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# Interpretation of Human Rights for the Protection of the Environment in the European Court of Human Rights

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# Interpretation of Human Rights for the Protection of the Environment in the European Court of Human Rights

*Svitlana Kravchenko\* and John E. Bonine\*\**

*Presented in March 2011 at the University of the Pacific, McGeorge School of Law Symposium on The Global Impact and Implementation of Human Rights Norms.*

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\*\* John E. Bonine, LL.B., is the B.B. Kliks Professor at the School of Law, University of Oregon. He was proud to be asked by his wife, Svitlana Kravchenko, to be co-author of her book, *Human Rights and the Environment* (Carolina Academic Press), and of this article, but insists that its vision and approach are attributable to Dr. Kravchenko. Professor Bonine is co-founder of the Environmental Law Alliance Worldwide ([www.elaw.org](http://www.elaw.org)), of the world's first Environmental Law Clinic (now operating through the Western Environmental Law Center — [www.westernlaw.org](http://www.westernlaw.org)), and of the annual Public Interest Environmental Law Conferences ([www.pielc.org](http://www.pielc.org)) (now in their 30th year). He is also founder of ENVLAWPROFESSORS, a discussion list founded 20 years ago and used today by 500 professors around the world, and of a network of U.S. public interest environmental lawyers. Prior to beginning his academic career in 1978, Professor Bonine served as Associate General Counsel for Air, Noise, and Solid Waste of the U.S. Environmental Protection Agency.

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ABSTRACT

*To a remarkable degree, European courts have come to recognize that human rights include environmental rights—a development in jurisprudence that remains little known in the United States and in many other countries. A substantial body of transnational court decisions has dramatically expanded the scope of human rights, offering the protections of international law against environmental harms. This Article will describe the decisions of the European Court of Human Rights over the past two decades (including the factual backgrounds of the cases, which are essential to understand the rulings), suggest some*

*areas for further research, and describe some problems that have yet to be thoroughly addressed. We suggest that courts around the world should pay attention to these developments and argue that, within Europe, national courts should pay closer attention to the environmental principles enunciated by the European Court of Human Rights. By doing so, national courts will ensure recognition of these principles as an integral part of their national jurisprudence. Lawyers can play a role in advancing these goals through the use of strategic litigation.*

## I. THE ENVIRONMENTAL EVOLUTION OF THE EUROPEAN CONVENTION

For more than a decade, ruing the lack of an explicit environmental right, the Parliamentary Assembly of the Council of Europe (“Assembly”) has urged that Europeans should have an enforceable right to a healthy environment.<sup>1</sup> The Assembly has recommended several times that the Council’s Committee of Ministers “draw up an additional protocol to the European Convention on Human Rights, recognising the right to a healthy and viable environment.”<sup>2</sup> Each time, however, the Committee of Ministers of the Council of Europe has rejected this plea—most recently in 2010.<sup>3</sup> Trying again in 2011, the Parliamentary Assembly urged “the importance of securing . . . the right to a healthy environment, as one of the fundamental social rights directly related to the right to life.”<sup>4</sup> The plea has fallen on deaf political ears.

Judicial ears have not been so deaf. Although in 1976 the European Commission on Human Rights (an institution that no longer exists) dismissed a claim to an environmental right based on the right to life as being a “manifestly unfounded” legal argument,<sup>5</sup> by the 1980s and 1990s both the Commission and

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1. Eur. Parl. Ass., *Drafting an Additional Protocol to the European Convention on Human Rights Concerning the Right to a Healthy Environment*, Doc. No. 12003 (2009), available at <http://assembly.coe.int/Documents/WorkingDocs/Doc09/EDOC12003.pdf>. Previously the Parliamentary Assembly officially recommended the “human right to a healthy and clean environment” in the European Convention and made reference to this and other human rights approaches to environmental issues in PA Recommendations 1130 (1990), 1431 (1999) and 1614 (2003). The Committee of Ministers denied all three attempts. See *Regional Treaties and Legal Provisions*, RIGHT TO ENV’T, <http://www.righttoenvironment.org/default.asp?pid=82> (last visited Mar. 18, 2012). Note: Citations in footnotes have been checked and rewritten by the editorial staff of the law journal, which takes responsibility for their style and accuracy.

2. See, e.g., Eur. Parl. Ass., *Drafting an Additional Protocol to the European Convention on Human Rights Concerning the Right to a Healthy Environment*, 32d Sess., Recommendation 1885 (2009), available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta09/EREC1885.htm>.

3. Eur. Parl. Ass., *Reply from the Committee of Ministers*, 27th Sess., Doc. No. 12298 (2010), available at <http://assembly.coe.int/main.asp?Link=/documents/workingdocs/doc10/edoc12298.htm>.

4. Eur. Parl. Ass., *The Role of Parliaments in the Consolidation and Development of Social Rights in Europe*, Doc. No. 12632 (2011), available at <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc11/EDOC12632.htm>.

5. *X & Y v. Fed. Rep. of Germany*, App. No. 7407/76, 5 Eur. Comm’n H.R. Dec. & Rep. 161, 162 (1976) (rejecting assertion that military activity in a marshland violated such a claimed right to a safe environment).

the European Court of Human Rights were interpreting the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>6</sup> (the main human rights treaty for Europe, hereinafter referred to as the European Convention) to apply to environmental degradation.<sup>7</sup>

#### A. *The Convention and the Court*

The European Convention says nothing explicitly about the environment. The atrocities committed by Nazi Germany and the rise of communism in the Soviet Union and Eastern Europe led to its adoption in 1950,<sup>8</sup> while environmental problems were not at the forefront of consciousness. In the hands of the European Court of Human Rights (“ECHR” or “the Court”), however, the European Convention has come to be seen as the last resort for the powerless whose health is affected by environmental pollution. This is because the Court has derived environmental rights from traditional fundamental rights for nearly two decades.

Despite the lack of an explicitly enumerated right to a healthy environment in the European Convention,<sup>9</sup> other rights that are recognized therein have been used to grant remedies in the case of environmental harm. Most ECHR environmental cases have interpreted Article 8—the right to privacy and family life—as a legal basis for stopping pollution or degradation of the environment or awarding compensation where pollution or degradation have occurred. Other cases have used Article 2—the right to life.<sup>10</sup>

The European Convention has been ratified by all forty-seven nations that are members of the Council of Europe, a body whose membership extends from the Atlantic to the Pacific Ocean and from the North Sea to the Mediterranean.<sup>11</sup>

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6. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, available at <http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/The+Convention+and+additional+protocols/The+European+Convention+on+Human+Rights/> [hereinafter European Convention on Human Rights].

7. See *infra* text accompanying notes 24-55.

8. At a meeting of the Consultative Assembly of the Council of Europe in 1949, the Committee on Legal and Administrative Questions drew up a report that became the foundation for the Convention. Eur. Consult. Ass., *Measures for the Fulfilment of the Declared Aim of the Council of Europe*, 1st Sess., Doc. No. 77 (1949), available at <http://assembly.coe.int/Conferences/2009Anniversaire49/DocRef/Teitgen6.pdf>. The chair of the committee, Sir David Maxwell-Fyfe, had been a prosecutor at the Nuremberg Trials for Nazi war criminals. The first proposals for the Convention “were for a type of European collective pact against totalitarianism.” ED BATES, *THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 45-49 (2010).

9. *Tătar v. Romania*, App. No. 67021/01, Eur. Ct. H.R. (Jan. 27, 2009), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search *Tătar v. Romania* under Case Title) (recognizing the right to enjoy a healthy and protected environment in a sort of *obiter dictum*). See discussion *infra* Part I.B.2.(d) and note 200.

10. Cases using Articles 6 (fair trial) and 10 (right of information) are beyond the scope of this article.

11. For members of the Council of Europe, see *Navigate by Country*, COUNCIL EUR., <http://www.coe.int/portal/web/coe-portal/home/country> (last visited Mar. 19, 2012). The region encompassed by the Council of Europe should not be confused with the region comprising the European Union. While

Because these countries have accepted the European Convention, they have also subjected themselves to the jurisdiction of the ECHR. The ECHR accepts applications alleging human rights violations brought by individuals against States.<sup>12</sup> When the ECHR finds a breach of the rights enshrined in the Convention, it grants “just satisfaction,”<sup>13</sup> obliging the government at issue to adopt measures to remedy the applicant’s individual situation.

In some respects, a treaty protecting human rights should be considered like a constitution—a document that expresses a society’s fundamental principles and whose application is not confined to solving the specific problems that originally gave rise to its adoption. This is what has happened with the European Convention in the hands of the ECHR. Indeed, the Court has even declared the European Convention to be a “constitutional instrument of European public order.”<sup>14</sup> It has further recognized the Convention to be a “living instrument which . . . must be interpreted in the light of present-day conditions.”<sup>15</sup> The Directorate General of Human Rights of the Council of Europe has pointed out that the Court applies Article 8 (as it does other Articles) “on a case-by-case basis

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publicity and habit among Americans and Western Europeans may treat the twenty-seven nations who are members of the European Union as “Europe,” the EU covers only the western half of Europe. The European continent is considered by many to extend from the Atlantic at least to the Ural Mountains in Russia. French President Charles de Gaulle stated as much in 1962 and on other occasions, causing much consternation in the Ministry of Foreign Affairs of the Soviet Union, as it was interpreted to suggest a desire to break up the Soviet Union, more than half of which was in Asia. Yuri Dubinin, *About a ‘Europe from the Atlantic to the Urals’*, RUSS. GLOBAL AFF. (Nov. 17, 2007), [http://eng.globalaffairs.ru/number/n\\_9784](http://eng.globalaffairs.ru/number/n_9784). Indeed, as far back as 1887, a large stone marker was erected by geographers from the Austro-Hungarian Empire at what they calculated to be the “center of Europe.” Its location is in western Ukraine, to the east of the EU, and it contains this inscription in Latin from 1887: “Locus Perennis Diligentissime cum libella librationis quae est in Austria et Hungaria confecta cum mensura gradum meridionalium et paralleloumierum Europeum . . . MDCCCLXXXVII.” See *The Centre of Europe*, RAKHIV, [http://www.rakhiv.com/index\\_en.php?page=CenterOfEurope&lang=en](http://www.rakhiv.com/index_en.php?page=CenterOfEurope&lang=en) (last visited Mar. 19, 2012).

12. By way of comparison, cases can be brought before the Inter-American Court of Human Rights only by the Inter-American Commission on Human Rights, not by individuals. American Convention on Human Rights art. 61, Nov. 21, 1969, 1144 U.N.T.S. 143. When the European Convention on Human Rights and Fundamental Freedoms was first adopted in 1950 (came into force in 1953), it created the European Commission on Human Rights and the European Court of Human Rights. This is discussed in Eur. Consult. Ass., *Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby: Explanatory Report*, ETS 155 (1994), available at <http://conventions.coe.int/treaty/en/reports/html/155.htm>. Cases involving citizens could be brought to the Court only by the Commission. *Id.* In 1998, Protocol 11 abolished the Commission, resulting in cases being filed directly in the Court by citizens throughout Europe. Eur. Consult. Ass., *Steering Committee for Human Rights (CDDH) Explanatory Report to the [draft] Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention*, 114th Sess., Doc. No. CM (2004) 65, available at <https://wcd.coe.int/ViewDoc.jsp?id=739765>. See also European Convention on Human Rights, *supra* note 6, at art. 34.

13. European Convention on Human Rights, *supra* note 6, at art. 41.

14. *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) at 27 (1995). These words were, of course, *obiter dicta*.

15. *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) at 15 (1978).

while giving the concepts an autonomous Convention meaning.”<sup>16</sup> This “flexibility” means that the meaning of the European Convention “is capable of evolving” and has “the potential to embrace a wide variety of matters.”<sup>17</sup>

### B. Article 8—Right to Private and Family Life

Most of the jurisprudence involving environmental matters has developed under Article 8 of the European Convention, Section 1 of which reads: “Everyone has the right to respect for his private and family life, his home and his correspondence.”<sup>18</sup>

At first glance, this language does not appear to involve environmental harms at all. What is a person’s “private and family life?” How can harm to the environment be seen as a lack of “respect” for that life? How can “respect for . . . his home” translate into enforceable protections against pollution? Does this Article protect against infringements by private parties, by governmental bodies, or both? Do noisy fireworks show a lack of “respect” for private life? If a governmental body fails to give information to residents of a nearby danger, does that constitute a remediable violation of the Convention? Does a lack of participation in governmental decision-making constitute a lack of such respect?

Many early cases in the ECHR interpreting the “privacy” prong of Article 8 focused on intensely personal matters, such as the relationship between an unmarried mother and her child,<sup>19</sup> a demand that a prisoner be subjected to blood tests,<sup>20</sup> or arguments over parental visitation rights with children born as a result of an extra-marital or adulterous affair.<sup>21</sup> Cases interpreting the “home” prong have largely involved questions of search and seizure.<sup>22</sup> Beginning in 1994, however, environmental harm has been recognized as having the potential to

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16. URSULA KILKELLY, HUMAN RIGHTS HANDBOOK, NO. 1, THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE: A GUIDE TO THE IMPLEMENTATION OF ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 10 (2001).

17. *Id.* at 10-11.

18. Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 221, available at <http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG> [hereinafter “Convention” or “European Convention”]. Section 2 of Article 8 further provides:

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

*Id.* (emphasis added).

19. *Marckx v. Belgium*, 31 Eur. Ct. H. R. (ser. A) at 8 (1979).

