



Hannes Veinla

*Docent of Environmental Law,  
University of Tartu*

# Precautionary Environmental Protection and Human Rights<sup>\*1</sup>

## 1. Introduction

The precautionary principle and the fundamental right to a clean environment can be considered the two ‘rising stars’ of contemporary environmental law.

Implementation of a precautionary principle was induced by the need to define the foundation for formation of environmental policy in a situation of predominant scientific uncertainty regarding the possible negative impact of human activities on the environment. Though scientific methods have undergone rapid development in the last few years, human ability to interpret complicated processes related to the environment has not increased remarkably. The reliability of the methods in use is clearly insufficient for giving political decision-makers trustworthy information enabling them to foresee the consequences.

Elements of the relationship between environmental protection and human rights have become the core of lively debate in recent years.

Recognition of the connection between environmental protection and human rights derives from the principle according to which human rights are inseparable from each other and directly dependent upon each other.<sup>\*2</sup> On account of this, full realisation of civil and political rights is impossible when economic, social, and cultural rights are not guaranteed. Therefore, continuous success in guaranteeing human rights depends upon the degree of success of national and international policy in economic and social spheres. It is impossible to distinguish the requirement to guarantee the right to life, respect to private and family life, health protection, and other human rights from the requirement to guarantee a normal living environment to everyone. The present article aims to shed some light on the interrelations between the precautionary principle and classical human rights, with examination also aimed at addressing a key question: Is it enough to proceed from an existing list of human rights, or is it necessary instead to recognise new, specific environment-related fundamental rights?

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<sup>2</sup> K. Reid. *A Practitioner’s Guide to the European Convention on Human Rights*. London: Sweet & Maxwell 1998, p. 212.

## 2. Civil and political rights and the quality of the environment

The European Convention on Human Rights<sup>3</sup> provides us with several human rights — the right to respect for private and family life, the right to peaceful enjoyment of possessions (article 1 of the First Protocol), and the right to life<sup>4</sup> — which can be connected with the quality of our environment. In addition to these main articles, connections between protection of the environment and human rights can be found also in article 10 of the convention, which asserts the right to access and to spread information.<sup>5</sup> Several economic, social, and cultural rights are related to the environment also; these rights are subject to discussion in the sections of the paper that follow.

### 2.1. The right to respect for private and family life

Starting with the Lopez Ostra case<sup>6</sup>, the right to respect for private and family life has been the principal factor that plaintiffs, as well as the European Court of Human Rights (ECHR), have connected with the pollution of the environment. In the Lopez Ostra case, the ECHR admitted that “severe environment pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely”.<sup>7</sup> In this case, the complaint was made against the omission of a state (more precisely, of the local municipality), which tolerated continuation of activities of an enterprise in grave violation of waste management rules, thus hindering the private life of Lopez Ostra and her family near the enterprise. The Lopez Ostra case created a precedent, which served as a basis for cases to follow.

The second case worthy of mention in this category is that of Guerra.<sup>8</sup> In this case as well, a complaint was made against an omission of the state, which did not inform (as addressed in article 10) the plaintiffs about the dangers threatening their private and family life.<sup>9</sup> The ECHR did not apply article 10, finding instead that violation of article 8 had taken place.<sup>10</sup> Thus, it appears that, according to the ECHR, every person has a right to a certain ‘private space’, intruding into which in different ways (including via pollution of it) is potentially a violation of human rights.

### 2.2. The right to life

No uniform opinion on the content of the right to life exists. Classical opinion equates the right solely with the right to ‘physical life’, whereas other qualitative aspects of life usually are connected with economic, social, and cultural rights. According to another school of thought, the right to life includes also minimal elements of quality of life.<sup>11</sup> Differences of interpretation are conspicuous also as regards the ECHR and the UN Commission on Human Rights (UNCHR). The UNCHR has interpreted the right to life in a quite broad way, declaring that the “state cannot perform its obligation to protect life without taking measures to decrease mortality of infants, to antedate industrial accidents, and to protect environment”.<sup>12</sup> The ECHR approaches the right to life from a significantly narrower perspective, treating it as the above-mentioned right to ‘physical life’. As it is unlikely for any European country at the present time to permit any such activities as directly threaten the physical existence of humans, it is understandable why the ECHR has not seen a connection between polluting environment and the right to life. However, at the same time some judges have expressed an opinion

<sup>3</sup> Available at <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm> (15.07.2007).

<sup>4</sup> More or less similar connections can be found also from the International Covenant on Civil and Political Rights (available at <http://www.ohchr.org/english/law/ccpr.htm>) and from regional human right instruments.

<sup>5</sup> See P. Sands. Human Rights, Environment and the Lopez-Ostra case: Context and Consequences. – European Human Rights Law Review 1996/6, pp. 597–618.

<sup>6</sup> Lopez Ostra v. Spain, judgment of 9 December 1994, application No. 16798/90. – A303-C. Also available at <http://cmiskp.echr.coe.int/tkp197/search.asp?sessionId=1367215&skin=hudoc-en> (15.07.2007).

<sup>7</sup> *Ibid.*, paragraph 51.

<sup>8</sup> Guerra and others v. Italy, judgment of 19 February 1998, application No. 14967/89. – Reports 1998-I. Also available at <http://cmiskp.echr.coe.int/tkp197/search.asp?sessionId=1367215&skin=hudoc-en> (15.07.2007).

<sup>9</sup> See C. Miller. The European Convention on Human Rights: Another Weapon in the Environmentalist’s Armoury. – Oxford Journal of Environmental Law 1999 (11), pp. 158–176.

