



European Union Action to
Fight Environmental Crime

The European Court of Human Rights and Environmental Crime

WORK PACKAGE 2 ON “INSTRUMENTS, ACTORS, AND INSTITUTIONS”



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Abstract

The report aims to highlight the role and the influence of the human rights protection's system provided for by the European Convention on Human Rights (ECHR) and the European Court of Human Rights (ECtHR) on the fight against the environmental crime at the European and national level. Through an analysis of the ECtHR case-law concerning the infringements of other rights, such as the right to life (Article2) and the right to private and family life (Article8), the reports provides an overview of the ECtHR case-law relating to the respect of the right to a healthy environment. This overview shows the positive obligations incumbent on the Contracting States to criminalise the most serious conducts affecting the environment. Indeed, it is worth to mention that, besides negative obligations arising from the protection of the human rights provided for by the ECHR and imposing a duty on the States of not interfering in the individuals' enjoyment of their rights, the ECtHR has elaborated the so called "doctrine of positive obligation", which requires that States actively protect the human rights within their jurisdiction, even through the adoption of preventive and repressive measures against the infringements of human rights perpetrated not only by the State's action, but also by the private subjects.

The report also focuses on the influence of the ECtHR case-law concerning the environmental matter on the EU legal system; indeed, it is possible to draw a kind of "integrated restrictions" table, built up from the limitations established by the ECtHR jurisprudence (i.e. the principles of necessity and proportionality of the criminal intervention), which can represent specific guidelines for the EU legislator, in the development of the competence in criminal matter provided for by Article83 TFEU, in order to prevent an excessive use of such a competence.

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1 Preliminary remarks

This chapter of the report deals with the relevance and the influence of the human rights protection's system provided for by the European Convention on Human Rights (ECHR) and the European Court of Human Rights (ECtHR) on the fight against the environmental crime at the European and national level. Indeed, after the entry into force of the Lisbon Treaty, the whole system of protection of fundamental rights at the European level has been enhanced by the provision of Article 6 TEU, which made the EU Charter of Fundamental Rights binding (para. 1), included the rights protected by the ECHR – together with the constitutional traditions common to the Member States - among the general principles of the EU law (para. 3), and further stated the accession of the EU to ECHR.¹

Moreover, Article 52, para. 3, of the EU Charter provides for that: “*In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.*”

This provision is also confirmed by the *Explanations to the EU Charter*, which state, referring to Article 52, para. 3, that: “*The reference to the ECHR covers both the Convention and the Protocols to it. The meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case law of the European Court of Human Rights and by the Court of Justice of the European Communities.*”

Therefore, considering such remarks, the provision of Article 83 TFEU, which attributes an indirect competence in criminal matter to the European legislator (see in this respect the Report on the European Level, Article 83 TFUE)² and also in the perspective of a desirable widening of the competences of the European Public Prosecutor's Office (EPPO) to environmental crime (see the Report on the European Level, Article 86 TFEU), the analysis of the role and the influence of the ECHR system on the fight against the environmental crime is particularly worthwhile.

In this respect, the approach shall be double.³ On the one hand, the positive obligation of criminal protection, which the ECtHR imposes to the Contracting States, are to be analysed, especially in relation to the right to life (Article 2) and the right to respect for private life (Article 8). When some conducts represent a serious threat to the

¹ On the European Charter of Fundamental Rights, see Giovanni Grasso, “La protezione dei diritti fondamentali nella Costituzione per l’Europa e il diritto penale: spunti di riflessione critica”, in *Lezioni di diritto penale europeo*, ed. Giovanni Grasso and Rosaria Sicurella (Milano: Giuffrè, 2007), 654-655; Francesco Palazzo, “Charte européenne des droits fondamentaux et droit penal”, *Revue de Science Criminelle* (Janvier-Mars 2008): 1 ff.; Nicoletta Parisi, “Funzione e ruolo della Carta dei diritti fondamentali nel sistema delle fonti alla luce del Trattato di Lisbona”, *Diritto dell’Unione Europea* (2009): 656-657; Luigi Daniele, “Carta dei diritti fondamentali dell’Unione europea e Trattato di Lisbona”, *Il diritto dell’Unione europea* (2008): 655 ff.; Oreste Pollicino and Vincenzo Sciarabba, “La Carta di Nizza oggi tra ‘‘sdoganamento giurisprudenziale’’ e Trattato di Lisbona”, *Diritto pubblico comparato ed europeo* (2008): 101 ff.; Emilio Pagano, “Dalla Carta di Nizza alla Carta di Strasburgo dei diritti fondamentali”, *Diritto pubblico comparato ed europeo* (2008): 94 ff.; Lucia Serena Rossi, “I diritti fondamentali nel Trattato di Lisbona”, www.europeanrights.eu; Ugo Villani, “Principi democratici e diritti fondamentali nella ‘Costituzione europea’”, *La Comunità Internazionale* 4 (2005): 643 ff.; Stefano Manacorda, “Carta dei diritti fondamentali dell’Unione europea e CEDU: una nuova topografia delle garanzie penalistiche in Europa?”, in *La Convenzione europea dei diritti dell’uomo nell’ordinamento penale italiano*, ed. Vittorio Manes and Vladimiro Zagrebelsky (Milano: Giuffrè, 2011): 147 ff.; Sergio Carrera, Marie De Somer and Bilyana Petkova, “The Court of Justice of the European Union as a Fundamental Rights Tribunal. Challenges for the effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice”, in *CEPS Paper in Liberty and Security in Europe* (2012) n. 49/August.

² Giovanni Grasso, “La «competenza penale» dell’Unione europea nel quadro del Trattato di Lisbona”, in *L’evoluzione del diritto penale nei settori d’interesse europeo alla luce del Trattato di Lisbona*, ed. Giovanni Grasso, Lorenzo Picotti and Rosaria Sicurella (Milano: Giuffrè, 2011): 694.

³ For a similar approach to the study of the case-law of ECtHR, see Loukis Loucades, “Environmental protection through the jurisprudence of the European Convention on Human Rights”, *British Yearbook of International Law* (2005): 250.

environment and consequently to the life of individuals, the Court often requires the Contracting States to provide for relevant criminal legislation, in order to sanction such detrimental behaviours.⁴ On the other hand, the judgments of the ECtHR envisage a kind of “integrated table” of general requirements related to the criminal policy (i.e. the principles of necessity and proportionality of the criminal intervention), which can represent a kind of guidelines for the EU legislator, in the development of the competence in criminal matter provided for by Article 83 TFEU, in order to prevent an excessive use of such a competence.⁵

Moreover, the future accession of the EU to the ECHR will cause a reinforcement of the tasks devoted to the ECtHR, which will be able to judge the compliance with the fundamental rights protected by the ECHR and ECtHR, not only of the national legislations, but also of the European legislation concerning the environmental matter.⁶

2 The protection of the environment in the ECHR system

The word “environment” is not mentioned in the provisions of the European Convention on Human Rights (ECHR) and even less the concept of a right to a healthy environment. Similarly, the Convention does not directly determine whether an individual has the right to a healthy environment. Therefore, the main concern consists of the question: to what extent can individuals invoke such a new right to a healthy environment, alongside the State’s correlative obligation in front of an international judicial body. Actually, the right to a healthy environment is recognized in European case-law through an extensive interpretation of the applicability domain of certain other rights, expressly provided for in the Convention. It derives consequently that any infringement of the right to a healthy environment cannot be invoked as such before the European Court of Human Rights (ECtHR), since it is not protected specifically by the Convention. As the Court stipulates in its case-law: “severe environmental pollution may affect individual’s [...] private and family life adversely [...]. Yet the crucial element which must be present in determining whether, in the circumstances of the case, environmental pollution has adversely affected one of the rights safeguarded by paragraph 1 of article 8 is the existence of a harmful effect on a person’s private or family sphere and not simply the general deterioration of the environment. *Neither article 8 nor any of the other articles of the Convention are specifically designed to provide general protection to the*

⁴ Concerning the positive obligation of criminal protection provided by the case law of the ECtHR, see Giovanni Grasso, “La prospettiva penalistica (Protezione dei diritti fondamentali e obblighi di tutela penale)”, in *Nuove forme di tutela delle situazioni soggettive nelle esperienze processuali. Atti dell’Incontro di studi* (Messina, 26 settembre 2003), (Milano: Giuffrè, 2004): 113 ff.; Emanuele Nicosia, *Convenzione europea dei diritti dell'uomo e diritto penale* (Torino: Giappichelli, 2006): 255 ff.; Phillip Leach, “Positive Obligations from Strasbourg – Where do the Boundaries Lie?”, *Interights Bulletin* (2006): 123 ff.; Roberto Chenal, “Obblighi di criminalizzazione tra sistema penale italiano e Corte europea dei diritti dell'uomo”, *Legislazione Penale* (2006): 176 ff.; Giancarlo De Vero, “La giurisprudenza della Corte di Strasburgo”, in *Delitti e pene nella giurisprudenza delle Corti europee*, ed. Giancarlo De Vero and Giuseppina Panebianco (Torino: Giappichelli, 2007), 28; Francesco Vigano, “Il diritto penale sostanziale italiano davanti ai giudici della CEDU”, *Giurisprudenza di merito* 12 (2008): 81 ff.; Caterina Paonessa, *Gli obblighi di tutela penale. La discrezionalità legislativa nella cornice dei vincoli costituzionali e comunitari* (Pisa: Edizioni ETS, 2009): 167 ff.; Valeria Scalia, *Profili penalistici e obblighi di tutela nella giurisprudenza della Camera dei diritti dell'uomo per la Bosnia e l'Erzegovina* (Torino: Giappichelli, 2009): 77 ff.; Francesco Vigano, “Obblighi convenzionali di tutela penale?”, in *La Convenzione europea dei diritti dell'uomo nell'ordinamento penale italiano*, ed. Vittorio Manes and Vladimiro Zagrebelsky (Milano: Giuffrè, 2011): 243 ff.; Matthias Klatt, “Positive obligation under the European Convention on Human Rights”, *ZaöRV* 71 (2011): 692 ff.; Anna Maria Maugeri, “Fundamental Rights in the European Legal Order, both as a Limit on Punitive Power and as a Source of Positive Obligation to Criminalise”, *New Journal of European Criminal Law* 4 (2013): 374-408.

⁵ See Rosaria Sicurella and Valeria Scalia, “Data Mining and Profiling in the Area of Freedom, Security and Justice. State of Play and New Challenges in the Balance between Security and Fundamental Rights Protection”, *New Journal of European Criminal Law* 4 (2013): 409 ff.

