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PROCEDURAL ASPECTS OF ARTICLE 8 OF THE ECHR IN ENVIRONMENTAL CASES – THE GREENING OF HUMAN RIGHTS LAW

This paper analyzes the legal basis for 'proceduralization' of Article 8 of the European Convention on Human Rights in environmental cases. Procedural aspect of Article 8 has been interpreted as giving rise to a positive duty for States, under certain circumstances, to protect individuals from environmental factors that seriously affect their private and family life. The paper shows that the Court's reliance on the concept of positive obligations with regard to Article 8 has expanded significantly over time, abandoning the link between the State and the harmful activity, as well as reflecting strong preventive nature of duties contained in Article 8. It is shown that the proceduralization of Article 8 represents an influence by a number of well established rules and principles of international law relating to the environment. Another aspect that is analysed in this paper is the scope of procedural dimension of Article 8, which is compared with other environmental law sources, as well as with other procedural rights that derive from the European Convention. Finally, it has been argued that the European Court has an environmentally expansionist interpretation of the right to private and family life, and that the Court set very important standards in relation to the content of procedural rights to participate in environmental decision-making and to access justice in environmental matters. However, the authors conclude that the Court's approach in dealing with certain matters could be criticized as well, such as the failure to provide clear standards in relation to the scope and definition of environmental information.

Key words: *Right to respect for private and family life. – Environmental due process. – European Court of Human Rights. – Access to environmental information. – Environmental impact assessment.*

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1. INTRODUCTION

Back in 1991 Koskenniemi identified a general tendency of 'proceduralization' in environmental disputes, believing it to be the main reason for the international courts' distancing from their main function which consists in establishing an internationally wrongful act.[1] It is manifested through mechanisms of cooperation which prevail in most of international treaties that regulate the protection of the environment. The distinction between substantive and procedural obligations in environmental field can be traced to the work of the International Law Commission (ILC) as regards Draft Articles on Prevention of Transboundary Harm from Hazardous Activities.[2] Even the World Court's uneasiness to deal with environmental disputes manifested itself in its submissiveness to certain external influences, primarily the impact of the work of the ILC, despite Draft Articles' negligible importance and non-binding character.[3] Experiencing difficulties to establish violation of the most frequent duty in the field of environmental protection – the duty to prevent environmental harm – the International Court of Justice (ICJ) has literally copied the ILC's concept of duty to prevent as a substantive obligation consisting of four different procedural duties – duty to notify, to cooperate, to consult and to conduct environmental impact assessment.[4] The argumentation of the ICJ used in its Judgment in the *Pulp Mills on the River Uruguay* case clearly points to the conclusion that obligations of a procedural character appear as a shield from various obstacles encountered by the Court when resolving environmental disputes.[5] As opposed to these negative effects of 'proceduralization' in international environmental law, the area of in-

[1] M. Koskenniemi, "Peaceful Settlement of Environmental Disputes", *Nordic Journal of International Law* 60/1991, 73.

[2] Draft Articles on Prevention of Transboundary Harm from Hazardous Activities – Report of the International Law Commission on the work of its fifty-third session, *Yearbook of the International Law Commission* 2/2001*,* UN Doc. A/56/10, 148.

[3] Y. Kerbrat, "International Law Facing the Challenge of Compensation for Environmental Damages", *in* Y. Kerbrat, S. Maljean-Dubois (eds), *The Transformation of International Environmental Law*, Pedone & Hart 2011, 213–231.

[4] The Court concluded that Uruguay violated its procedural obligations provided in the 1975 Statute of the River Uruguay, but that it did not violate its substantive obligation to prevent pollution of the river, stemming from the same international treaty. Pulp Mills on the River Uruguay (*Argentina v. Uruguay*), Judgment of 20 April 2010, *ICJ Reports* 2010, paras. 67–158.

[5] Parties expressed opposite views concerning the implications of an obligation's qualification as procedural or substantive as regards consequences of the established breach, encouraging the relevant discussions by the international legal doctrine: G. Hafner, I. Buffard, "The Work of the International Law Commission: From Liability to Damage Prevention", *in* Y. Kerbrat, S. Maljean-Dubois (eds), 233–249; Pulp Mills on the River Uruguay, paras. 14, 76 and 77.

ternational human rights law has had nothing but benefits from such a process.[6]

The European Convention on Human Rights does not contain provision on the right to healthy environment, but under Article 8, which guarantees the respect for private and family life, the home and correspondence, the European Court of Human Rights found in many cases that severe environmental pollution can affect individual's well-being. In other words, the Court has developed approaches which indirectly protect the environment under Article 8, although its wording does not determine whether environmental effects can affect rights guaranteed in this article, and the protection of the environment is not included in the list of legitimate interests when the State can restrict rights enshrined in Article 8.[7]

In the past 20 years, the European Court broadly interpreted this provision in the context of environmental protection and became an important forum for providing protection and awarding damages.[8] There is, however, a limit in application of the European Convention to cases which concern environment, as the Court will not deal with the environment in general, but with serious harms that affect individual autonomy.[9] In its case law concerning environmental pollution, the Court indicates that "there is no explicit right in the Convention to a clean and quiet environment, but where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8".[10] In that case, the environmental pollution must be severe, which could affect individuals' well-being and "prevent them from enjoying their homes in such a way as to affect their private and family life adversely, even without seriously endangering their health."[11]

It is as early as in 1998 in the case *Guerra and Others v. Italy*[12] that the European Court of Human Rights started to accord procedural

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[6] N. A. Popović, "In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment", *Columbia Human Rights Law Review* 27/1995–1996, 489.

[7] These legitimate interests are: national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, and the protection of the rights and freedoms of others (Article 8, par. 2).

[8] R. Desgagné, "Integrating Environmental Values into the European Convention on Human Rights", *American Journal of International Law* 89/1995.

[9] See F. Stewart, "A Right to Silence?", *The Journal of the Law Society of Scotland*, 15 February, 2010, available at *http://www.journalonline.co.uk/Magazine/55-2/1007578.aspx,* last accessed 10 October 2015.

