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The European standpoint on
environmental rights: between a
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Summary

The thesis *The European standpoint on environmental rights: between a Human Rights Court and a Business Court* covers a research in a rather new area of the international human rights law, namely the area of environment and human rights. In specific, this research is carried out through the study and analyse of the case law of the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ) connected to environmental harm and its correlation to human rights law.

The first chapter of the thesis will introduce the reader into a more detailed description of the aim of this research and will give a short overview of the methodology used for the investigation.

Furthermore, the second chapter will focus on the background related to the two Courts under analyse and at the same time on the law provisions related to the Courts' case law analyse, which will be performed in the third chapter of this thesis.

The fourth chapter will focus on answering the question on the existence and achievement through the Courts' jurisprudence of a balance between the need of a high protection of the environment and the need for society's development.

All these chapters will lead to the last chapter of this research containing personal conclusions and a short overview of the potential issues correlated to the future accession of the European Union to the European Convention on Human Rights.

Subsequently, the research leads to the conclusion that the European Court of Human Rights focuses on reinterpreting the human rights set in the Convention with the purpose of incorporating environmental issues. However, the European Court of Justice focuses more on the realization of an effective sustainable development that will be able to sustain the economy of its Member States.

Preface

My interest in the area of environment and human rights began during my master studies once I achieved a more extensive knowledge of the international human rights law area. My studies and personal research made me realize that among all the fundamental human rights, there exists the most basic one, which constitutes the fundament from which all the other rights evolve.

This led me to the conclusion that this basis is not exactly a human right *per se*, but the environment and the possible environmental right that can be related to the human being. I reached this conclusion because I believe that there cannot be a proper protection of the human rights if there is not at first a protection of the environment. No human beings can live without a clean and safe environment and, hence, no human rights would exist either.

I consider that, in order to be able to protect human beings through human rights, there must be first a protection of the human environment. The human rights of the individuals will also be affected, when the environment has been harmed. Thus, these two elements cannot be separated. Nevertheless, since the environment is the basis for all human rights, it is in need of more protection than it was given until the present day, especially at international and regional level.

By writing this paper, I hope to achieve my goal of transmitting and making others understand better the importance of further research and work within this field.

Judge Christopher Weeramantry (ICJ) stated: “the protection of the environment is a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself [...] damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments”¹. The environment is the basis for the enjoyment of all the other human rights.

¹ Separate opinion of Vice-President Weeramantry, in the *Gabcikovo-Nagymaros* case before the International Court of Justice.

Abbreviations

AG	Advocate General
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
EIA	Environmental Impact Assessment
EU	European Union
ICJ	International Court of Justice
SD	Sustainable Development
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
WCED	World Commission on Environment and Development
WHO	World Health Organization
WSSD	World Summit on Sustainable Development

1 Introduction

In the European society today, the interdependence between environment and human rights has become an emerging issue. The majority of the European population is affected at present, in one way or the other, by different sorts of environmental damage. For example, according to the European Environmental Agency, since 1997, up to 45 % of Europe's urban population may have been exposed to air pollution above the EU limit set in order to protect human health; and up to 60 % may have been exposed to levels of ozone that exceed the EU target value.² In addition, it has been estimated that 20% of the European Union's population is exposed to noise pollution.³

The main purpose of the present thesis is the study and analyse of the case law of the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ) connected to environmental harm. In particular, this thesis will approach the case law related to certain categories of environmental harm, namely: industrial pollution, noise pollution and regional/urban development. The length of this paper does not allow for a broader analyse and therefore I chose these categories that I consider most suitable for representing the jurisprudence of the both Courts and, at the same time, to make possible a comparative analysis, in order to find out whether the two courts adopt similar or conflicting approaches towards environmental protection.

Neither of the two Courts works on the basis of the existence of an actual right to clean environment. However, I decided to use the word *right* instead of *protection*, because my focus is on the environment connection to human rights and not merely the environment protection *per se*. Thus, the focus is on the protection of the environment in its relation to human rights.

The growing importance for a better safeguard of the environment requires for the enforcement of a higher legal protection, which goes beyond the national level. At present, it appears that we are at a stage in which the protection of the environment can be better accomplished through human rights means. This is achieved by making recourse to violations of human rights norms with the aim of solving environmental harm problems. Thus, one of the goals of this research is to determine whether the notoriety of the European standards regarding human rights law, in comparison with other legal systems, can also be upheld when it comes to the protection of the

² The European Environmental Agency, <http://www.eea.europa.eu/themes/air/dc>, visited on the 10th of March 2011.

³ The EU Commission, Environment, <http://ec.europa.eu/environment/noise/greenpap.htm#situ>, visited on the 10th of March 2011.

environment through human rights mechanisms. This can be achieved by looking at the jurisprudence of the two courts, important at regional levels, which deal with this subject matter, namely the ECtHR and the ECJ. In this regard, the investigation of the jurisprudence will try to give the answer to what kind of environmental impact reaches the threshold of a violation of human rights, in order to see if the two Courts have different standards, when assessing a case. In order to bring a claim before any of the two Courts, in cases regarding environmental harm, the applicants are required to have been directly affected by the harmed invoked, which means that the Courts require a high threshold in order to admit a case. Therefore, in most of these cases it is very difficult, to meet the high standards imposed by the Courts.

In order to achieve these goals, my research will focus on finding and analyzing the standards of proof set by the two Courts for environmental harm that can be found in their case law, with the purpose of understanding the tendencies found in these judgements, and which are the clashes between their approaches. I am looking for the role that the different interests play in the decision-making process before the two Courts. Here, I expect to find is two different approaches with regard to *environmental rights*: the *human rights approach* versus the *business/economic oriented approach*. This investigation will help at drawing conclusions regarding the current position of each of the Courts in their assessment of the present situation of the environment and its relationship with human rights law. That is to say, I am looking to find out their standing in regard to the perspective of reinterpreting human rights in the light of environmental concerns, by analysing the aspects where the jurisprudence of the two Courts intersects and, at the same time, where it collides.

Furthermore, the main purpose of this paper is tightly connected to a bigger and more important issue concerning the need of finding a balance between a healthy environment and the need for further development in our society. The need for the achievement of this balance will result from the actual jurisprudence of the Courts. My investigation will focus at this point on finding out how this balance has been achieved through the jurisprudence of the two most significant Courts in Europe. The reason for my referral to development issues is simply because one cannot talk about environmental rights today, especially in the European society, without referring also to the development, as a fundamental *right*. As a result, there exists somewhat of a clash between offering a high protection for the environment and at the same time offer a limitless prospect for development. Thus, the issue that arises here is analyzing the way in which the Courts manage to find a balance between the environmental development interests at stake in each of the cases brought before them. In order to find that out, I will be examining how the standards of proof, mentioned above, come into conflict with the

development aspects, especially in dealing with European states, which strongly believe in reaching a high level of development.

This study has as a final goal questioning whether the accession of the European Union to the European Convention on Human Rights would further develop or, on the contrary, would limit the current, and possibly the future, standard of protection conferred to the environment at European level.

The methodology of my research will employ mainly the analyse and evaluation of the most relevant jurisprudence of the ECtHR and ECJ from the period 1990 to 2010, which has as subject matters the industrial pollution, noise pollution and development, issues that have been associated by the two Courts with human rights violations. This will also involve, on a smaller scale, the review of statistics and literature related to environmental harm and its consequences on human rights. In addition to my case law analyse, I will also be examining several regional and international conventions, which can be correlated with human rights and the environment at the same time.

Before going into the analyze of the case law, I will give a short background of the ECtHR and the ECJ and also an overview of the general legislation provisions related to environmental rights in the ECHR system and EU system, respectively. Further, I will point out the main areas covered by the Courts in their case law concerning environmental issues, in specific the types of environmental harms that the Courts have dealt with.

2 The fundamental principles and provisions of *environmental rights*

The legal standing of the environment has been an emerging issue in recent years in the context of international law and in the context of international human rights law. There are three main theories with regard to the *standing* of the environment in the international legal arena.

Firstly, there are those who consider the protection of the environment to be intrinsic in some of the already recognized human rights, as, for example, the right to home in the European Convention on Human Rights.

Secondly, there are those who consider that a new *environmental right* should emerge, but only in connection to the human being. This is also called the human right to the environment or to a clean environment.

Lastly, the environment has been internationally recognized through environmental conventions, even though not in a legally strong enough manner, as having its own standing on the world stage, as an element in need of its own legal protection.

At global level, the environment was under debate for the first time in a UN international conference in 1972. This conference put the basis on matters concerning the environment and the development through a Declaration containing 26 principles. This had a great impact at European level, when just one year later, in 1973, the European Community (at the time) created the Environmental and Consumer Protection Directorate and realized its first Environmental Action Programme⁴.

The first principle of the 1972 Declaration of the United Nations Conference on the Human Environment⁵ states that: “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations”. The first impression that one gets after reading this principle is that the Declaration has been clearly founded on a *human-rights perspective*⁶.

At European level, the first EC directives related to environmental matters were published in the 1970s and gave a more developed and complex perspective over the environmental problems than the very general

⁴ The Environmental Action Programme gives directions to the European Commission in the environmental field.

⁵ Also called *the Stockholm Declaration*.

⁶ Birnie, Patricia W., Boyle, Alan E. & Redgwell, Catherine, *International law and the environment*, 3. ed., Oxford University Press, Oxford, 2009, p. 49.

UN conventions. Moreover, it was the European Court of Justice to first bring up an environmental issue in a case⁷, in 1979. The ECJ made about 60 ruling on cases concerning the environment between the years to 1990.. It was in 1985 when the ECJ proclaimed that protecting the environment constituted *one of the Community's central objectives*.

Regarding the European Court of Human Rights, there were only 2 relevant cases decided on between 1982 and 1990. Judgements concerning environment became more numerous and important after 2000.

In a ECtHR judgement, it was declared that: “on a broader plane the Kyoto Protocol makes it patent that the question of environmental pollution is a supra-national one, as it knows no respect for the boundaries of national sovereignty. This makes it an issue par excellence for international law – and a fortiori for international jurisdiction. In the meanwhile, many supreme and constitutional courts have invoked constitutional vindication of various aspects of environmental protection – on these precise grounds. We believe that this concern for environmental protection shares common ground with the general concern for human rights”⁸. The Kyoto Protocol is a protocol to the UN Framework Convention on Climate Change, which has the aim to fight against global warming by imposing binding targets for the EU, among other states, for reducing greenhouse gas emissions.

Two of the most important legal principles in the context of international environmental law, the *precautionary principle* and the *polluter-pays principle*, have been introduced at global level by the Rio Declaration on Environment and Development in 1992. The Declaration was set out as a guide for the future sustainable development. These two principles have to be reiterated in the context of this thesis due to their importance and extensive use in the jurisprudence of the ECJ. This shows clearly that from the beginning the ECJ was far more active than the ECtHR on matters related to the environment and its protection.

The *precautionary principle* stated in Principle 15 of the Rio Declaration, is part of a text proposed by the European Union by inspiration from Swedish and German environmental law.⁹ Principle 15 declares “in order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”. This principle has been explained in the doctrine as requiring that” once environmental damage is threatened, action

⁷ ECJ, C-120/78 , *Cassis de Dijon* (1979).

⁸ Opinion of the dissenting Judges Costa, Ress, Turmen, Zupancic and Steiner sitting in the case of *Hatton and Others v. UK* (2003), para. 1.

⁹ Birnie, Patricia W., Boyle, Alan E. & Redgwell, Catherine, *International law and the environment*, 3. ed., Oxford University Press, Oxford, 2009, p. 154.

should be taken to control or abate possible environmental interference even though there may still be scientific uncertainty as to the effects of the activities”.¹⁰

Moreover, the *precautionary principle* was introduced at European level, by the Maastricht treaty, which marked its evolution from a philosophical principle towards a legal norm.¹¹ In the jurisprudence of the ECJ this principle has been applied in cases involving human health. The Court of Justice considers this principle in the light of Article 17(2) (1), of the EC, as one of the fundamental principles for the protection policy. According to the ECJ jurisprudence when “there is uncertainty as to the existence or extent of risks to human health, the institutions may take measures without having to wait until the seriousness of these risks has been fully demonstrated.”¹²

The *polluter-pays* principle was first stated in Principle 16 of the Rio Declaration: “National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.”

In addition, the World Health Organization considers even a third principle of highly importance in regard to environmental concerns, *the prevention principle*, which represents the action that should be taken where possible in order reduce pollution at the source. In order for this to be achieved, an environmental (health¹³) impact assessment is necessary.

In conclusion, at UN level, the situation has been rather static since the first convention in 1972 and not much progress has been done towards a better protection of the environment. Nevertheless, at European level, mostly through EU legislation, a complex legal system seems to be contouring in the last twenty years.

¹⁰ Freestone, David, *The Road from Rio: International environmental law after the Earth Summit*, Journal of Environmental Law (1994) 6 (2):193-218, p. 211.

¹¹ ECtHR, the case of *Tatar v. Romania*, para 69.

¹² ECJ, C-180/96, *United Kingdom v. Commission (1998)* and ECJ, C-157/9, *National Farmer's Union(1998)* .

¹³ In the case of the WHO.

2.1 Background of the ECtHR and the ECJ

The European Court of Human Rights is an international court set up in 1959 by the Council of Europe, founded in 1949. The Court has the jurisdiction to rule in accordance to the European Convention on Human Rights. As such, it rules on individual or State applications alleging violations of the civil and political rights set out in the Convention. It sits as a permanent court since 1998, when Protocol 11 of the Convention entered into force, which also gave the direct possibility to the individuals to apply to the Court. The European Court of Human Rights has jurisdiction over the 47 State Members of the ECHR. In 50 years the Court has delivered over 10,000 judgments, which are binding on the countries concerned¹⁴.

The European Convention on Human Rights is an international treaty signed by the member States of the Council of Europe in 1950 in Rome and entered into force in 1953. The individual complaints are examined by a Chamber if they are evaluated as meritorious. Decisions of great importance may be appealed to the Grand Chamber. As follows, since a decision of the Court is binding on the member states and must be complied with¹⁵, there is a body, called the Committee of Ministers of the Council of Europe, which has the function to supervise the execution of the Court judgments. Nevertheless, this body cannot force states to comply, but as a final resort a State can be sanctioned for non-compliance with its explosion from the Council of Europe.

The European Court of Justice¹⁶, created in 1952, is the highest Court of the European Union, hence it rules according and on EU law. The ECJ has jurisdiction over the 27 Member States of the European Union. The main tasks of the ECJ are to interpret the law of the EU and to ensure that its application is uniform in the member states. The Court also has the power to solve legal disputes, which might arise between EU member states, EU institutions, businesses and individuals. The Court is composed of 27 judges, each representing the member states and their national legal systems. The Court can sit as a Grand Chamber, consisting of 13 judges or in Chambers of 5 or 3 judges. The ECJ rules in several types of cases, however the types related to these thesis are mostly the *references for preliminary ruling* and *actions for failure to fulfil an obligation*. The first type of procedure can be invoked by a national court regarding the interpretation or validity of EU legislation and, the second type of procedure, can be claimed if there is reason to believe that a member state has not fulfilled its obligations under the EU law. Furthermore, the Court is assisted by eight

¹⁴ European Court of Human Rights official website: <http://www.echr.coe.int>.

¹⁵ European Convention on Human Rights, Article 46.

¹⁶ European Court of Justice, http://curia.europa.eu/jcms/jcms/Jo2_7031/.

Advocates-General, who have the role to give reasoned opinions on the cases brought before the Court. Their opinions must be public and impartial. In addition, the Court of First Instance was created in 1998, in order to help the ECJ with the caseload. This Court has the role to give rulings on actions brought by private individuals, companies and some organisations, and cases relating to competition law.

The ECJ, in its judgements, sometimes refers to the case law of the Court of Human Rights and treats the Convention on Human Rights as though it was part of the EU's legal system. The ECJ gives the European Convention on Human Rights *special significance* as a *guiding principle* in its case law.¹⁷ The European Court of Justice uses a set of general principles of law to guide its decision-making process. One such principle is the respect for fundamental rights. In Article 6(2) of the Treaty Establishing the European Union,¹⁸ it states: "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law."

Even though the state members of the EU are at the same time members of the ECHR, the European Union itself is not. However, the Treaty of Lisbon has taken effect since December 2009 and, consequently, the EU is expected to sign and become a member of the Convention. This would make the Court of Justice bound by the judicial precedents of the European Court of Human Rights and thus be subject to its human rights law.

¹⁷ Arnall, Anthony, *The European Union and its Court of Justice*, 2. ed., Oxford University Press, Oxford, 2006, p 339.

¹⁸ TEU, the Maastricht Treaty (1992).

2.1.1 ECHR provisions related to environment

The European Court of Human Rights has stated throughout its jurisprudence that *the Convention is a living instrument, to be interpreted in the light of present-day conditions*¹⁹. This *interpretation* of the Court concerning several Convention requirements *has generally been progressive*, “in the sense that they have gradually extended and raised the level of protection afforded to the rights and freedoms guaranteed by the Convention to develop the *European public order*”.²⁰ In the 1950s, when the Convention was adopted, the universal need for environmental protection was not yet apparent. For that reason, the Commission and the Court have reinterpreted some provisions in the light of new requirement in regard to environmental human rights.

The Court reiterates that the Convention is intended to guarantee rights that are “practical and effective”, not “theoretical or illusory”²¹. The Convention normally protects the individual against direct abuses of power by the State authorities and “typically the environmental aspect of the individual's human rights is not threatened by direct government action”.²² The State has nevertheless the positive obligation to take the necessary measures to protect the individual's rights, by controlling and implementing measures concerning *private players*. In this context, the problem to be solved by the ECtHR resumes at whether “the State has done anything or enough”²³. The cases can concern the failure of the authorities to act, in not taking action²⁴ or not taking the appropriate action²⁵ in order to put a stop to third party breaches of the right(s) invoked. In addition, the governmental decision-making process concerning complex issues of environmental and economic policy must involve appropriate investigations and studies, so that the effects of activities that might damage the environment and infringe individuals' rights may be predicted and evaluated in advance. Furthermore, a fair balance may accordingly be struck between the various conflicting interests at stake.²⁶

In the jurisprudence of the ECtHR, so far, the protection of the environment has been decided mostly on cases concerning breaches of

¹⁹ For example, in the ECtHR case of *Airey v. Ireland* (1979), pp. 14-16, 26, and *Loizidou v. Turkey* (1995), pp. 26-27, 71.

²⁰ The Joint Dissenting Opinion of Judges Costa, Ress, Turmen, Zupancic and Steiner, case of *Hatton and Others v. The United Kingdom* (2003), para 2.

²¹ ECtHR, the case of *Moreno Gomez v. Spain*, paragraph 56.

²² The Joint Dissenting Opinion of Judges Costa, Ress, Turmen, Zupancic and Steiner, case of *Hatton and Others v. The United Kingdom* (2003), para 6.

²³ The Joint Dissenting Opinion of Judges Costa, Ress, Turmen, Zupancic and Steiner, case of *Hatton and Others v. The United Kingdom* (2003), para 7.

