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## Balancing Conflicting Goods

### The European Human Rights Jurisprudence on Environmental Protection

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*The implementation of environmental protection measures may interfere with the enjoyment of certain human rights. The European Court of Human Rights and the former Commission have developed quite an extensive jurisprudence in which these potentially conflicting goods of human rights and nature protection are balanced. Conservation-related cases have generally concerned the right to property, the right to private life and home, the right to a fair trial and the prohibition of discrimination. Especially with regard to the right to property, an increase in conservation-related cases and findings of violations is noticeable.*

Human rights; European Court of Human Rights; nature conservation; environment; right to property; right to respect for home, private and family life; right to a fair trial; prohibition of discrimination

#### 1. Introduction

This contribution examines the frictions between environmental protection measures and the human rights of individuals affected by these measures. More specifically, it is analysed how the European Court of Human Rights and the former Commission have balanced in their jurisprudence these potentially conflicting “goods” of human rights and environmental protection.

The relationship between human rights and environmental protection is more commonly addressed from a synergetic perspective, in which their reciprocally beneficial relationship is stressed. The Draft Principles on Human Rights and the Environment of 1994, elaborated by Special Rapporteur Mrs. Fatma Zohra Ksentini, articulate this mutual connection as follows: “human rights violations lead to environmental degradation and ... environmental degradation

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leads to human rights violations”.<sup>2</sup> On the one hand, the realization of human rights generally contributes to the protection of the environment.<sup>3</sup> On the other, a healthy environment is often a prerequisite to be able to enjoy human rights.<sup>4</sup>

However, the realization of nature conservation measures may also interfere with the enjoyment of certain human rights, such as the right to property. From such conflict perspective, two questions arise. A first question concerns the limitations that may be put on the enjoyment of human rights for reasons of nature conservation. Human rights treaties generally prescribe the circumstances under which human rights may be lawfully interfered with. Only a few human rights, such as the right to life, are non-derogable. The European human rights organs have generally accepted nature conservation as a legitimate public interest goal that may justify the interference with the enjoyment of a human right, if the other conditions are fulfilled as well (cf. *infra*). A second question which has less frequently been considered in research is under which circumstances limitations on nature conservation initiatives can be justified for reasons of human rights protection: when should nature conservation initiatives be restricted to guarantee the enjoyment of human rights by individuals involved in or affected by nature conservation? This contribution addresses both questions, which are mirror images of one another, in the European human rights jurisprudence.

In the conservation-related cases brought before the European Court of Human Rights and the former Commission, applicants have most readily alleged violations of the right to property, the right to private life and home, the right to a fair trial, and the prohibition of discrimination. These four rights are consecutively discussed.<sup>5</sup>

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<sup>2</sup> *UN Commission on Human Rights, Review of Further Developments in Fields with which the Sub-Commission has been concerned: Human Rights and the Environment. Final report prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur, U.N. Doc. E/CN.4/Sub.2/1994/9 (1994), Annex 1, preamble, para. 10.*

<sup>3</sup> See, e.g., *D. Shelton, Environmental Rights*, in: P. Alston (ed.), *Peoples' Rights*, p. 185, 186.

<sup>4</sup> See, e.g., *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1998)*, preamble, para. 6.

<sup>5</sup> The analysis of the jurisprudence is updated until March 2009.

## 2. The right to property

The human rights organs of the Council of Europe developed a rich, but relatively unexplored, case law with regard to the impact of conservation measures on the enjoyment of the right to property.<sup>6</sup> Pursuant to Article 1 of Protocol No. 1,

[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

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

The European Court of Human Rights has stated that “the right to peaceful enjoyment of his possessions” as protected by Article 1, in substance guarantees the right to property.<sup>7</sup> The Court has emphasized that the concept of “possessions” has an autonomous meaning. It is not restricted to ownership of physical goods, but must be understood as including certain other rights and interests constituting assets.<sup>8</sup> The concept of “possessions” also includes claims, in respect of which an applicant can argue that he has at least a “legitimate expectation” of obtaining effective enjoyment of a property right.<sup>9</sup> This broad understanding of property is illustrated by the fact that the European Court and the former Commission have considered hunting and fishing rights as falling within the ambit of the right to property.<sup>10</sup>

According to the constant jurisprudence of the European Court of Human Rights, Article 1 of Protocol No. 1 consists of “three distinct rules”. The first rule, enshrined in the first sentence of the first paragraph, generally provides for the peaceful enjoyment of property. The second and third rules constitute limitations on the first rule. The second rule, contained in the second sentence of the first paragraph, allows the deprivation of possessions subject to certain

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<sup>6</sup> The conservation-related jurisprudence on the right to property is more extensively discussed in *E. Desmet, Natuurbescherming en het recht op eigendom in de rechtspraak van het Europees Hof voor de Rechten van de Mens: een dubbele intensifiëring, Milieu- en Energierecht*, 2010 (3), *forthcoming*.

<sup>7</sup> ECtHR, *Marckx v. Belgium*, 13 June 1979, para. 63, Series A no. 31.

<sup>8</sup> See, e.g., ECtHR, *Gasus Dosierund Fördertechnik GmbH v. the Netherlands*, 23 February 1995, para. 53, Series A no. 306-B; ECtHR, *Iatridis v. Greece* [GC], no. 31107/96, para. 54, ECHR 1999-II.

<sup>9</sup> ECtHR, *Pine Valley Developments Ltd and Others v. Ireland*, 29 November 1991, para. 51, Series A no. 222.

<sup>10</sup> For hunting rights, see, e.g., Eur. Comm. HR, *J. v. Sweden*, no. 14459/88, 19 February 1992; ECtHR, *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, para. 74, ECHR 1999-III. Regarding fishing rights, see, e.g., Eur. Comm. HR, *Günther v. Sweden*, no. 26265/92, 27 November 1996; ECtHR, *Posti and Rahko v. Finland*, no. 27824/95, para. 76, ECHR 2002-VII; ECtHR, *Gudjonsson v. Iceland* (dec.), no. 40169/05, 2 December 2008.

conditions. The third rule, set out in the second paragraph, recognizes that states are entitled to enact laws to control the use of property in accordance with the general interest.<sup>11</sup> The Court has emphasized the interconnection of these three rules: “[t]he second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule.”<sup>12</sup>

Formal expropriation implies a transfer of ownership. However, “in the absence of a formal expropriation ... the Court considers that it must look behind the appearances and investigate the realities of the situation complained of,” to determine whether that situation amounted to a de facto expropriation.<sup>13</sup> To find a de facto deprivation, the interference must “deprive [the applicant] of all meaningful use of his property.”<sup>14</sup>

The term “control” of the third rule, contained in the second paragraph of Article 1 of Protocol No. 1, refers to a “state measure or decision which obliges or forbids a certain use, exclusion or disposal of property.”<sup>15</sup> Deprivation and control of the use of property clearly constitute interferences with the right to property. However, the Court has noted that there can also be an interference with the “peaceful enjoyment of possessions,” guaranteed by the first sentence of the first paragraph of Article 1 of Protocol No. 1, when such an interference does not amount to deprivation or control of the use of property.<sup>16</sup> Each of the three rules – on enjoyment, deprivation, and control – can thus be interfered with.

