

Environmental cases in the ECHR. A focus in noise pollution

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Abstract

Noise is one of the main problems in modern societies. Moreover, noise as well as other forms environmental degradation (fumes, waste...) can, not only be an «inconvenience», but also a «polluted environment» can harm people's health and life. Human Rights litigation can be an effective way to fight environmental degradation and protect people's life. The European Court of Human Rights has decided some «environmental cases», being the world's leading court in this area. The rich case-law of the ECHR starts to build criteria that are useful, in the face of the violation of certain rights by environmental factors, in advancing the acceptance of a «right to live in a healthy environment». This article aims at analyzing those criteria, as a tool for researchers and lawyers that work in the linkage between Human Rights and the Environment at the ECHR.

Key words: Noise, Environment, Human Rights, Environmental Law, European Court of Human Rights, Life, Privacy, Property.

Resumen

El ruido es uno de los mayores problemas en las sociedades modernas. Además, tanto el ruido como otras formas de degradación ambiental (humos, basuras,...) pueden, no sólo ser un «inconveniente», sino también dañar la salud y la vida de las personas. La litigación en Derechos Humanos puede ser un medio efectivo para proteger el Medio Ambiente y la vida de las personas. El Tribunal Europeo de Derechos Humanos ha decidido algunos «casos ambientales», siendo el tribunal internacional pionero en este área. La rica jurisprudencia del Tribunal Europeo de Derechos Humanos ha comenzado a establecer criterios que son útiles, apreciando una violación de ciertos derechos por factores ambientales, para avanzar la aceptación del derecho «a vivir en un Medio Ambiente adecuado». Este artículo intenta analizar dichos criterios, intentando ser una herramienta para investigadores y abogados que trabajen en la unión entre Derechos Humanos y Medio ambiente en el TEDH.

Palabras clave: Ruido, Medio Ambiente, Derechos Humanos, Derecho Ambiental, Tribunal Europeo de Derechos Humanos, Vida, Intimidad, Propiedad.

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Introduction

The topic of this paper is the analysis of the European Court of Human Rights (ECHR) case law on environmental issues, with a special focus on noise pollution cases. The ECHR case law on environmental issues is not explicit, and various criteria affect the judgments, therefore is important to analyze, understand and try to systematize those decisions. Noise deserves a special attention because it is a great problem in modern societies. In the EU about 40% of the population is exposed to road traffic noise with an equivalent sound pressure level exceeding 55 dBA daytime, and 20% are exposed to levels exceeding 65 dBA.¹ Therefore noise is a great environmental problem in modern societies as it adversely affects the quality of the living human environment (just as general pollution). The ECHR's case law on noise is just starting.

The main sources used in this paper are decisions of the ECHR, while secondary sources are used to find further explanation and analysis. The paper (1) first provides some background regarding noise and its impacts; (2) secondly, focuses in the case law of the ECHR, analyzing different articles that have been, or that could be successfully used in the future in environmental cases. In each article, after analyzing case law on environmental issues, the paper focuses on the noise issue. The analyzed articles are those that protect «substantive rights» (articles 2, 3, 8 and 1 of Protocol no. 1). Other articles such as: the rights to a fair trial (art. 6); to receive and impart information and ideas (art. 10); and to an effective remedy (art. 13), are outside the scope of this paper.

¹ Andrés Alonso, Fernando Luis de. *El tratamiento administrativo de la contaminación acústica*. Publicaciones del Valedor do Pobo, A coruña, 2003. p. 13.

² I. Mínguez Enríquez de Salamanca. «Efectos del ruido en el sistema cardiovascular». En *Jornadas Internationaes sobre contaminación acústica en las ciudades*, 2002. p. 13.

³ Andrés Alonso, Fernando Luis de. *El tratamiento administrativo de la contaminación acústica*. Publicaciones del Valedor do Pobo, A coruña, 2003. p. 13.

⁴ AAVV. *Guidelines for Community Noise*. World Health Organization, Geneva, 1999. p. vii.

⁵ De Esteban Alonso, Alfonso. «Noise pollution and health». *Observatorio medioambiental*. 2003, 6. p. 74. ANDRÉS ALONSO, Fernando Luis de. *op. cit.* pp. 15-16. AAVV. *Guidelines for Community Noise*. World Health Organization, Geneva, 1999. pp. vii-viii and pp. 3-21.

1. Noise as a problem: background

1.1. Definitions

In the ground of physics *noise* means «a sonorous phenomenon formed by irregular vibrations in frequency (period, cycle or hertz) and amplitude per second, with different timbres, depending on the material that originates them». ² Physically, noise is no more than a sound, it is in sociology where «noise» becomes a term associated to disturbances of greater or smaller intensity caused by non-wished sounds. ³

Environmental noise is defined as noise emitted from all sources except noise at the industrial workplace. Main sources are road, rail and air traffic; industries; construction and public work; and the neighborhood. ⁴ Therefore we can refer to *noise pollution* as the environmental noise that adversely affects the human environment.

1.2. How to measure noise?

To measure a sound, three magnitudes must be considered: ⁵

— *Frequency content of the sound*: ⁶ Number of vibrations per second of the air in which the sound is propagating. It is measured in Hertz (Hz). Our listening systems are not equally sensitive to all frequencies. To compensate, various types of frequency weighting have been used. Among the weightings known, ⁷ the A is most commonly used, as it is intended to approximate the frequency response of our hearing system.

⁶ The highest component of high frequencies the noise has, the more annoying it will be for the human ear. GARCÍA SANZ, Benjamín and JAVIER GARRIDO, Francisco. *La contaminación acústica en nuestras ciudades*. Fundación La Caixa, Barcelona, 2003. p. 54. Available at http://obrasocial.lacaixa.es/estudiossociales/vol12_es.html

⁷ A for levels under 55 phons, B for levels between 55 and 80 phons, C for levels of more than 80 phons, D used for aircraft noise. ANDRÉS ALONSO, Fernando Luis de. *op. cit.* p. 16.

- *Sound pressure levels*: Related with the amount of energy used to generate it. It is measured in decibels (dB).
- *The duration*: *Leq* measures the average of different noise levels during a certain amount of time.

With these three magnitudes, the noise is measured dBA (decibels using the A weighting) obtained in a certain amount of time, expressed by *Leq*. For instance *LAeq*, 8 hours 55 dBA, would mean that there was an average amount of 55 decibels, during a measuring time of 8 hours, using the A weighting.

The regulations use various *indicators*, depending on their purpose and regulation area.⁸ *LAeq* should be used to measure continuing sounds such as road traffic noise. For measures of individual events (aircraft noise...) *LAm* is used.⁹

Any person with some training may be able to use a sound pressure meter. According to international standards: type 0 sound pressure meters are the most precise, but only used in laboratory; type 1 have a precision of +/- 1 dB; type 2 have a precision of +/- 2 dB. Generally using a type 2 (costs around 200€) is enough, although a type 1 (costs around 3000€, and requires more specialized training) should be used for long-time measurements.¹⁰

1.3. What levels of noise are excessive?

The WHO provided Guideline Values on its report *Guidelines for Community Noise*.¹¹ «These are values for the onset on

⁸ «From the scientific point of view the best criterion for choosing a noise indicator is its ability to predict an effect. Therefore, for different health end points, different indicators could be chosen. Long-term effects such as cardiovascular disorders are more correlated with indicators summarizing the acoustic situation over a long time period, such as yearly average of night noise level outside at the façade (*L_{night,outside1}*), while instantaneous effects such as sleep disturbance are better with the maximum level per event (*L_{max}*), such as passage of a lorry, aeroplane or train.

