operate in a political context and are often asked to decide on issues which have a great societal impact.[57]

Second, the perception of human rights as such is changing in the political domain.[58] Too often, human rights are seen as an obstacle, a legal impediment which makes it impossible to initiate effective policies. A related issue is that human rights are only too often associated with the rights of perpetrators, in order to shield them from governmental interference. That perception is to my mind incorrect. It especially fails to acknowledge the introduction of positive obligations in human rights law. This doctrine requires States to act, to provide assistance to persons in order to ensure the full realisation of human rights. Because of the doctrine of positive obligations, protection is offered to victims of domestic violence,[59] to victims of human trafficking,[60] et cetera.

I therefore do not discern a relationship between the Court's output legitimacy and a shift in political attitude towards the Court. I believe the changing political attitude can be attributed to other factors, such as a changing perception of the judicial task in general and a changing perception of 'human rights' in general. Having said that, complacency – in so far as it exists – on the side of human rights institutions is uncalled for. The fundamental questions resulting from the current political climate need a serious response. It needs to be welcomed that human rights issues (including matters pertaining to the Court) are no longer discussed exclusively amongst legal experts, but in a wider political setting. One might even say that the Court has become a fully-fledged institution, which no longer needs to be defended in an unconditional and uncritical manner since the practical (legal and political) importance of the Court is widely recognized. Matters of the Strasbourg Court have become an integral part of political debate and implementing the Strasbourg acquis has become largely institutionalized. The occasionally critical attitude in the political domain is an integral part in the dialogue between the Court and the national authorities. In my opinion, such a critical attitude is perfectly acceptable, as long as the criticism has some factual basis and is conducted in a respectful manner towards the institution as such.[61]

57 *See also* the speech of the Minister of Security and Justice during the international conference 'How to deal with the criticism of the European Court of Human Rights?', which was held on 12 April 2012 in The Hague and organised by the Netherlands School of Human Rights Research in cooperation with the European Public Law Organisation.

58 *See* the contribution of the former minister of Justice, E.M.H. Hirsch Ballin in: A. van Kalmthout, T. Kooijmans and H. Moors (eds.), *Mensbeeld, beeldvorming en mensenrechten* [Humanity, Image and Human Rights], Nijmegen, Wolf Legal Publishers, 2012.

59 ECtHR, *Opuz v. Turkey*, judgment of 9 June 2009, No. 33401/02.

60 ECtHR, *Rantsev v. Cyprus and Russia*, judgment of 7 January 2010, No. 25965/04.

61 In that sense, I could not agree more with the most recent annual report of the Council of State (2012) available on the Council's website <www.raadvanstate.nl>.

ENVIRONMENTAL PROTECTION UNDER ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Thijs Drupsteen

1. SOME RECENT CASES

Facts are vital to the appreciation of case law. Let me introduce two cases to you, one in which the European Court of Human Rights (the Strasbourg Court) holds that there has been a violation of Article 8 of the European Convention on Human Rights (hereafter: the Convention) and one in which the Court finds that there is no violation of this Article which has become so very much important to environmental law.[1]

Deés v. Hungary

Mr Dees lives in Alsónémedi, a Hungarian village south of Budapest. He lives along a street crossing the village. Some kilometres east of the village is the M5, E75 motorway connecting Budapest to Kecskemét and Szeged on the south border of Hungary. Since 1 January 1997 the private operator of the M5 motorway introduced a toll. The toll charges were high, and many car drivers choose the free secondary motorway crossing Alsónémedi instead of the expensive primary one. Mr Dees complained about noise, vibration, pollution and odour caused by the heavy traffic making his home virtually uninhabitable. This nuisance amounted to a violation of his right to respect for his private life and home as guaranteed by Article 8 of the Convention.

The Hungarian government argued that it had taken several measures to protect the inhabitants of Alsónémedi from environmental harm, so that it was complying with its positive obligations under Article 8. The toll charges had been slightly lowered; a reduction system had been introduced; three bypass roads had been constructed; a speed limit of 40 km/h had been introduced and two intersections were provided with traffic lights.

1 ECtHR, *Deés v. Hungary*, judgment of 9 November 2010, No. 2345/06; ECtHR, *Ivan Atanasov v. Bulgaria*, judgment of 2 December 2010, No. 12853/03.

