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DI PADOVA



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AND POLITICAL SCIENCE

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AND INTERNATIONAL STUDIES

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# **The Right to Healthy Environment: Potential of the European Convention on Human Rights**

*Supervisor: Prof. Paolo De Stefani*

*Candidate:*

**Volha Shavela**

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## **Abstract**

The European Convention on Human Rights (ECHR) does not include any article specifically designed to provide a general protection of the environment as such. But many believe that the ECHR has already established one of the most remarkable mechanisms of control and guarantee of “right to a healthy environment” through the evolving interpretation of existing provisions. This paper intends to present the limits of the European Court of Human Rights jurisprudence in regard of environmental cases and shows how Europe and the world would benefit if the right to a healthy environment became a stand-alone right in the ECHR.

**Key words:** Human Rights, Environment; Right to a Healthy Environment; European Court of Human Rights; European Convention on Human Rights.



### **List of abbreviations:**

Human Rights Law (HRL).

International Humanitarian law (IHL).

Multilateral Environmental Agreements (MEAs).

The Court of Justice of the European Union (CJEU).

The European Court of Human Rights (ECtHR).

The European Convention on Human Rights (ECHR).

The European Union (EU).

The International Covenant on Economic, Social and Cultural Rights (ICESCR).

The International Court of Justice (ICJ).

The Office of the United Nations High Commissioner for Human Rights (OHCHR).

The United Nations (UN).

The United Nations Environment Programme (UNEP).

West Nile virus (WNV).

In this paper the definition «The Court» is a synonym of the European Court of Human Rights (ECtHR). Definition «the court» is used for domestic court if not otherwise specified.



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## Introduction

*Let me suggest that if a farmer sees a tree that is unhealthy, they don't look at the branches to diagnosis it, they look at the root. So like that farmer, we must look at the root, and not to the branches of the government, not to the politicians run by corporations. We are the root, we are the foundation, this generation, it is up to us to take care of this planet. It is our only home. We must globally warm our hearts and change the climate of our souls and realize that we are not apart from nature; we are a part of nature. And to betray nature is to betray us, to save nature, is to save us. Because whatever you're fighting for: Racism, Poverty, Feminism, Gay Rights, or any type of Equality. It won't matter in the least, because if we don't all work together to save the environment, we will be equally extinct*<sup>1</sup> (Richard Williams).

According to World Health Organization «health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity».<sup>2</sup> Human well-being and enjoyment of human rights are impossible without healthy environmental conditions. Right to life, right to health, right to water and other fundamental rights and freedoms are indivisible from the right to healthy environment. However there is no article in the European Convention on Human Rights (ECHR) or in the Universal Declaration of Human Rights that includes the "right to a healthy environment" as such or an article specifically designed to provide general protection of the environment.

Many have suggested that the right to a healthy environment should exist as a stand-alone right and should be codified and respected at European level. Nevertheless the proposal of a Parliamentary Assembly to draft an additional Protocol to the ECHR has been rejected by the Committee of Ministers of the Council of Europe for three times. In its last report the Committee stated «... although the European Convention on Human Rights does not expressly recognize a right to the protection of the environment, the convention system already indirectly contributes to the protection of the environment

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<sup>1</sup> Williams Richard- rapper and activist apologizing to future generations for humanity's part in destroying the environment.

<sup>2</sup> Preamble to the Constitution of the World Health Organization as adopted in 1946 and entered into force on 7 April 1948.

through existing convention rights and their interpretation in the evolving case law of the European Court of Human Rights<sup>3</sup> and «the Committee of Ministers did not consider it advisable to draw up an additional protocol to the convention in the environmental domain. Since then the position of the Committee of Ministers on this issue has remained unchanged.»<sup>4</sup>

In this paper I defend a human rights-based approach to environment. I will argue that Europeans must have the right to healthy environment incorporated in the ECHR. I will demonstrate how Europe and the whole world can benefit if such additional protocol would come into being.

Throughout this paper I will address the following questions:

- 1) How the European Court of Human Rights (ECtHR) has ensured environmental protection so far?
- 2) What are the limits of the ECtHR in regard of environmental issues?
- 3) Are there alternative mechanisms that can guarantee the right to healthy environment for Europeans apart from additional protocol to the ECHR?

The interlink between environment and human rights and how to apply human rights to the environment is widely discussed today among scholars and goes far beyond the academic community. The growing environmental caseload of human rights courts and treaty bodies indicates the importance of the topic in mainstream human rights law.

However even though there are many works devoted to this topic there is no research that would clearly show the concrete benefits of adopting a substantive right to healthy environment. In this paper I present real-life examples and show how situations would have been different if we had had a codified right to healthy environment in the ECHR. I wish my paper will contribute to the understanding of the problem and might stimulate further research in social and natural sciences<sup>5</sup>.

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<sup>3</sup> Van de Venis, 2011, p. 10.

<sup>4</sup> Idem, p. 10.

<sup>5</sup> In conclusion of this paper I suggest that we need more research in the area of natural science.

My personal motivation to write this paper is my deep dissatisfaction with the quality of the environment in my Country, as a result of the Chernobyl nuclear disaster. Even though my country is not a member of the Council of Europe, its ecology can also benefit from the recognition of the right to healthy environment under the ECHR.

In this paper I will use social science and legal methods. Firstly, I will analyze the case-law developed by the European Court of Human Rights. I will determine to what extent harm to environment can be qualified by the ECtHR as a human rights violation. For this part my main sources will be judgments and decisions issued by the ECtHR<sup>6</sup>, the Environmental Case Law Toolkit<sup>7</sup> and the Manual on Human Right and the environment.<sup>8</sup>

For chapter 2 and chapter 3 I used data from academic literature, government and NGO publications, international agreements as well as articles from reliable on-line media. Some opinions I collected on the occasion of some meetings with UN experts in Geneva<sup>9</sup> have also been mentioned.

### **Chapter overview:**

In chapter 1 I examine the Strasbourg caseload in order to see under what conditions environmental harm constitutes a violation of the ECHR. By the end of the chapter I will sum up the main principles used by the Court when it deals with «environmental» cases.

In chapter 2 I present and analyze cases that involve an environmental element but that are very unlikely to meet the admissibility criteria set out in the ECHR or in which it seems obvious that the applicant would lose the case.

Chapter 3 starts with a brief introduction of a variety of definitions of the discussed right. Then I will make an overview of possible mechanisms of protection of the right under consideration both at the international regional and national level. Finally I assess

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<sup>6</sup> European Court of Human Rights website.

<sup>7</sup> European network of environmental law organizations, 2011.

<sup>8</sup> Council of Europe, 'Manual on Human Right and the environment (2nd edition), 2012.

<sup>9</sup> Meeting of EMA students from Padua University with UN representatives took place in Geneva, Switzerland on 18- 21 May 2015.

national and international possible approaches to safeguard the environment in Europe, and consider ways to overcome existing challenges.

I conclude that effective protection of the environment in Europe requires the right to healthy environment to be recognized on three levels: national, regional and international. But the recognition of this right at the European level will eventually lead to the recognition and/or strengthening of the same right at any other levels. I would also give some modest recommendations on how to achieve that goal.

## **Chapter 1.Role/Working of the ECtHR: analysis and assessment**

The goal of this chapter is to assess how far the European Court of Human Rights takes into consideration issues related to the environment. I will overview relevant environmental cases handled by ECtHR and will sum up principles on human rights and environmental protection derived from its case-law. I will conclude that the Court has already recognized that human rights and environmental concerns are interlinked but it is still reluctant to recognize the existence of a right to healthy environment as such.

For this chapter I selected cases which are often referred to in judgments and decisions of the Court. Those cases also show that violations of human rights due to unhealthy environment do not occur in one country or group of countries, they have been happening across the entire Europe. Besides, many academics discuss only Article 2 and Article 8 of the ECHR as being relevant to human rights and environmental damages. But in fact other articles as well can be interpreted as to protect the environment. To begin with I want briefly provide some basic information about the way the European Court of Human Rights works.

The ECtHR is an international court set up in 1959 and based in Strasbourg. Its task is to ensure that 47 the Council of Europe member states respect the rights and guarantees set out in the European Convention on Human Rights. The ECHR has been in force since 1953 and it is an international treaty to protect human rights and fundamental freedoms in Europe.

The Court's judges do not represent any state and act entirely independently of their country of origin. They are elected by a majority vote in the Parliamentary Assembly of the Council of Europe.

The Court can receive individual or inter-State applications. But so far almost all applications have been lodged by individuals. Anyone who feels that his/her human rights are being violated by a Council of Europe member State can make an application to the European Court. It is not necessary for applicant to be a national of one of the

States bound by the Convention. If the violation has been committed by one of Council of Europe member state against a person on its territory this would satisfy conditions for lodging application. If the Court finds a violation then the state concerned is under an obligation to comply with the judgment. The Court can not hear the case against individuals or private institutions, the complaint must be attributed to one or more public authorities in the State(s)<sup>10</sup>. It is hard to predict the length of proceeding. Often it takes years before the Court delivers a judgment. But for many individuals it is the last chance to obtain justice and change the law and practices in their home country.

The ECtHR must not be confused with the Court of Justice of the European Union (CJEU), based in Luxembourg and International Court of Justice (ICJ), based in the Hague. The CJEU ensures compliance with the EU law and rules on the interpretation and application of the treaties establishing the European Union. The ICJ settles disputes submitted to it by States according to international law.

### **1.1 Cases with environmental element in the ECtHR.**

In this section cases dealt with by the ECtHR with a distinct element linked to the right to healthy environment will be summarized. They are listed in accordance with the human right set forth in the European Convention raised with the claim.

#### **Right to life (Article 2 of the European Convention on Human Rights):**

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

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

*- (a) in defense of any person from unlawful violence;*

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<sup>10</sup> European Court of Human Rights (a).

- (b) *in order to effect a lawful arrest or to prevent escape of a person lawfully detained;*

- (c) *in action lawfully taken for the purpose of quelling a riot or insurrection.*

### **Case of L.C.B. v. the United Kingdom<sup>11</sup>**

Between 1952 and 1967 the United Kingdom carried out a number of atmospheric tests of nuclear weapons in the Pacific Ocean. During such tests service personnel were ordered to line up in the open and to face away from the explosions with their eyes closed and covered. The applicant was the daughter of a catering assistant in the Royal Air Force who participated in those tests. She claimed that the state's failure to warn her parents of the dangers of tests to children they might have and her father's unmonitored exposure to radiation was the probable cause of her childhood leukemia. Because of her illness she had to undergo chemotherapy treatment and was not able to fully participate in average childhood activities.

The Court did not find evidence that the applicant's father had been dangerously irradiated. The Court decided that the causal link between applicant's leukemia and the exposure of her father to radiation had not been established. The Court also considered that the scientific information about tests available to the state at that time was not enough for the state to take any special actions in relation to the applicant or her father. It follows that there has been no violation of Article 2.

### **Case of Oneryildiz v. Turkey<sup>12</sup>**

A methane explosion occurred on a municipal rubbish tip killing thirty-nine people who had built their dwellings there without authorization. In that accident the applicant lost his house and nine close relatives. The applicant complained that the government did not take any preventive measures despite the fact that the local public authorities knew about the risk. Two years prior to the accident an expert report had drawn the attention

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<sup>11</sup> Case of L.C.B. v. the United Kingdom, (14/1997/798/1001), judgment of 09/06/1998, ECtHR.

<sup>12</sup> Case of Oneryildiz v. Turkey, (48939/99), judgment of 30/11/2004, ECtHR.

of the municipal authorities to the possibility and danger of a methane explosion. However no action had been taken by officials.

The Court found a violation of Article 2. Since public authorities knew about the real and immediate risk, they had an obligation, under Article 2, to safeguard lives of slum inhabitants by working out appropriate regulations. Moreover the state had the duty to inform people about the risks they were running by living in that area.

### **Case of Budayeva and others v. Russia<sup>13</sup>**

The town of Tyrnauz in central Caucasus had been repeatedly hit by mudslides over seventy years. Local people were informed of the existing risk of mudslides but were reassured by local authorities that all reasonable measures had been taken to avoid damage from mud and debris flows.