[10] *Hatton and Others v. the United Kingdom*, App. No. 36022/97, Judgment (Grand Chamber) of 8 July 2003, par. 96.

[11] See e.g., *Taşkin and Others v. Turkey*, App. No. 46117/99, Judgment of 10 November 2004, par. 113.

[12] *Guerra and Others v. Italy*, App. No. 116/1996/735/932, Judgment of 19 February 1998. In this case, a chemical factory was opened one kilometer from the inhabited

value to Article 8 of the Convention.[13] Observance of the procedural aspect of the right to private and family life has since evolved to such a significant level that it may as well be qualified as one of the most prominent features of the Court's jurisprudence in environmental cases.

This paper will first examine the legal basis for introducing procedural considerations in the Court's reasoning. An attempt will ensue to demonstrate that 'proceduralization' of Article 8 represented an influence of a number of well established rules and principles of international law relating to the environment. These considerations will be followed by an in-depth analysis of the scope and content of various procedural elements of the right to private and family life.

2. LEGAL BASIS FOR INTRODUCING PROCEDURAL ELEMENTS IN THE COURT'S REASONING

Legal basis for interpreting right to private and family life as containing certain procedural elements lies in the concept of State's positive obligations. However, as opposed to the concept of positive obligations in general, which does not relate exclusively to Article 8 of the Convention but also to other rights guaranteed by the Convention,[14] the Court seems to have established through its case-law the existence of State's positive obligations in a specific, environmental context.

Court's reliance on the concept of positive obligations with regard to Article 8 has expanded significantly over time.[15] The Court has con-

settlement. This factory produced fertilizers, labeled as highly risky to the health and well-being of residents. The factory plant threw a high degree of flammable gas which freed toxic substances such as sulfur dioxide, ammonia, sodium and arsenic trioxide. Several accidents had happened, and in one of them, the freed arsenic caused poisoning of about 150 people, who were hospitalized. The Court found that the State hadn't taken all reasonable steps to protect population from toxic fumes, and thus, to ensure the individual's enjoyment under Article 8 of the European Convention.

[13] E. Folkesson, "Human Rights Courts Interpreting Sustainable Development: Balancing Individual Rights and the Collective Interest", *Erasmus Law Review* 6/2013, 147.

[14] J.-F. Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights*, Council of Europe, 2007; H. Cullen, "Siliadin v. France: Positive Obligations under Article 4 of the European Convention on Human Rights", *Human Rights Law Review* 6/2006, 585–592; U. Kilkelly, "Protecting Children's Rights under the ECHR: the Role of Positive Obligations", *Northern Ireland Legal Quarterly* 61(3)/2010, 245–261; D. Xenos, *The Positive Obligations of the State under the European Convention on Human Rights*, Routledge 2012. See also the relevant jurisprudence of the European Court of Human Rights: *X and Y v. The Netherlands*, App. No. 8978/80, Judgment of 26 March 1985, par. 23; *Marckx v. Belgium*, App. No. 6833/74, Judgment of 13 June 1979; *Airey v. Ireland*, App. No. 6289/73, Judgment of 9 October 1979, par. 32.

[15] It is as early as in 1985 that the Court recalled that although the purpose of Article 8 "is essentially that of protecting the individual against arbitrary interference by

sistently required States to take "positive steps to legislate or carry out other preventative action".[16] However, first Article 8 cases with environmental implications decided by the Court reflect its cautious and timid approach in interpreting the right to private and family life as including specific positive duties for States.[17] Even though the *Lopez Ostra v. Spain* case represented an important moment for claims of environmental nature under the Convention, the Court failed to tackle the issue of whether there was a breach of State's negative obligation, positive obligation or both.[18] It is, nevertheless, indicative that the Court considered it necessary to establish the link between the State and the harmful activity in question thus implying that it represented an essential precondition for holding the State responsible for the violation of Article 8 of the Convention.[19]

The case of *Guerra and Others v. Italy* represented a turning point not only as regards State's positive obligations in environmental field,[20] but also in relation to their significance as legal basis for procedural elements of Article 8. The Court considered that in addition to primarily

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the public authorities, it does not merely compel the State to abstain from such interference" but also to adopt "measures designed to secure respect for family and private life even in the sphere of the relations of individuals between themselves." *X and Y v. The Netherlands*, par. 23. For classification of positive obligations see D.J. Harris, M. O'Boyle, C. Warbrick, *Law of the European Convention on Human Rights*, 1995, 284.

[16] B. Clark, "Water Law in Scotland: The Water Environment and Water Services (Scotland) Act 2003 and the European Convention on Human Rights", *Edinburgh Law Review* 10/2006, 94.

[17] Acevedo believes that the Court was clearly struggling with finding the adequate conceptual basis upon which to derive environmental rights. M. Acevedo, "The Intersection of Human Rights and Environmental Protection in the European Court of Human Rights", *New York University Environmental Law Journal* 8/1999–2000, 478–479.

[18] The Court's reasoning was criticized by the doctrine: S. Kravchenko, J. Bonine, "Interpretation of Human Rights for the Protection of the Environment in the European Court of Human Rights", *Pacific McGeorge Global Business and Development Law Journal* 25/2012, 251–255. In this case, the town Lorca in Spain was exposed to the opening of a large number of factories in leather industry. One of them was built without proper permits, some 12 meters from the house of the applicant. A waste treatment plant had emitted polluting fumes, smells, and noise, which immediately led to health problems among residents. The Government implemented some measures, but they were not enough to completely eliminate the risk to health. The Court simply stated that "the State did not succeed in striking a fair balance between the interest of the town's economic well-being – that of having a waste-treatment plant – and the applicant's effective enjoyment of her right to respect for her home and her private and family life". *Lopez Ostra v. Spain*, App. No. 16798/90, Judgment of 9 December 1994, par. 58.

[19] The Court stressed that Spanish authorities "were theoretically not directly responsible for the emissions in question" but that "the town allowed the plant to be built on its land and the State subsidized the plant's construction". *Ibid.*, par. 52.