The greater part of conservation-related cases have been classified by the European human rights organs as falling under the rule of control of the use of property.<sup>17</sup> Since 2007, some conservation-related cases were investigated under the rule of deprivation of property.<sup>18</sup> In

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<sup>11</sup> ECtHR, *Sporrong and Lönnroth v. Sweden*, 23 September 1982, para. 52, Series A no. 52.

<sup>12</sup> ECtHR, *James and Others v. the United Kingdom*, 21 February 1986, para. 37, Series A no. 98.

<sup>13</sup> ECtHR, *Sporrong and Lönnroth v. Sweden*, 23 September 1982, para. 63, Series A no. 52.

<sup>14</sup> Eur. Comm. HR, *Günther v. Sweden*, no. 26265/92, 27 November 1996.

<sup>15</sup> *T. van Banning*, *The Human Right to Property*, 2002, p. 106.

<sup>16</sup> ECtHR, *Sporrong and Lönnroth v. Sweden*, 23 September 1982, Series A no. 52.

<sup>17</sup> See, e.g., Eur. Comm. HR, *Oerlemans v. The Netherlands*, no. 12565/86, 62 DR 203, 10 July 1989; ECtHR, *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, para. 74, ECHR 1999-III; ECtHR, *Posti and Rahko v. Finland*, no. 27824/95, para. 76, ECHR 2002-VII; ECtHR, *Alatulkkila and Others v. Finland*, no. 33538/96, para. 66, 28 July 2005; ECtHR, *Schneider v. Luxembourg*, no. 2113/04, paras. 42-44, 10 July 2007.

<sup>18</sup> See, e.g., ECtHR, *Urbárska Obec Trenčianske Biskupice v. Slovakia*, no. 74258/01, para. 116, ECHR 2007-XIII (extracts); ECtHR, *Turgut and Others v. Turkey*, no. 1411/03, 8 July 2008; ECtHR, *Devecioğlu v. Turkey*, no. 17203/03, 13 November 2008.

several cases, the applicants alleged that conservation-related measures had amounted to a de facto expropriation. Until now, however, the European human rights organs have not accepted this argument.<sup>19</sup> Some conservation-related cases were also considered as coming within the general rule of the peaceful enjoyment of property.<sup>20</sup> Finally, in a few cases it was not deemed necessary to determine whether a situation came within the first rule, namely when it was judged that there had been a fair balancing of interests anyhow.<sup>21</sup>

In case of an interference with one of the three rights contained in Article 1 of Protocol No. 1 – enjoyment, deprivation, and control of the use of property – it must be assessed whether that interference was justified. To determine the acceptability of an interference, a three-fold test is consistently used: lawfulness, public or general interest, and proportionality.

The first criterion is lawfulness: the interference must be provided in a domestic law that is adequately accessible and sufficiently precise, as to enable a citizen to foresee the consequences of his or her actions.<sup>22</sup> This condition of lawfulness has hardly ever been an issue in the conservation-related cases examined.<sup>23</sup>

Secondly, an interference by public authorities with the enjoyment of private property must pursue a public or general interest goal. The protection of the natural environment has been accepted by both the former Commission and the Court as a legitimate public or general

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<sup>19</sup> See, e.g., ECtHR, *Fredin v. Sweden (no. 1)*, 18 February 1991, paras. 42-47, Series A no. 192; ECtHR, *Pine Valley Developments Ltd and Others v. Ireland*, 29 November 1991, paras. 55-56, Series A no. 222; Eur. Comm. HR, *Uuhiniemi and 14 Others v. Finland*, no. 21343/93, 10 October 1994; ECtHR, *Matos e Silva, Lda., and Others v. Portugal*, 16 September 1996, paras. 82-85, Reports of Judgments and Decisions 1996-IV; Eur. Comm. HR, *Günther v. Sweden*, no. 26265/92, 27 November 1996; ECtHR, *Saliba v. Malta*, no. 4251/02, 8 November 2005; ECtHR, *Pindstrup Mosebrug A/S v. Denmark (dec.)*, no. 34943/06, 3 June 2008.

<sup>20</sup> See, e.g., ECtHR, *Katte Klitsche de la Grange v. Italy*, 27 October 1994, para. 40, Series A no. 293-B; ECtHR, *Matos e Silva, Lda., and Others v. Portugal*, 16 September 1996, para. 79, Reports of Judgments and Decisions 1996-IV; ECtHR, *Papastavrou and Others v. Greece*, no. 46372/99, para. 38, ECHR 2003-IV; ECtHR, *Katsoulis and Others v. Greece*, no. 66742/01, para. 38, 8 July 2004; ECtHR, *Aarniosalo and Others v. Finland (dec.)*, no. 39737/98, 5 July 2005; ECtHR, *Pindstrup Mosebrug A/S v. Denmark (dec.)*, no. 34943/06, 3 June 2008.

<sup>21</sup> See, e.g., Eur. Comm. HR, *Uuhiniemi and 14 Others v. Finland*, no. 21343/93, 10 October 1994; Eur. Comm. HR, *Eskelinen and 54 Others v. Finland*, no. 19761/92, 10 October 1994.

<sup>22</sup> ECtHR, *Sunday Times v. the United Kingdom (no. 1)*, 26 April 1979, para. 49, Series A no. 30 (on freedom of expression, Article 10 ECHR). For the application of these criteria in case of Article 1 of Protocol No. 1 see, e.g., on the rule of deprivation: ECtHR, *Lithgow and Others v. the United Kingdom*, 8 July 1986, Series A no. 102 and on the rule on control of the use of property: ECtHR, *Špaček, s.r.o., v. the Czech Republic*, no. 26449/95, para. 54, 9 November 1999.