⁶ See in this respect Fifth Negotiation Meeting between the CDDH ad hoc negotiation group and the European Commission on the accession of the European Union to the European Convention on Human Rights – Final report to the CDDH, Strasbourg, 5 aprile 2013, 47+1(2013)008, Annex V – Draft Explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms.

environment as such; to that effect, other international instruments and domestic legislation are more pertinent in dealing with this particular aspect.⁷

Analysing the case-law of ECtHR it is possible to observe that the violation of the right to a healthy environment has been considered in connection with other fundamental rights expressly provided for, such as the right to life (Article 2 ECHR), the right to private and family life (Article 8 ECHR), the right to property (Article 1-Additional Protocol n. 1 to ECHR), the right to a fair trial (Article 6 ECHR) and the freedom of speech (Article 10 ECHR).

According to the *Manual on Human Rights and Environment* drafted by the Council of Europe, “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 emissions 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.”

Therefore, in order to have an overview of the ECtHR case-law relating to the respect of the right to a healthy environment, it is necessary to analyse different judgments concerning the infringements of other rights, which have been connected to such a right by the Court.⁸ In fact, such an in-depth overview is essential in order to outline not only the positive obligations to criminalise the most serious conducts affecting the environment, provided for in the case law of the ECtHR, but also the constraints to the national legislations (and after the accession of the EU to the ECHR, even to the EU legislation), strictly related to the principles of necessity and proportionality (which are often taken into consideration in those cases involving articles 8, 10 and 1 of Protocol n. 1), which represent a crucial aspect of this case law.

⁷ See ECtHR, 22.05.2003, *Kyrtatos v. Greece*, application n. 41666/98, para. 52 (emphasis added).

⁸ In this respect and generally speaking about the ECtHR case-law concerning environment-related violations, see Council of Europe, *Manual on Human Rights and Environment*, http://www.coe.int/t/dghl/standardsetting/hrpolicy/Publications/Manual_Env_2012_nocover_Eng.pdf; Alastair Mowbray, *Cases and Materials on the European Convention on Human Rights* (Oxford: Oxford University Press, 2004), 385 ff.; David J. Harris et al., *Law of the European Convention on Human Rights* (Oxford: Oxford University Press, 2009); 390 ff.; Hari M. Osofsky, “Learning from Environmental Justice: A New Model for International Environmental Rights”, in *Human Rights and the Environment*, ed. Dinah. L Shelton (Cheltenham-Northampton: Edward Elgar Research Collection, 2011): vol. I, 71 ff.; Sumudu Atapattu, “The Right to a Healthy Life or the Right to Die Polluted The Emergence of a Human Right to a Healthy Environment Under International Law”, in *Human Rights and the Environment*, ed. Dinah. L Shelton (Cheltenham-Northampton: Edward Elgar Research Collection, 2011): 57 ff. (see in particular 90 ff.); Alan Boyle, “Human Rights or Environmental Rights? A Reassessment”, in *Human Rights and the Environment*, ed. Dinah. L Shelton (Cheltenham-Northampton: Edward Elgar Research Collection, 2011): 132 ff.; Sergio Bartole, Pasquale De Sena and Vladimiro Zagrebelsky, *Commentario breve alla Convenzione Europea dei Diritti dell’Uomo* (Padova: CEDAM, 2012): 349 ff.; Chris Hilson, *Risk and the European Convention on Human Rights: Toward a New Approach*, http://www.reading.ac.uk/web/FILES/law/CYEL_Hilson_article_2_June_final.pdf; Laura Dogaru, *Preserving the Right to a Healthy Environment in ECHR Jurisprudence*, http://revcurrentjur.ro/arkiva/attachments_201104/recjurid114_9F.pdf; Jonathan Verschueren, *Contribution of the case law of the European Court of Human Rights to sustainable development in Europe*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2321663.

3 Pollution⁹

3.1 Experimental dangerous activities

L.C.B. v. United Kingdom, Application n. 14/1997/798/1001, 09 June 1998

No violation of Article 2 - No violation Article 3

The case was about the nuclear tests conducted on the Christmas Island by the United Kingdom between 1952 and 1967. Service personnel had to line up in the open during the tests and were possibly exposed to dangerous levels of radiation. The applicant contended that she could have received an earlier diagnosis about her condition and thus more effective treatment if the government had not failed to notify her family about the increased risk of cancer caused by her father's exposure to radiation. Such an omission of the State – she alleged – caused an infringement of her right to life and the prohibition of torture under Article 2 and Article 3 respectively. The Court ruled that there was no violation of Article 2 and Article 3, because it noted that there was not sufficient evidence to conclusively decide whether the applicant's father was exposed to dangerous levels of radiation, and the State did not have an obligation to warn the applicant's parents of health effects from radiation unless it "appeared likely at the time" that the radiation exposure was of a real risk to the applicant. The Court concluded that evidence supporting the causal link between the nuclear tests and cancer in children was not strong enough to support such an obligation.

Roche v. United Kingdom, application n. 32555/96, 19 October 2005

Violation of Article 8.

The applicant was a British citizen who suffered from a series of medical conditions, such as hypertension, bronchitis, and bronchial asthma, that he alleged resulted from mustard and nerve gas tests undergone during his military service at Porton Down Barracks in England. The applicant was concerned, so he contacted the military to gain access to information about medical reports from his time at Porton Down Barracks beginning in 1987. The military only partially granted his request. The applicant alleged that the government's failure to provide him with his medical records caused him great anxiety and stress and constituted a violation of Article 8. The Court ruled that there was a violation of Article 8, because the government had a positive obligation to establish an effective and accessible procedure to grant the applicant access to "all relevant and appropriate information" regarding risks to his health from his military service without the applicant having to litigate. According to the Court, the government failed to do this.

Vilnes and Others v. Norway, application nos. 52806/09, 22703/10, 05 December 2013

No violation of Article 2 – Violation of Article 8

The applicants complained that they had sustained damage to their health after working in diving operations in the North Sea. This had resulted from the failure of the Norwegian authorities to protect their rights under Articles 2 and 8 of the Convention. The applicants complained generally, with reference to Article 2, that the respondent State had failed to take necessary measures to prevent the divers' lives from being put at risk that was avoidable. According to the Court's case-law, the respondent State had a duty to provide effective protection for the applicants, with a particular emphasis on the duty to provide information about the risks involved in diving operations and rapid tables. The Court ruled that there was no violation of Articles 2, since the authorities of the respondent State went to some lengths in their efforts to secure the protection of the divers' safety and health by taking a wide range of measures, and in so doing they acted in a manner that was consistent with their positive obligations under Article 2. On the contrary, the Court concluded that there was a violation of Article 8 of the Convention on account of the failure of the respondent State to ensure that the applicants received essential information, enabling them to assess the risks to their health and safety.

⁹ All the judgments of the European Court of Human Rights are available at the website <http://hudoc.echr.coe.int>

3.2 Productive activities causing danger to people's health

López Ostra v. Spain, application n. 16798/90, 03 December 1994

Violation of Article 8.

The applicant, a resident of the town of Lorca, resided only twelve meters from a liquid and solid waste treatment plant, that was operating without the proper license beginning in July 1988. An accident at the plant caused gas fumes, “pestilential” smells, and other environmental problems, which resulted in various nuisances and health problems and even a three-month evacuation of the town. The Court ruled that there was a violation of Article 8, as it found that the plant constituted a serious interference with the rights to home and private and family life under Article 8. Next, the Court ruled that the authorities failed to take reasonable and appropriate measures to protect the applicant's Article 8 rights. In this regard, the Court noted that local authorities allowed the plant to be built on government land, subsidized the construction, failed to correct persisting pollution problems after the plant reopened, and delayed and appealed legal attempts to shut down the illegal plant. The Court concluded these burden measures on the applicant did not strike a “fair balance” with the legitimate aim of the community in the economic benefits of a waste treatment plant.

Guerra and Others v. Italy, application n. 116/1996/735/932, 19 February 1998

Violation of Article 8.

The applicants were residents of the town of Manfredonia that was located one kilometer from a chemical factory that produced fertilizer and caprolactam. The chemical factory released a slew of dangerous substances, including nitric oxide, ammonia, arsenic trioxide, and inflammable gas that could cause an explosion. Local atmospheric conditions also caused emissions to regularly drift directly over Manfredonia.

Meanwhile, the applicants were unable to access information regarding the risks of the chemical plant. The Court unanimously ruled that there was a violation of Article 8, as the chemical plant's harmful toxic emissions constituted a significant interference with the right to respect for private and family life and home. The Court then determined that Italian authorities failed to take reasonable and appropriate measures to protect the applicants from the toxic emissions. Considering that the reports on safety were never transmitted to the local population, and that information about the fertilizer plant was not received until production ceased in 1994, the applicants were unable to assess the risk the plant posed to their health. The Court thus ruled that authorities failed to secure a sufficient level the Article 8 rights of the applicant.

Taskin and Others v. Turkey, application n. 46117/99, 10 November 2004

Violation of Article 8

The applicants, who lived in and around the village of Bergama, all resided within 10 kilometers of a mining site. In February 1992, authorities granted a mining company rights to operate a gold mine, which included authorization to use cyanide leaching to extract the gold. The Court ruled that the State violated Article 8 of the ECHR, because the authorities should have provided the applicants with the necessary information to assess the danger to their health. This constituted a failure to take reasonable and appropriate steps to safeguard the interests of the applicant's right to private and family life and home and thus violated Article 8.

Öneryildiz v. Turkey, Application n. 48939/99, 30 November 2004

Violation of article 2 – Violation of Article1 of Additional Protocol n. 1

The applicant lived in the slum quarter of Kazım Karabekir in Istanbul, which was surrounded by a rubbish tip (i.e. a landfill). A 1991 expert report concluded that the rubbish tip did not conform to the relevant regulations and thus posed a serious health risk, especially because of the potential for a methane explosion. Authorities did not act on this information, and a methane explosion in April 1993 destroyed ten houses, including the applicant's house, killing nine of his relatives. While two mayors were given criminal sentences for failing to prevent the accident, the court commuted their prison sentences to fines, which were unenforced. The Court ruled that there was a violation of Article 2, because authorities knew or ought to have known of the significant risk of a methane explosion by, at the very latest, the time of the expert report in 1991, Turkish authorities had a positive obligation to take necessary and sufficient measures to safeguard the lives of local residents. Instead of installing a gas-

extraction system, which would have been effective and not overly burdensome, Turkish authorities failed to take appropriate steps to prevent the explosion. The Court also notes that Article 2 requires an effective, independent, and impartial official investigation procedure and sufficient criminal penalties for lost lives. While authorities conducted an official investigation and exposed the authorities responsible for the deaths, the courts convicted these officials for negligence in performing their duties but not for endangering the lives of others. This penalty was inadequate to meet the obligations arising out of Article 2 because it did not punish authorities for the lost lives.