The European Court of Human Rights first recalls that under Article 8 an individual has the right to respect for his home, meaning not just the right to the actual physical area, but also to the quiet enjoyment of that area within reasonable limits. Breaches of this right may also include those that are diffuse, such as noise, emissions, smells or other similar forms of interference. The Court refers to the *Moreno Gómez* case.[2]

The Court then considers that the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention when it comes to the determination of regulatory and other measures intended to protect Article 8 rights. The Court recognises the complexity of the State's tasks in handling infrastructural issues, such as the present one. It observes nevertheless that the measures which were taken by the authorities consistently prove to be insufficient, as a result of which the applicant was exposed to excessive noise disturbance over a substantial period of time. The Court finds that this situation created a disproportionate individual burden for the applicant. In that respect the Court observes that on the basis of the expert opinion of Budapest Technical University, the domestic courts concluded that the noise caused by the traffic exceeded the statutory level. The Court already decided that noise significantly above statutory level unresponded to by appropriate State measures, may as such amount to a violation of Article 8 of the Convention.[3] In the present case it notes that despite the State's efforts to slow down and reorganise traffic in the neighbourhood, a situation involving substantial traffic noise in the applicant's street prevailed at least up and including May 2003 as two measuring sessions established noise values respectively 15% and 12% above the values provided for by statute.

In these circumstances the Court holds that the respondent State has failed to discharge its positive obligation to guarantee the applicant's right to respect for his home and private life. Accordingly, there has been a violation of Article 8 of the Convention.

Ivan Atanasov v. Bulgaria

Mr Atanasov lives in the village Elshitsa on a distance of about one kilometre of a tailings pond in which sludge of the Plovdiv waste-water treatment was dumped. The land that Mr Atanasov cultivates is about four kilometres away from the pond. Elshitsa is part of the municipality of Panagyuristha which is about 80 kilometres east of Sofia.

Mr Atanasov complains that the Bulgarian authorities have failed to comply with a number of legal requirements and to strike a fair balance between the

2 ECtHR, *Moreno Gómez v. Spain*, judgment of 16 November 2004, No. 4143/02.

3 ECtHR, *Oluiç v. Croatia*, judgment of 20 May 2010, No. 61260/08; ECtHR, *Moreno Gómez v. Spain*, judgment of 16 November 2004, No. 4143/02.

various interests at stake, consequently putting his and his family's health at risk and preventing him from enjoying his home. According to an Eco Elshitsa EOOD report, the heavy-metal content of water flowing from the pond was higher than the regulatory maximum. Atanasov relied on the official reports which stated that the sludge from the Plovdiv plant contained heavy metals and constituted hazardous waste. Furthermore, an expert opinion obtained in 2004 by the mayor of Elshitsa had shown that the pond's toxicity had increased instead of providing a sustainable solution to the problem. In Antonov's opinion harm to his health was very likely, especially in the long term. In his view such a risk – which weighed heavily on his private and family life and the enjoyment of the amenities of his home – was sufficient to trigger the application of Article 8 of the Convention.

The Bulgarian government argued that the environment in Elshitsa had not deteriorated. There was no indication that the applicant's private life or home had been affected in any way. The government argued that there was no indication that the license to carry waste water sludge had been unlawful. The government relied in particular on the fact that the law did not require a prior Environmental Impact Assessment for this project, as the project was meant to reduce the effects of earlier contamination.

The Court opens its judgment with a general consideration. It holds, referring to several earlier cases, that in today's society the protection of the environment is an increasingly important consideration. However, Article 8 is not to be engaged every time environmental deterioration occurs: no right to nature preservation as such is included among the rights and freedoms guaranteed by the Convention or its Protocols. The State's obligations under Article 8 come into play in that context only if there is a direct and immediate link between the impugned situation and the applicant's home or private or family life. Therefore the first issue to decide is whether the applicant's complaint of environmental pollution can be regarded as affecting adversely to a sufficient extent, the enjoyment of the amenities of his home and the quality of his private life.

It follows from earlier cases that the question whether pollution can be regarded as affecting adversely an applicant's rights under Article 8 of the Convention depends on the particular circumstances of the case and on the available evidence. In this respect, the Court adds that in assessing evidence it has generally applied the standard of proof 'beyond reasonable doubt'. The salient question is whether the applicant has been able to show to the Court's satisfaction that there has been an actual interference with his private sphere and secondly, that a minimum level of severity has been attained. The mere allegation that the domestic environmental rules are not followed is not sufficient ground for the assertion that the applicant's rights under Article 8 have been interfered with.