20. *X. v. Austria*, App. No. 8278/78, 18 Eur. Comm’n H.R. Dec. & Rep. 154 (1979) (blood test).

21. *Jolie & Lebrun v. Belgium*, App. No. 11418/85, 47 Eur. Comm’n H.R. Dec. & Rep. 243 (1986).

22. *See, e.g., Smirnov v. Russia*, App. No. 71362/01, Eur. Ct. H.R. para. 49 (Nov. 12, 2007), <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search *Smirnov v. Russia* under Case Title) (giving police unfettered discretion in searches violates Article 8).

violate Article 8.<sup>23</sup> This recognition has since encompassed noise pollution, air pollution, water pollution, and other matters.

In addition to the recognition of a substantive right to be protected against pollution under Article 8, the Court has developed a jurisprudence of procedural protections that include recognition of a positive duty of governments to provide information and analysis to citizens and a right of citizens to challenge governmental decisions in the courts.

### *1. A Substantive Environmental Right*

#### *a. The Seed of an Environmental Right: López Ostra v. Spain (1994)*

As long ago as the early 1980s, litigants attempted to use Article 8 as the basis for an environmental right. In *Arrondelle v. U.K.*<sup>24</sup>—a case that involved noise pollution as a result of the operation of Heathrow Airport in London—after Article 8 was raised, the parties reached a so-called “friendly settlement” that removed the matter from being the subject of a ruling by the European Court. Later, in *Powell and Rayner v. United Kingdom*, an applicant raised an Article 8 argument in a case decided in 1990, but the Court did not find a violation. The Court in that case did state that “the quality of the applicant’s private life and the scope for enjoying the amenities of his home have been adversely affected by the noise generated by aircraft.”<sup>25</sup> The Court concluded, “Article 8 (art. 8) is therefore a material provision . . . .”<sup>26</sup> However, despite the applicability of section 1 of Article 8, the Court concluded that “there is no serious ground for maintaining that either the policy approach to the problem or the content of the particular regulatory measures adopted by the United Kingdom authorities gives rise to violation of Article 8 (art. 8)” and “the United Kingdom Government cannot arguably be said to have exceeded the margin of appreciation afforded to them or upset the fair balance required to be struck under Article 8 (art. 8).”<sup>27</sup> The Grand Chamber of the Court handed down a similar ruling in 2003, also involving Heathrow Airport in London,<sup>28</sup> but awarded compensation to the applicants.<sup>29</sup>

The first case to hold clearly that the European Convention on Human Rights includes environmental rights was the 1994 case, *López Ostra v. Spain*.<sup>30</sup> Mrs. Gregoria López Ostra lived in a town called Lorca, in the Murcia region of Spain.

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23. *López Ostra v. Spain*, 303 Eur. Ct. H.R. 41 (1994).

24. *Arrondelle v. United Kingdom*, App. No. 7889/77, 26 Eur. Comm’n H.R. Dec. & Rep. 5 (1982).

25. *Powell & Rayner v. United Kingdom*, 172 Eur. Ct. H.R. (ser. A) at 18 (1990).

26. *Id.*

27. *Id.* at 19-20.

28. *Hatton v. United Kingdom*, 2003-VIII Eur. Ct. H.R. 191.

29. *See infra* text accompanying note 68.

30. *López Ostra v. Spain*, 303 Eur. Ct. H.R. 41 (1994).



She and her family—her husband and their two daughters—lived a few hundred meters from a heavy concentration of leather manufacturing facilities. Several tanneries belonging to a company called SACURSA had a plant, built with a State subsidy, for the treatment of liquid and solid waste; it was located about twelve meters from the applicant's home. The plant began to operate in 1988 without the license required by regulations on activities classified as causing nuisance and being unhealthy, noxious, and dangerous for health. Contamination of air that resulted from the plant's operation caused health problems and nuisance to many Lorca people, particularly those living in the area close to tanneries.<sup>31</sup>

Following numerous complaints and in the light of reports from health authorities and the Environment and Nature Agency for the Murcia region, the town council ordered cessation of one of the plant's activities. They permitted the treatment of wastewater contaminated with chromium to continue, however.<sup>32</sup> In response to the decision, Mrs. López Ostra filed suit in local court,<sup>33</sup> as her two sisters-in-law did later.<sup>34</sup>

Among other evidence, the Ministry of Justice's Institute of Forensic Medicine "indicated that gas concentrations in houses near the plant exceeded the permitted limit."<sup>35</sup> It noted that the applicant's daughter, Cristina, and her nephew, Fernando López, "presented typical symptoms of chronic absorption of gas, symptoms that periodically manifested themselves in the form of acute broncho-pulmonary infections."<sup>36</sup> It believed, based on the evidence, that there was a relationship between the children's disease and the levels of gas. Also, according to pediatricians, Cristina's diagnosis showed that she experienced "nausea, vomiting, allergic reactions, anorexia, etc., which could only be explained by the fact that she was living in a highly polluted area."<sup>37</sup>

The rights recognized by the European Convention are mirrored in the Spanish Constitution,<sup>38</sup> but various Spanish courts rejected Mrs. López Ostra's rights-based arguments. The Supreme Court of Spain ruled that there was no

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31. *Id.* at 43. Note: in this and several other paragraphs, for purposes of readability, the authors have chosen not to place quotation marks around some words taken directly from court opinions, while citing to the source paragraphs in the opinions.

32. *Id.* at 43-44.

33. *Id.* at 44.

34. *Id.* at 46.

35. *Id.* at 47.

36. *Id.*

37. *Id.*

38. CONSTITUCIÓN ESPAÑOLA, B.O.E. n. 311, Dec. 27, 1978, §§ 15, 17-19 (Spain), available at [http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist\\_Normas/Norm/const\\_espa\\_texto\\_ingles\\_0.pdf](http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf). Excerpts of the sections can be found in *López Ostra*, 303 Eur. Ct. H.R. at 23. See, e.g., the 2004 decision of the Constitutional Court of Spain in the case of *Manuel Jiménez de Parga y Cabrera*, upholding the position that invasion of a home by external noise can constitute a violation of the privacy rights of the home. S.T.S., Feb. 23, 2004 (S.T.C. No. 16/2004) (Spain).

violation of her rights because “no public official had entered her home or attacked her physical integrity.”<sup>39</sup> The Constitutional Court of Spain ruled that the issue of respect for private life had not been raised in lower courts and that the presence of fumes, smells, and noise did not amount to a breach of the right to inviolability of the home.<sup>40</sup>

After exhausting efforts in Spanish national courts, Mrs. López Ostra applied to the European Commission on Human Rights for relief. The Commission found a violation of Article 8 of the Convention, which protects “private and family life.”<sup>41</sup> The case then moved on to the ECHR. The brevity with which the Court treated the question of whether pollution can be considered an infringement of Article 8 is quite remarkable. On this key jurisprudential issue, it spent no analytical energy, but simply said: “Naturally, severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely. . . .”<sup>42</sup>

The case also posed the question whether Spain could be held liable when the most immediate cause of the pollution was a private company, not the State. The Court had no problem with finding that it could. Although the Spanish and local authorities were “theoretically not directly responsible” for the pollution, “the town allowed the plant to be built on its land and the State subsidised the plant’s construction.”<sup>43</sup> After some, but not all, of the pollution emanating from the plant was prevented, “the council’s members could not be unaware that the environmental problems continued. . . .”<sup>44</sup> With this remark, the Court appeared to transition into finding that inaction by the State could be a ground for liability. The Court also addressed “whether the national authorities took the measures necessary for protecting the applicant’s right to respect for her home and for her private and family life under Article 8.”<sup>45</sup> It found that the municipality “failed to take steps” to protect Mrs. López Ostra and also “resisted judicial decisions” that would have helped her.<sup>46</sup> In addition, it found that other State authorities

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39. *López Ostra*, 303 Eur. Ct. H.R. at 45. The Spanish Supreme Court has subsequently reversed its position on this. *Moreno Gómez v. Spain*, 2004-X Eur. Ct. H.R. 327

40. *López Ostra*, 303 Eur. Ct. H.R. at 45-46. In a later case, the Spanish Constitutional Court accepted that noise pollution could amount to such a violation. S.T.S., Feb. 23, 2004 (S.T.C. No. 16/2004) (Spain), available at <http://www.tribunalconstitucional.es/en/jurisprudencia/Pages/Sentencia.aspx?cod=8215> (“una exposición prolongada a unos determinados niveles de ruido, que puedan objetivamente calificarse como evitables e insoportables, ha de merecer la protección dispensada al derecho fundamental a la intimidad personal y familiar, en el ámbito domiciliario”). *Id.* The authors thank Abogado Eduardo Salazar of Murcia, Spain for providing this and other Spanish cases.

41. *López Ostra*, 303 Eur. Ct. H.R. at 50.

42. *Id.* at 54.

43. *Id.* at 55.

44. *Id.* at 55.

45. *Id.*

46. *Id.* at 56.

“contributed to prolonging the situation”<sup>47</sup> through participation in litigation on the side of the factory. The Court did not undertake a complete analysis of State responsibility to protect citizens from pollution, however, leaving that for another day.

Finding an intrusion by air pollution into Mrs. López Ostra’s private and family life did not end the inquiry. In interpreting Article 8 of the Convention, the Court stated that “regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole.”<sup>48</sup> In evaluating a situation involving State decision-making and liability (and even more so in considering what is an appropriate remedy in such a situation), the Court uses the “margin of appreciation” doctrine. Under this doctrine, the Court allows the State a certain degree of discretion. Despite this margin of appreciation, the Court ruled in Mrs. López Ostra’s case that the State did not strike a “fair balance between the interest of the town’s economic well-being . . . and the applicant’s effective enjoyment of her right to respect for her home and her private and family life.”<sup>49</sup> Accordingly, it found that Article 8 had been violated.<sup>50</sup>

The Court ordered compensation even though a pecuniary value could not be established for the loss suffered by the applicant. In addition to the nuisance caused by the gas fumes, noise, and smells from the plant, the Court took into consideration the distress and anxiety felt by the applicant as she saw the situation persisting and her daughter’s health deteriorating. The Court awarded Mrs. López Ostra 4,000,000 Spanish pesetas.<sup>51</sup>

This was not the end of the dispute over pollution from the SACURSA facility, however. In 1993 and 1994, the Mayor of Lorca granted a license that allowed the facility to continue in operation after imposing some “corrective measures” for treatment of wastewater and disposal of sludge.<sup>52</sup> When two other residents (D.<sup>a</sup> Elisa y D.<sup>a</sup> Silvia) filed a lawsuit complaining about continued pollution, the case made its way again to the Supreme Court of Spain. That court ruled that the 1994 *López Ostra* case of the ECHR was not controlling because of the subsequent grant of a pollution license along with corrective measures. As the

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47. *Id.*

48. *Id.* at 54-55.

49. *Id.* at 56. For some analysis of the “margin of appreciation” and “fair balance,” see Richard Desgagné, *Integrating Environmental Values into the European Convention on Human Rights*, 89 AM. J. INT’L L. 263, 276 (1995).

50. *López Ostra*, 303 Eur. Ct. H.R. at 56-58.

51. *Id.* at 58.

52. Tribunal Supremo, Sala Tercera, de lo Contencioso-administrativo, Sección 5ª, Sentencia de 4 Jul. 2002, rec. 4705/1997, Roj: STS 4967/2002, at “Primero,” available at <http://www.poderjudicial.es> (navigate to Canal Judicial, then to Jurisprudencia under Tribunal Supremo, where you may conduct a search).

plaintiffs did not discuss the corrective measures, their case could not establish a violation of the right to privacy.<sup>53</sup>

Nonetheless, *López Ostra* represented a significant turning point for environmental claims under the Convention regime.<sup>54</sup> It was the first case in which the ECHR found a breach of the Convention as a consequence of environmental harm. The Court's decision left it somewhat unclear, however, whether the outcome was based primarily on actions taken by various authorities (for example, the state subsidy, local permission to build the plant, and prolonging the situation by litigating on the factory's side), on inaction by authorities (inaction by the council's members, national authorities' failure to take necessary measures, municipality's failure to take steps), or on both—that is, the question remains whether both a negative and a positive duty existed and was breached. Those grounds for liability were addressed more clearly in a case decided by the Court four years later, *Guerra v. Italy*.<sup>55</sup>

*b. Government Inaction and Positive Duty: Guerra v. Italy (1998)*

A few years after the *López Ostra* case, the European Court took another step in the direction of recognizing environmental rights and State responsibility under Article 8. It held squarely that the right to respect for private and family life could be considered violated by government inaction as well as by action. Furthermore, it ruled that a government's failure to provide information to citizens on environmental risks constituted a violation of Article 8. The Court also hinted that other Articles of the Convention might someday be put to use in pollution cases. In fact, some judges would have gone even farther and immediately applied Articles 2 and 10 to the case.<sup>56</sup>

The case *Guerra v. Italy* arose as a result of pollution emitted from a factory in Italy that produced fertilizers and other chemicals. The factory had been classified as “high risk” according to criteria set out in a presidential decree that was adopted to implement the “Seveso Directive” of the Council of the European Communities.<sup>57</sup> The factory emitted air pollution for several years, as a byproduct

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53. *Id.* at “Cuarto.”

54. Various authors have made this point, including, most recently, Ole W. Pedersen, *European Environmental Human Rights and Environmental Rights: A Long Time Coming?*, 21 GEO. INT'L ENVTL. L. REV. 73, 86 (2008).

55. *Guerra v. Italy*, 1998-I Eur. Ct. H.R. 210; see *infra* notes 51-67 and accompanying text.