²⁴ For example, in the ECtHR case of *Moreno Gomez v. Spain*, para 61.

²⁵ For example, in the ECtHR case of *Fedeyeva v. Russia* (2005).

²⁶ ECtHR, the case of *Giacomelli v. Italy* (2007), para 83.

Member States in regard to circumstances of severe environmental pollution, in the nearby of the applicant's home. The cases involved the following types of pollution: industrial pollution, noise pollution, deforestation and urban development; sectors, which will be used as the main sources for the case law discussion in the next chapter of this thesis. This was achieved through the extension of the already existing provisions of the European Convention of Human Rights, since there is no direct stipulation regarding the environment. The position adopted by the ECtHR has been a human rights based approach to the protection of the environment, since, of course, it is a human rights Court.

A violation against environmental rights can be potentially associated to the Articles 2 (right to life), 3 (prohibition of torture or inhumane treatments), 6 (rights to a fair trial), 8 (right to privacy, family life and home), 10 (freedom of expression²⁷) of the Convention or Article 1 (right to property) of the Protocol 1 of the Convention.

The Council of Europe has published in 2006 a manual²⁸ on human rights and the environment, where it describes the principles, which emerge from the jurisprudence of the ECtHR in connection to *environmental rights*. This manual seeks to clarify the relationship between human rights and environment, as it results from the jurisprudence of the Court. It can be said that, so far, the material covered by this manual represents the most important *principles* that the Court applied in case law concerning the environment. The manual exposes the three most important principles in regard to the individual rights, which could be affected by environmental harm. On the one hand, the human rights protected by the Convention may be directly affected by harmful environmental factors, which can lead to a substantive violation of those rights. On the other hand, harmful environmental factors may also give rise to procedural violations of those rights. It is important to mention here that the procedural aspects of these rights, in regard to the subject of the present thesis, refer to information and communication duties that the national authorities have in case of environmental damage. Lastly, the national authorities may also use the protection of the environment as a legitimate aim in order to justify a possible interference with certain individual human rights. For example, the Court has established in its case law that the right to peaceful enjoyment of one's possessions (Article 1 of Protocol 1) may be confined if this is considered necessary for the protection of the environment.²⁹

The most important provision in the environmental area, according to the case law of the court, is considered to be Article 8 of the Convention, which protects the individual's right to respect for his private and family

²⁷ The thesis will only mention in regard to this Article, the right to information.

²⁸ Council of Europe, *Manual on Environment* (2006),

²⁹ Council of Europe, *Manual on Environment* (2006),

life, his home and his correspondence. A home means, according to the Courts' interpretation, the place, the physically defined area, where private and family life develops. The individual has a right to respect for his home, meaning not just the right to the actual physical area, but also to the quiet enjoyment of that area. The breaches of the right to respect of the home are not limited to the concrete or physical breaches, such as unauthorised entry into a person's home, but also include those that are not concrete or physical, such as noise, emissions, smells or other forms of *interference*³⁰. In one of the ECtHR judgements' it has been stated that "Article 8 embraces the right to a healthy environment, and therefore it can be claimed for the protection against pollution and nuisances caused by harmful chemicals, offensive smells, agents which precipitate respiratory ailments, noise and so on".³¹

The ECtHR itself recalled and underlined in its jurisprudence that there is no explicit right in the Convention to a clean and quiet environment³², but if any type of pollution directly and seriously affects an individual, an issue could arise under Article 8 of the Convention. The Court further explained that Article 8 of the Convention could arise in the case of severe environmental pollution which affects an individual well-being and which prevents them from enjoying their homes to such an extent as to affect their private and family life adversely. These effects do not have to extend as to endanger the health in a serious way, for the Court to find a violation³³. However, this might change once the Court starts ruling on cases in accordance to Protocol 14 of the Convention, which establishes a new frame concerning the Court's rulings. According to Protocol 14, the rights of the applicants must be *trespassed* in a substantial way in order for the Court to find a violation on one of the rights set out in the Convention. At present, for an issue to arise under Article 8, the environmental factors must directly and seriously affect private and family life or the home. More specifically, the adverse effects must attain a certain minimum level. The assessment of the minimum has to be made in regard to all the circumstances of the case, such as the intensity and duration of the nuisance and its physical or mental effects, as well as the general environmental context.

The Court also states that in order to bring an arguable claim under Article 8, the interference complained of cannot be as negligible as to be comparable to the *environmental hazards inherent in life in every modern city*³⁴ and uses this standard in order to analyze the general context of the

³⁰ For example, in the ECtHR case of *Giacomelli v. Italy* (2006), para 76.

³¹ The Joint Dissenting Opinion of Judges Costa, Ress, Turmen, Zupancic and Steiner, case of *Hatton and Others v. The United Kingdom* (2003), para 2.

³² ECtHR, the case of *Hatton and Others v. UK* (2003), para 96.

³³ ECtHR, the case of *Taskin and Others v. Turkey* (2004), paragraph 113.

³⁴ ECtHR, the case of *Fadeyeva v. Russia*, paragraph 68-69.

environment. For example, in the case³⁵ of *Hatton and Others v. the United Kingdom*, where the Court stated that “a serious breach may result in the breach of a person’s right to respect for his home if it prevents him from enjoying the amenities of his home”³⁶.

Usually, the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it may involve the authorities’ adopting measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves³⁷. Even in the situation in which private actors would be responsible for the pollution, the State still has the positive obligation to guarantee the applicant’s right to respect for private life and home; otherwise, it would be in breach of the Article.

According to the second paragraph of Article 8 restrictions are permitted, *inter alia*, in the interests of the economic well-being of the country and for the protection of the rights and freedoms of others. Hence, it can be legitimate for the State to take into consideration economic interests when shaping its environmental policy. The scope of the margin of appreciation is not identical in each case but varies according to the context. Relevant factors can include the nature of the right in a given situation, its importance for the individual and the nature of the activity concerned³⁸.

Article 1 of Protocol 1 of the Convention regarding the right to property is the next most invoked provision after Article 8 and the applicants normally invoke this provision in the situation where there is a diminish in value of their property due to environmental problems present in the surroundings of their property.

The Articles 2 (right to life) and 3 (prohibition of torture and degrading treatments) of the Convention are quite seldom invoked before the Court in environmental cases and in most of the cases the Court didn’t find a violation on these provisions. In regard to the substantial aspect of Article 2, the positive obligation deriving from it entails the duty on the State to establish a legislative and administrative framework in order to provide effective deterrence against threats to the right to life.³⁹ This obligation applies mainly in the context of dangerous activities, where special attention is required in regard to any special features of the activity in question, particularly those which have a high level of potential risk to human lives. According to the Court, the national legislation must govern the licensing, setting up, operation, security and supervision of the activity and must make it mandatory for all those concerned to take practical

³⁵ See Chapter 5, of the present paper, *Noise pollution*.

³⁶ ECtHR, the case of *Hatton and Others v. The United Kingdom* (2003), para. 96.

³⁷ ECtHR, the case of *Moreno Gomez v. Spain*, para. 55.

³⁸ ECtHR, the case of *Buckley v. the United Kingdom* (1996), para. 74.

³⁹ ECtHR, the case of *Oner v. Turkey* (2004), para 89.

measures to ensure the effective protection of the individual who might be at danger. Concerning the procedural aspect of Article 2, the national judicial system must proceed to an independent and impartial investigation procedure that satisfies certain minimum standards as to effectiveness. It should, furthermore, be capable of ensuring that criminal penalties are applied where lives are lost, as a result of a dangerous activity if and to the extent that this is justified by the findings of the investigation.⁴⁰

Furthermore, Article 10 of the Convention (freedom of expression) can be invoked in situations where an individual has had a limited or prohibited access to information regarding environmental issues that could affect the area where he/she is living.

It is important to state at this point that this thesis will not analyse cases and violations in regard to Article 6(1) (right to fair trial) of the Convention, even though there are a number of ECtHR judgements concerning the named Article, since it is beyond the purpose of this paper.

The ECHR provisions illustrated above intend to provide the necessary background information for the later discussion in chapter 3 on individual cases. An analyse will be provided in chapter 3, which will illustrate how the ECtHR tends to interpret ECHR provisions in the light of possible *environmental rights*.

⁴⁰ ECtHR, the case of *Onervldiz v. Turkey* (2004), para 94.

2.1.2 EU legislation regarding environment

The Single European Act (1986) amended the treaty in order to include the Articles 174-176 and Article 95, which provided explicit law and policy-making powers in relation to environmental protection. The Treaty of Maastricht (1992) adds furthermore Articles 3 and 2 where the developments in the sphere of the environment are acknowledged and it is further stated a new objective for the promotion of economic development and sustainable growth that respects the environment. The Treaty of Amsterdam (1997), in its Article 6, provides that environmental protection requirements must be integrated into the definition and implementation of community policies in order to promote sustainable development.

At present, the European Union has a well-developed legislation on different areas concerning the environment and, hence, the European Court of Justice has an extensive jurisprudence concerning environmental matters. There is a very wide range of EU legislation in force concerning the environment. The main areas covered are: nature and biodiversity; integrated pollution control; waste management; air pollution; water pollution; noise pollution; environmental impact assessment; genetically modified organisms. Most of EU legislation to protect the environment is quite technical, in that it sets out detailed technical and scientific standards. The EU legislative provisions cover all the environmental sectors, which refer to water, air, nature, waste, noise, and chemicals, and can concern matters such as environmental impact assessment, access to environmental information, public participation in environmental decision-making and liability for environmental damage. This *body of law* is part of the European environmental *acquis*, an area where the EU legislation has grown significantly and is constantly improving.⁴¹ In addition, EU has also ratified and implemented a number of international conventions concerning environmental protection, which have mainly contributed to the EU legislation with some of the most basic and important principles of environmental law that have been mentioned previously in this paper.

The environmental legislation of the EU is enforced in the same way as other EU legislation. The European Commission is the institution, which monitors its implementation and may bring individual member states to the European Court of Justice (ECJ) for failure to implement it properly. It is the Commission's responsibility under Article 17(1) of the Treaty on European Union to ensure that both the Treaty on European Union and the Treaty on the Functioning of the European Union as well as measures

⁴¹ European Commission, Environment, http://ec.europa.eu/environment/legal/implementation_en.htm, visited on the 20th of February 2011.

adopted pursuant to them are correctly applied. The Commission is therefore considered as the *Guardian of the Treaties*.⁴²

The European Community has directed its attention more toward procedural environmental rights than towards a substantive right to the environment. Where the Community has attempted to accommodate a substantive human right, this has taken the shape of a policy statement rather than a specific right.⁴³

The procedural environmental rights focus on the right to access to information, public participation, and access to review procedures at the regional level, as embodied in the jurisprudence of the European Court of Human Rights, the Aarhus Convention, and environmental policy and law from the EC. However, there has been little international progress toward a substantive human right; but, at regional level, in Europe, the recognition of a substantive human right to the environment is progressing at a rather steady pace.⁴⁴

In a recent case of the ECJ, this reference for a preliminary ruling brought by the Slovakian Supreme Court concluded that Article 9(3) of the Aarhus Convention does not enjoy direct effect in EU law. The EU joined the Aarhus Convention through a Council Decision.⁴⁵ The Convention consists of three pillars: access to information, public participation in decision-making and access to justice. The first two pillars are regulated by the EU, however, the third pillar, access to justice in environmental matters, is not. The Court underlined in this case that national courts must take into account, “to the fullest extent possible”, the requirements of the Aarhus Convention. It remains to be seen the interpretations which will be given by the different national Courts.⁴⁶

In addition, in another recent case, the ECJ ruled that an NGO has the capacity to challenge projects, which might have a significant effect on the environment, in interpreting and applying the 1998 Aarhus Convention, and the Environmental Impact Assessment (EIA) Directive (85/337/EEC) as amended in 2003 in order to implement the Aarhus Convention.⁴⁷

A common Convention of the Council of Europe and the European Union on Civil Liability for Damage resulting from Activities Dangerous to the Environment (also referred to as the Lugano Convention) drafted in 1993 has not yet entered into force, even though it would only need 3

⁴² European Commission, <http://ec.europa.eu/environment/legal/law/index.htm>, visited on the 15th of March 2011.

⁴³ The European Union Charter on Fundamental Rights, Article 37.

⁴⁴ Pedersen, Ole W., *European Environmental Human Rights and Environmental Rights: A Long Time Coming?*, 21 Geo. Int'l Env'tl. L. Rev. 73, Fall 2008, p. 50.

⁴⁵ EC Directive 2005/370.

⁴⁶ ECJ, C-240/09, *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* (2011).

⁴⁷ ECJ, C-115/09 *Trianel Kohlekraftwerk Lünen* (2011).

ratifications.⁴⁸ The Convention has as a main objective the liability based on the *polluter pays* principle.

The Convention on the Protection of the Environment through Criminal Law (also referred to as the Strasbourg Convention) from 1998 has the aim at protecting the environment by using, as a last resort, criminal law in order to punish the most harmful man-made acts done to the environment.⁴⁹ This Convention establishes as criminal offences a number of acts “committed intentionally or through negligence where they cause or are likely to cause lasting damage to the quality of the air, soil, water, animals or plants, or result in the death of or serious injury to any person”.⁵⁰

The EU effectively in several directives has taken up environmental issues. The nature of a directive leaves the member state no choice as to the form or methods and binds the member state to the directives’ aim. Article 288 TFEU (ex Article 249 TEC) states that, “a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and method.” There are several directives covering environmental issues. The following are of importance for the thesis, because of their relevance to the environmental concerns in the different sectors that the thesis approaches and, furthermore, they are dealt with in the case law of the ECJ, which I will be analyzing in chapter 3 of this paper.

The EC Directive 2004/35 establishes the framework of the environmental liability with regard to the prevention and remedying of environmental damage. This contains one of the basic principles of environmental law, which is also stated in Article 191(2) of the TFEU. This type of liability regards the *pure ecological damage*, and “it involves the public authorities’ powers and duties, in comparison to usual civil liability system which regards a form of so called “traditional damage, which involves damage to property, economic loss or personal injury”.⁵¹

In the joined cases C-379/08 and C-380/08, the ECJ firstly stated the legal importance of this principle: “the prevention and remedying of environmental damage should be implemented through the furtherance of the “polluter pays” principle as indicated in the Treaty and in line with the principle of sustainable development”.⁵²

⁴⁸ 1993 Convention of the Council of Europe and the European Union on Civil Liability for Damage resulting from Activities Dangerous to the Environment, <http://conventions.coe.int/treaty/en/Treaties/Html/150.htm>, visited on the 30th of March 2011.

⁴⁹ 1998 Convention on the Protection of the Environment through Criminal Law, <http://conventions.coe.int/treaty/en/Treaties/Html/172.htm>, visited on the 30th of March 2011.

⁵⁰ Articles 2, 3 and 4 of the Strasbourg Convention.

⁵¹ European Commission, Environment, <http://ec.europa.eu/environment/legal/liability/index.htm>, visited on the 20th February 2011.

⁵² ECJ, joined cases C-379/08 and C-380/08, para 3.

Moreover, it is important for the purpose of this thesis to mention Article 7 of this Directive which underlines that there is a need of an EIA to be made when there damage to the land in order to further assess the adverse effects the damage could have on human health. However, the wording of the text does not imply that this is a mandatory requirement, since it only states that it is *desirable* to do so.

In the text of the Directive, it can also be noticed a similar obligation to the *positive obligation* provided by Article 8 of the ECHR, according to which the Member States have the responsibility to supervise their private industries in order to assure their compliance with national requirements. Hence, Article 24 of 2004/35 Directive entails that: “It is necessary to ensure that effective means of implementation and enforcement are available, while ensuring that the legitimate interests of the relevant operators and other interested parties are adequately safeguarded. Competent authorities should be in charge of specific tasks entailing appropriate administrative discretion, namely the duty to assess the significance of the damage and to determine which remedial measures should be taken”.⁵³

Furthermore, Article 6 of the Directive makes reference to human health by providing the steps that should be taken when environmental harm has occurred, by the operator responsible for the harm or by the competent authority in case which has a supervision duty in relation to the operator’s actions: “*immediately control, contain, remove or otherwise manage the relevant contaminants and/or any other damage factors in order to limit or to prevent further environmental damage and adverse effect on human health*”.⁵⁴ The remedial options have also been analyzed and implemented according to the effects they could have on public health and safety, the possibility of a future prevention of damage and the avoidance of collateral damage. It is interesting to notice that there are also taken into consideration, when deciding on a remedial option, the relevant social, economic and cultural concerns and other relevant factors specific to the regional area⁵⁵.

In addition, Article 11 of the same Directive provides that “*the duty to establish which operator has caused the damage or the imminent threat of damage, to assess the significance of the damage and to determine which remedial measures should be taken*”. In the *ERG* preliminary ruling⁵⁶, the remedial options are also being analyzed and implemented according to the effects they could have on public health and safety, the possibility of a future prevention of damage and the avoidance of collateral damage. It is

⁵³ EC Directive 2004/35, Article 24.

⁵⁴ EC Directive 2004/35, Article 6.

⁵⁵ ECJ, joined cases C-379/08 and C-380/08, para

⁵⁶ ECJ, joined cases C-379/08 and C-380/08.

interesting to notice that there are also taken into consideration, when deciding on a remedial option, the relevant social, economic and cultural concerns and other relevant factors specific to the locality.

The 82/501/EEC Directive of the Council of the European Communities (the *Seveso* directive) on the major accident hazards of certain industrial activities dangerous to the environment and the well-being of the local population.

The 2006/12/EC Directive on waste has been the subject of numerous infringements. The issues regarded mostly violations of Article 4 (concerning disposal of waste without endangering human health and the environment) and Article 5 (on the establishment of disposal installations) of this Directive. The Court has established in its case law that Article 4(1) of the 2006/12 Directive does not specify the actual content of the measures which must be taken in order to ensure that waste is disposed of without endangering human health and without harming the environment. Nevertheless, the Member States have the obligation to achieve this objective, but, at the same time, they can avail themselves by invoking the margin of discretion in assessing the need for such measures. The Court analyzes the infringements under this Directive in relation with the duration of the situation and the severity of the deterioration, without any action being taken by the competent authorities. At this point the Court might consider that the Member States have exceeded the discretion conferred to them by this provision. Furthermore, the European Commission stated that the role of Article 4(1) of the 2006/12 Directive is preventive, in that the Member States must make sure that operations for the disposal or recovery of waste do not endanger human health.⁵⁷

In addition, under Article 5(1) of the 2006/12 Directive, Member States have the obligation to take appropriate measures in order to establish an integrated and adequate network of waste disposal installations, by taking into consideration geographical circumstances or the need for specialised installations for certain types of waste. The Court ruled that “the criteria governing the location of waste disposal sites must be determined in the light of the objectives of the Directive, which include the protection of health and the environment and the establishment of an integrated and adequate network of disposal installations, which must, in particular, enable waste to be disposed of in one of the nearest appropriate installations”. The locations should be decided in considering “the distance of such sites from inhabited areas where the waste is produced; the prohibition on establishing installations in the vicinity of sensitive areas; and the existence of adequate

⁵⁷ EC Directive 2006/12, Article 4(1).

infrastructure for the shipment of waste, such as connections to transport networks”.⁵⁸

Furthermore, another Directive relevant to the subject of the paper is the EC Directive 2002/49 of the European Parliament and of the Council of 25 June 2002 relating to the assessment and management of environmental noise. The aim of this Directive is to implement legislation in order to “avoid, prevent or reduce on a prioritised basis the harmful effects, including annoyance, due to exposure to environmental noise.”⁵⁹ According to Article 2, the provisions of this Directive apply “to environmental noise to which humans are exposed in particular in built-up areas, in public parks or other quiet areas in an agglomeration, in quiet areas in open country, near schools, hospitals and other noise sensitive buildings and areas.”