In this case the Court is not persuaded that the pollution caused by sludge on the tailings pond has indeed affected the applicant's private sphere to the extent

necessary to trigger the application of Article 8. Firstly, the applicant's home and land are situated at a considerable distance from the source of pollution. Secondly, the pollution emanating from the pond is not the result of active production processes which can lead to a sudden release of large amounts of toxic gases or substances. Thirdly, there is no indication that there have been incidents entailing negative consequences for the health of those living in Elshitsa. The applicant could not show any actual harm to his health or even short-term health risks; he merely feared negative consequences in the long term.

In the absence of proof of any direct impact of the impugned pollution on the applicant or his family, the Court is not persuaded that Article 8 is applicable. There has been therefore no violation of Article 8 of the Convention.

2. CRITICISM OF THE STRASBOURG COURT

Especially in the United Kingdom the case law of the Strasbourg Court and the Court itself are under rather heavy criticism of especially politicians.[4] Their main argument is that the Court does not respect the outcome of national political processes and national legislation. In some of its cases the Court acts as a 'hidden politician'. Trigger for this opposition against the Court is the case *Greens and M.T. v. the United Kingdom* about the right to vote for prisoners.[5] These criticisms have also been brought forward in the Netherlands. The arguments in the Netherlands are more or less the same as in the United Kingdom: national democracy, national democratic processes and national legislation have become subordinate to the case law of the Court, which is felt not to be right. Reactions on this line of criticism were both quick and predictable. National States do have to respect the case law of the Court as they are High Contracting Parties to the Convention, a treaty of the Council of Europe. Besides, the Court does respect the margin of appreciation of national States, so why should there be so many complaints?

The criticism and the reactions it has provoked illustrate a couple of features of the debates on the Strasbourg Court. First, it is important to mention the pre-eminent position in the United Kingdom of the rule of law and in relation with that, the position of Parliament with regard to the courts. The United Kingdom Parliament has a much stronger position in this respect than Parliaments on the continent. The reaction of Prime Minister Cameron on the Strasbourg Court's *Greens*-judgment may be compared with concerns expressed throughout the United Kingdom following the well-known *Factortame* judgment of the Court of Justice of the European Community back in 1990.[6] Just like then a mixture of

4 *See* elsewhere in this volume, DE POORTER, pp. 197ff.

5 ECtHR, *Greens and M.T. v. the United Kingdom*, judgment of 23 November 2010, Nos. 60041/08 and 60054/08.

6 CoJ, *Factortame*, judgment of 19 June 1990, Case No. C-213/89.

concern about the position of Parliament and resentment against European integration featured comments made by critics. Sentiments against European developments and European case law setting aside national arrangements are the second feature of debates on the Strasbourg Court these days. Such sentiments have remained strong, in the Netherlands and as well as in other European countries. The situation may be compared to the concerns of many American States in relation to Federal Government and to the case law of the American Supreme Court.[7] Thirdly, the quick and predictable reaction shows that we are not used to fundamental critics of the European Court of Human Rights, as we in the Netherlands are not used to such criticism of our national judiciary either. However, this is a naive and somewhat dangerous position. No national or international institution is by itself or because of its position safeguarded against criticism. This also holds true for the judiciary. The judiciary has to defend its position against critics by doing its job fair, reliable, open and speedy.

As far as I can see, this political criticism does not include the case law of the Court in environmental cases under Article 8 of the Convention. This case law is referred to in the context of a different kind of criticism. It originates from concern about the enormous workload of the Strasbourg Court. The Court has taken several measures for its own organization to meet this workload, but it is feared that the Court by handling cases as it does will never overcome its workload. This handling has been characterized by Janneke GERARDS as 'incremental jurisdiction'.[8] Incremental jurisdiction according to Gerards means 'case by case jurisdiction'.[9] The Court investigates on a case to case basis whether a human right is at stake and subsequently whether the infringement of that right may be justified in the specific circumstances of the case. This approach in combination with the need for consistency and for respect for earlier interpretations results in an incremental jurisdiction that is strongly based on analogy. Step by step the Court accepts in this way more and more individual interests as human rights interests. Although this individual approach may seem to be quite positive, the outcome of it may be problematic. A step by step approach without a clear object or a clear direction may bring the Court into a position in which it would not have arrived when it had taken into account all the consequences in advance. Much of the material criticism on the Strasbourg Court is related to the ever broader scope of the rights protected under the

7 *Compare with* R. FERNHOUT, 'Het Supreme Court als *amicus curiae*. Een paar vergelijkende en relativerende kanttekeningen' [The Supreme Court as *Amicus Curiae*. Some Comparative Comments to Put Things into Perspective] in J. GERARDS and A. TERLOUW (eds.), *Amici curiae, Adviezen aan het Europese Hof voor de Rechten van de Mens* [Amici Curiae. Advices to the European Court of Fundamental Rights], Nijmegen, Wolf, 2012, pp. 67–81.