***Fadeyeva v. Russia*, application n. 55723/00, 05 June 2005**

Violation of Article 8.

The applicant was a resident that lived about 450 meters from the Severstal steel plant, Russia's largest iron smelter and employer of about 60,000 people. The applicant lived within the "sanitary security zone" (SSZ) – a 5,000 meter pollution buffer zone where, by law, nobody was supposed to live. The applicant alleged that Russia violated Article 8 of the ECHR by failing to protect her from a severe environmental nuisance.

The Court stated that there was a violation of Article 8, as it found a causal link between the severe emissions from the steel plant and the applicant's health, citing reports of the health effects that dangerous levels of pollution had on the applicant. Moreover, emissions exceeded legal limits reach an unsafe level by definition. The State therefore had a positive obligation to strike a fair balance between the rights to respect for the applicant's home and private life and the interests of the community in the steel plant. The Court ruled that Russia failed to comply with this obligation, firstly because the conditions of the steel plant violated domestic environmental standards that the State did not properly enforce, and secondly because the State failed to enforce laws that were supposed to relocate the applicant out of the SSZ.

***Tătar v. Romania*, application n. 67021/01, 27 January 2009**

Violation of Article 8

The applicants were Romanian nationals, who lived in Baia Mare (Romania). Paul Tătar has lived since 2005 in Cluj-Napoca (Romania). The company S.C. Aurul S.A., operating as S.C. Transgold S.A., obtained a license in 1998 to exploit the Baia Mare gold mine. The company's extraction process involved the use of sodium cyanide. Part of its activity was located in the vicinity of the applicants' house. On 30 January 2000 an environmental accident occurred at the site. A United Nations study reported that a dam had breached, releasing about 100,000 m³ of cyanide-contaminated tailings water into the environment. Relying on Article 2 (right to life) of the European Convention on Human Rights, the applicants complained that the technological process used by the company put their lives in danger, and that the authorities had failed to take any action in spite of the numerous complaints filed by Tătar. The Court observed that pollution could interfere with a person's private and family life by harming his or her well-being, and that the State had a duty to ensure the protection of its citizens by regulating the authorising, setting-up, operating, safety and monitoring of industrial activities, especially activities that were dangerous for the environment and human health. The Court observed that the existence of a serious and material risk for the applicants' health and well-being entailed a duty on the part of the State to assess the risks, both at the time it granted the operating permit and subsequent to the accident, and to take the appropriate measures. The Court observed that a preliminary impact assessment conducted in 1993 by the Romanian Ministry of the Environment had highlighted the risks entailed by the activity for the environment and human health and that the operating conditions laid down by the Romanian authorities had been insufficient to preclude the possibility of serious harm. The Court further noted that the company had been able to continue its industrial operations after the January 2000 accident, in breach of the precautionary principle, according to which the absence of certainty with regard to current scientific and technical knowledge could not justify any delay on the part of the State in adopting effective and proportionate measures. The Court also pointed out that authorities had to ensure public access to the conclusions of investigations and studies. It reiterated that the State had a duty to guarantee the right of members of the public to participate in the decision-making process concerning environmental issues. It stressed that the failure of the Romanian Government to inform the public, in particular by not making public the 1993 impact assessment on the basis of which the operating license had been granted, had made it impossible for members of the public to challenge the results of that assessment. The Court concluded that the Romanian authorities had failed in their duty to assess, to a satisfactory degree, the risks that the company's activity might entail, and to take suitable measures in order to protect the rights of those concerned to respect for their private lives and homes, within the meaning of Article 8, and more generally their right to enjoy a healthy and protected environment.

***Giacomelli v. Italy*, application n. 59909/00, 26 March 2007**

Violation of Article 8.

The applicant was a resident of Brescia who lived 30 meters away from a plant that treated and stored “special waste,” some of which was hazardous. The government contended that the significant benefit of treating waste and boosting the economy justified the plant’s operations under Article 8, para. 2. The applicant stressed the government had failed to take affirmative steps to protect the applicant from noise, odours, and emissions in violation of Article 8. The Court ruled that there was a violation of Article 8 of the ECHR, as the hazardous waste treatment constituted a serious interference of rights arising out of Article 8. Furthermore, the Court stated that the government failed to justify this interference, since they did not strike a fair balance between the interests of the individual and those of the whole community. The Court also noted that national authorities failed to enforce an Italian administrative court decision to suspend the plant. Overall, according to the Court's view, authorities failed to take reasonable and appropriate steps to uphold Article 8.

***Dubetska and Others v. Ukraine*, application n. 30499/03, 10 February 2011**

Violation of Article 8.

The applicants were residents of the village of Silets, who lived near a State-owned factory and mine. Studies had showed negative environmental effects, like ground water infiltration, toxic dust in the atmosphere and soil, and heavy metals in the water and soil, resulting from the spoil heaps and other parts of the factory and mine. Air and water tests had also showed pollutant levels exceeding maximum standards by several times. Meanwhile, the applicants had suffered from serious health effects such as chronic bronchitis, emphysema, and cancer. These factory and mine also increased flooding. The applicants alleged that the government’s failure to protect them from these environmental conditions violated Article 8. The Court ruled that there was a violation of Article 8, since, looking at the nuisance’s intensity, duration, and effect on health and quality of life, it determined that there was a significant interference with the right to private and family life and home. The Court reasoned that pollution exceeded allowable levels by law and that studies showed serious health risks. Also considering that the factory and plant were government owned, the Court found a clear duty of the government to secure the Article 8 rights of the applicants. Such a duty was not respected as the government’s attempts to mitigate the pollution largely failed: pollution reduction plans went unimplemented, authorities failed to resettle the applicants, the spoil heaps were never downsized, and operations were never suspended. Years of judicial proceedings did not remedy this failure of enforcement, either.

***Di Sarno and Others v. Italy*, application n. 30765/08, 12 January 2012**

Violation of Article 8.

The applicants were 18 Italian nationals, 13 of whom lived in - and the other five who worked in – the municipality of Somma Vesuviana (Campania). From 11 February 1994 to 31 December 2009 a state of emergency was in place in the region of Campania, declared by the then Prime Minister on account of serious problems with the disposal of urban waste. The applicants complained that, by omitting to take the necessary measures to ensure the proper functioning of the public waste collection service and by implementing inappropriate legislative and administrative policies, the State had caused serious damage to the environment in their region and placed their lives and health at risk. They criticised the authorities for not informing those concerned of the risks entailed in living in a polluted area. The Court pointed out that States had first and foremost a positive obligation, especially in relation to hazardous activities, to put in place regulations appropriate for the activity in question, particularly with regard to the level of the potential risk. Article 8 also requires that members of the public should be able to receive information enabling them to assess the danger to which they are exposed. The collection, treatment and disposal of waste were hazardous activities; as such, the State had been under a duty to adopt reasonable and appropriate measures capable of safeguarding the right of those concerned to a healthy and protected environment. The Italian authorities had for a lengthy period been unable to ensure the proper functioning of the waste collection, treatment and disposal service, resulting in an infringement of the applicants' right to respect for their private lives and their homes. The Court therefore held that there had been a violation of Article 8.

3.3 Natural disasters

Budayeva and Others v. Russia, application nn. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 22 March 2008

Violation of article 2 – No violation Article1 of Additional Protocol n. 1

The applicants were Russian citizens primarily from the town of Tyrnauz, which was devastated by several mudslides in July 2000. Russian authorities did not give any warning of the first mudslide. While there was an order to evacuate the area after the first mudslide, some of the applicants returned home prematurely because there were no barriers or officials to indicate that the evacuation was still active. Some noticed that their utilities were on again and took this to mean they could return home. The next day, there was an even larger mudslide, killing the husband of one of the applicants. Several more mudslides occurred over the next week. The applicants alleged that government authorities caused or exacerbated the effect of the mudslides and thus caused damage to their homes, possessions, and health in violation of Article 2. The Court ruled that there was a violation of Article 2 (right to life), which posed a positive duty on the government to take appropriate measures to safeguard the lives of individuals, particularly in regards to dangerous activities, which includes the duty to adequately notify the public about life-threatening emergencies and to establish procedures to fix any shortcomings in protecting the right to life. The criminal investigation into the death of the applicant's husband lasted only a week and did not look into the government's failure to protect the town's residents. Furthermore, during a civil suit for damages, the applicant did not have access to facts that only the authorities had access to, nor did the courts seek expert opinions. The Court ruled that this constituted a second violation of Article 2, which requires an effective, independent, and impartial official investigation and careful judicial scrutiny of a possible breach of the right to life.

Kolyadenko and Others v. Russia, application nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, 28 February 2012

Violation of Article 2 – Violation of Article 8 – Violation of Article1, Additional Protocol n. 1

The applicants lived in Vladivostok, in particular the area where the applicants lived was located in the Sovetskiy District of Vladivostok close to the Pionerskoye (Sedankinskoye) water reservoir near the Pionerskaya (Sedanka) river. According to the applicants, because of the urgent release of a large quantity of water from the Pionerskoye reservoir on 7 August 2001, a large area around the reservoir was instantly flooded, including the area where the applicants resided and no emergency warning had been given before the flood. Therefore, the applicants complained that the authorities had put their lives at risk on 7 August 2001 by releasing a large amount of water, without any prior warning, from the Pionerskoye reservoir into a river which for years they had failed to maintain in a proper state of repair, causing a flash flood in the area around the reservoir where the applicants lived. They also complained that they had no judicial response in respect of those events and accordingly insisted that there had been a breach of Articles 2, 8 and 1 of Additional Protocol n. 1. The Court ruled that there was a violation of article 2 in both its aspects, substantive and procedural. After reiterating that the positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life, the Court considered 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. In the particular context of dangerous activities, special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives. They must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks. Among these preventive measures particular emphasis should be placed on the public's right to information. The relevant regulations must also provide for appropriate procedures, taking into account the technical aspects of the activity in question, for identifying shortcomings in the processes concerned and any error committed by those responsible at different levels. In assessing whether the respondent State complied with its positive obligations, the Court considered the particular circumstances of the case, regard being had, among other elements, to the domestic legality of the authorities' acts or omissions, the domestic decision-making process, including the appropriate investigations and studies, and the complexity of the issue, especially where conflicting Convention interests are involved. In the specific case, the Court noted that the authorities failed to establish a clear legislative and administrative framework to enable them effectively to assess the risks inherent in the operation of the

Pionerskoye reservoir and to implement town planning policies in the vicinity of the reservoir in compliance with the relevant technical standards. Furthermore, the Court concluded that there has been a violation of Article 2 of the Convention in its procedural aspect on account of the lack of an adequate judicial response by the authorities to the events of 7 August 2001. Moreover, the Court had no doubt that the causal link established between the negligence attributable to the State and the endangering of the lives of those living in the vicinity of the Pionerskoye reservoir also applies to the damage caused to the applicants' homes and property by the flood. Indeed, the positive obligation under Article 8 and Article 1 of Protocol No. 1 required the national authorities to take the same practical measures as those expected by them in the context of their positive obligation under Article 2 of the Convention. Since it was clear that no such measures were taken, the Court concluded that the Russian authorities failed in their positive obligation to protect the applicants' homes and property.