In addition, the EC Directive 2002/30 on the introduction of noise-related operating restrictions at European Union airports has as main objectives: “to lay down rules for the Community to facilitate the introduction of operating restrictions in a consistent manner at airport level so as to limit or reduce the number of people significantly affected by the harmful effects of noise”⁶⁰ and “to promote development of airport capacity in harmony with the environment”.⁶¹ In regard to the obligation of the Member States under this Directive, Article 4(1) states that “Member States shall adopt a balanced approach in dealing with noise problems at airports in their territory. They may also consider economic incentives as a noise management measure”.⁶²

A very important Directive, which is often analyzed by the ECJ, is the Council Directive 85/337 on the assessment of the effects of certain public and private projects on the environment. Article 3 sets out the subject-matter of the environmental impact assessment: ‘The environmental impact assessment will identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with the Articles 4 to 11, the direct and indirect effects of a project on the following factors: human beings, fauna and flora, soil, water, air, climate and the landscape; the interaction between the factors mentioned in the first and second indents; material assets and the cultural heritage.’

According to this Directive, firstly there should be made checks in order to ascertain whether the planned works are liable to have significant effects on the environment and, secondly, those effects should be assessed in accordance with the provisions of Articles 5 to 10 of the Directive.

⁵⁸ EC Directive 2006/12, Article 5(1).

⁵⁹ EC Directive 2002/49, Article 1.

⁶⁰ EC Directive 2002/30, Article 1(a).

⁶¹ EC Directive 2002/30, Article 1(c).

⁶² EC Directive 2002/30, Article 4(1).

The EIA has been also defined as “the procedure for evaluating the likely impact of a proposed activity on the environment”.⁶³ This is also contained in Principle 17 of the Rio Declaration, which states: “Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority”.

In addition to the EU Directives, the Charter on Fundamental Rights of the European Union (CFREU) entered into force and, thus, became binding to all Member States. The Charter includes important rules on environmental protection and shows in its development the growing European concern to link a safe environment with human rights.

Firstly, Article 52(3) of the Charter specifies that, “in so far as the Charter contains rights which correspond to rights guaranteed by the European Convention on Human Rights, the meaning and scope of those rights are to be the same as those laid down by the Convention”. According to the explanation of that provision, “the meaning and scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the ECHR”⁶⁴. Furthermore, the same Article provides that the protection conferred by the Convention should not prevent the European Union from providing protection that is more extensive under its law.

Secondly, Article 37 of the Charter entails the necessity for the protection of the environment through the realization of sustainable development. As such, this provision does not confer an individual right on the inhabitants of the EU; its wording is quite general and it sounds more like a policy objective of the European Union rather than a right. *This right is expressed as a principle and, moreover, does not arise in a vacuum but instead responds to a recent process of constitutional recognition in respect of protection of the environment, in which the constitutional traditions of the Member States have played a part.*⁶⁵ A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development. Even the judges at the ECtHR comment upon the wording of this Article by stating that: “These recommendations show clearly that the member States of the European

⁶³ Birnie, Patricia W., Boyle, Alan E. & Redgwell, Catherine, *International law and the environment*, 3. ed., Oxford University Press, Oxford, 2009, p. 164.

⁶⁴ Advocate General’s Opinion in the case no C-120/10, reference for a preliminary ruling from the Conseil d’État, Belgium, para. 79.

⁶⁵ Advocate General’s Opinion in the case no C-120/10, reference for a preliminary ruling from the Conseil d’État, Belgium, para. 78.

Union want a high level of protection and better protection, and expect the Union to develop policies aimed at those objectives”⁶⁶.

The explanations relating to the Charter, prepared by the Praesidium of the Convention, state that Article 37 is based on Article 3(3) TEU, Articles 11 and 191 TFEU and also on some national constitutional provisions⁶⁷.

However, a recent report⁶⁸ on the Charter of Fundamental Rights of the European Union, which analyzes the progress made in regard to the application of each of the rights and “claims” of its contents, makes no reference to Article 37 and the environment, besides its mentioning in the table of contents.

Thirdly, Article 7 of the Charter states, in the same terms as Article 8 of the European Convention on Human Rights, “everyone has the right to respect for his or her private and family life, home and communications”.

The EU legal provisions exposed in this section demonstrate that the progress made at regional level in Europe is greater than the international one; however, these provisions also show that this progress is made rather slowly. In addition, these legal provisions are relevant for the further discussion of the case law brought before the ECJ and their aim is to provide the confronting perspective to the ECHR provisions exposed previously in this paper.

⁶⁶ Dissenting judges Costa, Ress, Turmen, Zupancic and Steiner in their dissenting opinion of the case *Hatton and Others v. UK*, para 1.

⁶⁷ Advocate General’s Opinion in the case no C-120/10, reference for a preliminary ruling from the Conseil d’État, Belgium, para 16.

⁶⁸ Report on the Application of the EU Charter of Fundamental Rights, 2010, http://ec.europa.eu/justice/policies/rights/docs/report_EU_charter_FR_2010_en.pdf, visited on the 30th of March 2011.

2.2 Statistics on State violations/infringements

The cases concerning environmental harm are constantly growing before the both Courts: the ECtHR and the ECJ. The alleged violations of rights/directives' infringements have had a significant growth in the last two decades, when the concern over the protection of the environment has increased among the European population. The European society has then started to realize that the harm done to the environment is affecting their own rights and, thus, it started to "react" by confronting the national authorities at European level, since this is a matter affecting the community as a whole, at regional level.

My research is extended throughout a period of two decades, starting from 1990. However, the majority of cases, which will be analyzed in this paper, are decisions from the last 10 years, period in which the Courts have been dealing with the environmental issue on a larger scale than previously. At European level, the judgements of the two Courts and their implementation have been considered the most effective way in order to achieve the protection of the environment.

The idiom *environmental protection* appears in fifty-seven of the cases brought before the ECtHR⁶⁹ and the phrase *environmental human rights* appeared for the first time in the judgment of *Hatton and Others v. UK*.⁷⁰ Looking at the range of cases, the ECtHR⁷¹ has covered the following issues in its case law:

1. *industrial pollution*, where complaints have been brought on Article 2 and Article 8 of the Convention;
2. *noise pollution*, where most cases have been claims regarding Article 8 and Article 1 of Protocol 1 of the Convention;
3. *urban/regional development*, where there have been claims on Article 8 and Article 1 of Protocol 1 of the Convention;
4. *passive smoking*, where a single case has been brought on Article 3 of the Convention.

In chapter 3 the first three ranges of cases of the ECtHR's classification will be used and applied to the ECJ, because of their relevance in the jurisprudence of both Courts. Furthermore, these three sectors offer elements from the two Courts, which can be analysed from a comparative point of view.

⁶⁹ Based on a search conducted on HUDO available at www.echr.coe.int covering cases from 1990 to 2010, visited in February-March 2011.

⁷⁰ ECtHR, the case of *Hatton and Others v. UK* (2003).

⁷¹ See Annex 4 of this thesis, pg. 72.

Before the ECJ,⁷² there are predominantly five sectors of jurisprudence related to environmental protection:

1. the environment impact assessment (EIA);
2. air;
3. water;
4. waste;
5. nature.

Nature conservation, waste and water legislation accounts for 59% of the infringement caseload for the environment sector and the sectors of environmental impact assessment and air account for 27%.⁷³

The European Commission is the institution that deals with the environmental infringement cases⁷⁴. According to further statistics⁷⁵ made by the European Commission in the period between 2003 and 2009, it can be observed a rather constant number of infringement cases, which appear every year. However, the number of such cases has diminished from 550 cases in 2003 to 450 cases in 2009. Nonetheless, the European Commission estimates an increase of these numbers in the future, mostly due to the enlargement of the European Union.

The Commission follows a certain procedure when it suspects that an infringement has taken place in one of the member states. It first sends a written warning, in the form of an official letter and if the Member State fails to respond, or its answer is unsatisfactory, then the Commission sends a final warning that sets out the detailed reasons for the complaint and sets a deadline for the state. After the completion of these steps, a case goes before the ECJ and the Court decide whether a Treaty infringement has taken place and, if so, it gives instructions to the state regarding remedies. Only if the Member State fails to obey the ECJ's ruling, after a second round of warnings the Commission can eventually send the case back to the Court⁷⁶, to impose a fine. The majority of cases are infringements under Article 258 TFEU. The cases where the existence of an infringement was declared by a judgment of the European Court of Justice are also called *Article 260 cases*.

The issues concerning the infringements by member states can be placed into three main categories:

1. *non-communication*, when a Member State fails to notify the Commission of the steps it has taken to implement an EU Directive;
2. *non-conformity*, when a Member State fails to transpose a Directive into national law correctly;

⁷² See Annex 2 and Annex 3 of this thesis, pg. 70-71.

⁷³ European Commission, Environment, <http://ec.europa.eu/environment/legal/law/statistics.htm>, visited on the 25th February 2011.

⁷⁴ See Annex 1 of this thesis, pg. 69.

⁷⁵ European Commission, Environment, <http://ec.europa.eu/environment/legal/law/statistics.htm>, visited on the 25th February 2011.

⁷⁶ TFEU, Article 260.

3. *horizontal bad application*, when a Member State neglects the obligations imposed by a European law, such as drawing up plans, monitoring activities, making impact assessments, or designating special areas.

In 1985 the ECJ announced that protecting the environment constituted “one of the Community's central objectives”⁷⁷. In this context, concerning individual complaints, the statistics at EU level show that more complaints have been received from individuals on environmental issues than any other matter.⁷⁸ During 1990 there were 480, and they have “risen by more than a third since 1991”.⁷⁹ From then on to mid-1998, national judges sent eighty-two references in the field. In 55 percent of the cases, individuals prevailed over the government. Since 1995, one out of every five Article 226 rulings has been in the field of the environment. Through 1998, 212 proceedings had been brought, leading to 138 rulings. The Court found the defendant Member State to be in violation of EC law in 122 of these rulings.⁸⁰

Before the ECJ, individuals, others than the addressees may claim that a decision is of individual concern to them only if that decision affects them by reason of certain attributes, which are peculiar to them, or by reason of factual circumstances, which differentiate them from all other persons and thereby distinguish them individually in the same way as the person addressed.

This section of the paper has the purpose of showing the great importance for the protection of the environment through the jurisprudence of these regional courts. The case law proves its importance in two different sectors: the human rights protection related to environment and the development *protection* related to environment. The so-called *protection* of the development refers to the achievement of sustainable development, which would be in harmony with the human environment. This argument will be developed later, in the fourth chapter of this thesis.

⁷⁷ *Procureur de la République v Association de défense des brûleurs d'huiles usagées (ADBHU)*, 240/1983, 1985.

⁷⁸ Freestone, David, *The Road from Rio: International environmental law after the Earth Summit*, *Journal of Environmental Law* (1994) 6 (2):193-218, p. 217.

⁷⁹ Report on the Application of Community Law on the Environment, 1992, Offprint of Chapter G of the Tenth Annual Report to the European Parliament on Commission monitoring of the application of Community law, C OM (93) 320/2, 28 April 1993.

⁸⁰ Stone Sweet, A. 2004. *The Judicial Construction of Europe*. Oxford Scholarship Online. Available at:

<http://www.oxfordscholarship.com/ludwig.lub.lu.se/oso/public/content/politicalscience/9780199275533/toc.html>.

3 Case law analysis

The broad notion of *environmental harm* or *environmental damage* does not have a general definition, its explanation is rather limited to *harm done to the environment*. This harm is usually achieved through pollution. Pollution is the introduction of a contaminant into the environment, mostly done by human actions. However, it can also be a result of natural disasters. The environmental pollution represents one form of environmental harm and it is defined as “the addition of any substance (solid, liquid or gas) or any form of energy (heat, sound or radioactivity) to the environment at a rate faster than it can be dispersed, diluted, decomposed, recycled or stored in some harmless form. The major kinds of pollution are air pollution, water pollution and land pollution; with the addition of modern types of pollution such as noise pollution, light pollution and plastic pollution.”⁸¹

This chapter will analyze the case law of the two Courts in three different sectors that deal with environmental harm: industrial pollution, noise pollution and regional/urban development. These represent the most relevant areas of jurisprudence for the purpose of this paper. The case law of the two courts reflects the position of the judges with regard to the link between environment and human rights as well as their reasoning on the issues arisen. The environmental harm is thus, strongly connected to the state of health of human beings and as a result, it can lead to infringements of the right to health, in various forms. The World Health Organization’s definition of health as stated in the Preamble of its *Constitution* as adopted by the International Health Conference in 1946 is: *the state of complete physical, mental and social well-being and not merely the absence of disease or infirmity*⁸².

Overall, it will result from the jurisprudence that the ECtHR analyses more the actual violation/harm brought to a human right, which is caused by environmental damage. Therefore, the jurisprudence of the ECtHR is more important when it comes to analyzing the substance of the violations of different human rights standards. However, the ECJ tends to take more into consideration the need for remedies after a violation has occurred.

⁸¹ Encyclopaedia Britannica, <http://www.britannica.com/EBchecked/topic/468070/pollution>, visited on the 1st of March 2011.

⁸² *Constitution of the World Health Organization*, Official Records of the World Health Organization, no. 2, p. 100.

The area of the ECJ jurisprudence that I will be analyzing in this paper is called the Environment and Consumers.⁸³ As it results from its name, the majority of the cases deal with the environment and its relation to human health. There are, certainly, a number of cases, which relate strictly to the environment, like the fauna, the flora and so on, subjects which are outside the purpose of this thesis. The legislation and implicitly the jurisprudence of the ECJ do not correlate the protection of the environment to the protection of human rights in the same way as the ECtHR. Thus, the strongest link found in the EU legislation and ECJ case law, is the human health.

It can be deduced that the two Courts could potentially come into conflict, after the accession of the EU to the European Convention on Human Rights, in the situation in which an individual would bring a claim in front of the ECtHR alleging the violation of one of the rights of the ECHR that can be related to environmental damages.

⁸³ Represents one of the subject-matters in which the ECJ has the jurisdiction to make a decision. All the case law concerning the environment can be found under this heading.

3.1 Industrial pollution

Industrial pollution is normally the consequence of the operation of different types industries. Industrial pollution in its turn can have different forms, among which, water pollution, air pollution, soil pollution or waste disposal. Principle 6 of the Stockholm Declaration on the Environment states, “The discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon ecosystems.”

The most important and common legal elements that the ECtHR considers when analyzing a case concerning industrial pollution are the distance of the applicant’s home from the source of the pollution and the proof or a strong likelihood for a link between the applicant’s well-being and the pollution. These elements are reflected in all the following judgements, which are analyzed in this sub-chapter.

The first case where the court identified a violation of the ECHR as a result of environmental conditions was the case of *López Ostra v. Spain*⁸⁴. Here, the applicant and her family lived in the Spanish town of Lorca, which contained multiple tanneries and leather facilities. Because of the applicant and her family living in close proximity, twelve meters, to a facility treating waste from the tannery production, the applicant's daughter suffered from clinical nausea, vomiting, allergic reactions, and anorexia. The adjacent plant operated without the necessary licenses since July 1988. The applicant’s family was relocated in February 1992, in the centre of the city where the municipality paid the rent. In an expert report of 16 April 1993 the Ministry of Justice’s Institute of Forensic Medicine in Cartagena indicated that gas concentrations in houses near the plant exceeded the permitted limit. Relying mainly on the authorities' indecision and hesitation in taking action against the plant, the Court found that the Spanish authorities had not managed to strike a fair balance between the town's economic interests and the applicant's effective enjoyment of her right to respect for her home and found an Article 8 violation.⁸⁵ Although the court refrained from framing a substantive right to the environment under the ECHR, it nevertheless found Spain violated its positive obligation to ensure that the applicant could live in an environment that did not constitute a serious health threat to her and her family. The Court notes that the family had to bear the nuisance caused by the plant for over three years before moving house with all the attendant inconveniences, even if the authorities relocated them and paid for the rent. The Court accentuated the prolonging

⁸⁴ ECtHR, the case of *López Ostra v. Spain* (2004).

⁸⁵ ECtHR, the case of *López Ostra v. Spain*, p. 56 and 58.

of the situation, in the terms of a standard of proof without the authorities solving the issue at hand. It can be disputed at this point whether the same violation would be found even at present after the entrance into force of the new Protocol 14 to the ECHR. The Court considered that the conditions in which the applicant and her family lived for a number of years were certainly very difficult but did not amount to degrading treatment within the meaning of Article 3.

In the case of *Guerra v. Italy*⁸⁶, the applicants lived at approximately 1 km from the *Enichem agricoltura* company's chemical factory. In 1988, the factory, which produces fertilisers and *caprolactam* was classified as *high risk* according to the criteria set out in a national decree, which transposed into Italian law Directive 82/501/EEC of the Council of the European Communities (the "Seveso" directive), on the major accident hazards of certain industrial activities dangerous to the environment and the well-being of the local population. In 1988, a report of a committee of technical experts appointed by Manfredonia District Council established that because of the factory's geographical position, emissions into the atmosphere were most of the times directed towards the city. In addition, results of a study performed by the factory itself showed that the emission treatment equipment was inadequate and the environmental impact assessment incomplete.

The applicants alleged that the Italian authorities violated Articles 2, 8, and 10 by failing to mitigate the risk of a major accident at a nearby chemical factory and by withholding information from local residents about the risks and about what emergency procedures were in place. The Court did not find Article 10 to be applicable in this case, by motivating that Article 10 does not impose the an obligation for the authorities to collect and disseminate information of their own motion. Nevertheless, a common concurring opinion on this issue, of Judge Palm, Bernhardt, Russo, Macdonald, Makarczyk and Van Dijk underlines that under different circumstances the State may have a positive obligation to make available information to the public and to disseminate such information which by its nature could not otherwise come to the knowledge of the public. Instead, the court found that the authorities had failed in their positive obligation under Article 8 to secure effective respect for the applicants' right to private and family life, by taking into consideration the facts previously exposed. Moreover, the Court stated that the applicants waited, right up until the production of fertilisers ceased in 1994, for essential information that would have enabled them to assess the risks of living in a town exposed to danger in the event of an accident at the factory. Here, it can be concluded that the failure by authorities to disclose information relating to risks associated with harmful

⁸⁶ ECtHR, the case of *Guerra v. Italy* (1998).

activities may constitute a violation of the ECHR under Article 8. Thus, Article 8 does, in some circumstances, carry with it a positive obligation for the authorities to supply information on issues affecting the environment. However, Judge Thor Vilhjalmsson considered in his separate opinion that he would have preferred that the case be dealt under Article 10 of the Convention.

