should not only refrain from interfering arbitrarily with individuals' rights as protected expressly by the articles of the Convention, they should also take active steps to safeguard them. These additional obligations are usually referred to as positive obligations as the authorities are required to act so as to prevent violations of the rights encompassed in the Convention or punish those responsible. For instance, in *Budayeva and others v. Russia* the Court found that the authorities are responsible under Article 2 of the Convention for implementing a defence and warning infrastructure to prevent the the loss of life as result of natural disasters.[572] Considering the European Social Charter it is in fact evident that the majority of its provisions are by their very nature positive obligations, e.g. the obligation to guarantee a healthy working environment.

### 1.29. Possessions (peaceful enjoyment of)

The notion of *possessions* within the meaning of Article 1 of Protocol No. 1 to the Convention is not limited to ownership of physical goods and is independent from the formal classification in domestic law. For instance, social security benefits, clientele or economic interests connected with the running of a shop were treated as "possessions" by the Court. The Court has also stated that Article 1 of Protocol No. 1 applies to present and existing possessions but also to claims in respect of which the applicant can argue that he or she has at least a reasonable and

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[571] ILC Draft Articles on Transboundary Harm, ILC Report (2001) GAOR A/56/10, 66, available at:
http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_7_2001.pdf.

[572] See *Budayeva and others v. Russia*, judgment of 20 March 2008, Application No. 15339/02.

"legitimate expectation" of obtaining effective enjoyment of a property right.

### 1.30. Precautionary principle

The *precautionary principle* takes account of the effect that it is often difficult, if not impossible, to assess the precise impact of human action on the environment and that some actions can cause irreparable harm. It requires that if there is a strong suspicion that a certain activity may have detrimental environmental consequences, it is better to control that activity now rather than to wait for incontrovertible scientific evidence. It has been, *inter alia*, included in the Rio Declaration, and it played a role in justifying import restrictions in the WTO regime arguing that products had not been produced in a sustainable manner.

### 1.31. Prevention principle

The *prevention principle* is closely related to the precautionary principle. The prevention principle holds that it is generally cheaper and more efficient to prevent environmental catastrophes than to remedy their consequences. Consequently, when assessing the feasibility of preventive action versus remedial action, in the light of, for example, the interference with civil and political rights, preventive actions should be preferred. The principle has been included *inter alia* in the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal of 1989 and has also served as inspiration for the 1983 EC Environmental Action Programme.

### 1.32 Proportionate measures/proportionality

By *proportionate measures* the Court means measures taken by the authorities that strike a fair balance between the interests of the community and the interests of an individual. The Court applies this test in the context of its examination of the respect for the right to private and family life (Article 8) as well as the right to property (Article 1 of Protocol No. 1) .

### 1.33. Public authorities

Public authorities should be understood broadly as including both national and local authorities of all government branches carrying out activities of a public nature. They will therefore include municipalities as well as prefects or ministries.

### 1.34. Public interest/general interest

The terms *public interest* and *general* interest appear in Article 1 of the first Protocol of the Convention (Protection of Property). They have also

been used by the Court with reference to other articles to assess whether an *interference* by a public authority with an individual's rights can be justified. An interference may serve a legitimate objective in the *public* or *general interest* even if it does not benefit the community as a whole, but advances the *public interest* by benefiting a section of the community.[573]

### 1.35. Public participation principle

The principle is at the core of the Aarhus convention. In general, it requires states to take the public into account and offer procedural means to have its concerns voiced and considered.

### 1.36. Rio Declaration

The Rio Declaration on Environment and Development[574] concluded the 1992 United Nations "Conference on Environment and Development". The Rio Declaration consists of 27 principles intended to guide future sustainable development around the world. The declaration stresses the principle of sustainable development (Principles 4 and 8), the precautionary and preventive principle (Principle 15), the polluter/user-pays principle (Principle 16), the principle of common but differentiated responsibilities (Principle 7), and the right to the exploitation of one's own resources save the absence of harm of ones neighbours (Principle 2). It also mentions the right to development (Principle 3).

### 1.37. Stockholm Declaration

The Stockholm Declaration[575] is the final document of the United Nations Conference on the Human Environment in 1972 – the first UN conference on the environment. A right to a healthy environment is proclaimed in the declaration for the first time.

### 1.38. Subsidiarity (principle of)

The *principle of subsidiarity* is one the founding principles of the human rights protection mechanism of the Convention. According to this principle it should first and foremost be for national authorities to ensure that the rights enshrined in the Convention are not violated and to offer redress if ever they are. The Convention mechanism and the European Court of Human Rights should only be a last resort in cases where the national level has not offered the protection or redress needed.

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[573] See *James and Others v. the United Kingdom*, Judgment of 21 February 1986, paragraphs 39-46.
[574] Adopted on 14 June 1992, available at: www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163.
[575] Adopted on 16 June 1972, available at: www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503.

### 1.39. Sustainable development principle

This principle holds that development must be capable of being maintained in the long term and that sustainable production should be favoured when possible. This principle can be seen as having an economic, environmental, and ecological dimension, which must be balanced (See Principles 4 and 8 of the Rio Declaration.

### 1.40. United Nations Framework Convention on Climate Change (UNFCCC)

The UNFCCC is a result of the 1992 United Nations Conference on Environment and Development in Rio. The objective of the treaty is to establish a framework to consider what can be done to reduce global warming and to cope with whatever temperature increases are inevitable. A number of nations approved, in addition to the treaty, the Kyoto Protocol of 1997, which has more powerful (and legally binding) measures for regulating, *inter alia*, $CO_2$ emissions.

# Appendix II: Judgments and decisions of the European Court of Human Rights relevant to the environment

| | Decision on admissibility or Judgment | Date | Articles of the Convention | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | 2 | 3 | 6 (1) | 13 | 8 | 10 | 11 | 1-P1 |
| *Arrondelle v. the United Kingdom** | Admissible (friendly settlement) | 15/7/1980 | | | | □ | □ | | | □ |
| *Zimmerman and Steiner v. Switzerland* | Judgment | 13/7/1983 | | | □ | | | | | |
| *G. and E. v. Norway** | Inadmissible | 3/10/1983 | | | | □ | □ | □ | | □ |
| *Baggs v. the United Kingdom** | Partially admissible | 16/10/1985 | | | □ | □ | □ | | | □ |
| *Rayner v. the United Kingdom** | Partially admissible | 16/7/1986 | | | □ | | □ | | | □ |
| *Vearnacombe and others v. the United Kingdom** | Admissible | 18/1/1989 | | | □ | □ | □ | | | □ |
| *Powell and Rayner v. the United Kingdom* | Judgment | 21/2/1990 | | | □ | □ | □ | | | |
| *S. v. France** | Inadmissible | 17/5/1990 | | | | | □ | | | □ |
| *Fredin v. Sweden* | Judgment | 18/2/1991 | | | □ | | | | | □ |
| *Pine Valley Development Ltd v. Ireland* | Judgment | 29/11/1991 | | | □ | | | | | □ |
| *Zander v. Sweden* | Judgment | 25/11/1993 | | | □ | | | | | |
| *López Ostra v. Spain* | Judgment | 9/12/1994 | | □ | | | □ | | | |
| *Piermont v. France* | Judgment | 27/4/1995 | | | | | | □ | | |

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|---|---|---|---|---|---|---|---|---|---|---|
| *Matos e Silva Lda. and others v. Portugal* | Judgment | 16/9/1996 | | | □ | □ | | | | □ |
| *Buckley v. the United Kingdom* | Judgment | 25/9/1996 | | | | | □ | | | |
| *Balmer-Schafroth and others v. Switzerland* | Judgment (GC) | 26/8/1997 | | | □ | □ | | | | |
| *Guerra and others v. Italy* | Judgment (GC) | 19/2/1998 | □ | | | | □ | □ | | |
| *Chassagnou and others v. France* | Judgment (GC) | 29/4/1999 | | | | | | | □ | □ |
| *McGinley and Egan v. United Kingdom* | Judgment | 9/6/1998 | | | □ | □ | □ | | | |
| *L.C.B. v. the United Kingdom* | Judgment | 9/6/1998 | □ | □ | | □ | □ | | | |
| *Hertel v. Switzerland* | Judgment | 25/8/1998 | | | □ | | □ | □ | | |
| *Steel and others v. the United Kingdom* | Judgment | 23/9/1998 | | | | | | □ | | |
| *L'Association des Amis de St-Raphaël et Fréjus and others v. France* | Inadmissible | 29/2/2000 | | | □ | □ | | | | □ |
| *Athanassoglou and others v. Switzerland* | Judgment (GC) | 6/4/2000 | | | □ | □ | | | | |
| *Pagliccia and others v. Italy* | Inadmissible | 7/9/2000 | | | | | □ | | | |
| *Ünver v. Turkey* | Inadmissible | 26/9/2000 | | | □ | | | | | □ |
| *Sciavilla v. Italy* | Inadmissible | 14/11/2000 | | | | | □ | | | |
| *Chapman v. the United Kingdom* | Judgment (GC) | 18/1/2001 | | | □ | | □ | | | □ |