<sup>23</sup> See, however, ECtHR, *Saliba v. Malta*, no. 4251/02, 8 November 2005, with dissenting opinion as regards the issue of lawfulness of Judge Bonello joined by Judge Borrego Borrego.

interest.<sup>24</sup> In the case of *Fredin v. Sweden (No. 1)* of 1991, the Court emphasized “that in today’s society the protection of the environment is an increasingly important consideration.”<sup>25</sup> This phrase has been repeated in various succeeding conservation-related cases.<sup>26</sup> Nevertheless, the national authorities enjoy a wide margin of appreciation in determining the public/general interest: “Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is “in the public interest.” The European Court will only intervene when the judgment of the legislator is “manifestly without reasonable foundation.”<sup>27</sup> This wide margin of appreciation has also been applied in cases concerning nature conservation.<sup>28</sup> In recent years, however, a new phrase was incorporated in the considerations on the wide margin of appreciation in conservation-related cases, which evidences the increasing importance attached by the Court to the protection of the environment. In the case of *Hamer v. Belgium* of 2007, the Court stated for the first time that

“[e]conomic imperatives and *even certain fundamental rights*, such as the right to property, *should not be seen as being given primacy over considerations concerning the protection of the environment*, in particular when the State has legislated on the matter. The public authorities then assume a responsibility which should be materialized through their intervention at the opportune moment in order not to deprive of every useful effect the provisions protective of the environment that they have decided to put in place.”<sup>29</sup>

The Court thus underlines the responsibility of the national authorities to take measures to guarantee the protection of the environment, even if these measures may interfere with the enjoyment of certain fundamental rights, such as the right to property. The Court has restated this point of view in later judgments.<sup>30</sup>

The third and most critical condition for an interference to be appropriate, is that of proportionality. This means that an interference must achieve a fair balance between the

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<sup>24</sup> See, e.g., Eur. Comm. HR, *Herrick v. The United Kingdom*, no. 11185/84, 42 DR 275, 11 March 1985; Eur. Comm. HR, *Oerlemans v. The Netherlands*, no. 12565/86, 62 DR 203, 10 July 1989.

<sup>25</sup> ECtHR, *Fredin v. Sweden (no. 1)*, 18 February 1991, para. 48, Series A no. 192.

<sup>26</sup> See, e.g., Eur. Comm. HR, *Uuhiniemi and 14 Others v. Finland*, no. 21343/93, 10 October 1994; Eur. Comm. HR, *Eskelinen and 54 Others v. Finland*, no. 19761/92, 10 October 1994.

<sup>27</sup> ECtHR, *James and Others v. the United Kingdom*, 21 February 1986, para. 46, Series A no. 98.

<sup>28</sup> See, e.g., ECtHR, *Koustelidou and Others v. Greece (dec.)*, no. 35044/02, 20 November 2003; ECtHR, *Ansay and Others v. Turkey (dec.)*, no. 49908/99, 2 March 2006; ECtHR, *Lazaridi v. Greece*, no. 31282/04, 13 July 2006; ECtHR, *Nikas and Nika v. Greece*, no. 31273/04, para. 33, 13 July 2006.

<sup>29</sup> Own translation, emphasis added. ECtHR, *Hamer v. Belgium*, no. 21861/03, para. 79, ECHR 2007-XIII (extracts).

<sup>30</sup> See, e.g., ECtHR, *Turgut and Others v. Turkey*, no. 1411/03, para. 90, 8 July 2008; ECtHR, *Temel Conta Sanayi Ve Ticaret A.Ş. v. Turkey*, no. 45651/04, para. 42, 10 March 2009.

general interest of the community and the requirements of protection of the individual's fundamental rights.<sup>31</sup> Such a balance is absent if a person has to bear “an individual and excessive burden.”<sup>32</sup> In general, the state enjoys “a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question.”<sup>33</sup> Arai-Takahashi has criticized the wide margin allowed to national states in evaluating the *consequences* of the interference with property rights as an “excessively restrained approach” of the European human rights organs.<sup>34</sup> Also in the context of nature conservation measures, the Strasbourg organs have left a wide margin of appreciation to the national governments.<sup>35</sup>

Eleven parameters may be identified which influence the assessment of the European Court and the former Commission of whether the principle of proportionality has been respected. To find a violation of Article 1 of Protocol No. 1, there will generally be a combination of these parameters.<sup>36</sup> These parameters are: the extent of the interference; the impact on livelihood; the legally binding character of the nature conservation measure; reasons of conscience; the behaviour of the state in respect of the goal of nature protection; the state of mind and behaviour of the applicant; the characteristics of the property right; the availability of an alternative; compensation paid by the state; procedural safeguards; and the availability of an effective internal remedy. These factors are hereinafter succinctly discussed.

A first parameter which influences the appraisal of proportionality in conservation-related cases brought before the European human rights organs is the extent to which the interference restricts the enjoyment and use of one's possessions. The more severe and definitive the interference with the enjoyment of property is, the more easily the principle of proportionality will be considered violated.<sup>37</sup> Particularly when “the very substance of the applicants’

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<sup>31</sup> ECtHR, *Sporrong and Lönnroth v. Sweden*, 23 September 1982, para. 69, Series A no. 52.

<sup>32</sup> *Id.* at para. 73.

<sup>33</sup> ECtHR, *AGOSI v. the United Kingdom*, 24 October 1986, para. 52, Series A no. 108.

<sup>34</sup> *Y. Arai-Takahashi*, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, 2002, p. 157.

<sup>35</sup> See, e.g., Eur. Comm. HR, *Jónsson et al v. Iceland*, no. 41242/98, 21 October 1998; ECtHR, *Hamer v. Belgium*, no. 21861/03, para. 78, ECHR 2007-XIII (extracts); ECtHR, *Theodoraki and Others v. Greece*, no. 9368/06, para. 61, 11 December 2008.

<sup>36</sup> See, e.g., ECtHR, *Köktepe v. Turkey*, no. 35785/03, para. 92, 22 July 2008.

<sup>37</sup> See, e.g., ECtHR, *Alatulkkila and Others v. Finland*, no. 33538/96, para. 67, 28 July 2005.

ownership” is affected, the Strasbourg organs will be stricter in their evaluation.<sup>38</sup> Two criteria may be distilled from the jurisprudence that are used to assess the extent of the interference: (i) whether and how the property can still be used after the interference, and (ii) the purpose for which the property was originally intended.<sup>39</sup> Making the exercise of certain activities dependent on a prior authorization or coordination does not upset the fair balance required between the general interest and the individual’s fundamental rights.<sup>40</sup> Logically, a definitive restriction is more serious than a temporary limitation.<sup>41</sup>

A second factor taken into account by the former Commission when evaluating the proportionality is whether the interference has an impact on the livelihood of the applicants.<sup>42</sup> Even when the applicant’s livelihood is affected, a wide margin of appreciation is left to the national authorities.<sup>43</sup> In the jurisprudence of the European Court of Human Rights, the “impact on livelihood” does not seem to function as a separate parameter, but appears more commonly as a factor in the determination of the parameter of “compensation”, namely whether the states were under the obligation to compensate the affected person for the interference with the enjoyment of his or her property (cf. *infra*).