Nevertheless a mudslide in 2000 led to a catastrophe. Eight people died including the applicant's husband. Besides, her son and other members of her family were heavily injured. The applicant accused the local authorities of inadequate maintenance of protecting equipment and failure to set up a warning system. Official papers proved that authorities had received warnings from the state monitoring agency about the urgent need to repair some defense infrastructure. However no funds had been allocated to prevent devastating consequences of mudslides. Moreover the government did not have any warning and evacuation policy in regard to such a highly probable natural disaster. In this case the Court found that there had been a casual link between government's inaction and the death of numerous people. The Court confirmed that Russian authorities failed to ensure effective protection of the right to life and breached Article 2 of the ECHR.

What those cases show is that states have to comply with their positive obligation and take necessary steps to prevent death caused by highly probable natural disasters or man made activities that worsen the environment. This can be done through proper regulations, adequate defense, and warning systems. In theory, Article 2 can apply even

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<sup>13</sup> Case of Budayeva and others v. Russia, (15339/02, 21166/02, 20058/02, 11673/02 and 15343/02), judgment of 20/03/2008, ECtHR.



in cases where loss of life does not occur but is very likely to occur, for example, in situations of nuclear tests or inappropriate running of chemical factory<sup>14</sup>.

**Prohibition of torture (Article 3 of the European Convention on Human Rights):**

*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*

**Case of Florea v. Romania<sup>15</sup>**

The applicant suffered from chronic hepatitis and arterial hypertension while serving a sentence of life imprisonment. He had to share a cell for approximately nine months with more than a hundred prisoners. According to the applicant, 90% of his cellmates were smokers. He was also in the company of smokers during his three stays in the prison hospital. Applicant was advised by his doctor to avoid smoking. However due to overcrowding and lack of space in prison prison's authority could not separate smoking and non-smoking prisoners. The Court has established that there had been a violation of Article 3 of the ECHR. State was supposed to protect prisoner from harmful effects of passive smoking.

**Right to liberty and security (Article 5 of the European Convention on Human Rights):**

*Everyone has the right to liberty and security of person.*

*No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*

*(a) the lawful detention of a person after conviction by a competent court;*

*(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;*

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<sup>14</sup> Council of Europe, 'Manual on Human Right and the environment (2nd edition)', 2012, p. 35.

<sup>15</sup> Case of Florea v. Romania, (37186/03), judgment of 14/09/2010, ECtHR.

*(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;*

*(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;*

*(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;*

*(f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.*

*Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him.*

*Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.*

*Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*

*Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.*

### **Case of Mangouras v. Spain<sup>16</sup>**

In 2002 the ship «Prestige», flying the flag of the Bahamas, accidentally spilled 70,000 tonnes of fuel oil into the Atlantic Ocean in the Spanish exclusive economic zone. The oil spill caused an ecological disaster which effects on marine flora and fauna lasted for several months and spread as far as to the French coast. Spilled oil destroyed marine life and had environmental impact on several sectors of the Spanish economy including fishing, commerce and tourism.

The Greek applicant, who was the captain of «Prestige», was arrested and criminal investigations started. He was remanded in custody with the possibility of release on bail of three million euros. His bail was paid by the ship owner's insurers about two months later. The applicant alleged that the sum set for bail in his case had been excessive and had been fixed without his personal circumstances being taken into consideration. He relied on Article 5 of the ECHR.

The Court found that there had been no violation of Article 5 of the Convention. The Grand Chamber agreed that there had been a growing and legitimate concern both in Europe and internationally about offences against the environment. The Court considered that the domestic court had taken into account the applicant's personal situation as well as his professional relationship with the persons who were to provide the security, his nationality, place of permanent residence, his age and his lack of ties in Spain. The Court also considered the seriousness of the offence and the disastrous environmental and economic consequences of the oil spill. A high level of bail was justified to ensure that the applicant would appear for trial and those responsible for environmental disaster would not escape from justice. This case, among other things, shows that the Court when issuing a judgment takes into account national and international environmental regulations and standards.

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<sup>16</sup> Case of Mangouras v. Spain, (12050/04), judgment of 28/09/2010, ECtHR.

**Right to a fair trial (Article 6 of the European Convention on Human Rights):**

*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*

*Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*

*Everyone charged with a criminal offence has the following minimum rights:*

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
- (b) to have adequate time and the facilities for the preparation of his defence;*
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*

### **Case of Taşkın and Others v. Turkey<sup>17</sup>**

The applicant complaint to a domestic court about the environmental pollution caused by a gold mine located close to his village. He stated that firstly, gold was extracted through unsafe process, and secondly, that the use of explosives caused noise pollution. The Turkish Constitution (Article 56) recognized the right to live in a healthy, balanced environment. The Turkish Supreme Administrative Court annulled a mining permit by reason of its adverse effects on the environment and human health. However authorities ordered to close the gold mine only ten months after the delivery of the judgment.

The applicant stated that the authorities' delay to comply with the administrative courts' decisions had infringed his right to effective judicial protection. The Court found that there has been a violation of Article 6 of the Convention. The national authorities failed to comply in practice and within a reasonable time with the judgment given by the Supreme Administrative Court.

As it has been noticed by scholars this case also shows the benefits of having environmental rights included in national constitution<sup>18</sup>. The Court has recognized that the right to healthy environment when enshrined in national law constitutes a civil right. Violation of that right might be addressed by Article 6 paragraph 1.

### **The second case worthy of mention in this category is that of **Howald Moor and Others v. Switzerland<sup>19</sup>****

Hans Moor spent his entire career working in a machinery plant. From 1965 until at least 1978 he was exposed to asbestos dust in the course of his work. In May 2004 he was diagnosed with a highly aggressive malignant tumor that was caused by his exposure to asbestos. He died one year later. His wife applied to the Swiss court claiming that the insurance fund and her husband's employer were jointly and severally liable for the death of her husband.

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<sup>17</sup> Case of Taşkın and Others v. Turkey, (46117/99), judgment of 10/11/2004, ECtHR.

<sup>18</sup> Kashif, 2013. p 35.

<sup>19</sup> Case of Howald Moor and Others v. Switzerland, (52067/10 and 41072/11), the case is not final, ECtHR.

The Swiss Court dismissed her claim on the grounds that the absolute time-limit of ten years from the date of the occurrence of the damage had expired. The Federal Court found that the limitation period began running from the date on which the damage had occurred, irrespective of when it had become apparent.

The applicants, Ms. Moor and her two daughters, complained that their right of access to a court had been breached. The Court pointed out that the latency period for this kind of diseases could be several decades. The Court stated that when calculating the limitation period it has to be taken into account that sometimes a person is not aware of his/her disease. In the present case the Strasbourg jurisdiction found that the application of the periods in question had restricted the applicants' access to a court to the point of breaching Article 6 of the Convention.

### **Case of a Thanassoglou and others v. Switzerland<sup>20</sup>**

The applicants lived in villages situated close to a nuclear power plant. A private company which had operated the nuclear power plant, applied to the government for an extension of its operating license for an indefinite period. The applicants complained that the nuclear power plant did not meet safety standards and that the risk of an accident was higher than usual. The Federal Council however dismissed the applicant's claims and granted the company the operating license.

Before the ECtHR the applicants complained that they had been denied access to a court in respect of the decision of the Federal Council. In their pleadings they were claiming not about an imminent danger to their own lives but about a general danger linked to the nuclear plant.

The Court found that the link between the public authorities' decisions and the domestic law rights (life, physical integrity, property), was not sufficient to bring Article 6 into play. The Court found that the policy on how best regulate the use of nuclear energy is a task each state has to regulate according to its democratic processes. Article 6 was found not applicable also in the case of **Balmer-Schafroth and others v.**

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<sup>20</sup> Case of a Thanassoglou and others v. Switzerland, (27644/95), judgment of 06/04/2000, ECtHR.

**Switzerland.**<sup>21</sup> The applicants failed to show that the power station posed serious and imminent danger to them personally.

Article 6 guarantees the right to a fair trial, access to a court and enforcement of court decisions. However, Article 6 is not always applicable when the right in question is not recognized under domestic law or if it is the right under domestic administrative law.

**Right to a private and family life (Article 8 of the European Convention on Human Rights):**

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

*There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

**Case of Lopez Ostra v. Spain<sup>22</sup>**

The applicant alleged that the polluting fumes, repetitive noise and strong smells from a waste treatment plant situated near her house made her family's living conditions unbearable and caused serious health problems to her and members of her family. She claimed that the Spanish government did not take any active measures to stop the environmental pollution and this was an infringement of her right under Article 8 of the ECHR. The Spanish government argued that there was no grave health risk to the life of applicant.

In that case the Court was on the side of applicant. The Court stated that "severe environmental pollution may affect individuals' well-being and prevent them from

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<sup>21</sup> Case of Balmer-Schafroth and others v. Switzerland, (67\1996\686\876), judgment of 26/08/1997, ECtHR.

<sup>22</sup> Case of Lopez Ostra v. Spain, (16798/90), judgment of 09/12/1994, ECtHR.

enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health”.

The Court also found that Spain «did not succeed in striking a fair balance between the interest of the town’s economic well-being - that of having a waste-treatment plant - and the applicant’s effective enjoyment of her right to respect for her home and her private and family life»<sup>23</sup>. A fair balance between the interests of the applicant and interest of the community has become a principle that the Court applies when dealing with environmental issues. However the Court pointed out that state enjoys a certain margin of appreciation when it comes to balancing the competing interests of the individual and of the community as a whole.

The case of **Dubetska and Others v. Ukraine**<sup>24</sup> also shows that state has an obligation to fairly balance interests of stakeholders. In that case applicant complained about having suffered health problems and house damage as a result of operation of closely located state-owned coal mine and factory. State could have balanced interests of stakeholders by for example curbing pollution or by resettling applicants. However, over twelve years the Ukrainian authorities had been aware of the adverse environmental effects of the mine but had not taken any effective measures to help applicants. The Court concluded that there had been a violation of Article 8.

**Hatton and others v. the United Kingdom**<sup>25</sup> is significant and a quite unusual case. The applicants lived close to Heathrow airport and complained that their health suffered because of the noise from night-time planes. The Chamber held that there was a violation of Article 8 since the UK’s government failed to strike a fair balance between the state’s economic well-being and the applicants’ effective enjoyment of their right to respect for their homes and private and family lives.

Judgments delivered by the Grand Chamber are final and cannot be appealed against. In case of judgments delivered by a Chamber, within three months following the

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<sup>23</sup> Case of Lopez Ostra v. Spain (16798/90), judgment of 09/12/1994, ECtHR, paragraph 58.

<sup>24</sup> Case of Dubetska and Others v. Ukraine, (30499/03), judgment of 10/02/2011, ECtHR.

<sup>25</sup> Case of Hatton and others v. the United Kingdom (36022/97), judgment of 02/10/2001 ECtHR and Case of Hatton v. the United Kingdom, (36022/97), judgment of 08/07/2003, ECtHR.



publication of the judgment the parties can request referral of the case to the Grand Chamber for fresh consideration.<sup>26</sup> The UK's government took advantage of the opportunity and appealed against the 2001 judgment. In 2003 decision the Court recalled that in regard of pollution state might be held liable for violation of Article 8 in two circumstances. Firstly, when state is directly involved in causing pollution and secondly, when state fails to regulate private industry under its jurisdiction that causes pollution. Thus Article 8 requires states to fulfill their positive obligations to regulate and monitor all kinds of activities under its jurisdiction that might be dangerous for environment, even if that is an activity of the third party. However this time the Grand Chamber decided that the failure of the British government to reduce night flights from Heathrow Airport did not breach the Article 8. The previous judgment was thus overturned. This time judges found that the state had acted within its margin of appreciation. The Court found that only a small percentage of people had suffered by the noise and the housing prices had not significantly dropped in the area near the airport, and the applicants could have moved to another area without financial loss. The Court also stressed that maintaining of night flights was necessary for the economic well-being of the country. Judges failed to reach a conclusion about whether the policy on night flights at Heathrow airport had actually led to an increase in night noise.

Interesting that in another case concerning noise, **Dees v. Hungary**<sup>27</sup>, the Court noticed that the state has to take effective measures to balance the interests of all sides. Mr. Deés complained to the ECtHR that the noise, vibration, smell, and pollution caused by heavy traffic on his street made his home uninhabitable and that the government's measures to improve the situation had been insufficient. The Court found that Hungary failed in carrying out its positive obligation and there was a violation of Article 8 of the Convention.