8 J. GERARDS, *Het prisma van de grondrechten* [The Prism of Fundamental Rights], inaugural speech, Radboud University Nijmegen, 2011 and J. GERARDS, 'Een alternatieve strategie voor het ECtHR. Naar een betere afbakening van grondrechten en een procedurele toetsing' [Towards a better demarcation of fundamental rights and procedural review] in GERARDS and TERLOUW (eds.) 2012, pp. 89–100.

9 *See* also elsewhere in this volume, GERARDS, pp. 73ff.

Convention. To Gerard's mind there is only one reason for a special protection of human rights when these rights are indeed special. As more precarious interests are considered to be human rights under the Convention, fewer reasons for protection remain. It is not necessary to reach a uniform protection for these not so essential human rights interests. National governments have to be considered as capable of doing so. The Strasbourg Court has to concentrate on the protection of the basic human rights under the Convention.

Of course, a lot of comments may be made in relation to this opinion. To my mind a court always operates incrementally in the sense that it develops its case law from case to case. But there may be differences. After a given number of cases a court may give a kind of statement of the law by surveying earlier cases and formulating some general rules for further jurisdiction. Secondly, a court may attach either less or more importance to the specific circumstances of the case. One of the critical remarks the Strasbourg Court faces is that the Court acts from time to time as a court of third or even fourth instance.

In general it will be difficult for courts to take into consideration in advance the consequences of its judgments. Most courts will try to do so, but in my experience often consequences do come up that were not to been foreseen. It is also doubtful to which extent a court may set in advance general rules according to which it will consider future cases.

This all does not mean that GERARDS' opinion on the incremental jurisdiction of the Court is without sense. The approach she suggests may give the Court the opportunity to restrict its activities to the core human rights and to stop the development of bringing ever more interests under the broad scope of human rights interests that are to be protected under the Convention.

According to GERARDS the Strasbourg Court has already applied this approach in recent cases in the field of environmental law under Article 8 such as *Atanasov v. Bulgaria*[10] and *Dubetska and Others v. Ukraine*.[11] I will analyze the Court's case law in environmental cases to see whether the Court really applies this new approach and especially whether it does so consequently.

3. ENVIRONMENTAL CASES UNDER ARTICLE 8 OF THE CONVENTION

Lopez Ostra v. Spain

The first successful environmental case under Article 8 is *Lopez Ostra v. Spain*.[12] On a distance of 12 meter of her home a waste water treatment plant was opened in the Spanish town Lorca in 1988. The plant caused fumes, repetitive noise and

10 *See* the introduction of this Chapter.
11 *See* below, para. 3.
12 ECtHR, *Lopez Ostra v. Spain,* judgment of 9 December 1994, No. 16798/90.

a strong smell which rendered her family's living conditions unbearable and caused serious health problems to both the applicant and her family. A license for the plant was not granted.

Whether the question is analysed in terms of interference by a public authority that has to be justified in accordance with paragraph 2 of Article 8 or in terms of a positive duty on the State, according to the Court the applicable principles are broadly the same. Pieter van Dijk has never failed to stress the importance of separating those two aspects of Article 8. Be that as it may, in facto one principle rules and that is the principle of a fair balance that has to be struck between on the one hand the competing interests of the individual and on the other hand of the community as a whole, while in any case the State enjoys a certain margin of appreciation. The court refers to the earlier case of *Powell and Rayner v. the United Kingdom*,[13] in which the fair balance between these interests around the Heathrow airport had not been struck. In the *Lopez Ostra* case the question is whether the national authorities took the measures necessary for protecting the applicant's right of respect for her home and for her private life and family life. The authorities not only had failed to take the steps necessary to this end but also had resisted judicial decisions to that effect. Although the city board of Lorca had borne the expenses of renting a flat away from the purification plant the family Lopez Ostra had had to bear the nuisance caused by the plant for more than three years. Under these circumstances the municipality's offer did not provide for sufficient redress for the nuisance and inconvenience to which the family had been subjected.