4 Noise pollution

4.1 Airports and roads

Hatton and Others v. United Kingdom, Grand Chamber, application n. 36022/97, 08 July 2003¹⁰

No violation of Article 8 (proportionality test)

The applicants, who lived about 12 kilometers from Heathrow Airport, claimed that noise from night flights caused significant disturbances to their sleep. In 1993, the Secretary of State for Transport adopted a quota system of night flying restrictions ("1993 Scheme") aimed at striking a proper balance between the local residents' needs and the economic interest of maintaining a 24-hour international airport. The Court ruled that there was no violation of Article 8 on the ground that the interests of the applicants were properly taken into consideration when deciding to implement the 1993 Scheme. The Court relied on statistical information to conclude that the noise disturbances to the applicants surrounding Heathrow Airport were "negligible," and therefore did not outweigh the substantial economic community interest of maintaining a 24-hour international airport (proportionality test, taking into consideration different conflicting interests). The Court also noted that the applicants could have found new residences without a significant loss. Thus, in evaluating the competing interests of the individual and the community as a whole, the Court believed that the national authority (here, the Secretary of State for Transport) should be given a wide margin of appreciation in taking measures to mitigate the noise from the airport.

Deés v. Hungary, application n. 2345/06, 9 November 2010

Violation of Article 6 – Violation of Article 8

The case was about noise, pollution, and smell in relation to a road with heavy traffic, as well as the associated court proceedings. Traffic increased significantly on a certain street in the town of Alsonemedi, where the applicant lived. The applicant described his home as almost uninhabitable because of the noise from the traffic and the pollution from fumes. The applicant alleged violations of Article 8. The Court stated that there was a violation of such a provision, since, notwithstanding the causal relationship between the damage to the applicant's

¹⁰ In the first judgment (ECtHR, 20.10.2001, *Hatton and Others v. United Kingdom*, application n. 36022/97), issued by the Chamber the Court had found a violation of Article 8. In fact, the State had a positive duty to take reasonable and appropriate measures to secure the applicants' rights under Article 8 and to strike a fair balance between the competing interests of the individual and of the community as a whole. In the particularly sensitive field of environmental protection, mere reference to the economic well-being of the country was not sufficient to outweigh the rights of others. States were required to minimise, as far as possible, the interference with these rights, by trying to find alternative solutions and by generally seeking to achieve their aims in the least onerous way as regards human rights. In order to do that, a proper and complete investigation and study with the aim of finding the best possible solution which would, in reality, strike the right balance, should precede the relevant project. Therefore, the Court considered that the State failed to strike a fair balance between the United Kingdom's economic wellbeing and the applicants' effective enjoyment of their right to respect for their homes and their private and family lives. There had accordingly been a violation of Article 8.

house and the traffic was not sufficiently proven, the noise constituted a “serious nuisance” that was significant enough to compromise the right to quiet enjoyment of the home under Article 8. Therefore, the State has a positive obligation to uphold Article 8, and while authorities had a significant margin of appreciation in balancing the interests of road users and the applicant, the Court concluded that measures to reduce noise levels were inadequate because noise levels remained, according to tests, 12 and 15 percent above the legal limit. Thus the applicant was disproportionately burdened and a violation of Article 8 occurred.

***Grimkovskaya v. Ukraine*, application n. 38182/03, 21 July 2011**

Violation of Article 8

The applicant lived with her parents and son on K. Street in the city of Krasnodon. The applicant claimed that the M04 motorway was rerouted through K. Street beginning in 1998 and resulted in heavy traffic. Authorities did not conduct a feasibility study before rerouting the road. The applicant contended that the increase in traffic has made her house almost uninhabitable because of vibration, noise, air pollution, dust, and potholes filled with harmful materials. The applicant had medical records attesting to health problems with her son and parents, including chronic poisoning from heavy-metal salts in her son. A children’s hospital recommended that the applicant’s son, having been in a polluted area his entire life, be resettled.

The Court held that there was a violation of Article 8, since the heavy traffic interfered with the applicant’s right to private and family life to a sufficient level of severity to trigger Article 8. Next, the Court found that authorities failed to strike a fair balance between the interest of the community as a whole in using the road for transportation and the interest of the applicant, as authorities failed to conduct an adequate feasibility study to assess the environmental impact and gather local feedback and to mitigate the harmful effects of the M04 motorway in an effective and meaningful matter until it was closed.

4.2 Commercial activities

***Moreno Gomez v. Spain*, application n. 41343/02, 16 November 2004**

Violation of Article 8

The applicant lived in an area that had several bars and nightclubs that caused a lot of noise and made it difficult for him to sleep. The applicant alleged that the failure to enforce the allowable noise levels constituted a violation of Article 8. The Court ruled that there was a violation of Article 8 of the ECHR, which can occur through nonphysical intrusions into a person’s home, such as noise, emissions, and smells, so long as it is a “serious breach.” Under the facts of the case, the Court noted that noise levels measured in the building’s entrance way violated the maximum level in an acoustically saturated zone, which by definition means that the noise levels are excessive and cause disturbances. The Court considered this to be a serious breach. Next, the Court concluded that authorities failed to strike a fair balance between the interests of the applicant in the peaceful enjoyment of her home and the interest of the community in the nightclub.

***Oluic v. Croatia*, application n. 61260/08, 20 May 2010**

Violation of Article 8.

The applicant was a resident of Rijeka, who lived in the same house as a bar. On 01 May 2001, an expert measured levels of noise coming from the bar to be in excess of permitted levels. The applicant alleged a violation of Article 8 because the State failed to protect her from excessive noise levels from the bar. The Court ruled that there was a violation of Article 8, since the noise in question met the minimum level of severity for an Article 8 claim because measurements by independent experts over 8 years showed that noise levels from the bar were beyond allowable levels by domestic standards, international standards (set by the World Health Organization), and standards set by most European countries. Furthermore, the court also recognized that excessive noise could affect the health of the applicant’s daughter. Thus the State had a positive duty to take reasonable and appropriate measures to secure this Article 8 right. The Court ruled that the State failed to meet this obligation.

***Mileva and Others v. Bulgaria*, application nos. 43449/02 and 21475/04, 25 November 2010**

Violation of Article 8

This case is about the noise emanating from a computer gaming club that operated on the floor below the applicants' flats. The applicants contended that the failure of authorities to end the nuisance from the computer club and their passiveness concerning the electronic games club and the office both violated Article 8. The Court ruled that there was a violation of Article 8, since considering the intensity, duration, effects and general context of the noise caused by the club, this constituted a severe interference with the right to respect for home and private and family life. Indeed, the Court noted that the club ran non-stop and drew noisy crowds inside and outside of the building. Next, the Court stated that authorities failed to meet their duty to implement measures to protect the applicants from the excessive noise from the club and to remedy the situation or even enforce the condition that patrons use the back door.

5 Passive smoke

***Elefteriadis v. Romania*, application n. 38427/05, 25 January 2011**

Violation of article 3.

The applicant was serving a sentence of life in prison for murder. Between 1994 and 2000, the applicant was in a 13.81 square meter cell with three smokers. The applicant argued that his unwilling exposure to smoke caused pulmonary illnesses and constituted a violation of Article 3. The Court unanimously ruled that there was a violation of Article 3 (prohibition of torture), because the authorities had a duty to take measures to safeguard the applicant's health by moving him away from smokers. Instead, authorities forced the applicant to be exposed to smoke in several locations against the recommendation of his doctor.

The Court also determined that the domestic courts failed to uphold Article 3, as they should have looked at the damage previously suffered by the applicant even if he had subsequently been transferred to a no smoking cell and they also should not have required the applicant to provide proof of damages.

6 Cases concerning violations of the right to a fair trial (Article 6) and the freedom of speech (Article 10)

***Steel and Morris v. United Kingdom*, application n. 32772/02, 15 February 2005**

Violation of Article 6 – Violation of Article 10 (proportionality test)

The applicants were members of London Greenpeace, which led an anti-McDonald's campaign in the mid-1980s. This campaign distributed leaflets that generally alleged that McDonald's is deadly (e.g. causes cancer and heart disease), greedy, and environmentally devastating (e.g. destroys rainforests to raise cattle), and also that they torture animals, exploit poor countries, manipulate children, and have poor working conditions. In September 1990, McDonald's issued a writ against the applicants that sought damages for libel (i.e. publishing false information that damages a reputation). The applicants applied for legal aid, but were repeatedly refused, which they alleged hampered their ability to sufficiently defend themselves. The applicants contended that unfair proceedings and the ruling against them for exercising free speech violated Article 6 and Article 10 respectively. The Court ruled that there was a violation of Article 6 (right to a fair trial), as a litigant in criminal proceedings must be able to present a case before the court in an effective manner and without a substantial disadvantage. Based on this concept, the Court stressed that legal aid is required under Article 6 as determined on a case-by-case basis and depending on the complexity of the case, the importance of the law, and the ability of a defendant to represent him or herself (including consideration of finances). Thus, the failure to grant the applicant's request for legal aid violated Article 6 § 1. Moreover, the Court ruled that there was a violation of Article 10, since the defamation proceedings constituted an interference with freedom of expression and notwithstanding such interference was "prescribed by law" and constituted a "legitimate aim" of protecting commercially valuable

companies like McDonald's from false and damaging statements, however it was not "necessary to a democratic society", because the domestic court proceedings placed a disproportionate burden on the applicants as the proceedings were generally unfair – for example, the applicants were refused legal aid despite being faced with a complex case with heaps of documents, and they could not even afford transcripts of the court hearings. Therefore, the State failed to properly consider the applicants' interests, because the burdensome court proceedings were not "proportionate" to the goal of preventing libel. The Court also concluded that the damages did not bear a reasonable relationship of proportionality to the legitimate aim they served (i.e. to compensate for damage to reputation).

Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (n. I), application n. 24699/94, 28 June 2001

Violation of Article 10 (proportionality test)

The applicant, an animal protection group, tried to air a commercial about the pig meat industry, which included observations on poor living conditions of pigs and the heavy use of medicines. The Commercial Television Company refused to air the commercial on the television programs of the Swiss Radio and Television Company because they thought the commercial was too political. The Court ruled that there was a violation of Article 10, since the refusal to broadcast the applicant's commercial constituted an interference with the freedom of expression that was "prescribed by law" under the Federal Radio and Television Act. Furthermore, the interference pursued a legitimate aim because the law attempted to prevent powerful financial groups from squashing public opinion and using financial resources to gain an unfair political advantage. However, the Court determined that the interference was not "necessary in a democratic society." In this respect, the Court noted that the applicant was not seeking to broadcast the type of unfair political speech, neither was the applicant a powerful group using vast amounts of money to unduly gain a competitive advantage or interfere with public opinion. To the contrary, the applicant was part of an ongoing debate about the animal industry. Thus, the government did not sufficiently demonstrate that the legitimate aim of preventing political advertising was proportionate to the ban of the applicant's commercial.

7 Positive obligations arising from the ECtHR case-law

This short overview on the ECtHR case-law shows how from the right to life (Article 2) or to private life (Article 8) could arise several positive obligations incumbent on the Contracting States, sometimes involving also the use of criminal law by the States, in order to comply with them.

In particular, according to the previous version of the *Manual on Human Rights and Environment* drafted by the Council of Europe, such obligations include: (i) the positive obligation to regulate activities of an industrial or technological nature which might adversely affect the sphere of protected rights, such as the right to life (Article 2) and the right to private and family life (Article 8); (ii) the positive obligation effectively to enforce legal, administrative, or judicial measures designed to prevent or remedy the unlawful interference with such rights; (iii) the positive obligation to provide information and engage in consultation with affected individuals and people with regard to the actual risk and danger of the environmental impact in issue.

Actually, besides *negative obligations* arising from the protection of the human rights provided for by the ECHR and imposing a duty on the States of not interfering in the individuals' enjoyment of their rights, the ECtHR has elaborated the so called "doctrine of positive obligation", which requires that States actively protect the human rights within their jurisdiction, even through the adoption of preventive and repressive measures against the infringements of human rights perpetrated not only by the State's action, but also by the private subjects (i.e. individuals, groups or organisations). In this latter case, it is said that the Convention has a *horizontal effect*, because it extends the scope of the human rights protection to including the violations caused by the private action, as long as the acting subjects are within the State's jurisdiction, according to article 1 ECHR. Consequently, a State can be considered responsible by the ECtHR, whether it did not comply with such a positive obligation of adopting preventive or repressive measures, when a violation of human rights derived from this lack of action.

Adopting a criminal-law perspective, particularly interesting are the situations, when the compliance with the ECHR positive obligations requires the implementation and the enforcement of criminal law provisions, in order to ensure the effectiveness of the fundamental rights and the protection of individuals. The criminal law plays in

such cases, therefore, a crucial role as a tool of human rights protection, carrying out both a preventive and repressive function. Moreover, the States' choice for the adoption of criminal law provisions within their jurisdictions becomes partially forced by the ECtHR positive obligations. Hence, a State can perpetrate a violation of the ECHR provisions, if its criminal law system is unable to prevent or punish human rights infringements within its jurisdiction. As a result, the ECtHR can check the possible lacks and omissions concerning the exercise of investigation and punishment powers, caused by the State's inactivity, and considers the same State liable for the human rights violation.¹¹

The leading case concerning a positive obligation requiring the adoption of criminal provision deals with a violation of Article 8 ECHR, i.e. the right to respect for private and family life and for the home. Despite the ECtHR states that "the choice of the means calculated to secure compliance with Article 8 in the sphere of relations of individuals between themselves is in principle a matter that falls within the Contracting States' margin of appreciation" and therefore "there are different ways of ensuring respect for private life, and the nature of the State's obligation will depend on the particular aspect of private life that is at issue. Recourse to the criminal law is not the only answer",¹² however it finds that "the protection afforded by the civil law in the case of wrongdoing of the kind inflicted on Miss Y is insufficient. This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal law provisions".¹³

Actually, the Court's reasoning is the expression of the internal logic, which guides the Court in requiring the States to adopt criminal law provisions, i.e. the necessity of having recourse to criminal law only as the last resort, after a careful analysis aiming at striking a fair balance between the conflicting interests at stake, paying a particular attention to the essentiality of the rights at issue and trying to find out the less grievous way of interfering in the rights of individuals, through a serious development of the proportionality test.

The provision of such positive duties in the ECtHR case law implies that if the States have failed to fulfill them, a kind of non-compliance procedure can be activate, according to Article 46 ECHR, by the Committee of Ministers of Council of Europe, and a serious violation of the principles of the rule of law and human rights may lead to a State having its right of representation suspended and being requested by the Committee to withdraw from the Council of Europe, according to articles 8 and 3 of the Statute of the Council of Europe.¹⁴

8 The positive obligations arising from Article 2 ECHR

After outlining the positive obligations dealing with Article 8, the ECtHR finds the same kind of obligation arising from Article 2 ECHR. In particular, in these circumstances the positive duties pertain not only to the substantial characteristics of the criminal law system, but also to the procedural ones, concerning the administration of criminal justice and the prosecution and sentence of those individuals founded guilty of the human rights violations. Such duties have a two-faced structure: a) a preventive obligation, which requires the States to enforce all the measures needing to prevent the loss of human lives;¹⁵ b) an investigation/prosecution obligation, which provides for an effort by the national competent authorities to carry out a serious, effective,

¹¹ See Scalia, *Profili penalistici e obblighi di tutela*, 87 ff.

¹² ECtHR, 26.03.1985, *X and Y v. The Netherlands*, application n. 8978/80, para. 24; in this respect, see also ECtHR, 04.12.2003, *M.C. v. Bulgaria*, application n. 39272/98, para. 150.

¹³ ECtHR, 26.03.1985, *X and Y v. The Netherlands*, para. 27 and ECtHR, 26.05.2005, *Siliadin v. France*, application n. 73316/01, para. 144.

¹⁴ See, in this respect, Harris et al., *Law of the European Convention on Human Rights*, 885.

¹⁵ See ECtHR, 28.10.1998, *Osman v. UK*, application n. 87/1997/871/1083, para. 115: "It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual".

prompt and impartial investigation, in order to ascertain the individual criminal liabilities for the perpetrated violations of the right to life.

Taking into account the first obligation, the Court states that in order to comply with it the State has *generally* to enforce criminal law provisions, which prevent the commission of conducts affecting the right to life, and make their application effective; but, *in some particular circumstances*, the fulfillment of such a duty requires the State to implement special measures, adequate to ensure the best protection for individuals in situations where their life is at risk. Actually, the scope of such an obligation is outlined by the Strasbourg Court, which states that it arises, in particular, when “the authorities *knew or ought to have known* at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, *judged reasonably*, might have been expected to avoid that risk”.¹⁶ And the reason of the domestic authorities’ choice can be judged by the Court only in the light of all the circumstances of each particular case.

Concerning the duty to conduct an effective and impartial official investigation, the Court has elaborated a set of rules, in order to check the adequate compliance of the States’ behaviour with such an obligation.¹⁷ In particular, the investigation must be a) conducted by independent authorities; b) effective and adequate to identify and sentence the perpetrators. Indeed, in order to check the latter requirement, the Court needs also to ascertain 1) the promptness, 2) the publicity of such an investigation and 3) the possible access of the victims or their close relatives to the results of the investigation.

In the context of the environmental matter, Article 2 has been applied where certain activities endangering the environment are so dangerous that they also endanger human life. In particular, in cases involving dangerous activities, as nuclear tests, operations of chemical factories with toxic emissions or waste-collection sites – carried out both by public authorities and by private companies – the scope of the positive obligations arising from Article 2 depends on the harmfulness of the activities and the foreseeability of the risks to life.

In *Öneryildiz v. Turkey*, first of all the Court finds a causal link between the accident and the negligence of the local authorities,¹⁸ since they had known, or should have known, that the inhabitants of the slum areas had been faced with a real threat and they had failed to remedy the situation by doing all that could reasonably have been expected of them. Therefore, despite the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case, if the infringement of the right to life or to personal integrity is not caused intentionally,¹⁹ having regard to the sector of public activities involved, to the number and status of the authorities found to have breached their duties, to the fact that the repercussions of the risk in question were likely to affect more than one individual, and, lastly, to the tragic nature of the events which occurred in the case, the Court concludes that, in the circumstances of the present case, a domestic remedy which could merely result in an award of compensation cannot be considered to be a proper avenue of redress or one capable of discharging the respondent State of its obligation to set up a criminal-law mechanism commensurate with the requirements of Article 2 of the Convention. Indeed, the Court notes that administrative and criminal proceedings were instituted against those responsible for the accident and the first resulted in an order against the latter to pay damages and the second to a finding of guilt (paras. 92-94).

¹⁶ See ECtHR, 28.10.1998, *Osman v. UK*, para. 116 (emphasis added). The Court also finds in the same paragraph that “having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge”.

¹⁷ It has to be said that in fact the Court outlined this set of rules in judgments concerning violations of the right to life perpetrated through the use of the force by the same States’ authorities, see ECtHR, 19.02.1998, *Kaya v. Turkey*, application n. 158/1996/777/978, para. 86; ECtHR, 28.07.1998, *Ergi v. Turkey*, para. 79; ECtHR, 04.05.2001, *Kelly v. UK*, application n. 30054/96, paras. 95-98 and 114-115. However, such rules can be certainly extended to the cases, where the violations are perpetrated by private individuals.

¹⁸ Differently, in *L.C.B. v. UK* 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 leukemia and it concluded that it was not reasonable to hold that, in the late 1960’s, the UK authorities could or should have taken action in respect of the applicant.

¹⁹ As stated in the Calvelli and Ciglio case, in the specific sphere of medical negligence, since such obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts; see also, *mutatis mutandis*, *Powell v. the United Kingdom*, application n. 45305/99.

However, the criminal proceedings in question, of which the sole purpose was to establish the possible liability of the authorities for “negligence in the performance of their duties” could not in itself be regarded as “adequate” with regard to the allegations of violations of the applicant’s right to life (para. 106).

This judgment shows the ECtHR reasoning focusing on the recourse to criminal law as last resort, since it has to be used in principle only for violations committed intentionally. Nevertheless, if the violation caused not intentionally is particularly serious, taking into account the crucial importance of the affected legal interest (i.e. the right to life), the seriousness of the offence perpetrated and as a result the particular danger caused by such a violation, paying also attention to the role of the national public authorities involved in the infringement,²⁰ the Court states an obligation incumbent on the Contracting States to provide and effectively apply criminal law provisions, in order both to deter and to punish such violations. Actually, the Court applied the principle of necessity and proportionality, reasoning according to the most important guidelines of the criminal policy.

In addition, the Court recognizes similar positive obligations (prevention/investigation) also in cases of natural disasters, even though they are as such, beyond human control, as in *Budayeva and others v. Russia*,²¹ even because it finds that there had been a causal link between the serious administrative flaws in this case and the applicants’ death.