From a practical point of view, indicators should be easy to explain to the public so that they can be understood intuitively. Indicators should be consistent with existing practices in the legislation to enable quick and easy application and enforcement. *L_{night, outside}*, adopted by the European Noise Directive, is an indicator of choice for both scientific and practical use.

Among currently used indicators for regulatory purposes, *LAeq* (A-weighted equivalent sound pressure level) and *L_{max}* are useful to predict short-term or instantaneous health effects». AAVV. *Night Noise Guidelines*

health effects from noise exposure». ¹² These levels represent the scientific consensus in the area, and could be used as reference by legislators and courts.

1.4. Which can be the consequences for health of environmental noise?

Noise can affect the health in two main ways:¹³ (1) Direct effects from exposure to extremely high noise (>140 dBA or long exposures to noises above 85 dBA), such as loss of audition, or damages in the internal ear; (2) non-auditory, psychological, physiological and behavioral effects due to long exposures to lower intensity environmental noise (sleep disturbance, cardiovascular effects, mental health effects).¹⁴ Environmental noise negatively affects the people's health and welfare, although in a different way to each of them.¹⁵ Due to this subjectivity scientific uncertainty exists on the precise effects of noise for health.

2. Human rights, environment and noise in the European Court of Human Rights

The scope of this section is the European Convention on Human Rights and Fundamental Freedoms (the Convention) adopted in 1950. As of September 29th 2008 the Convention

for Europe. World Health Organization, European Centre for Environment and Health, Bonn, 2007. p. 17.

⁹ *Id.* p. 5.

¹⁰ RUIZ PADILLO, Diego Pablo. «Comentario sobre los distintos tipos de sonómetros, sus especificaciones técnicas y su uso». In: <http://www.ruidos.org/Documentos/sonometros.html> (Accessed: September 25 2008).

¹¹ AAVV. *Guidelines for Community Noise*. World Health Organization, Geneva, 1999. p. 38. Table in p. 47. p. xvi.

¹² *Id.* p. 38. Table in p. 47.

¹³ Isabel López Vario, «Medio ambiente y salud. Impacto del ruido», *Papeles del psicólogo*, February de 1997, www.papelesdelpsicologo.es/imp_ruido.asp?id=753 (accessed 9/18/2008).

¹⁴ AAVV. *Guidelines for Community Noise*. World Health Organization, Geneva, 1999. p. 38. Table in p. 47.

¹⁵ ANDRÉS ALONSO, Fernando Luis de. *El tratamiento administrativo de la contaminación acústica*. Publicaciones del Valedor do Pobo, A coruña, 2003. p. 17.

has been ratified by 47 European nations.¹⁶ The Convention establishes the European Court of Human Rights (ECHR).¹⁷ Claims can be brought by individuals¹⁸ and by other contracting states.¹⁹ Court decisions are binding for all parties.²⁰

«There is no formal doctrine of precedent as such within the Convention system».²¹ However, the Court generally bases its decisions on previous jurisprudence,²² because «it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases».²³ In addition, this case law will be also used in some of the countries party to the Convention, such as Spain.²⁴

The convention was not designed for general environmental protection,²⁵ but the Court has derived «environmental rights» from traditional fundamental rights since the 1990s.²⁶

¹⁶ Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Kingdom. *Simplified chart of signatures and ratifications. Treaties coming from the subject matter. Human rights (Convention and Protocols only)*. Council of Europe. <http://conventions.coe.int/Treaty/Commun/ListeTableauCourt.asp?MA=3&CM=16&CL=ENG> (Last visit 9/29/2008).

¹⁷ Art. 19 ECHR. «To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as «the Court». It shall function on a permanent basis».

¹⁸ Art. 34 ECHR. «The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right».

¹⁹ Art. 33 ECHR. «Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party».

²⁰ Art. 46 ECHR. «1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution».

Therefore, the crucial element will be to determine that «in the circumstances of a case, environmental pollution has adversely affected one of the rights safeguarded»²⁷ by the Convention.

The Court has already identified in its case law that environmental factors can affect: the right to life (Art 2), the right to private and family life as well as the home (Art 8), right to a fair trial and access to a court (Art 6), the right to receive and impart information and ideas (Art 10), the right to an effective remedy (Art 13), and the right to the peaceful enjoyment of one's possessions (Art 1 of Protocol No 1).²⁸

In the following subsections I will analyze the ECHR case law in environmental cases, with a special focus on noise cases, under arts. 2, 3, 8 and art. 1 of protocol no. 1.

²¹ Philip Leach, *Taking a Case to the European Court of Human Rights*, Second Edition (New York: Oxford University Press, 2005). p. 165.

²² As can be noticed by simply looking at the list of cases cited by the court, included by E.H.R.R. in the beginning of any case. See for example *Hirst v. United Kingdom (No. 2)*, 42 E.H.R.R. 41 (ECHR, 2006).

²³ *Beard v. United Kingdom*, 33 E.H.R.R. 19 (ECHR, 2001), para. 81.

²⁴ Art 10.2 Spanish Constitution 1978: «The norms relative to basic rights and liberties which are recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements on those matters ratified by Spain».

²⁵ «Neither Art.8 nor any of the other Arts of the Convention are specifically designed to provide general protection of the environment as such; to that effect, other international instruments and domestic legislation are more pertinent in dealing with this particular aspect». *Kyrtatos v. Greece*, (2005) 40 E.H.R.R. 16 (ECHR, 2003), para. 52. See also: Loukis G. Loucaides, «Environmental Protection through the Jurisprudence of the European Convention on Human Rights», in *The European Convention on Human Rights*. Collected Essays (Leiden. Boston: Martinus Nijhoff Publishers, 2007). p. 167.

²⁶ Svitlana Kravchenko and John E. Bonine, *Human Rights and the Environment. Cases, Law and Policy* (Durham, North Carolina: Carolina Academic Press, 2008). p. 24.

²⁷ *Kyrtatos v. Greece*, (2005) 40 E.H.R.R. 16 (ECHR, 2003), para. 52.

²⁸ Council of Europe Publishing, *Manual on human rights and the environment. Principles emerging from the case-law of the European Court of Human Rights* (Strasbourg: Council of Europe, 2006). p. 6.

2.1. Art. 2, right to life

Art. 2 – Right to life:

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

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

- a. in defence of any person from unlawful violence;
- b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- c. in action lawfully taken for the purpose of quelling a riot or insurrection.