[20] The significance of this judgmenet lies not only in a wide interpretation of Article 8, but also in proclamation that the State has a positive duty to ensure the respect of private and family life. See M. Acevedo, 438.

negative undertaking, "there may be positive obligations inherent in effective respect for private or family life".[21] It determined that the inaction through which the State failed to protect the right to private and family life was its failure to provide the applicants "with essential information that would have enabled them to assess the risks they and their families might run".[22] Such reasoning, qualified as "expansionist reading of Article 8",[23] implied that substantive rights contained in Article 8 included an implicit procedural right to environmental information.[24] However, thorough reading of the *Guerra* judgment leads to a somewhat surprising conclusion that the Court made no effort to provide an argumentation for such an opinion. An explanation was offered later that year in the case *McGinley and Egan v. the United Kingdom*.[25]

The *Hatton* judgment delivered by the Grand Chamber introduced novel standards. The Court made an explicit distinction between the substantive merits of the government's decision with environmental implications and its procedural aspect, i.e. the decision-making process.[26] Not only did the Court expand the concept of positive obligations contained

[21] The Court became more explicit by requiring that "it needed only be ascertained whether the national authorities took the necessary steps to ensure effective protection of the applicant's right to respect for their private and family life". *Guerra and Others v. Italy*, par. 58.

[22] *Ibid*., par. 60.

[23] S. Kravchenko, J. Bonine, 273.

[24] The Court rejected the claim under Article 10 on the basis that Article 10 essentially prohibits states from restricting a person from receiving information from others. However, it found a violation Article 8 due to the failure to inform the applicants about the risks from the chemical factory. See C. Hilson, "Risk and the European Convention on Human Rights: Towards a New Approach," *The Cambridge Yearbook of European Studies* 11/2008–2009, 356.

[25] In this case, the applicants had participated in nuclear tests conducted by the United Kingdom at Christmas Island. Their requests for test records for the support of their application for service disability pensions were denied. The Court explicitly stated that "where a Government engages in hazardous activities" respect for private and family life under Article 8 "requires that an effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information." *McGinley and Egan v. The United Kingdom*, App. No. 10/1997/794/995-996, Judgment of 9 June 1998, par. 101. The same conclusion was reached in *Roche v. the United Kingdom*, App. No. 32555/96, Judgment of 19 October 2005. These cases also indicate that the right to receive environmental information from the State involves a procedural aspect of Article 8 and is not protected under Article 10 of the Convention. D. García San José, *Environmental Protection and the European Convention on Human Rights*, Council of Europe Publishing, Strasbourg 2005, 63.

[26] *Hatton and Others v. The United Kingdom*, par. 99. In this case, it was recognized that an excessive noise can cause a violation of Article 8. The Court confirmed the position of the European Commission in *Vearncombe* that noise nuisance is intolerable. See Eur. Comm., *Vearncombe and Others v. Germany and UK,* App. No. 12816/87, Decision of 18. January 1989.

in Article 8 to include a procedural duty to conduct an environmental impact assessment,[27] it also introduced a duty to use the precautionary principle in providing relevant information.[28] In other words, the State's inaction cannot be excused by the absence of relevant scientific data.

Irrelevance of the link between the State and the dangerous activity was confirmed by the Court in *Fadeyeva v. Russia* case. Here, the applicant lived in proximity of the plant and her right to privacy had been seriously affected by the pollution from the Severstal steel plant. The Court noted that the steel plant was neither owned, controlled or operated by Russia at the material time, but it failed to apply effective measures to protect interests of the local population affected by the pollution. Thus, the Court clearly pointed out that "State's responsibility in environmental cases may arise from a failure to regulate private industry" and that "the applicant's complaints fall to be analyzed in terms of a positive duty on the State".[29] In *Giacomelli* case, where the applicant complained about the harmful emissions from a plant treating hazardous waste, the Court admitted that "Article 8 contains no explicit procedural requirements".[30] However, it considered this to be no obstacle for scrutinizing the decision-making process that led to measures of interference with the right to private and family life. The Court summarized this procedural aspect of Article 8 by pointing to a number of positive obligations incumbent upon States.[31]

Initial doubts and scarce approach to State's positive obligations as regards Article 8 have been replaced by firm and unequivocal standings expressed by the Court in its recent jurisprudence. According to the Court, it is beyond any doubt that, when dangerous activities are at stake, States "have an obligation to set in place regulations geared to the special features of the activity in question, particularly with regard to the level of

[27] It noted that "a governmental decision-making process concerning complex issues of environmental and economic policy (...) must necessarily involve appropriate investigations and studies". *Ibid*., par. 128.

[28] The Court explicitly stated that "this does not mean that decisions can only be taken if comprehensive and measurable data are available in relation to each and every aspect of the matter to be decided". *Ibid.*

[29] In other words, the Court's role would be "to assess whether the State could reasonably be expected to act so as to prevent or put an end" to the violation of the right to home, private and family life. *Fadeyeva v. Russia*, App. No. 55723/00, Judgment of 9 June 2005, par. 89.

[30] *Giacomelli v. Italy*, App. No. 59909/00, Judgment of 2 November 2006, par. 82.

[31] The Court referred to the duty to conduct appropriate investigations and studies, duty to provide for public access to the conclusions of such studies as well as an obligation to inform the public about the risks that they may face. The Court also emphasized that the individuals must be able to appeal to the courts against any decision, act or omission "where they consider that their interests or their comments have not been given sufficient weight in the decision-making process". *Ibid*., par. 83. See also, *Taşkin and Others v. Turkey*, paras. 118–119.

risk potentially involved".[32] More precisely, the State is obliged to govern the licensing, setting-up, operation, security and supervision of the hazardous activity and it has a duty to "make it compulsory for all those concerned to take practical measures to ensure the effective protection" of the rights guaranteed by the Convention.[33]

A number of conclusions regarding State's positive obligations as basis for procedural aspect of the right to private and family life stems from the case-law outlined above. First of all, the Court's initial focus on the link between the State and the activity harmful to the environment has been abandoned over time. State's positive obligations in relation to dangerous activities have consistently been interpreted to mean that State is involved "even when the threat comes from private individuals or other activities not directly related to the State".[34] Secondly, as due diligence obligations,[35] duties contained in Article 8 of the Convention reflect strong preventive nature, which in turn suggests that duty to prevent environmental harm is implicitly contained in Article 8, at least where dangerous activities are at source of interference with the right to home, private and family life.[36] Thirdly, starting with a duty to provide environmental information, the Court has obviously adopted an extensive approach to interpreting Article 8 so as to include a number of procedural duties for States.