56. *Guerra*, 1998-I Eur. Ct. H.R. at 232, 234-35, 236 (concurring opinions of Judge Walsh, Judge Jambrek, and Judge Vilhjálmsson); see *infra* notes 52-57.

57. *Guerra*, 1998-I Eur. Ct. H.R. at 216. The first “Seveso Directive” was issued by the European Communities (later the European Union) in response to a chemical explosion at a factory in Seveso, Italy, in 1976, in which dioxin and other pollutants contaminated a wide area. Council Directive 82/501/EEC, 1982 25 O.J. (L 230) 1 [hereinafter *Seveso I*]. It was replaced December 9, 1996, by “Seveso II.” Council Directive 96/82/EC, art. 18, 1996 O.J. (L 10) 13 (EU) [hereinafter *Seveso II*]; see *infra* note 173 and text accompanying note 174.

from the manufacturing of both fertilizers and caprolactam, the latter a chemical compound. In 1976, a serious accident occurred when the scrubbing tower for the ammonia synthesis gases exploded, and several tons of potassium carbonate and bicarbonate solution containing arsenic trioxide were emitted into the atmosphere. As a result, 150 people were admitted to hospital with acute arsenic poisoning.<sup>58</sup> Due to pollution emissions that drifted into their town from the factory, 420 residents of the town of Manfredonia filed legal actions in local court in 1985 against directors of the company for various offenses. They initiated a range of legal actions, including criminal proceedings for non-compliance with various environmental regulations. Nothing happened for several years.<sup>59</sup>

In 1988, Ms. Anna Maria Guerra and thirty-nine other women who lived in the town of Manfredonia, all of whom lived within approximately one kilometer of the factory, applied to the European Commission on Human Rights for relief. The applicants complained that local authorities had not taken appropriate action to reduce the pollution by the factory and prevent the risk of another accident. They argued that this lack of action infringed their rights to life and physical integrity under Article 2 of the European Convention.<sup>60</sup> They also complained that the State had failed to provide information about the risks from the pollution and how to proceed in the event of an accident. This, they argued, was a breach of their right to information under Article 10 of the Convention.<sup>61</sup> In the meantime, the factory had shifted to producing only fertilizers. It remained categorized as high risk, but no plan was devised for notifying the public in the case of a future disaster. Another seven years elapsed before the then-existing European Commission on Human Rights finally forwarded the case on to the ECHR in 1995.<sup>62</sup>

In the meantime, the plant ceased production of fertilizers in 1994, although a plant for the treatment of feed and wastewater continued, along with a thermoelectric power station, and it remained possible for caprolactam production to resume at any time.<sup>63</sup> When the case moved on to the ECHR, Ms. Guerra and her co-complainants asserted that their right to respect for family life under Article 8 of the Convention had been infringed, in part as a result of the authorities' failure to provide them with relevant information.<sup>64</sup>

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58. *Guerra*, 1998-I Eur. Ct. H.R. at 216.

59. Judgment was finally given in 1991. *See id.* at 217. Two directors were sentenced to prison for short terms and others escaped prison sentences because of a statute of limitations and amnesties. The two prison terms were overturned in 1992 by an appellate court. *Id.*

60. *Id.* at 214-17, 222.

61. *Id.* at 221.

62. *Id.* at 216, 222.

63. *Id.* at 216.

64. *Id.* at 221.

Three years later the Court, sitting as a Grand Chamber with twenty justices participating, ruled unanimously that Italy “did not fulfill its obligation to secure the applicants’ right to respect for their private and family life,” in violation of Article 8 of the Convention.<sup>65</sup> In doing so, it relied on its earlier ruling in *López Ostra*. “The Court reiterates that severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely (see, *mutatis mutandis*, the *López Ostra* judgment . . .).”<sup>66</sup> In reaching that conclusion, however, the facts arguably forced the Court to go beyond the issues posed by *López Ostra*, compelling it to decide that Article 8 not only forbids action by the State but also provides a remedy for inaction by the State. That is, the Article 8 right imposes a duty on the State to take positive, *protective* action in the environmental field.<sup>67</sup> The Court started cautiously, pronouncing that “there *may* be positive obligations inherent in effective respect for private or family life . . .”<sup>68</sup> That is, simply not interfering with private or family life is not enough. To be “effective,” the requirement of section 1 of Article 8 that the State “respect” private or family life may imply “positive obligations,” the Court said.<sup>69</sup> The Court then became more definite: it found it necessary to determine “whether the national authorities took the necessary steps to ensure effective protection of the applicants’ right.”<sup>70</sup>

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65. *Id.* at 228. Because it found a violation under Article 8, the Court ruled that there was no need to consider an additional claim under Article 2, the right to life, which we will address in part II-C of this article. *Id.* at 228-29. The Court made a similar decision in *Öçkan v. Turquie* [*Öçkan v. Turkey*], no. 46771/99, paras. 50, 57 Eur. Ct. H.R. (28 Mar. 2006), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search *Öçkan v. Turquie* under Case Title), in which it found it unnecessary to examine claims of a violation of Article 2’s protection for the right to life because it found a violation of the right of private and family life. The case involved threats to an underground aquifer and the corresponding ecosystem from cyanide leach gold mining. *Id.* at paras. 6, 7, 10.

66. *Guerra*, 1998-I Eur. Ct. H.R. at 228.

67. This duty of positive, protective action to safeguard private interference with human rights was first discussed extensively in two ECHR decisions in 1979. *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) (1979), and *Airey v. Ireland*, 32 Eur. Ct. H.R. (ser. A) (1979). In the latter case, a woman was unable to afford the cost of a lawyer to help her process a judicial separation from her husband. *Id.* at 6. The court said:

The Court does not consider that Ireland can be said to have “interfered” with Mrs. Airey’s private or family life: the substance of her complaint is not that the State has acted but that it has failed to act. However, although the object of Article 8 (art. 8) is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life . . . .

*Id.* at 17. This position was reiterated in *X and Y v. Netherlands*, 32 Eur. Ct. H.R. (ser. A), (1985), which involved the government’s failure to protect a mentally retarded young woman from being raped in an institution. *Id.* at 8. For a discussion of the duty of the state to take positive, protective action in human rights courts and institutions in other regions as well, see Aoife Nolan, *Addressing Economic and Social Rights Violations by Non-State Actors Through the Role of the State: A Comparison of Regional Approaches to the ‘Obligation to Protect.’* 9 HUM. RTS. L. REV. 225 (2009).

68. *Guerra*, 1998-I Eur. Ct. H.R. at 227 (emphasis added) (quoting *Airey*, 32 Eur. Ct. H.R. (ser. A) at 67).

69. *Id.*

70. *Id.*

The Court determined that the inaction through which the State failed to protect the Article 8 right was its failure to provide information to Guerra and others “that would have enabled them to assess the risks they and their families might run if they continued to live at Manfredonia, a town particularly exposed to danger in the event of an accident at the factory.”<sup>71</sup> This “information right,” an element of Article 8’s right to “respect,” will be discussed in more detail in part II-B of this article.

The Court awarded some monetary compensation for violation of the rights of Ms. Guerra and others.<sup>72</sup> It did not, however, order cleanup of the industrial estate where the explosion had occurred:

The Court notes that the Convention does not empower it to accede to such a request. It reiterates that it is for the State to choose the means to be used in its domestic legal system in order to comply with the provisions of the Convention or to redress the situation that has given rise to the violation of the Convention . . . .<sup>73</sup>

This reluctance to mandate a broad-based solution to the environmental problem identified in the case is understandable for a court that has little means of enforcing the decisions that it makes and that, perhaps, is concerned with staying out of the business of telling governments to take specific actions. But shying away from ordering anything but compensation may dramatically decrease the respect paid to decisions of the ECHR. The limited amount of compensation would be unlikely, by itself, to impact significantly the behavior of governments or corporations causing pollution.

*c. Balancing Away Environmental Impacts: Hatton v. United Kingdom (2003)*

If the Court appeared to some people, on the basis of the *López Ostra* and *Guerra* decisions, to be on a mission of broad-ranging environmental reform through the use of Article 8’s right to private and family life, such a view surely became less tenable as a result of the ECHR decision in *Hatton v. United Kingdom* in 2003.<sup>74</sup>

Eight persons who were members of a citizens group filed an application to the European Commission on Human Rights, which in turn was transmitted to the Court. Their assertion was that excessive noise from takeoffs and landings at

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71. *Id.* at 228.

72. *Id.* at 229.

73. *Id.* at 230 (citing several previous ECHR cases).

74. *Hatton v. United Kingdom*, 2003-VIII Eur. Ct. H.R. 189. The *Hatton* decision was vigorously criticized in David Hart & Marina Wheeler, *Night Flights and Strasbourg’s Retreat from Environmental Human Rights*, 16 J. ENVTL. L. 100, 132-39 (2004).

Heathrow Airport, near London, interfered with their sleep. In 2001 a seven-judge Chamber ruled by a vote of 5-2 that Article 8 had been violated.<sup>75</sup> The matter was referred, however, to a Grand Chamber—a panel of seventeen judges. In its 2003 judgment, the Grand Chamber noted that in a previous case, *Powell and Rayner v. United Kingdom*,<sup>76</sup> which also involved applicants complaining about aircraft noise, “the Court held that Article 8 was relevant, since ‘the quality of [each] applicant’s private life and the scope for enjoying the amenities of his home [had] been adversely affected by the noise generated by aircraft using Heathrow Airport.’”<sup>77</sup> The Court also quoted *López Ostra* and *Guerra* regarding how pollution can violate Article 8.<sup>78</sup> But then the Court reiterated “the fundamentally subsidiary role of the Convention” in societies subject to it. The Court considered that “national authorities,” with “direct democratic legitimation,” were “in principle better placed than an international court to evaluate local needs and conditions.”<sup>79</sup> Therefore, “the role of the domestic policy-maker should be given special weight” and the Court must give a “wide” “margin of appreciation” (range of deference) to national legislative decisions.<sup>80</sup> The Court went on to remark on the “the fair balance that has to be struck between the competing interests of the individual and of the community as a whole.”<sup>81</sup> All this led to the Court’s finding that there was no violation of Article 8.<sup>82</sup>

The Court lauded the fact that restrictions on flight patterns and engine noise enacted in 1993 were the “latest in the series of restrictions on night flights which began at Heathrow in 1962 . . . .”<sup>83</sup> It said that the government’s undertaking “not to allow a worsening of noise at night, and ideally to improve it” was maintained” and “the authorities continu[ed] to monitor the situation with a view to possible improvements.”<sup>84</sup> Although the Court had “no doubt that the implementation of the 1993 Scheme was susceptible of adversely affecting the quality of the applicants’ private life and the scope for their enjoying the amenities of their respective homes, and thus their rights protected by Article 8 of the Convention,”<sup>85</sup> that was not enough to find liability. Despite the acknowledgments regarding loss of enjoyment suffered by the applicants, the Court must consider whether, in the implementation of the 1993 Scheme, “a fair

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75. *Hatton*, 2003-VIII Eur. Ct. H.R. at 195-97.

76. *Powell & Rayner v. United Kingdom*, 172 Eur. Ct. H.R. (ser. A) (1990).

77. *Hatton*, 2003-VIII Eur. Ct. H.R. at 216 (quoting *Powell & Rayner*, 172 Eur. Ct. H.R. (ser. A) at 18).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 217.

82. *Id.* at 228.

83. *Id.* at 223.

84. *Id.*

85. *Id.*



balance was struck between the competing interests of the individuals affected by the night noise and the community as a whole.”<sup>86</sup> (This was unlike the situation in *López Ostra* and *Guerra*, where authorities were failing to comply with domestic laws. The applicants in the Heathrow Airport case did not suggest that the Heathrow policy “was in any way unlawful at a domestic level.”)<sup>87</sup> As for the policy itself, the Court observed that section 2 of Article 8 provides for a balancing test.<sup>88</sup> In considering whether the State had “struck a fair balance” between economic interests and the persons adversely affected by noise disturbances, the Court went out of its way to reduce environmental considerations to just one factor among many—by no means the most important one nor one deserving any special status:

Environmental protection should be taken into consideration by States in acting within their margin of appreciation and by the Court in its review of that margin, but it would not be appropriate for the Court to adopt a special approach in this respect by reference to a special status of environmental human rights.<sup>89</sup>

In addition to noting the benefits to economic competitiveness of the United Kingdom, in allowing the arrival of late-night flights from distant countries, the Court said that the government could validly “take into account the individuals’ ability to leave the area.”<sup>90</sup> The Court said that the authorities had not overstepped their allowable margin of appreciation, nor had there been “fundamental procedural flaws in the preparation of the 1993 regulations” on airport noise.<sup>91</sup>

*d. Limiting the Consideration of Environmental Impacts: Kyrtatos v. Greece (2003)*

In another case, decided the same year as *Hatton*, the Court decided that although some impacts on the environment might adversely affect a person’s “well-being,” others would not—at least if all they involved was a “swamp.” In *Kyrtatos v. Greece*,<sup>92</sup> a woman and her son, living in Germany, owned a house in Greece near a protected wetland bird habitat; they vacationed there from time to time. Local authorities had redrawn the urban growth boundary to allow development construction in the wetland. Mr. Nikos Kyrtatos and his mother, Mrs. Sofia Kyrtatou, challenged the development in national court in Greece, as

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86. *Id.* at 224.

87. *Id.*

88. *Id.*

89. *Id.* at 225.

90. *Id.* at 227.

91. *Id.* at 228.