2.1.1. Concept and application in environmental issues

«Art. 2 of the Convention, which safeguards the right to life, ranks as one of the most fundamental provisions in the Convention, and together with Art. 3 of the Convention enshrines one of the basic values of the democratic societies making up the Council of Europe. It must be interpreted in light of the principle that the provisions of the Convention be applied so as to make its safeguards practical and effective»²⁹

For this article to be applied, a *result* of a death is not necessary.³⁰ The art. 2 comprises both *positive and negative obliga-*

tions.³¹ Art. 2 relates both to *intentional and unintentional* killings.³² Therefore, it can be used when the state has not been diligent in taking the necessary steps to protect the right to life, which is a logical consequence of the positive obligations art. 2 imposes.

The most important *environmental case* regarding the right to life under the Convention is *Öneryıldız v. Turkey*. It has been the first environmental case in which the ECHR found a violation of the right to life.³³

The applicant, who lived in a shanty town on the edge of a rubbish tip, lost nine members of his family in a methane gas explosion which destroyed 11 houses. There were elements of *internal illegality* as the authorities knew the risks that the dwellers were facing. Moreover, the rubbish tip did not conform with national rules.³⁴ In this case the Court not only recognize the non compliance with national law, but also criticizes the legal framework and enforcement procedures.³⁵ As for the *rationale*: the court refers to the *positive obligations* of the state due to the substantive aspect of art. 2:

«The positive obligation to take all appropriate steps to safeguard life for the purposes of Art.2 entails above all a primary duty on the state to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life».³⁶

The Court held that there had been a violation of art. 2.³⁷

²⁹ *Osman v. United Kingdom*, 26 E.H.R.R. 245 (ECHR, 2000), para. 88. Citing: *Mccan and Others v. United Kingdom*, 21 E.H.R.R. 97 (ECHR, 1996), para. 146-147.

³⁰ Philip Leach, *Taking a Case to the European Court of Human Rights*, Second Edition (New York: Oxford University Press, 2005). p. 199.

³¹ «Art. 2 extends to but is not exclusively concerned with intentional killing resulting from the use of force by agents of the State. The first sentence of Art. 2(1) also imposes a positive obligation on Contracting States that the right to life be protected by law. In earlier cases, the Commission considered that this may include an obligation to take appropriate steps to safeguard life». *Osman v. United Kingdom*, 26 E.H.R.R. 245 (ECHR, 2000), para. 99.

³² *Stewart v. United Kingdom*, (1985) 7 E.H.R.R. CD453 (European Commission of Human Rights). Para. 14-15.

See also: Philip Leach, *Taking a Case to the European Court of Human Rights*, Second Edition (New York: Oxford University Press, 2005). p. 183.

³³ Sara C. Aminzadeh, «A Moral Imperative: The Human Rights Implications of Climate Change», *Hastings International and Comparative Law Review* 30 (2007): 231-265. Council of Europe Publishing, *Manual on*

human rights and the environment. Principles emerging from the case-law of the European Court of Human Rights (Strasbourg: Council of Europe, 2006). p. 85.

³⁴ *Öneryıldız v. Turkey*, (2005) 41 E.H.R.R. 20 (ECHR (Grand Chamber), 2004). Para. 98.

³⁵ «[T]he regulatory framework proved defective in that the Ümraniye municipal waste collection site was opened and operated despite not conforming to the relevant technical standards and there was no coherent supervisory system to encourage those responsible to take steps to ensure adequate protection of the public and co-ordination and co-operation between the various administrative authorities so that the risks brought to their attention did not become so serious as to endanger human lives». *Id.* Para 109.

³⁶ *Id.* Para. 89.

³⁷ «[U]nanimously that there has been a violation of Art. 2 of the Convention in its substantive aspect, on account of the lack of appropriate steps to prevent the accidental death of nine of the applicant's close relatives». *Öneryıldız v. Turkey*, (2005) 41 E.H.R.R. 20 (ECHR (Grand Chamber), 2004). Order. 1.

The rest of the environmental cases decided by the ECHR have not been considered to raise issues under art. 2, mainly because there was no death. For instance, in *Guerra and Others v. Italy*, the applicants alleged that the authorities had not taken appropriate action to reduce the risk of pollution by a factory, classified as «high risk», and to prevent the risk of accident. This, they argued, infringed their rights to life and physical integrity under Art. 2 of the Convention. The court decided that «having regard to its conclusion that there has been a violation of Art. 8, the Court finds it unnecessary to consider the case under Art. 2 also».³⁸

Conclusion: Environmental complaints may raise issues under art. 2. However, the court was strict so far, and would only apply art. 2 to very severe consequences, namely: death. The alleged violations of art. 2 will generally raise issues on art. 8 instead.³⁹

2.1.2. Application to noise

There have not been cases where the Court has decided that a violation of art. 2 was committed because environmental noise. As seen in part (1) of this paper, noise can have effects on health. However, those effects are not serious enough (except in nearly hypothetical situations) to cause death. Therefore art. 2 is not likely to be applied in cases regarding environmental noise.

2.2. Art 3, inhuman or degrading treatment

Art. 3.

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

A number of complaints in the ECHR regarding environmental issues invoked art. 3 among those allegedly violated. To the

present, no judgment has recognized a violation of Art 3 due to environmental factors.⁴⁰ Even when the court has recognized violations of other protected rights, such as art 8, it has not recognized a violation of art 3 because the situations were not severe enough.⁴¹

Deprivation of sleep had already been considered by the ECHR as amounting to a violation of human rights. In *Ireland v United Kingdom* the Court held that holding detainees in a room where there was «a continuous and loud hissing noise» constituted a practice of inhuman and degrading treatment.⁴²

The Court remains very restrictive on the application of art 3. The Court will require a minimum level of severity (depending on all circumstances of the case, duration, effects, age and health of the victim...). In most cases the Court has found no violation because the treatment was not sufficiently severe, in those cases «consideration should be given to the right to respect for physical and moral integrity under Art. 8».⁴³ Maybe in the future the Court will be more liberal when applying art. 3, but under current case-law, in cases of environmental factors a claim under art. 8 is more likely to be accepted.

2.3. Art 8, right to privacy and family life

Art. 8

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

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

³⁸ *Guerra and Others v. Italy*, (1998) 26 E.H.R.R. 357 (ECHR, 1998). Para. 62.

³⁹ *Taskin and others v. Turkey*, (2006) 42 E.H.R.R. 50 (ECHR, November 10th 2004). Para. 140.

⁴⁰ This can be checked, until 2005 in Council of Europe Publishing, *Manual on human rights and the environment. Principles emerging from the case-law of the European Court of Human Rights* (Strasbourg: Council of Europe, 2006). pp. 82-86. After 2006 the way to know the main trends of the ECHR decisions are the 2006 and 2007 Annual Reports, available at

<http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Reports/Annual+Reports/> (Accessed 11/9/2008).

⁴¹ «The conditions in which the applicant and her family lived for a number of years were certainly very difficult but did not amount to degrading treatment within the meaning of Art. 3». *Lopez Ostra v. Spain*, (1995) 20 E.H.R.R. 277 (ECHR, 1994). Para. 60.