3. PROCEDURAL ELEMENTS AS AN INFLUENCE OF INTERNATIONAL ENVIRONMENTAL LAW

All of the duties outlined throughout previous section represent well established rules and principles of international environmental law.

[32] *Di Sarno and Others v. Italy*, App. No. 30765/08, Judgment of 10 January 2012, par. 106.

[33] *Ibid*. See also *Brincat and Others v. Malta*, App. Nos. 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11, Judgment of 24 July 2014, par. 102. The Court also recognized that in the context of dangerous activities, the scopes of positive obligations under Articles 2 and 8 of the Convention overlap. Therefore, positive obligation under Article 8 requires the State to take the same measures as those expected of them under Article 2 of the Convention.

[34] U. Curi, "Concept of Environment, Sustainable Development and Respect for Human Rights", *Juridical Tribune* 3/2013, 225.

[35] E. Folkesson, 149.

[36] As rightly put by Van Dyke, protection of the environment through human rights mechanisms is "somewhat unique in that their enforcement requires proactive protection". Violations must, therefore, be prevented through the institution of appropriate preventive measures. B. Van Dyke, "A Proposal to Introduce the Right to a Healthy Environment into the European Convention Regime", *Virginia Environmental Law Journal* 13/1993-1994, 338-339.

The Court seems to have imported them from various sources of international law, although its reliance on international law instruments has mainly been cautious and not always explicit.[37]

Duty to provide environmental information represents an exception in this regard. Although the *Guerra* judgment failed to offer any explanation as to why right to information constituted a part of the right to private and family life, in subsequent cases the Court felt the need to rely on relevant international law instruments. In *Oneryildiz v. Turkey*, where the authorities failed to take any measure to prevent explosion of methane at the rubbish tip, the Grand Chamber took the position that where "dangerous activities are concerned, public access to clear and full information is viewed as a basic human right".[38] However, the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters,[39] has made the most important contribution to the acceptance and development of procedural rights at regional and national levels,[40] influencing in particular the jurisprudence of the European Court.[41] In the case *Tătar v. Romania* the Court referred explicitly to international environmental standards. It stated that the procedural rights of access to information, public participation in environmental decision-making and access to justice in environmental matters

[37] See more on the general application of international law before the Court in M. Forowicz, "The reception of International Law in the European Court of Human Rights", *International Courts and Tribunals Series*, Oxford 2010.

[38] The Court cited Council of Europe Parliamentary Resolution 1087 on the Consequences of the Chernobyl Disaster, stating that "Resolution 1087 (1996) makes clear that this right must not be taken to be limited to the risks associated with the use of nuclear energy in the civil sector". *Oneryildiz v. Turkey*, App. No. 48939/99, Judgment of 30 November 2004, par. 62. For a detailed discussion see S. Kravchenko, "Is Access to Environmental Information a Fundamental Human Right?", *Oregon Review of International Law* 11/2009, 232–233. Van Dyke, on the other hand, cites the relevant provisions of the United Nations General Assembly World Charter for Nature, considering it to have "most conspicuously embraced" the procedural rights to information and participation in environmental decision-making. B. Van Dyke, 338. Environmental due process represents an integral part of the Rio Declaration as well which declares that environmental issues are best handled with the participation of all concerned citizens at the relevant level. L. Ziemer, "Application in Tibet of the Principles on Human Rights and the Environment", *Harvard Human Rights Journal* 14/2001, 264–265.

[39] ECE/CEP/43, Aarhus Denmark, 25 June 1998. This Convention is limited to the access to justice and information, as well as to public participation in environmental decision-making, thus focusing strictly on procedural aspect of the right to the environment. See A Boyle, "Human Rights and the Environment: Where Next?", *European Journal of International Law*, 23(3)/2012, 622.

[40] M. Clemson, "Human Rights and the Environment: Access to Energy", *New Zealand Journal of Environmental Law* 16/2012, 68.

[41] A. Boyle, "Human Rights and the Environment: A Reassessment", *Fordham Environmental Law Review* 18/2008, 7.

were contained in the Aarhus Convention.[42] The Court took an important step further in the case of *Grimkovskaya v. Ukraine* where it explicitly applied the standards of the Aarhus Convention while considering whether the State provided a meaningful complaints mechanism.[43] It even relied on particular provisions of the Aarhus Convention in the case *Di Sarno v. Italy*, thus widening the scope of the duty to provide information to encompass not only dangerous human activities but also natural causes.[44] Surprisingly enough, the Court even decided to rely on standards contained in the Aarhus Convention in *Taşkin and Others v. Turkey*, despite the fact that Turkey is not a contracting party to this environmental treaty.[45]

As opposed to this frequent and explicit reliance on the provisions of the Aarhus Convention, the Court chose to import other international environmental standards in an implicit manner. This consideration is most obvious as regards the duty to conduct environmental impact assessment. Though regulated by the famous Espoo Convention at international level,[46] the environmental impact assessment has only recently come to be mentioned by the Court, each time relating to the states' failure to conduct relevant studies prescribed by national law.[47] However, the Court seems to have started to require more studies on environmental consequences of a particular activity, including its continuous monitoring and assessment, which suggests its willingness to widen the procedures aimed at taking environmental matters into account.[48]

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[42] The Court also referred to Council of Europe's Parliamentary Assembly Resolution 1430 (2005) on industrial hazards interpreting it to extend the duty of States to improve dissemination of information in environmental field. *Tătar v. Romania*, App. No. 67021/01, Judgment of 27 January 2009, par. 118.