92. *Kyrtatos v. Greece*, 2003-VI Eur. Ct. H.R. 257.

did the Greek Society for the Protection of the Environment and Cultural Heritage.<sup>93</sup> The Supreme Administrative Court of Greece ruled that the rezoning and development activities violated the environmental protection provisions of the Greek Constitution. When the local authorities failed to respect the national court decision and take action to restore the damaged wetland by removing buildings, the applicants filed their case in the ECHR.<sup>94</sup>

With regard to the challenge the applicants made based on Article 8, they were unsuccessful.<sup>95</sup> The Court agreed that under *López Ostra* harm to an individual's well-being could amount to a violation of Article 8 without a requirement that the activity at issue seriously endanger health. However, the Court could not conceive of how harm to species living in a wetland (which the Court studiously referred to as a "swamp") could affect a neighbor's well-being. The Court said it might have ruled differently if the harm had been to a forest:

[T]he applicants have not brought forward any convincing arguments showing that the alleged damage to the birds and other protected species living in the swamp was of such a nature as to directly affect their own rights under Article 8 § 1 of the Convention. It might have been otherwise if, for instance, the environmental deterioration complained of had consisted in the destruction of a forest area in the vicinity of the applicants' house, a situation which could have affected more directly the applicants' own well-being.<sup>96</sup>

This remarkable splitting of ecological (and psychological) hairs—or imposition of the Court's own aesthetic standards—drew a strong dissent from Judge Zagrebelsky, who wrote that "it could hardly be said that the deterioration of the environment did not lead to a corresponding deterioration in the quality of the applicants' life . . . ."<sup>97</sup> The dissenting judge was particularly critical of the swamp/forest distinction, writing, "I see no major difference between the destruction of a forest and the destruction of the extraordinary swampy environment the applicants were able to enjoy near their house."<sup>98</sup>

One will not know whether visual intrusion and harm to aesthetic sensibilities are completely outside the ambit of Article 8 until a future forest-destruction case is brought to the Court. It seems likely, however, that litigants have a better chance of success if the environmental harm that they bring to the Court involves pollution.

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93. *Id.* at 262-63.

94. *Id.* at 263.

95. *Id.* They did, however, obtain a ruling that the right to fair trial had been violated under Article 6 of the Convention. *Id.* at 270.

96. *Id.* at 268-69.

97. *Id.* at 272 (Zagrebelsky, J., dissenting).

98. *Id.*

e. *The Court as Enforcer of National Laws: Fadeyeva v. Russia (2005) and Ledyayeva v. Russia (2006)*

While *Hatton* and *Kyrtatos* signified clear limits on the Court's willingness to put Article 8 into service of protected environments, cases decided shortly thereafter showed that Article 8 is far from dead. A number of cases have continued to arise in which a government has promised, but failed, to curb pollution or to move people away from it. The Court has found it relatively easy to find violations in such situations.

Countries that were formerly part of the Soviet Union or within its orbit of influence inherited a concept of "sanitary protection zones" (also called "sanitary security zones," "sanitary exclusion zones," or, in the West, simply "buffer zones") from the past. The idea behind such zones is to create an area or buffer zone in which people are not allowed to live because it is too close to pollution sources.<sup>99</sup> If the concentration of a pollutant from a factory in the ambient air outside the factory exceeds the "maximum permissible limit" ("MPL")<sup>100</sup> established for a pollutant, the factory must establish a sanitary protection zone covering the area in which the MPL is exceeded.<sup>101</sup> Outside the boundary of the zone, MPLs must be met. Inside, they need not be, but housing, schools, and hospitals are prohibited within the zone.<sup>102</sup> By comparison, in the United States national ambient air quality standards for air pollutants must be met everywhere beyond the "fence-line" of an industrial establishment.<sup>103</sup>

In countries that use the sanitary protection zone concept, people who are living within a sanitary zone must be resettled outside of it. In theory, ordinary citizens would therefore not be exposed to pollutant concentrations above the MPLs.<sup>104</sup> The reality is different because of the ineffectiveness of resettlement policies. In 2004, Russia had 72,786 enterprises with sanitary protection zones

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99. A simple explanation of the concept can be found in Victor Davydov, *Russia: Sanitary Protection Zone Requirements*, EHS J. (Nov. 24, 2010), <http://ehsjournal.org/http://ehsjournal.org/victor-davydov/russia-sanitary-protection-zone-spz-requirements-overview/2010/>.

100. MPLs (termed PDKs in Russian) are the allowable levels of various polluting substances, as established by Russian legislation. See Dep't for the Execution of Judgments of the Eur. Court of Human Rights, *Industrial Pollution in Breach of the European Convention: Measures Required by a European Court Judgment*, COUNCIL EUR. paras. 6-8 (2007), <https://wcd.coe.int/ViewDoc.jsp?id=1094807&Site=DC> [hereinafter DEP'T EXECUTION JUDGMENTS] (describing Russian law and policy in this regard).

101. *Id.*

102. See *id.* at para. 8.

103. The air quality standards in the United States apply to "ambient air," and that is defined thus: "Ambient air means that portion of the atmosphere, external to buildings, to which the general public has access." 40 C.F.R. § 50.1(e) (2011). The U.S. Environmental Protection even has a "Fence-Line Monitoring Program" for enforcement. See *Clean Air Act National Enforcement Initiatives*, ENVTL. PROTECTION AGENCY, <http://www.epa.gov/oecaerth/civil/caa/caaenfpriority.html#Fence.compliance/civil/caa/caaenfpriority.html> (last updated May 18, 2010).

104. See Davydov, *supra* note 99.

but only 144,524 persons had been resettled outside of the zones.<sup>105</sup> This amounted to an average of fewer than two persons per zone. In other words, on average, less than one family from every zone had been resettled. When the problem of resettlement arises, a typical reaction is to reduce the size of the protection zone so as to exclude people from any resettlement duty.<sup>106</sup> These reductions may well occur without any air quality monitoring that justifies the reduction.<sup>107</sup>

Ms. Nadezhda Mikhaylovna Fadeyeva lived in the town of Cherepovets in Russia, where an important steel-producing cement plant, “Severstal,” is located. In 1982, her family moved to a flat situated about 450 meters from the boundary of the plant. The plant is the largest iron smelter in Russia and “the largest contributor to air pollution of all metallurgical plants in Russia.”<sup>108</sup> The “sanitary protection zone” around the plant covered a 5,000 meter-wide area.<sup>109</sup> Although this zone was supposed to separate the plant from the town’s residential areas, thousands of people, including the applicant’s family, lived there.<sup>110</sup> A Decree of the Council of Ministers of the Russian Soviet Republic, dated September 10, 1974, obliged the Ministry of Black Metallurgy “to resettle the inhabitants of the sanitary security zone who lived in districts nos. 213 and 214 by 1977.”<sup>111</sup> However, this had not been done.<sup>112</sup>

In 1990, the Government of the Russian Soviet Republic adopted a program that stated:

“the concentration of toxic substances in the town’s air exceed[s] the acceptable norms many times” and that the morbidity rate of Cherepovets residents was higher than average . . . [T]he steel plant was required to reduce its toxic emissions to safe levels by 1998 . . . The steel plant was also ordered to finance the construction of 20,000 square metres of residential property every year for the resettlement of people [who were] living within its sanitary security zone.”<sup>113</sup>

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105. DEP’T EXECUTION JUDGMENTS, *supra* note 100, at para. 9.

106. See, e.g., Lukpan Akhmediarov, *Karachaganak’s Sanitary Protection Zone Must Be Expanded*, URALSK WKLY. (Apr. 6, 2006), <http://www.crudeaccountability.org/en/index.php?mact=News,cntnt01,print,0&cntnt01articleid=12&cntnt01showtemplate=false&cntnt01returnid=69> (noting the Prosecutor of the Western Kazakhstan Oblast challenged the reduction in the radius of the sanitary zone, excluding the village of Berezovka and therefore any need to provide resettlement).

107. *Id.*

108. *Fadeyeva v. Russia*, 2005-IV Eur. T. H.R. 257, at 262-65.

109. *Id.* at 262-63.

110. *Id.* at 263.

111. *Id.*

112. *Id.*

113. *Id.*

Two years later, in 1992, the local authorities reduced the size of the zone to 1,000 meters, which of course had the effect of reducing the number of families that would have to be resettled.<sup>114</sup> In 1996, the Government of the Russian Federation adopted a program to reduce emissions and to resettle people. The second paragraph of the program's directive stated:

"The concentration of certain polluting substances in the town's residential areas is *twenty to fifty times higher than the maximum permissible limits (MPLs)*. . . . The biggest 'contributor' to atmospheric pollution is Severstal PLC, which is responsible for 96% of all emissions. The highest level of air pollution is registered in the residential districts immediately adjacent to Severstal's industrial site. . . . The situation is aggravated by an almost complete overlap of industrial and residential areas of the city, in the absence of their separation by sanitary security zones."<sup>115</sup>

"The [D]ecree further stated that 'the environmental situation in the city ha[s] resulted in a continuing deterioration in public health.'"<sup>116</sup>

The applicant, Mrs. Fadeyeva, made various attempts to be resettled outside the sanitary zone. In 1995, she brought a lawsuit in the town court seeking resettlement. She alleged that the environmental situation in the zone was dangerous for health and life. In April 1996, the court examined the situation and did not make an order to resettle the applicant, but it stated that the local authorities must place her on a "priority waiting list" to obtain new housing.<sup>117</sup> Despite a favorable appeals court ruling, nothing was done. In February 1997, "the bailiff discontinued the enforcement proceedings on the ground that there was no 'priority waiting list' for new housing for residents of the sanitary security zone."<sup>118</sup>

In 1999, the applicant brought a new lawsuit in the town court against the municipality seeking execution of the judgment of April 1996 and asking to be provided with a flat or the funds to buy one. "The applicant claimed . . . that systematic toxic emissions and noise from Severstal PLC's facilities violated her basic right to respect for her private life and home, [which was] guaranteed by the Russian Constitution and the European Convention."<sup>119</sup> The town court

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114. This was done by adoption of Municipal Decree No. 30. *Id.* at 263.

115. *Id.* at 263-64 (emphasis added).

116. *Id.* at 264.

117. *Id.* at 265-66.

118. *Id.* at 266.

119. *Id.*

dismissed this action on the basis that no “priority waiting list” and no alternative housing existed. This was upheld later by the regional court.<sup>120</sup>

Finally, Ms. Fadeyeva filed an application to the ECHR in 1999. After the Court transmitted a copy of the application to the Russian government, the municipality went to court locally in 2002 and argued that it lacked the authority to establish a zone in the first place.<sup>121</sup> The local court agreed, canceling the 1,000-meter zone.<sup>122</sup> Therefore, by the time the case reached the ECHR for decision, there was no longer any defined zone at all. The government argued that this meant the applicants no longer had any legal case. The Court ignored this maneuver, pointing out that the zone still existed at the relevant times giving rise to the original application.<sup>123</sup>

The Court found that the State was in violation of Article 8.<sup>124</sup> To get to that conclusion, it first said that not all adverse effects on the environment nor all adverse effects a person may suffer will necessarily serve to bring a case within the ambit of Article 8. Rather, the adverse effects of environmental pollution “must attain a certain minimum level if they are to fall within the scope of Article 8.”<sup>125</sup> Furthermore, the adverse effects must be more than the “environmental hazards inherent to life in every modern city.”<sup>126</sup> Some “level of severity” must be attained.<sup>127</sup> Ms. Fadeyeva was unable to provide any proof that her illness was caused by pollution from the steel plant.<sup>128</sup> Nonetheless, the Court received evidence that the ambient levels of several pollutants exceeded the MPLs,<sup>129</sup> and that an expert had concluded that levels of formaldehyde and carbon disulphide would lead to excess amounts of cancer and other ill effects in residents of the area, as compared to areas without such elevated pollution levels.<sup>130</sup> The Court said that it was “conceivable” that the applicant did not suffer any special and extraordinary damage,<sup>131</sup> but the “very strong combination of indirect evidence and presumptions makes it possible to conclude that the applicant’s health deteriorated as a result of her prolonged exposure to the industrial emissions . . .”<sup>132</sup> Even if this were not true, “there can be no doubt that [the pollution]

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120. *Id.* at 266-67.

121. *Id.* at 261, 264, 288-89.

122. *Id.* at 264.

123. *Id.* at 288-89.

124. *Id.* at 293.

125. *Id.* at 277 (citing *López Ostra* and *Hatton*).

126. *Id.*

127. *Id.*

128. *Id.* at 279.

129. *Id.* at 280-81.

130. *Id.* at 280-81. The expert, Dr. Mark Chernaik, happens to be a former student of one of the authors of this article.

131. *Id.* at 281.

132. *Id.*

adversely affected her quality of life at home.”<sup>133</sup> Consequently, the Court accepted “that the actual detriment to the applicant’s health and well-being reached a level sufficient to bring it within the scope of Article 8 of the Convention.”<sup>134</sup>

Significantly, the Court reiterated the positive-duty doctrine of *Guerra*. It pointed out that the steel plant “was not owned, controlled, or operated by the State,”<sup>135</sup> as had been the case in *Guerra*.