So the key consideration in the *Lopez Ostra* case is that Article 8 requires a fair balance between an individual interest and the general interest and that this balance had not been struck in the present case.

Guerra v. Italy

In the second case, *Guerra v. Italy*,[14] Italian citizens lived in Manfredonia within one kilometre from a factory of fertilizers and caprolactam that had been classified as high-risk. The factory released large quantities of inflammable gas and other toxic substances including arsenic trioxide. In 1976 as a result of the explosion of the scrubbing tower for the ammonia synthesis, several tonnes of potassium carbonate and bicarbonate solution containing arsenic trioxide escaped and 150 people were hospitalised. The citizens complained that the Italian authorities had not taken appropriate measures to reduce the risk of pollution and to avoid major accidents. Secondly, they complained about the failure of the State to provide sufficient information about the risk and on how to handle in case of a major accident.

13 ECtHR, *Powell and Rayner v. United Kingdom*, judgment of 21 February 1998, No. 9310/81.
14 ECtHR (Grand Chamber), *Guerra v. Italy*, judgment of 19 February 1998, No. 14967/89.

The Strasbourg Court refers to *Lopez Ostra* by stating that it has to be ascertained whether the national authorities have taken the necessary steps to ensure effective protection of the applicants' right to their private life and family life as guaranteed by Article 8 of the Convention. It holds that in this case the authorities had not done so. Although the conclusions of a safety report were adopted in 1993 by the Ministries for the Environment and of Health, according to a letter of the mayor of Manfredonia of 1995 the District Council was still awaiting directions of the Civil Defence Department about the safety measures that had to be taken and the procedure that had to be followed in case of an accident.

In the *Guerra* case the Court follows the reasoning of the *Lopez Ostra* case but adds an element to it in the sense that also the failure to supply sufficient information about the environmental risks at stake may cause an infringement of the obligations authorities have under Article 8 of the Convention.

Hatton v. the United Kingdom (the Heathrow case)

In *Hatton*[15] British citizens living near Heathrow Airport complained about the noise caused by the airport as a result of a new night flight scheme depriving them from their sleep. The Court here repeats the 'fair balance' test known from *Lopez Ostra* and the States'margin of appreciation in determining the steps to be taken to ensure compliance with the Convention, but the Court is rather critical of this margin. It underlines that States must take into consideration the whole range of material issues. In the particularly sensitive field of environmental protection States are required to minimise as far as possible the interference with rights protected by Article 8 by trying to find alternative solutions and by generally seeking to achieve their aims in the least onerous way as regards human rights. The Court then considers at length the available information: on the one hand about the profits for the national economy related to night flights and on the other hand about sleep disturbance and sleep depriviation. It notes that a 1992 study mentioned no sleep deprivation by night flights. It concludes that in the absence of any serious attempt to evaluate the extent or impact of the interferences with the applicants' sleeping patterns, and in generally in the absence of a prior specific and complete study with the aim of finding the least onerous solution as regards human rights, it is not possible to agree with the submission that the Government struck the right balance. Despite the margin of appreciation left to the respondent State, there has been a violation of Article 8. However, two judges disagreed with this outcome, as they were of the opinion that Article 8 had not been violated.

The case was then heard by the Grand Chamber, which brought things back to normal. The Grand Chamber held that there was no violation of Article 8.

15 ECtHR, *Hatton and Others v. the United Kingdom*, judgment of 2 October 2001, No. 36022/97; ECtHR (Grand Chamber), judgment of 8 July 2003.

Also in this judgment *Lopez Ostra* is the leading judgment. Differing from *Lopez Ostra* and *Guerra* is that in this case there is no element of State failure or domestic irregularity. The Court considers that it would not be appropriate to adopt a special approach by reference to a 'special status' of 'environmental human rights'. This means that the Court has to refer to the scope of the margin of appreciation available to a State when taking policy decisions of the kind at hand. Introducing the 1993 scheme was a general measure. In such cases States must in principle be left a choice between the ways and means of meeting the obligation to give due consideration to the particular interests that are protected by Article 8. The Courts' supervisory function being of a subsidiary nature is limited to review whether or not a particular solution may be regarded as a fair balance. In considering whether a fair balance was struck the Court studies statistical data, the importance of economic interests, the availability of measures to mitigate the effects of aircraft noise and the need of appropriate investigations and studies in relation to a governmental decision process concerning complex issues of environmental and economic policy. Considering these circumstances the Court does not find that the authorities have overstepped their margin of appreciation.