A third parameter employed by the former Commission is the legally binding character of the conservation measure. Complaints concerning conservation “intentions”, which are not legally binding, have been rejected by the Commission as manifestly ill-founded.<sup>44</sup> This parameter does not appear in the conservation-related case law of the European Court either.

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<sup>38</sup> See, e.g., ECtHR, *Sporrong and Lönnroth v. Sweden*, 23 September 1982, para. 52, Series A no. 52; ECtHR, *Housing Association of War Disabled and Victims of War of Attica and Others v. Greece*, no. 35859/02, para. 39, 13 July 2006.

<sup>39</sup> See, e.g., Eur. Comm. HR, *Gillow v. The United Kingdom*, no. 9063/80, para. 154, Series B no. 92, 3 October 1984; Eur. Comm. HR, *Oerlemans v. The Netherlands*, no. 12565/86, 62 DR 203, 10 July 1989; ECtHR, *Bahia Nova S.A. v. Spain* (dec.), no. 50924/99, 12 December 2000; ECtHR, *Koustelidou and Others v. Greece* (dec.), no. 35044/02, 20 November 2003; ECtHR, *Lazaridi v. Greece*, no. 31282/04, para. 35, 13 July 2006; ECtHR, *Nikas and Nika v. Greece*, no. 31273/04, para. 40, 13 July 2006; ECtHR, *Kortessi v. Greece*, no. 31259/04, para. 40, 13 July 2006.

<sup>40</sup> See Eur. Comm. HR, *Geouffre de la Pradelle v. France*, no. 12964/87, 5 October 1990; Eur. Comm. HR, *J. v. Sweden*, no. 14459/88, 19 February 1992.

<sup>41</sup> See ECtHR, *Katte Klitsche de la Grange v. Italy*, 27 October 1994, Series A no. 293-B (temporary prohibition on building); ECtHR, *Köktepe v. Turkey*, no. 35785/03, 22 July 2008 (definitive classification of the property as forest land).

<sup>42</sup> See Eur. Comm. HR, *Claesson and Others v. Sweden*, no. 11723/85, 1 July 1992.

<sup>43</sup> See Eur. Comm. HR, *Günther v. Sweden*, no. 26265/92, 27 November 1996.

<sup>44</sup> See Eur. Comm. HR, *Uuhiniemi and 14 Others v. Finland*, no. 21343/93, 10 October 1994; Eur. Comm. HR, *Eskelinen and 54 Others v. Finland*, no. 19761/92, 10 October 1994.

The fourth parameter, reasons of conscience, does appear prominently in the jurisprudence of the Court. Reasons of conscience to object a conservation measure, such as the compulsory transfer of hunting rights on one's property to third parties, are a significant factor to determine whether a fair balance has been struck between the general interest and the rights of the applicant.<sup>45</sup> Moreover, the Court has stated that the motive of an ethical opponent to hunting cannot be usefully balanced against the annual payment received as a compensation for the loss of the hunting right.<sup>46</sup>

A fifth element influencing the assessment of proportionality is the behaviour of the state in respect of the goal of nature protection. The European Court has emphasized that “when the State imposes important restrictions on the exploitation of a private property with the aim of guaranteeing the effective protection of the environment, it is incumbent on [the State] at least not to tolerate activities susceptible of undermining the achievement of this objective.”<sup>47</sup>

As a sixth parameter, the European Court takes the state of mind of the applicant into account when appreciating the proportionality of the conservation measure in relation to the aim pursued. The parameter “state of mind” works in two ways: whether the applicant was acting *bona fide* on the one hand, and whether he or she could have a legitimate expectation that the activities concerned would be accepted on the other. When the applicant possesses or owns his or her property in good faith, the state authorities need to be more careful and provide appropriate protection to the applicant when interfering with the enjoyment of his or her property for conservation-related reasons.<sup>48</sup> Besides, when the applicant could not reasonably have a legitimate expectation under national law that the activities he or she wanted to carry out – which fit uneasy with conservation goals – would be accepted, the European human rights organs will conclude more easily that the principle of proportionality was violated.<sup>49</sup>

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<sup>45</sup> See *Chassagnou, Petit and Lasgrezas v. France*, no. 25088/94, 1 July 1996; *Dumont and Others v. France*, no. 28331/95, 1 July 1996; and *Montion v. France*, no. 28443/95, 1 July 1996 (no possibility to oppose hunting on one's property for reasons of conscience); ECtHR, *Nilsson v. Sweden* (dec.), no. 11811/05, 26 February 2008 (possibility to oppose hunting on one's property for reasons of conscience).

<sup>46</sup> See ECtHR, *Schneider v. Luxembourg*, no. 2113/04, 10 July 2007.

<sup>47</sup> Own translation. ECtHR, *Z.A.N.T.E. – Marathonisi A.E. v. Greece*, no. 14216/03, para. 54, 6 December 2007.

<sup>48</sup> See, e.g., ECtHR, *Papastavrou and Others v. Greece*, no. 46372/99, ECHR 2003-IV; ECtHR, *Katsoulis and Others v. Greece*, no. 66742/01, 8 July 2004; ECtHR, *Housing Association of War Disabled and Victims of War of Attica and Others v. Greece*, no. 35859/02, 13 July 2006.

<sup>49</sup> See, e.g., ECtHR, *Fredin v. Sweden (no. 1)*, 18 February 1991, para. 54, Series A no. 192; Eur. Comm. HR, *G. v. France*, no. 14351/88, 6 December 1993; ECtHR, *Saarenpään Loma Ky v. Finland* (dec.), no. 54508/00, 9 May 2006.