[43] The Court concluded that it had not been shown that the applicant was afforded a meaningful opportunity to contest the State authorities' policymaking regarding the M04 motorway during the relevant period of time, basing its conclusion on the provisions of the Aarhus Convention in particular. *Grimkovskaya v. Ukraine*, App. No. 38182/03, Judgment of 21 July 2011, paras. 39, 69 and 72.

[44] *Di Sarno and Others v. Italy*, par. 107.

[45] *Taşkin and Others v. Turkey*, par. 99.

[46] Convention on Environmental Impact Assessment in a Transboundary Context, United Nations, *Treaty Series* 1989, 309.

[47] *Giacomelly v. Italy*, paras. 87–89; *Tătar v. Romania*. paras. 114–115.

[48] It remains to be seen whether the Court would go as far as it did with standards contained in the Aarhus Convention, i.e. whether the relevant standards relating to environmental impact assessment would be applied as an international standard as well, to States whose national laws on environmental impact assessment procedures do not correspond to relevant international and European law provisions. Kravchenko and Bonine challenge the applicability of the standards set in *Giacomelly v. Italy* and *Tătar v. Romania* in relation to Ukraine and its deficient law on environmental impact assessment. S. Kravchenko, J. Bonine, 275.

Finally, an obvious influence of international law can be seen in the Court's use of the precautionary principle.[49] An explicit mention of this principle has occurred only recently in the case *Tătar v. Romania*.[50] The Court relied not only on Principle 15 of the Rio Declaration, but also on the relevant European Union law.[51] It concluded that the precautionary principle required States not to delay taking preventive measures simply due to scientific uncertainty. However, an influence of international environmental standards in the context of the precautionary principle acquired a novel dimension in a more recent case of *Brincat and Others v. Malta* where the Court used international standards as means of proving that the respondent State cannot hide behind the claim that it had not been aware of dangers of a specific activity.[52]

These last remarks point to the Court's willingness to be under an intense influence of international environmental rules when dealing with the procedural aspect of Article 8 cases, not only as regards ready-to use provisions such as those contained in the Aarhus Convention but also less operative norms, precautionary principle being an excellent example.

4. SCOPE OF THE PROCEDURAL DIMENSION OF ARTICLE 8

This part of the article will focus on two aspects of the scope of procedural rights contained in Article 8. It will first remark on their extent

[49] This principle enables rapid response in a case of possible risk to the protection of the environment and is induced by the need to react in a situation of scientific uncertainty to possible danger of human activities on the environment. See more H. Veinla, "Precautinary Environmental Protection and Human Rights*", Juridica International Law Review* 12/2007, 91–99.

[50] However, it should be noted that in *Balmer-Schafroth* decision from 1997, seven judges issued a joint dissenting opinion, explicitly referring to the precautionary principle. They said: "The majority appear to have ignored the whole trend of international institutions and public international law towards protecting persons and heritage, as evident in European Union and Council of Europe instruments on the environment, the Rio agreements, UNESCO instruments, the development of the precautionary principle and the principle of conservation of the common heritage." They preferred to have "the judgment of the European Court that caused international law for the protection of the individual to progress in this field by reinforcing the "precautionary principle" and full judicial remedies to protect the rights of individuals against the imprudence of authorities." *Balmer-Schafroth and Others v. Switzerland,* App. Nos. 67\1996\686\876, Judgment of 26 August 1997. Also, *Hatton* and *Öneryıldız,* contain some elements of precautionary language. See H. Veinla, 95.

[51] *Tătar v. Romania*, par. 120.

[52] Taking into account the high number of United Nations member states that ratified the Asbestos Convention, the Court concluded that Malta ought to have known about the dangers of asbestos and that it therefore failed to satisfy its positive obligation to ensure that the applicants were adequately protected and informed about the risk. *Brincat and Others v. Malta*, par. 105.

as opposed to their international environmental law counterparts. An examination will follow of their relationship with other rights of procedural character included in the European Convention.

It is quite clear from the Court's jurisprudence that it is not concerned with environmental pollution as such, rather with its negative consequences on the enjoyment of rights contained in Article 8. This remark may be considered as representing the main cause for both *ratione personae* and *ratione materiae* aspects of the scope of procedural dimension of Article 8.

As correctly observed by Boyle, it is the risk to private and family life that "generates the requirement to provide information, not some broader concern with environmental governance, transparency of decision-making, or public participation".[53] Therefore, right to environmental information interpreted as being part of Article 8, is narrower than its international law counterpart contained in the Aarhus Convention. Namely, only those personally affected in the sense of being victims of violation of Article 8 rights may invoke their procedural right to environmental information.[54] These limitations of *ratione personae* character, however, cannot be qualified as an exclusive feature of environmental issues decided by the Court. They simply reflect the Court's individualistic approach in protecting human rights, in line with the applicable rules.

On the other hand, as regards *ratione materiae* aspect, the Court has significantly expanded the scope of Article 8 by taking into account relevant international standards. It continues to widen their scope, sometimes even exceeding relevant universal international law. In *Guerra v. Italy*, the Court held that the State's failure to provide essential information about environmental risks represented a violation of the right to private and family life.[55] The Court seems to suggest that, in addition to the duty to establish a procedure for acquiring environmental information, the State has an obligation to actively inform about the risks those who are affected.[56] In its *Taşkin* judgment, the Court emphasized the significance it attaches to an informed environmental process,[57] whereas in *Tătar v. Romania* it found that Romanian authorities failed to meet their duty to evaluate in advance the potential risks of the activity in question, thus violating rights to private and family life, and, "plus généralement, à

[53] A. Boyle (2008), 18–19.

[54] The same applies to the procedural right to participate in environmental decision-making, as well as to the right to appeal to the court. *Taşkin and Others v. Turkey*, paras. 118–125.

[55] *Guerra and Others v. Italy*, par. 60.

[56] *Ibid.,* paras. 57–60, *Vilnes and Others v. Norway*, App. Nos. 52806/09 and 22703/10, Judgment of 5 December 2013, par. 235.