At the same time, the Court points out that the State’s responsibility in environmental cases may arise from a failure to regulate private industry (see *Hatton and Others* . . .). Accordingly, the applicant’s complaints fall to be analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicant’s rights under Article 8 § 1 of the Convention (see *Powell and Rayner v. the United Kingdom* . . . and *Guerra and Others v. Italy* . . .). In these circumstances, the Court’s first task is to assess whether the State could reasonably be expected to act so as to prevent or put an end to the alleged infringement of the applicant’s rights.<sup>136</sup>

Since the problems were “long-standing and well known” and “the municipal authorities were aware of the continuing environmental problems,”<sup>137</sup> the authorities were “in a position to evaluate the pollution hazards and to take adequate measures to prevent or reduce them.”<sup>138</sup> That was sufficient to “raise an issue of the State’s positive obligation under Article 8 of the Convention.”<sup>139</sup> Finally, the Court concluded that, despite any margin of appreciation that must be allowed to a State, here there had not been offered any “effective solution.”<sup>140</sup> Therefore, the State “has failed to strike a fair balance between the interests of the community and the applicant’s effective enjoyment of her right to respect for her home and her private life. There has accordingly been a violation of Article 8 . . . .”<sup>141</sup>

Ms. Fadeyeva asked the Court to order the Russian government to offer her new housing or, in the alternative, 30,000 Euros to enable her to purchase housing outside the sanitary protection zone.<sup>142</sup> A concurring opinion would have

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133. *Id.*

134. *Id.*

135. *Id.* at 282.

136. *Id.*

137. *Id.*

138. *Id.* at 283.

139. *Id.*

140. *Id.* at 292-93.

141. *Id.* at 293.

142. *Id.* at 294.

pushed for a broader solution, expressing concern about the whole sanitary protection zone concept as well as the concept of resettlement:

In the present case . . . the resettlement of those living near the plant may be regarded as only one of many possible solutions, and, in my view, not the best one: had the authorities been stricter and more consistent in applying domestic environmental regulations, the problem would have been resolved without any need to resettle the population and with a positive impact on the environmental situation in general.<sup>143</sup>

However, the Court chose not to dictate what measures the government should take in response to the judgment. It said merely that “the Court has established the Government’s obligation to take appropriate measures to remedy the applicant’s individual situation.”<sup>144</sup> The Court did award 6,000 Euros in non-pecuniary damage for “much inconvenience, mental distress and even a degree of physical suffering.”<sup>145</sup> It also awarded 10,308 Euros in payments for the time that Ms. Fadeyeva’s Russian and British lawyers spent on the case.<sup>146</sup>

A year after the *Fadeyeva* case, the Court considered similar claims from several applicants living in the same apartment complex area and within the same “sanitary security zone” near the Severstal plant in cases collected under the name *Ledyayeva v. Russia*.<sup>147</sup> The lawyers who filed the *Fadeyeva* case had filed these other cases at the same time. After examining the evidence and arguments of both parties, the Court said:

[T]he Court does not see any reason to depart from its findings in the *Fadeyeva* judgment. . . . [T]he Court concludes that the actual detriment to the applicants’ health and well-being reached a level sufficient to bring it within the scope of Article 8 of the Convention.<sup>148</sup>

After finding a violation of Article 8, the Court turned to the issue of whether the authorities had “struck a fair balance between the interests of the applicants and those of the community as a whole.”<sup>149</sup> The Court recalled its reaction in the earlier *Fadeyeva* case:

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143. *Id.* at 298-99 (Kovler, J., concurring).

144. *Id.* at 294 (Kovler, J., concurring).

145. *Id.* at 293.

146. *See id.* at 296.

147. *Ledyayeva v. Russia*, App. Nos. 53157/99, 53247/99, 53695/00, 56850/00, Eur. Ct. H.R. (Oct. 26, 2006), <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search *Ledyayeva v. Russia* under Case Title).

148. *Id.* at para. 100. In *Ledyayeva*, the applicants did not present evidence of actual health damage as a result of the factory’s pollution and the Court did not require any. *Id.* at paras. 37, 100.

149. *Id.* at para. 101.



[In *Fadeyeva*,] [t]he Court accepted that, given the complexity and the scale of the environmental problem around the Severstal steel-plant, this problem could not be resolved in a short period of time. However, it did not mean that the authorities might remain passive.<sup>150</sup>

The Court concludes that, despite the wide margin of appreciation left to the respondent State, the authorities failed to take appropriate measures in order to protect the applicants' right to respect for their homes and private lives against serious environmental nuisances. In particular, the authorities have neither resettled the applicants outside the dangerous zone, nor have they provided for a compensation for those seeking the resettlement. Furthermore, it appears that the authorities failed to develop and implement an efficient public policy which would induce the steel-plant to reduce its emissions to the safe levels within a reasonable time. There has accordingly been a violation of Article 8 of the Convention.<sup>151</sup>

The decisions in *Fadeyeva* and *Ledyayeva* were based in large part on proof that maximum air contaminant levels were exceeded. But the Court buttressed its rulings finding Article 8 violations by citing various facts and testimony indicating that excessive levels of the pollutants in question would likely cause harm to humans.<sup>152</sup>

Turning to the question of justification under Section 2 of Article 8 ("fair balance"), one scholar has argued that *Fadeyeva* demonstrates that breach of domestic law is, in itself, sufficient to deprive the State of any fair balance arguments.<sup>153</sup> Indeed, the court in *Fadeyeva* said, "[d]irect interference by the State with the exercise of Article 8 rights will not be compatible with paragraph 2 unless it is 'in accordance with the law'. The breach of domestic law in these cases would necessarily lead to a finding of a violation of the Convention."<sup>154</sup> It is doubtless too soon, however, to determine whether mere breach of domestic law along with some harm will be enough on which to ground a complaint under the Convention.

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150. *Id.* at para. 104.

151. *Id.* at para. 110.

152. *See, e.g.,* *Fadeyeva v. Russia*, 2005-IV Eur. Ct. H.R. 257 at 280-81 ("very strong combination of indirect evidence and presumptions"; levels 10 times the MCLs; affidavit by Dr. Mark Chernaik; findings of local courts that resettlement was necessary).

153. "States cannot expect to persuade the European Court that the needs of the community can best be met in such cases by not enforcing the law." Alan Boyle, *Human Rights or Environmental Rights? A Reassessment*, 18 *FORDHAM ENVTL L. REV.* 471, 489 (2007).

154. *Fadeyeva*, 2005-IV Eur. Ct. H.R. at 283.

*f. Is Anyone Paying Attention? Dubetska v. Ukraine (2011)*

In a 2011 case, *Dubetska v. Ukraine*, the problem of industrial pollution near people's houses arose again, this time in the context of breaches of domestic law by a government and additional evidence showing a serious problem as a result.<sup>155</sup> The applicants were Mrs. Ganna Pavlivna Dubetska and ten others, together making up two families. Their two houses were located in Vilshyna hamlet, Lviv Region, Ukraine, in the Chervonograd coal-mining basin.<sup>156</sup> In 1960, the State had put the Velykomostivska coal mine No. 8 into operation. A spoil heap of the mine was placed 100 meters from the applicants' family homes. In 1979, the State had also opened the Chervonogradska coal processing factory in the vicinity of the hamlet. During its operation, the factory piled up a new sixty-meter spoil heap located 430 meters from the Dubetska-Nayda family house and 420 meters from the Gavrylyuk-Vakiv family house.<sup>157</sup>

As explained by the Court:

According to a number of studies by governmental and non-governmental entities, the operation of the factory and the mine has had adverse environmental effects. . . . [T]he mine's and the factory's spoil heaps caused continuous infiltration of ground water, resulting in flooding . . . According to an assessment commissioned by the State Committee for Geology and Mineral Resource Utilization, . . . the factory was a major contributor to pollution of the ground water . . . The authors of the assessment contended, in particular, that:

Rocks from the spoil heaps contain a variety of toxic heavy metals

. . .

[C]oal-mining . . . in the region for over forty years has been negatively affecting the environment . . . The general area of soil subsidence is about 70 square kilometres. . . .

Extremely high pollution levels . . . were found in the hamlet of Vilshyna, not far from the coal-processing factory and mine no. 8 spoil heaps, in the wells of Mr T. and Mr Dubetsky. We can testify that even the appearance of this water does not give grounds to

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155. *Dubetska v. Ukraine*, App. No. 30499/03, Eur. Ct. H.R. (Feb. 10, 2011), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search *Dubetska v. Ukraine* under Case Title).

156. *Id.* at paras. 1, 6-9. The interests of applicants were represented for several years in national courts by Yaryna Ostapyk, a lawyer of the public interest environmental law firm Environment-People-Law.

157. *Id.* at paras. 10, 12.

consider it fit for any use. People from this community should be supplied with drinking-quality water or resettled ....<sup>158</sup>

The applicants alleged that their houses were damaged “as a result of soil subsidence caused by mining activities and presented an acknowledgement of this signed by the mine’s director” in January 1999.<sup>159</sup> “[T]he mine promised to pay for the repair of their houses but never did so.”<sup>160</sup> The applicants also alleged that they were “continuing to suffer from a lack of drinkable water.”<sup>161</sup> They contended that the hamlet had no access to a drinking water supply line until 2009. “Using the local well and stream water for washing and cooking purposes caused itching and intestinal infections.”<sup>162</sup>

Some of the applicants made allegations that they developed chronic diseases “associated with the factory operation, especially with air pollution.”<sup>163</sup> “They presented medical certificates which stated that [they] were suffering from chronic bronchitis and emphysema,” or had been diagnosed with carcinoma.<sup>164</sup> They also alleged that environmental factors created by mining affected communication between family members, spouses, and children and thus affected family life in violation of Article 8.<sup>165</sup> “The applicants complained that the State authorities had failed to protect their home, private, and family life from excessive pollution generated by two State-owned industrial facilities.”<sup>166</sup> They further alleged a violation of Article 8 of the Convention on the ground that the mine and factory are State-owned, and the State had failed to fulfill “its positive obligation to regulate hazardous industrial activity.”<sup>167</sup>

Considering a wide variety of evidence, including photographic evidence, the Court held that there had been a breach of Article 8 of the Convention.<sup>168</sup> The State’s argument that it had engaged in a fair balance was rejected. The Court said that “the Government’s approach to tackling pollution in the present case has . . . been marked by numerous delays and inconsistent enforcement.”<sup>169</sup> The Court awarded compensation of non-pecuniary damages in full. The Dubetska-Nayda family claimed 32,000 Euros and the Gavrylyuk-Vakiv family claimed 33,000 Euros as compensation for both the applicants’ physical suffering that resulted from living in an unsafe environment as well as their psychological distress that

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158. *Id.* at paras. 13-15.

159. *Id.* para. 24.

160. *Id.*

161. *Id.* at para. 25.

162. *Id.*

163. *Id.* at para. 28.

164. *Id.*

165. *Id.* at para. 29.

166. *Id.* at para. 73.

167. *Id.* at para. 88.

168. *Id.* at paras. 109-24, 146-56.

169. *Id.* at para. 151.

resulted from complications in familial, interpersonal communication, and “frustration with making prolonged unsuccessful efforts to obtain redress from the public authorities.”<sup>170</sup>

As to pecuniary damage, applicants claimed 28,000 Euros total—constituting the market value of two comparable houses (one for each of the two applicant’s families) in the neighboring area that was not affected by pollution. They argued that “their houses had lost market value and could not be sold.”<sup>171</sup>

The Court declined to award the applicants any pecuniary damages; it held that the allegation that “their houses have lost market value” should have been made and examined not under Article 8 of the Convention but under Article 1 of Protocol no. 1, which protects property rights. There was therefore no causal link between the violation found (Article 8) and the alleged loss of market value.<sup>172</sup>

## 2. *Procedural Rights in Article 8*

One of the most interesting developments in recent years has been the Court’s importing of procedural principles into its Article 8 jurisprudence. The 1998 case of *Guerra v. Italy* introduced the concept that failure to carry out the State’s positive duty with regard to providing information that the public needs could constitute a violation of Article 8. That concept of procedural duties inherent in Article 8 has since been developed in several cases, starting with a right to information and later expanding to include rights to public participation and access to justice. The right to information has been developed largely in the context of disasters, but has expanded beyond.

### a. *Duty to Provide Information: Guerra v. Italy (1998)*

In 1976, a dense vapor cloud containing tetra-chloro-dibenzo-para-dioxin (TCDD, commonly referred to simply as “dioxin”) was released from a reactor at a chemical plant in Seveso, Italy. The dioxin contaminated a wide area; 600 people were evacuated from their homes, and more than “2,000 were treated for dioxin poisoning.”<sup>173</sup> In 1982, the European Council issued the so-called “Seveso Directive,” requiring member States of the European Union to adopt laws and policies to protect citizens against such events and provide some level of information to them.<sup>174</sup> Although the purpose of the Directive was to obtain

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170. *Id.* at para. 163.

171. *Id.* at para. 158.

172. *Id.* at paras. 160-61.

173. *Chemical Accidents (Seveso II) - Prevention, Preparedness and Response*, EUR. COMM’N, <http://ec.europa.eu/environment/seveso/index.htm> (last updated Mar. 6, 2012).