Logically, it cannot be sustained that there was a disproportionate burden when the applicant herself contributed to the loss of her legitimate expectations.<sup>50</sup>

Seventh, the characteristics of the property right that has been interfered with by conservation measures are also taken into consideration. As such, when no definitive rights were acquired by the applicant, the Court is reluctant to find a breach of Article 1 of Protocol No. 1.<sup>51</sup> When the applicant's prior situation, in which the conservation initiative interferes, was illegal, the Court is unwilling to accept a violation of the right to property.<sup>52</sup>

The eighth parameter, "availability of an alternative", covers two different situations. On the one hand, the Strasbourg organs are less inclined to find a violation of Article 1 of Protocol No. 1 when the applicant could enjoy his or her property in an alternative way, which counterbalanced the negative consequences of the interference.<sup>53</sup> On the other hand, the European human rights organs will be more strict in their appreciation of proportionality when the state had alternative, less restrictive measures at its disposal to achieve the same objective. However, the availability to the state of alternative solutions does not in itself suffice to find a breach of the right to property.<sup>54</sup> The latter jurisprudence has not been applied yet in conservation-related cases, but might become relevant in the future.

A ninth, important parameter in the balancing exercise of the European human rights organs is whether the state paid compensation for the interference with the enjoyment of the property of the applicant. In cases of deprivation of property, the European Court has stated in general that "the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable ... only in exceptional circumstances."<sup>55</sup> Indeed, in all conservation-related cases where the applicant did not receive any compensation for the deprivation of his

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<sup>50</sup> See ECtHR, *Bahia Nova S.A. v. Spain* (dec.), no. 50924/99, 12 December 2000.

<sup>51</sup> See ECtHR, *Kozubek v. Poland* (dec.), no. 62040/00, 11 December 2007.

<sup>52</sup> See, e.g., ECtHR, *Saliba v. Malta*, no. 4251/02, 8 November 2005; ECtHR, *Hamer v. Belgium*, no. 21861/03, paras. 83-86, ECHR 2007-XIII (extracts).

<sup>53</sup> ECtHR, *Aarniosalo and Others v. Finland* (dec.), no. 39737/98, 5 July 2005.

<sup>54</sup> See, e.g., ECtHR, *Hentrich v. France*, 22 September 1994, Series A no. 296-A; ECtHR, *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, para. 123, ECHR 2003-VIII; ECtHR, *Borzonov v. Russia*, no. 18274/04, para. 61, 22 January 2009.

<sup>55</sup> ECtHR, *Holy Monasteries (The) v. Greece*, 9 December 1994, para. 71, Series A no. 301-A; ECtHR, *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, para. 111, ECHR 2005-VI; ECtHR, *Nastou v. Greece* (no. 2), no. 16163/02, para. 33, 15 July 2005.

or her property, a violation of Article 1 of Protocol No. 1 was found.<sup>56</sup> Also with respect to measures controlling the use of property, compensation may be required for the principle of proportionality to be respected. As such, the Court has observed that “the legitimate aim of protecting the natural heritage, however important it may, does not exempt the State from its obligation to compensate the persons concerned when the attack on their property right is excessive.”<sup>57</sup> In contrast, when the measures controlling the use of property did not affect the applicant in a particularly severe manner, the absence of compensation may be acceptable.<sup>58</sup> When assessing whether the state was obliged to pay a compensation for the interference, the impact on livelihood is taken into account.<sup>59</sup> Also regarding compensation, states are left a wide margin of appreciation. Legitimate aims of “public interest” may justify a reimbursement of less than the market value.<sup>60</sup> Although this reasoning has not been explicitly applied as yet with respect to conservation measures, the recognition of nature protection as a legitimate public interest (*cf. supra*) suggests that a compensation lower than the market value could be acceptable in conservation-related cases. Logically, the Court has been more willing to find a violation when domestic law provides no possibility of obtaining compensation.<sup>61</sup> On the other hand, when it is possible under domestic law to receive a compensation but the applicant does not take the necessary steps to attempt to acquire this compensation, a lack of compensation will not disrupt the balance required between the general interest and the applicant’s rights.<sup>62</sup>

The tenth factor playing a part in the assessment of proportionality concerns procedure. Article 1 of Protocol No. 1 has been interpreted by the Strasbourg organs as requiring the respect for some procedural safeguards. In the words of the Court: “Although Article 1 of Protocol No. 1 contains no explicit procedural requirements, the proceedings at issue must also afford the individual a reasonable opportunity of putting his or her case to the responsible

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<sup>56</sup> See, e.g., ECtHR, *Urbárska Obec Trenčianske Biskupice v. Slovakia*, no. 74258/01, ECHR 2007-XIII (extracts); ECtHR, *Turgut and Others v. Turkey*, no. 1411/03, paras. 91-92, 8 July 2008; ECtHR, *Devecioğlu v. Turkey*, no. 17203/03, 13 November 2008; ECtHR, *Nural Vural v. Turkey*, no. 16009/04, 10 March 2009; ECtHR, *Rimer and Others v. Turkey*, no. 18257/04, 10 March 2009; ECtHR, *Şatur v. Turkey*, no. 36192/03, 10 March 2009; ECtHR, *Temel Conta Sanayi Ve Ticaret A.Ş. v. Turkey*, no. 45651/04, 10 March 2009.

<sup>57</sup> Own translation. ECtHR, *Theodoraki and Others v. Greece*, no. 9368/06, para. 61, 11 December 2008.

<sup>58</sup> See, e.g., ECtHR, *Pindstrup Mosebrug A/S v. Denmark* (dec.), no. 34943/06, 3 June 2008.

<sup>59</sup> See, e.g., ECtHR, *Alatulkkila and Others v. Finland*, no. 33538/96, 28 July 2005; ECtHR, *Devecioğlu v. Turkey*, no. 17203/03, 13 November 2008. The “impact on livelihood” was also identified as a separate parameter for the assessment of proportionality used by the former Commission (*cf. supra*).

<sup>60</sup> See, e.g., ECtHR, *James and Others v. the United Kingdom*, 21 February 1986, para. 54, Series A no. 98; ECtHR, *Kozacioğlu v. Turkey*, no. 2334/03, para. 64, 31 July 2007.

<sup>61</sup> ECtHR, *Papastavrou and Others v. Greece*, no. 46372/99, para. 37, ECHR 2003-IV.

<sup>62</sup> Eur. Comm. HR, *Photo Photiades & Co Ltd v Cyprus*, no. 41113/98, 21 October 1998.

authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by this provision.”<sup>63</sup>

Finally, it is an aggravating factor when the applicant has no effective internal remedy at his or her disposal to challenge the contested conservation measure.<sup>64</sup>

To end, the following general observations and reflections may be formulated with respect to conservation-related cases alleging a violation of Article 1 of Protocol No. 1. On the whole, the European Court of Human Rights and the former Commission have aimed at striking a fair balance between the general interest in nature conservation and the requirement of protecting the individual’s fundamental rights. Nevertheless, a wide margin of appreciation is left to the national authorities, with respect to various issues such as the determination of the public or general interest, the choosing of the means of the interference, the assessment whether the consequences of the interference are justified in the general interest, and the terms of compensation. On the other hand, state authorities should take adequate measures to protect the individual’s interests, especially when the latter is acting in good faith. Such a protection is enhanced through, for example, respecting procedural safeguards or awarding a reasonable compensation.