⁴² *Ireland v United Kingdom* (1978) 2 E.H.R.R. 25.

⁴³ Philip Leach, *Taking a Case to the European Court of Human Rights*, Second Edition (New York: Oxford University Press, 2005). p. 202.

2.3.1. Concept and application in environmental issues

The right to private and family life and one's home is the base for most successful claim regarding environmental issues in the ECHR. Most of the complaints that allege violations of arts 2 and 3 will generally be successful if considered by the Court under art. 8.

An early definition of the right to privacy identified it as a right to solitude,⁴⁴ as Judge Cooley said: «the right to privacy is the right to be let alone». However, modern jurisprudence has determined a wider scope of that right. The ECHR has declared that this right implies respect for the quality of private life as well as the enjoyment of the amenities of one's home.⁴⁵ The doctrine of *positive obligations* is applicable to art. 8.⁴⁶ The Court has interpreted art. 8 to cover environmental factors:

«Breaches of the right to respect for the home are not confined to concrete or physical breaches, such as unauthorised entry into a person's home, but also include those that are not concrete or physical, such as noise, emissions, smells or other forms of interference. A serious breach may result in the breach of a person's right to respect for his home if it prevents him from enjoying the amenities of his home».⁴⁷

The Court's case law has established some criteria to determine whether a violation of art. 8 has existed. First, (2.3.1.1) the facts of the case have to determine that the *private sphere*⁴⁸ has been affected. Second, (2.3.1.2) the Court will examine 2 aspects of the government's action: (2.3.1.2.1) the substantive merits of the government's decision (restrictions of the rights in art. 8 are allowed under some circumstances, the court will

determine if those requisites exist); (2.3.1.2.2) Afterwards, the court will scrutinize the decision-making process to ensure that due weight has been accorded to the interests of the individual.

2.3.1.1. Facts that will determine a violation of the Art 8

The following points are important to determine whether a complaint affects the *private sphere* (raising issues under art. 8):

— *Burden of proof*: The burden of proof used by the ECHR is «proof beyond reasonable doubt».⁴⁹ However, in cases regarding violations of art. 8 by environmental factors the Court has relaxed this burden. In *Ladyeyeva v. Russia* the court established:

«Whereas in many cases the existence of an interference with a Convention right is evident (...), in other cases it is a subject of controversy. The present four applications belong to this second category. There is no doubt that serious industrial pollution negatively affects public health in general. However, it is often impossible to quantify its effects in each individual case, and distinguish them from the influence of other relevant factors, such as age, profession etc. The same concerns possible worsening of the quality of life caused by the industrial pollution. The «quality of life» is a very subjective characteristic which hardly lends itself to a precise definition. Therefore, taking into consideration the evidentiary difficulties involved, the Court has no other choice than to repose thrust primarily, although not exclusively, in the findings of the domestic courts and other competent authorities in establishing factual circumstances of the case. However, the Court cannot rely blindly on the decisions of the domestic authorities, especially when they are obviously inconsistent or contradict each other. In such situation it has to assess the evidence in its entirety».⁵⁰

⁴⁴ Antonio-Enrique Perez Luño, «El derecho a la intimidad en el ámbito de la biomedicina», in *Biotecnología, derecho y dignidad humana* (Granada: Comares, 2003). p. 262.

⁴⁵ *Powell & Rayner v. the United Kingdom*. 12 Eur. Ct. H.R. 355 (ser. A)(1990). Para. 40.

⁴⁶ «Art. 8 not only protects against arbitrary interference by public authorities, but also implies the obligation of public authorities to adopt positive measures to ensure the right. Public authorities must implement those measures in order to protect the rights. Public authorities may have the duty to inform the public about environmental risks». *Guerra and Others v. Italy*, (1998) 26 E.H.R.R. 357 (ECHR, 1998). Para. 60.

⁴⁷ *Hatton v. United Kingdom*, (2003) 37 E.H.R.R. 28 (ECHR, July 8th 2003). Para. 96. *Giacomelli v. Italy*, (2007) 45 EHRR 38 (ECHR, 2 de November de 2006). Para. 76.

⁴⁸ «In the context of cases raising issues linked to environmental degradation or nuisance the Court has tended to interpret the notions of private and family life and home as being closely interconnected, and, for example, in one case it referred to the notion of 'private sphere'». Council of Europe Publishing, *Manual on human rights and the environment. Principles emerging from the case-law of the European Court of Human Rights* (Strasbourg: Council of Europe, 2006). p. 33.

⁴⁹ Philip Leach, *Taking a Case to the European Court of Human Rights*, Second Edition (New York: Oxford University Press, 2005). p. 174.

⁵⁰ *Ladyeyeva v. Russia*, App. Nos. 53157/99, 53247/99, 53695/00 and 56850 (ECHR, 26 de October de 2006). Para. 90.

Finally, even if the «Court did not establish that the applicant's health had deteriorated solely because of her living within the zone. Nevertheless, the Court found that the excessive levels of industrial pollution inevitably made her more vulnerable to various diseases. Moreover, there was no doubt that it had adversely affected the quality of life at her home».⁵¹

To sum up, considering the difficulty of proof of damage in cases involving environmental factors, the Court will examine all the existing evidence freely, considering that difficulty. If the Court finds that the applicants' *quality of life* has been deteriorated, the Court will find a violation, even if specific proof is lacking

— *Place*: «A home will usually be the place, the physically defined area, where private and family life develops».⁵²

— *Environmental factors and minimum level of the adverse effects*: The court has recognized interference with privacy and family life caused by various environmental hazards: Emissions, smells, noise, pollution... In order to fall under art. 8 complaints relating to environmental matters would have to show that: first, there was an actual interference with the applicant's *private sphere*; and, secondly, that a level of severity was attained (depending on all the circumstances of the case: intensity and duration of the nuisance, its physical and mental effects).⁵³ No specific damage to health is required.⁵⁴

The Court has found that art. 8 rights were affected in various situations: Pollution and nuisance caused by industrial plants;⁵⁵ noise generated by aircraft on the Heathrow Airport;⁵⁶ pollution caused by the noise and odours generated by a waste-treatment plant in the vicinity of the applicants home;⁵⁷ a chemical factory which produced fertilizers and other chemicals 1 km away from the applicants home;⁵⁸ disturbance and permanent risk originated by noise and harmful emissions from a waste treatment plant 30 meters away from the applicant's house;⁵⁹ a gold mine that used cyanidation in its process.⁶⁰

The Court did not find a violation of art. 8 when in the case of a homeowner who lived near a protected bird habitat, included in the urban growth area. The Court decided that neither the interference with the conditions of family life caused by the elimination of the bird protected area, nor the increasing disturbances from the neighborhood reached the degree of seriousness for the purposes of art. 8.⁶¹

2.3.1.2. Courts Assessment

«Whether the case is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under paragraph 1 of Article 8 or in terms of an interference by a public authority to be justified in accordance with paragraph 2, the applicable principles are broadly similar. (...) fair balance

⁵¹ *Id.* Para. 91-95. The same facts in: *Fadeyeva v. Russia*, (2007) 45 EHRR 10 (ECHR, 2005 30 de November de 2005).