174. *Seveso I*, *supra* note 57. After further disasters, such as the disastrous 1984 leak of methyl isocyanate at a chemical plant in Bhopal, India, which caused more than 2,500 deaths, and a spill contaminating the Rhine River in 1986, the Seveso directive was amended twice—in 1987 and 1988. *Chemical Accidents*

information and to mandate that local authorities develop plans to inform and protect the public, the actual information collected by authorities from industrial establishments was to be kept secret from the public.<sup>175</sup>

Against this background, a governmental cover-up of information of even greater magnitude occurred in connection with the 1986 nuclear disaster at the Chernobyl nuclear plant in Ukraine. The government of the Soviet Union, despite knowing that an explosion had occurred at Chernobyl on April 26, 1986, and that radioactive particles were being released into the atmosphere at a significant rate, withheld this information from the public for several days. It encouraged a scheduled May Day parade to go forward five days later in Kyiv, the capital city, despite the elevated levels of radiation being hidden from Ukraine's citizens.<sup>176</sup> Adults and children (including family members of the authors) were showered with radioactive particles, but still they did not know. When Ukrainian citizens learned what had happened, they were outraged. The event was responsible for creating an environmental movement that played a role in the collapse of the Soviet Union.<sup>177</sup> It led to an adoption of a provision in the Ukrainian Constitution that makes information a fundamental right and makes withholding of information a crime.<sup>178</sup> On the Tenth Anniversary of the Chernobyl disaster, April 26, 1996, the Parliamentary Assembly of the Council of Europe adopted Resolution 1087, which not only referred to the risks associated with the production and use of nuclear energy in the civil sector but asserted that "public access to clear and full information . . . must be viewed as a basic human right."<sup>179</sup> It can be said that the concept that the right to private and family life in Article 8 of the European Convention includes a right to environmental information may be traced to these events. In fact, in *Guerra v. Italy* the ECHR made a special point of quoting from Resolution 1087 and terming the resolution as "[o]f particular relevance . . . in the present case."<sup>180</sup>

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(*Seveso II*) - Prevention, Preparedness and Response, *supra* note 173.

175. *Seveso I*, *supra* note 57, at art. 13.

176. See Will Englund, *Chernobyl a Milestone on the Road to Ukrainian Independence*, WASH. POST (Apr. 24, 2011), [http://www.washingtonpost.com/world/chernobyl-a-milestone-on-the-road-to-ukrainian-independence/2011/04/22/AFRghNdE\\_story.html](http://www.washingtonpost.com/world/chernobyl-a-milestone-on-the-road-to-ukrainian-independence/2011/04/22/AFRghNdE_story.html). The niece of one of the authors participated in that parade as a child. See Maggie Keenan, *Reflections on Three Mile Island and Chernobyl*, <http://www.elaw.org/book/export/html/5704> (last visited Jan. 28, 2012).

177. See Englund, *supra* note 176.

178. Конституція України [Constitution] Dec. 1, 1991, art. 50 (Ukr.), available at <http://www.president.gov.ua/en/content/constitution.html>; see Svitlana Kravchenko, *Is Access to Environmental Information a Fundamental Human Right?*, 11 OR. R. INT'L L. 227, 239-40 (2009).

179. Eur. Parl. Ass., *On the Consequences of the Chernobyl Disaster*, 16th Sess. Doc. No. 7538 (1996), available at <http://assembly.coe.int/main.asp?link=http://assembly.coe.int/Documents/WorkingDocs/doc96/EDOC7538.htm>. Later, in *Öneryıldiz v. Turkey*, the Grand Chamber went further, noting that such a human right to information had previously been found by the Court to be part of the right of private and family life under Article 8 of the European Convention, citing the decision in *Guerra*. *Öneryıldiz v. Turkey*, 2004-XII Eur. Ct. H.R. 79.

180. *Guerra v. Italy*, 1998-I Eur. Ct. H.R. 210, 221.

One might have expected the most relevant part of the Convention to be Article 10, section 1, which talks of the “freedom . . . to receive and impart information and ideas without interference by public authority.”<sup>181</sup> But that freedom, the Court said in *Guerra*, “cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion.”<sup>182</sup> That was not the end of the matter, however. The Court went on to hold that failure to provide to the citizens of the area “essential information that would have enabled them to assess the risks they and their families might run if they continued to live at Manfredonia” resulted in the State not meeting its obligation to secure the “right to respect for their private and family life.”<sup>183</sup>

The Court’s holding that the apparently substantive rights in Article 8 included an implicit procedural right to information was a significant, expansionist reading of Article 8. Yet the Court provided no analysis as to why this was so. It simply said that Article 8 did so. In taking this step, the Court opened the door to the future recognition of other procedural rights (such as public participation and conceivably access to justice) as part of Article 8. *Guerra* was the first step in what has become an ever-broadening interpretation of Article 8 to support procedural rights. Other cases were to follow.

*b. Duties of EIA and Access to Justice: Taşkin v. Turkey (2004)*

The Court returned to the issue of a right to information being implicit in Article 8 in *Taşkin v. Turkey*.<sup>184</sup> It was one of a long-running series of cases involving cyanide heap-leach gold mining. Residents near a mine operated by Eurogold argued that the cyanide posed a significant risk to flora, fauna, underground water sources, and human health.<sup>185</sup> The Court sidestepped the question whether the mine created a substantive violation of Article 8 on the ground that the permit for the mine had been annulled in other litigation by Turkey’s Supreme Administrative Court.<sup>186</sup> Despite various court rulings, the Government of Turkey proceeded to issue permits and approvals,<sup>187</sup> leading to the case brought before the ECHR.

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181. European Convention on Human Rights, *supra* note 6, at art. 10(1).

182. *Guerra*, 1998-I Eur. Ct. H.R. at 226. Since the time of *Guerra*, the nations of Europe have imposed widespread duties on their governments to make positive disclosures of information—for example, in the Kiev Protocol on Pollutant Release and Transfer Registers. *Kiev Protocol on Pollutant Release and Transfer Registers*, UNECE, <http://www.unece.org/env/pp/prtr.htm> (last visited Mar. 19, 2012).

183. *Guerra*, 1998-I Eur. Ct. H.R. at 244.

184. *Taşkin v. Turkey*, 2004-X Eur. Ct. H.R. 179.

185. *Id.* at 189.

186. *Id.* at 206.

187. *Id.* at 192-98.

The Court found that Article 8's right to respect for private and family life requires that a decision-making process be "fair" and afford "due respect" to the interests safeguarded by Article 8, even though "Article 8 contains no explicit procedural requirements."<sup>188</sup> The Court then put content into the concept of fairness and due respect by requiring that, before making an environmental policy decision, "the decision-making process must firstly involve appropriate investigations and studies" so that the government can "predict and evaluate in advance the effects of those activities which might damage the environment and infringe individual's rights."<sup>189</sup> It sounds as if the process of environmental impact assessment ("EIA"), which is normally used to evaluate the effects of potential activities in advance, is a necessary prerequisite for any decision-making to comply with Article 8.

Nor can an EIA be done in secret. The Court went further and, citing *Guerra v. Italy*, required that the public have "access to the conclusions of such studies and to information which would enable members of the public to assess the danger to which they are exposed"; this importance "is beyond question."<sup>190</sup>

Finally, the Court made access to justice mandatory. Individuals concerned "must also be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process," citing *Hatton*.<sup>191</sup>

These are remarkably expansive interpretations of Article 8's rather simply stated guarantee of the right to private and family life. Two years later, as we will see next, the Court continued its new discovery of procedural rights in Article 8.

c. *Duties of EIA and to Suspend Activity: Giacomelli v. Italy (2006)*

Having discovered a duty to investigate potential environmental impacts and a duty to provide for access to justice in Article 8, the ECHR next insisted on observance of national laws requiring a suspension of activities in the face of negative impacts. In *Giacomelli v. Italy*, a homeowner complained of pollution from a waste storage and treatment plant about thirty meters from her home.<sup>192</sup> The regional authorities had granted permission to operate the plant and increase the quantity of waste processed there without conducting a required EIA to ensure the plant's compliance with Italy's environmental laws.<sup>193</sup> Eventually, when the plant operator applied for relicensing five years later, an EIA was conducted (seven years after the plant began operation).<sup>194</sup> Even though the EIA

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188. *Id.* at 206.

189. *Id.* at 206-07.

190. *Id.*

191. *Id.*; *Hatton v. United Kingdom*, 2003-VIII Eur. Ct. H.R. 191.

192. *Giacomelli v. Italy*, 2006-XII Eur. Ct. H.R. 345.

193. *Id.*

194. *Id.*

indicated that the plant was in violation of two different Italian environmental laws, however, the authorities did not suspend operation of the plant as required by law and by rulings of the Italian courts in the matter.<sup>195</sup> The ECHR held that the State's conduct violated Article 8 because the administrative authorities deprived the homeowner of her procedural rights by failing to complete an EIA in the first instance and violated the principle of the rule of law by failing to suspend the plant's operation when the EIA was eventually completed and negative consequences were shown.<sup>196</sup>

The expansion of Article 8 in both *Taşkin* and *Giacomelli* to encompass a duty to complete an EIA is a remarkable development. It may have limited effect in the states of the European Union, where EIAs have become relatively routine. However, it could have more bite in Eastern Europe. For example, in 2011 Ukraine adopted a new Law on Urban Building Activity, which eliminates public participation in EIA procedures for most projects.<sup>197</sup> One might speculate about whether a challenge to that repeal of EIA requirements could successfully be brought in the national courts of Ukraine, based on *Taşkin* and *Giacomelli* and eventually in the ECHR.

*d. Duty to Use the Precautionary Principle in Providing Information:  
Tătar v. Romania (2009)*

In another case of alleged procedural shortcomings by the State, the Court explicitly used the precautionary principle for the first time.<sup>198</sup> *Tătar v. Romania* concerned the Baia Mara gold mine.<sup>199</sup> In 2000, a dam holding back cyanide-laden water collapsed, leading to widespread pollution of places in Romania, Hungary, and Serbia-Montenegro.<sup>200</sup> A man and his son complained that elevated levels of cyanide fumes had aggravated the son's asthma. Regarding this complaint, the Court said that "no causal link" had been proved "between

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195. *Id.*

196. *Id.* at 365-67.

197. Закон України про регулювання містобудівної діяльності, [The Law of Ukraine on Regulation of Urban Development], 3395-VI art. 21 (May 19, 2011) (Ukr.), available at <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=3038-17>.

198. The Court refused to use the precautionary principle in *Balmer-Schafroth v. Switzerland*, where it denied relief to applicants objecting to a nuclear power plant operating nearby. The Court said that to show a violation of Article 8 it was necessary to demonstrate "serious but also specific and, above all, imminent" personal danger. This drew the fire of eight dissenting judges. See dissenting opinion of Judge Pettiti. *Balmer-Schafroth v. Switzerland*, 1997-IV 43 Eur. Ct. H.R. 1346, 1361. It refused again in *Asselbourg v. Luxembourg*, 1999-VI Eur. Ct. H.R. 399.

199. *Tătar v. Romania*, App. No. 67021/01, Eur. Ct. H.R. para. 69 (Jan. 27, 2009), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search *Tătar v. Romania* under Case Title).

Starting in 2007, some of the hearings of the European Court of Human Rights are available by webcast. In this case, the hearing is available at <http://www.echr.coe.int/ECHR/EN/Header/Press/Multimedia/Webcasts/+of+public+hearings/>.

200. *Id.* at para. 111.



sufficient exposure to certain doses of sodium cyanide and aggravation of asthma.”<sup>201</sup> Therefore it made no award of pecuniary damages.<sup>202</sup>

The Court went on, however, to assess whether Romania had a duty to warn the public of potential adverse effects of the cyanide leaching process and other problems, whether it had complied with that duty, and whether the public had adequate information that would allow it to participate in decision-making concerning the proposal. It noted that “le principe de précaution” (the precautionary principle) recommends that States not delay taking preventive action simply because of scientific uncertainty.<sup>203</sup> The Court held that Romania should have addressed in advance the potential risk of the mine on the environment and the health of the population. However, the Court made no award of compensation. With regard to moral (non-pecuniary) damage, it simply refused to make an award, without any explanation whatsoever.<sup>204</sup>

### C. Article 2—Right to Life

While most of the jurisprudence of the ECHR has involved Article 8, in some instances the Court has decided to invoke Article 2, which guarantees a right to life.

#### 1. Side-stepping the Issue: *Guerra* (1998) and *LCB* (1999)

In *Guerra v. Italy*, the Court toyed with Article 2, but ultimately (over the objection of two judges) chose to rely only on Article 8.<sup>205</sup> In a concurring opinion in *Guerra*, however, Judge Walsh wrote that while “the Court in its judgment has briefly mentioned Article 2, but has not ruled on it, I am of the opinion that this provision has also been violated.”<sup>206</sup> Moreover, Judge Jambrek wrote in his concurring opinion in *Guerra* that protection of health and physical integrity is as closely associated with the “right to life” as with the “respect for private and family life.” He also wrote:

If information is withheld by a government about circumstances which foreseeably, and on substantial grounds, present a real risk of danger to health and physical integrity, then such a situation may also be protected

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201. “La Cour constate donc que les requérants n’ont pas réussi à prouver l’existence d’un lien de causalité suffisamment établi entre l’exposition à certaines doses de cyanure de sodium et l’aggravation de l’asthme.” *Id.* at para. 106.

202. *Id.* at para. 131.

203. *Id.* at para. 109.

204. *Id.* at paras. 107, 132.

205. See discussion *supra* in text at notes 57-73.

206. *Guerra v. Italy*, 1998-1 Eur. Ct. H.R. 210, 232 (Walsh, J., concurring).

by Article 2 of the Convention: “No one shall be deprived of his life intentionally.”

It may therefore be time for the Court’s case law on Article 2 (the right to life) to start evolving, to develop the respective implied rights, articulate situations of real and serious risk to life, or different aspects of the right to life.<sup>207</sup>

That time came soon thereafter. In a case decided in 1999, the Court refused to find a violation of the right to life in Article 2 as a result of a member of the Royal Air Force being exposed to radiation during open-air nuclear testing.<sup>208</sup> The Court based its decision on a finding that the government of the United Kingdom had done all that it could to avoid a risk to life. In cases decided in 2004 and 2008, however, the Court found that it could no longer sidestep the use of Article 2, at least in dramatic situations where actual loss of life had occurred.