The number of conservation-related cases brought before the European human rights organs has been gradually growing from 1985 onwards. In the majority of these cases the applicant complained that conservation measures had disproportionately interfered with his or her right to the peaceful enjoyment of possessions. Only in 1996, the Court found for the first time a violation of Article 1 of Protocol No. 1 in a conservation-related case, namely in *Matos e Silva, Lda., and Others v. Portugal*.<sup>65</sup> The case of *Chassagnou and Others v. France* of 1999 was the second case where a breach of the right to property was found as a result of a conservation measure.<sup>66</sup> Since 2003, the number of conservation-related cases in which a violation of Article 1 of Protocol No. 1 was found, has been increasing. As of March 2009, in about one fifth of all conservation-related cases where the applicants had alleged a violation

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<sup>63</sup> ECtHR, *Jokela v. Finland*, no. 28856/95, para. 45, ECHR 2002-IV. See also, e.g., ECtHR, *AGOSI v. the United Kingdom*, 24 October 1986, para. 55, Series A no. 108; ECtHR, *Hentrich v. France*, 22 September 1994, para. 49, Series A no. 296-A.

<sup>64</sup> See, e.g., ECtHR, *Köktepe v. Turkey*, no. 35785/03, 22 July 2008.

<sup>65</sup> ECtHR, *Matos e Silva, Lda., and Others v. Portugal*, 16 September 1996, *Reports of Judgments and Decisions* 1996-IV.

<sup>66</sup> ECtHR, *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, ECHR 1999-III.

of the right to the peaceful enjoyment of possessions, the Court accepted that there had been a violation.

How should this increase in findings of violations be interpreted? To a certain extent, it is a logical corollary of the increase in conservation-related cases brought before the Court. Also, the cipher of one fifth of violations of the right to property in conservation-related cases is somewhat unrepresentative, given that a series of similar cases brought against Turkey is included.<sup>67</sup> Nevertheless, in my opinion, the Court is raising the standard in two ways. On the one hand, the Court is attaching increasing importance to measures of nature conservation. This became apparent from the insertion of a new consideration in recent case law, that “even certain fundamental rights, such as the right to property, should not be seen as being given primacy over considerations concerning the protection of the environment.”<sup>68</sup> On the other hand, the state is required to be careful and respectful, with regard to both its own behaviour and to the affected persons. Also here, the Court seems to become stricter. As such, the Court recently held that the state must act itself in such a way as not to undermine the realization of the goal of environmental protection.<sup>69</sup> With respect to the affected persons, compensation has generally been required in cases of deprivation of property, absent exceptional circumstances. However, also with regard to (intrusive) measures controlling the use of property, the Court recently held that “the legitimate aim of protecting the natural heritage, however important it may, does not exempt the State from its obligation to compensate the persons concerned when the attack on their property right is excessive.”<sup>70</sup> In conclusion, the increased importance attached by the Court to nature conservation seems to be accompanied by an increased interest in ensuring that the state acted appropriately to mitigate the strongest negative effects of the conservation measures on the enjoyment of one’s property. In my view, this double intensification constitutes a useful way to approach the sensitive relationship between nature conservation and the rights of affected persons.

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<sup>67</sup> See ECtHR, *Nural Vural v. Turkey*, no. 16009/04, 10 March 2009; ECtHR, *Rimer and Others v. Turkey*, no. 18257/04, 10 March 2009; ECtHR, *Şatır v. Turkey*, no. 36192/03, 10 March 2009; ECtHR, *Temel Conta Sanayi Ve Ticaret A.Ş. v. Turkey*, no. 45651/04, 10 March 2009.

<sup>68</sup> ECtHR, *Hamer v. Belgium*, no. 21861/03, para. 79, ECHR 2007-XIII (extracts).

<sup>69</sup> ECtHR, *Z.A.N.T.E. – Marathonisi A.E. v. Greece*, no. 14216/03, 6 December 2007.

<sup>70</sup> Own translation. ECtHR, *Theodoraki and Others v. Greece*, no. 9368/06, para. 61, 11 December 2008.

### 3. The right to respect for home, private and family life

Nature conservation measures may also infringe on an individual's right to respect for his or her private life, family life and home, as protected by Article 8 EHCR:

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

The European Court has consistently held that Article 8 not only implies negative obligations of non-interference by states. Also positive obligations may be intrinsic to an effective "respect" of the rights concerned.<sup>71</sup> Nonetheless, states enjoy "a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals."<sup>72</sup>

An interference with the exercise of the right to private life, family life and home is justified when the three conditions laid down in the second paragraph of Article 8 ECHR are fulfilled: the interference must be in accordance with the law; have a legitimate aim; and be necessary in a democratic society. The former European Commission observed that "although the requirements of Article 8 are more stringent than those of Article 1 of Protocol No. 1 in respect of the legitimacy of the aim sought to be achieved by the measure in question, the test of the proportionality of the interference is substantially similar in respect of both provisions."<sup>73</sup> Indeed, several of the parameters identified here above as influencing the assessment of proportionality in cases on the right to property are reappearing here.

The case of *Herrick v. The United Kingdom* was the first conservation-related case invoking a violation of the right to private life, family life and home. The applicant complained that

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<sup>71</sup> See, e.g., ECtHR, *Guerra and Others v. Italy*, 19 February 1998, para. 58, *Reports of Judgments and Decisions* 1998-I.

<sup>72</sup> ECtHR, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, para. 67, Series A no. 94. See also, e.g., ECtHR, *Johnston and Others v. Ireland*, 18 December 1986, para. 55, Series A no. 112.

<sup>73</sup> Eur. Comm. HR, *Herrick v. The United Kingdom*, no. 11185/84, 42 DR 275, 11 March 1985 (referring to Eur. Comm. HR, *X. v. The United Kingdom*, no. 9261/81, 28 DR 177, 3 March 1982).

restrictions on the use of her bunker violated Article 8 ECHR. Yet, the former Commission held that

[t]he existence and operation of planning controls which delimit areas where domestic development may be extended is a legitimate control measure to protect the amenity value of rural areas and thereby to protect the rights of others. In view of this, and the fact that the applicant remains able to make substantial use of the property, which use she is merely prevented from extending further, the Commission finds that a proper balance has been struck between the applicant's and the general interest.<sup>74</sup>

Protecting the amenity value of rural areas is thus a legitimate aim, as required “to protect the rights of others.” The consideration that the applicant “remains able to make substantial use of the property” reminds of one of the criteria used to assess the parameter “extent of the interference” in the conservation-related cases on property, namely whether and how the property can still be used after the interference (cf. *supra*).