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|---|---|---|---|---|---|---|---|---|---|
| *Jane Smith v. the United Kingdom* | Judgment (GC) | 18/1/2001 | | | □ | | □ | | □ |
| *Coster v. the United Kingdom* | Judgment (GC) | 18/1/2001 | | | | | □ | | □ |
| *Thoma v. Luxembourg* | Judgment | 29/3/2001 | | | | | | □ | |
| *Dati v. Italy* | Inadmissible | 22/1/2002 | | | | | □ | | |
| *Burdov v. Russia* | Judgment | 7/5/2002 | | | □ | | | | □ |
| *Demuth v. Switzerland* | Judgment | 15/11/2002 | | | | | | □ | |
| *Dactylidi v. Greece* | Judgment | 27/3/2003 | | | □ | □ | | | |
| *Papastavrou and others v. Greece* | Judgment | 10/4/2003 | | | | | | | □ |
| *Kyrtatos v. Greece* | Judgment | 22/5/2003 | | | □ | | □ | | |
| *Hatton and others v. the United Kingdom* | Judgment (GC) | 8/7/2003 | | | | □ | □ | | |
| *Lam and others v. the United Kingdom* | Inadmissible | 8/7/2003 | □ | | □ | □ | □ | | □ |
| *Fadeyeva v. Russia* | Partially admissible | 16/10/2003 | □ | □ | □ | | □ | | |
| *Ashworth and others v. the United Kingdom* | Inadmissible | 20/1/2004 | | | | □ | □ | | □ |
| *Taşkın and others v. Turkey* | Partially admissible | 29/1/2004 | □ | | □ | □ | □ | | □ |
| *Gorraiz Lizarraga v. Spain* | Judgment | 27/4/2004 | | | □ | | □ | | □ |
| *Aparicio Benito v. Spain* | Partly inadmissible and adjourned | 4/5/2004 | □ | | | □ | □ | | |

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| *Vides Aizsardzîbas Klubs v. Latvia* | Judgment | 27/5/2004 | | | | | | □ | | |
| *Ledyayeva v. Russia* | Partially admissible | 16/9/2004 | □ | □ | □ | | □ | □ | | |
| *Kapsalis et Nima-Kapsali v. Greece* | Inadmissible | 23/9/2004 | | | □ | □ | | | | □ |
| *Giani v. Italy* | Inadmissible | 28/10/2004 | | □ | | □ | □ | | | |
| *Balzarini and others v. Italy* | Inadmissible | 28/10/2004 | | | | □ | □ | | | |
| *Ward v. the United Kingdom* | Inadmissible | 9/11/2004 | | □ | | | □ | | | |
| *Taşkın and others v. Turkey* | Judgment | 10/11/2004 | □ | | □ | □ | □ | | | |
| *Moreno Gómez v. Spain* | Judgment | 16/11/2004 | | | | | □ | | | |
| *Öneryıldız v. Turkey* | Judgment (GC) | 30/11/2004 | □ | | | □ | □ | | | □ |
| *Botti v. Italy* | Inadmissible | 2/12/2004 | □ | | | | □ | | | |
| *Steel and Morris v. the United Kingdom* | Judgment | 15/2/2005 | | | □ | | | □ | | |
| *Fadeyeva v. Russia* | Judgment | 9/6/2005 | | | | | □ | | | |
| *Okyay and Others v. Turkey* | Judgment | 12/7/2005 | | | □ | | | | | |
| *Roche v. the United Kingdom* | Judgment (GC) | 19/10/2005 | | | □ | □ | □ | □ | | □ |
| *N.A. and Others v. Turkey* | Judgment | 11/10/2005 | | | | | | | | □ |
| *Luginbühl v. Switzerland* | Inadmissible | 17/1/2006 | □ | | | | □ | | | |
| *Valico S. R. L. v. Italy* | Inadmissible | 21/03/2006 | | | □ | | | | | □ |
| *Öckan and others v. Turkey* | Judgment | 28/3/2006 | □ | | □ | □ | □ | | | |

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|---|---|---|---|---|---|---|---|---|---|---|
| *Ledyayeva and Others v. Russia* | Judgment | 26/10/2006 | | | | | □ | | | |
| *Giacomelli v. Italy* | Judgment | 2/11/2006 | | | | | □ | | | |
| *Aparicio Benito v. Spain* (French only) | Inadmissible | 13/11/2006 | □ | | | | □ | | | |
| *Murillo Saldias v. Spain* | Inadmissible | 28/11/2006 | □ | | □ | □ | | | | |
| *Lemke v. Turkey* | Judgment | 7/6/2007 | □ | | □ | □ | □ | | | |
| *Verein gegen Tierfabriken v. Switzerland* | Judgment | 4/10/2007 | | | □ | | | □ | | |
| *Hamer v. Belgium* *(French only)* | Judgment | 27/11/2007 | | | □ | | □ | | | □ |
| *Z.A.N.T.E. - Marathonisi A.E. v. Greece* | Judgment | 6/12/2007 | | | | | | | | □ |
| *Budayeva and Others v. Russia* | Judgment | 22/3/2008 | □ | | | □ | | | | □ |
| *Borysiewicz v. Poland* | Judgment | 1/7/2008 | | | □ | | □ | | | |
| *Turgut v. Turkey* | Judgment | 8/7/2008 | | | | | | | | □ |
| *Stoine Hristov v. Bulgaria* (French only) | Judgment | 16/10/2008 | | | | | □ | | | |
| *Mangouras v. Spain* | Judgment | 8/1/2009 | No violation of Article 5 | | | | | | | |
| *Tâtar v. Romania* | Judgment | 27/1/2009 | | | | | □ | | | |
| *Satir v. Turkey* | Judgment | 10/3/2009 | | | □ | | | | | □ |
| *Brânduşe v. Romania* | Judgment | 7/4/2009 | | □ | | | □ | | | |
| *Verein gegen Tierfabriken v. Switzerland (no. 2)* | Judgment (GC) | 30/6/2009 | | | | | | □ | | |

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| *Leon and Agnieszka Kania v. Poland* | Judgment | 21/7/2009 | | | □ | □ | □ | | | |
| *Depalle v. France* | Judgment (GC) | 29/3/2010 | | | | | | | | □ |
| *Băcilă v. Romania (French only)* | Judgment | 30/3/2010 | | | | | □ | | | |
| *Brosset-Triboulet and Others v. France* | Judgment (GC) | 29/3/2010 | | | | | | | | □ |
| *Mangouras v. Spain* | Judgment (GC) | 28/9/2010 | No violation of Article 5 | | | | | | | |
| *Deés v. Hungary* | Judgment | 9/11/2010 | | | □ | | □ | | | |
| *Dubetska and Others v. Urkaine* | Judgment | 10/2/2011 | | | | | □ | | | |
| *Ioan Marchiş and Others v. Romania* | Inadmissible | 28/6/2011 | | | | | □ | | | |
| *Grimkovskaya v. Ukraine* | Judgment | 21/7/2011 | | | □ | | □ | | | |

*** = Commission Decision | GC = Grand Chamber | P1 = Protocol No. 1**
**□ = Articles invoked | □ = Violation**

# Appendix III: Reference to Other Instruments Relevant to the Environment in ECHR case-law

The Court in its case-law has often made reference to international environmental law standards and principles.

For instance, a core principle referred to by the Court is *sic utere tuo ut alienum non laedas* (principle of "no harm"),[576] which has replaced the doctrine of absolute sovereignty.[577] According to this principle no State may act in a manner which inflicts damages on foreign territory, the population of the territory or foreign property. The International Court of Justice has reaffirmed its application in the realm of the environment in its Advisory Opinion on Nuclear Weapons.[578] Moreover, the Trail Smelter case affirmed the existence of a positive obligation to protect other States (and hence their population) from damage inflicted by private companies.[579] This also appears in Principle 2 of the 1992 Rio Declaration[580] and in the 2001 ILC Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities.[581]

The Court mentioned in *Tatar v. Romania* Principles 2 and 14 of the Rio Declaration under the list of relevant law. More importantly, it held in paragraph 111-112, as part of its reasoning: "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 […]. La Cour observe également qu'au-delà du cadre législatif national instauré par la loi sur la protection de l'environnement, des normes internationales spécifiques existaient, qui auraient pu être

[576] See also Appendix 1 "Glossary".
[577] Also known with respect to environmental matters as "Harmon-Doctrine".
[578] *Legality of the Threat or Use of Nuclear Weapons*, Advisory opinion of 8 July 1996, ICJ Reports (1996) 226, paragraph 29.
[579] Trail Smelter (*USA v. Canada*), arbitral award of 16 April 1938 and 11 March 1941, UN Reports of International Arbitral Awards, Vol. III, pp. 1905-1982.
[580] Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, 14 June 1992, available at: www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163, also Stockholm Declaration Principle 21, 16 June 1972, available at: www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503 .
[581] ILC Draft Articles on Transboundary Harm, ILC Report (2001) GAOR A/56/10, 66, available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_7_2001.pdf .

appliquées par les autorités roumaines." In the same case the Court referred in paragraphs 69 and 120 to the related "precautionary principle"

To mention another example, the "polluter pays" principle [582], contained e.g. in the Rio Declaration, holds that the polluter should in principle bear the cost of pollution regardless of where it occurs. The Court included in a number of cases[583] in the list of relevant law the EU directive 2004/35/EC, which aims to establish a framework of environmental liability based on the "polluter pays" principle, with a view to preventing and remedying environmental damage. Moreover, in *Öneryıldız v. Turkey* it referred to the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, whose provision are an elaboration of the principle.