## *2. Actual Loss of Life: Öneriyildiz v. Turkey (2004)*

The first occasion for recognition of Article 2’s right to life in an environmental context came in the case *Öneriyildiz v. Turkey*.<sup>209</sup> The applicant lived with twelve close relatives in the slum quarter Kazım Karabekir, a district of Istanbul. “Since the early 1970s, a household-refuse tip had been in operation” in that slum area.<sup>210</sup> Situated on a slope, the refuse site “spread out over a surface area of approximately 35 hectares and . . . was used as a rubbish tip” by several districts “under the authority and responsibility of the city council and . . . the ministerial authorities. When the rubbish tip started being used, the area was uninhabited and the closest built-up area was approximately 3.5 km away.”<sup>211</sup> However, later dwellings “were built without any authorisation in the area surrounding the rubbish tip, which eventually developed into the slums of Ümraniye.”<sup>212</sup>

According to an experts’ report dated May 7, 1991, “the rubbish tip in question did not conform to the technical requirements” set forth in the applicable regulations and presented a danger and “a major health risk for the inhabitants of the valley, particularly those living in the slum areas.”<sup>213</sup> The Report emphasized that:

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207. *Id.* at 234 (Jambrek, J., concurring).

208. *LCB v. United Kingdom*, App. No. 23413/94 Eur. Ct. H.R. para. 41 (June 9, 1998).

209. *Öneriyildiz v Turkey*, 2004-XII Eur. Ct. H.R. 79.

210. *Id.* at 89.

211. *Id.*

212. *Id.*

213. *Id.* at 91.

In any waste-collection site gases such as methane, carbon dioxide and hydrogen sulphide form. These substances must be collected and . . . burnt under supervision. However, the tip in question is not equipped with such a system. If methane is mixed with air in a particular proportion, it can explode. This installation contains no means of preventing an explosion of the methane produced as a result of the decomposition [of the waste].<sup>214</sup>

“The report was brought to the attention of the four councils,” and later the governor was “asked to brief the Ministry of Health and the Prime Minister’s Environment Office.”<sup>215</sup> The Environment Office made a recommendation “urging the Istanbul Governor’s Office, the city council and Ümraniye District Council to remedy the problems identified in the present case.”<sup>216</sup> While different governmental agencies discussed the problem back and forth, Ümraniye District Council informed the mayor of Istanbul that starting May 15, 1993, the dumping of waste would no longer be authorized.<sup>217</sup>

On April 28, 1993, “a methane explosion occurred at the site. Following a landslide caused by mounting pressure, the refuse erupted from the mountain of waste and engulfed some ten slum dwellings situated below it, including the one belonging to the applicant. Thirty-nine people died in the accident.”<sup>218</sup> “The applicant complained that the death of nine of his close relatives in the accident . . . had constituted a violation of Article 2 of the [European] Convention;”<sup>219</sup> that Article provides as follows:

Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.<sup>220</sup>

The Court recognized that the protection of the right to life “could be relied on in connection with the operation of the waste-collection sites” and held a positive obligation was binding on “States to take appropriate steps to safeguard the lives of those within their jurisdiction, for the purposes of Article 2.”<sup>221</sup> Therefore the Court held “unanimously “that there ha[d] been a violation of Article 2 of the Convention in its substantive aspect, on account of the lack of

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214. *Id.*

215. *Id.*

216. *Id.* at 92.

217. *Id.*

218. *Id.* at 92-93.

219. *Id.* at 108.

220. European Convention, *supra* note 18, at art. 2.

221. *Öneryıldız v Turkey*, 2004-XII Eur. Ct. H.R. at 109.

appropriate steps to prevent the accidental death of nine of the applicant's close relatives."<sup>222</sup>

The Court also continued its efforts to embed an information right in provisions of the Convention other than Article 10. Referring back to the Resolution adopted by the Council of Europe's Parliamentary Assembly in the wake of the Chernobyl disaster, the Court said:

Where such dangerous activities are concerned, public access to clear and full information is viewed as a basic human right; for example, the above-mentioned Resolution 1087 (1996) makes clear that this right must not be taken to be limited to the risks associated with the use of nuclear energy in the civil sector.<sup>223</sup>

*Öneryildiz* found a new locus for the "basic human right" to clear and full information. In addition to the previous recognition of the right as part of Article 8, the Court now said that a right to information should be considered an element of Article 2, which guarantees the right to life:

[T]his right, which has already been recognised under Article 8 (see *Guerra and Others*, cited above, p.228, § 60), may also, in principle, be relied on for the protection of the right to life, particularly as this interpretation is supported by current developments in European standards.<sup>224</sup>

The Court concluded that the applicant's right to information had been ignored, and thus Article 2 had been violated.<sup>225</sup>

### 3. *More Loss of Life: Budayeva v. Russia (2008)*

The Court returned to the invocation of Article 2 in *Budayeva v. Russia*.<sup>226</sup> Although that case did not involve environmental dangers, it did show that the Court was serious about insisting that governments have a duty not to leave citizens exposed to serious harm. Ms. Khalimat Budayeva and the other applicants involved in the case lived in the town of Tyrnauz, in Russia, next to Mount Elbrus. The region is prone to mudslides—they have been recorded every

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222. *Id.* at 145-46.

223. *Id.* at 108.

224. *Id.* at 115 (referring to the Court's previous citation to the Parliamentary Assembly's Resolution No. 1087, cited earlier in the case in ¶ 62).

225. *Id.* at 121-22.

226. *Budayeva v. Russia*, Apps. No. 15339/02, 21166/02, 20058/02, 11673/02 & 15343/02, Eur. Ct. H.R. (Mar. 20, 2008), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search *Budayeva v. Russia* under Case Title).

year since 1937.<sup>227</sup> The applicants alleged that in July 2000 the Russian authorities had failed to warn the local population about the likelihood of a large-scale, imminent mudslide that eventually devastated Tyrnauz and had not implemented evacuation and emergency relief policies. In July 2000, a flow of mud and debris hit the town of Tyrnauz and flooded part of the residential area.<sup>228</sup> Because there was no advance warning, the applicants only just managed to escape.<sup>229</sup> After the mudslide happened, an alarm was raised over loudspeakers, but the applicants claimed that there were no rescue forces or any other emergency relief after the disaster.<sup>230</sup> The next morning the mud level fell; certain residents, among them Khalimat Budayeva and her family, returned to their homes because there were no signs of emergency relief or order of evacuation from their government. However, a second, more powerful mudslide hit the town at 1 p.m., later that day. Ms. Budayeva and her eldest son managed to escape. Her younger son was rescued, but was seriously injured. Her husband, Vladimir Budayev, was killed when the block of flats in which he and his family lived collapsed. Eight people were officially reported dead, although the applicants alleged that nineteen people were missing.<sup>231</sup> All the applicants claimed that their homes were destroyed and that their living conditions and health had deteriorated because of the disaster.<sup>232</sup>

Relying on Articles 2 (right to life) and 8 (right to respect for private and family life), the applicants alleged that, as a result of the Russian authorities' failure to mitigate the consequences of the mudslides of July 2000, the authorities put the applicants' lives at risk and were responsible for the death of Mr. Budayev and the destruction of all the applicants' homes. They also complained under Article 2 that the authorities failed to carry out a judicial enquiry into the disaster. The Court found a violation of Article 2 and decided that it was therefore not necessary to examine Article 8.<sup>233</sup>

#### 4. *Is Article 2 Relevant?*

The *Öneryildiz* and *Budayeva* cases could be seen as restricted to their facts—people were allowed to live in dangerous areas despite clear knowledge possessed by the government that such dangers existed and actual deaths occurred. Will the Court be willing to use Article 2 in a situation of great risk where no life has yet been lost? *Guerra* suggests that it may not do so if Article 8 can be pressed into service.

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227. *Id.* at paras. 7, 14.

228. *Id.* at paras. 3, 25-26.

229. *Id.* at para. 55.

230. *Id.* at para. 28.

231. *Id.* at paras. 33, 41, 44.

232. *Id.* at paras. 52, 62, 70, 88.

233. *Id.* at paras. 3, 142, 201.

Situations may arise, however, in which “private and family life” are not impacted, yet high risk to life exists. It seems logical to these authors that Article 2 should be available in such cases.

## II. EMBEDDING ENVIRONMENTAL RIGHTS DECISIONS IN NATIONAL LAW AND COURT PRACTICE

The cases discussed in this article reveal several things. First, the Court is unwilling to order specific actions that would mitigate damage to the environment. Instead, it satisfies itself with small awards of compensation or even no compensation at all, but just a statement that the European Convention has been violated. This reliance on the good faith of officials, the great solicitude for national sovereignty, or a combination of both verges on naiveté. But it seems unlikely that this will change. As a result, to see any real impact of the Court’s decisions, one must look to another enforcer: national courts.

It is striking that several national courts have, at least initially, refrained from granting remedies under provisions of their national constitutions that are almost identical to Article 8, Section 2 of the European Convention.<sup>234</sup> The result is that citizens can achieve their relief only in the ECHR. As a consequence, the Court has a backlog of thousands of cases.<sup>235</sup> As another consequence, the doctrines enunciated by the Court are not being integrated into the rule of law of the countries that are members of the Council of Europe. On the other hand, the legal systems of some countries have thoroughly embraced the European Convention and the interpretations of the Convention made by the ECHR in its case decisions, as shown below.

### A. *Applicability of the Convention in Domestic Law*

In some countries, the Convention is directly applicable. That is, those countries’ national courts apply the European Convention in the same way as they apply their own national constitution and laws.<sup>236</sup> In the United Kingdom, for example, the Human Rights Act 1998 gives the Convention direct effect in domestic law.<sup>237</sup> In Ukraine, the Convention’s direct effect is stated in the

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234. See, e.g., *Fadeyeva v. Russia*, 2005-IV Eur. Ct. H.R. 257, 284; *López Ostra v. Spain*, 303 Eur. Ct. H.R. 41, 56.

235. The Council of Europe has announced plans to streamline procedures at the European Court of Human Rights to help deal with a backlog of 120,000 cases. See *Mammoth Backlog Prompts European Rights Court Reforms*, BBC NEWS (Feb. 19, 2010), <http://news.bbc.co.uk/2/mobile/europe/8525524.stm>.

236. A survey of the variety of statuses of the European Convention in domestic legal systems of Europe is provided in Georg Ress, *The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order*, 40 TEX. INT’L L.J. 359 (2005).

237. Human Rights Act, 1998, c. 42, § 4 (Eng.), available at <http://www.legislation.gov.uk/ukpga/1998/42/contents>.

national Constitution.<sup>238</sup> By itself, this would simply provide another source of law for national courts to use. What is more interesting is this question: what relevance does the jurisprudence of the ECHR have in national courts? This we shall discuss next.

### B. Use of ECHR Precedents

Do the judgments issued by the ECHR, which is located in Strasbourg, have any impact as precedents back in the country where the dispute arose or, indeed, in other countries that are members of the Council of Europe? Some countries use the jurisprudence of the ECHR as legally binding precedent; others simply show respect and deference to it.<sup>239</sup>

In most legal systems of Western Europe, decisions of the ECHR not only constitute legal obligations for the country concerned, but are also at least persuasive authority for other members of the Council of Europe. As a consequence, the jurisprudence of the ECHR should be central to the question whether environmental harms have a human rights dimension in Western European countries.

As an example, the Constitutional Court of Spain has been receptive to both the European Convention and the decisions of the ECHR. This receptivity may manifest itself simply as the Constitutional Court viewing the European Convention and the ECHR decisions as supportive, rather than determinative, of a legal result that it is inclined to reach. For example, in the 2004 decision in the case of *Manuel Jiménez de Parga y Cabrera*, the First Chamber of the Constitutional Court rejected a case brought by a pub owner who had been fined for noise pollution.<sup>240</sup> The pub owner questioned the right of the Mayor of the City of Gijón to impose the fine under a municipal law. The Court replied that the municipal law was justified by, among other things, Spain's law on atmospheric pollution (which the Court said could include noise), the right to personal privacy and family life enshrined in Article 18.1 of the Constitution of Spain, and Article 8 of the European Convention on Human Rights.<sup>241</sup>

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238. "International treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine." КОНСТИТУЦІЯ УКРАЇНИ [CONSTITUTION] June 28, 1996, art. 9 (Ukr.), available at <http://www.rada.gov.ua/const/conengl.htm>.

239. An interesting, recent article attempts to assess the degree to which decisions of the European Court of Human Rights have an impact on domestic legal and policy decisions. Laurence R. Helfer & Erik Voeten, *Do European Court of Human Rights Judgments Promote Legal and Policy Change?* (Working Paper, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1850526](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1850526). A handbook published by the Directorate General of Human Rights of the Council of Europe in 2001 stated without equivocation that "judges must assess the Convention complaint before them by applying the principles which are found in the jurisprudence of the European Court of Human Rights . . ." KILKELLY, *supra* note 16, at 5. The lack of equivocation in that statement may oversimplify the reality in some legal systems.

240. S.T.S., Feb. 23, 2004 (S.T.C. No. 16/2004) pt. I, sec. 2(b) (Spain) (on file with authors).

241. *Id.* at pt. II sec. 3.