It would also be relevant to mention here the Court's assessment in the **Chapman v. the United Kingdom** case<sup>28</sup> in which environmental protection conflicted with the interests of a national minority. The applicant, a gypsy (definition from the text of judgment),

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<sup>26</sup> European Court of Human Rights, 2014, p.10.

<sup>27</sup> Case of Dees v. Hungary, (2345/06), judgment of 09/11/2010, ECtHR.

<sup>28</sup> Case of Chapman v. the United Kingdom, (27238/95), judgment of 18/01/2001, ECtHR.

had bought a piece of land with the intention of living there in a caravan. In fact, local planning policies in force prohibited dwellings there since this was a landscape conservation area. The family returned to a nomadic life moving from place to place and both daughters of applicant could no longer attend school.

The Court took into account existing international standards recognizing the special needs of minorities and an obligation to protect their security, identity and lifestyle. Nonetheless the judges concluded that Article 8 of the Convention had not been violated. Even though there was an interference with the applicant's right to private and family life the government pursued the legitimate aim of protecting an asset of the community- the environment.

### **Case of Dzemyuk v. Ukraine<sup>29</sup>**

The applicant complained that the construction of a cemetery 38 meters away from his house had led to the contamination of drinking water and of water used for gardening purposes. He complained that contamination and disturbance from the burial ceremonies prevented him and his family from making normal use of their home and land and negatively affected their mental and physical health.

The Court recalled that for the complaint to fall within the scope of Article 8 it should meet several requirements. First, the interference must directly affect home, family or private life of the applicant. Secondly, the interference must attain a certain minimum level. That means that the Court will consider factors such as intensity, duration, physical or mental effects, etc. Additionally, when making an assessment the Court takes into account domestic regulations concerning the issue and examines if there was a breach of domestic law.

In the present case water pollution was a strong argument, particularly due to the fact that there was no centralized water supply in the applicant's village and local people used their own wells. The level of dangerous bacteria found in the drinking water was far higher than the permitted one. Although there was no unanimous conclusion as to

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<sup>29</sup> Case Dzemyuk v. Ukraine , (42488/02), judgment of 04/09/2014, ECtHR.

the true source of contamination it was very likely that it had emanated from the cemetery. More so, construction of cemetery so close to applicant's house was serious breach of domestic environmental health and sanitary regulations. The Court concluded that the minimum level required by Article 8 has been reached and the interference with applicant's right attained a sufficient degree of seriousness. There has consequently been a violation of Article 8.

In the case of **Leon and Agnieszka Kania v. Poland**<sup>30</sup> the Court recalled that there is no explicit right in the Convention to a clean and quiet environment. However, where a person is directly and seriously affected by pollution, an issue may arise under Article 8. Nevertheless, in this case the Court held that there had been no violation of Article 8. The level of noise pollution that affected the applicant was not considered as serious as to reach the threshold established in previous cases.

#### **Case of Guerra and others v. Italy**<sup>31</sup>

The applicants all lived in the town a kilometer away from the chemical factory. This factory was classified as "high risk" according to Italian law. In the course of its production cycle the factory had been releasing toxic substances and inflammable gases. Emissions from factory were often channeled towards the applicants' town. Moreover, factory already caused a serious accident in the past and one hundred and fifty people were hospitalized with acute arsenic poisoning.

The applicants complained not of an act by state but of its failure to act: to inform the public about the hazards of the factory and about absence of the procedures to be followed in the event of a major accident. The Court in this case found that Article 8 had been violated. The state failed to communicate relevant information that would have enabled the applicants and their families to assess the risks they might run by living close to the nearby factory. The Court noted that effective respect for private or family life involves not only protection of the individual against arbitrary interference

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<sup>30</sup> Case of Leon and Agnieszka Kania v. Poland, (12605/03), judgment of 21/07/2009, ECtHR.

<sup>31</sup> Case of Guerra and others v. Italy, (116/1996/735/932), judgment of 19/02/1998, ECtHR.

by the public authorities but also involves state's positive obligations to take the necessary steps.

Talking about environmental matters under Article 8 of the ECHR we also need pay attention to the position of the Court to the question of public participation in decision-making processes. To best illustrate it let us consider the case of **Grimkovskaya v. Ukraine**.<sup>32</sup>

Ukrainian government changed the routing of traffic. The applicant house became practically uninhabitable because of vibration and noise caused by up to several hundred trucks passing by every hour. In addition, air pollution increased substantially over the years. In assessing this matter, the Court noted that government had not created a mechanism through which residents could contribute their views to the related decision-making processes. It also pointed out those residents did not have access to relevant environmental information. This, as the Court highlighted, amounted to non-compliance by Ukraine to the Aarhus Convention that grants public rights as regards access to information, public participation and access to justice, in governmental decision-making processes on matters concerning the local, national and transboundary environment. Bearing those factors in mind, the Court concluded that there was not a fair balance between the applicant's rights guaranteed by Article 8 and the interests of the community. There has therefore been a breach of Article 8 of the Convention.

It is important to notice that as well as Article 2 Article 8 requires individual being directly affected by deterioration of the environment. In case of **Kyrtatos v. Greece**<sup>33</sup> the applicant complained that urban development destroyed the scenic beauty of the area he lived in. The Court commented that the harm caused to birds and other protected species living in the area did not directly affect the right of the applicant under Article 8 of the Convention. Thus the interference with the conditions of animal life in the area did not constitute an attack on the private or family life of the applicant. The Court noticed that domestic legislation and other international instruments are more pertinent in dealing with this kind of issues. There has accordingly been no violation of Article 8.

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<sup>32</sup> Case of Grimkovskaya v. Ukraine, (38182/03), judgment of 21/07/2011, ECtHR.

<sup>33</sup> Case of Kyrtatos v. Greece, (41666/98), judgment of 22/05/2003, ECtHR.

**Right to receive and impart information and ideas (Article 10 of the European Convention on Human Rights):**

*Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

*The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

**Case of Steel and Morris v. the United Kingdom<sup>34</sup>**

The two applicants were associated with a green group that campaigned on environmental and social issues. They were involved in production (according to domestic Court's finding, though applicants denied that) and distribution of leaflets that blamed "McDonald's", inter alia, for the starvation in the "Third World", deforestation, and the sale of unhealthy food that causes cancer and other diseases. «McDonald's» sued applicants in a domestic court and won the case. The applicants complained that the court's decision was a disproportionate interference with their right to freedom of expression because the information in leaflets was a matter of public interest and it was essential in a democratic state to discuss these issues freely and openly. The Government argued that the applicants should not attract the high level of protection afforded to the press under Article 10 because they were not journalists. They had not carried out any research before publication and did not attempt to present an objective picture, by, for example, giving «McDonald's» an opportunity to defend itself.

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<sup>34</sup> Case of Steel and Morris v. the United Kingdom, (68416/01), judgment of 15/02/2005, ECtHR.

The European Court of Human Rights noticed that expressions on matters of public interest and concerns require a high level of protection under Article 10. As well as journalists small campaign groups should be able to engage in public debate and report on issues of general interest. For these reasons, the Court unanimously held that there had been a violation of Article 10 of the Convention.

### **Case of VgT Verein Gegen Tierfabriken v. Switzerland<sup>35</sup>**

The applicant's association prepared a television commercial as a contrast to commercials of the meat industry. The film showed a noisy hall with pigs in small pens, gnawing nervously at the iron bars. The accompanying voice stated, *inter alia*, that the rearing of pigs in such circumstances resembled concentration camps, and that the animals were pumped full of medicaments. The advertisement appealed for people to eat less meat for the sake of their health, the animals and the environment. However the national authorities' refused to broadcast the commercial on Swiss television because of its allegedly clear political character.

The Court had to determine whether the interference was justified through the condition set out in paragraph 2 of Article 10. The Court found that the interference was prescribed by law because the Federal Radio and Television Act allowed not broadcasting "political" commercials. The Court also agreed with Government and noted that the interference pursued a legitimate aim. The refusal to broadcast commercial contributed towards financial autonomy of the advertising market and aimed at the "protection of the ... rights of others" within the meaning of Article 10 of the Convention. However the Court disagreed with the State that the measure was "necessary in a democratic society". The association's film was not a regular commercial inciting the public to purchase a certain product. It reflected a controversial opinion to an ongoing general debate on the manner in which animals were reared.

The Court recalled that «freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and

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<sup>35</sup> Case of Verein Gegen Tierfabriken v. Switzerland,(24699/94), judgment of 28/06/2001, ECtHR.

for each individual's self-fulfillment. »<sup>36</sup> This is also applicable to information that might offend shock or disturb. Democratic society requires pluralism, tolerance and broadmindedness. In consequence, there has been a violation of Article 10 of the Convention.

**Freedom of peaceful assembly and association (Article 11 of the European Convention on Human Rights).**

*1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*

*2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.*

**Case Makhmudov v. Russia<sup>37</sup>**

The applicant co-organized a protest against the planned construction of several luxurious blocks of flats in the place of facilities for sports and children in Moscow. Local authorities were aware about the planned assembly but they refused authorization referring to some information received from law-enforcement authorities about expected terrorist activities at the demonstration. However the Moscow's government did not cancel the three-day celebration of the "Day of the City" that began at the same place as the scheduled demonstration and was attended by thousands of people.

Despite the lack of authorization a few dozen residents gathered for environmental demonstration and the applicant was among them. The police officers broke up this small and peaceful assembly and the applicant was arrested. A district court found that

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<sup>36</sup> Case of Verein Gegen Tierfabriken v. Switzerland,(24699/94), judgment of 28/06/2001, ECtHR, paragraph 66.

<sup>37</sup> Case of Makhmudov v. Russia,( 35082/04), judgment of 26/07/2007, ECtHR.

he broke the established procedure for organizing public assemblies. The applicant alleged that authorities interfered with his right to freedom of assembly and association under Article 11 offering the lame excuse of a threat from terrorism attack.

The Court unanimously held that the interference was in violation of Article 11. Russian government failed to produce any satisfactory evidence that there existed any actual terrorist threat (the burden of proof lies upon he who affirms, not upon he who denies). More so solely the demonstration directed against the environmental policies had been cancelled, whereas the public festivities celebrations took place without any governmental intervention. The Court concluded that the domestic authorities acted in an arbitrary manner.

**Right to an effective remedy (Article 13 of the European Convention on Human Rights).**

*Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.*

In the above discussed *Hatton and Others v. the United Kingdom* cases (judgment 02/10/2001 and judgment 08/07/2003) the Court held that the scope of review by the domestic courts was not sufficient to comply with the Convention. The Court noted that it was «clear that the scope of review by the domestic courts was limited to the classic English public law concepts, such as irrationality, unlawfulness and patent unreasonableness, and did not allow consideration of whether the increase in night flights under the 1993 scheme represented a justifiable limitation on their right to respect for the private and family lives or the homes of those who live in the vicinity of Heathrow airport».<sup>38</sup> Judges voted by six votes to one that there has been a violation of Article 13.

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<sup>38</sup> Case of *Hatton and others v. the United Kingdom* (36022/97), judgment of 02/10/2001 ECtHR, paragraph 115.



**The right to the peaceful enjoyment of one's possessions (Article 1 of Protocol 1 to the European Convention on Human Rights):**

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

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

**Case of Depalle v. France<sup>39</sup>**

In 19-th century a dyke was given permission to occupy coastal area and build house temporarily. The applicant and his wife bought this property in 20<sup>th</sup> century with the rights of temporary occupancy and with obligation to regularly renew authorization. In 1993 the applicant requested such authorization but the government refused to renew it on previous terms since a new law entered into force a couple of years prior to this event. This law was meant for the protection of environment, in particular of the seashore. The authorities agreed to issue an authorization but only for a limited and strictly personal use that would prohibit the applicant from carrying out any work on the property other than maintenance and that would forbid transferring or selling the land and house. This would also include an option for the State, on the expiry of the authorization, to reuse the buildings or restore the property to its original condition.

The Court recognized that for today's society and consequently for the public authorities there is an increasingly important interest in environmental conservation policies. States are entitled to control the use of property in accordance with the general interest. In this case, the Court found that the state interference with the applicant's occupancy rights struck a fair balance between the general interest in environmental conservation policies and the applicant's individual fundamental right to peaceful

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<sup>39</sup> Case of Depalle v. France, (34044/02), judgment of 29/03/2010, ECtHR.

enjoyment of the “possession”. Consequently, there has not been a violation of Article 1 of Protocol No. 1.