**Judgments of the European Court of Human Rights which refer explicitly to other international environmental protection instruments are displayed in chronological order hereafter, with the relevant extracts.**

| Case | Reference to | Quotation/Comment | Paragraph | Date of decision |
|---|---|---|---|---|
| *Guerra and Others v. Italy* | **PACE resolution** | "Of particular relevance among the various Council of Europe documents in the field under consideration in the present case is Parliamentary Assembly. Resolution 1087 (1996) on the consequences of the Chernobyl disaster, which was adopted on 26 April 1996 (at the 16th Sitting). Referring not only to the risks associated with the production and use of nuclear energy in the civil sector but also to other matters, it states "public access to clear and full information ... must be viewed as a basic human right"." (List of relevant Council of Europe text) | 34 | 18/02/1998 |
| *Kyratatos v. Greece* | **International instruments** | "Neither Article 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." | 52 | 22/05/2003 |

582 See also Appendix 1 "Glossary".

583 e.g. *Tatar v. Romania*, judgment of 27.01.2009 and *Mangouras v. Spain*, judgment of 08.01.2009

| Case | Reference to | Quotation/Comment | Paragraph | Date of decision |
|---|---|---|---|---|
| *Taskin and Others v. Turkey* | **Rio Declaration** | (List of relevant law) | 98 | 10/11/2004 |
| *Taskin and Others v. Turkey* | **Aarhus Convention** | (List of relevant law) | 99 | 10/11/2004 |
| *Taskin and Others v. Turkey* | **PACE recommendation** | Recommendation 1614 (2003) on Environment and Human Rights (List of relevant law) | 100 | 10/11/2004 |
| *Öneryıldız v. Turkey* | **PACE resolution** | Resolution 587 (1975) on problems connected with the disposal of urban and industrial waste, Resolution 1087 (1996) on the consequences of the Chernobyl disaster, Recommendation 1225 (1993) on the management, treatment, recycling and marketing of waste (List of relevant Council of Europe text) | 59 | 30/11/2004 |
| *Öneryıldız v. Turkey (GC)* | **Committee of Ministers recommendation** | Recommendation No. R (96) 12 on the distribution of powers and responsibilities between central authorities and local and regional authorities with regard to the environment. (List of relevant Council of Europe text) | 59 | 30/11/2004 |
| *Öneryıldız v. Turkey (GC)* | **Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment (ETS No 152)** | (List of relevant Council of Europe text) | 59 | 30/11/2004 |
| *Öneryıldız v. Turkey (GC)* | **Convention on the Protection of the Environment through Criminal Law (ETSNo. 172)** | (List of relevant Council of Europe text) | 59 | 30/11/2004 |

| Case | Reference to | Quotation/Comment | Paragraph | Date of decision |
|---|---|---|---|---|
| *Öneryıldız v. Turkey (GC)* | **European standards** | "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." | 60 | 30/11/2004 |
| *Öneryıldız v. Turkey (GC)* | **Convention on the Protection of the Environment through Criminal Law (ETS No. 172)** | "In that connection, the Strasbourg Convention calls on the Parties to adopt such measures“ as may be necessary to establish as criminal offences” acts involving the “disposal, treatment, storage ... of hazardous waste which causes or is likely to cause death or serious injury to any person ...”, and provides that such offences may also be committed “with negligence” (Articles 2 to 4). Although this instrument has not yet come into force, it is very much in keeping with the current trend towards harsher penalties for damage to the environment, an issue inextricably linked with the endangering of human life. [...] Article 6 of the Strasbourg Convention also requires the adoption of such measures as may be necessary to make these offences punishable by criminal sanctions which take into account the serious nature of the offences; these must include imprisonment of the perpetrators." | 61 | 30/11/2004 |
| *Öneryıldız v. Turkey (GC*) | **European standards** | “Where such dangerous activities are concerned, public access to clear and full information is viewed as a basic human right; for example, the above-mentioned Resolution 1087 (1996) makes clear that this right must not be taken to be limited to the risks associated with the use of nuclear energy in the civil sector.” | 62 | 30/11/2004 |

| Case | Reference to | Quotation/Comment | Paragraph | Date of decision |
|---|---|---|---|---|
| *Öneryıldız v. Turkey (GC)* | **European standards** | "Referring to the examples provided by cases such as [...] and to the European standards in this area, the Chamber emphasised that the protection of the right to life, as required by Article 2 of the Convention, could be relied on in connection with the operation of waste-collection sites, on account of the potential risks inherent in that activity." | 65 | 30/11/2004 |
| *Öneryıldız v. Turkey (GC)* | **European standards** | "The Court considers that this obligation must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, and a fortiori in the case of industrial activities, which by their very nature are dangerous, such as the operation of waste-collection sites ("dangerous activities" – for the relevant European standards, see paragraphs 59-60 above)." | 71 | 30/11/2004 |
| *Okyay and Others v. Turkey* | **Rio Declaration** | (List of relevant law) | 51 | 12/07/2005 |
| *Okyay and Others v. Turkey* | **PACE recommendation** | Recommendation 1614 (2003) on Environment and Human Rights (List of relevant law) | 52 | 12/07/2005 |
| *Borysiewicz v. Poland* | **International environmental standards** | "[T]he Court notes that the applicant has not submitted [...] 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." | 53 | 01/07/2008 |
| *Demir and Bayakara v. Turkey* | **Aarhus Convention** | "In the *Taşkın and Others v. Turkey* case, the Court built on its case-law concerning Article 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." | 83 | 12/11/2008 |

| Case | Reference to | Quotation/Comment | Paragraph | Date of decision |
|---|---|---|---|---|
| *Mangouras v. Spain* | **International Convention for the Prevention of Pollution from Ships** | (List of relevant law) | 20 | 08/01/2009 |
| *Mangouras v. Spain* | **United Nations Convention on the Law of the Sea** | (List of relevant law) | 20 | 08/01/2009 |
| *Mangouras v. Spain* | **EC directive** | Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (List of relevant law) | 20 | 08/01/2009 |
| *Mangouras v. Spain* | **EC directive** | Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements (List of relevant law) | 20 | 08/01/2009 |
| *Tâtar v. Romania* | **EC directive** | Directive No. 2004/35/CE (List of relevant law) | 69 | 27/01/2009 |
| *Tâtar v. Romania* | **Stockholm Declaration** | (List of relevant law) | 69 | 27/01/2009 |
| *Tâtar v. Romania* | **Rio Declaration** | (List of relevant law) | 69 | 27/01/2009 |
| *Tâtar v. Romania* | **Aarhus Convention** | (List of relevant law) | 69 | 27/01/2009 |
| *Tâtar v. Romania* | **ICJ judgment** | *Gabcikovo Nagymaros (Hungary v. Slovakia)* (List of relevant law) | 69 | 27/01/2009 |
| *Tâtar v. Romania* | **PACE resolution** | Resolution 1430 (2005) on Industrial hazards (List of relevant law) | 69 | 27/01/2009 |
| *Tâtar v. Romania* | **EU directive** | Directives 2006/21/CE and 2004/35/CE on environmental liability with regard to the prevention and remedying of environmental damage (List of relevant law) | 69 | 27/01/2009 |
| *Tâtar v. Romania* | **EU Commission Communication** | COM/2000/0664 final on security of mining activities (List of relevant law) | 69 | 27/01/2009 |

| Case | Reference to | Quotation/Comment | Paragraph | Date of decision |
|---|---|---|---|---|
| *Tâtar v. Romania* | **Precautionary principle (ECJ, Maastricht, Amsterdam Treaty)** | "En vertu du principe de précaution, l'absence de certitude compte tenu des connaissances scientifiques et techniques du moment ne saurait justifier que l'État retarde l'adoption de mesures effectives et proportionnées visant à prévenir un risque de dommages graves et irréversibles à l'environnement. Dans l'histoire de la construction européenne, le principe de précaution a été introduit par le Traité de Maastricht […]. Cette étape marque, au niveau européen, l'évolution du principe d'une conception philosophique vers une norme juridique. Les lignes directrices du principe ont été fixées par la Commission européenne dans sa communication du 2 février 2000 sur le recours au principe de précaution. La jurisprudence communautaire a fait application de ce principe dans des affaires concernant surtout la santé, alors que le traité n'énonce le principe qu'en ce qui concerne la politique de la Communauté dans le domaine de l'environnement. La Cour de justice des Communautés européennes («CJCE») considère ce principe, à la lumière de l'article 17 § 2, 1er alinéa, CE, comme l'un des fondements de la politique de protection d'un niveau élevé poursuivie par la Communauté dans le domaine de l'environnement. Selon la jurisprudence de la CJCE, lorsque « des incertitudes subsistent quant à l'existence où à la portée des risques pour la santé des personnes, les institutions peuvent prendre des mesures sans avoir à attendre que la réalité et la gravité ce ces risques soient pleinement démontrées » [Royaume Uni/Commission, Aff C-180/96, et CJCE, National Farmer's Union, C-157/96,] " (French only) | 69 | 27/01/2009 |