[57] *Taşkin and Others v. Turkey*, paras. 118–125.

la juissance d'un environnement sain et protégé".[58] Recent judgment in the case of *Kolyadenko and Others v. Russia* further broadened the procedural aspect of Article 8 to include natural phenomena by finding that Russia failed to inform the public of the fact that they lived in a flood prone area and that they did not establish an operational emergency warning system.[59] The ever evolving nature of the procedural aspect of Article 8 seems to be confirmed by the Court's approach in the 2013 *Vilnes v. Norway* case. The Court introduced what appears to be the new procedural element of Article 8, that of prior informed consent.[60]

The scope of certain procedural elements of Article 8 is also determined by their comparison with relevant Convention matches. In relation to the freedom of expression, the Court has consistently interpreted Article 8 as including the right to environmental information rather than finding a separate violation of Article 10.[61] By switching to Article 8, i.e. linking right to receive environmental information with the potential negative effects on the applicants' quality of life, the Court managed to "reach a result it otherwise could not".[62]

As regards Article 6 of the Convention, restrictive conditions for applying it have, in environmentally sensitive cases, again been overcome

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[58] *Tătar v. Romania*, par. 107.

[59] *Kolyadenko and Others v. Russia*, App. Nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, Judgment of 28 February 2012, par. 185.

[60] It suggested that not only should the Court investigate whether the State provided the applicants with essential information needed to be able to assess the risks, but also whether they had given informed consent to the taking of such risks. *Vilnes and Others v. Norway*, par. 236. In this case, the applicants are former deep sea divers, who took part in diving operations in the petroleum industry from 1965 to 1990. They alleged that these operations caused them serious health problems, which led to partial disability, and that they hadn't consented to these risks of which they did not have full knowledge at that time.

[61] As early as in *Guerra v. Italy*, the Court decided not to consider that freedom guaranteed under Article 10 could be interpreted as "imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion". *Guerra and Others v. Italy*, par. 53. The Court had thus abandoned the reasoning adopted earlier by the Commission in the same case.

[62] M. Acevedo, 488. Acevedo also notes that by providing for this right under Article 8 instead of Article 10 the Court avoided the potential situation of the State ensuring compliance with its obligation by simply not putting anything in writing or classifying writing materials as confidential. *Ibid*., 490, fn. 200. For a different standing see Concurring Opinion of Judge Jambrek. *Guerra and Others v. Italy*, Concurring Opinion of Judge Jambrek. D. Shelton, "Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized?", *Denver Journal of International Law & Policy* 35/2006–2007, 137–139. M. Fitzmaurice, J. Marshall, "The Human Right to a Clean Environment – Phantom or Reality? The European Court of Human Rights and English Courts Perspective on Balancing Rights in Environmental Cases", *Nordic Journal of International Law* 76/2007, 118.

by the introduction of adequate procedural elements under Article 8. In *Taşkin and Others v. Turkey* the Court ascertained that not only did Article 8 include a right to a fair decision-making process, it also implicated the right to access to court.[63] Furthermore, in *Tătar v. Romania*, the Court appears to suggest that right to access to court based on Article 8 is more extensive than the one envisaged by Article 6. By allowing the applicant to appeal against individual scientific environmental impact studies, the Court did not require the result of the court proceedings to be decisive for the applicant's rights.[64]

5. ENVIRONMENTAL DUE PROCESS – CERTAIN REMARKS REGARDING ITS CONTENT AND FUNCTIONS

Folkesson argues that the European Court has "set national environmental standards as a measurement of compliance with the obligations under the ECHR" and that it is "hesitant to set its own standards for the environmental pillar".[65] Although such a conclusion may be true in relation to the substantive aspect of the right to private and family life since the Court relies on State's existing national standards and accords them certain margin of appreciation, when it comes to various procedural elements of Article 8 the Court not only chose to rely heavily on relevant international standards but also to be creative enough to overpass them and transform them into an environmentally expansionist interpretation of the right to private and family life. This remark, however, does not imply that the Court's approach in dealing with procedural aspect of Article 8 is devoid of any critique.

Through its case-law the Court established certain criteria for assessing violation of different procedural rights.

As regards the right to environmental information, the Court emphasized temporal and spatial elements, as well as the essential character of the information, as being decisive in that regard. In the *Guerra* judgment, it acknowledged that "the applicants waited, right up until the production of fertilizers ceased in 1994, for essential information that would have enabled them to assess the risks they and their families might run if they continued to live at Manfredonia, a town particularly exposed to

[63] *Taşkin and Others v. Turkey*, par. 119.

[64] *Tătar v. Romania*, paras. 113, 116–117 and 119. Similarly, in *Roche v. the United Kingdom* the Court noted that an individual should not be required to litigate in order to receive relevant information. What seems important is that the applicant made constant efforts to disclose such information independently of any litigation. *Roche v. the United Kingdom*, paras. 165–166.

[65] E. Folkesson, 147.

danger in the event of an accident at the factory".[66] However, the formulation used by the Court may be reproached for the fact that it seems to suggest that the purpose of providing environmental information consists in enabling the applicants to assess the risks on their own. The Court has continued to express this standard using the same wording in its subsequent jurisprudence despite the fact that it has since interpreted the procedural aspect of Article 8 as including the positive duty to conduct appropriate environmental studies.[67] It is, therefore, the duty of the State to assess the risks through an environmental impact study, as well as to provide relevant conclusions to interested persons. The Court seems to forget that, generally, applicants are not equipped with necessary prudence that would enable them to understand and assess difficult expert language used in environmental impact studies. Recent jurisprudence offers an indication that Court's reasoning may be starting to change in this regard.