Furthermore, the Court considered that since there has been a violation of Article 8, it was unnecessary to consider the case under Article 2 also. On the contrary, Judge Walsh was of the opinion that in the present case a violation of Article 2 should have been found, since this Article guarantees the protection of the bodily integrity of the applicants.

Likewise, in *Fadeyeva v. Russia*⁸⁷ the Court found Russia in violation of Article 8 due to its lack of attention to existing domestic rules to protect citizens from pollution. The applicant in *Fadeyeva* lived at approximately 450 meters from a steel plant, which is the largest iron smelter in Russia and the main employer, with a number of 60 000 employees. According to the 1999 State Report on the Environment, the Severstal plant was the largest contributor to air pollution of all metallurgical plants in Russia. In 1965, the authorities had created a so called “sanitary security zone” of 5000 meter-wide area in order to protect people living in the area, but the zone had been reduced in 1992 to 1000 meter-wide area. In addition, the authorities had, without effect, ordered the inhabitants of the “sanitary security zone” to resettle and failed to offer them any effective assistance in their attempt to resettle. Furthermore, the Court hinted at the procedural norms enshrined in Article 8 in cases of environmental decisions when noting, “there is no indication that the State designed or applied effective measures which would take into account the interests of the local population affected by the pollution, and which would be capable of reducing the industrial pollution to acceptable levels.”⁸⁸

In the case of *Giacomelli v. Italy*⁸⁹, the applicant lived 30 metres away from a plant for the storage and treatment of *special waste* classified as hazardous or non-hazardous, operating since 1982. The different forms of waste treatment covered by Ecoservizi’s licence included, for the first time, the *detoxification* of hazardous waste, a process involving the treatment of special industrial waste using chemicals. In 1991, the national authorities allowed the company to raise the quantity of toxic waste for detoxification from 30,000 to 75,000 cubic metres.

The Court took into consideration the fact that that neither the decision to grant Ecoservizi an operating licence for the plant nor the decision to authorise it to treat industrial waste by means of detoxification was preceded

⁸⁷ ECtHR, the case of *Fadeyeva v. Russia* (2005).

⁸⁸ ECtHR, the case of *Fadeyeva v. Russia*, para 292-293.

⁸⁹ ECtHR, the case of *Giacomelli v. Italy* (2007).

by an appropriate investigation or study, in accordance with the transposed European Directive 85/337/EEC concerning EIA. In specific, Ecoservizi was not required to undertake such a study until 1996, seven years after commencing its activities involving the detoxification of industrial waste. The Court further notes that during the EIA procedure, which was not concluded until a final opinion was given in 2004, the Ministry of the Environment found on two occasions, in 2000 and 2001, that the plant's operation was incompatible with environmental regulations on account of its unsuitable geographical location and that there was a risk to the health of the local residents. The court found an Article 8 violation in *Giacomelli v. Italy*, where for several years the applicant's right to respect for her home, was seriously impaired by dangerous activities. The Court considers that the State did not succeed in striking a fair balance between the interest of the community in having a plant for the treatment of toxic industrial waste and the applicant's effective enjoyment of her right to respect for her home and her private and family life.

Furthermore, the applicants, in the case of *Tatar v. Romania*⁹⁰, were living at 100 meters from a gold extraction plant, which began operating in 1998, by using sodium cyanide, a very dangerous substance for the environment and for human health. In 1993, the Ministry of Environment Research Institute conducted a preliminary impact assessment and concluded that the land and underground waters in the area were polluted. In January 2000 an environmental accident occurred at the site, which was followed by an UN study reported that a dam had breached, releasing about 100,000m³ of *cyanide-contaminated tailings* water into the environment. The World Health Organization (WHO) also confirmed the pollution of the site. The Court noted at this point that the company was in breach of the precautionary principle, due to the fact that it was allowed to continue its industrial operations. According to this principle, the absence of certainty with regard to current scientific and technical knowledge could not justify any delay on the part of the State in adopting effective and proportionate measures.⁹¹ The Court underlined that, contrary to other cases, in the present one the pollution of the site and the dangers entailed was quite predictable,⁹² and, furthermore, the authorities had accurate information since the study conducted by the Government in 1993.

In this case, the applicants invoked Article 2 of the Convention in complaining that at the technological process used by the company put their lives in danger; nevertheless, the Court decided that the case should be examined under Article 8 of the Convention. Among others, the applicants complained about their suffering of asthma due to the heavy pollution, but

⁹⁰ ECtHR, the case of *Tatar v. Romania* (2009).

⁹¹ ECtHR, the case of *Tatar v. Romania*, para 109.

⁹² ECtHR, the case of *Tatar v. Romania*, para 111.

the Court noted considered that the applicants had failed to prove the existence of a causal link between exposure to sodium cyanide and asthma. Nevertheless, the Court took into consideration that the existence of a serious risk for the applicants' health and well-being entailed a duty on the State to consider the risks, both at the time it granted the operating permit and subsequent to the accident, and to act appropriately. In their partial dissenting opinion, Judge Zupancic and Gyulumyan, strongly disagreed with this statement, by arguing that the Court relied just on the lack of official information from the part of the authorities, without requiring proof from the applicants. The Romanian state was therefore found in violation of Article 8 of the Convention, due to the lack of action in protecting the life and home of the applicants and in preventing the consequences on the environment and on the general population.⁹³

The applicant, in the case of *Öneryildiz v. Turkey*⁹⁴, was living in the slum quarter of Kazim Karabekir in Ümraniye (Istanbul), together with other 12 relatives. The Kazim Karabekir area was part of an expanse of rudimentary dwellings built without any authorisation on land surrounding a rubbish tip, which had been jointly used by Istanbul City Council since 1972. In 1993, a methane explosion occurred at the tip and the refuse erupting from the pile of waste destroyed 13 houses situated below it, including the one belonging to the applicant, who lost nine relatives. Thirty-nine people died in the accident.

The Court considered, in view of the present case, two conventions of the Council of Europe, namely the 1993 Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment (the Lugano Convention) and the 1998 Convention on the Protection of the Environment through Criminal Law (the Strasbourg Convention). The Court observed, in relation to these documents that primary responsibility for the treatment of household waste rests with local authorities, which the governments are obliged to provide with financial and technical assistance.⁹⁵

The operation by the public authorities of a site for the permanent deposit of waste is described as a *dangerous activity*, and *loss of life* resulting from the deposit of waste at such a site is considered damage incurring the liability of the public authorities.⁹⁶ In that connection, the Strasbourg Convention calls on the Parties to adopt such measures “as may be necessary to establish as criminal offences” acts involving the “disposal, treatment, storage ... of hazardous waste which causes or is likely to cause death or serious injury to any person ...”, and provides that such offences may also be committed

⁹³ ECtHR, the case of *Tatar v. Romania*, para 112.

⁹⁴ ECtHR, the case of *Öneryildiz v. Turkey* (2004).

⁹⁵ ECtHR, the case of *Öneryildiz v. Turkey*, para 60.

⁹⁶ The Lugano Convention, Article 2(1) (c)-(d) and Article 7 (a)-(b).

“with negligence”.⁹⁷ Although this instrument has not yet come into force, it is penalties for damage to the environment, an issue inextricably linked with the endangering of human life.

In the first judgement of the Chamber, it was found that there was a causal link between, on the one hand, the negligent omissions attributable to the Turkish authorities and, on the other, the occurrence of the accident on 28 April 1993 and the ensuing loss of human life, in considering that the national authorities did not make any real effort to avert the serious operational risks highlighted in the expert report, nor made any attempt to discourage the applicant from living near the rubbish tip that was the source of the risks. The Grand Chamber, in its later decision, agreed on this point with the Chamber and, consequently, it found that Turkey was in breach of the substantive aspects of Article 2 of the Convention.⁹⁸ The Grand Chamber further found a violation of Article 2 of the Convention in its procedural aspect, on account of the lack, in connection with a fatal accident provoked by the operation of a dangerous activity, of adequate protection “by law” safeguarding the right to life and deterring similar life-endangering conduct in future.⁹⁹ In addition, it is interesting to be noted here that the Court also found a violation of Article 1 of Protocol 1, even though the applicant was living in a slum and was awarded also compensation from the Government for his loss. The Court stated on this matter that: “the relevant authorities’ tolerance of the applicant’s actions for almost five years, leading to the conclusion that those authorities acknowledged *de facto* that the applicant and his close relatives had a proprietary interest in their dwelling and movable goods¹⁰⁰, which was of a sufficient nature and sufficiently recognised to constitute a substantive interest and hence a “possession” within the meaning of the rule laid down in the first sentence of Article 1 of Protocol No. 1”.¹⁰¹

Nevertheless, at present, after the entering into force of Protocol 14, the Court’s practice has changed and it does not admit cases solely on the bases of a too low compensation, as long as the national authorities provided one. As Judge Mularoni expressed in his partly dissenting opinion: “neither implicit tolerance nor other humanitarian considerations can suffice to legitimise the applicant’s action under Article 1 of Protocol No. 1”, where he considered that this kind of reasoning might have “paradoxical effects” since the buildings have been erected in breach of town planning regulations.

⁹⁷ Articles 2 to 4.

⁹⁸ ECtHR, the case of *Öneryildiz v. Turkey*, para 101.

⁹⁹ ECtHR, the case of *Öneryildiz v. Turkey*, para 118.

¹⁰⁰ ECtHR, the case of *Öneryildiz v. Turkey*, para 127.

¹⁰¹ ECtHR, the case of *Öneryildiz v. Turkey*, para 129.

Judge Kovler, in his dissenting opinion in the case of *Fadeyeva v. Russia* expressed the opinion that *environmental rights* under Article 8 relate more to the sphere of *private life* and not with that of *home*. He considers that the notion of *home* was intended solely for the purpose of “defining a specific area of protection” which is separated from the notion of “private and family life”.

A conclusion that can be drawn from these judgements is that the Court seems to decide upon a case connected to environmental harm in either connection to Article 2 or Article 8 of the Convention, but never in connection to both. The Court seems to exclude the applicability of both Articles at the same time and consider only the most relevant one to the respective case.

Concerning the ECJ jurisprudence in the area of industrial pollution, there is a high number of decisions in regard to waste recovery and disposal. In this context, in the case of the *Commission v. Italy*¹⁰², the Italian State was brought before the Court for having failed to implement the Article 4 and Article 5 of the 2006/12/EC Directive concerning waste. In specific, the national authorities have not established an integrated and adequate network of disposal installations in the urban areas of the Campania. The situation existed since 1994 when a state of emergency was declared in the region. At the time, a thermal treatment of the waste was implemented through a management plan, however the implementation process failed to work, due to, on the one hand, the low volume of waste collected, and, on the other hand, the opposition coming from local residents, due to the location of these treatment plants. The Court took into account that the production of waste in Campania accounts for 7% of the total national waste production and population in the region accounts for 9% of the total population of the country.¹⁰³

The Court noted furthermore that according to its settled case law, the Italian state cannot plead internal situations such as difficulties related to the opposition coming from local inhabitants’ for the establishment of disposal installations, in order to justify a failure to comply with obligations and time-limits laid down by EU law.

The Court concluded that “the accumulation of large quantities of waste along public roads and in temporary storage areas has undoubtedly given rise to a ‘risk to water, air or soil, and to plants or animals’ within the meaning of Article 4(1)(a) of Directive 2006/12”, which is likely to affect “adversely ... the countryside or places of special interest” within the meaning of Article 4(1)(c) of Directive 2006/12.¹⁰⁴ Moreover, such quantities of waste lead to “nuisances through noise or odours” within the

¹⁰² ECJ, C-297/08, *Commission v. Italy* (2010).

¹⁰³ ECJ, C-297/08, *Commission v. Italy*, para 70.

¹⁰⁴ EC Directive 2006/12, on waste.

meaning of Article 4(1)(b). As a result, the Court declared that the Italian state failed to do a proper recovery and disposal of waste and as a result put in danger the human health and, at the same time, harmed the environment.

The concern involving industrial pollution is one of the most emerging issues at European level, with regard to developed and developing countries. The industries represent one of the fundamental elements for the development of the European society. At this point, the related problems of the sustainability of the development and the protection of human rights have also emerged. While, the ECtHR focus more on the human aspect related to the threat imposed by industries; unfortunately, the ECJ raises the issue of *danger for the human health* and *harm to the environment* quite seldom in cases concerning industrial pollution. Hence, the ECJ case law analyze in relation to these two factors is not reflected to such a considerable extent as to draw up patterns from the Court's judgements. For example in the ECJ judgements, there is no referral to private life, family life or inhumane treatment, as one can find in the ECtHR jurisprudence. In addition, the *directly affected* standard, which I mentioned in the introduction of this thesis, can be easily identified in the judgements. For example, in accordance with Article 12 of the Directive 2004/35, any legal or natural person is entitle to bring a claim for a violation of the Directive in front of the competent authority in three instances: if that person is affected or is likely to be affected by an environmental damage, if a person has sufficient interest when it comes to the environmental decision-making related to the damage or if a person is claiming the violation of a right related to the environmental damage.

3.2 Noise pollution

Noise pollution is the excessive, displeasing human, animal or machine-created environmental noise that disrupts the activity or balance of human or animal life. The word *noise* comes from the Latin word *nauseas*, meaning seasickness¹⁰⁵. The purpose of this paper will be on analyzing the effects of the noise pollution on human life and the environment. The extraordinarily sensitive doctrine concerning environmental nuisances goes back to Roman law. Roman law classified these nuisances as *immissiones in alienum*¹⁰⁶.

The sound pressure level¹⁰⁷, according to the World Health Organization, is a measure of the air vibrations that make up the sound. All measured sound pressures are referenced to a standard pressure that corresponds roughly to the threshold of hearing at 1 000 Hz – the lower limit. As a result, the sound pressure level indicates how much greater the measured sound is than this threshold of hearing. Because the human ear can detect a wide range of sound pressure levels (10–102 Pascal (Pa)), they are measured on a logarithmic scale with units of decibels (dB). In addition, in the ECtHR judgements related to noise pollution, the Court explains that if the instantaneous noise pressure level is measured, that is called as “A-weighting”, mostly known as dBA; and, if the noise pressure level is measured over a certain time span, this is called the “equivalent continuous sound pressure level” (abbreviated LAeq).¹⁰⁸

In 1999, in Geneva, the World Health Organization (WHO) stipulated in the *Guidelines for community noise*, “community noise (also called environmental noise, residential noise or domestic noise) is defined as noise emitted from all sources except noise at the industrial workplace.” According to this document, the main sources of this type of noise include road, rail and air traffic, industries, construction and public work, and the neighbourhood.

From the data collected¹⁰⁹ by the WHO, it results that the population in general is highly affected by the noise level. For example, in the European Union approximately 40% of the population are exposed to road traffic noise with a level of noise exceeding 55 dB (A) during daytime. In addition, 20% of the population is exposed to levels exceeding 65 dB (A). In addition, considering all the exposure to transportation, approximately 50% of the European Union citizens are estimated to live in zones, which do not

¹⁰⁵ http://en.wikipedia.org/wiki/Noise_pollution, visited on the 10th of March 2011.

¹⁰⁶ Dig.8.5.8.5 Ulpianus 17 ad ed. <http://www.thelatinlibrary.com/justinian/digest8.shtml>, visited on the 10th of March 2011.

¹⁰⁷ World Health Organization, *Guidelines for Community Noise*, 1999, Chapter 2.

¹⁰⁸ ECtHR, the case of *Oluic v. Croatia (2010)*, para 28.

¹⁰⁹ World Health Organization, *Guidelines for Community Noise*, 1999.

ensure *acoustical comfort* for its inhabitants. Furthermore, about 30% of the population is exposed at night to equivalent sound pressure levels exceeding 55 dB (A). Levels of noise which were calculated in densely travelled roads were found to have equivalent sound pressure levels for 24 hours of 75 to 80 dB(A).

Further conclusions drawn by the WHO, which have been stipulated in its Guideline, underline that the noise pollution problem is growing on an international scale, in contrast to many other environmental problems; this increase has been also accompanied by a higher number of complaints from affected individuals. Most people are usually exposed to a number of noise sources, but road traffic noise has been acknowledged to be the dominant source.¹¹⁰ Additionally, the growth of the population, the urbanization and to a large extent the technological development are the main noise pollution sources, with the further increase of the noise problem due to the enlargements of highway systems, international airports and railway systems.

In relation to noise levels in homes, the guidelines state in order to protect the majority of people from being seriously annoyed during the daytime, the sound pressure level on balconies, terraces and in outdoor living areas should not be above the level of 55 dB LAeq for continuous noise. However, during night time, the sound pressure levels at the outside façades of living spaces should not exceed 45 dB LAeq, in order for the people to be able to sleep with bedroom windows open. This value has been obtained by assuming that the noise reduction from outside to inside with the window partly open is 15 dB and, where noise is continuous, the equivalent sound pressure level should not exceed 30 dB indoors, if negative effects on sleep, such as a reduction in the proportion of REM sleep, are to be avoided.¹¹¹

Until present, cases claiming violations, which had as a main cause noise pollution, have been brought in front of the ECtHR on Article 8 and Article 1 of Protocol 1 of the European Convention on Human Rights. The main complaint of these cases is in regard to the violation of the private life and home of the applicant. The case law of the ECHR has held on a number of occasions that noise pollution forms part of the environment for the purposes of Article 8 of the Convention.

The ECtHR has used in its judgements definitions and levels of noise pollution established by the World Health Organization in its *Guidelines for community noise* and also by the different State Members of the ECHR.

I will be analyzing some of the relevant cases worth mentioning at this stage, in which the ECtHR has extended the applicability and meaning

¹¹⁰ WHO, Guidelines for Community noise, ch. 1.

¹¹¹ World Health Organization, *Guidelines for Community Noise*, 1999, ch. 4.3.

of some of the Articles of the Convention and, as follows, has extended its jurisdiction over other pressing issues than initially haven't been stated or intended to be stated in the provisions of the ECHR. Thus, the Court now makes decisions on cases claiming some sort of environmental harm.