| Case | Reference to | Quotation/Comment | Paragraph | Date of decision |
|---|---|---|---|---|
| *Tâtar v. Romania* | **UN and EU reports** | "La Cour observe qu'au moins pendant un certain laps de temps après l'accident écologique de janvier 2000 différents éléments polluants (cyanures, plomb, zinc, cadmium) dépassant les normes internes et internationales admises ont été présents dans l'environnement, notamment à proximité de l'habitation des requérants. C'est ce que confirment les conclusions des rapports officiels établis après l'accident par les Nations unies (UNEP/OCHA), l'Union européenne (Task Force) et le ministère roumain de l'Environnement (voir les paragraphes 26, 28 et 63 ci-dessus).La Cour ne voit aucune raison de douter de la sincérité des observations formulées par les requérants à cet égard." (French only) | 95-96 | 27/01/2009 |
| *Tâtar v. Romania* | **Rio Declaration** | "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 (voir pp. 21 et 23 ci-dessus).La Cour observe également qu'au-delà du cadre législatif national instauré par la loi sur la protection de l'environnement, des normes internationales spécifiques existaient, qui auraient pu être appliquées par les autorités roumaines" (French only) | 111-112 | 27/01/2009 |
| *Tâtar v. Romania* | **Stockholm Declaration** | "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 (voir pp. 21 et 23 ci-dessus).La Cour observe également qu'au-delà du cadre législatif national instauré par la loi sur la protection de l'environnement, des normes internationales spécifiques existaient, qui auraient pu être appliquées par les autorités roumaines" (French only) | 111-112 | 27/01/2009 |

| Case | Reference to | Quotation/Comment | Paragraph | Date of decision |
|---|---|---|---|---|
| *Tâtar v. Romania* | **Aarhus Convention** | "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). Dans le même sens, la Résolution no 1430/2005 de l'Assemblée parlementaire du Conseil de l'Europe sur les risques industriels renforce, entre autres, le devoir pour les États membres d'améliorer la diffusion d'informations dans ce domaine (voir p. 25, f)." (French only) | 118 | 27/01/2009 |
| *Tâtar v. Romania* | **Precautionary principle** | "……appeared for the first time in the Rio declaration**.**" | 120 | 27/01/2009 |
| *Brosset-Triboulet and Others v. France (GC)* | **Committee of Ministers recommendation** | Recommendation No. R (97) 9 of the Committee of Ministers on a policy for the development of sustainable environment-friendly tourism (List of relevant law) | 55 | 29/03/2010 |
| *Brosset-Triboulet and Others v. France (GC)* | **European Code of Conduct for Coastal Zones.** | (List of relevant law) | 55 | 29/03/2010 |
| *Depalle v. Drance (GC)* | **Committee of Ministers recommendation** | Recommendation No. R (97) 9 of the Committee of Ministers on a policy for the development of sustainable environment-friendly tourism (List of relevant law) | 54 | 29/03/2010 |
| *Depalle v. Drance (GC)* | **European Code of Conduct for Coastal Zones.** | (List of relevant law) | 54 | 29/03/2010 |
| *Mangouras v. Spain (GC)* | **EC directive** | Directive 2005/35/EC on ship-source pollution (List of relevant law) | 37 | 28/09/2010 |
| *Mangouras v. Spain (GC)* | **ECJ judgment** | Case C-308/06 on validity of Directive 2004/35/EC (List of relevant law) | 39-40 | 28/09/2010 |
| *Mangouras v. Spain (GC)* | **United Nations Convention on the Law of the Sea.** | (List of relevant law) | 44 | 28/09/2010 |
| *Mangouras v. Spain (GC)* | **ITLOS case-law** | (List of relevant law) | 46-47 | 28/09/2010 |

| Case | Reference to | Quotation/Comment | Paragraph | Date of decision |
|---|---|---|---|---|
| *Mangouras v. Spain (GC)* | **International Convention for the Prevention of Pollution from Ships** | (List of relevant law) | 53 | 28/09/2010 |
| *Mangouras v. Spain (GC)* | **International Convention on Civil Liability for Oil Pollution Damage** | (List of relevant law) | 54 | 28/09/2010 |
| *Mangouras v. Spain (GC)* | **The London P&I Rules** | (List of relevant law) | 55 | 28/09/2010 |
| *Mangouras v. Spain (GC)* | **European and international law** | "[T]he Court cannot overlook the growing and legitimate concern both in Europe and internationally in relation to environmental offences. This is demonstrated in particular by States' powers and obligations regarding the prevention of maritime pollution and by the unanimous determination of States and European and international organisations to identify those responsible, ensure that they appear for trial and, if appropriate, impose sanctions on them (see "Relevant domestic and international law" above). A tendency can also be observed to use criminal law as a means of enforcing the environmental obligations imposed by European and international law.<br><br>The Court considers that these new realities have to be taken into account in interpreting the requirements of Article 5§3 in this regard. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies. [...]" | 86 | 28/09/2010 |
| *Mangouras v. Spain (GC)* | **ITLOS case-law** | "It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies." | 89 | 28/09/2010 |

| Case | Reference to | Quotation/Comment | Paragraph | Date of decision |
|---|---|---|---|---|
| *Grimkovskaya v. Ukraine* | **Aarhus Convention** | (List of relevant law) | 39 | 21/7/2011 |
| *Grimkovskaya v. Ukraine* | **PACE recommendation** | Recommendation 1614 (2003) of 27 June 2003 on environment and human rights (List of relevant law) | 40 | 21/7/2011 |
| *Grimkovskaya v. Ukraine* | **Aarhus Convention** | "[The Court] 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." | 69 | 21/7/2011 |
| *Grimkovskaya v. Ukraine* | **Aarhus Convention** | "72. Overall, the Court attaches importance to the following factors. First, the Government's failure to show that the decision […] was preceded by an adequate environmental feasibility study and followed by the enactment of a reasonable environmental management policy. Second, the Government did not show that the applicant had a meaningful opportunity to contribute to the related decision-making processes, including by challenging the municipal policies before an independent authority. Bearing those two factors and the Aarhus Convention […] in mind, the Court cannot conclude that a fair balance was struck in the present case." | 72 | 21/7/2011 |

# Appendix IV: Good Practices

The following represents a selection of practical initiatives and legal frameworks aimed at protecting the environment and respecting the obligations stemming from the European Convention on Human Rights and the European Social Charter. The examples have been taken from the responses provided by a number of member states in 2010 and 2011.[584] The examples do not represent an exhaustive list but rather serve to illustrate some typical actions of member states.

This summary of good practices has been broken down into five categories:

1. Embedding environmental rights in the national policy and legal framework
2. Establishing control over potentially harmful environmental activities
3. Requiring environmental impact assessments (EIAs)
4. Securing public participation and access to information on environmental matters
5. Making environmental rights judiciable and the environment a public concern

## 1. EMBEDDING ENVIRONMENTAL RIGHTS IN THE NATIONAL POLICY AND LEGAL FRAMEWORK

### a. ENVIRONMENT AND NATIONAL CONSTITUTIONS

In several countries the environment is protected through the constitution. For example, the **Bulgarian** Constitution provides for the right to a "healthy and favourable environment in accordance with the established standards and norms" (Article 55). The same article proclaims vice-versa an obligation for the citizens to protect the environment.

The Constitution of **Poland** also contains several environmental provisions. Article 74 requires public authorities to pursue policies which ensure the ecological security of current and future generations. Article 68, paragraph 4, places an explicit duty on public authorities to prevent negative health consequences resulting from the degradation of the environment.

[584] See compilation of contributions from member states – documents GT-DEV-ENV(2011)03, GT-DEV-ENV(2011)03_Add1 and GT-DEV-ENV(2011)03_Add2.

Article 44 of the Constitution of the **Slovak Republic** provides explicitly that "everyone shall have the right to a favourable environment". It places a duty on everyone to protect and improve the environment. Likewise, Article 74 of the **Serbian** Constitution places an obligation to preserve and improve the environment for "everyone" in addition to prescribing the right to a healthy environment. The Constitution of **Slovenia** also contains a "right to a healthy living environment" (Article 72).

The Constitution of the Republic of **Albania** stipulates that the state shall aim at ensuring "a healthy and ecologically sustainable environment for current and future generations" as well "as rational exploitation of forests, water, pastures, and other natural resources on the basis of a sustainable development principle" (Article 59).

On the basis of a special federal constitutional Act, **Austria** commits itself to comprehensive protection of the environment, i.e. to protecting the natural environment as the basis of mankind's life against detrimental effects. Due to that constitutional commitment, the legislative and administrative organs are required to improve environmental protection. In its case-law, the Austrian Constitutional Court has given a broad meaning to the notion of "environmental protection" as employed in the Act.

While the **Czech** Constitution provides only a general provision on environmental protection (Article 7), the Czech Charter of Fundamental Rights and Freedoms, which is part of the constitutional legislation, grants the "right to a favourable living environment" as well as "the right to timely and complete information about the state of the living environment and natural resources" (Article 35). In exercising his/her rights nobody may endanger or cause damage to the living environment, natural resources, the wealth of natural species, and cultural monuments beyond limits set by law.

Mindful of its responsibility toward future generations, the Basic Law for the Federal Republic of **Germany** imposes an obligation on the state to protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order (Article 20a).

The **Spanish** Constitution sets out that everyone has the right to enjoy an environment suitable for the development of the person, as well as the duty to preserve it (Article 45). The public authorities shall safeguard rational use of all natural resources with a view to protecting and improving the quality of life and preserving and restoring the environment, by relying on essential collective solidarity.

The **Swedish** Constitution guarantees that the public institutions shall promote sustainable development leading to a good environment for present and future generations (Chapter 1, Article 2).

**Switzerland**'s Constitution has several provisions relating to environmental protection. While Article 73 of the Swiss Constitution enshrines the principle of sustainable development, Article 74 deals more specifically with environmental protection. Articles 76 to 79 treat the handling of water, forests, the protection of natural and cultural heritage and fishing and hunting.