Furthermore, the Court cited *López Ostra* and *Guerra* in support of its decision upholding the municipal law.<sup>242</sup>

Such views have also penetrated the domestic jurisprudence of Spain widely. For example, in a 2010 case, the Superior Court of Justice of the Murcia Region said:

Thus, in S.92/01 of February 21, we said that “the fundamental right to personal and family privacy and the inviolability of the home according to the judgments cited by the plaintiffs, including the European Court of Human Rights, presupposes respect for a wide range of guarantees and powers, which includes barring all types of invasion at home, not just those involving direct physical penetration, but also can be indirectly by mechanical, electronic or similar, producing noise and even through the emission of odors which disturb the privacy of the people in that room that is his home, which should be exempt and immune to invasions or attacks other external persons or authorities (STC 22/1984, of 17-2 (RTC 1984 \ 22)).<sup>243</sup>

A similar approach is taken in Russia. A resolution (Постановление, *postanovleniia*) issued by the Supreme Court of the Russian Federation in October 2003 states:

The Russian Federation, as a Member-State of the Convention on Protection of Human Rights and Basic Freedoms recognises the jurisdiction of the European Court on Human Rights as mandatory with respect to interpretation and application of the Convention and Protocols thereof in the event of an assumed breach by the Russian Federation of provisions of these treaty acts when the assumed breach has taken place after their entry into force in respect to the Russian Federation. . . . [Therefore] the application by courts of the said Convention should take into account the practice of the European Court on Human Rights to avoid any violation of the Convention on Human Rights and Basic Freedoms.<sup>244</sup>

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242. *Id.*

243. T.S.J. Oct. 25, 2010 (R.J.C.A. 898/10, ¶ Segundo) (Spain), available at <http://www.aranzadi.es/index.php/informacion-juridica/jurisprudencia/contencioso-administrativo/sentencia-del-tribunal-superior-de-justicia-region-de-murcia-de-25-octubre-2010> (Google translation, modified by author).

244. Resolution “On application by courts of general jurisdiction of the commonly recognized principles and norms of the international law and the international treaties of the Russian Federation,” *Rasporiazheniia Bюллетень № 12 sec. 10* [Resolution Adopted by the Plenum of the Supreme Court of the Russian Federation No. 5] Oct. 10, 2003, available at <http://www.supcourt.ru/catalog.php?c1=English&c2=Documents&c3=&id=6801> (English). We have quoted the English translation that is presented on the website of the Russian Supreme Court. The original resolution in Russian is, “О применении судами общей юрисдикции общепризнанных принципов и норм международного права и международных



. . . The courts within their scope of competence should act so as to ensure the implementation of obligations of the State stemming from the participation of the Russian Federation in the Convention. . . .<sup>245</sup>

Furthermore, a December 2003 resolution of the Plenum of the Supreme Court states explicitly that courts should consider not only decisions of the Constitutional Court of Russia and summary resolutions of the Plenum of the Supreme Court but also decisions of the ECHR when provisions of the European Convention are to be applied in a case.<sup>246</sup> A law professor and head of the Civil Law Department of St. Petersburg University, Russia, who has also sat as an *ad hoc* member of the ECHR, points out that this provision is not limited to jurisprudence from ECHR cases involving Russia: "Russian courts should be mindful of the European Court's [judgments] construing the norms of the Convention as applied in the case in question. This is regardless whether the European Court's [judgments] were issued in relation to Russia or other country [sic]."<sup>247</sup> He buttresses this view by citing to decisions of the Constitutional Court of Russia that have, in fact, made reference to ECHR judgments in cases involving Belgium, Greece, and Romania.<sup>248</sup>

Courts throughout the Russian judiciary are citing ECHR decisions as part of the basis for their decisions. As long ago as 1995, the Plenum of the Russian Supreme Court issued a resolution stating that external sources of law (including international treaties) should be used by the courts and that legislation conflicting with those external sources should be ignored.<sup>249</sup> The later resolution of the

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договоров Российской Федерации," *Rasporiazheniia Bюллетень № 12* [Resolution Adopted by the Plenum of the Supreme Court of the Russian Federation No. 5] Oct. 10, 2003, available at [http://www.supcourt.ru/vscourt\\_detale.php?id=1961](http://www.supcourt.ru/vscourt_detale.php?id=1961) (Russian).

245. *Id.* at sec. 11. In addition, the Supreme Court Resolution provides:

If the court in hearing a case has established the circumstances that contributed to the violation of the rights and liberties of citizens guaranteed by the Convention, the court has the right to issue its ruling (or decision) which would draw attention of relevant organisations and officials to the circumstances and facts of violation of the rights and liberties requiring that necessary measures be taken.

*Id.* In the hands of a creative and brave Russian judge, this authority could conceivably lead to injunctive-type actions beyond the mere individual compensation ordered by the ECHR. For a discussion of this provision, see Valeriy A. Musin, *Recent Case Law of the European Court of Human Rights: An Overview*, 35 INT'L J. LEGAL INFO. 262 (2007).

246. *Постановление Пленума Верховного Суда Российской Федерации № 23* [Resolution of the Plenum of the Supreme Court of the Russian Federation No. 23] Res. No. 23, Dec. 19, 2003, para. 4 (Russ.), available at [http://www.supcourt.ru/vscourt\\_detale.php?id=4729](http://www.supcourt.ru/vscourt_detale.php?id=4729).

247. Musin, *supra* note 245, at 263.

248. *Id.* at 264.

249. *Распоряжение О некоторых вопросах применения судами Конституции Российской Федерации при осуществлении правосудия* [Resolution On Certain Questions of the Courts' Application of the Russian Federation Constitution in the Administration of Justice] Res. No. 8, Oct. 31, 1995, available at [http://www.supcourt.ru/vscourt\\_detale.php?id=3863](http://www.supcourt.ru/vscourt_detale.php?id=3863).

Supreme Court, dated December 19, 2003,<sup>250</sup> did increase the attention paid by courts not just to international treaties, but to the decisions of the ECHR interpreting the European Convention. For example, one scholar has looked at a number of lower court decisions in defamation cases in Russia and observed an increasing practice in the lower courts of citing ECHR interpretations of Article 10 of the European Convention.<sup>251</sup>

In Ukraine, Article 9 of the Constitution of Ukraine gives all international treaties ratified by Ukraine the status of national law.<sup>252</sup> Furthermore, countries that ratify the European Convention are obligated to accept the jurisdiction of the ECHR and to abide by its judgments in cases to which the country is a party.<sup>253</sup> For example, the Parliament of Ukraine ratified the European Convention on July 17, 1997,<sup>254</sup> and it thereby accepted the jurisdiction of the ECHR.

The question of the precedential effect of ECHR rulings is also still an open one in Ukraine. In 2006, Ukraine's parliament adopted the Law of Ukraine on the Enforcement of Judgments and the Application of the Case-Law of the European Court of Human Rights, which states, "In cases, courts apply the Convention and [the practice of the European] Court as legal authority."<sup>255</sup> Does this law mean what it says? If it does, is it constitutional in Ukraine? The Ukraine Parliament Commissioner for Human Rights (also known as the human rights ombudsman) has questioned whether this provision of Ukrainian law really obliges Ukrainian courts to follow the decisions of the ECHR as precedents for their own decisions. She wrote in a 2010 report:<sup>256</sup>

Systemic analysis of Ukraine's Constitution, in particular, of its Articles 8, 9, 92, 93 etc., gives grounds to a conclusion that *the Constitution does*

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250. See *supra* note 244.

251. Peter Krug, *Internalizing European Court of Human Rights Interpretations: Russia's Courts of General Jurisdiction and New Directions in Civil Defamation Law*, 32 BROOK. J. INT'L L. 1 (2006).

252. КОНСТИТУЦІЯ УКРАЇНИ [CONSTITUTION] June 28, 1996, art. 9 (Ukr.), available at <http://www.rada.gov.ua/const/conengl.htm>.

253. *The European Human Rights System*, HUMAN RIGHTS EDUC. ASSOC., [http://www.hrea.org/index.php?doc\\_id=365](http://www.hrea.org/index.php?doc_id=365) (last visited Mar. 19, 2012).

254. Закон України Про ратифікацію Конвенції про захист прав людини і основоположних свобод 1950 року, Першого протоколу та протоколів N 2, 4, 7 та 11 до Конвенції» [Law of Ukraine on Ratification of the Convention on Human Rights and Fundamental Freedoms 1950, the First Protocol and Protocols of Nos 2, 4, 7 and 11 to the Convention], Відомості Верховної Ради України [VVR] [Supreme Council of Ukraine] N 40, st. 263, 1997 (Ukr.), available at <http://zakon3.rada.gov.ua/laws/show/475/97-%D0%B2%D1%80>.

255. "Суди застосовують при розгляді справ Конвенцію та практику Суду як джерело права." Про виконання рішень та застосування практики Європейського суду з прав людини [Law of Ukraine on the Enforcement of Judgments and the Application of the Case-Law of the European Court of Human Rights], Відомості Верховної Ради України [VVR] [Supreme Council of Ukraine] N 30, st. 260, Art. 17, Feb. 23, 2006 (Ukr.), available at <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=3477-15>.

256. NINA KARPACHOVA, THE STATE OF OBSERVANCE OF THE EUROPEAN STANDARDS ON HUMAN RIGHTS AND FREEDOMS IN UKRAINE: SPECIAL REPORT OF THE UKRAINIAN PARLIAMENT COMMISSIONER FOR HUMAN RIGHTS (2010).

*not envisage the judicial precedent to be a source of law in Ukraine.* For this reason the role of the judgments of the European Court of Human Rights are sometimes put under question when it [sic] goes about the application of certain provisions of the Convention by Ukraine's courts.<sup>257</sup>

How strong is this argument? In reality, the courts of Ukraine regularly cite to the decisions of the ECHR in their own decisions. They appear to do so, however, primarily when the ECHR decision is in line with the court's own view of Ukrainian national legislation.<sup>258</sup> What if they disagree with the ECHR? Considering the various cases decided under Article 8 cited earlier in this article, might high-level Ukrainian courts reject the view adopted by the ECHR that environmental harm can be an invasion of the right of private and family life? If they were to do so, a person suffering harm from environmental pollution might be unable to obtain a remedy from the Ukrainian courts while still being able to obtain a remedy from the ECHR. What would that do to the doctrine under which complainants are expected first to exhaust national remedies before approaching the ECHR? Such attempts would appear to be in vain. Presumably, the ECHR would have to rule that environmental litigants have no obligation to pursue useless remedies. That, however, would run contrary to the whole purpose of the exhaustion doctrine under the Convention, which is, in part, presumably meant to suffuse the legal systems of nations that are parties to the European Convention with the human rights norms contained therein.

The Ukrainian Commissioner suggests a different manner for incorporating European human rights norms into the practice of Ukrainian courts, namely to educate judges about the European Convention.<sup>259</sup> However, if Ukrainian judges are free to formulate their own interpretations of Article 8, interpretations which may exclude remedy for environmental harm, an education program is hardly a sufficient answer. The European Commissioner for Human Rights appears to have a different approach. In a 2008 report, he recommended that each country should undertake a baseline study that focuses on recurring or structural problems. Among the recommendations for conducting such a study was this: "Evaluate efforts to provide human rights education. Many governments are not giving enough attention and resources to ensure that people know their rights and understand how to claim them."<sup>260</sup> In other words, while the Ukrainian

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257. *Id.* at 47.

258. Conversation with Yalyzaveta Aleksyeyeva, Attorney, Environment-People-Law (Sept. 15, 2011). In neighboring Moldova, the Constitutional Court regularly cites the judgments of the European Court as precedential. Alexei Barbaneagra, *Case-Law (Theoretical and Practical Aspects)*, [http://refugiati.org/attachments/PrecedentJudiciar\\_RDAU\\_en.pdf](http://refugiati.org/attachments/PrecedentJudiciar_RDAU_en.pdf) (last visited Mar. 19, 2012).

259. See *Council of Europe Action Plan for Ukraine*, COUNCIL EUR. (June 25, 2008), <http://wcd.coe.int/ViewDoc.jsp?id=1317485&Site=CM>.

260. Thomas Hammarberg, *Recommendation on Systematic Work for Implementing Human Rights at*

Commissioner is saying that *judges* should be educated on the European Convention, the European Commissioner is saying that the *people* should be educated on how to “claim” their rights under the European Convention. Of course there are two ways of claiming one’s rights: to insist upon them in encounters with government officials and to insist upon them in court cases. But if the Ukrainian courts will refuse to recognize ECHR precedents as a matter of national jurisprudence, educating citizens seems a massive waste of time.

### III. CONCLUSIONS: A CALL FOR STRATEGIC LITIGATION

Might more comprehensive remedies be available in national courts? If so, would it be possible for a litigant in a national court to use an ECHR ruling on a violation of Article 8 to ask a national court to grant a more sweeping remedy than what the ECHR ordered, such as an injunction to clean up the steel plant or to resettle residents? If the Russian Federation ignores ECHR precedents and compensation rulings, what can a complainant do? Does it matter whether the European Convention has direct application within a nation’s legal system? If direct application is possible, will that provide hope for future applicants that they could achieve a domestic remedy after an ECHR ruling?

Although it has been suggested that a way of incorporating the ECHR’s interpretation of human rights into national law is education of judges, the authors believe strategic litigation can accomplish education as well as incorporation more effectively. One way that judges can be educated about the European Convention would be by having lawyers bring cases to the national courts that allege violations of the Convention—including asking the courts to respect the interpretations of the European Convention stated authoritatively by the ECHR. In this regard, strategic litigation might be more successful than training disconnected from specific cases.