Similarly in the case of **Hamer v. Belgium**<sup>40</sup> the Court recognized the greater importance of environmental protection over property rights. The applicant inherited a holiday home on forest land where building was not permitted. Besides, to connect the house to the drainage and water-supply systems she had to cut approximately fifty pine trees in breach of the domestic forestry regulations. To protect the environment the Belgian court ordered the applicant to restore the site to its former condition and to demolish the building within one year. The applicant complained that this was a disproportionate interference with her property rights.

The Court held that even though environment is not explicitly protected in the ECHR, environment can constitute a legitimate aim because society and the public authorities take a keen interest in its protection. The Court noted that « financial imperatives and even certain fundamental rights, such as ownership, should not be afforded priority over environmental protection considerations, in particular when the State has legislated in this regard»<sup>41</sup> In this case the Court could not see any other effective measures to protect a forested area but restoration of the site. Accordingly, there has been no violation of Article 1 of Protocol No. 1.

## **1.2 Summary of the Court’s principles derived from environmental cases.**

After having analyzed the caseload of the ECtHR related to environment it is possible to conclude the following. None of the articles in European Convention of Human rights is specifically designed to provide general protection of the environment. However case-law shows that the right to healthy environment is indirectly recognized by the European Court of Human Rights by broad interpretation of existing codified fundamental rights: the right to life; right to liberty and security; the right to a fair trial; the right to a private and family life; the right to receive and impart information

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<sup>40</sup> Case of Hamer v. Belgium ,(21861/03), judgment of 27/11/2007, ECtHR.

<sup>41</sup> Case of Hamer v. Belgium ,(21861/03), judgment of 27/11/2007, ECtHR, paragraph 79.

and ideas; the right to peaceful assembly and association, the right to an effective remedy, the right to the peaceful enjoyment of one's possessions.

Evidently the European Court of Human Rights has recognized that environment and human rights are interlinked and that severe environmental harm can prevent people from enjoying their individual rights. The number of registered and adjudicated cases in this category is vast. It is undeniable that growing environmental caseload is a positive tendency. Apart from everything else it discourages governments to neglect environment by failure to control and regulate environmental issues within their jurisdiction. Next I will sum up the principles the ECtHR takes into account when dealing with cases that involve an environmental element.

First, it requires the applicant to be directly and seriously affected by environmental degradation and be unable to leave an unhealthy environment without financial losses. Secondly, the Court is most likely to find violations of the ECHR articles in cases where there is an established link between a negative environmental impact and inability on the part of the applicants to exercise their fundamental human rights. Moreover the Court is more inclined to find a prohibited interference when the applicant's physical/material losses have crossed a certain threshold of value.

The Court also tends to look at the question of the lawfulness of the government's actions under domestic law. In many cases the Court would find a violation if there was a breach of domestic environmental policies. But the Court also takes into account the obligations of state under international law. For example, in the case of *Grimkovskaya v. Ukraine* the Court pointed out that state had some obligations under the Aarhus Convention.

Furthermore, the Court admitted that environment is a public interest. Thus the Court takes into account if governments when determining their environmental and economic policies have considered the interests of all stakeholders who might be affected. Those who might be affected should have the opportunity to take part in a decision-making procedure and be able to challenge the decision in courts or through other domestic mechanisms.

Having all stakeholders on board makes a huge difference but it is not enough. In addition, the Court also tests whether a fair balance was struck between the interests of the individuals and the economic interests of the community as a whole. Some individual rights are not absolute rights and they might be restricted for the economic well-being of the community (Hatton v. the United Kingdom case). But such measures should be in accordance with rules set in the ECHR: they have to follow a legitimate aim, be in accordance with domestic law, proportionate to the aim pursued, etc. A positive thing, in my view, is that some individual rights might be restricted with the purpose of safeguarding the environment (Case of Depalle v. France; case of Hamer v. Belgium).

Cases presented in chapter 1 also prove that states have both positive and negative obligations when it comes to the issues of environment. For example, the Court emphasized the importance of the right to receive, distribute and impart information and ideas on environmental issues. On the one hand, this means that government should not interfere in the dissemination of information concerning environmental issues. On the other hand, it also requires the state to take proactive measures, as for instance by informing people within its jurisdiction about imminent health risks, provided government possesses such information (Case of Oneryildiz v. Turkey). What is more, the government has also responsibility to take all proper measures to protect the lives of people from natural disasters when it is evident that an accident will occur. Another example of positive obligation of the state is the obligation to regulate private sector so that its activity would not harm the environment to the degree of interfering with human rights.

Overall, the case-law of the ECtHR demonstrated that the ECHR can offer a certain degree of environmental protection. However despite ambitiousness and volume of the ECtHR decisions the European Human rights law remains incomplete. The Hatton v. the United Kingdom case, in my view, explicitly demonstrated that there is no consistency in the interpretation of Convention's articles when it comes to cases with an environmental impact. In Hatton the Chamber concluded, by five votes to two, that the state had violated Article 8 due to noise from night flights at Heathrow; then the Grand

Chamber reexamined the case and voted twelve to five that there was no violation. In the next chapter I will present other examples where the ECtHR would not step in to help people to struggle against unhealthy environmental policies and practices inside their countries.

## **Chapter 2. The right to healthy environment.**

In the previous chapter I have illustrated how the ECtHR indirectly protects the environment and indirectly recognizes the right to a healthy environment through present-day interpretation of the ECHR's articles. Many authors, including Radulescu<sup>42</sup>, welcome this green tendency and suggest that the ECHR interpretations can be taken by all courts, for our and future generations benefit. However in this chapter I will discuss issues that are not covered by the ECtHR's jurisprudence or are very unlikely to be addressed by the Court. The stories presented here have been highlighted in reliable mass-media but people did not appeal to the ECtHR. Based on the principles derived from caseload I contemplated what the Court would say if there had been such application. In all those stories negative consequences have not fully materialized yet but if nothing changes we will be the witnesses of some devastating effects. I will finish the chapter with an explanation on how Europe and the world as a whole would benefit if a right to a healthy environment becomes a stand-alone right in the ECHR.

### **2.1. Limits of the ECHR.**

#### ***No harm no victim***

Recent years have seen explosion of bee activism. Placards with «Save the bees», «Where is my honey», «Planet before profit», «EU: save our bees», «Give bees a chance» - have been held at protests organized to stop the decline of bees caused by harmful agricultural and industrial practices. Some of these protesters are bee keepers that claim that the extinction of bees also negatively affects the honey production business, whereas other bee activists are not involved in such business but claim that human existence somehow depends on the intensive work done by bees, which are a powerful indicator of the healthy state of the global environment and without them the human population will face hunger and starvation.

Let us assume that the applicant, relying on Article 2 (right to life) and Article 8 (right to private and family life) of the ECHR, filed a complaint before the ECtHR against

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<sup>42</sup> Radulescu, 2012.

his state (or even more states), complaining that governmental destructive agricultural policies led to bees decline in his village. He would explain that bee habitat shrank after the government had converted grasslands and forests into mono-culture farms contaminated with pesticides. The applicant would present scientific arguments to show that pesticides and losses of herb-rich grasslands and season-long flowering are the key factors in the decline of bees. He also would point to research and NGO publications on how the decline of those species affects human societies.

As Greenpeace explains, bees are crucial for agriculture because 70% of top100 human food crops are pollinated by bees.<sup>43</sup> Pollinators, among other things, are critical for the creation of the seeds that feed birds<sup>44</sup>. In its turn the continuing loss of birds can allow insects to breed at alarming rates<sup>45</sup> which again negatively affects agriculture. Besides, lack of pollination leads to forest degradation which also causes many problems<sup>46</sup>. For example, lack of naturally cleaned water leads to soil erosion, making the floods and mud slides more likely<sup>47</sup>. A great number of healthcare products include extracts from forest's plants and such extracts so far can not be synthetically re-created.

The applicant could also draw the attention of the Court to the fact that nearly one in 10 wild bee species face extinction in Europe<sup>48</sup> and that in Europe there is a common «growing recognition of the benefits of the natural, biologically diverse environment to human health and well-being»<sup>49</sup>. In sum, the destruction of an ecosystem by the extermination of bees is an attack on human beings.

As previously mentioned the ECHR was not designed for environmental protection in general. To win the «environmental» case at the ECtHR applicant has to «hide» his real intention of protecting environment behind other rights, in this case the right to life; the right to a private and family life. More so the applicant must have directly and

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<sup>43</sup> Greenpeace USA, Bees in Crisis.

<sup>44</sup> International Union for Conservation of Nature, 2008.

<sup>45</sup> Melvin, 2011.

<sup>46</sup> International Union for Conservation of Nature, 2008.

<sup>47</sup> Melvin, 2011.

<sup>48</sup> International Union for Conservation of Nature, 2015.

<sup>49</sup> European Environment Agency, 2010.

personally been the victim of the environmental violations he is alleging. The guidance on how to make an application to the European Court of Human rights clearly indicates « A case will only be successful if... there has been a violation of a human right... the applicant is a 'victim'<sup>50</sup>. The case of the individual defending a broad public interest would be inadmissible in the ECtHR. Nor can applicant complain on behalf of other people, unless they are clearly identified and applicant is their official representative<sup>51</sup>. That means that green NGOs do not have access to the Court unless rights of their member(s) were actually affected by the environmental factors. Agudo<sup>52</sup> argues that such measure serves to protect the Court from an excessive case-load but that does not mean that there has not been a violation. In the presented hypothetical example the applicant is a «green» activist who is not involved in honey production business; thus he is not directly harmed by the state's policy. Consequently he can not rely on the ECtHR jurisprudence to counter domestic laws and policies.

### *Suffer first, complain later*

The ECtHR's «no harm, no victim» principle in environmental matters also does not serve well for prevention of violations. From the point of view of ECtHR a person becomes a victim when a violation already has taken place and damage is evident or when there is a high standard of proof of imminent risk. Veinla<sup>53</sup> researched if the risk of damage alone can constitute sufficient grounds to consider an individual a victim by the ECtHR. The author concludes that in cases like *Öneryıldız v. Turkey* and *Hatton v. the United Kingdom* the Court recognized that the constant fear of a possible future environmental distraction (for example, noise) is enough to take this as a violation of Article 8 (the right to a private and family life). But Veinla adds that such cases are exceptions from the existing general rule. Overall «this requirement [of being a victim of a violation] indeed is not in concordance with the precautionary principle. Civil and political rights are therefore applicable in environmental protection only to a limited

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<sup>50</sup> Unlock the law website, 2015.

<sup>51</sup> European Court of Human Rights (a), p. 5.

<sup>52</sup> Agudo, 2003.

<sup>53</sup> Veinla, 2007.



extent. More possibilities for this are offered only by the right to enjoy private and family life... »<sup>54</sup>.

The article with Veinla's findings was published in 2007 but there have not been any significant changes in this area since then. There has not yet been a case where the ECtHR would find violation with no evidence of *imminent* risk. To illustrate how the employment of this principle negatively affects people's health let us look at the following case.

Cosmetic industry sponsored research and investigations prove that all parabens are safe for use<sup>55</sup>, whereas some national food institutes, cancer funds, independent medical researchers point out to the adverse and even lethal effects of parabens. For instance, funds and organizations focused on breast cancer have established that parabens cause human breast tumor cells to grow and proliferate<sup>56</sup>. According to the Danish National Food Institute adverse effects were noted on sperm production and testosterone levels in young male rats exposed to butylparaben, isobutylparaben and propylparaben<sup>57</sup>. Danish government has treated this issue seriously. In 2011 Denmark prohibited the mentioned substances in products for use by children younger than three years of age.

Scientific studies that prove the danger of parabens have been published in scientific journals almost every year. The volume of data gave rise to concern in the European Union. In 2010 Health and Food Safety Scientific Committees (consisted of the Scientific Committee on Consumer Safety, the Scientific Committee on Health and Environmental Risks and the Scientific Committee on Emerging and Newly Identified Health Risks) provided the European Commission with the scientific opinion on parabens<sup>58</sup>. Below are sub conclusions from that report.

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54 Idem.