It is worthwhile to examine the scope and the contents of the positive obligation of prevention in the environmental context. First of all, it requires the State to put in place a legislative and administrative framework, designed to provide effective deterrence against threats to the right to life, which includes:

- a) regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives. They must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks;
- b) the public’s right to information;
- c) appropriate procedures, taking into account the technical aspects of the activity in question, for identifying shortcomings in the processes concerned and any errors committed by those responsible at different levels.²²

However, the Court recognizes a broader margin of appreciation to the States, when they have to manage natural disaster, because of their unforeseeability. In such cases, therefore, the Court investigates the imminence of a natural hazard that had been clearly identifiable and if the disaster concerned a recurring calamity affecting a distinct area developed for human habitation or use.²³

Nevertheless, the Court states that it is not sufficient in order to fulfill the positive obligation the presence of a legislative or administrative framework in the national system, it also requires that the relevant public authorities provide an adequate response - judicial or otherwise – and ensure that the legislative and administrative framework is properly implemented and that breaches of the right to life are repressed and punished as appropriate.²⁴

The second face of the positive obligations arising from Article 2 ECHR refers to the “procedural aspect”, because it imposes on States investigative duties after the loss of life occurred, i.e. the duty to promptly initiate an independent and impartial investigation, which must be capable of ascertaining the circumstances in which the

²⁰ In particular, in the case of dangerous activities, when the public authorities were fully aware of the likely consequences and disregarded the powers vested in them, hence failing to take measures that were necessary and sufficient to avert certain risks which might involve loss of life, see ECtHR [Grand Chamber], 30.11.2004, *Öneryildiz v. Turkey*, para. 93; ECtHR, 22.03.2008, *Budayeva and Others v. Russia*, para. 139.

²¹ See ECtHR, 22.03.2008, application nn. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, para. 135. In particular, the positive obligation at issue required the Russian authorities to warn the local population about the risk, to implement evacuation and emergency relief policies or, after the disaster, to carry out a judicial enquiry. In an earlier case, the Court had already recognized the possibility to extend such a positive obligation to natural disaster, but it had to declare the inadmissibility because the applicants had failed to exhaust the domestic remedies, see ECtHR, 28.11.2006, *Murillo Saldias v. Spain*.

²² See ECtHR [Grand Chamber], 30.11.2004, *Öneryildiz v. Turkey*, application n. 48939/99, paras. 89-90 and also ECtHR, 22.03.2008, *Budayeva and Others v. Russia*, paras. 129 and 132.

²³ See ECtHR, 22.03.2008, *Budayeva and Others v. Russia*, paras. 134-135 and 137.

²⁴ See ECtHR [Grand Chamber], 30.11.2004, *Öneryildiz v. Turkey*, para. 91; ECtHR, 22.03.2008, *Budayeva and Others v. Russia*, para. 138.

incident took place and identifying shortcomings in the operation of the regulatory system. Such an investigation must also be capable of identifying the public officials or authorities involved in the chain of events in issue.²⁵

9 Positive obligations arising from Article8 ECHR

The ECtHR has recognized a positive obligation incumbent on the Contracting States in different situations, which include:

- cases where some characteristics of the States' legal systems actually represent an obstacle for individuals to enjoy their rights. In such situations the States have a positive obligation to remove this obstacle, e.g. through the modification of their legislative framework;²⁶
- cases where the States have to support the enjoyment of some individuals' rights through the enforcement of positive measures, which create the proper conditions (economic or social) for an effective exercise of such rights by the subjects.²⁷

In the context of cases raising issues linked to environmental degradation or nuisance, Article8 is not necessarily violated, unless the environmental factors directly and seriously affect private and family life or the home.²⁸ Therefore, the Court must ascertain whether a causal link exists between the activity and the negative impact on the individual and whether the adverse have attained a certain threshold of harm, which 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.²⁹

²⁵ See ECtHR [Grand Chamber], 30.11.2004, *Öneryildiz v. Turkey*, para. 94; ECtHR, 22.03.2008, *Budayeva and Others v. Russia*, para. 142.

²⁶ See ECtHR, 13.06.1979, *Marckx v. Belgium*, application n. 6833/74, para. 45, which states: "Respect for family life [...] implies an obligation for the State to act in a manner calculated to allow these ties (between near relatives) to develop normally".

²⁷ See in this respect, ECtHR, 09.10.1979, *Airey v. Ireland*, application n. 6289/73, in particular para. 26.

²⁸ The ECtHR has recognized a wide scope to the concept of private and family life; in particular, in the cases where environment is at stake, it has tended to interpret such notions as being closely interconnected: e.g. it refers to *private sphere* or to *living space*, see respectively ECtHR, 09.06.2005, *Fadeyeva v. Russia*, paras. 70, 82 and 86 and ECtHR, 07.04.2009, *Brândușe v. Romania*, application n. 6586/03, para. 64: "La Cour doit examiner s'il convient d'appliquer les principes susmentionnées de l'article 8 de la Convention au cas d'espèce, dans lequel «l'espace de vie» du requérant est représenté par la cellule où il purge sa peine de prison, et si les nuisances olfactives alléguées par l'intéressé ont atteint le seuil minimum de gravité pour que la question posée rentre dans le champ d'application de l'article précité".

²⁹ Concerning the minimum threshold of harm, the Court states that severe environmental pollution such as excessive noise levels generated by an airport, fumes, smells and contamination emanating from a waste treatment plant, toxic emissions from a factory can affect the enjoyment of the right protected by Article 8, even when the pollution is not seriously health threatening, see in this respect ECtHR, 09.12.1994, *Lopez Ostra v. Spain*, dealing with the fumes and noise from a waste treatment plant and an exposure to them for more than three years; ECtHR, 07.04.2009, *Brândușe v. Romania*, concerning the bad odours coming from a rubbish tip in the nearby of the prison where the applicant lives in his cell; ECtHR, 09.06.2005, *Fadeyeva v. Russia*, regarding a case where over a significant period of time the concentration of toxic elements emanating by a steel plant in the air near the applicant's house seriously exceeds safe levels and deteriorate the applicant's health; ECtHR, 10.02.2011, *Dubetska and Others v. Ukraine*, where the Court emphasizes that no issue under Article 8 will arise if the detriment complained of is negligible in comparison to the environmental hazard inherent in life in every modern city (para. 105), but in the instant case the specific area in which the applicant lives is both according to the legislative framework and empirically unsafe and the public authorities have not found an effective solution to the applicants situation for 12 years (paras. 105, 106, 111 and 118). For a comment on this case, see Małgorzata Fitzmaurice, "The European Court of Human Rights, Environmental Damage and the Applicability of Article 8 of the European Convention on Human Rights and Fundamental Freedoms", *Environmental Law Review* 13 (2011): 107.

Despite generally speaking the Court requires the existence of a causal link between the dangerous activity and the negative impact on the individual, in order to recognize a violation of Article 8, however if the possible environmental damage is severe enough that it seems likely that individuals' well-being and the enjoyment of their homes are adversely affected (e.g. on the basis of environmental impact scientific studies), the Court does not carry out an in-depth check on the existence of such a causal link, since it is satisfied with only a sufficiently close link to be established with the private and family life, even according to the precautionary principle, sometime recalled by the Court.³⁰

As already mentioned above, the positive duties resulting from the right to private life may, under specific circumstances, even require the State to provide criminal law provisions for the protection of the rights granted under Article 8 ECHR.³¹ Whether the State complied with such an obligation can be determined by the Court through a comparison with the limits set out in Article 8, para. 2. Therefore, according to the ECtHR case-law, the decisions of national public authorities affecting the environment must be provided for *by law* and follow a legitimate aim, such economic well-being of the Country or the protection of the rights and freedom of others. Moreover, 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.³² Considering the complexity which often characterizes the assessment of the technical and social aspects of the environmental issues, the national public authorities can better identify what might be the best policy or the best provisions to enforce,³³ according to the so-called *doctrine of the margin of appreciation*. Therefore, despite the subsidiary nature of the ECHR system, where it is up to Contracting States, in the first place, to secure the rights and liberties it enshrines - as States are considered to be in principle in a better position than the international judge to indicate in the concrete situation the point of equilibrium between conflicting interests and the necessity of a restriction complying with human rights protection's standards, by reason of their direct and continuous contact with the vital forces of their Countries –, the ECHR system does not give the Contracting States an unlimited power of appreciation. The domestic margin of appreciation thus goes hand in hand with ECtHR's supervision,³⁴ which can check whether the national authorities have approached the problem with due diligence and have taken all the competing interests into consideration.³⁵

In the assessment of the proportionality test, some authors have distinguished two levels of proportionality. At the first stage, the proportionality test involves the legitimate aim or the interference and the means by which this is carried out. At this stage, the test is successfully passed by the State if they proved the mere requirement of "relevant" reasons for the interference. At the second stage of proportionality, the test regards the conflict between the general interest and the harm suffered by the individual. At this stage, in order to satisfy the proportionality test, the States need to provide "sufficient" reasons, which would imply, in practice, the lack of other less grievous means by which the legitimate aim could be attained in the present case. According to European Court's environmental case law, whenever an intimate aspect of individuals' rights is at stake (such, for

³⁰ See ECtHR, *Tătar v. Romania*, 27.01.2009, paras. 107 and 120-121; ECtHR, 10.11.2004, *Taşkin and Others v. Turkey*, application n. 46117/99, para. 112-114.

³¹ See Robert Esser, "Nuclear Accidents: Human Rights Challenges in Criminal Proceedings", *European Energy and Environmental Law Review* (June 2013): 90.

³² See in this respect ECtHR, 09.12.1994, *Lopez Ostra v. Spain*, para. 51.

³³ See ECtHR, 08.07.2003, *Hatton and Others v. United Kingdom*, Grand Chamber, paras. 97,98 and 100; ECtHR, 21.02.1990, *Powell and Rayner v. UK*, application n. 9310/81, para. 44; ECtHR, 02.11.2006, *Giacomelli v. Italy*, para. 80. See also, Małgorzata Fitzmaurice and Jill Marshall, "The Human Right to a Clean Environment-Phantom or Reality? The European Court of Human Rights and English Courts Perspective on Balancing Rights in Environmental Case", *Nordic Journal of International Law* (2007): 120 ff.

³⁴ Such a supervision concerns both the aim of the measures challenged and its necessity; it covers not only the basic legislation, but also the decision applying it, even one given by an independent Court, see ECtHR, 07.12.1976, *Handyside v. UK*, application n. 5493/72, paras. 48-49. According to the opinions of some authors, the presence of a wide margin of appreciation of the Contracting States implies a kind of simple presumption of the reason of the restrictions provided for the rights protected by the ECHR, see Sébastien van Droogenbroeck, *La proportionnalité dans le droit de la Convention européenne des droits de l'homme – Prendre l'idée simple au sérieux* (Bruxelles: Bruylants, 2001): 232-235.