The other cases wherein Article 8 was invoked against conservation measures all concerned Gypsy applicants opposing planning policies of the United Kingdom.<sup>75</sup> In the case of *Chapman v. The United Kingdom* of 2001, for example, the land of a Gypsy applicant was situated in a green belt. She claimed that the refusal of planning permission to station a caravan on her land and the pursuit of enforcement measures against her in respect of her occupation of her land constituted a violation of Article 8 ECHR<sup>76</sup>. The applicant did not dispute the lawfulness of the interference. She also accepted the legitimate aim of the measures of “protecting the rights of others” through preservation of the environment. The discussion thus focused on whether the interference was “necessary in a democratic society.” The Court reiterated its views established in *Buckley v. The United Kingdom* that, first, the national authorities in principle enjoy a wide margin of appreciation regarding the choice and implementation of planning policies. Second, in determining whether a state remains within its margin of appreciation, procedural safeguards are important. In particular, the decision-making process must be fair and due respect must be afforded to the interests of the

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<sup>74</sup> Eur. Comm. HR, *Herrick v. The United Kingdom*, no. 11185/84, 42 DR 275, 11 March 1985.

<sup>75</sup> See also, e.g., Eur. Comm. HR, *Mabey v. The United Kingdom*, no. 28370/95, 15 May 1996.

<sup>76</sup> For similar cases, see ECtHR, *Beard v. the United Kingdom* [GC], no. 24882/94, 18 January 2001; ECtHR, *Coster v. the United Kingdom* [GC], no. 24876/94, 18 January 2001; ECtHR, *Jane Smith v. the United Kingdom* [GC], no. 25154/94, 18 January 2001; and ECtHR, *Lee v. the United Kingdom* [GC], no. 25289/94, 18 January 2001. See also, ECtHR, *Harrison v. The United Kingdom* (dec.), no. 32263/96, 3 May 2001 (similar facts, declared inadmissible).

individual protected by Article 8.<sup>77</sup> Significantly, the Court was reluctant in judging the conflict between the general interest in nature conservation and the interests of a minority:

[T]he complexity and sensitivity of the issues involved in policies balancing the interests of the general population, in particular with regard to environmental protection and the interests of a minority with possibly conflicting requirements, renders the Court's role a strictly supervisory one.<sup>78</sup>

The Court also considered that “although the fact of being a member of a minority with a traditional lifestyle different from that of the majority of a society does not confer an immunity from general laws intended to safeguard assets common to the whole society such as the environment, it may have an incidence on the manner in which such laws are to be implemented.”<sup>79</sup>

Where there is a conflict between the right of a person to respect for his or her home and the right of others to environmental protection, the Court considered it “highly relevant whether or not the home was established unlawfully ... [and] will be slow to grant protection to those who, in conscious defiance of the prohibitions of the law, establish a home on an environmentally protected site.”<sup>80</sup> This consideration mirrors the parameter “state of mind of the applicant”: it matters whether the applicant was *bona fide* or not. The Court also applied the parameter “availability of an alternative” by noting that it must be considered whether a suitable alternative accommodation was available. The more suitable the alternative accommodation, the less serious the interference will be assessed.<sup>81</sup> The evaluation of the suitability of the alternative accommodation must take into account the particular needs of the person concerned and the rights of the local community to environmental protection. Also here, a wide margin of appreciation is left to the national authorities.<sup>82</sup> In the particular case, the Court considered that the measures could not be regarded as disproportionate to the legitimate aim being pursued and held that there had been no breach of Article 8 ECHR.

In the cases reviewed, the European human rights organs did not find a violation of the right to private life and home caused by nature conservation-related measures. Various parameters used in the assessment of proportionality in cases of interference with the peaceful enjoyment

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<sup>77</sup> *Id.* at para. 92. See also ECtHR, *Buckley v. the United Kingdom*, 25 September 1996, paras. 75-77, *Reports of Judgments and Decisions* 1996-IV.

<sup>78</sup> ECtHR, *Chapman v. the United Kingdom* [GC], no. 27238/95, para. 94, ECHR 2001-I.

<sup>79</sup> *Id.* at para. 96.

<sup>80</sup> *Id.* at para. 101.

<sup>81</sup> *Id.* at para. 103.

<sup>82</sup> *Id.* at para. 104.

of possessions have also been employed in the case law on the right to private life and home. These include the extent of the interference, the state of mind of the applicant, the availability of an alternative, and procedural safeguards.

#### 4. The right to a fair trial

Pursuant to Article 6(1) ECHR, “[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” The right to a fair trial is essential for the effective enjoyment of the other rights guaranteed in the European Convention. It is well-established case law of the European Court that the right to property is a civil right within the meaning of Article 6(1).<sup>83</sup> Therefore, in various cases where the applicants claimed that nature conservation measures had violated their right to property, they also alleged that Article 6(1) ECHR had been breached. In some of these conservation-related cases, the Court felt that the length of the proceedings was excessive and did not correspond to the requirement of a “reasonable time.”<sup>84</sup> In *Katte Klitsche de la Grange v. Italy*, however, the European Court concluded that the length of the proceedings was not excessive, “in particular since the decisions, which concerned such a sensitive area as town planning and the protection of the environment, could have and in fact did have important repercussions on the Italian case-law.”<sup>85</sup> The protection of the environment is thus recognized as a complex and sensitive issue. In a few cases, a violation of Article 6(1) was found because there had been a lack of access to a tribunal.<sup>86</sup> In other conservation-related cases, however, the Court did not accept the alleged violation of Article 6(1) ECHR.<sup>87</sup>

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<sup>83</sup> See, e.g., ECtHR, *Fredin v. Sweden (no. 1)*, 18 February 1991, para. 63, Series A no. 192; ECtHR, *Oerlemans v. the Netherlands*, 27 November 1991, para. 48, Series A no. 219.