However, the fact that the constitution of a country does not contain any specific article on the environment does not mean that the protection cannot be claimed through other constitutional provisions. For instance, in **Cyprus** claims for the protection of the environment have been made through the constitutional provisions on human rights (right to life and corporal integrity, prohibition of inhuman and degrading treatment, rights to respect for private and family life, right to property).

### b. ENVIRONMENT AND NATIONAL LEGISLATION

Most countries have developed either framework legislation often defining basic principles of environmental protection and/or they have enacted a number of specific legislations in the main environmental sectors.

#### *Examples of countries with framework legislation on the environment*

**Albania** passed the Law on Environmental Protection in 2002. In addition there are other specialised legislation which regulate, for instance, the treatment of dangerous wastes, ionising radiation, gathering of statistical data on the environment, strategic environmental assessments, air and water quality, waste management, environmental impact assessments, chemicals and hazardous waste, biodiversity, fauna protection, including Integrated Pollution Prevention and Control, Large Combustion Plant, Seveso II, Pollution Release and Transfer Register and the Liability Directive.

In **Bulgaria** the horizontal legislation in the field of environment conservation includes the Environmental Protection Act, Liability for Prevention and Remedying of Environmental Damage Act, and the Access to Public Information Act. In addition, separate legal acts have been passed in main sectors such as on air quality, waste management, water quality, nature conservation, chemicals and mine waste.

The **Czech Republic** has enacted the Law on the Environment. The horizontal legislation sets rules in particular for access to environmental information, environmental impact assessment, urban planning, integrated pollution prevention and control, environmental damage, prevention and remedies and environmental criminal offences. The sectoral environmental legislation covers a wide range of environmental issues, specifically water, soil, air and ozone protection, nature protection, waste management, forest management, use of mineral resources, chemicals management, prevention of industrial accidents, the use of genetically modified organisms, climate change, and the use of nuclear energy, radiation protection and protection against noise.

**Hungary** established the Act on the General Rules of Environmental Protection.

**Norway** has adopted the Nature Diversity Act.

**Poland** has enacted the Nature Protection Act and the Environmental Protection Law. In addition, there are also specialised environmental legislations which regulate, among other things, the issue of waste, genetically modified organisms, the use of atomic energy, the emission of greenhouse gases and other substances, water protection, carrying out geological work and extracting mineral deposits, and forest protection.

**Slovenia** has adopted the Environment Protection Act of 2004. Based on this act further regulations relating to air quality, waste management, nature protection, soil protection and noise protection have been enacted.

**Sweden** adopted the Environmental Code in 1999. At the same time a system of environmental courts was introduced. The court system presently consists of five regional environmental courts and one Environmental Court of Appeal.

***Examples of countries with a number of specific legislations on the environment***

In **Austria** provisions on the protection of the environment are found for example in the Trade Code, the Water Act, the Waste Management Act, the Air Pollution Law for Boiler Facilities, the Forestry Act and the Air Pollution Impact Act.

**Cyprus** has enacted a multitude of sector and problem specific legislation concerning, *inter alia,* ambient air and water quality, air and ground water protection against pollution, industrial pollution and risk management, management waste and chemicals, disposal of hazardous and toxic waste, polluting substances, animal waste, biotechnology, nature

protection, noise, radiation protection, consumer protection, permissible sound levels, exhaust fumes, emissions of pollutants, chemicals, genetically modified products, energy conservation, renewable energy sources and climate change.

In 2005 **Estonia** passed the Environmental Assessment and the Environmental Management System Act.

**Serbia** has enacted specific legislation to regulate planning and construction, mining, geological research, waters, land, forest plants and animals, national parks, fisheries, hunting, waste management, protection against ionic radiation and nuclear safety. In 2004, Serbia enacted the Law on Environmental Protection, Law on Strategic Environmental Assessment, Law on Environmental Impact Assessment and Law on Integrated Pollution Prevention and Control to harmonise its framework with EU regulations. The Criminal Code includes a special chapter on offences against the environment. The initiative to amend the Criminal Code in order to fully comply with Directive 2008/99/EC (crime in the area of environment) was initiated by the Ministry of Environment, Mining and Spatial Planning and approved by the Ministry of Justice. In the course of 2009 and 2010 a new set of laws and implementing legislation in the area of environmental protection was adopted, notably on chemicals, noise protection, prohibition of development, production, storage and usage of chemical weapons, waste, package and packaging waste and biocide products, air protection, nature protection, protection against non-ionising radiation, protection against ionising radiation and sustainable use of fish stock.

The **Slovak Republic** has enacted multitudinous and multifarious environmental legislation in the areas of public administration, environmental funding, examination of influence over the environment, prevention of serious industrial accidents, environmental designation of products, environmental management and auditing, integrated prevention and control of environmental pollution, protection of land and nature, genetically modified organisms, water economy, protection of the quality and quantity of water, protection of ambient air and ozone layer, waste economy, geological works and environmental damages. Offences committed against the environment are defined in the Criminal Code.

In **Spain,** the national Parliament has enacted a specific legislation on natural heritage and biodiversity, assessment of the effects of certain plans and programmes, coastal areas, continental water, the national parks network, environmental liability, integrated pollution prevention and control, the quality and protection of the air, waste and waste packaging, environmental noise, geological sequestration of $CO_2$, access to information and public participation on environmental matters. The regions

may establish a higher level of protection to the basic legislation, but not a lower one.

**Switzerland** has enacted multiple laws of which the most important one is the Environmental Protection Act, which deals with, *inter alia*, pollution control (air pollution, noise, vibrations and radiation), environmental impact assessment, environmentally hazardous substances, the handling of organisms, waste and the remediation of polluted sites. Other crucial laws are the Federal Act on the Protection of Nature and Cultural Heritage, the Water Protection Act, the Forest Act and newly the Federal Act on the Reduction of $CO_2$ Emissions.

### c. ENVIRONMENT AND NATIONAL POLICY FRAMEWORKS INCLUDINGPLANS OF ACTIONS AND INSTITUTIONAL ARRANGEMENTS

**Cyprus** has drawn up and implemented several action plans for the promotion of environmental matters, green and eco label policies, and green public procurement. Responsibility for the protection of the environment is allocated to different ministries. The Ministry of Agriculture, Natural Resources and Environment, namely its Environment Service, is vested with the overall responsibility and the implementation of environmental legislation and programmes. However other ministries also share responsibility in this area, such as the Ministry of Interior, the Ministry of Labour and Social Insurance, the Ministry of Health and the Ministry of Commerce and Industry.

**Hungary** has established a “Green-Point Service” as part of the Public Relations Office, which works within the framework of the Ministry for Environment and Water. The service provides, *inter alia*, access to environmental information and operates a nationwide information network of environment, nature and water protection.

In **Slovenia**, the Resolution on the National Environmental Protection Programme has established four areas which are of high policy concern: climate change, nature and biodiversity, quality of life, and waste and industrial pollution.

In 2004, **Serbia** established the Environmental Protection Agency within the Ministry of Environmental Protection and Spatial Planning, with the task of developing, harmonising and managing the National Environmental Information System, gathering, consolidating and processing environmental data, as well as drafting reports on the environmental status and implementation of the environmental protection policy. In 2008, Serbia adopted a National Sustainable Development Strategy which is structured around three pillars: knowledge-based sustainability, socio-economic conditions and environment and natural

resources. To complement this general strategy several specific action programmes have been adopted. In addition, planning and management of environment protection is secured and provided by implementation of the National Environment Protection Programme, which contains short-term (2010-2014) and long-term objectives (2015-2019), National Waste Management Strategy (2010) and National Strategy for Biodiversity (2011).

The strategic goals of the Republic of **Albania** in the field of the environment are defined in the Environmental Cross-cutting Strategy (ECS). Many of the policies and measures of this strategy are supported by programmes and actions set out in inter-ministerial strategies. The effective implementation of the strategy lies with a number of institutions, but often inter-institutional bodies have been created to ensure co-ordination.

In 2008, the **Austrian** Government adopted comprehensive standards for public participation and recommended their application throughout the federal administration. Although the standards are not yet at present applied comprehensively, NGOs claim their application in the preparation of plans, programmes or policies in the environmental field.

In the **Czech Republic**, the Strategic Framework for Sustainable Development for 2010-2030 identifies key issues devoted to sustainable development and presents measures to address them. Apart from this overarching strategy there are other strategies and plans of action on particular issues in place, e.g. on abating climate change impacts, biodiversity protection, main catchment areas and waste management. The central role in environmental governance at national level is performed by the Ministry of the Environment and its special environmental bodies such as the Czech Environmental Inspectorate. Other ministries and/or national bodies are also involved in environmental protection.

In **Poland**, a National Environmental Policy is adopted for a period of four years in accordance with the Environmental Protection Law. It defines in particular the environmental objectives and priorities, the levels of long-term goals, the type and timing of environmental actions as well as measures necessary to achieve the objectives, including legal and economic mechanisms and financial resources.

In 2007, **Spain** adopted a Sustainable Development Strategy which includes “a long-term perspective to aim towards a more coherent society in terms of the rational use of its resources, and more equitable and cohesive approach and more balanced in terms of land use”. The state legislation usually includes co-ordination mechanisms and planning directives. At the institutional level, an inter-territorial conference on

environment regularly gathers the state and regional authorities competent for the environment and the Advisory Committee on Environment in which NGOs and other civil society organisations participate, to provide advice to the Ministry of Environment.