In *Fägerskiöld v. Sweden*¹¹², the case involved the issue of constant pulsating noise coming from a wind turbine, which was affecting the applicants' private life and their property value, in Hästholmen, Sweden. The applicants, Mr and Mrs Fägerskiöld have their permanent residence in Jönköping, but use for recreational purposes a property in Hästholmen, since 1980s. Starting with the 1991 there were two wind turbine built in the nearby of the applicants' property, to which it was later added in 1998 a third wind turbine. This third wind turbine was the cause of the applicants' complaint. The first and second turbines were located at 430 meters from the applicants' property and 620 meters, respectively. In addition, the first turbine had a delivery of 225 kilowatts (kW), while the second one had a delivery of 150 KW. However, the third turbine added in 1998 was situated at a distance of 371 meters from the applicant's property with a delivery of 600 kW. In May 1998, the company which built the turbine carried out noise tests of all the three turbines, at the applicants' recreational property, and concluded that the levels of noise coming from the third turbine alone was calculated at 37.7 decibels (dB) and the noise coming from all the three turbines together was calculated at 39.4 dB. It is important to be mentioned that these tests were conducted during evening time.¹¹³

Furthermore, the Swedish Environment Committee, a body which analyzed the results found at the applicants' property, decided that the noise levels did not exceed the maximum level permitted of 40 dB. However, it decided to temporarily limit at certain periods the functionality of the third turbine, in order to minimise the nuisance perceived by a number of neighbours and, in particular, two houses which were situated closer than the applicants' property. These were considered to be *protective* and *precautionary* measures.¹¹⁴ The limitation included the stop of the wind turbine in the situation in which the wind does not exceed a speed of four meters per second and also, during the summer months, the wind turbine's rotor blades was supposed to be adjusted to a "less aggressive" angle in order to minimise the sound level. The Committee decided also that all mechanical noise, produced by the turbine should be eliminated. However, the applicants' considered that even with all the precautionary measures that have been taken, the noise made by the turbine did not diminished and it was still causing them *serious nuisance*. As a result, the applicants appealed to the County Administrative Court, which decided that in this case, the

¹¹² ECtHR, the case of *Fägerskiöld v. Sweden* (2008), inadmissible decision.

¹¹³ ECtHR, the case of *Fägerskiöld v. Sweden*, pg 2.

¹¹⁴ ECtHR, the case of *Fägerskiöld v. Sweden*, pg 3-4.

disturbance had to be considered as tolerable and the appeal was rejected as such.¹¹⁵

The applicants invoked in their complaint both Article 8 of the Convention and Article 1 of Protocol 1 of the Convention. On the one hand, they complained of the fact that the continuous, pulsating noise coming from the third turbine and also, the light reflections from its rotor blades, interfered with the peaceful enjoyment of their property, which was especially bought for recreational purposes, and the enjoyment of their private and family life. On the other hand, the applicants claimed that as a consequence of the disturbance, their property has decreased in value.

It is important to be mentioned here that according to the Court's jurisprudence, and in particular in the case of *Demades v. Turkey*¹¹⁶, a second property which is used as a holiday home and it is "fully furnished and equipped and used" will be considered and interpreted under the notion of "home", as normally used by the Court.

The Court reiterated in this case, as in its previous jurisprudence that in order for a claim to be raised under Article 8 of the Convention, the interference with the applicants' right must have directly affected their home, family or private life. Additionally, the adverse effects of the environmental pollution have to attain a certain minimum level of severity. Some of the standards taken into consideration in order to certify the interference are the intensity of the nuisance, the duration of the nuisance, and the physical and mental effects of the nuisance.

In connection to the present case, firstly, the Court considered that the applicants were *directly affected* by the *constant, pulsating sound* of the wind turbine. Further, the Court had to analyze whether this noise disturbance was enough as to reach the minimum level of severity, as set in its jurisprudence. In order to do that, the Court used both the results from the noise tests performed at the applicants' property and the levels set by the WHO's Guidelines for Community Noise and its Fact Sheet No. 258¹¹⁷. At this point, the Court noticed and criticized the fact that the applicants' have not carried out any alternative noise tests and as a result, the Court can only take into account in its judgement the tests taken by the turbines' company itself. It can be observed here that the ECtHR inclines towards having, where possible, independent and alternative proof, which comes directly from the applicants bringing a claim before it.

After analyzing both the test results and the levels set by the WHO, the Court reached the conclusion that the nuisance caused by the wind turbine did not reach the minimum threshold in order to be considered *severe environmental pollution*. The Court concluded that the tests showed

¹¹⁵ ECtHR, the case of *Fägerskiöld v. Sweden*, pg 5.

¹¹⁶ ECtHR, the case of *Demades v. Turkey* (2004).

¹¹⁷ Both documents have been referred to earlier in this subchapter.

just a slight higher level than the maximum recommended by the Swedish Environmental Protection Agency. However, the levels were not high enough as to exceed the WHO's maximum established levels.¹¹⁸ The Court had to rely on approximate estimations of noise values, since an accurate assessment was not made. The Court also took in consideration the recreational purposes of the property and its location in a semi-rural area. However, even considering these extra elements in the case, the Court still did not consider the noise levels to be serious enough as to affect the applicants' private and family life or the enjoyment of their home. The Court took into account as a proof the visit made by the Swedish County Administrative Court at the applicants' property and concluded that even if there was a *somewhat disturbing* sound, it was considered to be *tolerable*. The Court further considered that neither the noise levels, nor the light reflections, which were a secondary effect after the noise disturbance, reached the *high threshold established in cases dealing with environmental issues*. The applicants have not submitted at any time to the Court any proof that would show that their health had been *adversely affected* in any way by either the noise or the light reflections.¹¹⁹ The Court also found that the interference with the applicants' right under Article 8 was proportionate to the aims pursued, in considering as well the temporary measures taken by the Swedish Environment Committee, which was also revising these measures at certain periods in order to reduce the nuisance caused to the applicants.

It is important to note here that the Court considers that the operating of the wind turbine is of *general interest* due to it being an *environmentally friendly source of energy, which contributes to the sustainable development of natural resources*.¹²⁰ Moreover, it noted that since the third wind turbine alone was capable of producing enough energy as to sustain the heating of about 50 households over a period of one year, the turbine was *beneficial for both the environment and the society*.¹²¹ Is this the point where the Court draws the line in between the human rights violations and the society's sustainable development?

There can be noticed here a clear competing interest between the applicants, which were affected by the nuisance, and the community as a whole, which benefited from the wind turbine. In the present case, the Court inclines to favour the community's need over the applicant's *tolerable* disturbance.¹²²

¹¹⁸ ECtHR, the case of *Fägerskiöld v. Sweden*, pg 9-10.

¹¹⁹ ECtHR, the case of *Fägerskiöld v. Sweden*, pg 17.

¹²⁰ ECtHR, the case of *Fägerskiöld v. Sweden*, pg 18-19.

¹²¹ ECtHR, the case of *Fägerskiöld v. Sweden*, pg 19.

¹²² ECtHR, the case of *Fägerskiöld v. Sweden*, pg 17.

In addition, the Court analyzed the claim under Article 1 of protocol 1 to the Convention; it noticed that indeed the Contracting States have a wide margin of appreciation in environmental matters, though they still have to balance the two competing interests at stake.¹²³ However, the Court found that the applicants have failed to prove in any way the allegation of the decrease in value of their property. Therefore, the Court found the case to be inadmissible in regard to both Article 8 and Article 1 of Protocol 1, for being *manifestly ill-founded*.

It can be also noticed by following the line of arguments in the present case that the threshold level is relatively high when it comes to an environmental issue as this one; the Court itself states this in its judgement of *Fägerskiöld v. Sweden*. In addition, the Court requires certain proof, which should preferably be coming directly from the applicants, in order to assess better the allegations brought.

The Court seems to balance the effects originated from a source of pollution that causes severe environmental damage¹²⁴, in comparison to a source that uses renewable resources in the interest of the community and has a minor effect on the population¹²⁵.

In comparison to the *Fägerskiöld v. Sweden* case, the cases of *Ashworth and Others v. UK*, *Moreno Gomez v. Spain* and *Hatton and Other v. UK* reported significantly higher levels of noise. Firstly, as it results from the Court's case law, the claims regarding noise pollution have been brought and can be analyzed under Article 8 of the Convention, Article that is being used in the majority of the cases that reach the Court.

One of the elements taken into account, when analysing if there has actually been a violation of Article 8, is the distance of the applicant's home, place of residence and where he/she enjoys his/her family life, from the source of the noise disturbance. In the case of *Moreno Gomez v. Spain*¹²⁶, the judgment refers only to the *vicinity of the applicant's home*¹²⁷ without specifically state the exact distance. The applicant, living in the vicinity of an area with several bars and clubs, complained mainly about noise disturbance which wouldn't allow her to sleep. Furthermore, in the case of *Hatton and others v. UK*¹²⁸, Ms Hatton's house was at 11.7 distance km from the end of the nearest runway at Heathrow. The Court states itself that the discomfort caused to individuals depends on the *geographical location* of their respective homes in relation to the place where the noise

¹²³ ECtHR, the case of *Fägerskiöld v. Sweden*, pg 18.

¹²⁴ For example, the *Severstal* steel plant, in the case of *Fadeyeva v. Russia*.

¹²⁵ For example, the noise pollution produced by the wind turbines in Sweden, in the case of *Fägerskiöld v. Sweden*.

¹²⁶ ECtHR, the case of *Moreno Gomez v. Spain* (2004).

¹²⁷ ECtHR, the case of *Moreno Gomez v. Spain*, paragraph 10.

¹²⁸ ECtHR, the case of *Hatton and Others v. UK*

comes from and on the individuals' own disposition to be disturbed by the respective noise¹²⁹.

For example, in earlier cases concerning protection against aircraft noise the Commission found that Article 8 was applicable in *Arrondelle v. the United Kingdom*¹³⁰ the applicant's house was just over one and a half kilometres from the end of the runway at Gatwick Airport. In *Baggs v. the United Kingdom*¹³¹ the applicant's property was 400 metres away from the south runway of Heathrow Airport. However, these two applications ended with friendly settlements.

Furthermore, another element, which is analysed in this type of cases, is the level of the noise in the applicant's home both during daytime and during nighttime. In each case, the Court requires tests, which have been performed in the applicant's home and, if possible, done by objective subjects. The Court usually aspects an involvement in the issue from the applicant's side and in the cases in which this does not happen, the Court is constrained to make its judgement on tests performed by the polluter itself or by national authorities, which might or might not be objective on the issue.

In the case of *Moreno Gomez v. Spain*, the measured noise levels, performed by experts delegated by the City Council, were of around 100 to 115 dBA during Saturday nights, when most of the entertainment clubs in the vicinity of the applicant's home were having their activity. A domestic law in the province of Valencia was stating that the noise levels between 10 pm and 8 am could not exceed 45 dBA. It is also important to be mentioned here that the applicant's home was situated in an urban area, in a residential zone, since in some cases the distinction and noise levels between urban and rural area is of importance. In addition, the applicant's home was *neither within nor adjacent to an area of vital importance, such as an area relevant to a strategic transport or communications infrastructure*¹³². The Court considers this when balancing the individual's right against the community overall needs for the development of the society. In the instant case, the Court did not need proof of the level noise directly from the applicant, since the national authorities were perfectly aware of the applicant's situation and about the high levels of noise.

In the case of *Hatton and Others v. UK*, the daytime noise level at Ms Hatton's house coming from the aircrafts was between 57 and 60 dBA Leq. The UK government measures the level of disturbance according to the following levels: "a daytime noise contour of 57 dBA Leq represents a low level of annoyance; 63 dBA Leq represent a moderate level of annoyance;

¹²⁹ ECtHR, the case of *Hatton and Others v. UK*, para. 118.

¹³⁰ ECtHR, the case of *Arrondelle v. the United Kingdom* (1980).

¹³¹ ECtHR, the case of *Baggs v. the United Kingdom* (1985).

¹³² ECtHR, the case of *Moreno Gomez v. Spain*, para 49.

69 dBA Leq correspond to a high level of annoyance; and 72 dBA Leq represent a very high level of annoyance”¹³³. At the house of another applicant, Peter Thake, which was situated at a distance of 4.4 km from the Heathrow airport, a daytime noise was measured at levels between 63 and 66 dBA Leq, according to the Government itself. All the applicants in this case were living at distances in between 11 and 1 km and having noise levels measure between 57 and 66 dBA. In addition, according to the levels measured by the Government, the average “peak noise event” levels, that is the maximum noise caused by a single aircraft movement, suffered by the applicants at night in between 70 and 85 dBA. In comparison, the World Health Organisation “Guidelines for Community Noise” set as a guideline value for avoiding sleep disturbance at night of a *single noise event* of 60 dBA.¹³⁴ As opposite from the *Hatton* case where a violation was not found on Article 8, the noise levels outside the applicant’s house in the case of *Dees v. Hungary* were measured between 67 and 69 dBA. In that judgement the Court did rule on a violation of Article 8, due to new infrastructure and as a result from disturbance coming from the heavy traffic in the neighbourhood area. The Court explained its decision of this case by stating that the noise levels at the applicant’s house were in average of around 15 % above the limits imposed by a Hungarian statutory law. It can be disputed at this point that the Court did not make the same judgement in the *Hatton* case.

A further element is the distinction of the disturbance between daytime and night time. In the case of *Moreno Gomez v. Spain*, the applicant mostly complained of disturbance during night time since the source of the noise pollution was mainly coming from bars and clubs situated in the area surrounding her home, in specific around 127 nightclubs. The main problem she had to deal with was the lack of sleep, which entailed several other consequences on her daily activities and her health.

An additional important element is the duration in time of the noise disturbance. For example in the case of *Moreno Gomez v. Spain*, were there was found a violation of Article 8, the time-frame extended for several years, as well as in the *Hatton* case. This is taken usually in consideration together with the effect of the disturbance on the applicant’s home, private or/and family life. For example, in the case of *Powell and Rayner v. the United Kingdom*¹³⁵, the Court declared that Article 8 is applicable in the case because: “In each case, albeit to greatly differing degrees, the quality of the applicant’s private life and the scope for enjoying the amenities¹³⁶ of his home had been adversely affected by the noise generated by aircraft using

¹³³ ECtHR, the case of *Hatton and Others v. UK*, para. 11.

¹³⁴ The World Health Organisation, *Guidelines for Community Noise*, ch 4, pg 46.

¹³⁵ ECtHR, the case of *Powell and Rayner v. the United Kingdom (1990)*.

¹³⁶ See *Chapter 3* of this paper.

Heathrow Airport.¹³⁷ Moreover, in the case of *Moreno Gomez v. Spain*, the Court found that the disturbance affected the applicant's home and private life by taking into account the high volume of noise at night and the long period over which the applicant was affected by this noise and these led to *serious infringement*¹³⁸ by the State.

In the case of *Hatton*, the Court had to decide between the arguments of the Government which claimed a wide margin due to the matters of general policy which surrounded this case and applicants' claim that their sleep was affected, which gave them the right to ask for a narrow margin of appreciation to be taken into consideration due to the *intimate* nature of the right protected. However, the Court, as in the Grand Chamber, found that there was no violation of Article 8 in this case, due to the limited number of people that was affected and due to the high economical interests at stake, which was contrary to the findings of the Chamber in its previous decision on the same case. Moreover, in the case of *Powell and Rayner v. UK*¹³⁹, the Court acknowledged and stated that, since Heathrow Airport one of the busiest airports in the world, it represents an important position in international trade and communications and in the economy of the United Kingdom; as such, and because it pursued a legitimate aim in the case, the consequential negative impact on the environment could not be entirely eliminated.

Additionally, in the case of *Dees v. Hungary*¹⁴⁰, the Court found that there existed a direct and serious nuisance which affected the street in which the applicant lives and prevented him from enjoying his home¹⁴¹. These two terms appear frequently in the Court's judgement involving environmental issues. They seem to be the key for the finding of a violation in these cases, but there is neither real definition nor a set frame in which the *direct* and *serious* nuisance terms could be explained.

There were strong dissenting opinions regarding Article 8 of the Convention in the case of *Hatton and others v. UK*, in the form of one common dissent of five of the judges sitting in this case. They argue in favour of the violation of Article 8 in this case, by stating that the current stage in the development of the related jurisprudence has argued that there is *an urgent need for a decontamination of the environment*¹⁴² which leads to the conclusion that the health is the most basic human need. They consider that the majority's decision in this case gives precedence to economic considerations over basic health conditions, since the majority sees the

¹³⁷ ECtHR, the case of *Powell and Rayner v. the United Kingdom (1990)*, paragraph 40.

¹³⁸ ECtHR, the case of *Moreno Gomez v. Spain*, para. 61.

¹³⁹ ECtHR, the case of *Powell and Rayner v. UK*, para. 42.

¹⁴⁰ ECtHR, the case of *Dees v. Hungary (2010)*.

¹⁴¹ ECtHR, the case of *Dees v. Hungary (2010)*, para 24.

¹⁴² ECtHR, the case of *Hatton and Others v. UK*, joint dissenting opinion of Judges Costa, Ress, Turmen, Zupancic and Steiner, *Introduction*.

applicants' "sensitivity to noise" as *that of a small minority of people*¹⁴³. The dissenting judges consider this view as contrary to the growing concern over environmental issues in Europe and contrary to the previous judgements in the cases of *Arrondelle*, *Baggs* and *Powell and Rayner*. In addition, the dissenting opinion argues also that the levels of noise set by the WHO are objective set levels and are *not "subjective" in the sense of being due to over-sensitivity or capriciousness*. Additionally, one of the important functions of human rights protection is to protect *small minorities* whose *subjective element* makes them different from the majority. They also argue that under Article 3 sleep deprivation may be considered as an element of inhuman and degrading treatment or even torture and even if this is not an issue of Article 3, the judges underline "that the problem of noise, when it seriously disturbs sleep, does interfere with the right to respect for private and family life."¹⁴⁴ In addition, the same judges consider that in this case the margin of appreciation of the state should be narrower, since the right to sleep has a *fundamental nature*.

In the judgement of *Selmouni v France*¹⁴⁵, the Court took into account the definition of torture given in Article 1 of the United Nations Convention against Torture, which does consider that excessive noise may in fact amount to "severe pain or suffering, whether physical or mental."

Moreover, they argue that the State has not brought proof regarding the bad effects that the limitation of the night flights would bring upon the economy. It can be observed how the actual proof is more required from the applicant's side, since with no proof the applicant almost never has a chance of a decision being made in his/her favour, but it doesn't seem that the State is required to provide proof to the same extent. In some cases, as the present one, the State seems to *win* by bringing before the Court only *theoretical arguments* and not concrete proof. The dissenting judges state themselves the following: "the general reference to the economic well-being of the country is not sufficient to justify the failure of the State to safeguard an applicant's rights under Article 8".¹⁴⁶

Secondly, there are noise pollution cases that have been brought in regard to the violation of Article 1 of Protocol 1 to the Convention, but this Article has been invoked only after firstly making the claim under Article 8 of the Convention. It can be regarded as a secondary claim in the cases that claim noise pollution. Besides the already analyzed case of *Fägerskiöld v. Sweden*, Article 1 of Protocol 1 has been invoked in two other relevant

¹⁴³ ECtHR, the case of *Hatton and Others v. UK*, para. 118.

¹⁴⁴ ECtHR, the case of *Hatton and Others v. UK*, joint dissenting opinion of Judges Costa, Ress, Turmen, Zupancic and Steiner, para 11.

¹⁴⁵ ECtHR, the case of *Selmouni v France* (1999).