³⁵ See ECtHR, 09.06.2005, *Fadeyeva v. Russia*, para. 128. See also Daniel Garcia San José, *Environmental Protection and the European Convention on Human Rights*, (Council of Europe: 2005), 50 ff.

example, intimacy within private life), the reasons must be particularly convincing and a rather narrow margin of appreciation is left to Contracting States.³⁶

9.1 Proportionality test and procedural aspects of Article 8 ECHR

Actually, if the States want to successfully pass the above mentioned second level of the proportionality test, trying to strike a fair balance between the individuals' rights and the interests of the community as a whole, they must show that they have recognized and made effective a set of procedural guarantees – also arising from Article 8 - to individuals involved in the decision-making process dealing with dangerous environmental issues. In this respect, first of all the Court states that public authorities have a duty to inform the public about environmental risks, so that they could enable people possibly affected by the environmental threats to assess the risk, which they and their families might run, and consequently choose for a movement from the dangerous area or for other alternative solutions.³⁷ Such an obligation is generally complemented by the further duty to ensure access to information (e.g. to the environmental assessment scientific studies carried out by the public authorities in relation to the implementation of dangerous activities) through an effective and accessible procedure.³⁸ In this context, the Court also quotes EU and international environmental standards, as the Directive 2004/35/EC,³⁹ the 1992 Rio Declaration on Environment and Development⁴⁰ and the Aarhus Convention,⁴¹ which provide for the public's right to information and the right to access to information in cases of environmental danger.⁴² However, not all cases concerning access to information on risk involve concrete, proven risks from industrial or natural hazard, where information on risk can ground a choice on whether and how to avoid it, since there are other situations where individuals have been exposed to a toxic risk in the past and have developed a fear or anxiety, which leads them to link their current health problems with it and to want access to information on the exposure incident, in order to monitor data and try to prove a causal link between their illness and the exposure.⁴³

³⁶ See García San José, *Environmental Protection*, 51.

³⁷ See in this respect ECtHR, 19.02.1998, *Guerra and Others v. Italy*, where the Court recognises a violation of Article 8, since the Italian public authorities have not fulfilled their obligation to secure the applicants' right to respect for private and family life, on the ground that the applicants have not received essential information from the authorities that would enabled them to assess the risks which they and their families might run if they continue to live in the area; ECtHR, *Tătar v. Romania*, 27.01.2009, paras. 101 and 113.

³⁸ ECtHR, 07.04.2009, *Brândușe v. Romania*, paras. 63 and 74; ECtHR, 19.02.1998, *Guerra and Others v. Italy*, pars. 60; ECtHR, 02.11.2006, *Giacomelli v. Italy*, para. 83; ECtHR, *Tătar v. Romania*, 27.01.2009, paras. 93, 101, 113-116, and 118.

³⁹ Directive 2004/35/EC of the European Parliament and the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage. *OJ L 143, 30.4.2004*.

⁴⁰ Adopted in June 1992 by the United Nations Conference on Environment and Development, meeting in Rio de Janeiro (Brazil). In particular, 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."

⁴¹ Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters - ECE/CEP/43, adopted on 25 June 1998 by the United Nations Economic Commission for Europe in application of Principle 10 of the Rio Declaration, and came into force on 30 October 2001.

⁴² See for example ECtHR, *Tătar v. Romania*, 27.01.2009, paras. 69 and 118; ECtHR, 10.11.2004, *Taşkin and Others v. Turkey*, paras. 98-100.

⁴³ See in this respect, ECtHR, 09.06.1998, *McGinley and Egan v. UK*, application n. 10/1997/794/995-996, para. 101: "Where a Government engages in hazardous activities, such as those in issue in the present case, which might have hidden adverse consequences on the health of those involved in such activities, respect for private and family life under Article 8 requires that an effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information." In the considered case, the Court finds that such a positive obligation has been fulfilled by the State, since "Rule 6 of the Tribunal Rules provided a procedure

Within the “procedural aspect” of the protection granted by Article 8 – and also in the light of the satisfaction of the proportionality test - the Court also requires the State to ensure the right of the public (and in particular of those individuals whose interests could be concretely affected) to be involved in the decision-making process, which relate to the environment. In particular, the Court has stressed the importance of public access to the conclusions of studies and investigations – launched by the national authorities in order to predict and evaluate in advance the effects of some dangerous activities on the environment and to strike a fair balance between the concurring interests at stake, which allows individuals to assess the danger to which they are exposed. The case *Hatton and others v. UK* represents a paramount application of such principles. In fact, in the Court’s view, when States make decisions affecting environmental issues, there are two aspects to the inquiry which may be carried out by the Court: a) the substantive merits of the government’s decision, to ensure that it is compatible with Article 8; b) the decision-making process to ensure that due weight has been accorded to the interests of the individual. In this respect the Court is required to consider all the procedural aspects, 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.⁴⁴

Within the scope of the Article 8 procedural aspects, the right to access to a court is inclusive. Actually, where individuals, who should be involved by the authorities in the decision-making process, consider that their interests have not been given sufficient weight, they can appeal to a court,⁴⁵ in order to complain not only about an improper decision-making process, but also about individual scientific studies requested by the public authorities, even when the necessary documents have not been made available publicly. In this respect the right to access to a court based on Article 8 appears broader than that of Article 6, since the former does not require that the 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, which on the contrary represent the prerequisite for the recognition of the right to access to court granted by Article 6.⁴⁶

which would have enabled the applicants to have requested documents relating to the MOD’s assertion that they had not been dangerously exposed to radiation, and that there was no evidence before it to suggest that this procedure would not have been effective in securing disclosure of the documents sought” (para. 102). Similar conclusions have been reached by the Court in ECtHR, 19.10.2005, *Roche v. United Kingdom*, paras. 162-163, but the result is totally different, as the Court states a violation of Article 8, since it ascertains “difficulties in making comprehensive and structured disclosure to date undermines [...] any suggestion that an individual going to Porton Down to review records retained there (the 1998 Scheme) could lead to the provision of all relevant and appropriate information to that person. It is undoubtedly the case that certain records (existing after 1996) were, given their age and nature, somewhat dispersed so that the location of all relevant records was, and could still be, difficult.” (para. 166).

⁴⁴ See ECtHR, 08.07.2003, *Hatton and Others v. United Kingdom*, Grand Chamber, paras. 99 and 104. Similar conclusions have been reached by the Court in other cases: ECtHR, 02.11.2006, *Giacomelli v. Italy*, 82-84 and 94, where the State failed to respect the procedure established to respect the individual rights in the licensing of a waste treatment plant, since 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 laws (paras. 94-95); ECtHR, *Tătar v. Romania*, 27.01.2009, paras. 88, 101 and 113; ECtHR, 10.11.2004, *Taşkin and Others v. Turkey*, paras. 118-119, where the Court reiterates that only those specifically affected have the right to participate in the decision-making process, since an *action popularis* to protect the environment is not envisaged by the Court; ECtHR, 07.04.2009, *Brândușe v. Romania*, paras. 62-63; ECtHR, 10.02.2011, *Dubetska and Others v. Ukraine*, paras. 144-145, where the Court states that the procedural safeguards available to the individuals may be rendered inoperative and the State may be found liable when a decision-making process is unjustifiably lengthy or when a decision taken as a result remains for an important period unenforced; ECtHR, 21.07.2011, *Grimkovskaya v. Ukraine*, paras. 66-69, where the decision to route the motorway through the city was not preceded by an adequate feasibility study and a reasonable policy for mitigating the motorways effects on the residents was not carried out.

⁴⁵ ECtHR, 10.11.2004, *Taşkin and Others v. Turkey*, para. 119; ECtHR, *Tătar v. Romania*, 27.01.2009, pars. 88; ECtHR, 10.02.2011, *Dubetska and Others v. Ukraine*, paras. 143-145; ECtHR, 21.07.2011, *Grimkovskaya v. Ukraine*, pars. 69.

⁴⁶ See ECtHR, 26.08.1997, *Balmer-Schafrroth and Others v. Switzerland*, application n. 67/1996/686/876, paras. 39-40; ECtHR, 10.11.2004, *Taşkin and Others v. Turkey*, pars. 130; ECtHR, 06.04.2000, *Athanassoglou and Others v. Switzerland*, application n. 27644/95, pars. 40.

10 The role of the ECtHR case-law in the fight against environmental crime

The previous reflections can be useful to investigate the influence of the ECtHR case-law, providing for positive obligations to adopt and enforce criminal provisions in the most serious cases of environmental damages – committed both intentionally and not intentionally in some circumstances, on the criminal law national systems of the ECHR Contracting States. It can be affirmed that such an influence spreads in three different directions:

- a) the provision of such positive obligations influences *directly* the criminal law system of the State sentenced by the ECtHR, which must comply with the judgment of the Court, in order to prevent the non-compliance procedure provided for Article 46 ECHR;
- b) the provision of such positive obligations influences *indirectly* also the criminal law systems of the other Contracting States, since they could be considered also liable for not fulfilling such obligations, in the case their citizens made a complaint before the Court.
- c) as a result, a proper harmonization effect affects the criminal law domestic systems, on the basis of the standards of human rights protection identified by the Court.⁴⁷ Such a harmonization effect is further improved by the obligation of a ECHR consistent interpretation of the domestic legislations, provided for in many Contracting States⁴⁸.

Moreover, the influence of the ECtHR case-law relating on the environmental matter also spreads on the EU legal system, since it is possible to draw a kind of ‘integrated restrictions’ table’, built up from the limitations established by the ECtHR jurisprudence (in particular concerning Article 8, para. 2), as specifically improved by national provisions, which can be considered as a prevailing trend within EU Member States’ legislations. Such integrated table - in the perspective of drafting a common legislation at EU level - built on both European and national grounds, would represent a particularly useful guideline for the EU legislator.

In particular, as for the positive obligations to criminalise the most serious conducts affecting the environments, the ECtHR case-law certainly represents a good reference point for the application of the criminal policy principles of necessity, proportionality and effectiveness of the criminal law intervention, which should also inspire the EU legislator in adopting criminal law provisions concerning the environmental matter⁴⁹. In this respect, the guidelines outlined by the Strasbourg Court require that:

- i) the recourse to criminal law must represent the last resort (*extrema ratio*), where other less intrusive measures have not been respected or they are considered ineffective or inadequate;
- ii) consequently, the criminal law provisions must show the best efficiency and seriousness;

⁴⁷ For an in-depth analysis on the harmonisation process in the sector of protection of the environment through criminal law, see Grazia Maria Vagliasindi, “The European harmonisation in the sector of protection of the environment through criminal law: the results achieved and further needs for intervention”, *The New Journal of European Criminal Law* 3 (2012): 320-331.