Although from an environmental point of view the Grand Chamber's judgment in *Hatton* may be disappointing, one cannot say that the Court takes a dominant position or even plays a political role in this case. The earlier judgment of the regular chamber may be regarded as an application of a proportionality test, but the Grand Chamber is quite clear that also in environmental cases the usual test including the margin of appreciation has to be applied.[16]

The Court's approach in *Lopez Ostra*, *Guerra* and the Grand Chamber's judgment in *Hatton* is rather consistent. Article 8, when it comes to positive obligations, requires a fair balance between the interests at stake. Serious environmental harm may be an infringement of the interests protected by Article 8. Governmental failure in taking appropriate measures including giving reliable and appropriate information leads to such an infringement. The *Heathrow* case differs from *Lopez Ostra* and *Guerra* in two respects. First, it was doubtful whether serious environmental harm did occur in the *Heathrow* case. Secondly, there was no governmental failure in taking measures and giving information.

Kleyn and Others v. the Netherlands (the Betuweroute case)

Applicants in the *Betuweroute* case raised a number of claims under Articles 6 and 8 of the Convention and Article 1 of the First Protocol.[17] The case became

16 *See also* TH. DRUPSTEEN, 'Heathrow en evenredigheid' [Heathrow and Proportionality] in T. BARKHUYSEN, M.L VAN EMMERIK and J.P. LOOF (eds.), *Geschakeld recht* [Linked Up Law; Liber Amicorum in honour of Evert Alkema], Deventer, Kluwer, 2009, pp. 135–148.

17 ECtHR, *Kleyn and Others v. the Netherlands*, judgment of 6 May 2003, Nos. 39343/98, 39651/98, 43147/98 and 46664/99.

well-known in the Netherlands because of the paragraphs about the independent and impartial position of the Administrative Jurisdiction Division of the Council of State. These paragraphs must immediately have caught the eye of the (then) president of that Division once the judgment was delivered. However, I will now ask the reader's attention for the Article 8-aspects of the case, as the judgment also holds considerations about claims under Article 8 about environmental harm of the new railway 'Betuweroute'. The Court's reasoning in this case is somewhat different from the foregoing cases. The remaining question is whether the interference in this case may be considered 'necessary in a democratic society'. A margin of appreciation is left to national authorities but the scope of this margin is not identical in each case. As regards exercise of discretionary judgment by national authorities in the implementation of planning policies, it is not for the Court to substitute its own view. The Court has to examine whether the decision making process prior to measures of interference was fair and did so with due respect to the interests of individuals safeguarded by Article 8. The Court holds that no unfair balance was struck taking the investigations on the possible future harm of the railway track into account as well as the possibilities of domestic judicial review in this case.

Taskin and Others v. Turkey

Taskin is about a gold mine using a manufacturing process that is dangerous for people living in the neighbourhood by lixiviation of the soil with cyanide of potassium. The license for the mine was nullified by the Turkish Council of State but the Turkish authorities neglected this decision. When the case was heard in Strasbourg seven years later the mine was still in use. The Court refers to the *Lopez Ostra* and the *Hatton* case. It also accepts the decision of the Council of State that the license was not in the public interest. By neglecting this decision by taking a decision by the Turkisch council of ministers to continue the use of the mine, which was not published, Turkey failed in protecting the rights under Article 8 of the Convention.[18]

Moreno Gómez v. Spain

Moreno Gómez lives in a night club district in Valencia. The area was designated by the local authorities as an acoustically saturated zone. The Valencia City Council had taken some action by establishing a by-law on noise, but it tolerated and thus contributed to the repeat flouting of this rule. The applicant suffered a serious infringement of respect for her home as a result of the authorities' failure to take action. Before going into the specific details of the case the Court recalls

18 ECtHR, *Taskin and Others v. Turkey*, judgment of 10 November 2004, No. 46117/99.

general principles underlying the case law under Article 8 in which *Hatton, Powell and Rayner, Lopez Ostra, Guerra* and again *Hatton* are mentioned.[19]