⁵² *Giacomelli v. Italy*, (2007) 45 EHRR 38 (ECHR, 2 de November de 2006). Para. 76. In the rest of the cases, the applicants also base their complaints in their homes.

⁵³ *Fadeyeva v. Russia*, (2007) 45 EHRR 10 (ECHR, 2005 30 de November de 2005). Para. 69-70.

⁵⁴ «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, without, however, seriously endangering their health». *Lopez Ostra v. Spain*, (1995) 20 E.H.R.R. 277 (ECHR, 1994). Para. 51. *Kyrtatos v. Greece*, (2005) 40 E.H.R.R. 16 (ECHR, 2003), para. 52. No link between the pollution caused by the factory and the applicants' health could be determined in *Fadeyeva*. But the Court determined that «there was no doubt that it had adversely affected the quality of life at her home». *Fadeyeva v. Russia*, (2007) 45 EHRR 10 (ECHR, 2005 30 de November de 2005).

⁵⁵ *Ladyeyeva v. Russia*, App. Nos. 53157/99, 53247/99, 53695/00 and 56850 (ECHR, 26 de October de 2006). Para. 91-95. The same facts in: *Fadeyeva v. Russia*, (2007) 45 EHRR 10 (ECHR, 2005 30 de November de 2005).

⁵⁶ *Powell & Rayner v. the United Kingdom*. 12 Eur. Ct. H.R. 355 (ser. A)(1990). Para. 40.

⁵⁷ *Lopez Ostra v. Spain*, (1995) 20 E.H.R.R. 277 (ECHR, 1994). Para. 54-55.

⁵⁸ *Guerra and Others v. Italy*, (1998) 26 E.H.R.R. 357 (ECHR, 1998). Para. 57.

⁵⁹ *Giacomelli v. Italy*, (2007) 45 EHRR 38 (ECHR, 2 de November de 2006). Para. 68.

⁶⁰ *Taskin and others v. Turkey*, (2006) 42 E.H.R.R. 50 (ECHR, 10 de November de 2004). Para. 103.

⁶¹ *Kyrtatos v. Greece*, (2005) 40 E.H.R.R. 16 (ECHR, 2003). Para. 53-54.

(...) has to be struck between the competing interests of the individual and of the community as a whole; (...) [And] the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention».⁶²

The court, considering those two principles (*fair balance* and *margin of appreciation*), will take a two-step analysis:

«Firstly, the Court may assess the substantive merits of the national authorities' decision to ensure that it is compatible with Art. 8. Secondly, it may scrutinise the decision-making process to ensure that due weight has been accorded to the interests of the individual».⁶³

2.3.1.2.1. Substantive merits of the Government decision (balancing applicants interests and public interest)

National authorities can restrict art. 8 rights. However, they must follow certain requisites when limiting those rights: they should be prescribed by law, be necessary in a democratic society and thus pursue a legitimate aim (such as the protection of health or the economic well-being of the country), they should also be proportionate to the aim pursued. Once established that these measures are prescribed by law and are necessary in a democratic society in pursuing a legitimate aim, it has to be examined whether the measures in question are proportionate to this legitimate aim. For this purpose, the Court weighs the individual interests and the community's interests. In this examination the authorities enjoy a certain *margin of appreciation*. However that *margin of appreciation* is not absolute and does not prevent the court from assessing the proportionality.⁶⁴

«In relation to the substantive aspect, the Court has held on a number of occasions that in cases involving environmental issues the State must be allowed a wide margin of appreciation».⁶⁵ National Authorities have to make the initial assessment

of the «necessity» of the interference.⁶⁶ However, when a national authority, such as the Supreme Administrative Court, has weighed the competing interest, and based its decision in the applicant's effective enjoyment of the right «no other examination of the material aspect of the case with regard to the margin of appreciation generally allowed to the national authorities in this area is necessary».⁶⁷

If the Court finds that the first criteria are fulfilled, and therefore the government decision can be substantively correct, it will analyze the decision making process to determine the scope of the margin of appreciation left to the state (when all the affected people have been informed and heard and the process established by national law has been followed the margin of appreciation will be wider) for balancing the interests of the individual and the community.

For instance, in *Giacomelli* there was a national interest, because the plant processed 23% of the waste in Italy.⁶⁸ In this case the Court, after finding this *legitimate aim*, proceeded analyzing that a fair balance between the public interest at stake and the human right in question. For determining the scope of the margin of appreciation the court examined «whether due weight was given to the applicant's interests and whether sufficient procedural safeguards were available to her».⁶⁹

2.3.1.2.2. Procedural safeguards: determining the scope of the margin of appreciation

«The Court must ensure that the interests of the community are balanced against the individual's right to respect for his or her home and private life. (...) [T]he decision-making process leading to measures of interference must be fair and must afford due respect to the interests safeguarded to the individual by Art. 8».⁷⁰ The breach of the internal procedure and the exist-

⁶² *Giacomelli v. Italy*, (2007) 45 EHRR 38 (ECHR, 2 de November de 2006). Para. 78. See also: *Powell & Rayner v. the United Kingdom*. 12 Eur. Ct. H.R. 355 (ser. A)(1990). Para. 41; *Lopez Ostra v. Spain*, (1995) 20 E.H.R.R. 277 (ECHR, 1994). Para. 51.

⁶³ *Taskin and others v. Turkey*, (2006) 42 E.H.R.R. 50 (ECHR, 10 de November de 2004). Para. 115.

⁶⁴ Council of Europe Publishing, *Manual on human rights and the environment. Principles emerging from the case-law of the European Court of Human Rights* (Strasbourg: Council of Europe, 2006), pp. 79-80.

⁶⁵ *Giacomelli v. Italy*, (2007) 45 EHRR 38 (ECHR, 2 de November de 2006). Para. 80. See also: *Hatton v. United Kingdom*, (2003) 37 E.H.R.R. 28

(ECHR, 8 de July de 2003). Para. 100; *Taskin and others v. Turkey*, (2006) 42 E.H.R.R. 50 (ECHR, 10 de November de 2004). Para. 116.

⁶⁶ *Giacomelli v. Italy*, (2007) 45 EHRR 38 (ECHR, 2 de November de 2006). Para. 80.

⁶⁷ *Taskin and others v. Turkey*, (2006) 42 E.H.R.R. 50 (ECHR, 10 de November de 2004). Para. 117.

⁶⁸ *Giacomelli v. Italy*, (2007) 45 EHRR 38 (ECHR, 2 de November de 2006). Para. 50.

⁶⁹ *Id.* Para. 84.

⁷⁰ *Giacomelli v. Italy*, (2007) 45 EHRR 38 (ECHR, 2 de November de 2006). Para. 82.

ence of any domestic irregularity is normally required for an action to succeed under art. 8.⁷¹

This internal irregularity is essential on determining the scope of the margin of appreciation left to the state.⁷² Environmental matters are complex matters in which the court will generally defer to the state's national legislation to ensure that the *fair balance*⁷³ was done. However, if the internal legislation has been violated the court will consider that the procedural safeguards of the applicants were violated⁷⁴ and therefore the state failed in striking a fair balance notwithstanding the margin of appreciation left to the respondent State.⁷⁵ In fact in all the successful environmental cases under art. 8 some degree of internal irregularity existed.