In *Ledyayeva and Others v. Russia* the Court noted that the information contained in environmental report was definitely of use for determining the scale of the environmental problem and its consequences, but that "it did not impose any particular obligation on the plant or the State authorities".[68] The Court seems to suggest that relevant environmental reports must also include specific information as to what practical measures will be implemented by the State in response to an environmentally degrading situation. In *Tătar v. Romania* the Court went one step further and found it necessary to examine whether, in the context of the situation that ensued after the environmental accident in question, State authorities informed the public about potential risks that such accident may produce on their health and environment, whether they informed the population about preventive measures that would be taken in case similar accidents occurred in future, as well as whether the authorities informed the inhabitants about the measures they intended to take in order to mitigate risks for health and environment should such accident happen again.[69] In addition, the Court failed to provide clear standards as regards the scope and definition of environmental information. As opposed to the *Guerra* judg-

[66] *Guerra and Others v. Italy*, par. 60.

[67] In *Băcilă v. Romania* the Court reaffirmed the principles previously envisaged in *Giacomelli v. Italy*, implying that duty to conduct environmental impact assessment represents a standard in the Court's reasoning regarding procedural elements of Article 8, regardless of its status in national law. *Băcilă v. Romania*, App. No. 19234/04, Judgment of 30 March 2010, par. 62.

[68] *Ledyayeva, Dobrokhotova, Zolotareva and Romashina v. Russia*, App. Nos. 53157/99, 53247/99, 53695/00 and 56850/00, Judgment of 26 October 2006, par. 107. This case concerns four applicants, residents of the Russian town of Cherepovets, who lived around the steel works that caused the level of atmospheric pollution to be many times in excess of the limits established by domestic regulations.

[69] *Tătar v. Romania*, par. 101.

ment "where it was not disputed that the inhabitants of Manfredonia were at risk from the factory in question and that the State authorities had in their possession information which would have enabled the inhabitants to assess this risk", in *McGinley and Egan v. the United Kingdom* the Court attached particular significance to the fact that "the existence of any other relevant document has not been substantiated and is thus no more than a matter of speculation".[70] Latest development concerning criteria for environmental information occurred in the case of *Brincat and Others v. Malta*, which concerns former workers of the public ship repair yard. The Court rejected Maltese Government's contention that the distribution of masks represented an implicit source of information for the applicants regarding risks of asbestos to which they had been exposed,[71] thus confirming that not only should environmental information be explicit, but also that the State's duty to establish accessible and effective official procedures represents a precondition for enjoying the right to environmental information.

Introduction of the precautionary principle in the Court's reasoning has brought valuable improvements. However, its positive effect seems to remain restricted to the procedural aspect of Article 8, not the substantive one. In *Tătar v. Romania* the Court held that the precautionary principle required States not to hide behind scientific uncertainty for not taking preventive measures.[72] It seems to have gone one step further in its *Taşkin v. Turkey* judgment since it suggested that the applicant may claim violation of Article 8 as regards procedural guarantees even if it is not certain that he would be exposed to adverse consequences of a dangerous activity.[73] What Court demanded in this particular case was that the applicant showed that negative effects are likely to occur.[74] However, the Court refused to apply the precautionary principle in *Balmer-Schafroth v. Switzerland*. The Court held that the applicants "failed to show that the operation of Mühleberg power station exposed them personally to a danger that was not only serious but also specific and, above all, imminent".[75] It follows that severe pollution still represents the main requirement for considering the applicability of Article 8.[76]

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[70] *McGinley and Egan v. The United Kingdom*, par. 99.

[71] *Brincat and Others v. Malta*, par. 114.

[72] *Tătar v. Romania*, par. 120.

[73] *Taşkin and Others v. Turkey*, par. 113.

[74] Compare with *Ivan Atanasov v. Bulgaria*, App. No. 12853/03, Judgment of 2 December 2010, par. 76.

[75] *Balmer-Schafroth and Others v. Switzerland*, par. 40.

[76] See also M. Fitzmaurice, J. Marshall, 116–118. For comparison see the case of *Luginbuhl v. Switzerland*, App. No. 42756/02, Judgment of 17. January 2006.

The Court has managed to set important standards in relation to the content of the procedural rights to participate in environmental decision-making and to access justice in environmental matters. In *Grimkovskaya v. Ukraine* the Court found that the State failed to show that its decision to route motorway M04 via K. Street in which the applicant resided, was preceded by an "adequate feasibility study, assessing the probability of compliance with applicable environmental standards and enabling interested parties, including K. Street's residents, to contribute their views".[77] The *Dubetska and Others v. Ukraine* case emphasized that the applicants need to be able to challenge environmental decisions "in an effective way" and that procedural guarantees available to the applicant may become inoperative and the State may be found liable under the Convention "where a decision-making procedure is unjustifiably lengthy or where a decision taken as a result remains for an important period unenforced".[78] However, the Court did not consider it appropriate to scrutinize the manner in which the decision-making process is organized by national law. In *Flamenbaum and Others v. France*, it did not attach importance to the applicants' argument that the decision-making procedure was fragmented and that they did not have the opportunity to have the project examined by a single judge. What seemed to matter is that the applicants had an occasion to participate in each phase of the decision-making process.[79] Also, the fact that the outcome of the proceedings did not meet the applicants' expectations is not considered by the Court to be "sufficient to establish that they were not involved in or given access to the decision-making process".[80] As regards access to justice in environmental matters, the Court found it important that domestic courts prematurely dismissed the applicant's civil claim against local authorities, it criticized the judgment for being too short and for not containing direct response to the applicant's main arguments.[81] The Court has thus set higher threshold for assessing violation of the relevant procedural aspect of Article 8. It not only examined whether the applicant had access to an adequate complaints procedure, but also the manner in which such procedure was conducted.

Another remark concerns the status of procedural environmental considerations in the Court's reasoning. Not only does the Court use the

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[77] *Grimkovskaya v. Ukraine*, par. 67.

[78] *Dubetska and Others v. Ukraine*, App. No. 30499/03, Judgment of 10 February 2011, par. 144.

[79] *Flamenbaum and Others v. France*, App. Nos. 3675/04 and 23264/04, Judgment of 13 December 2012, par. 159.

[80] *Zammit Maempel v. Malta*, App. No. 24202/10, Judgment of 22 November 2011, par. 71.