In **Switzerland**, plans of action are mainly contained in the national legislation processes. Furthermore, a National Biodiversity Strategy is under evaluation.

## 2. ESTABLISHING CONTROL OVER POTENTIALLY HARMFUL ENVIRONMENTAL ACTIVITIES

In **Belgium**, the authorisation of specific activities comes primarily within the remit of the regions. Nevertheless, the federal authority remains responsible for authorising the operation of nuclear activities as well as for authorising activities in marine areas that come under Belgian jurisdiction (North Sea).

In the **Slovak Republic**, the Constitution provides explicitly that the state shall care for economical exploitation of natural resources, ecological balance and effective environmental policy. It shall secure protection of determined sorts of wild plants and wild animals (Article 44).

In **Serbia**, the Law on Environmental Protection establishes manifold instruments to exercise various degrees of control over public and private activities which have an impact on the environment. It contains regulatory and other instruments such as permit regime, user and pollution fees and economic incentives. The law also contains an elaborated sanctioning regime for violators of environmental legislation, even criminal penalties are possible. This law implements the Seveso II Directive, which refers to harmful activities. In addition, three by-laws were passed based on the directive. Competence for law enforcement in the field of environmental protection is divided between: republic environmental protection inspections, provincial environmental protection, local environmental protection inspections.

In **Austria**, besides bans of massive damage to the environment and codes of conduct, permits issued by public authorities are prevailing, which means that activities (mostly economic) are subject to control exerted or permits granted by administrative authorities. Moreover, the Environmental Control Act provides that the Federal Minister responsible for the environment shall submit a written report on the state of implementation of environmental control to the Parliament every three years.

The **Bulgarian** Constitution states that subsurface resources (national roads, forests, beaches, water, etc.) constitute exclusive state property and that the state exercises the sovereign rights to the continental shelf and the maritime spaces (Article 18). The land as a basic national resource shall receive special protection by the state and the society (Article 21). The Environmental Protection Act ensures that anyone who culpably inflicts pollution or environmental damage on another shall be liable to indemnify the aggrieved party (Article 170).

In the **Czech Republic**, control over potentially harmful environmental activities is implemented through granting permissions and supervision of how these are implemented. A system of response measures provides for fines (penalties) and environmental liability. Institutionally the major burden is imposed on national and local authorities. Administrative and criminal courts are also considered part of this protection system as their role is not limited only to determining sanctions.

Similarly, in **Cyprus** environmental permits are issued to industrial and other plants by the Ministry of Labour to regulate air emissions, and by the Ministry of Agriculture regulating industrial waste, dangerous substances, water and soil pollution. The control of industrial pollution is achieved by the licensing of industrial installations and the systematic monitoring of their operation with on-site inspections so that the licensing standards and conditions are met and complied with. If need be, court orders may be obtained. Breach of environmental laws and violations of the conditions of a licence or permit give rise to criminal liability or civil liability for nuisance as well as for negligence for any damage sustained to person or property.

In **Germany**, various environmental laws provide that certain environmentally relevant activities may be commenced only after authorisation by the public authorities. Authorisation conditions aimed at protecting the environment are determined by statute, which are then reviewed by the public authorities in an authorisation procedure. To ensure compliance with obligations, sanctions are imposed for violations.

The Environmental Protection Law of **Poland** provides for a number of legal instruments aimed at establishing control over activities potentially harmful to the environment. For example, a permit issued by the competent authority is required for the operation of systems releasing gases or dust into the air, discharging sewage to water or soil and generating waste (Article 180). Another solution is the establishment of the National Pollutant Release and Transfer Register used to collect data on exceeding the applicable threshold values for releases and transfers of pollutants, and transfers of waste (Article 236a).

Furthermore, the release of gases or dust into the air, the discharge of sewage to water or soil, water consumption and waste storage are subject to a charge for using the environment (Article 273). The Act also governs the issue of responsibility in environmental protection. An important role is also played by the Act on Preventing and Remedying Environmental Damage establishing a mechanism of accountability of entities using the environment for the imminent threat of damage to the environment and environmental damage. The Act on Inspection for Environmental Protection governs the performance of inspection by the Inspection of Environmental Protection, establishes the National Environmental Monitoring including information on the environment and its protection, and also refers to the execution of tasks in the event of environmental damage and major accidents.

Certain natural resources in **Spain** are considered public domain (territorial sea, beaches, rivers or certain forest). Its public use and the temporary exclusive use by concession are controlled in order to ensure its integrity and its preservation. In general, the establishment of environmental permits are used which allows the public administration to supervise that the private activity is developed in accordance with the requirements of the relevant environmental legislation (wastes, waste and chemicals, emissions of pollutants, etc.). In other cases, a prior communication or a responsible declaration must be presented to the public administration before the beginning of the activity, subjected to *ex post* supervision by the public authorities. Other preventive techniques are the certification or the regulation of the market of pollutions fees ($CO_2$). The Spanish law also establishes a system of sanctions, including criminal and administrative, and civil liability for causing environmental damage. For the enforcement of this legislation specialised units exist in the law enforcement agencies and in the Public Prosecutor Office.

In **Sweden**, environmental inspection and enforcement, referred to as “supervision” in the Environmental Code, are carried out by authorities at regional and local level and sometimes at national level. They are integrated in a single carefully balanced inspection and enforcement plan of each responsible authority in order to enable priority planning. To improve inspection efficiency the immediate enforcement authorities should regularly follow up and evaluate their planning and implementation. The Swedish Environmental Protection Agency has issued general guidelines for inspection planning. The Environmental Code also contains provisions on supervision and sanctions. The main enforcement instrument is administrative orders which can be combined with an administrative fine. The Code also includes environmental sanction charges and criminal penalties.

In **Switzerland** control over potentially harmful environmental activities is provided by the competent authorities either at the federal or at the cantonal level.

## 3. REQUIRING ENVIRONMENTAL IMPACT ASSESSMENTS (EIAS)

By **Belgian** law the state is required to carry out substantial EIAs to guarantee its effective control over potentially harmful activities. For example, Article 28 of the Law of 20.01.1999 states that "any activity in marine areas that is subject to a permit or authorisation, […] is subject to an environmental impact assessment by the competent authority appointed to this task by the Minister, both before and after granting the permit or authorisation. The EIA is designed to assess the effects of the activities on the marine environment."

The Nature Diversity Act of **Norway** also contains the requirement to undertake EIA to strike a fair balance between the various conflicting interests. Another very detailed example describing the requirements of an EIA is the **Hungarian** Act LIII of 1995.

According to the **Estonian** Act on Environmental Impact Assessment and Environmental Management System, the explicit goal of the EIA is to prevent and reduce potential environmental damage (Paragraph 2). The Act makes EIAs mandatory in cases where potentially a significant environmental impact could occur or where designated environmental protection sites (Natura 2000 sites) are impacted (paragraph 3). The Act defines environmental impact rather broadly as any direct or indirect effects of activities on human health and well-being, the environment, cultural heritage or property (paragraph 4). Moreover, it has defined that any irreversible change to the environment is considered "significant" (paragraph 5). In addition, the Act contains an extensive list of activities from mining to waste management or public infrastructure project which always require an EIA (paragraph 6). The Estonian Act also contains a section on "transboundary EIAs" (paragraph 30).

In **Austria**, EIAs are *inter alia* governed by the Impact Assessment Act. An EIA is mandatory for projects of the type included in Annex 1 of the Act and which meets certain threshold values or certain criteria specified for each type of project (e.g. production capacity, area of land used). The EIA as now practiced in Austria is a clear quality improvement over previous project licensing instruments and is thus an important step towards precautionary and integrative environmental protection. It also serves as a planning instrument and a basis for decision-making. Moreover, it gives environmental concerns the same degree of attention as any other and makes the project approval procedure more transparent and explicit by involving the public.

Also in **Poland**, the EIA is one of the basic legal instruments of environmental protection, considered the best expression of the principles of prevention and precaution in the investment process. The "Act on Access to Information about the Environment and its Protection, Public Participation in Environmental Protection and Environmental Impact Assessments" makes EIA a mandatory part of the decision-making process aiming at issuing a permit for the implementation of the proposed project, also serving as an auxiliary instrument for ensuring equal treatment of environmental aspects with social and economic issues. In Poland an important role is also played by the EU's instrument for organisations (enterprises and various institutions) - Eco-Management and Audit Scheme - which on a voluntary basis assesses the impact on the environment, in particular of small and medium enterprises and institutions whose individual effects may be relatively small - and therefore not subject to regular supervision by the environmental inspection services - but the sum of their impacts can be a significant burden to the environment.

The **Albanian** Law "On environmental protection" requires that activities with environmental impacts undergo an EIA process before implementation. Detailed EIA procedures are set forth in the Law "On the evaluation of environmental impact" (Chapter III). The activities are classified into two groups: Annex 1 applies to activities that require an in-depth EIA process, while Annex 2 lists the activities that need a summarised process of EIA. With a view to assessing possible adverse impacts on the environment, the law also foresees a review of applications for development. The Law "On the protection of the environment from transboundary effects" describes the procedure to follow for EIAs in a transboundary context.