2.3.2. Noise

The general doctrine on environmental issues has also been used in cases that only included environmental noise. While a number of cases have been decided where noise was one of the environmental factors that affected the applicants art. 8 rights, only two main cases have been decided where noise was the only factor in play: *Hatton v. UK* and *Moreno Gómez v. Spain*.

Hatton involved noise from the Heathrow Airport. The applicant complained about excessive noise, starting in 1993, during nighttime that deprived her from sleeping, and finally moved away to avoid the aircraft noise at night. In 1993 the Secre-

tary of State for Transport adopted a new policy for nighttime flights. The levels of noise were between 70 and 89 dBA.⁷⁶

In *Moreno Gómez v. Spain* the applicant lived in the vicinity of bars, pubs and discotheques, allowed by licensed permits by Valencia City Council, since 1974. Noise had been a problem during weekend nights, so the City Council passed a regulation requiring no more than 45 dBA Leq external noise from 10 p.m. to 8 a.m. The City classified the zone as an «acoustically saturated zone», measure that included ban on new bars. However, new licences were granted. The city undertook various sound-level readings, which indicated that the limits were exceeded. An expert report found an hourly average noise of more than 70 dBA between 1 a.m. and 3 a.m.⁷⁷

In *Hatton* the Court found no violation of art. 8. In *Moreno Gómez* the court found violation of art. 8.

Noise cases follow the general principles described in the previous section (2.3.1).

2.3.2.1. Facts that will determine a violation of the Art 8

— *Noise is an environmental factor capable of affecting art 8 rights.* Both cases recognize that noise negatively affects art 8 rights.⁷⁸

— *Burden of proof:* In *Moreno Gómez* the Court decided that there was no need for the applicant to establish the level

⁷¹ Francis McManus, «Noise pollution and human rights», *European Human Rights Law Review* 6 (2005). p. 585. Therefore, if this internal irregularity does not exist, the Court will defer to the State's margin of appreciation. See: *Hatton v. United Kingdom*, (2003) 37 E.H.R.R. 28 (ECHR, 8 de July de 2003).

⁷² *Giacomelli v. Italy*, (2007) 45 EHRR 38 (ECHR, 2 de November de 2006). Para. 84.

⁷³ «The ECHR provides for the limitation of certain rights for the sake of the greater public interest. The European Court of Human Rights has said that when rights are restricted there must be a fair balance between the public interest at stake and the human right in question. The Court is the final arbiter on when this balance has been found. It does however give States a «margin of appreciation» in assessing when the public interest is strong enough to justify restrictions on certain human rights». In: Council of Europe Publishing, *Manual on human rights and the environment. Principles emerging from the case-law of the European Court of Human Rights* (Strasbourg: Council of Europe, 2006). p. 78.

⁷⁴ *Giacomelli v. Italy*, (2007) 45 EHRR 38 (ECHR, 2 de November de 2006). Para. 93. *Taskin and others v. Turkey*, (2006) 42 E.H.R.R. 50 (ECHR, 10 de November de 2004). Para. 125.

⁷⁵ *Giacomelli v. Italy*, (2007) 45 EHRR 38 (ECHR, 2 de November de 2006). Para 97.

⁷⁶ *Hatton v. United Kingdom*, (2003) 37 E.H.R.R. 28 (ECHR, 8 de July de 2003). Para. 27.

⁷⁷ *Moreno Gómez v. Spain*, (2005) 41 E.H.R.R. 40 (ECHR, 11/16/2004). Para. 45.

⁷⁸ «[T]he applicant lives in an area that is indisputably subject to nighttime disturbances; this clearly unsettles the applicant as she goes about her daily life, particularly at weekends». *Moreno Gómez v. Spain*, (2005) 41 E.H.R.R. 40 (ECHR, 11/16/2004). Para. 58. «[W]here an individual is directly and seriously affected by noise or other pollution, an issue may arise under Art. 8». *Hatton v. United Kingdom*, (2003) 37 E.H.R.R. 28 (ECHR, 7/8/2003). Para. 96.

of noise inside her house, because she lived in an area specially designated because of noise causing serious disturbance to residents, and the authorities knew the data due to studies carried out by them. The burden of proof was «reversed».⁷⁹

— *Place*: In both cases, the alleged nuisance was noise affecting the applicant's house during nighttime.⁸⁰

— *Minimum level of severity*: The Court has not taken a uniform criteria. In *Moreno Gómez* the noise beyond the levels permitted by the council's regulation determined the level.⁸¹ In *Hatton*, without citing any specific authority, the Court finds that the applicants are considerably affected by night flights.⁸² No clear standard has been followed by the Court. This is consistent with its jurisprudence in environmental cases where the Court will look at «all the circumstances of the case».⁸³ However, it might be better if the Court used a common standard to determine when art. 8 is affected,⁸⁴ such as the WHO Guidelines, which would be consistent with its doctrine of «autonomous concepts».⁸⁵

⁷⁹ «[T]he domestic courts found that the applicant has failed to establish the noise levels inside her home. The Court considers that it would be unduly formalistic to require such evidence in the instant case, as the City authorities have already designated the area in which the applicant lives an acoustically saturated zone, which (...) means an area in which local residents are exposed to high noise levels which cause them serious disturbance (...). [T]he fact that the maximum permitted noise levels have been exceeded has been confirmed on a number of occasions by council staff (...). Consequently, there appears to be no need to require a person from an acoustically saturated zone such as the one in which the applicant lives to adduce evidence of a fact of which the municipal authority is already officially aware. Thus, in the domestic proceedings, the representative of state council's office did not consider it necessary to require the applicant to adduce such evidence (...) and added that there had been a reversal of the burden of proof in the present case». *Moreno Gómez v. Spain*, (2005) 41 E.H.R.R. 40 (ECHR, 11/16/2004). Para. 59.

⁸⁰ *Id.* Para. 49.

⁸¹ «In view of the volume of the noise—at night and beyond the permitted levels—and the fact that it continued over a number of years, the Court finds that there has been a breach of the rights protected by Art. 8». *Id.* Para. 60. «[I]n *Gomez* the relevant domestic irregularity comprising the flouting of the local byelaw was not simply a factor which was to be taken into account by the Court as a condition precedent to the State's liability; rather, it determined the very quality standards by means of which the court determined whether Art.8 had been infringed». Francis McManus, «Noise pollution and human rights», *European Human Rights Law Review* 6 (2005). p. 585.