[81] *Grimkovskaya v. Ukraine*, par. 71.

procedural elements to establish violation of appropriate positive obligations and thus the breach of the right to private and family life, which may be qualified as their primary function,[82] it uses environmental due process for other, accessory purposes as well.

The Court has attached significance to procedural elements as means for evaluating the applicability of Article 8. More concretely, the Court considered that the issue of access to information which could either have allayed the applicants' fears or enabled them to assess the danger to which they had been exposed, was sufficiently closely linked to their private and family lives as to raise an issue under the provision of Article 8.[83] The Court used the same approach in *Tătar v. Romania* where, in assessing the applicability of Article 8 in the case at hand, it took into consideration official reports and environmental impact studies which enabled it to come to a conclusion that the pollution caused by the activity of Săsar factory could also result in depriving the applicants of their right to home, private and family life.[84]

In addition, the procedural elements may serve as a means for assessing the fair balance test.[85] In *Fadeyeva v. Russia* the Court thought it necessary to examine whether there had been "manifest error of appreciation by the national authorities in striking a fair balance between the competing interests of different private actors".[86] Admitting that its role regarding issues of environmental protection is primarily a subsidiary one due to their complexity, the Court considered it necessary to investigate into the decision-making process in order to assess whether due respect had been afforded to the interests of the applicant.[87] Despite the fact that Russian authorities referred to several environmental impact studies, the Court reproached the Government for having failed to produce these documents or to provide for explanation as to how their conclusions had been taken into account regarding the public policy towards the Cherepovets steel plant. Furthermore, the State failed to specify "how the interests of the population residing around the plant were taken into account when conditions attached to the permit were established", thus confirming the importance of participation in environmental decision-making in the

[82] *Budayeva and Others v. Russia*, App. Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, Judgment of 20 March 2008, paras. 136–137, reaffirmed in *Brincat and Others v. Malta*, par. 101.

[83] *McGinley and Egan v. The United Kingdom*, par. 97.

[84] *Tătar v. Romania*, par. 97.

[85] *Hatton and Others v. The United Kingdom*, par. 128, *Powell and Rayner v. The United Kingdom*, App. No. 9310/81, Judgment of 21 February 1990, par. 45.

[86] *Fadeyeva v. Russia*, par. 105.

[87] The same approach was used in *Giacomelly v. Italy*, par. 84, *Zammit Maempel v. Malta*, par. 73.

course of applying the fair balance test.[88] Similarly, in *Grimkovskaya v. Ukraine* the Court attached importance to three factors when assessing the balance of interests. Firstly, there was no adequate environmental feasibility study that preceded the decision of the State authorities to designate K. Street as part of the M04 motorway. Secondly, the Government failed to establish "reasonable environmental management policy" in the aftermath of its decision. Thirdly, the applicant had no meaningful opportunity to contribute to the decision-making process or to challenge the decisions before an independent authority.[89]

Finally, procedural elements have served the Court, among other factors, to determine whether the pollution levels reached the high threshold of severity in order to be able to pronounce on the admissibility of the complaint in question. In a case concerning wind turbines, the Court noticed that the applicants had not made a formal demand for an in-depth noise investigation, despite having been reminded of the opportunity to do so by the competent authority. The Court considered that "such a demand would have resulted in a decision by the Environment Committee which could have appealed against to the Board and subsequently to the environmental courts".[90] Lacking such information about the noise levels, the Court found it necessary to accept the results from the noise tests made available to it, as an approximate estimate of the noise levels emitted from wind turbines. The Court has thus qualified relevant procedural elements as a factor for determining the level of severity of environmental interference, i.e. the factor to be taken into consideration with regard to proving it.[91]

6. CONCLUSION

The reason for introducing a procedural obligation into a Convention right is to ensure 'effective' respect for that particular right. Environmental cases very often raise an issue of access to information, as an integral part of the procedural aspect of protection afforded by Article 8. However, it is important to underline that the failure to grant access to information may give rise to a violation of this article in environmental cases, even where the individual is not seeking that information in order to enforce a civil right, as it was demonstrated in *Roche*.

[88] *Ibid*., par. 129. See also *Ledyayeva, Dobrokhotova, Zolotareva and Romashina v. Russia*, paras. 109–110.

[89] *Grimkovskaya v. Ukraine*, par. 72.

[90] *Fägerskiöld v. Sweden*, App. No. 37664/04, Decision on admissibility of 26 February 2008, par. 16.

[91] See also *Borysiewicz v. Poland*, App. No. 71146/01, Judgment of 1 July 2008, par. 53.

The European Court has recognized in its extensive jurisprudence that the need for providing information and communication on environmental hazards forms an integral part of the State's positive obligations under Article 8. It has also been established that public authorities must observe certain requirements as regards participation in decision-making process, access to justice in environmental matters and environmental impact assessment. The Court's reliance on the concept of positive obligations with regard to Article 8 has expanded significantly during the last two decades, its most important manifestations being the abandonment of the link between the State and the harmful activity and attribution of a strong preventive nature to the duties contained in Article 8.

Development of procedural aspects of Article 8 was influenced by a number of generally accepted and recognized environmental rules and principles. As correctly observed by Boyle, procedural rights are the most important environmental addition to human rights law, "as a human rights perspective directly addresses environmental impacts on the life, health, private life, and property of individual humans rather than on other states or the environment in general."[92] The growing jurisprudence of the European Court in environmental cases indicates the need to include this topic in mainstream human rights law. However, 'proceduralization' of Article 8 demonstrates a process of "greening" of existing human rights law in the absence of expressly recognized right to a healthy environment. There are two possible ways for the future expansion of environmental protection: inclusion of a separate right to a healthy environment, or further expansion of Court's jurisprudence in environmental matters. Apparanetly, it is more realistic to expect the latter scenario. Therefore, regardless of some weaknesses and inconsistencies in Court's jurisprudence, it is very important that the Court re-confirmed that the right to access to information is a free-standing procedural right under Article 8, and that it is creative enough to transform relevant environmental standards into an expansionist interpretation of this right.

[92] A Boyle (2012), 613.