¹⁴⁶ ECtHR, the case of *Hatton and Others v. UK*, joint dissenting opinion of Judges Costa, Ress, Turmen, Zupancic and Steiner, para 16.

cases. However, the Commission and the Court respectively have found both of these applications inadmissible.

In the case of *S. v. France*¹⁴⁷, which was found to be inadmissible by the Commission, the applicant had brought a complaint on Article 8 of the Convention and on Article 1 of Protocol 1 of the Convention. In regard to the first mentioned Article, the applicant considered that her home, situated at a distance of 300 meters from the *Saint Laurent des Eaux* nuclear plant and separated only by the Loire, was affected by noise pollution. The property of the applicant is an old villa from the 18th century, which used to be surrounded by a rural area, which instead has been transformed into an industrial area in the 1960s. The level of the noise disturbance was measured at 50-55 dBA during the day and night.

In regard to the second mentioned Article, the applicant claimed that the noise would affect the value of the property and that would constitute a sort of *partial expropriation*, as the Commission has stated in this case, regarding the possible consequences of noise pollution. In regard to Article 1 of Protocol 1, the applicant also stated that there was a violation with her right of enjoying her property in a pleasant environment. According to an expertise ordered by the Administrative Tribunal of Orleans, the value of the property has decreased by 50 % and the applicant did not get a compensation for both the loss in value and the disturbance at her home, which was considered by the Commission as a high enough amount as to compensate for the violation of her right and the amount cannot be considered as disproportionate.

In another case, *Ashworth and Others v. United Kingdom*¹⁴⁸, the Court has found the claim as being inadmissible. On the one hand, it found that the claim on Article 1 of Protocol 1 has not been substantiated by evidence, since the applicants did not provide proof that the value of their properties has declined due to the activities on a private aerodrome, situated at about 100 meters from Mr and Ms Ashworth property, and also the Court emphasizes that there is no drawback for them to find other homes and move. Moreover, the Court could not assess the level or intensity of the disturbance, since the applicants did not bring their claims to the national authorities before bringing a claim at the Court. However, the Court concluded that the applicants could not have been seriously affected by the noise, since the activity of the aerodrome was confined daytime and mostly restricted in the weekends. Here, the judges make a comparison to the *Hatton* case that was considered to affect in a more serious way the rights of the applicants and, still, the majority of the judges standing in that case did not find a violation.

¹⁴⁷ ECtHR, the case of *S. v. France* (1990).

¹⁴⁸ ECtHR, the case of *Ashworth and Others v. United Kingdom* (2004).

The Court also took into consideration in this case the importance of the employment positions created by the existence of this aerodrome, which has a number of around 160 employees.

It is also interesting to note one of the Court's statements, which is part of the present judgement: [...] *while environmental protection should be taken into consideration by Governments in acting within their margin of appreciation and by the Court in its review of that margin, it would not be appropriate for the Court to adopt a special approach to the protection of environmental human rights.*¹⁴⁹ In regard to the environmental issues that mankind has to deal with at present time, I think it would be of great importance, if not imperative, that a regional Court would deal with these types of issues in a more effective way. I state this by considering two aspects, on the one hand, human beings depend on environment, as a vital element of their existence and, as such, is should benefit of special protection and, on the other hand, the only way to achieve that protection is at regional and international level, since this is a matter that concerns all the states. In order to be able to protect human beings through human rights, there must be first and foremost a protection of the human environment and that cannot be accomplished by single actions of single states.

The definition given to environmental noise in the EC Directive 2002/49 is "the summary of noise from transport, industrial and recreational activities".¹⁵⁰ This directive also notes that the competent authorities in the European member states have to produce strategic noise maps for major roads, railways, airports and agglomerations, with the additional obligation of informing and consulting the public. The Directive 2002/49/EC further defines *environmental noise* as *unwanted or harmful outdoor sound created by human activities, including noise emitted by means of [...] air traffic*. In addition, a system is established in order harmonise noise-exposure limit values, values which, according to Article 3(s), might be different *for different types of noise (road-, rail-, air-traffic noise, industrial noise, etc.), different surroundings and different noise sensitiveness of the populations; they may also be different for existing situations and for new situations (where there is a change in the situation regarding the noise source or the use of the surrounding)*.

In the *Abraham and Others*¹⁵¹ case, the issue regarded noise pollution caused by a Belgian airport. The preliminary reference was made in proceedings brought by several individuals who live in the vicinity of Liège-Bierset Airport, in Belgium, against, among others, the Region of Wallonia, Société nationale des voies aériennes-Belgocontrol and the Belgian State regarding the noise pollution, often also during the night,

¹⁴⁹ ECtHR, the case of *Ashworth and Others v. United Kingdom*, para 98.

¹⁵⁰ EC Directive 2002/49, Article 10(1).

¹⁵¹ ECJ, C-2/07, *Abraham and Others* (2008).

caused by the establishment of an air freight centre at that airport. This centre has been in use since 1996, when certain modifications have been made to the infrastructure of that airport in order to enable it to be used 24 hours per day and 365 days per year. In particular, the runways were modified and there were constructed new runway exits, aprons and a control tower. One of the questions referred to the Court, related to the argument of this thesis, is whether the increase in the activity of an airport should be taken into consideration when examining the potential environmental effect. In correlation to this case, the Court has frequently stated that the scope of Directive 85/337 is wide and its purpose very broad¹⁵². Additionally, on the one hand Article 4(2) of the mentioned confers Member States a measure of discretion when it comes to specifying the types of projects, which will be subject to an assessment or to establish the criteria and/or thresholds applicable in each case. However, on the other hand, there is a limit to that discretion which can be found in Article 2(1) which declares that *projects likely, by virtue inter alia of their nature, size or location; to have significant effects on the environment are to be subject to an impact assessment*. It follows that Directive 85/337 aims for *an overall assessment of the environmental impact of projects or of their modification*¹⁵³. In considering that, the Court concluded that, not only direct, but also indirect effects, which would result from the use and exploitation of final products, should be taken into consideration when assessing the environmental impact of a project or of its modification. The Advocate General points out in this case that in the Annex III of this Directive it can be found the following statements: *the effects should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the project; the estimate of effects includes, by type and quantity, expected residues and emissions resulting from the operation of the project, that is to say from the activity that takes place*¹⁵⁴. The first factor mentioned as possibly being affected according to Article 3 of the Directive is human beings.

In the case of *Commission v. Spain*¹⁵⁵, the Court stated that the mere construction of a new railway track can have a significant effect on the environment within the meaning of the Directive 85/337, *since it is likely to have lasting effects on, for example, flora and fauna and the composition of soil or even on the landscape and produce significant noise effects*¹⁵⁶. In the Advocate General's Opinion of the same case, it is underlined that the construction of a new railway track for the purpose of implementing tracks

¹⁵² ECJ, C-2/07, *Abraham and Others*, para 42.

¹⁵³ ECJ, C-2/07, *Abraham and Others*, para 42.

¹⁵⁴ The Advocate General's Opinion in the case no C-2/07, *Abraham and Others*, para 31.

¹⁵⁵ ECJ, C-227/01, *Commission v. Spain (2004)*.

¹⁵⁶ ECJ, C-227/01, *Commission v. Spain (2004)*, para 49.

for high-speed trains adds a great frequency of traffic on the tracks as a result of duplication which would have a significant noise effect. He declares, furthermore, that the noise level will exceed 45 decibels, which is the maximum level recommended by the World Health Organisation for night-time environments, which in his opinion would have effects on the environment¹⁵⁷.

The Advocate General, in its opinion for the preliminary ruling in the case of *European Air Transport SA v. Collège d'Environnement de la Région de Bruxelles-Capitale, Région de Bruxelles-Capitale*,¹⁵⁸ makes reference for the first time to Article 37 of the Charter of Fundamental Rights of the European Union. The Court was called in this case to decide upon the concept of *operating restrictions* from Article 2 of the Directive 2002/30/EC.¹⁵⁹ This reference for a preliminary ruling is made in the proceedings between European Air Transport and a regional body responsible for supervising environmental legislation. The latter imposed an administrative penalty for noise levels measured at the ground in excess of the allowed levels set. The European Air Transport appealed claiming that not the measurement 'at the ground' but measurement 'at source' is the mandatory criterion under international law. The AG considered that the limits on noise levels at issue were not 'operating restrictions' within the meaning of Directive 2002/30/EC on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Community airports. As a result, the AG concluded on this matter that Member States are free to establish noise limits at airports as long as there are no conflicts arising with the EU harmonization rules.

The Advocate General stated furthermore that this is the ideal opportunity for the Court to express its view when it comes to the balance that should be decided in between economic interests, on the one hand, and the protection of the environment and human health, on the other hand¹⁶⁰. The Advocate General on this point that the protection conferred by the fundamental rights Charter is constitutional in nature, by invoking Article 52 of the Charter which implies that the meaning and scope of the guaranteed rights are determined not only by the text of the Convention, but also by the case-law of the ECtHR. The ECtHR addressed the specific question of airport noise in its judgment in *Hatton v United Kingdom*, acknowledging that aircraft noise gives States grounds for taking active protective measures and, at times requires them to do so. In accordance with

¹⁵⁷ The Advocate General's Opinion in the case no C-227/01, *Commission v. Spain*, para. 40.

¹⁵⁸ The Advocate General's Opinion in the case no C-120/10, reference for a preliminary ruling from the Conseil d'État, Belgium.

¹⁵⁹ The judgement of the ECJ has not yet been released.

¹⁶⁰ The Advocate General's Opinion in the case no C-120/10, reference for a preliminary ruling from the Conseil d'État, Belgium, paras. 1-2.

Article 53 of the Charter, that interpretation binds the European Union and must be taken into account by the Court of Justice.¹⁶¹

By researching into the jurisprudence of the European Court of Justice, I could notice and, hence, draw the conclusion that the majority of the cases deal with noise pollution caused by transportation means: airplanes and airports, trains, cars. In the case of airports, it can be concluded that it is a common problem both at the ECtHR and at the ECJ. And also, both of the Courts and the Advocate General take into consideration and make references to the levels set in the WHO's Guidelines regarding noise. It can be noticed at this point that guidelines of international organizations are being used even though they do not directly bind the European Courts. Hence, this shows the growing concern of this issue, not only at European level, but also at global level, an issue that must be dealt with by reference to international norms.

At first, the case law of the ECJ seems to be more extended in the area of noise pollution caused by transportation means. However, the ECJ does not analyze in its judgements, besides in very general terms, the effects that this disturbance has on the environment and/or human beings. On the contrary, the ECtHR's approaches the same issues from the perspective of the individual's well-being as protected by the provisions of the Convention.

¹⁶¹ The opinion of the AG in the European Air Transport case, para 80.

3.3 Regional and Urban development

This subchapter of my thesis deals with several issues, which relate to urban or regional development. These issues involve, for example, urban planning, transport development, etc which can affect individuals rights, such as privacy, home, family life, health or right to property. In some cases, the urban or regional development refers to the expansion of urban areas into the natural habitats, but this subject will not be treated in the context of this paper.

The issues regarding human rights violations, as a consequence of urban or regional development, have been brought before the ECtHR in connection with different types of cases concerning environmental harm. For example, we can talk about urban development even in cases of industrial or noise pollution, where the source of pollution has been used for developing a certain area. The term development constitutes in most of the cases, if not all, a certain economic growth, which represents the goal of democratic societies in general. Therefore, in the analyze of this subchapter I will also go back to some of the previous cases analyzed, in order to illustrate better the points made by the Courts when dealing with development issues.

Before the ECtHR, the complaints were mainly made in regard to the Articles 8 (right to private life, family life and home), 2 (right to life) and Article 1 of Protocol 1 to the Convention. However, the cases in which the last to Articles have been claimed, the Court did not actually examine the violation under that Article or did not find the case admissible. These cases will be shortly illustrated further.

In the case of *Kyrtatos v. Greece*¹⁶², the applicants owned a property, in the southeastern part of the Greek island of Tinos, which included a swamp by the coast. The complaint of the applicants was based on the building permits issued by the authorities, which was followed by the construction of two buildings near the applicant's property. The applicants claimed that the permits were illegal due to the existence of a swamp in the area concerned which, according to a constitutional provision protecting the environment; no buildings could be erected in an important natural habitat for various protected species. They invoked Article 8 in order to make their claim and brought before the Court two different arguments, one claiming the fact that "urban development had destroyed the swamp which was adjacent to their property and that the area where their home was had lost all of its scenic beauty"¹⁶³ and the other claiming that they were affected by the noises emanating from the activities of the firms operating in the area.

¹⁶² ECtHR, the case of *Kyrtatos v. Greece* (2003).

¹⁶³ ECtHR, the case of *Kyrtakos v. Greece*, para 51.

However, the Court, in this case, did not consider that the interference with the conditions of animal life in the swamp constituted an attack on the applicants' private or family life.¹⁶⁴ The Courts underlines again in this case the need for proof which would demonstrate the claims of the applicants, but which were not brought by the applicants. Therefore, the Court could not establish the link and the direct harm of the alleged damage to the environment on the applicant's rights. Moreover, in regard to the second claim of the applicants, the Court considered that disturbances coming from the applicants' neighbourhood as a result of the urban development of the area didn't reach a level of such seriousness as to be considered a violation under Article 8.¹⁶⁵

In another type of case, *Buckley v. the United Kingdom*¹⁶⁶, regarding landscape planning, the matter concerned the refusal of a planning permission, which would enable a gypsy family to live in caravans on their own land. The applicant's land was part of six adjacent sites occupied by gypsies, out of which only one had received permanent planning permission for the residential use of three caravans. The matter examined by the Court here was whether the interference was *necessary in a democratic society*, where the interests of the community had to be balanced against the applicant's right to respect for her *home*. The authorities planning of the landscape and surrounding area (*preservation of rural landscape*¹⁶⁷) was actually balanced against the special needs of the applicant as a gypsy, who wanted to pursue a traditional lifestyle. However, the Court did not consider that Article 8 gave the right for an individual's accommodation preferences to prevail over a general interest of a community, since there was alternative housing that was offered for the applicant. Nonetheless, this alternative housing offered was not on the applicant's own land.

The Court considered that when it comes to landscape planning of an area, the State has a very wide margin of appreciation and the Court as an international Court is less suited to evaluate the local conditions of the situation. In addition, the Court did not consider either that the applicant was being discriminated on the basis on the ethnicity, in regard of Article 14 taken together with Article 8 of the Convention, since there was no evidence that at any time the applicant it does not appear that the applicant was "subjected to any detrimental treatment for attempting to follow a traditional Gypsy lifestyle"¹⁶⁸. However, this position of the majority in this case was criticized by judge Repik, who states in the dissenting opinion that the Court's consideration of the applicant's interests in respect to the needs for

¹⁶⁴ ECtHR, the case of *Kyrtakos v. Greece*, para 53.

¹⁶⁵ ECtHR, the case of *Kyrtakos v. Greece*, para 54.

¹⁶⁶ ECtHR, the case of *Buckley v. the United Kingdom (1996)*.

¹⁶⁷ ECtHR, the case of *Buckley v. the United Kingdom*, para 67.

¹⁶⁸ ECtHR, the case of *Buckley v. the United Kingdom*, para 67.

the countryside's protection, were only analyzed in *abstract and general* terms.

This case could be seen in opposition to another case involving mainly noise pollution, which was analyzed in the previous chapter. In the case of *S. v. France (1990)*, the matter concerned as well the change of the rural landscape and transforming the surroundings in a more of an industrial area, by building a power plant alongside the Loire, in France. However, in this case the authorities were the ones changing the planning of the area. Furthermore, the Commission found the case inadmissible, both on the grounds of Article 8 and Article 1 of Protocol 1, due to the fact that the applicant had already received compensation for the disturbance caused by the plant which was in the nearby of her property.

The issue of the economic development of an area can be also analyzed from the point of view of the *Taskin and Others v. Turkey*¹⁶⁹ case, which concerns the granting of permits to operate a goldmine. The permit also authorised the use of the cyanide leaching process for the gold extraction, which was dangerous for the population living in the nearby area. This process could entail health risks for the population, risks of pollution and destruction of the local ecosystem. The Court found a violation of Article 8, by considering that the Turkish authorities had deprived the procedural safeguards, laid down in the Turkish legislation, protecting the applicants of all its useful effects. The Court based its judgement also on the national court's judgements which held that according to the impact study of the area, the gold mine's geographical location and the geological features of the region, the operating permit did not serve the general interest and, in addition, the same study also stated the danger of the use of sodium cyanide for the local ecosystem, human health and safety.¹⁷⁰

The Court found it unnecessary to examine the complaint under Article 2, since it considered that it was in essence the same as the one submitted under Article 8.

In another case, *Dees v. Hungary*¹⁷¹, analyzed previously in this paper, concerning noise pollution, the issue involved the need to balance between the interests of road-users and those of the inhabitants of the surrounding areas. The applicant relying on Article 8 of the Convention and complained that, because of the noise, pollution and smell caused by the heavy traffic in his street, his home had become uninhabitable. Even though, the authorities, in this case, made efforts slow down and reorganise the traffic in the area, the Court considered that the measures taken were not

¹⁶⁹ ECtHR, the case of *Taskin and Others v. Turkey (2005)*.

¹⁷⁰ ECtHR, the case of *Taskin and Others v. Turkey*, para 121.

¹⁷¹ ECtHR, the case of *Dees v. Hungary (2010)*.

sufficient as to not put a burden on the applicant, who was exposed to excessive noise disturbance over a substantial period.¹⁷²

In the partly dissenting opinion of Judge Zagrebelsky in the case of *Kyrtakos v. Greece*¹⁷³, he states that it was recognized by the Court in other judgements that a degradation of the environment could amount to a violation of a specific right recognised by the Convention and he further considers with regard to the present case that the deterioration of the environment actually affected the applicants' rights even without considering the deterioration of the swamp fauna.¹⁷⁴ He finds it also difficult to be able to quantify the damage caused to an individual's private and family life, in order to prove further it before the Court. He also expresses the quality of the environment and the growing awareness of that issue which should be taken more into consideration by the Court in order to recognize the growing importance of environmental deterioration on people's lives. Furthermore, I consider of major importance the following conclusion he makes in his opinion with states that "such an approach would be perfectly in line with the dynamic interpretation and evolutionary updating of the Convention that the Court currently adopts in many fields."¹⁷⁵

However, not all the judges sitting in the case of *Buckley v. the United Kingdom* voted for not finding a violation in regard to Article 8 of the Convention. A statement from one of the dissenting judges in the case seems relevant for future considerations on similar issues: "the Convention ought, in the case of Gypsy families, to inspire the greatest possible respect for family life, transcending planning considerations."¹⁷⁶ He also argues in favour of a violation of Article 14 taken in conjunction with Article 8, by stating, among others, the following: "with regard to the impairment of the *rural and open quality of the landscape* and environment protection which, in the Government's submission, would justify an interference even under Article 8; the fact that the authorities rely on this argument only against Gypsy families also amounts to a disproportionate interference for, in the hierarchy of the State's positive obligations, the survival of families must come before bucolic or aesthetic concerns." Judge Pettiti adds to this argument that "if the Buckley case were transposed to a family of ecologists or adherents of a religion instead of Gypsies, the harassment to which Mrs Buckley was subjected would not have occurred". Additionally, judge Lohmus, in his dissenting opinion of the same case, in regard to Article 8, underlines the fact that "living in a caravan and travelling are vital parts of

¹⁷² ECtHR, the case of *Dees v. Hungary* (2010), para 23.