Fadeyeva v. Russia

Fadeyeva lives on a distance of 450 metres from the Severstal steel plant in the municipality of Cheropovets within the sanitary security zone around the plant. The local authorities refused to offer her a house somewhere outside the zone. The Court points out that the adverse effects of environmental pollution must attain a certain minimum level if they are to fall within the scope of Article 8. The Court considers that from 1999–2003 the level of air pollution by dust, carbon disulphide and formaldehyde has constantly exceeded the domestic norms. Further, that the Steel plant was responsible for 95% of the overall air pollution in the city. The argument to refuse the resettlement of Fadeyeva was that this would inevitable breach the rights of others on the waiting list for a house. The Strasbourg Court then considers very profoundly whether there was any justification under section 2 of Article 8. It recalls the general principles of its case law giving a wide margin of appreciation to the authorities of the Member States. It concludes that as far as the housing conditions of Fadeyeva are concerned, placing her on the waiting list does not give her any realistic hope of being removed from the source of pollution. The Court also holds that it is not possible to make a sensible analysis of the Government's policy towards Severstal because the Government failed to show clearly what this policy consists of. The Court summarizes that it is not its role to dictate precise measures that should be adopted by the State, but that the State did not offer the applicant any help to move from the dangerous area and that no information has come to its attention that the State designed or applied effective measures that would take into account the interests of the local population.[20]

Giacomelli v. Italy

Giacomelli lives in Brescia 30 metres away from a plant for the storage and treatment of special waste. The plant had been operated by Ecoservizi since 1982. After giving an overview of the relevant case law the Court observes that neither the initial license for the plant nor the decision to authorize it to treat industrial waste by means of detoxification was preceded by an appropriate investigation or study in accordance with applicable statutory provisions. Ecoservizi had not been asked to undertake an environmental impact assessment until 1996. The Court further notes that the Ministry of the Environment concluded on two occasions that the plant's operation was not in compliance with environmental

19 ECtHR, *Moreno Gómez v. Spain*, judgment of 16 November 2004, No. 4143/02.
20 ECtHR, *Fadeyeva v. Russia*, judgment of 9 June 2005, No. 55723/00.

regulations on account of its unsuitable geographical location and because there was a specific risk to the health of the local residents. In a set of contentious proceedings the Lombardy Regional Administrative Court and the Italian Council of State had held that the plant's operation had no legal basis and should therefore be suspended with immediate effect. But the administrative authorities did not at any time order closing the factory. The Court finds that there has been a violation of Article 8.[21]

Tatar v. Romania

Tatar lives in the city Baia Mare, in which the factory Aurul operates exploiting minerals by using cyanide. He complains that there were no prior investigations before rendering a license to the factory; that no information about the dangerous consequences of the factory was available and that the factory's activities had aggravated his son's asthma. The Court finds (two judges dissenting) no sufficient proof for a causal relation between the activities of the factory and the illness of his son, but agrees with the complaints about the absence of prior investigations and the lack of information.[22]

Bacila v. Romania

Bacila lives in Copsa Mica, in which the lead and zinc factory Sometra operates. The factory emits high levels of dangerous chemical substances that cause direct harm to the health of the inhabitants of Copsa Mica. In 1998 and 2006 the Romanian authorities granted licenses to the factory but neither of these licenses was followed by individual measures to diminish the level of pollution. Between 2003 and 2006 Sometra was operating without an environmental license. The Court concludes that the Romanian authorities did not take in consideration the interests of the local people and failed to strike a fair balance between the economic interests and the effective enjoyment of the rights protected under Article 8.[23]

Oluic v. Croatia

The *Oluic* case is similar to the *Moreno Gómez* case. Oluic complained about noise from a bar in the apartment building she lived in. The noise level measured at several occasions exceeded the permitted levels set in a governmental by-law. The local administrative authority used its power to adopt certain measures but these were not executed. The Court finds that the respondent State has failed to

21 ECtHR, *Giacomelli v. Italy*, judgment of 2 November 2006, No. 59909/00.
22 ECtHR, *Tatar v. Romania*, judgment of 27 January 2009, No. 67021/01.
23 ECtHR, *Bacila v. Romania*, judgment of 30 March 2010, No. 19234/04.

discharge its positive obligation to guarantee the applicants' right to respect for her home and private life.[24]

Mileva v. Bulgaria

The *Mileva* case is a rather typical Article 8 case. The case is about noise caused by visitors of a computer club. The club is open for 24 hours a day, seven days a week. The Court considers that the nuisance in and outside the building of the computer club was clearly demonstrated and that the Bulgarian authorities decided to close the club but that this decision was not executed.[25]