<sup>84</sup> ECtHR, *Matos e Silva, Lda., and Others v. Portugal*, 16 September 1996, *Reports of Judgments and Decisions* 1996-IV; ECtHR, *Kukkola v. Finland*, no. 26890/95, 15 November 2005; ECtHR, *Katsoulis and Others v. Greece*, no. 66742/01, 8 July 2004; ECtHR, *Kortessi v. Greece*, no. 31259/04, 13 July 2006; ECtHR, *Lazaridi v. Greece*, no. 31282/04, 13 July 2006; ECtHR, *Nikas and Nika v. Greece*, no. 31273/04, 13 July 2006; ECtHR, *Hamer v. Belgium*, no. 21861/03, ECHR 2007-XIII (extracts); ECtHR, *Theodoraki and Others v. Greece*, no. 9368/06, 11 December 2008.

<sup>85</sup> ECtHR, *Katte Klitsche de la Grange v. Italy*, 27 October 1994, para. 62, Series A no. 293-B.

<sup>86</sup> ECtHR, *Skärby v. Sweden*, 28 June 1990, Series A no. 180; ECtHR, *Fredin v. Sweden (no. 1)*, 18 February 1991, Series A no. 192; ECtHR, *Posti and Rahko v. Finland*, no. 27824/95, ECHR 2002-VII.

<sup>87</sup> ECtHR, *Oerlemans v. the Netherlands*, 27 November 1991, Series A no. 219; ECtHR, *Jane Smith v. the United Kingdom [GC]*, no. 25154/94, 18 January 2001; ECtHR, *Chapman v. the United Kingdom [GC]*, no. 27238/95, ECHR 2001-I; ECtHR, *Alatulkkila and Others v. Finland*, no. 33538/96, 28 July 2005; ECtHR, *Saarenpään Loma Ky v. Finland*, no. 54508/00, 13 February 2007.

A conservation-related case which was brought before the Strasbourg organs exclusively under Article 6 ECHR is *Denev v. Sweden*. In that case, the applicant contested an injunction of the Forestry Board which ordered him to plant a specific type of trees on his land.<sup>88</sup> The Commission considered that such an injunction was decisive for the right to property, which is a civil right within the meaning of Article 6(1) ECHR. Because the applicant had not had access to a tribunal satisfying the requirements of Article 6(1), the Commission concluded that there had been a violation. Finally, the manner of informing owners of conservation-related measures taken with regard to their property has been linked to the right to access to a court inscribed in Article 6(1) ECHR.<sup>89</sup>

## 5. Prohibition of discrimination

Article 14 ECHR guarantees the enjoyment of the rights and freedoms set forth in the Convention “without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” Article 14 is an accessory provision: only discrimination in relation to the enjoyment of one of the other substantive rights protected by the European Convention may entail a violation of Article 14.<sup>90</sup> However, “the application of Article 14 does not presuppose a breach of one or more of such provisions and to this extent it is autonomous. For Article 14 to become applicable it suffices that the facts of a case fall within the ambit of another substantive provision of the Convention or its Protocols.”<sup>91</sup> Therefore, conservation measures that interfere with the right to property, the right to respect for private life and home, the right to a fair trial or another right guaranteed under the European Convention or its Protocols, must always be implemented without discrimination, even when the interference itself is justified.

In one conservation-related case until now, *Pine Valley Developments Ltd and Others v. Ireland*, the Court found a violation of Article 14 ECHR taken in conjunction with Article 1 of Protocol No. 1. The Court held that the prohibition of discrimination had not been respected, given the unjustified difference of treatment between the applicant and other

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<sup>88</sup> Eur. Comm. HR, *Denev v. Sweden*, no. 12570/86, 59 DR 127, para. 25, 4 July 1989.

<sup>89</sup> See, e.g., ECtHR, *Geffre v. France* (dec.), no. 51307/99, ECHR 2003-I (extracts).

<sup>90</sup> See *O.D. Arnardóttir*, Equality and nondiscrimination under the European Convention on Human Rights, 2003, p. 1.

<sup>91</sup> ECtHR, *Thlimmenos v. Greece* [GC], no. 34369/97, para. 40, ECHR 2000-IV.

individuals in the same situation.<sup>92</sup> In *Chassagnou and Others v. France*, there was a violation of Article 1 of Protocol No. 1 read in conjunction with Article 14 ECHR.<sup>93</sup> The fact that large landowners could oppose the transfer of hunting rights on their lands to a hunters' association, whereas landowners of smaller areas could not, constituted a discrimination on the ground of property. In the other conservation-related cases identified, no breach of Article 14 ECHR was found.<sup>94</sup> For instance, complaints of discrimination on the basis of the geographical location of the applicants or the inclusion of their property in a protected area have not been accepted by the European human rights organs.<sup>95</sup>

## 6. Conclusion

In recent years, a considerable number of conservation-related cases has been brought before the European human rights organs. Applicants claiming before the European Court of Human Rights and the former Commission that a measure of environmental protection led to a violation of their human rights have generally invoked the right to property and the right to a fair trial, and to a lesser extent the right to respect for private life and home and the prohibition of discrimination.

The Strasbourg organs have accepted nature protection as a legitimate public interest goal, which may warrant an interference with the rights to property, private life, and home. For an interference to be justified, two additional criteria must be fulfilled: the interference must be in accordance with the law and the principle of proportionality must be respected. This principle of proportionality requires a fair balance between the public interest and individual interests. In general, the European human rights organs have been reluctant to pronounce on the conflict between conservation measures and the interests of individuals or minorities,

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<sup>92</sup> ECtHR, *Pine Valley Developments Ltd and Others v. Ireland*, 29 November 1991, para. 64, Series A no. 222.

<sup>93</sup> ECtHR, *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, paras. 89-95, ECHR 1999-III.

<sup>94</sup> See, e.g., ECtHR, *Fredin v. Sweden (no. 1)*, 18 February 1991, Series A no. 192; ECtHR, *Chapman v. the United Kingdom* [GC], no. 27238/95, ECHR 2001-I; ECtHR, *Posti and Rahko v. Finland*, no. 27824/95, ECHR 2002-VII; ECtHR, *Alatulkila and Others v. Finland*, no. 33538/96, para. 70, 28 July 2005.

<sup>95</sup> See, e.g., Eur. Comm. HR, *I.F., F.D. and Sté S. v. France*, nos. 10800/84 and 10849/84, 5 October 1987; Eur. Comm. HR, *Meynadier and Pujol v. France*, no. 21014/92, 31 August 1994; Eur. Comm. HR, *SjöbergThörn v. Sweden*, no. 25907/94, 11 April 1996; Eur. Comm. HR, *Jónsson et al v. Iceland*, no. 41242/98, 21 October 1998; ECtHR, *Gudjonsson v. Iceland (dec.)*, no. 40169/05, 2 December 2008.

given the complexity and sensitivity of the issues at stake. A wide margin of appreciation has been left to the national states.