¹⁷³ Partly dissenting opinion of Judge Zagrebelsky in the case of *Kyrtakos v. Greece* (2003).

¹⁷⁴ Partly dissenting opinion of Judge Zagrebelsky in the case of *Kyrtakos v. Greece* (2003).

¹⁷⁵ Partly dissenting opinion of Judge Zagrebelsky in the case of *Kyrtakos v. Greece* (2003).

¹⁷⁶ Dissenting Opinion of Judge Pettiti, the case of *Buckley v. the United Kingdom* (1996).

Gypsies' cultural heritage and traditional lifestyle.” This is also relevant to the argument of this thesis, taken into consideration that when we talk about environmental rights, there is often in debate the property rights of different ethnic groups which claim their traditional rights to have the property of a certain part of land. For example, there is the Inuit case, concerning the pollution and global warming caused to the traditional lands¹⁷⁷ of the people originally living in the Northern hemisphere, in the parts of in the Federation of Russia, northern and western Alaska in the United States, northern Canada and Greenland. Whereas, in the present case of the gypsy travellers, the problem is quite the opposite, nevertheless the same principles should be applied or at least taken more into consideration and analyzed.

Moreover, some years later, in the case of *Chapman v. The United Kingdom*¹⁷⁸, the votes for not finding a violation of Article 8 of the Convention were split 10 to 7. The issue in this case was very similar to the *Buckley* case, where the decision was unanimous. This shows that we can expect for a change in the jurisprudence of the ECtHR in this type of cases.

In regard to the regional or local development concern, the ECJ case-law has a somewhat different approach than the ECtHR. The development problem, which may affect the environment and individuals, usually concerns at ECJ level the interpretation or analyze of the environmental impact assessment and the Directive 85/337 on the assessment of the effects of certain public and private projects on the environment.

In a case¹⁷⁹ involving the Brussels Airport, the Court concluded that in certain instances, even if the development of a certain area is not a whole *project* in itself, but just a reconstruction, the EIA Directive might still be applicable.

The preliminary ruling was brought during the proceedings of case brought by Brussels Hoofdstedelijk Gewest (Brussels Capitol Region) and a number of other applicants against the Vlaams Gewest (Flemish Region). The case concerned a decision relating to the operation of the Bruxelles' National Airport. One of the questions referred was whether the term *construction* in the EIA Directive 85/337 should be interpreted as meaning that an environmental impact report should be compiled not only for the execution of the infrastructure works but also for the operation of the airport. The Court ruled that the cumulative effect of a number of works, such as the infrastructure works, may trigger the Directive and that this is for the national court to decide.

Furthermore, in the case C-87/02, *the Commission v. Italy*, the Court ruled that the Italian national authorities have not fulfilled their obligations

¹⁷⁷ Inuit Petition brought before the Inter-American Court of Human Rights (2005).

¹⁷⁸ ECtHR, the case of *Chapman v. The United Kingdom* (2001).

¹⁷⁹ ECJ, C-275/09, *Brussels Hoofdstedelijk Gewest and others v Vlaams Gewest* (2011).

under Article 4(2) of the EIA Directive¹⁸⁰, by not making an environmental impact assessment. The project in need of the assessment concerned the building of a road, which would cross an area close to residences some metres from the historic centre of the commune of Teramo in Abruzzo (Italy) and would affect the bed of the Tordino river. This project was required to be undergoing an assessment because the provisions of the Directive 85/337 note that it is required in the case of the construction of relief roads in urban areas or widening of an existing road to four or more lanes, of a length greater than 1 500 metres within an urban area, which applied in this case. However, the national authorities failed, in the first place, to do a proper screening of the project in order to assess if there actually was or not a need for a further environmental impact assessment. The Court itself does not rule on that matter, nor does it analyze projects from that point of view. The Court considered that in this case the screening made, in order to decide on the need of an EIA, was not based on the actual environmental effects that the project could have.¹⁸¹

The Court declared in the case of *WWF and others*¹⁸² that the national court to ascertain whether the competent authorities have correctly assessed the significance of the effects of a project on the environment.¹⁸³ The same judgement touches upon the discretion given to the Member States in implementing this Directive and thus it is stated that “the fact that the Member State has the discretion referred to in the previous paragraph is not in itself sufficient to exclude a given project from the assessment procedure under the Directive. If that were not the case, the discretion accorded to the Member States by Article 4(2) of the Directive could be used by them to take a particular project outside the assessment obligation when, by virtue of its nature, size or location, it could have significant environmental effects.”¹⁸⁴ The mentioned *discretion* could be compared with the *margin of appreciation* used in the ECtHR judgements on state violations.

The AG’s opinion in this case touches upon Article 37 of the European Charter, by stating that “Community citizens are entitled to demand fulfilment of that responsibility under Article 37 of the Charter of Fundamental Rights of the European Union, which guarantees a high level of environmental protection and the improvement of the quality of the

¹⁸⁰ “Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require. To this end Member States may inter alia specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10.”

¹⁸¹ ECJ, C-87/02, *the Commission v. Italy*, para 47.

¹⁸² ECJ, C-435/97, *WWF and others (1999)*.

¹⁸³ ECJ, C-435/97, *WWF and others*, para 32.

¹⁸⁴ ECJ, C-435/97, *WWF and others*, para 44.

environment. Accordingly, the main elements of any measure which strays from the general criteria aimed at protecting the environment must be duly specified, since that is an embodiment of the rational exercise of power, as well as being a tool which, if necessary, enables the measure to be reviewed.”¹⁸⁵ In the present case, the responsibility of the national authorities has not been fulfilled due to the fact that there were no proper reasons given for the refusal of an impact assessment to be made.

This section of the paper shows the enormous development that is currently taking place in different sectors of the European society as a result of the globalization and, hence, the growing need of the individuals towards consumption and movement. The ECtHR jurisprudence shows how this affects the single individual and which rights are likely to be violated on this basis, whereas the ECJ jurisprudence shows how this issue can affect a community as a whole and which is the role of the local authorities in solving the respective issues.

¹⁸⁵ The opinion of the Advocate General in the case C-87/02, *the Commission v. Italy*, para 36.

4 Sustainable development

The European jurisprudence does not stand alone in this trend of including human rights in environmental standards. Besides reacting to pollution and hazards that occurred, a positive notion towards the future and protecting environment for future generations is an issue. At UN level the term *sustainable development* arose about 30 years back. The concept emerged from the environmental movement created after the Second World War, as a resistance against the negative impacts of society's development on the environment and on humans. The roots of this concept can be found in the 1972 Stockholm Conference on Human Environment, which finally led to the first use of the term by the UN *Brundtland Commission*¹⁸⁶ (1987) which formulated a definition of *sustainable development* as development that *meets the needs of the present without compromising the ability of future generations to meet their own needs*.¹⁸⁷ The name comes from the Norwegian Prime-Minister, who chaired the Commission at the time. During the works, Brundtland himself declared: "The environment does not exist as a sphere separate of human action, ambitions and needs, and attempts to defend it in isolation from human concerns have given the very word *environment* a connotation of naivety in some political circles. The word *development* has also been narrowed into a very limited focus, along the lines of *what poor nations should do to become rich*. But the *environment* is where we live; and the *development* is what we all do in attempting to improve our lot within that abode. The two are inseparable".¹⁸⁸ The two notions: development and environment represent the biggest concerns of today's society.

The concept of *sustainable development* was later introduced by the 1992 Rio Declaration, together with other important environmental law principles, such as the *precautionary* principle, the *polluter-pays* principle or the principle of *public participation*. At a later stage, during the 2002 World Summit on Sustainable Development, the concept was defined as including *three independent and mutually reinforcing pillars*, which were *economic development, social development and environmental protection*¹⁸⁹. Nevertheless, the legal status of these principles has not been yet addressed. In the work of the Experts Group on Environmental Law of

¹⁸⁶ Formally known as the World Commission on Environment and Development (WCED).

¹⁸⁷ United Nations, *Report of the World Commission on Environment and Development: Our Common Future*; General Assembly Resolution 42/187, of 11 December 1987.

¹⁸⁸ United Nations, *Report of the World Commission on Environment and Development: Our Common Future*, pg 6.

¹⁸⁹ UN, *Report of the World Summit on Sustainable Development*, UN Doc A/CONF 199/20 (2002), resolution 1, para 5.

the World Commission on Environment and Development (WCED) on “Legal Principles for Environmental Protection and Sustainable Development”, the question of the legal status of these principles has not been addressed.¹⁹⁰

Sustainable development (SD) has also been illustrated as the concept, which brings together the exploitation of natural resources and the integration of environment and development.¹⁹¹ Environmental sustainability is the process of ensuring that current processes of interaction with the environment are pursued with the idea of keeping the environment as intact as naturally possible. For these reasons, the principle of sustainable environment has also been called an *ideal*.¹⁹² This concept is important for the purpose of this paper because of its use in the jurisprudence of the two Courts as a standard element when deciding if an environmental harm has reached the threshold for being considered a menace to a community or to an individual.

Principle 1 of the Rio Declaration proclaims that: “Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.” Hence, this principle puts the human beings at the centre of the concerns for sustainable environment.¹⁹³ In addition, Principle 4 states that “In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.” In order to achieve these goals the Declaration recommends in its Principle 17 that environmental impact assessment should be used as a national instrument, in the situation in which proposed activities are likely to have a significant adverse impact on the environment. These activities should be subject to a decision of a competent national authority.

The ECtHR has stated in the case of *Taskin and Others v. Turkey* that where a State must determine complex issues of environmental and economic policy, the decision-making process must firstly involve appropriate investigations and studies in order to allow them to predict and evaluate in advance the effects of those activities which might damage the environment and infringe individuals’ rights and to enable them to strike a fair balance between the various conflicting interests at stake.¹⁹⁴

¹⁹⁰ Experts Group on Environmental Law *Environmental Protection*.

¹⁹¹ Birnie, Patricia W., Boyle, Alan E. & Redgwell, Catherine, *International law and the environment*, 3. ed., Oxford University Press, Oxford, 2009, p 56.

¹⁹² Verschuuren, Jonathan, *Sustainable Development and the nature of environmental legal principles*, Potchefstroom Electronic Law Journal, Vol. 9, No. 1, 2006, p 12.

¹⁹³ Birnie, Patricia W., Boyle, Alan E. & Redgwell, Catherine, *International law and the environment*, 3. ed., Oxford University Press, Oxford, 2009, p 56.

¹⁹⁴ ECtHR, the case of *Taskin and Others v. Turkey*, para 116.

It is considered by some authors, in invoking Principle 7 of the Rio Declaration, that the developed countries have a major responsibility for attaining sustainable development “in view of the pressures their societies place on the global environment and of the technologies and financial resources they command”.¹⁹⁵ Principle 7 states that “States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit to sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.” All the different categories of environmental harm, which I analyzed in the previous chapter, are connected to the recent modern developments of our society, both in the developed and developing countries.

The principle of sustainable development can also be found in a binding treaty, for example in Article 2 of the Kyoto Protocol¹⁹⁶ to the United Nations Framework Convention on Climate Change of 1997, which declares that: “each Party included in Annex I, in achieving its quantified emission limitation and reduction commitments under Article 3, in order to promote sustainable development, shall [...].

In the judgement of *Fägerskiöld v. Sweden*, the Swedish Environmental Code¹⁹⁷ declares in Article 1 of Chapter 1 that “its purpose is to *promote sustainable development* which will ensure a healthy and sound environment for present and future generations”, as well as also ensuring that “*human health and environment are protected* against damage and inconvenience, whether caused by pollutants or other sources”. Furthermore, the Court itself considered in the judgement of this case that the operating of the wind turbine is of *general interest* due to it being an *environmentally friendly source of energy which contributes to the sustainable development of natural resources*. And it noted that since only one wind turbine was capable of producing enough energy as to sustain the heating of about 50 households over a period of one year, the turbine was *beneficial for both the environment and the society*. Is this the point where the Court draws the line in between the human rights violations and sustainable development?

At EU level, the principle of sustainable development has been mentioned in several EC Directives. The principle is usually illustrated in the preamble of these Directives. For example, in the preamble of the

¹⁹⁵ Birnie, Patricia W., Boyle, Alan E. & Redgwell, Catherine, *International law and the environment*, 3. ed., Oxford University Press, Oxford, 2009, p 56.

¹⁹⁶ Signed and ratified by all the EU member states.

¹⁹⁷ Part of the Swedish four Constitutional laws.

Council Directive 96/61/EC concerning Integrated Pollution Prevention and Control it is stated the following: “Whereas this Directive [...] lays down the measures necessary to implement integrated pollution prevention and control in order to achieve a high level of protection for the environment as a whole; whereas application of the principle of sustainable development will be promoted by an integrated approach to pollution control”.

The principle has no legal definition in the EU legislation, however it has been mentioned in doctrine that the legal meaning of *sustainable development* should be determined in connection to the legal provision in which the expression is being used.¹⁹⁸ Sustainable development was officially declared for the first time as a political aim of the EC in the Fifth Environmental Action Program, where the Council agreed that the achievement of sustainable development calls for significant changes in current patterns of development, production, consumption and behaviour.¹⁹⁹ It has been argued in the legal doctrine that SD in the EU Law follows the understanding in international law comprising essentially four principles: “integration (of environmental considerations) into economic and other development planning, intergenerational equity (preserve natural resources for the benefit of future generations), sustainable (prudent, appropriate, rational, wise) use of natural resources and, finally, intra-generational equity or equi-table use (the use by one state must take account of the needs of other states)”.²⁰⁰

Moreover, the preamble of the Treaty on European Union declares that: “Determined to promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields”.

The preamble is usually used in the interpretation of the text of the respective treaty. Hence, Article 2 of the EC declares that the Community “shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of

¹⁹⁸ *Sustainable Development* as legal term in European Community Law: Making It Operable within the Habitats Directive and the Water Framework Directive, Herwig Unnerstall, July 2005, p. 2.

¹⁹⁹ European Community, 1993, 3.

²⁰⁰ (Dhondt, 2003, 59 following Sands, 1995)

protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States”.

In addition, Article 6 of the EC states that “environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development.” Like Article 2 EC, this so called integration clause comes under the heading of “principles”.

The ECJ has invoked one of the principles of environmental legislation in Article 174 EC, i.e. the precautionary principle, in order to interpret Article 6(3) HD without directly mentioning that a different interpretation would be in contradiction with the Article 174 EC: “In the light, in particular, of the *precautionary principle*, which is one of the foundations of the high level of protection pursued by Community policy on the environment, in accordance with the first subparagraph of Article 174(2) EC, and by reference to which the Habitats Directive must be interpreted, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned.”²⁰¹

The principle is mentioned only briefly in the European Charter on Fundamental Rights, in the preamble, where it is declared that the European Union “seeks to promote balanced and sustainable development”. In a recent opinion, the Advocate General, Cruz Villalon, expressed the opinion that the Court has now the opportunity to share its view in regard to the right balance in between the economic policies of the Member States and the protection of the environment and of people’s health.²⁰² A decision in this case, concerning airport noise, it’s still underway.

The high percentage of cases concerning nature protection legislation can be explained by the fact that many infrastructure developments proposed in the Member States that lead to complaints are those affecting in some way Natura 2000²⁰³ sites or EU protected species. The balancing act of ensuring the protection of such sites and species on the one hand and allowing Member States to be free to pursue economic develop on the other is one that requires constant work and vigilance. Similarly, balancing acts are required for cases in which complainants invoke the environmental impact assessment Directive. These complaints are the so-called NIMBY (*Not In My Back Yard*) cases.²⁰⁴ The fact that complainants raise concerns about proposed developments in their vicinity

²⁰¹ ECJ 2004, para. 44; similar ECJ, 2000a and 2000b; cf Jans, 2000, 22 and Dhondt, 2003, 179), pg 11.

²⁰² Advocate General’s Opinion in the Case no C-120/10, *European Air Transport*.

²⁰³ The EU’s internal biodiversity policy.

²⁰⁴ European Commission, Environment, <http://ec.europa.eu/environment/legal/law/statistics.htm>, visited on the 12th of April 2011.

does not however mean that those complaints are not in many cases legitimate if evidence is available that Community law has not been respected. European public health is one of the priorities of the EU Sustainable Development Strategy. Environmental quality and the link to human health are highlighted in the EU Sixth Environment Action Programme, which aims at assessing the potential environmental impacts on human health.

The jurisprudence of the ECtHR and ECJ could be seen as *complementary* when it comes to sustainable development and to the *human* component. Where, the first one works for the well-being of the individual and the other for an *overall* well-being. In the text of the 1987 WCED it has been stated that: “The concept of sustainable development does imply limits – not absolute limits but limitations imposed by the present state of technology and social organization on environmental resources and by the ability of the biosphere to absorb the effects of human activity”.²⁰⁵ In the same way, the two Courts have assumed the role of limiting as far as possible, in today’s society, the effects of the development on the European society. On the one hand, as far as the ECtHR is concerned, this has implied the limitation of the effects of environmental harm with regard to fundamental human rights. On the other hand, the ECJ’s jurisprudence has developed a business like view of these effects, by limiting the development mainly in consideration of the sustainability. That is to say, it can be read from its case law that the extension of the development should only be limited when it reaches the threshold imposed by the EU’s legislation on environmental harm.

In the European society one cannot talk about the protection of the environment without being questioned “what about the development and the people’s right to development? – Of course, one cannot go hungry just to preserve the environment intact. Thus, the answer has to be sustainable development, a concept that makes the protection of the environment and the need for further development meet halfway.

²⁰⁵ United Nations, *Report of the World Commission on Environment and Development: Our Common Future*, pg 8.

5 Concluding remarks in the perspective of the EU accession to the ECHR

The jurisprudence analyse of the two Courts can easily lead to the main conclusion of this thesis. On the one hand, the European Court of Human Rights has at the centre of any environmental issue, the human rights involved. On the other hand, the European Court of Justice puts at the centre of its attention the main element on which the European Union was built, the realization of sustainable development as a prerequisite to *sustaining* the economy of the Member States.

That is to say, as exposed in the beginning of this paper, the environment does not have its own standing at present. On the contrary, it seems to be solely the means to an end, which is the protection of human rights and the realization of a sustainable development, respectively. That Thus, at this stage in the development of international environmental law, the protection of the environment seems to be realized only for the purpose of protecting *elements* of higher importance, namely human rights and the economy. The environment is protected solely to the extent needed in order to not affect those elements in need of a greater protection.

The central problem in the jurisprudence of the Courts is not the environmental problem *per se*, but trying to solve environmental problems so that they do not end up affecting the fundamental pillars on which these two organizations were built, namely the human rights and the economy. This conclusion can be drawn from the previous analyze of the case law and the high thresholds set up by the Courts.