55 Scientific Committee on Consumer Safety, 2010, p. 20.

56 Breast Cancer fund (USA).

57 Scientific Committee on Consumer Safety, 2010, p.21.

58 Scientific Committee on Consumer Safety, 2010.

-«Sub conclusion 2: «...For the iso-derivatives of butyl- and propylparaben, and for benzyl- or phenylparaben no suitable data are present. »<sup>59</sup>

-«Sub conclusion 4: One study with some shortcomings provides evidence for in vivo dermal absorption of butylparaben in the absence of notable effects on hormone levels. No data is available for the other parabens. »<sup>60</sup>

-«Sub conclusion 6: The requested in vivo pharmacokinetic data in human volunteers after exposure to paraben-containing cosmetic products are not available. »<sup>61</sup>

-«there still is the missing link between the rat and human dermal absorption, especially of the absorption and metabolism of the parent compound in the skin»<sup>62</sup>.

I found that this extensive report neither stated that parabens are safe nor it confirmed that they are unsafe. According to this document there was still insufficient data to draw any precise conclusion. We do not know if parabens are killing us or not, but cosmetic products with parabens have been on the open market and male and females unconsciously have been putting kilograms of parabens on their faces and bodies for years.

It took the European Union (EU) four years to realize the seriousness of danger of such parabens like isopropylparaben; isobutylparaben; phenylparaben; benzylparaben; and pentylparaben. In 2014 European Commission added these preservatives to the list of substances prohibited in cosmetic products and restricted maximum concentration of other parabens in products such as toothpastes, hand soaps and face powders<sup>63</sup>.

Even though the European Union banned mentioned preservatives they are still being used in cosmetic products in European countries outside the EU. Along with that there is a long list of various parabens that are still legally used in products across the Europe but scientists warn that they also cause adverse effects on the health of humans and animals. What is incredible is that this happens when paraben-free products with

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<sup>59</sup>Idem, p. 13.

<sup>60</sup> Idem, p. 15.

<sup>61</sup>Idem, p. 18.

<sup>62</sup>Idem, p. 22.

<sup>63</sup> Chemical Watch Global risk and regulations news, 2014.

healthy, natural ingredients can offer the same quality and variety as products with parabens.

There are millions of Europeans who are still not aware of the danger of products they use every day. In fact, many people start to think about such issues only when their doctor inform them that they have cancer. Can an individual stop this cosmetic toxicity by bringing a case to the ECtHR after the exhaustion of domestic remedies?

From the point of view of the ECtHR it would be very unlikely that uncertainty in the case of parabens can constitute sufficient grounds to consider an individual as a victim. The ECtHR does not offer protection in advance and has no sufficient potential to eliminate the problems leading to violations unless there is an immediate risk to the applicant. To put it simply a person has to suffer first and only then the Court might step in.

### ***Suffering misfortune vs. suffering violation of a human right***

But suffering alone is not an argument when there is no clear link between bad environmental condition and its impact on person's health or quality of life. The thing is that sometimes it is extremely difficult to prove the existence of such link and the next example explains why.

One episode from the life of the grandmother of an autistic child:

*«I am struggling desperately to hold seven-year-old Jimmy, who is screaming and lunging violently at the locked doors. We are in the ladies' lavatory at the art gallery and he can't understand why we have to queue. Waiting women stare quizzically at us and I long to scream out to them for support, to find an ally, but it is all I can do to manage the red-faced Jimmy, who is almost out of control.*

*Glimpsing myself in the mirror, I wonder what on earth I am doing grappling with my strong, unruly grandson, whom I love so dearly. I am so relieved when we finally shut ourselves into our cubicle, hidden from curious eyes.*

*Soon we are walking down the art gallery stairs to the exit. Jimmy holds my hand, happily. I like to imagine that we appear just like any other grandmother and grandson enjoying a day out. Very few of my friends know that I have an autistic grandson. I can't bear to hear their well-meaning but inappropriate advice: "Have you read the book written by X? The author is autistic." It breaks my heart because I know that Jimmy, even with the best help in the world, will never be able to read or write or lead a "normal" life.*

*I catch a glimpse of my daughter, who is waiting for us at the exit, staring out into space in a very rare moment of reverie. Care for Jimmy is a 24/7 job for her. In my anguish, I really want, so badly, to help lighten her load. "How did you get on?" she asks me, tentatively. I smile, hope I look reassuring, and lie, "Oh fine, no problem."<sup>64</sup>*

I decided to insert this letter here because it clearly shows how autism reduces the quality of life of a child and his family. But is it just a misfortune that this child was born with autism or were there any factors that led to the kid's disorder? The letter was written by an anonymous thus we do not know the full history of that family. However after reading medical research papers I discovered that autism might be caused by genetic or environmental component.

Scientists have identified a number of genes associated with autism. That means that a predisposition to autism may be inherited and can run in families. It has been noticed that people with autism often have parents or adult brothers and sisters with autism-like symptoms, such as delays in language development<sup>65</sup>. Besides, it is generally agreed today that many environmental factors before, during or after birth can trigger this disorder. A number of studies have demonstrated that autism may be caused by a parent's exposure to air pollution<sup>66</sup>, pesticides<sup>67</sup> and other dangerous chemicals.

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<sup>64</sup> Anonymous letter of the grandmother of an autistic child in the Guardian, 2015.

<sup>65</sup> Russo, 2009.

<sup>66</sup> Lyall and others, 2014.

<sup>67</sup> Shelton, 2014.

For the ECtHR it is important to establish an evident link between environmental degradation and an applicant's loss. But how on earth the Court can know if the child was born with autism because of purely genetic factors or because of environmental factors that affected the child or his parents? Even scientists today would not be able to give a 100% correct answer. More so a number of studies show that autism is likely to be caused by the complex interplay of genetic and environmental factors<sup>68</sup>. Currently we do not have any medical test to ascertain how big was the impact of environmental agent and genetics in each individual case of autism.

It is also extremely difficult to prove that this disorder originated from a certain factor when other people exposed to the same factor did not develop similar disease. All of us have different genetic variations and different level of resistance to the same environmental factors. For example, some people are immune to heart disease in spite of smoking and constant overeating<sup>69</sup>. If just one out of ten people becomes sick due to unhealthy environment at his working place the Court might fail to find casual link between unhealthy working environment and that illness. Though in fact this individual might become ill or even die explicitly because of working unhealthy environment.

Autism is just one example that shows how environment can be interlinked with genetic diseases. In fact nearly all diseases result from an interaction between genetic and environment<sup>70</sup>. It is already established fact that exposure to asbestos often causes lung cancer, a range of chemicals are associated with leukemia, and smoking is linked to variety cancer types<sup>71</sup>.

For the Court it is important to establish the exact environmental factor that affected person or his parents: whether it was pesticide, air pollution, medication, gold mine, food etc. In fact it could be simply a combination of all those factors. But let us assume that the Court possess concrete evidence that in certain particular case the disorder was caused by exposure to pesticides. Then it is almost impossible to establish how those chemicals penetrated into the applicant's body. Pesticides are found today everywhere:

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68 Volk and others, 2014.

69 Center of genetics and disease prevention, 2000.

70 National Institute of Environmental Health Sciences (USA).

71 United States Department of Health and Human Services, 2003.

lawns, gardens, homes, food etc. More so modifications of the DNA caused by environmental factor can occur not in the applicant's body but in the body of his/her parents or even grandparents. Some genetic diseases are known to skip generations. To put it simply «bad gene» can wait and show itself many decades later in children and grandchildren.

The ECtHR will not be satisfied with speculation as to what might have caused the applicant's disease. It requires a clear causal link between the violation and the negative consequences from which the applicant suffers. Causal link is often difficult to prove due to the limits of today's science. So here we found ourselves in a paradoxical situation. We know that the negative environmental factor «X» leads to a particular illness. At the same time we can not prove that a concrete person has this illness due to this very environmental factor «X». Therefore, I state we need an instrument that would eliminate factor «X» without reference to an individual. I believe that «the right to healthy environment» can serve this purpose.

### *After us the deluge*

What is more, the codified right to healthy environment will protect the health of yet unborn human beings. I will clarify that point in the following example.

At one time Europe was covered with forests of oaks, elms, birch, and lime from north Scotland to the Urals. But over the centuries European forests have been turned into agriculture and pastures. Today virgin forests in Europe amounts to just 0.4 % of the total forest area<sup>72</sup>. A big part of primary forest lies in a chain of the Carpathian mountains and 53 % of these mountains stretch in Romania.

An individual in Romania bought a summer house particularly because of its close location to a pristine beautiful forest. One year later an Austrian company (Holzindustrie Schweighofer)<sup>73</sup>, which is the dominant player on the wood products market in Romania, was given authorization from Romanian government to cut that forest. A large number of Romanian and foreign NGOs launched campaigns in Europe

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<sup>72</sup> Parviainen, 2005, p 9.

<sup>73</sup> Environmental Justice Organizations, Liabilities and Trade, 2015.

expressing their concerns regarding legal and the illegal immoral practices of Holzindustrie Schweighofer<sup>74</sup>

What would be the likeliest scenario if that particular Romanian would want to stand for his right to enjoy healthy benefits of the forest in the ECtHR? As we already know the Court would consider if the person was a direct victim and how severe the damage was. In that case the applicant is not the direct victim and the Court is most likely to decide that a threshold of harm has not been reached. The applicant did not leave in summer house permanently and he could sell it and buy another summer house elsewhere. The Austrian company claims that it purchases only legal wood and refuse «wood from National Parks- even though it is legal from certain regions according to the Forestry Law»<sup>75</sup>. The Court is not sure if Holzindustrie Schweighofer used legal or illegal practice in Romania. But the company could have worked in compliance with the regulatory standards existing in Romania. Consequently domestic law might have not been violated.

Firstly, I need to notice that there is no a guarantee that government would not allow cutting of the forest near applicant's next summer house. However, my main point is that the current system is not meant for protection of rights of future generations. Neither this person, nor his children and grandchildren would ever be able to appreciate the beauty of the forest and benefit from it by breathing fresh air or getting natural medicine there. In European human rights law «future generations» have no voice to claim their rights today. But «future generations» is not something that will come in 10-20 years; every minute a new child is born in Europe, born with all fundamental rights proclaimed in the UN Human Rights Declaration and in the European Convention on Human Rights. It would be fair to say that this baby is entitled to at least the same quality of environment as previous generations had.

It is a well-known fact that the degradation of the environment through loss of natural areas contributes to increases of asthma, obesity, cancer, diabetes, diseases of the cardiovascular and nervous systems- all of which are major problems for people in

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<sup>74</sup>Idem.

<sup>75</sup> A personal statement of Schweighofer G. (the owner of the Schweighofer group), 8 May 2015.

Europe<sup>76</sup>. It should be also noted that human evolution has been taking place in the context of a vast variety of flora and fauna. It may be that this diversity is a necessary precondition for human mental health<sup>77</sup>. So “what we are doing to the forests of the world is but a mirror reflection of what we are doing to ourselves and to one another.”<sup>78</sup> It is also a clear reflection of how we respect the rights of children.

Many scholars argue that a rights-based approach provides the best way to protect current and future generations<sup>79</sup>. If such approach existed under the ECHR then the Romanian government would have to take into account the interest of future generations in a healthy environment. Currently when there is a conflict between economy and ecology the state automatically gives priority to financially profitable projects and dismisses environmental concerns. Not surprisingly, because consequences of environmental damage often become evident in the long term whereas economic benefits could be achieved rather quickly, for example, just prior to next elections of the parliament.

The ECHR includes some individual rights which are not absolute rights and they might be restricted for the economic well-being of the community (see above the *Hatton v. the United Kingdom* case). The Court can not and should not dictate to a state what must be its priorities. But in chapter 1 I noticed that the Court recognizes the environment as a public good and it pays attention if government when determining their environmental and economic policies have considered the interests of all stakeholders who might be affected. The *Grimkovskaya v. Ukraine* case showed that it is possible to complain to the Court about an unfair decision-making process in environmental matters. However, the Court admitted that the decision making process might exclude the interests of green NGOs or environmental defenders when they are not directly affected by the policy under discussion. Taking into account these facts it appears that currently some harmful

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<sup>76</sup> European Environment Agency, 2010, p. 91.

<sup>77</sup> Mosin, 2006.

<sup>78</sup> Original saying belongs either to Mahatma Gandhi or to Chris Maser, author of «Forest Primeval: The Natural History of Ancient Forest». Sources vary on that issue.