2.3.2.2. Court's assessment

In these noise cases, the Court repeats the same doctrine about its assessment in cases «involving State decisions affecting environmental issues»: ⁸⁶ art. 8 rights can be restricted, but the state has to achieve a *fair balance* between the interests of the individual and the community as a whole. The state has a *margin of appreciation* and its scope will be determined analyzing the internal procedure that lead to the action (or inaction) of the state.⁸⁷

In *Moreno Gómez* the court did not go through the steps separately, and simply stated:

Valencia city council adopted rules for protecting the applicant's rights but «it tolerated, and thus contributed to, the repeated flouting of the rules (...). Regulations to protect guaranteed rights serve little purpose if they are not duly enforced (...). The facts show that the applicant suffered a serious infringement of her right to respect for her home as a result of the authorities' failure to take action to deal with the night-time disturbances.

⁸² *Hatton v. United Kingdom*, (2003) 37 E.H.R.R. 28 (ECHR, 7/8/2003). Para. 118.

⁸³ «[D]epending on all the circumstances of the case: intensity and duration of the nuisance, its physical and mental effects». *Fadeyeva v. Russia*, (2007) 45 EHRR 10 (ECHR, 2005 30 de November de 2005). Para. 69-70.

⁸⁴ «If the approach taken by the Court in *Gomez* (where, as we have seen, the court held that Art.8 was infringed by simple dint of the noise in question exceeding domestic law) is followed, this would lead to inconsistency». Francis McManus, «Noise pollution and human rights», *European Human Rights Law Review* 6 (2005). p. 586.

⁸⁵ «A number of terms used in the Convention (...), are autonomous concepts. This means that the classification under national law will be a factor in the Court's determination as to whether the Convention is applicable, but it will not be decisive». Philip Leach, *Taking a Case to the European Court of Human Rights*, Second Edition (New York: Oxford University Press, 2005). p. 165.

⁸⁶ *Hatton v. United Kingdom*, (2003) 37 E.H.R.R. 28 (ECHR, 7/8/2003). Para. 98.

⁸⁷ *Moreno Gómez v. Spain*, (2005) 41 E.H.R.R. 40 (ECHR, 11/16/2004). Para. 55. *Hatton v. United Kingdom*, (2003) 37 E.H.R.R. 28 (ECHR, 7/8/2003). Para. 98. «The Court considers that in a case such as the present, involving State decisions affecting environmental issues, there are two aspects to the inquiry which may be carried out by the Court. First, the Court may assess the substantive merits of the Government's decision, to ensure that it is compatible with Art 8. Secondly, it may scrutinise the decision-making process to ensure that due weight has been accorded to the interests of the individual». *Id.* Para. 99.

In these circumstances, the Court finds that the respondent State has failed to discharge its positive obligation to guarantee the applicant's right to respect for her home and her private life, in breach of Art. 8 of the Convention». ⁸⁸

In *Hatton*, after recognizing that art. 8 rights had been affected the Court continued with its traditional assessment:

«[B]roadly similar principles apply whether a case is analysed in terms of a positive duty on the State or in terms of an interference by a public authority with Art.8 rights to be justified in accordance with para.2 of this provision. The Court is not therefore required to decide whether the present case falls into the one category or the other. The question is whether, in the implementation of the 1993 policy on night flights at Heathrow airport, a fair balance was struck between the competing interests of the individuals affected by the night noise and the community as a whole». ⁸⁹

2.3.2.2.1. Substantive merits of the Government decision (fair balance)

In *Hatton* the Court had to face the question on whether it should apply a wide or narrow margin of appreciation, which had to be done looking at the circumstances of the case. ⁹⁰ The

Court decides that the 1993 night flight scheme was a general measure, and that the applicants private life was not so intruded as in criminal measures, therefore the wide margin of appreciation was applicable. ⁹¹ In *Hatton* the Court found a national interest ⁹² and that the government implemented some measures to protect art. 8 rights, ⁹³ therefore it turned to check the decision making process.

2.3.2.2.2. Procedural safeguards

— *Internal irregularity*: The main fact in *Moreno Gómez* was the lack of enforcement of the rules regarding noise. ⁹⁴

In *Hatton* the Court decided that the margin of appreciation to apply was wide and then turned to scrutinize the decision making process. In the general doctrine about environmental factors, the internal irregularity and the lack of following of the national process determine that the fair balance was not struck. In *Hatton* the Court analyzed that the process contained enough safeguards, ⁹⁵ even after determining that no *internal irregularities* existed (this is used by the Court to distinguish the case from *Lopez Ostra* and *Guerra*). ⁹⁶

⁸⁸ *Moreno Gómez v. Spain*, (2005) 41 E.H.R.R. 40 (ECHR, 11/16/2004). Para. 61-62.

⁸⁹ *Hatton v. United Kingdom*, (2003) 37 E.H.R.R. 28 (ECHR, 7/8/2003). Para. 119.

⁹⁰ «The Court is thus faced with conflicting views as to the margin of appreciation to be applied: on the one hand, the Government claim to a wide margin on the ground that the case concerns matters of general policy, and, on the other hand, the applicants' claim that where the ability to sleep is affected, the margin is narrow because of the 'intimate' nature of the right protected. This conflict of views on the margin of appreciation can be reconciled only by reference to the context of a particular case». *Hatton v. United Kingdom*, (2003) 37 E.H.R.R. 28 (ECHR, 8 de July de 2003). Para. 103.

⁹¹ «The Court notes that the introduction of the 1993 Scheme for night flights was a general measure not specifically addressed to the applicants in this case, although it had obvious consequences for them and other persons in a similar situation. However, the sleep disturbances relied on by the applicants did not intrude into an aspect of private life in a manner comparable to that of the criminal measures considered in the case of *Dudgeon* to call for an especially narrow scope for the State's margin of appreciation. Rather, the normal rule applicable to general policy decisions would seem to be pertinent here» *Id.* Para. 123. This determination of the scope of margin of appreciation is criticized by: Jeremy Hyam, «*Hatton v*

United Kingdom in the Grand Chamber: one step forward, two steps back», *European Human Rights Law Review* 6 (2003): 638.

⁹² «British Airways, whose submissions were supported by the British Air Transport Association («BATA») and the International Air Transport Association («IATA»), submitted that night flights at Heathrow play a vital role in the United Kingdom's transport infrastructure, and contribute significantly to the productivity of the United Kingdom economy and the living standards of United Kingdom citizens. They contended that a ban on, or reduction in, night flights would cause major and disproportionate damage to British Airways' business, and would reduce consumer choice. The loss of night flights would cause significant damage to the United Kingdom economy». *Hatton v. United Kingdom*, (2003) 37 E.H.R.R. 28 (ECHR, 8 de July de 2003). Para. 115.

⁹³ *Id.* Para. 126.

⁹⁴ *Moreno Gómez v. Spain*, (2005) 41 E.H.R.R. 40 (ECHR, 11/16/2004). Para. 61-62.

⁹⁵ «In connection with the procedural element of the Court's review of cases involving environmental issues, the Court is required to consider all the procedural aspects, including the type of policy or decision involved, the extent to which the views of individuals (including the applicants) were taken into account throughout the decision-making procedure, and the procedural safeguards available». *Hatton v. United Kingdom*, (2003) 37 E.H.R.R. 28 (ECHR, 8 de July de 2003). Para. 104.

⁹⁶ *Id.* Para. 120.