The **Bulgarian** legislation regulates the issue of EIA in the Environmental Protection Act where it is stated that “An environmental assessment and an environmental impact assessment shall be performed in respect of plans, programmes and investment proposals for construction, activities and technologies, as well as amendments or extensions thereof, the implementation whereof entails the risk of significant impact on the environment...” (Article 81(1)).

In the **Czech Republic**, certain activities and projects specified in the Act on Environmental Impact Assessment, which could have impact on public health and the environment, are subject to EIA. Impact assessment is required also for certain plans and programmes which may have effects on the environment. The Act implements relevant EU legislation and takes into account also international commitments of the Czech Republic under the **Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention).**

In **Cyprus**, EIAs are required to be carried out under specific laws in relation to proposed private and public development projects in order to assess the possible effects of potentially harmful activities on, *inter alia*, human health, green areas, forests, water, property, and the environment generally. An Environmental Impact Assessment Committee was set up in 2001 to advise on environmental issues.

In **Serbia,** according to the Law on Environmental Impact Assessment construction projects may not commence without the prior completion of the impact assessment procedure. The EIA Study must be approved by the competent authority. This Law regulates the impact assessment procedure for projects that may have significant effects on the environment, the contents of the EIA Study, the participation of authorities and organisations concerned as well as the public, the transboundary exchange of information for projects that may have significant impact on the environment of another state, the supervision and other issues of relevance to the impact assessment. The participation of the public in all phases of an environment impact assessment is guaranteed through national legislation.

Under the **Spanish** Environmental Projects Assessments Law, EIA is a prerequisite before issuing a permit in the case of potentially harmful activities and infrastructure works. Besides, other legislation also provides EIAs of a preventive character for certain activities that could produce an important alteration of the public maritime and terrestrial domain (Coastal Area Law) or into the continental waters (Water Law).

According to the **Swedish** Environmental Code an EIA must be submitted together with a permit application. The purpose is to describe the direct and indirect impact of the planned activity. It must include a site

description of the plant or activity as well as descriptions of the technology that will be used. Different alternatives for both these aspects are compulsory. The EIA must also describe the impact on people, animals, plants, land, water, air, climate, landscape and the cultural environment. Furthermore, it should describe impacts on the management of land, water and the physical environment in general, as well as on the management of materials, raw materials and energy.

Also **Switzerland** has enacted the obligation of performing an EIA for installations which are likely to cause extensive environmental contaminations (Article 10a ff. of the Environment Protection Act).

## 4. SECURING PUBLIC PARTICIPATION AND ACCESS TO INFORMATION

In **Belgium** there is a general right of access to public documents, i.e. those stemming from public authorities, enshrined in Article 32 of the Constitution. Moreover, the specific "Law on public access to environmental information" has been established to implement the procedural rights guaranteed in the Aarhus Convention and EC directives. Additionally, Belgium has enacted the "Law on the assessment of the effects of certain plans and programmes on the environment and public participation in the elaboration of the plans and programmes relating to the environment". At the regional level several acts have been passed guaranteeing comparable rights.

The Environmental Information Act of **Norway** builds upon the obligations under the Aarhus Convention. It aims at facilitating public access to environmental information, in particular to the conclusions of environmental studies. According to the Act, administrative agencies are under duty to hold general environmental information relevant to their areas of responsibility and functions available and to make this information accessible to the public. Likewise "private undertakings", including commercial enterprises and other organised activities, are under a similar obligation to collect and provide information about factors relating to their activities which may have an appreciable effect on the environment. Any person is entitled to request such information.

**Bulgaria** has enshrined the right of access to information in its Environmental Protection Act. Article 17 explicitly mentions that it is not necessary for the information requesting party to prove a concrete interest, i.e. personal interest, to receive information.

The Environment Impact Assessment and Environmental Management System Act of **Estonia** also contains provisions on public information. For example, it requires public authorities to publish any conclusions of EIA (paragraph 16).

Like in Belgium, the right of access to information is in general guaranteed in the **Polish** Constitution (Article 74, paragraph 3). Poland has moreover implemented the Aarhus Convention and EU law through its "Act on access to information about the environment and its protection and public participation in environment protection and on the assessment of impact on the environment". The Act prescribes, *inter alia*, that individuals do not have to demonstrate a legal or factual interest. The Act also provides for public participation in projects with environmental impacts. To facilitate access to information Poland has established the Centre for Environmental Information. Emphasis has also been placed on making environmental information easily accessible by using online registers.

In the **Slovak Republic**, the Constitution guarantees the right of everyone to have full and timely information about the state of the environment and the causes and consequences of its condition (Article 45).

The same is the case for the **Serbian** Constitution (Article 74). The access to information of public importance is regulated mainly by the Law on Environmental Protection (Articles 78–82) and the Law on Free Access to Information of Public Importance. Procedures for public participation have been developed by a series of recent laws: the Law on Environmental Protection, the Law on EIA, Law on Strategic Environmental Assessments (SEA) and the Law on the Internal Plant Protection Convention (IPPC).

**Slovenia** has enacted the Act on Access to Information of Public Character, which is not specific to the environment. Similar to Poland, Slovenia has made available online draft regulations and those in force, international agreements and other important documents to ensure maximum openness and transparency of its decision-making and legislative processes.

In **Albania**, the Framework Law "On Environmental Protection" sets out detailed rules on public participation in decision-making on environmental protection. It also guarantees the rights of individuals and environmental and professional NGOs to be informed and have access to environmental data. Additionally, as a Party to the Espoo Convention, Albania has adopted legislation which foresees the right of the public from neighbouring countries to participate in activities with a transborder impact.

In **Austria**, the term "environmental information" used in the Environmental Information Act is broadly phrased so that any kind of information on the state of the environment, factors, measures or activities (possibly) having an impact on the environment or conducive to

the protection of the environment can be collected. The claim to environmental information is deemed an *actio popularis*. As it is not always easy for citizens to identify the body obliged to provide information, the Act provides for a respective duty to forward/refer the request for environmental information to the competent authorities.

Before granting permits or licences under certain laws, public authorities in **Cyprus** are required to obtain the views of any persons interested or who may be affected by the proposed plan or development and of local government boards and municipalities and to give such views due consideration.

In the **Czech Republic**, the Act on Administrative Procedure sets general principles for decision-making procedures within the public administration, including general rules for participation in the procedures. The person considered participant in the procedure is the one whose rights or obligations could be affected directly by the decision as well as everyone indicated as a participant under a special law (paragraph 27). In this context public participation in the decision-making process related to environmental issues is provided for by various special environmental acts.

In **Spain**, the Act 27/2006 guarantees access to environmental information and the diffusion and availability of environmental information to the public. This right is guaranteed without any obligation to declare a certain interest. The right to public participation on environmental matters can be exercised through certain administrative organs (the Advisory Council on Environment, the National Council for Climate Change, the Council for the Natural Heritage and Biodiversity, the National Council of Water, etc.). In addition, direct participation (in person or by representative associations) is possible in most administrative procedures and in the elaboration of procedure, plans or programmes on environmental matters.

**Sweden** has a long tradition of public participation in environmental decision-making, as well as of openness and transparency, or insight, in the activities of public authorities. For almost 40 years there has been an environmental permit procedure for industrial activities and other major installations with an environmental impact. Under the rules in the Environmental Code, anyone who intends to conduct an activity that requires a permit or a decision on permissibility has to consult with the country administrative board, the supervisory authority, and individuals who are likely to be particularly affected. The corresponding process is also guaranteed in transboundary contexts. Under the principle of public access to official documents everyone in Sweden is entitled to examine the content of the information held by public authorities. This is even

guaranteed in the Constitution (Chapter 2 of Act on Freedom of the Press).

**Switzerland** grants general access to information for public documents by its Freedom of Information Act. Moreover, Switzerland is in the process of acceding to the Aarhus Convention.

## 5. MAKING ENVIRONMENTAL RIGHTS JUDICIABLE AND THE ENVIRONMENT A PUBLIC CONCERN

In **Belgium** not only individuals but also NGOs have various possibilities of obtaining access to justice through both judicial and administrative procedures. Generally, to have a standing in the Belgian Courts the applicant needs to prove that he or she has an interest in his or her claim. This has been interpreted by the Belgian Supreme Court as to require the violation of one's own subjective rights. However, in response to this jurisprudence the Law of 12.01.1993 establishes the possibility for injunctive relieves to secure a general interest such as a manifest violation of legislative or regulatory provision on environmental protection or the serious risk of such a violation. This possibility has specifically been designed with environmental organisations in mind. The procedure is only open to national environmental non-lucrative organisations that have existed for at least three years. Moreover, NGOs and the public can turn to the Council of State to voice their complaints. In addition, the Law of 5.8.06 has created a Federal Appeal Committee for access to environmental information. Comparable procedures have been set up at the regional level as well.

Similar to Belgium, NGOs in **Switzerland** that are dedicated to environmental issues for at least ten years are entitled to access justice claiming a violation of the environmental legislation. Additionally, Article 6 of the Environment Protection Act states that authorities and individuals can seek and obtain advice on how to reduce environmental pollution from environmental protection agencies.

The **Hungarian** Act on the General Rules of Environmental Protection provides that natural and legal persons and unincorporated entities are entitled to participate in non-regulatory procedures concerning the environment. In particular, everyone has the right to call the attention of the user of the environment and the authorities to the fact that the environment is being endangered, damaged or polluted. It also allows environmental NGOs to be a party in proceedings concerning environmental protection. The Act, in addition, contains the idea of *actio popularis* stating that "in the event the environment is being endangered, damaged or polluted, organisations are entitled to intervene in the interest of protecting the environment" which includes filing a lawsuit against the

user of the environment (Section 99). Additionally, Hungary has established the Office of the Environment Ombudsman to facilitate public complaints in environmental matters.