<sup>79</sup> Science and Environmental Health Network / The International Human Rights Clinic at Harvard Law School, 2008, p. 3.



domestic environmental polices are in compliance with the European Convention on Human Rights.

### ***No country is an island***

Now, let's take a look at one more case:

In 2015 «Friends of the Earth» observers discovered that the Ukrainian government was keeping containers with nuclear waste in the open air at the «Zaporizhia» nuclear power station. That was just 200 km away from the Ukraine's conflict area in Donbas. "With a war around the corner, it is shocking that the spent fuel rod containers are standing under the open sky, with just a metal gate and some security guards waltzing up and down for protection," said Patricia Lorenz, Friends of the Earth nuclear spokeswoman.<sup>80</sup>

Ukrainian government failed to ensure that the waste store would have a roof and it could not guarantee that conflict would not reach the plant's location. In addition, Sergey Bozhko, the chairman of the State Nuclear Regulatory Inspectorate of Ukraine pointed out «... I cannot say what could be done to completely protect installations from attack, except to build them on Mars.»<sup>81</sup>

Thus it appears that so far it has just been a Europe's luck that no bomb landed at «Zaporizhia» nuclear power station. Just for the record, the Chernobyl accident occurred in 1986 at the Chernobyl nuclear power plant in Ukraine, caused radioactive fallout in Eastern Europe, United Kingdom, Scandinavia and the eastern United States. About 70% of the radioactive fallout landed in Belarus. 20% of Belarusian agricultural lands and 23% of forests were contaminated by radionuclides. Thyroid cancer rates in children under 15 years increased from 2,000 in 1990 to 8,000-10,000 in 2001. Thirty year recovery period for Belarusian economy was estimated at \$235 billion.<sup>82</sup> The next time when people could settle down and grow crops safely near Chernobyl power plant will be in at least 20,000 years!<sup>83</sup>

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<sup>80</sup> Neslen, 2015.

<sup>81</sup> Idem.

<sup>82</sup> The United Nations and Chernobyl.

<sup>83</sup> Chernobyl power plant director Ihor Gramotkin, quoted by Auyezov O. and Balmforth R.

This shows that pollution having occurred in one state might affect people in other jurisdictions. At the same time currently neither environmental nor human rights law have established effective mechanisms to prevent transboundary pollution and to penalize governments that violate human rights of citizens in another states. The opposite argument can be proved only theoretically.

For example, Boyle<sup>84</sup> constructed theoretical argument from which it follows that existing human rights treaties including the ECHR and developments in international environmental law by their nature may address transboundary issues. The author claims that international agreements bind a state to protect people in other jurisdictions from cross-border environmental pollution caused on the territory of that state. More so, if trans-border pollution has already occurred states have obligations to facilitate access to remedies for affected people in another state. He based his argument on the fact that extra-territorial approach had been applicable in non-environmental cases.

A similar point can be found in the Council of Europe publications: «The Court has not decided on cases relating to environmental protection which raise extra-territorial and transboundary issues. The Court has produced, in different contexts, ample case-law elaborating the principles of the extra-territorial and transboundary application of the Convention, which could be potentially relevant for environmental issues. However, as they have been developed under very different factual circumstances, it will be up to the Court to determine if and how they can be applied to cases concerning the environment».<sup>85</sup> So far, however, there has been no precedent of extraterritorial application of human rights law to environmental cases.

As to international law in general, I would like to present here the opinion I received from Dag Seierstad, senior expert of UNEP Post-conflict and disaster management branch<sup>86</sup>. According to him currently there is no «hard» law that can penalize countries for polluting or causing environmental harm to other countries. If a long-term and severe environmental damage happens it potentially could be considered at the UN

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<sup>84</sup> Boyle, 2012, p. 628.

<sup>85</sup> Council of Europe, 'Manual on Human Right and the environment (2nd edition)', p.114.

<sup>86</sup> Seierstad, 2015.

Security Council with following resolutions, sanctions or even interventions. Small and medium scale environmental crises can be addressed by international law only if there is a bilateral agreement between the country that polluted and any «victim» country. In such case the polluting country might be penalized for violation of international law. And the Chernobyl disaster proves this point. No state brought a case to international courts against USSR; claims of people on national levels came across barrier of state immunity<sup>87</sup>. But as Boyle noted the situation is even more complex when multiple states contribute to transboundary pollution or when most countries make for global environmental harm<sup>88</sup>.

### ***Collective crime is not a crime***

Summer 2003 was the hottest summer on record in Europe. More than 70,000 people died across the European continent from cardiovascular and respiratory diseases caused by anomalous high air temperatures<sup>89</sup>. Heat waves particularly targeted those whose metabolism could not adjust quickly to extreme temperatures: young and old people. They were dying from an invisible killer on the streets and behind locked doors and closed windows. Evidence from climate models suggests that heat waves in Europe were the result of a climate change and the World Health Organization asserts the same in its reports<sup>90</sup>.

Another story took place in Greece in summer 2010. An individual of Greek ethnic origin living not far from Athens suddenly felt sick. He applied to a hospital complaining of a headache, high fever and neck stiffness. Physicians having analyzed his blood sample diagnosed West Nile virus (WNV). It was unbelievable because in fact this person has not traveled outside Greece for a long period of time. What is worse there was no (and there is no) available vaccine or specific antiviral treatments for West Nile virus infection. Doctors did their best to save the life of the patient by giving him supportive treatment, such as intravenous fluids and pain relievers. Nevertheless the patient died several days later.

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<sup>87</sup> Kopylev and Solncev, 2013.

<sup>88</sup> Boyle, 2012, p. 640.

<sup>89</sup> World Health Organization, 2014.

<sup>90</sup> Idem.

During that summer, 34 more people died in Greece from the WNV out of 262 recorded cases<sup>91</sup>. Human cases of this disease had not been registered in Greece before. This became the first documented outbreak of WNV infection in that country.<sup>92</sup> Since then the virus have returned to Greece every summer. In 2014 the Greek Center for Disease Control and Prevention reported: “the West Nile virus steadily re-appears in the summer months of the last five years, with human infections recorded in various areas of Greece.”<sup>93</sup>

West Nile virus is a mosquito-borne infection usually found in tropical regions of the world. Humans are mainly infected through the bite of an infected mosquito. Meteorological data shows that summer temperatures in Greece in 2010 were higher than average. Heat and increased humidity are believed to be the primary reason for increase of mosquito populations able to transmit the WNV. Such climatic conditions also reduce the time needed for the virus development inside the mosquito<sup>94</sup>.

Other mosquito-borne diseases that have hit Greece over last years include Malaria. Greece continue to struggle with its financial crisis and currently can not afford to invest resources to sustain malaria and other diseases unusual for that region. The international charity, Medecins Sans Frontiers, now offers Greeks patients treatment which it is usually provides in sub-Saharan Africa.<sup>95</sup>

Daniel Brooks, zoologists that has studied how climate change has affected parasites in very different ecosystems, warns that if climate change continues subtropical and tropical diseases may spread across Europe and America to the extent that «Ebola could become the norm rather than the exception»<sup>96</sup>. The scientist admits that variations in climate are a normal thing for our planet. What is not normal this time is the speed of change. Climate change is happening more rapidly than it was in the past and affecting the nature in such a drastic way that never happened before.

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<sup>91</sup> Eurosurveillance, 2014.

<sup>92</sup> Idem.

<sup>93</sup> Tsagari, 2014.

<sup>94</sup> European Centre for Disease Prevention and Control, 2010, p. 6.

<sup>95</sup> McElroy, 2012.

<sup>96</sup> Brooks quated in Basulto, 2015.

It is obvious that people in the above mentioned cases suffered from the consequences of climate change. Their human rights were violated by polluting countries that had opted out from the Kyoto Protocol or that simply did not care to reduce their emissions. Roughly said these people became victims with no right to fair trial because they could not file lawsuit against dozens of governments.

### *Spillover effect and armed conflicts*

In this paper I do not focus much on issues of international humanitarian law (IHL) as related to the right to a healthy environment. I believe this is a topic for a separate research study. But I have to notice that armed conflicts cause significant damage to the environment and directly and indirectly affect people's health during war and in post-conflict period. Many believe that in situations of armed conflict Human Rights Law (HRL) is displaced by international humanitarian law, which is «a set of rules that seek, for humanitarian reasons, to limit the effects of armed conflict»<sup>97</sup>.

However the International Court of Justice in the Congo v. Uganda Case (2005)<sup>98</sup>, stated that both bodies of law (IHL and HRL) were relevant and would be taken into consideration in the context of occupation<sup>99</sup>. More so, according to UNEP report, in the cases of severe environmental damage «HRL would suggest that an affected person or community could seek relief with the UN and regional human rights organs, rather than rely only on grave breaches of IHL and war crimes proceedings. »<sup>100</sup> Thus it seems that both IHL and HRL complement each other during armed conflicts and implementation of the right to a healthy environment in HRL will have its impact on IHL as well.

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<sup>97</sup> Definition given by the International Committee of the Red Cross. (see International Committee of the Red Cross, 2014).

<sup>98</sup> International Court of Justice, Armed Activities on the territory of the Congo (Democratic Republic of Congo v. Uganda), ICJ reports, 19 December 2005.

<sup>99</sup> United Nations Environment Programme, 2009, p. 48

<sup>100</sup> Idem, p. 50

## **2.2 Substantive right to a healthy environment in the ECHR: how it will change reality?**

Environmentalists, scholars, well-known people and average Europeans are dissatisfied with the current state of affairs and are calling for the legal recognition of the right to a healthy environment at the international level. In fact, «to ignore this voluminous evidence of the will of the people would be to ignore the evolution of international law during the last half-century».<sup>101</sup>

If the right to healthy environment is embedded in fundamental legal documents such as the ECHR it will create duties and responsibilities for Council of Europe member states and consequently will result in greener practices of business and individuals<sup>102</sup>.

Lobbying economically profitable but environmentally harmful projects and policies would become extremely difficult. Furthermore, states would not have choice to decide what is more important: economic or environmental benefits. Governments will have to allow only those projects and policies that meet both economic and environmental criteria. Today's technology and science offer eco-friendly ways of living which don't need to be primitive, complicated or expensive. There is no need to choose between development and environment in XXI century, we can afford to combine both.

One might say that rights-based approach might devalue existing international environmental, criminal and health law which are also designed to either directly or indirectly achieve environmental protection. The first international agreements to protect the environment were established at the end of the 19<sup>th</sup> Century. In 1886 Germany, Luxembourg, Switzerland and the Netherlands agreed to regulate salmon fishing in the Rhine River. The International Convention for the Protection of Birds useful for agriculture was signed in 1902. Currently there are about 300 multilateral and 900 bilateral treaties on environmental protection<sup>103</sup>. Plus there are all kinds of “standards” and «guidelines» for states and businesses that include environmental aspect. In fact many of these declarations and resolutions are “soft law” and thus not

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<sup>101</sup> Rodriguez-Rivera, 2006, p. 272.

<sup>102</sup> Van de Venis, 2011.

<sup>103</sup> Agudo, 2003.

legally binding. Besides, many legally binding agreements are aspirational or educative but do not include practical measures, specific commitments and ways of progress assessments<sup>104</sup>.

Moreover, there is no correlation between increase of environmental treaties and bettering of our environment. At the beginning of last century there were less treaties and documents about environmental protection but global environment in general was in a better state. Nowadays more than 2 million people die every year and billions of cases of diseases occur globally due to pollution<sup>105</sup>. Over the last decades unfortunately the environment has been stably degrading. International environmental law, designed to assist conservation and protection of the environment, often is not capable to function and maintain sustainability. Consequently the existing system “doesn’t actually protect the environment” but, “at best ..., merely slow the rate of its destruction.”<sup>106</sup>

Unlike environmental law environmental human right law will focus less on states and more on the people who became hurt or could be hurt by the destruction of the environment. Victims of environmental disruption will have access to international procedures to challenge government for lack of the will to prevent environmental degradation. Subsequently this right would help to realize greater environmental protection and thus would provide benefit for both current and future generations<sup>107</sup>. But what is more, an individual will be able to protect ecosystem and biodiversity without even being a direct victim. And he/she could claim their right to healthy environment with no reference to violations of existing human rights.

This is not to say that we do not need environmental law today. What I am saying is that a human right based approach and international environmental law can strengthen each other and offer us a better future. This would be the most powerful way to achieve a healthy environment. Additionally codified right would create more awareness and will help to win the hearts and minds of people; it would empower them to participate in the

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<sup>104</sup> Rose, 2011, p.9.