The European Union was built with the purpose of creating a community based on its economic growth, well being and stability. Therefore, it understood faster the problems that might arise from the lack of a protection given to the environment and as a result it acted more rapidly. A regional court like the ECJ, which has been dealing with cases concerning economic matters, was more likely to get sooner to the stage where it had to solve environmental problems and discuss environmental rights.

The ECtHR, on the other hand, was created for the purpose of protecting human rights and, therefore, claims regarding environmental harm arose some years later. This development is normal, given the fact that throughout history human rights issues were always late to arise. It's only a few decades back when the individual was not even considered a subject of

international law and in addition environmental rights are only considered as a third generation of rights. Hence, this can explain the slow, but steady, pace towards the development of an *environmental right* at European level.

Furthermore, the judgements of the ECJ focus mainly on the procedural aspects concerning EU's environmental legislation, whereas the ECtHR has a more developed jurisprudence in the area of the substantive aspects of the rights violated under the ECHR. It is true that many cases concerning environmental matters are dealt with under procedural rights, like Article 6 or Article 5 of the ECHR, nevertheless the creativity of the Court in recognizing environmental rights can be seen in relation to the substantive aspects of the Articles involved. Hence, the ECtHR has indeed derived environmental rights, to a certain extent, from the provisions of the Convention, which was not created nor intended to protect individuals against environmental harm.

For example, while both Courts focus their judgements related to the environment to the right to health, in the case of the ECtHR this right is a central one, *incorporated* in Article 8 of the Convention, while for the ECJ seems to be more of a secondary matter, which appears only in the *background* of the different judgements.

Furthermore, the EU's accession to the ECHR is required under Article 6 of the Lisbon Treaty and foreseen by Article 59 of the ECHR as amended by the Protocol 14. The EU's accession to the ECHR will place the EU on the same footing as its Member States with regard to the system of fundamental rights protection supervised by the European Court of Human Rights in Strasbourg. The EU would have its own judge at the European Court of Human Rights in Strasbourg. Accession will also provide a new possibility of remedies for individuals. They will be able to bring complaints about alleged violations of fundamental rights by the EU before the European Court of Human Rights. These complaints can only be brought once the domestic remedies are extinguished. The EU Commission expects the accession to harmonize both the law of the European Court of Human Rights and the European Court of Justice. However, in a harmonization process between human rights and economy, where will that leave the environment?

One positive element of this accession will probably be the power given to the ECtHR to reevaluate cases on environmental issues from a human rights perspective, a human rights approach to the already economic approach taken by the ECJ with regard to the environment, which would bring about individual solutions to individual problems.

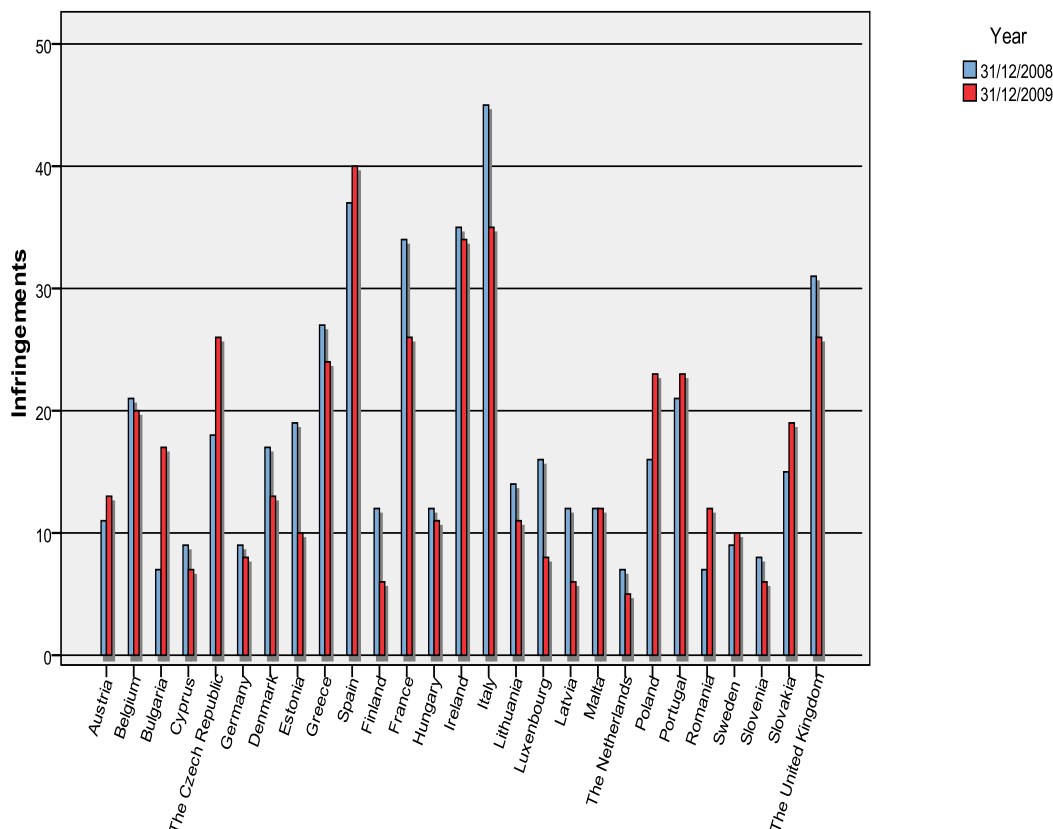
In conclusion, the analyse of the Courts' jurisprudence has shown two different approaches with regard to environmental rights, namely the human rights approach versus the business/economic oriented approach. Nevertheless, these approaches have demonstrated that these two systems

are in reality nor clashing, but actually complementing each other through the different legislation and different case law.

In addition, the same analyse shows the clear tendency towards the classification of the ECJ case law as *community oriented* judgements and the ECtHR case law as *individually oriented* judgements. That is to say, the ECJ gives judgements based on the needs and aims of the EU community, whereas the ECtHR gives judgements based on a sole individual's issues in a specific case. This definitely shows the complementary role that the two Courts have within the environmental area. This role might get much stronger once the European Union is a member of the European Convention on Human Rights.

Annexes

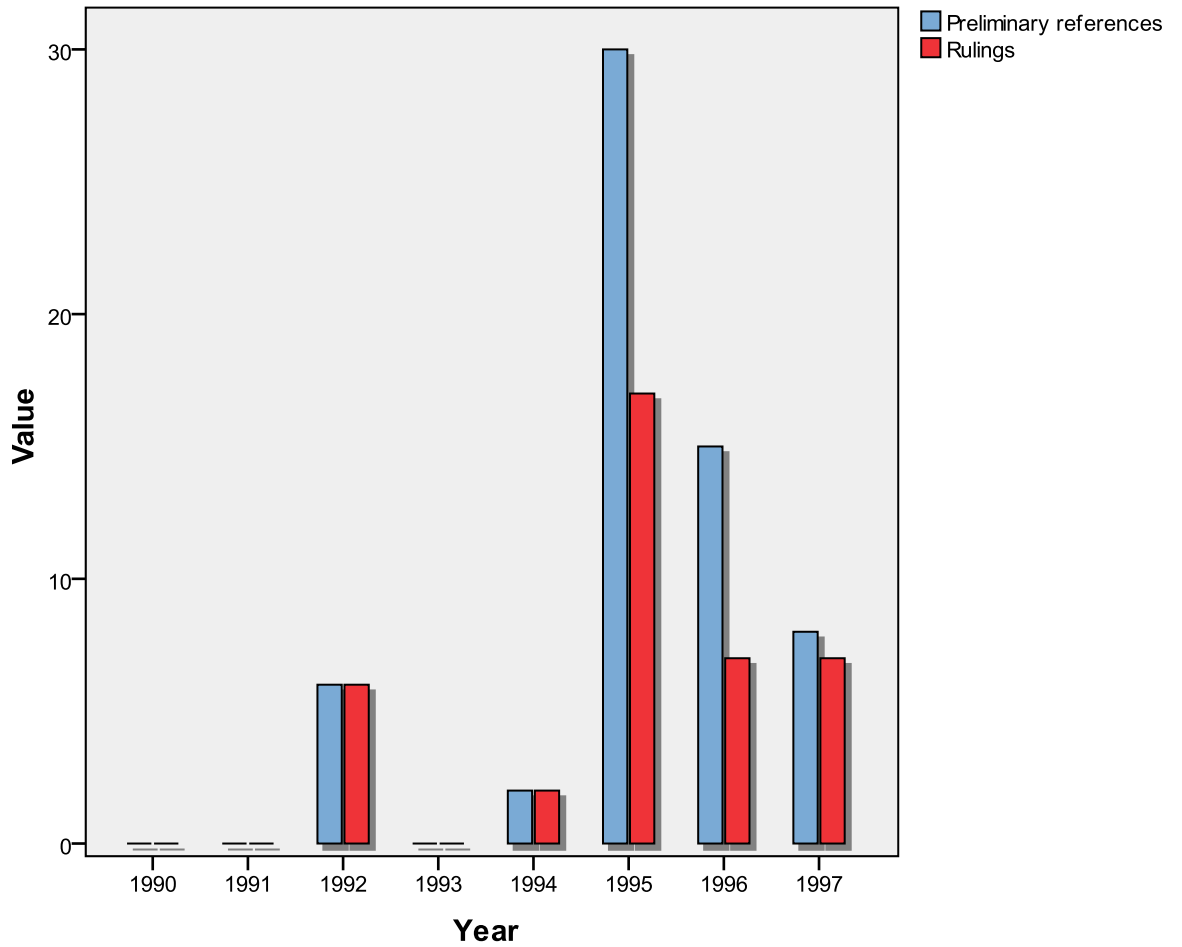
Annex 1.²⁰⁶ . Infringements by Member States in 2008 and 2009.



Annex 1. If one looks at the case load of open infringement cases being pursued against Member States as shown in the table below, it is immediately apparent that there is a considerable difference between the numbers of open cases for the 15 older Member States compared to the 12 new Member States. This is not surprising given that case loads often build up over time. However, some of the new Member States are already generating caseloads to rival those of the older Member States. With regard to the older Member States where the case loads are more mature and the larger Member States generally also have a larger case load, although Ireland and Germany are exceptions to this latter trend. A slightly larger case load can also be observed for the southern Member States than the northern Member States. However, a note of caution should be added that a large case load does not automatically translate into a conclusion that environmental implementation and enforcement is particularly more troublesome in that Member State or the reverse, that a low case load automatically reflects good environmental performance. The overall case load can depend on many different factors such as the level of pro-activeness of local environmental groups and citizens and how likely they are to approach the European Commission with their concerns rather than maybe turning to their national authorities or courts.

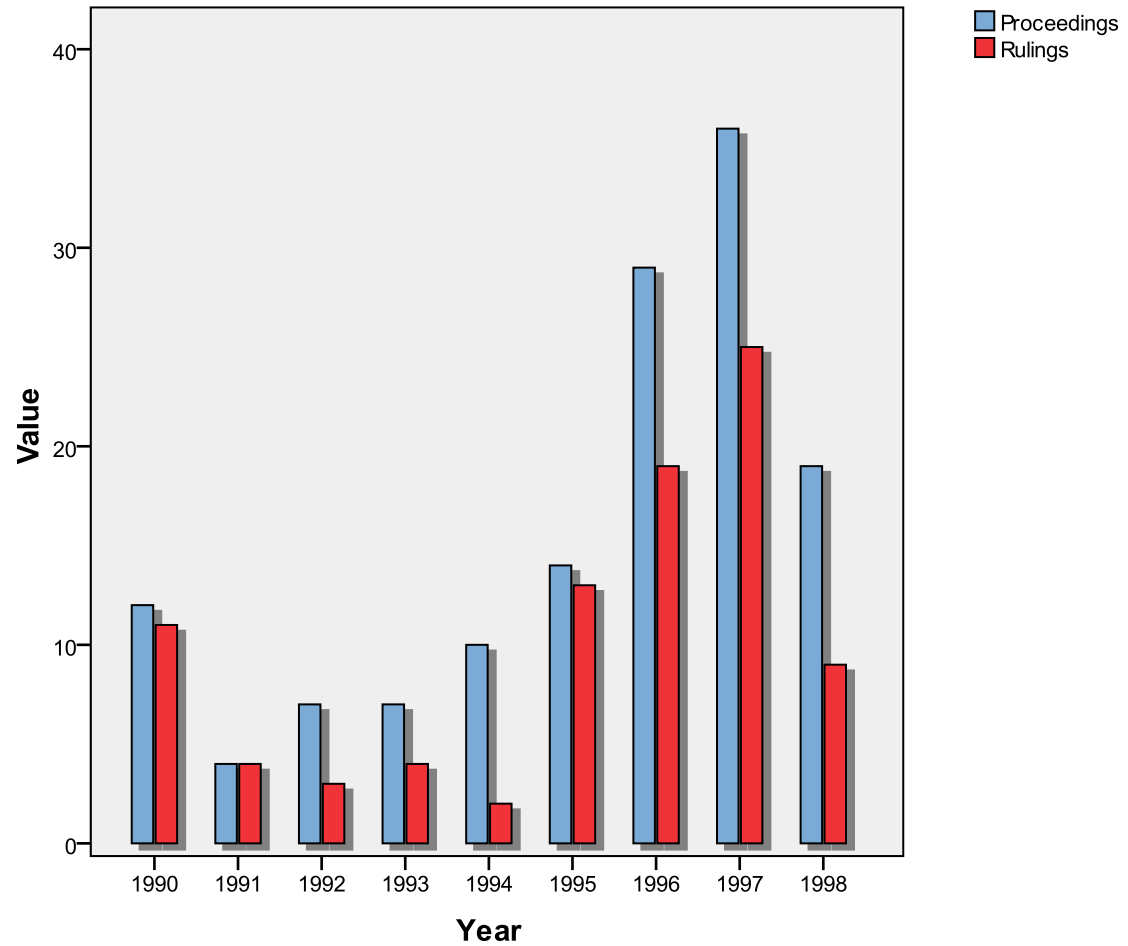
²⁰⁶ European Commission, Environment, http://ec.europa.eu/environment/index_en.htm, visited on the 12th of March 2011.

Annex 2.²⁰⁷ ECJ



²⁰⁷ Stone Sweet, Alec, *The judicial construction of Europe*, Oxford University Press, Oxford, 2004, p. 210, <http://www.oxfordscholarship.com.ludwig.lub.lu.se/oso/public/content/politicalscience/9780199275533/toc.html>, visited on the 13th of March 2011.

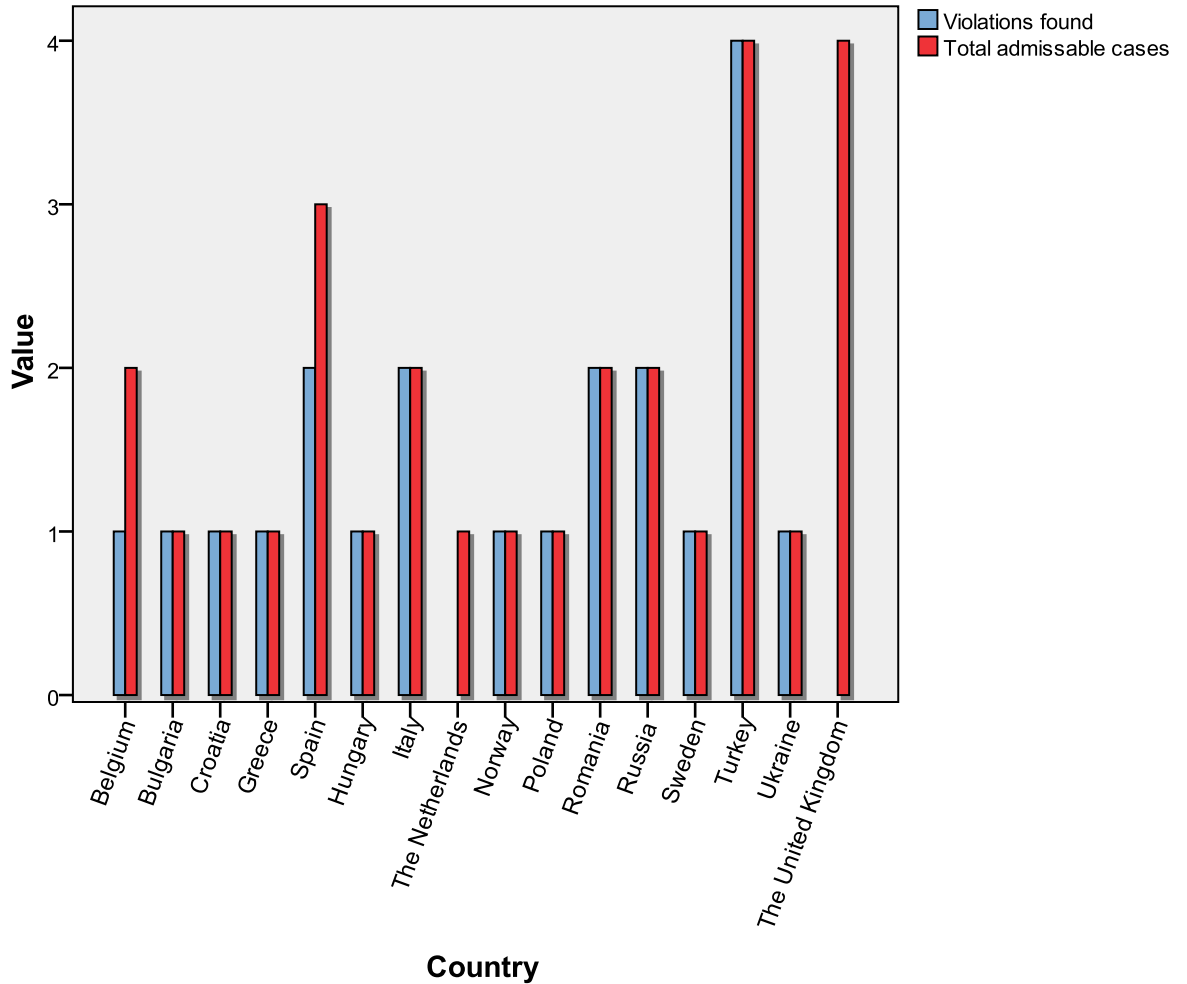
Annex 3.²⁰⁸ ECJ



Annex 3. In 80% of the rulings there was found a violation by the European Court of Justice.

²⁰⁸ Stone Sweet, Alec, *The judicial construction of Europe*, Oxford University Press, Oxford, 2004, p.210 , <http://www.oxfordscholarship.com.ludwig.lub.lu.se/oso/public/content/politicalscience/9780199275533/toc.html>, visited on the 13th of March 2011.

Annex 4. European Court of Human Rights decisions from 1990 to 2010



Annex 4. It is interesting to note here that the United Kingdom was party to many complaints concerning environmental cases before the ECtHR, however there is no case in which the UK has been found in violation of any of the provisions of the Convention. All the cases in which UK was involved were either inadmissible or no violation was found, however several of these judgements contained strong dissenting opinions from part of the judges.

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