⁴⁸ See Scalia, *Profilo penalistico e obblighi di tutela*, 102-105; Vitaliano Esposito, “Danno ambientale e diritti umani”, in www.penalecontemporaneo.it, 10-11. For a critical perspective, see Verschueren, *Contribution of the case law of the European Court of Human Rights to sustainable development in Europe*, 15, who finds that, despite the ECtHR has established a continent wide safety net protecting all Europeans against severe environmental pollution and it has forced the authorities in 47 States to offer their citizens and NGOs procedural rights whenever the environment is at stake, assess the impact on the environment of their decisions, implement and enforce existing standards and carry out domestic rulings, however the ECtHR case-law did not lead to a harmonization of environmental standards across Europe, nor to the adoption of progressive environmental policies.

⁴⁹ See Valeria Scalia, “Controllo giurisdizionale su necessità e proporzionalità delle scelte di criminalizzazione del legislatore europeo: uno sguardo sulle possibilità di dialogo tra le Corti europee” in *Le sfide dell’attuazione di una Procura europea: definizione di regole comuni e loro impatto sugli ordinamenti interni*, ed. Giovanni Grasso et al. (Milano: Giuffrè, 2013): 364 ff.

iii) in particular, criminal law legislation must be provided for conducts committed intentionally or for conducts committed not intentionally, where they caused or can cause prolonged and serious damages to the quality of air, soil or waters, to the animals or plants and where they can provoke the death or grievous injuries to individuals.

As for the restrictions of the Contracting States' margin of appreciation in the assessment of a fair balance between the individuals rights and the interests of the community as a whole within the environmental matter, in the light of the proportionality test, provided by the ECtHR case-law according to Article 8, para. 2, they create a set of procedural rules, which actually reflects the essential elements of the Aarhus convention and other international and European legal instruments – i.e. access to information, public participation in environmental decision-making, and access to justice, which have all been incorporated into European human rights law through the jurisprudence of the ECtHR. In substance, the Aarhus Convention rights are also ECHR rights, enforceable in national law and through the Strasbourg Court like any other human rights.⁵⁰ These rules - concerning also the carrying out of scientific studies and researches in order to assess and map the risk linked to the development of activities particularly dangerous for the environment and the involvement in the decision-making process of those individuals whose interests could be affected by such activities – can further represent a kind of draft for a model of compliance programme aiming at the prevention of environmental crimes, according to the corporate governance principles.⁵¹

Actually, the identification of such a set of rules causes as a consequence an improvement of the harmonization process concerning best practices, consisting principally in duties of prevention and information, within the European Countries; process already triggered by the necessary compliance by the States with the obligations arising from other European and international legal instruments.

Furthermore, the enforcement of these best practices, focusing on mechanisms of risk prevention and assessment, within the legal and administrative framework of the European States makes the recourse to criminal law provisions really an exception, which has to be reserved only to the most serious conducts affecting the environment and the rights of individuals.

11 Concluding Remarks

The short analysis of the ECtHR case-law shows to what extent it can influence the criminal and administrative legislation of the Contracting States in the environmental matter, considering that the national legal systems must comply with the obligations and constraints outlined in the judgments of the Strasbourg Court. Consequently, whenever the legal system of a Contracting State provides for a legislation or a case-law or a practice, which somehow infringes the requirements established by the Court, the ECtHR itself therefore can formally recognize such a violation within its judgments and as a result the sentenced State must change its legal system, according to the Court's indications, which are binding for all the Contracting States according to Article 46 ECHR.⁵² The Court has gradually become more courageous in its judgments in giving indications under Article 46 as to the most appropriate individual and general measures needing to provide redress and, going even further, it noted in the so-called *pilot judgments* that the violation was a result of a malfunctioning of the State legislation or administrative practice affecting a large but identifiable class of citizens and that general measures were required at national level.⁵³ Recently, Protocol n. 14 entered into force on the 1st June 2010 has progressively reinforced the mechanism of control on the execution of the Court's judgments, involving in such a mechanism the Court

⁵⁰ See Alan Boyle, "Human Rights or Environmental rights? A Reassessment", available at http://www.law.ed.ac.uk/includes/remote_research_areas_data/type_formats/remote_journals_listing?sq_content_src=%2BdXJsPWh0dHALM0ElMkYlMkZ3d3cyLmxhd5lZC5hYy5IayUyRmZpbGVfZG93bmxxYWQlMkZwdWJsaWNhdGlvbnMlMkYwXzEyMjFfaHVtYW5yaWdodHNvcmVudmlyb25tZW50YWxyaWdodHNhcmVhc3Nlc5wZGYmYWxsPTE%3D, 36.

⁵¹ See Esposito, "Danno ambientale e diritti umani", 9.

⁵² Article 46, para. 1, ECHR provides: "The High Contracting Parties undertake to abide by the final judgment of the Court in any case where they are parties".

⁵³ See in this respect ECtHR, 22.06.2004, *Broniowski v. Poland*, application n. 31443/96, in *Reports of Judgments and Decisions 2004-V*.

itself when a sentenced State does not comply with the requirements of the judgment and the Committee of Ministers.⁵⁴

The reinforced control mechanism, the tool of the “pilot judgments” and the future accession of the EU to ECHR make stronger the influence of the ECtHR case-law on the national legal systems – and with respect to our topic, on the domestic criminal legislations concerning the fight against the environmental crime – and after the accession even on the European legislation in the same field. Indeed, the Court develops its novel pilot judgment procedure as a technique of identifying the structural problems underlying clone cases against many countries and imposing an obligation of the States to address these problems.

In conclusion, there is certainly evidence of convergence in the environmental case-law and a cross-fertilization of ideas between the different legal systems at different level⁵⁵ – i.e. international, European and national -, which allow a virtuous circle of preventive and repressive legal patterns, that can on the one hand improve the respect of the principles guiding the criminal law policies by the legislators and on the other hand heighten the standard of protection of individuals rights where environmental issues are at stake.

12 Summary

The report deals with the relevance and the influence of the human rights protection's system provided for by the European Convention on Human Rights (ECHR) and the European Court of Human Rights (ECtHR) on the fight against the environmental crime at the European and national level. Although the word “environment” is not mentioned in the ECHR, the right to a healthy environment is recognized in the ECtHR case-law through an extensive interpretation of the applicability domain of certain other rights, expressly provided for in the Convention, such as the right to life (Article 2 ECHR), the right to private and family life (Article 8 ECHR), the right to property (Article 1- Additional Protocol n. 1 to ECHR), the right to a fair trial (Article 6 ECHR) and the freedom of speech (Article 10 ECHR).

Therefore, in order to have an overview of the ECtHR case-law relating to the respect of the right to a healthy environment, it is necessary to analyse different judgments concerning the infringements of other rights, which have been connected to such a right by the Court. This analysis shows how from the right to life (Article 2) or to private life (Article 8) could arise several positive obligations incumbent on the Contracting States in order to comply with them.

Particularly interesting are the situations, where the compliance with the ECHR positive obligations requires the implementation and the enforcement of criminal law provisions, in order to ensure the effectiveness of the fundamental rights and the protection of individuals. The criminal law plays in such cases, therefore, a crucial

⁵⁴ Harris et al., *Law of the European Convention on Human Rights*, 863-869; Nabil Hajjami, “L’entree en vigueur du Protocole N. 14 a la Convention Europeenne de sauvegarde des droits de l’homme”, *Revue Belge de Droit International* 1 (2010): 204-233; Bruno Nascimbene, “Le Protocole N. 14 a la Convention Europeenne des droits de l’homme a la lumiere de ses travaux preparatoires”, *Revue trimestrielle des droits de l’homme* (2006): 531-546; Francesco Salerno, “Le modifche strutturali apportate dal Protocollo n. 14 alla procedura della Corte europea dei diritti dell’uomo”, *Rivista di diritto internazionale privato processuale* (2006): 395; Martin Eaton and Jeroen Schokkenbroek, “Reforming the Human Rights Protection System Established by the European Convention on Human Rights”, *Human Rights Law Journal* (2005): 1-17; Stéphanie Lagoutte, “Le Protocole 14 a la Convention une assurance de la perennite du system europeen de protection des droits de l’homme?”, *Cahiers de Droit Européen* 1-2 (2005): 127-154; Andrea Saccucci, *Profili di tutela dei diritti umani tra Nazioni Unite e Consiglio d’Europa* (Padova: CEDAM, 2005), 167; Marie-Aude Beernaert, “Protocol 14 and New Strasbourg Procedures: Towards Greater Efficiency? And at What Price?”, *European Human Rights Law Review* (2004): 545-547 (especially, with respect to the execution of the Court’s judgments, see 554-555); Ugo Villani, “Il Protocollo n. 14 alla Convenzione europea dei diritti dell’uomo”, *La Comunita` internazionale* (2004): 487; Antonio Leandro, “Le modifche principali al sistema di garanzia istituito dalla CEDU introdotte con il Protocollo n. 14 del 13 maggio 2004”, *Diritto pubblico comparato ed europeo* (2005): 949; Eduardo Savarese, “Il Protocollo n. 14 alla Convenzione europea dei diritti dell’uomo”, *Rivista di diritto internazionale* (2004): 714.

⁵⁵ See Boyle, “Human Rights or Environmental rights? A Reassessment”, 31.

role as a tool of human rights protection, carrying out both a preventive and repressive function. Moreover, the States' choice for the adoption of criminal law provisions within their jurisdictions becomes partially forced by the ECtHR positive obligations. Hence, a State can perpetrate a violation of the ECHR provisions, if its criminal law system is unable to prevent or punish human rights infringements within its jurisdiction. As a result, the ECtHR can check the possible lacks and omissions concerning the exercise of investigation and punishment powers, caused by the State's inactivity, and considers the same State liable for the human rights violation.

For instance, in the context of the environmental matter, Article 2 has been applied where certain activities endangering the environment are so dangerous that they also endanger human life. In particular, in cases involving dangerous activities, as nuclear tests, operations of chemical factories with toxic emissions or waste-collection sites – carried out both by public authorities and by private companies – the scope of the positive obligations arising from Article 2 depends on the harmfulness of the activities and the foreseeability of the risks to life.

The influence of the ECtHR case-law relating on the environmental matter also spreads on the EU legal system, since it is possible to draw a kind of “integrated restrictions” table, built up from the limitations established by the ECtHR jurisprudence (in particular concerning Article 8, para. 2), as specifically improved by national provisions, which can be considered as a prevailing trend within EU Member States’ legislations. Such integrated table - in the perspective of drafting a common legislation at EU level - built on both European and national grounds, would represent a particularly useful guideline for the EU legislator.

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