<sup>105</sup> United Nations Environment Programme , (a).

<sup>106</sup> Margil quoted in Burns and Bollier, 2013, p.66.

<sup>107</sup> Van de Venis, 2011.

decision making processes concerning environment<sup>108</sup>. In short, this would serve to promote environmental ethics and a code of moral duty for all people.<sup>109</sup>.

At last, the right to a healthy environment is a prerequisite for the realization of other first, second and third generation rights such as, for example, right to life, right to food, right to water and sanitation, right to work etc. Today half of the world's population can not realize the full potential of their human rights due to a polluted and degraded environment<sup>110</sup>. More so, human rights abuses are often caused by poverty. Dr. David Boyd,<sup>111</sup> a Canadian leading expert in environmental law and policy, states that industrialized nations whose constitutions include environmental rights are not only greener and cleaner but also healthier and wealthier. Economists agree that environmental rules are expensive but when one takes into account both economic and societal factors, benefits justify the costs<sup>112</sup>.

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<sup>108</sup> Glazebrook, 2009.

<sup>109</sup> Office of the High Commissioner for Human Rights, 2002.

<sup>110</sup> Idem.

<sup>111</sup> An interview with Boyd, in the article of Wideman.

<sup>112</sup> Rich and Broder, 2011.



### **Chapter 3. Alternative mechanisms to «the right to healthy environment in the ECHR».**

In this chapter I will discuss alternative definitions of the right to healthy environment and alternative mechanisms that can guarantee the right to healthy environment for Europeans. I will conclude that to tackle environmental problems in Europe right to a healthy environment needs to be recognized on three levels: national, regional and international. I would also suggest that Europe should be the leader in promoting this right.

#### **3.1 Definition of the right**

“Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being”, states the Stockholm Declaration of 1972. Since then the debate started concerning different formulations of the environmental human rights.<sup>113</sup>

There is general difficulty in defining the term «environment» and the right that could interlink environment and human well-being. Academic literature, newspaper articles, government and NGOs publications, international agreements, national constitutions have offered different names, formulations and interpretations of that right:

-«the right to a healthy environment»<sup>114</sup>; «the right to live in ecologically clean natural surroundings»<sup>115</sup>; «the right to adequate environment»<sup>116</sup>; «the right to a general satisfactory environment favorable to their (all peoples) development»<sup>117</sup>; «right to a safe, clean and sustainable environment.»<sup>118</sup>; «human right to a healthy and ecologically balanced environment»<sup>119</sup>; «the right to a quality environment»<sup>120</sup>; «the right to live in

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<sup>113</sup> United Nations Environmental Programme, 2004, p 1.

<sup>114</sup> Article 11 in the protocol of San Salvador, adopted at San Salvador on November 17, 1988, at the eighteenth regular session of the General Assembly.

<sup>115</sup> Proposal by the Ukrainian delegation to the United Nations Commission on Human Rights, in Shelton 1991, p. 137.

<sup>116</sup> The International Network for Economic, Social and Cultural Rights (ESCR-Net).

<sup>117</sup> Article 24 in the African Charter on Human Rights adopted in 1981.

<sup>118</sup> The Human Rights Declaration of the Association of Southeast Asian Nations, adopted in 2012.

<sup>119</sup> Radulescu, 2012.

<sup>120</sup> Glazebrook, 2009.

an environment free from contamination»<sup>121</sup>; «right to a healthy, safe and environmentally-sound environment»<sup>122</sup> ; «the right to an environment that is not harmful to their (people's) health or well-being ...»<sup>123</sup>; «right to a secure, healthy and ecologically sound environment»<sup>124</sup>; «right to livelihood»<sup>125</sup>; «environmental right»<sup>126</sup> and so on.

«Environmental right» or «rights of nature» encapsulates the concept that our planet has its own rights and stands on the same legal level as governments or individuals. Ecuador incorporated such provision into its constitution in 2008. But compared to other concepts this one has lower chances for success on international level,<sup>127</sup> not least because of various technical reasons. For example, it is not clear who will represent nature in a court.

The other definitions might sound different but the concept behind them might be used to address some issues that I described in chapter 2: prevention of environmental pollution; rights of future generations; state responsibility for transboundary environmental harm, etc. «The right to a healthy environment» is the most popular definition and that is why I decided to use it in this paper.

### **3.2 Effectiveness of international and domestic law to prevent and fight environmental degradation.**

Even though many constitutions around the world guarantee a right to healthy environment currently international law does not recognize this right as such. Many bilateral and multilateral treaties, resolutions and declarations though acknowledge the connection between human rights and environment.

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<sup>121</sup> The Constitution of Ecuador, Article 19.

<sup>122</sup> Shelton, 2002, p. 24.

<sup>123</sup> Text proposal for the ECHR by Stand Up For Your Rights group, 2010.

<sup>124</sup> Office of the High Commissioner for Human Rights, 2002. p. 15.

<sup>125</sup> Patil, 2014.

<sup>126</sup> Stone, 2010.

<sup>127</sup> Cassel, 2008, p 106.

The Universal Declaration of Human Rights was drafted at the time when people did not have such big environmental concerns as we have today. But a contemporary reading of Article 3<sup>128</sup> and Article 25<sup>129</sup> of the Declaration helps to establish a bridge between human rights and environment. The same could be said about Article 11<sup>130</sup> and Article 12<sup>131</sup> of the 1966 UN Covenant on Economic, Social, and Cultural Rights. Special Procedures of the UN Human Rights Council in the regard of environment, climate change, indigenous people's rights, food and water contributed to this field.

The 1992 Rio Declaration contains some key principles for an environmentally responsible development: public participation in environmental decision-making, environmental impact assessments, need to integrate environment and development for a healthy and productive life in harmony with nature. But it was the Aarhus Convention adopted by the United Nations Economic Commission for Europe in 1998 that really made a difference in linking human right and environment. Aarhus Convention promotes access to information, public participation in decision-making and access to justice in environmental matters. It enables ordinary people, irrespective of their citizenship or nationality to influence decisions that affect their surrounding. The Convention was ratified by most European and Central Asia states<sup>132</sup> and governments have adjusted national laws to reflect the Aarhus Convention principles. As I showed in chapter 2 the ECtHR relies on the Aarhus Convention when taking decisions in «environmental» cases. However the Convention itself does not include the right to healthy environment. It protects rights which are narrower than the right I discuss in this paper.

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<sup>128</sup> «Everyone has the right to life, liberty and security of person» Article 3 of the Universal Declaration of Human Rights adopted by the UN General Assembly in 1948.

<sup>129</sup> «Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family...» Article 25 of the Universal Declaration of Human Rights adopted by the UN General Assembly in 1948.

<sup>130</sup> «The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.» Article 11 of the International Covenant on Economic, Social and Cultural Rights adopted in 1966

<sup>131</sup> "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.» Article 11 of International Covenant on Economic, Social and Cultural Rights adopted in 1966.

<sup>132</sup> United Nations Economic Commission for Europe and the United Nations Environment Programme, 2006, p. 5

Interestingly, two regional human rights treaties acknowledge a right to environment. Article 24 of 1981 African Charter on Human and Peoples' Rights proclaims that « All peoples shall have the right to a general satisfactory environment favorable to their development. » The American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, known as the 'Protocol of San Salvador', in Article 11 on the «Right to a healthy environment» says: «1. Everyone shall have the right to live in a healthy environment and to have access to basic public services. 2. The States Parties shall promote the protection, preservation, and improvement of the environment».

But even so, the right to satisfactory environment in the African Convention is a peoples' right, not a right of the individuals<sup>133</sup>. And the Inter-American Court of Human Rights tends to connect the protection of the environment with the protection of indigenous peoples.<sup>134</sup> Most environmental cases in the Inter-American Court were about extractive and development activities in areas occupied by indigenous and tribal communities. There have been no decisions of the Inter-American Commission or the Inter-American Court directly in relation to Article 11<sup>135</sup>.

In 2005 Center for International Environmental law and Earthjustice presented a petition to the Inter-American Commission on Human Rights about violations resulting from global warming caused by the United States<sup>136</sup>. That petition stated that global warming, to which US is the largest contributor, directly violates human rights of Inuit people-indigenous peoples inhabiting the Arctic regions of Greenland, Canada, and Alaska. For them ice is a crucial element of survival. Thinning ice shelves and shorter freeze periods have affected their ability to travel and hunt. Applicants claimed that Commission was obligated to act on that issue.

Despite evident facts petition was rejected in 2006. The Commission replied that it «will not be able to process... petition at present... the information provided does not

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<sup>133</sup> Boyle, 2011, p. 1

<sup>134</sup> Lixinski, 2010, p.594.

<sup>135</sup> Office of the High Commissioner for Human Rights, 2013, p.12.

<sup>136</sup> Center for International Environmental Law

enable us to determine whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration.»<sup>137</sup>

Then there is the international environmental law which is an area of international law that includes instruments to control the human impact on public health and planet in general. As highlighted previously, international environmental law consists of many «soft» law documents and numerous multilateral and bilateral legally binding international agreements concerning different areas: marine and atmospheric pollution, wildlife and biodiversity, hazardous wastes and their disposal, ozone layer, etc.

The process of implementation of multilateral environmental agreements (MEAs) depends on the provisions of the treaty. Often it involves development or strengthening of national policies and legislation, education, technical assistance, financial assistance and criminal enforcement. Most multilateral international agreements have established special bodies to monitor implementation of the Convention and provide policy advice to governments. Usually states have to prepare regular reports about the progress in the implementation of MEA to which it is a party.<sup>138</sup> But the fact is that some political leaders are reluctant to address an environmental challenge since that contradicts their national plans of economic development or there are other less lofty aims such as self-profiteering through abusing government offices and corruption. One must admit that the weakness of international environmental law is the absence of compulsory dispute settlement mechanisms.

Equally there is a gap between international human rights provisions and their implementation and enforcement.<sup>139</sup> We still lack an international human rights court. And the UN Human Rights Committee does not have authority to consider complaints about violation of right to healthy environment because the instrument it is based on excludes this right. The Committee will consider environmental case only when applicant manages to interlink it with already codified human rights (the same as in the ECtHR). But some countries fail to respect even existing international human rights

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<sup>137</sup> George, 2006.

<sup>138</sup> United Nations Environmental Programme(b), p. 39-42.

<sup>139</sup> United Nations Environmental Programme, 2004, p. 7.

law. All the more they are not eager to be in compliance with the right to healthy environment which so far exists only through the linkage with other rights. The question then arises as to whether should we create a stand-alone right to healthy environment in international environmental and human rights law with dispute settlement mechanisms?

There were proposals to create a body similar to the International Court of Justice in the Hague. Its role would be to enforce international agreements on cutting greenhouse gas emissions and fine states that fail to protect species or ruin natural environment. The Court was suggested to be established on a convention on the right to a healthy environment. It would enable both individuals and non-governmental organizations to complain about environmental injustice.<sup>140</sup> This proposal has one distinct advantage. International environmental law and human rights law are very specific branches of law and judges have to be experts in both.

Green organizations welcome any initiative that leads to the recognition of substantive right to a healthy environment on the international level. But opinions vary on whether it is a probable scenario for the future of international community. Van de Venis<sup>141</sup> suggests that it is inevitable that right to a clean and healthy environment will become codified under international human rights law in the period between a few years to two decades from now. Other authors also hold opinion that we are in the middle of a process of recognition of this right on international level.<sup>142</sup> But currently countries like US, China and Iran are reluctant to favor this idea<sup>143</sup>.

More so UN officials point out that only 3% of the total UN regular budget is allocated to human rights pillar. This is not much compared to the resources provided to the other two UN pillars. New autonomous right will take up budget resources (cost of meetings, interpretation, maintenance of new office, etc.)<sup>144</sup> and will redirect attention and

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<sup>140</sup> Gray, 2008.

<sup>141</sup> Van de Venis, 2011.

<sup>142</sup> Shelton, 2002

<sup>143</sup> Boyle, 2011, p. 11.