Similarly, in **Slovenia** the possibility exists of an *actio popularis* to protect the environment. According to Article 14 of the Environment Protection Act, in order to exercise their right to a healthy living environment, citizens may, as individuals or through societies, file a request with the judiciary. Ultimately, by such a request citizens can oblige a person responsible for an activity affecting the environment, to cease such an activity if it causes or would cause an excessive environmental burden or presents a direct threat to human life or health. Moreover, this can lead to the prohibition of starting an activity which affects the environment if there is a strong probability that the activity will present such a threat. In addition, the Supreme Court has recognised the right to a healthy living environment as one of the personal rights for whose violation compensation and just satisfaction can be claimed.

**Poland's** "Act on the access to information about the environment and its protection and public participation in environment protection and on the assessment of impact on the environment" also ensures public access to justice on environment related matters. This involves, for example, the right of environmental organisations to take part in proceedings with the right of being a party and to appeal against a decision and file a complaint with the administrative court, also in cases when the organisation did not take part in the given proceedings requiring public participation.

The **Albanian** Law on Environmental Protection ensures that any individual or organisation may start legal proceedings in a court regarding environment related matters (Article 81). More specifically, in case of a threat to, or damage or pollution of the environment, individuals, the general public and non-profit organisations are entitled to the right to make an administrative complaint, and to start legal proceedings in a court of law. However, according to the Code of Administrative Procedures, the complainant needs to have exhausted all the administrative procedures before going to court (Article 137.3). This means that the complainant should first seek an administrative review from the relevant public authority and then appeal that decision at a higher body, before going to court. Environment related reviews or appeals may also be lodged with the Ombudsman.

The **Austrian** legal system provides several possibilities for enforcing environmental matters. In general, according to the Civil Code, anybody who is or fears of being endangered by pollution is entitled to file a lawsuit against the polluter and to seek an injunction. This right to preventive

action against pollution detrimental to health has been expressly acknowledged by courts as an integral, innate right of every natural person (Section 16), neither requiring participation in administrative proceedings nor ownership of private property in the proximity of the polluter. In addition, private entities in violation of environmental laws may be sued by competitors and special interest groups, since producing goods in violation of such laws is regarded by courts to be unfair competition. Furthermore, neighbours hold the individual right to prohibit emissions exceeding a certain level (Section 364 et seq). In this context, direct or indirect emissions having an effect from one property to another (e.g. waste water, smell, noise, light and radiation) are deemed as impairments. In addition, special laws provide for claims for damages related to the environment. Most of Austrian provisions on the protection of the environment are, however, of an administrative nature. The application and administration of such laws is subject to an effective appeal mechanism and can finally be challenged at the Administrative Court and/or the Constitutional Court. In addition, at regional level Environmental Advocacy Offices i.e. Ombudsmen for the environment have been set up who, in the position as parties, are authorised to lodge complaints with the Administrative Court with regard to compliance with legal provisions which are relevant for the environment. Furthermore, the Federal Environmental Liability Act provides for an environmental complaint, if the public authority fails to take action in the event of environmental damage (to water and soil, provided that human health is affected).

In **Cyprus**, natural or legal persons have a right under Article 146 of the Constitution to file a recourse to the Supreme Court against "any decision, act or omission of any organ, authority or person exercising any executive or administrative authority" if certain conditions are met. The complainant must have an "existing legitimate interest" which is adversely and directly affected. Class actions are not therefore available, as the interest required must be personal to the complainant. Nonetheless the Supreme Court's jurisprudence has extended the definition of "existing legitimate interest" to include local government boards and municipalities, but only in cases where the local natural environment is of a direct interest to or is the responsibility of the complainant community as a whole.

In the **Czech Republic**, the right to appeal against a decision issued by an administrative authority is guaranteed. The appeal procedure is governed by the Act on Administrative Procedure and special environmental laws. Access to judicial protection in case of public environmental concern is regulated only through general provisions of the Act on Judicial Administrative Procedure. In this context a special legal status in order to protect public interests is given by the law to the

Attorney General and also to a person to whom a special law, or an international treaty which is a part of the Czech legal order, explicitly commits this authorisation (§ 66).

In **Spain**, citizens, NGOs or any other entity who exercise the right of access to information may challenge before the administrative authorities any decision refusing the information requested and, if the denial decision is ratified, before the judicial authorities. The Act 27/2006 allows a request of the access to information from natural or legal persons acting on behalf or by delegation of any public authority. The decision adopted by the Public Administration is mandatory to the private person and is enforceable by coercive fines. In addition, on environmental matters, NGOs and other non-profit entities (under certain conditions) may exercise before the courts an *actio popularis* against any administrative decision, or the failure to adopt it, violating the environmental rules.

In **Sweden**, the right to appeal a decision concerning the release of an official document is set out in both the Freedom of the Press Act (Chapter 2, Article 15) and the Public Access to Information and Secrecy Act (Chapter 6, Section 7). The right to a determination by a court of law of the substantive and formal validity of decisions, etc., is provided for in different parts of Swedish legislation. This is particularly the case for permit decisions taken under the rules of the Environmental Code as well as permit decisions taken by the government in accordance with the Act on Judicial Review of Certain Government Decisions. Under the latter Act, environmental NGOs also have an explicit right to apply for judicial review of permit decisions by the government that are covered by article 9, paragraph 2, of the Aarhus Convention. In the case of environmental decisions issued under the Planning and Building Act, new rules in that Act also give environmental NGOs the right to appeal such decisions. In accordance with the Environmental Code as well as a number of other specialised acts, decisions may be appealed by a person who is affected by the decision if it has gone against him or her, by environmental NGOs, and by non-profit organisations that have safeguarded the interests of nature conservation or environmental protection as their main aim, that have at least 100 members or prove by other means that they have the support of the public, and that have conducted activities in Sweden for at least three years.

To ensure that authorities handle their business correctly, the actions and omissions of the public authorities in Sweden are examined by the Parliamentary Ombudsmen and the Chancellor of Justice. The public, including environmental NGOs, are always able to report infringements of various environmental regulations to supervisory authorities, and the public can also take direct contact with the Parliamentary Ombudsmen,

who examine complaints concerning deficiencies and omissions in the exercise of public authority.

In **Serbia**, the Law on Environmental Protection, on EIA, on Strategic Environmental Assessment (SEA) and on the International Plant Protection Convention (IPPC) enable individuals and organisations (including non-governmental organisations) to file administrative complaints and access courts in environmental matters. This environmental legislation envisages that individuals or organisations concerned with environmental development can initiate a decision review procedure before the responsibility authorities or a court. Those who do not have legal personality (e.g. state bodies, community organisations) can participate in the review process if they have a legal interest in the proceedings or hold specific rights and obligations (Article 40 paragraph 1 and 2 of the Law on General Administrative Procedure). The plaintiff in administrative disputes may be a natural, legal or other person, if considers to be deprived of certain right or interest provided by law by administrative act (Article 11 of the Law on Administrative Disputes).

In addition, each natural or legal person, - domestic or foreign - who believes that his/her rights were breached by the action or a failure to act by a public authority is entitled to lodge a complaint with the Ombudsman. The Ombudsman will refer the applicant to the relevant authorities to initiate legal proceedings, if all legal remedies have been exhausted (Article 25 of the Law on the Ombudsman).

Anybody can demand from another person to remove sources of hazard of serious damage to him/her personally or to the general public (indefinite number of people). He can also demand the cessation of activity inducing harassment or damage hazard if the harassment or damage can not be prevented by appropriate measures (Article 156 paragraph 1 of the Law on Obligatory Relations). Article 54 of the Criminal Procedure Code prescribes that the proposal for criminal prosecution should be lodged to the competent public prosecutor, and the proposal for private prosecution to the competent court.

# Appendix V: Further Reading

The literature listed in this appendix provides some additional information on the current state and interpretation of contemporary international environmental law, the European Convention on Human Rights and the European Social Charter with reference to the environment. The list is thought to complement the objective summary of the case-law of the Court and the Committee through academic analysis.

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This document contains the Proceedings of the High-level Conference Environmental Protection and Human Rights which took place on 27 February 2020 in Strasbourg (France), at the headquarters of the Council of Europe. It was organised by the Georgian Presidency of the Committee of Ministers of the Council of Europe in co-operation with, notably, the Steering Committee for Human Rights (CDDH).

On that occasion, the participants considered how to develop a strategy to support member States in better meeting their obligations in respect of human rights and environmental protection. In particular, they examined the potential of the European Convention on Human Rights, the European Social Charter and other Organisation's instruments, while keeping in mind current or previous initiatives at universal, regional and national levels.

This publication also includes the 2nd edition of the Manual on Human Rights and the Environment which comprises the relevant case-law of the European Court of Human Rights and the standards developed by the European Committee of Social Rights in respect of the European Social Charter.

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The Council of Europe is the continent's leading human rights organisation. It comprises 47 member states, including all members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.

**Presidency of Georgia**
Council of Europe
November 2019 – May 2020

**Présidence de la Géorgie**
Conseil de l'Europe
Novembre 2019 – Mai 2020

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