Dubetska and Others v. Ukraine

The case is about Ukrainian families living in the neighbourhood of a mine and a mine spoil heap. The Court first gives an overview of its case law under Article 8 in environmental cases. It then considers that although the authorities have taken a number of measures, they were not able to provide an effective solution for the applicants' personal situation in a period of more than twelve years. A choice for relocation of the families was not executed, while the Governments' approach of tackling the pollution was marked by numerous delays and inconsistent enforcement. A buffer zone management plan was developed by the factory but the measures mentioned in the plan were not enforced for over five years. The Court finds that there has been a breach of Article 8 of the Convention.[26]

Zammit Maempel v. Malta

The case is about two Maltese parents and their two children complaining about regular fireworks (twice a year) that were ignited in the neighbourhood of their house. The fireworks caused some damage to their house and some auditory damage. The Court considers it a case under Article 8 but does not find that the Maltese authorities did not strike a fair balance between the interests of the applicants and the general interest related to the fireworks. An expert group was established. Moreover, a civil law suit may have been brought against any police commissioner's omissions.[27]

24 ECtHR, *Oluiç v. Croatia*, judgment of 20 May 2010, No. 61260/08.
25 ECtHR, *Mileva and Others v. Bulgaria*, judgment of 24 November 2010, Nos. 43449/02 and 21457/04.
26 ECtHR, *Dubetska and Others v. Ukraine*, judgment of 2 May 2011, No. 30499/03.
27 ECtHR, *Zammit Maempel v. Malta*, judgment of 22 November 2011, No. 24202/10.

Di Sarno v. Italy

The case is about the failure in collecting, treatment and removal of household waste in and around Naples in 2007 and 2008. The applicants live or work in the municipality Somma Vesuviana. Although there is no clear prove of a causal link between the exposure to heaps of waste and the development of illnesses, the Court finds that there is a case under Article 8, because the life and health of the applicants has been threatened. In the province of Campania the state of emergency had been declared and the Italian government argued that this was a case of *force majeure*. The Court however, rejects the argument of *force majeure* and considers the failure in collecting, treatment and removal of waste, although it lasted only for five months as a breach of Article 8. Commenter Kamminga considers the case remarkable because of the fact that some of the applicants did not live in Somma Vesuviana but only worked there.[28]

4. CONCLUSION

This short summary shows that the European Court of Human Rights has become remarkable consistent in its case law under Article 8 in environmental law cases. It confirms GERARDS' observation that the Court starts with a general statement of the law of environmental cases under Article 8 and then deals with the specific circumstances of the case. This general statement consists of a number of elements. The rights guaranteed under Article 8 may be violated either by a direct infringement or by failing to protect them. In both cases a fair balance has to be struck between the interests involved. This balance is disturbed by environmental nuisance or damage. Not every environmental nuisance will breach the rights protected under Article 8. The nuisance or damage has to be real and has to exceed a certain level. Domestic standards are applied to decide whether the nuisance breaches Article 8 or not. States do have a wide margin of appreciation in tackling environmental problems. The role of the Court is in that sense a subsidiary one. Before measures are taken, due investigation has to be done, although not every detail has to be investigated. People involved have to be informed about the results of these investigations and about the risks related to the environmental damage or nuisance. Decisions taken by authorities have to be effective and have to be executed. In a number of cases authorities fail to take effective decisions or are reluctant to really execute them. This general statement is repeated in sometimes different wordings, but it remains essentially the same. It makes the case law of the Court predictable.

[28] ECtHR, *Di Sarno v. Italy*, judgment of 10 January 2012, No. 30765/08, annotated by Kamminga in *Milieu en Recht* [Environment and Law] 2012, No. 44.

A second noteworthy feature of the Courts' case law is that it deals rather prudent with the particular circumstances of the case. Often one gets the impression that the Court carefully tries to balance between protecting the rights of the applicants under Article 8 and giving a margin to the local or national authorities to operate and to decide on how to tackle the environmental problems involved. The Court is really reluctant in prescribing what to do in a particular case, but restricts itself in investigating whether something has been done anyhow and whether this had been done within a reasonable time and in an effective way.

To my mind there is not much reason to criticize the Court for its environmental case law. I do not think that the Court extends the scope of Article 8 too far by judging environmental cases. Be that as it may, one has to realize that even in applying the general principles of the Courts' case law a number of potential violations of Article 8 will be brought to the attention of the Court. Very often domestic standards are not met and very often domestic authorities are slow and less effective in responding to the situation. This means that the general principles developed will only be a slight solution to the problem of the enormous caseload of the Strasbourg Court.