<sup>144</sup> Kevin I. Koh Human Rights Officer at the Human Rights Treaties Division of the United Nations Office of the High Commissioner for Human Rights, 2015.

energies away from other fundamental human rights issues. Dias<sup>145</sup> at all believes that the right to healthy environment is unlikely to be recognized on international level for the lack of consensus on the definition, scope and context of the right between states. She recommends continuing to elaborate the right to environment at the national level which will gradually lead to crystallization of right to environment in customary international law.

Presently environmental rights are included in more than 90 national constitutions around the world<sup>146</sup>, including nearly all constitutions adopted since 1992 (The Rio Conference).<sup>147</sup> Over the past years case law, application and enforcement of environmental standards on national level have grown significantly<sup>148</sup>. Boyd<sup>149</sup> claims that in the period of 1990-2009 countries across the globe with government duty and individual right to healthy environment on average reduced green house gas emissions by 7.8% while countries without such constitutional provisions, such as the United States, Canada, United Kingdom and Australia increased emissions by 2.4%.

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<sup>145</sup> Dias, 2000, p. 26

<sup>146</sup> Boyd, 2012.

<sup>147</sup> Shelton, 2002, p. 22.

<sup>148</sup> United Nations Environmental Programme, 2009, p.49.

<sup>149</sup> Boyd in Deno, 2012.



Nations recognizing the constitutional right to a healthy environment. Digital image. Boyd D.R, «The Constitutional Right to a Healthy Environment» 2012,  
<http://www.environmentmagazine.org/Archives/Back%20Issues/2012/July-August%202012/constitutional-rights-full.html> (Accessed on 08.06.2015)

According to Boyd<sup>150</sup> these European countries explicitly recognize the right to a healthy environment: Albania, Andorra, Armenia, Belarus, Belgium, Bulgaria, Croatia, Czech Republic, Finland, France, Georgia, Greece, Hungary, Latvia, Macedonia, Moldova, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, Serbia, Slovak Republic, Slovenia, Spain and Ukraine.

Essentially when the right to a healthy environment is constitutionally protected it becomes «equal to other rights and superior to ordinary legislation»<sup>151</sup>. It becomes as meaningful as other social and economic human rights rights. In practice that means that a government gets to be restricted by law to pursue economic growth at the

<sup>150</sup> Boyd, 2011.

<sup>151</sup> Shelton, 2002, p. 24.



expense of nature. No matter how powerful might be national or private enterprises, no matter how significant might be their investments or profits, the state is supposed to ensure that they perform in a climate- and environment-friendly, predictable way. This is supposed to be achieved, inter alia, by active and proactive effective governmental policies.

Yet I find that the European constitutions provide different degree of strength and spread of the right under discussion. There is no uniformity in definitions of environmental rights and the ways of ensuring the right are diverse. Some constitutions include specific environmental guarantee, others interconnect them with different fundamental rights. Often constitutions put duty on government to protect environment «but stop short of granting a personal human right to the environment»<sup>152</sup>. On the whole many of those constitutions fell to address issues that I described in chapter 3. To illustrate, around the world only 22 constitutions recognize rights or duties of environmental protection towards future generations, and just three of them are in Europe<sup>153</sup> : Albania, Norway and Poland.

Constitution of Albania (1998): Chapter V, Article 59(1): «The state, within its constitutional powers and the means at its disposal, aims to supplement private initiative and responsibility with: ....e) a healthy and ecologically adequate environment for the present and future generations».<sup>154</sup>

Constitution of Norway (as last amended in 2007) Section E, Article 110 b: «Every person has a right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources should be managed on the basis of comprehensive long-term considerations whereby this right will be safeguarded for future generations as well...».<sup>155</sup>

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<sup>152</sup> Agudo, 2003.

<sup>153</sup> Office of the High Commissioner for Human Rights study, 2011, p. 2.

<sup>154</sup> Idem, p. 3.

<sup>155</sup> Idem, p.12.

Constitution of Poland (1997) Chapter II, Article 68: Article 74: «...(1) Public authorities shall pursue policies ensuring the ecological safety of current and future generations».<sup>156</sup>

And it is undeniable that, abusive environmental practices do happen in the countries with constitutionally-protected right to a healthy environment.

The Constitution of Ukraine, for example, contains «the right to an environment that is safe for life and health»<sup>157</sup>. Nevertheless the Ukrainian government lets containers with nuclear waste to be stored in the open air without proper protection (see chapter 3).

Finally it should be noticed that constitutional provisions lose its power when government lacks the will to observe the law and national courts grow politicized and influenced by the legislative and executive branches.

If that happens on national level victims of environmental degradation should have additional environmental protection on regional level. Incorporation of a right to healthy environment in the ECHR can really make a difference for people in Europe. The ECtHR can help to show up the problem, encourage public dialogue and condemn governments for violations. But winning a case in the ECtHR is one thing; stopping destructive behavior is another. The advantage is that state in its turn will be responsible to execute of the ECtHR's judgments under supervision of the Committee of Ministers of the Council of Europe.

In chapter 2 I showed that the ECtHR often find violation from non-conformity of state institutions with domestic law. One can conclude that it is enough to have right to healthy environment codified only on national level. Then if this right is violated by a government the Court will anyway find violation of right to healthy environment (even though this right exists only in the domestic law). But that is not always the case.

It should be stressed that currently the Court permits states a wide margin of appreciation when it comes to striking a fair balance between competing interests<sup>158</sup> such as the right to privacy and family life versus «green» rights. An additional protocol

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<sup>156</sup> Idem, p.12.

<sup>157</sup> Idem, p.17.

<sup>158</sup> Bjerler, 2009, p. 5.

added to the ECHR will allow the Court to deal with broader environmental issues. Besides, the ECHR could provide more concrete texts defining and protecting the right to a healthy environment. This will help to set a European common standard, because the contracting states have to ensure that their domestic legislation is compatible with the ECHR. And naturally European countries that currently lack «the right to healthy environment» in their constitution will have to adjust their laws.

Certainly, the implementation of the right to healthy environment solely on national and European regional levels will not solve global environmental problems. Even though the protection of the environment within a state is the duty of this state, no single country is able to stop the global environmental pollution. From the nature of things, environmental protection requires common cooperation between states and people at the local, national, regional and international levels. One of the reasons is that a geographical fragmentation of the right in question may affect the behavior of business and workers. Industrial management, for example, might decide to relocate a business to countries with weaker environmental regulations<sup>159</sup>. Thus it will solve an environmental problem in one place but create a new one in another part of the planet. At the end «pollution haven»<sup>160</sup> countries as well as other states still will have to deal with negative environmental impact not least because pollution does not stop at borders. That is why it is necessary for the given right to be recognized on international level as well. But Europe itself can significantly contribute to reducing the global impact of pollution by codifying the right to healthy environment in the ECHR and can inspire other regions and states to include similar provision and approach in their policies. As to the ECHR the issue of the extra-territorial application should be included in Article that states right to healthy environment (see chapter 5, policy recommendations).

The Parliamentary Assembly had tried and failed three times to integrate a right to healthy environment in the ECHR (in 1999, 2003 and 2010). In the Recommendation

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<sup>159</sup> Rich and Broder, 2011.

<sup>160</sup> This definition is taken from the "pollution haven hypothesis" which predicts that multinational firms seek to set up factories in countries with cheap resources and labor and weak environmental regulations. See Neumayer, 2010.

1883 (2009) the Parliamentary Assembly noticed that the protection of environment and human health are not yet properly guaranteed neither for current not for future generations. The last time Assembly almost unanimously voted (54 votes for, 3 against and 1 abstention) for the drafting of an additional protocol. Nevertheless the Committee of Ministers has again rejected this initiative. Roughly speaking Committee said that environment is already protected under the ECHR and nothing else is required. No other reasons were added<sup>161</sup>. «In plain words the Committee of Ministers were just saying: we did not want it in 1999 or 2003, and we do not want it now»<sup>162</sup>. However as I showed in this paper Europeans are not satisfied with reality and we can not have bright future if we continue just with what we have now. In next chapter I will suggest that additional protocol must be added to the ECHR and I will give recommendations on what European policy-makers, civil society and academics should do to achieve this goal.

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<sup>161</sup> CM/AS(2010)Rec1883-1885 final 18 June 2010 , Council of Europe.

<sup>162</sup> Van de Venis, 2011, p. 10.

## **Conclusion and recommendations:**

Nowadays international protection of the environment comes to the fore. Consequences of inadequate attention to this issue might become catastrophic. Scientists point out that the degradation of the environment can become irreversible. This would pose a challenge not only to the health but to the survival of human beings.

As to the human rights dimension, without a healthy environment people are not able to enjoy a wide range of human rights: right to life and health, right to food, right to water, etc. Our human dignity depends on nature and this fact was recognized in many academic studies, domestic and international laws, judicial decisions. Nevertheless, victims of environmental degradation often are not heard on a regional or international level and ignored on a national one.

“It is horrifying that we have to fight our own government to save the environment”<sup>163</sup> but that is unfortunately how things work at the moment. European Convention on Human Rights currently is not the proper tool that people can use to overturn their government’s decisions and practices harmful to the environment. Even though the Court can respond to some contemporary environmental concerns by interpretation of provisions in the Convention, it can not change the content of the document.

In chapter 1 I demonstrated that the right to a healthy environment can be protected by the ECtHR only if it derives from other human rights that are already included in the European Convention on Human Rights.

In chapter 2 I presented situations when there was an environmental harm and it did or could have a negative effect on people. However such cases would not meet the ECHR’s admissibility criteria or cases would be doomed to fail. I suggested that the ECHR has a big potential in this area if the right to a healthy environment becomes itself a human right in the Convention.

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<sup>163</sup> Ansel Adams, Photographer in Phillips, 2001, p. 167.

In chapter 3 I demonstrated that Europeans can fully enjoy their environment only when right to healthy environment is implemented and enforced on three levels: national, regional and international.

This paper was meant to demonstrate that Europe has a big potential to protect environment through right-based approach. It can stop climate change by enabling Europeans to legally stand for their environmental right and by inspiring other regions and international community in general to follow its example. Realization of this ambitious goal on European level will gradually lead to adoption of global international convention of human right to healthy environment and foundation of International Environmental Court.

I recommend that an additional protocol containing human right to a healthy environment should be added into the ECHR. European Convention on Human Rights guarantees a number of rights, and has plenty of space for a one more right-right to healthy environment which will serve present and future generations. There was the time in Europe when women could not vote and slavery was a normal thing. But good people managed to stand together and change the reality. It is the right time to do it again. It is time to prove again that right based approach is right!

### **Policy recommendations**

#### **Step 1**

More research is needed to analyze how different formulations of environmental rights in European national constitutions affect performance of states in protecting people against unhealthy environment. European countries that still do not have right to healthy environment in their constitutions need to adjust its laws so that to include this right.

##### **Step 1.1**

More research is needed to better understand the environmental threats to health and causes of environmental destructions. The outcomes of such studies can be used by the ECtHR to make a fair judgment and prevent violation of the human right to healthy environment. More attention should also be paid to the ethics of industry-sponsored

research. The Courts should take into account that research paid by companies can aim to cover negative consequences of produced products.

### **Step 1.2**

- State and non-state actors should lobby drafting of additional protocol to the ECHR:
- petitioning and pressing relevant bodies on national and European level
- peaceful demonstrations and campaigns
- wide coverage of that issue in national and European mass-media
- continual dialogue with members of the Committee of Ministers of the Council of Europe. Demanding the reasons for refusal to draft an additional protocol, and addressing their arguments.

### **Step 2**

All the mentioned actions should lead to drafting of an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment. The drafting should be open for a wide range of stakeholders: governments, NGOs other advocacy groups, lawyers, academics, analysts and media, business, labor unions. There should be also a group or person who will speak on behalf of future generations.

The Additional protocol should incorporate the following principles:

- access of an individual to the ECtHR even though he/she is not directly and seriously affected by environmental harm that he/she complains about.
- access of an individual to the ECtHR to prevent possible environmental disruption.
- governments should be responsible to ensure that every new generation has the same or better quality of environment than the previous one.
- when environment is concerned government has positive and negative responsibilities not only towards people under its jurisdiction but also towards those outside its borders. This also includes responsibility of government to hold its citizens and national

companies accountable for violation of right to healthy environment in other countries, in and outside Europe.

### **Step 3**

Taking into account that Europe is also affected by transboundary pollution, European policy-makers and Europeans in general should lobby for the codification of the right to a healthy environment on International level in a form of a UN legally binding treaty.



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