In a critical analysis it is difficult to know whether the court analyzed the process as an independent factor, or as part of determining that there had not been any *internal irregularities*. It is difficult to know if the Court would have deferred to the national authorities, whatever the process required by national law would have been.

However, the Court after finding that the wide margin of appreciation was applicable, that there was national interest, there was not internal violation, and procedural safeguards were taken,⁹⁷ decides that there was no violation of art. 8.⁹⁸

2.3.3. Conclusion art 8

The ECHR follows the same principles in the noise cases as in the rest of the environmental cases. The main importance of these cases is, therefore, recognizing that art 8 can also be violated by noise alone.

When assessing the government's action the Court will basically decide the case based in the existence of any *internal irregularity*. The Court analyzes the *internal irregularity* both when analyzing the substantive merits (*Hatton*, no irregularity) and the procedure (*Giacomelli*). So, the Court speaks about the two-step analysis, but it will really defer to the States' margin of appreciation if no *internal irregularity* is found. In future decisions the Court will have to show if the two steps analysis includes a real scrutiny of the alleged human-right violation, or it is just an elegant way of deferring to the State's internal legislation.

2.4. Art. 1 of protocol no. 1

Art. 1, protocol no. 1

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except

in the public interest and subject to the conditions provided for by law and by the general principles of international law.

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

The concept of possessions has been broadly interpreted and is an *autonomous concept*.⁹⁹

«The notion (...) is not limited to ownership of physical goods and is independent from the formal classification in domestic law. Other rights and interests constituting assets can also be regarded as 'possessions' for the purpose of this provision».¹⁰⁰

The scheme of the protection granted by this art. is similar to art 8. Article 1 of protocol no. 1 not only protects from violations by the state, but also requires the state to take *positive measures*¹⁰¹ to protect this right (for instance in the case of dangerous activities).¹⁰² However, the state may restrict this right, by expropriation or otherwise. Those restrictions will have to fulfill some requirements: those measures should be in accordance with the law, the national authorities will have a wide margin of appreciation in deciding what measures to implement in pursuance of the general interest.¹⁰³ However, the measures taken by public authorities must be proportionate and strike a fair balance between the interests involved.¹⁰⁴

An example of a case recognizing a violation of art. 1 of protocol no. 1 by noise is: *Bistrovic v. Croatia*. The applicants were expropriated part of their property by the Croatian authorities to build a motorway. The applicants complained that expropriation of only part of its land decreased the value of the rest (a farmland, deprived of its activity due to the situation of the motorway) and «insupportable living conditions in their house, which was now situated less than 3 metres from

⁹⁷ *Id.* Para. 128.

⁹⁸ «In these circumstances the Court does not find that, in substance, the authorities overstepped their margin of appreciation by failing to strike a fair balance between the right of the individuals affected by those regulations to respect for their private life and home, and the conflicting interests of others and of the community as a whole, nor does it find that there have been fundamental procedural flaws in the preparation of the 1993 regulations on limitations for night flights». *Id.* Para. 129.

⁹⁹ Philip Leach, *Taking a Case to the European Court of Human Rights*, Second Edition (New York: Oxford University Press, 2005). pp. 354-356.

¹⁰⁰ Council of Europe Publishing, *Manual on human rights and the environment. Principles emerging from the case-law of the European Court of Human Rights* (Strasbourg: Council of Europe, 2006). p. 81.

¹⁰¹ *Bistrovic v Croatia*, Application number 25774/05 (ECHR, 5/31/2007). Para. 33.

¹⁰² *Önerildiz v. Turkey*, (2005) 41 E.H.R.R. 20 (ECHR (Grand Chamber), 2004). Para. 134 and 135.

¹⁰³ *Fredin v. Sweden*, (1991) 13 EHRR 784 (ECHR, 2/18/1991). Para. 51.

¹⁰⁴ *Chapman v. United Kingdom*, (2001) 33 EHRR 18 (ECHR, 1/18/2001). Para 120.

the motorway»,¹⁰⁵ due to the increased noise pollution. The Court describes the assessment of the government decision it has to take:

«[T]he Court must determine whether, due to the State's interference or passivity, a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. (...) (The Court) must go beneath appearances and look into the reality of the situation, which requires an overall examination of the various interests in issue; this may call for an analysis not only of the compensation terms (...) but also, as in the instant case, of the conduct of the parties to the proceedings, including the steps taken by the State».¹⁰⁶

The state never addressed the decreased price of the property due to the nuisance caused by the motorway when fixing the compensation for the applicants' expropriated property.¹⁰⁷

«The Court therefore finds that, by failing to establish all the relevant factors for establishing the compensation for the applicants' expropriated property, and by failing to grant indemnity for the decrease in the value of their remaining estate, the national authorities have failed to strike a fair balance between the interests involved and have failed to make efforts to ensure adequate protection of the applicants' property rights in the context of expropriation proceedings».¹⁰⁸

Noise is, therefore, a factor that can determine the State's liability, as it affects the «peaceful enjoyment of (...) possessions». The state will have to take this into account in expropriation procedure.

In addition, it would be logical, due to the doctrine of *positive obligations*, that the state should take measures (noise protection, devices, indemnification...) if noise affects the peaceful enjoyment of one's possessions (for instance reducing the price of them).

Conclusions

First. The environmental factors that violate Convention rights can be produced by both governments and non-governmental actors, due to the *positive obligations* doctrine.

Second. The court will require a minimum severity of the violation. Most of the cases will, because of this requirement, fall within articles 8 and article 1 of protocol no. 1 rather than articles 2 or 3.

Third. If art. 8 has been allegedly violated in the case, the Court will analyze whether the action can be justified. To assess the government action the Court will analyze both the substantive (whether a *fair balance* between the private and the public interest existed) and the procedural aspects (analyzing if sufficient safeguard of the rights of the individual existed). In any of those two steps, if the Court finds an *internal irregularity* it will conclude that the government's action was not justified and a violation existed. Otherwise, if no *internal irregularity* exists, the Court will defer to the State's wide *margin of appreciation*.

Fourth. Applying art. 1 of protocol no 1 the Court will have to consider the environmental factors that could affect the peaceful enjoyment of possessions. If those factors are not considered the Court will find a violation. The damage will generally be loss of value of the property.

Fifth. The Court will make proof easier in environmental cases: (1) It won't require precise proofs from the applicant if the government was aware of the problem (*Moreno Gómez*); (2) and will not require an strict cause-effect nexus between the environmental factor and the violation. If the factor contributes to the violation, even if the precise effects can not be proven, the court will find a violation (*Ladeyeva*).

Sixth. Noise alone can violate both arts. 8 and 1 protocol no. 1. The Court will apply the same principles that in environmental issues to noise cases. The Court has not adopted a specific standard for determining when the minimum level of severity has been reached.

¹⁰⁵ *Bistrovic v Croatia*, Application number 25774/05 (ECHR, 5/31/2007). Para. 31.

¹⁰⁶ *Id.* Para. 34-35.

¹⁰⁷ *Id.* Para. 42.

¹⁰⁸ *Id.* Para. 44.

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