<sup>10</sup> The violation was too evident in both cases for the question of taking into account risks covered by uncertainty to arise.

<sup>11</sup> See R. Desgagne. Integrating Environmental Values into the European Convention on Human Rights. – American Journal of International Law 1995 (89) 2, p. 267.

<sup>12</sup> UN Doc CCPR/C/SR.222, paragraph 59.

according to which pollution of the environment is connected with the right to life at least to the same extent as to the right of peaceful enjoyment of private and family life.<sup>\*13</sup>

### 2.3. The right to peaceful enjoyment of possessions

*Arrondelle v. the United Kingdom*<sup>\*14</sup> was one of the first cases indicating connection between environment and ownership. The plaintiff asserted that the high noise level of an airport had reduced the value of his immovable at a fundamental level. Though the case did not reach a resolution later, it is essential to note that the ECHR declared the case admissible, basing this decision on article 8 of the European Convention on Human Rights, as well as on article 1 of the First Protocol. Yet the standpoints of the ECHR and of the Commission, regarding the content of the right in question and readiness to apply it in cases related to the environment, are not consistent at all. Thus, in the case *Rayner v. the United Kingdom*, the Commission indirectly pointed out that this article (i.e., article 1 of the First Protocol) is meant mainly to protect against arbitrary confiscation of possession and does not guarantee in principle free enjoyment of property in pleasant environment.<sup>\*15</sup> A standpoint of this nature does not favour applying this provision in an environmental context and allows applying the provision only in cases where the environmental impact is of an extent with a substantial influence on the market value of the immovable concerned. The ECHR yet has favoured broader interpretation and has found that article 1 of the First Protocol is applicable also in cases dealing with substantial influencing of “the content of the right to possession”.<sup>\*16</sup>

On the basis of the practice of the ECHR up to now, one can draw the conclusion that human rights and quality of environment, in the context of civil and political rights, are connected mainly in relation to the right to enjoy private and family life.<sup>\*17</sup> Such a choice on the part of the court is, in addition to the reasons mentioned above, probably caused by the opportunities to prove the evidence of damage and therefore the existence of a victim. Therefore, the practice of the ECHR has to be researched from the standpoint of the precautionary principle.

## 3. The precautionary principle in the context of civil and political rights

Human rights monitoring bodies have often faced a situation where decisions have to be made under conditions of too little information and uncertainty of what information is available — in spite of the fact that the ECHR does not lay the burden of proof strictly on the plaintiff and that states have to co-operate with the ECHR and to present additional data (e.g., the results of environmental inspection or monitoring), with the ECHR itself entitled to gather additional data, according to article 38, section 1 (a) of the European Convention on Human Rights). Where environmental matters are concerned, a situation where a violation of environmental quality requirements is not sufficiently obvious appears quite often; thus, additional research and proof are required. The fact that environmental quality standards in Europe are quite high and established with a certain caution and that violation of them need not necessarily involve damage has to be taken into account too. Summarising the above, one finds it obvious that, as a rule, in environment-related cases we are dealing with not direct damages but supposed damages. Therefore, the main question is this: Does the risk of damage alone constitute sufficient grounds for recognising the person as a ‘victim’ that he has the protection of the ECHR also? The court has usually required the presence of damage and proving it according to the standard ‘beyond reasonable doubt’. M. Kamminga has found that this is caused by the fact that the ECHR, unlike other regional human rights protection systems, has not often encountered outrageous and systematic violations of human rights accompanied by the state’s refusal of its co-operation in providing evidence.<sup>\*18</sup> In a situation like this, providing proof of a high standard is considered to be justified. The author of the present article admits that

<sup>13</sup> See Dissenting opinion of Judge Jambre in *Guerra* case (cited from: A. Andruskevych. *Environmental Human Rights Protection in the European Court of Human Rights*. – Access to Justice Handbook 2000, p 18.).

<sup>14</sup> Cited from M. Kamminga. *The Precautionary Approach in International Human Rights Law*. – D. Freestone, E. Hey (eds.). *The Precautionary Principle and International Law. The Challenge of Implementation*. Kluwer Law International 1996, pp. 174–175.

<sup>15</sup> Commission decision, *Powell and Rayner v. the United Kingdom*, application No. 9310/81, p. 14. Available at <http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=2190959&skin=hudoc-en&action=request> (17.09.2007).

<sup>16</sup> See R. Desgagne. *Integrating Environmental Values into the European Convention on Human Rights*. – *American Journal of International Law* 1995 (89) 2, p. 278.

<sup>17</sup> See M. Acevedo. *The Intersection of Human Rights and Environmental Protection in the European Court of Human Rights*. – *New York University Environmental Law Journal* 2000 (8), pp. 438–496.

<sup>18</sup> See M. Kamminga (Note 14), p. 177.

this kind of argument may be justified in other areas but not in the environment-related sphere, where even obvious readiness of a state for co-operation will not necessarily reduce scientific uncertainty. An innovative approach to standards of proof can be found in the ECHR case *Fadeyeva v. Russia*.<sup>19</sup> In 1990, the Government of the Russian Federation adopted a programme 'On Improving the Environmental Situation in Cherepovets'. The programme stated that "the concentration of toxic substances in the town's air exceeds the acceptable norms many times" and that the mortality rate of Cherepovets residents was higher than average. It was noted that many people still lived within the steel plant's 'sanitary security zone'. Under the programme, the steel plant was required to reduce its toxic emissions to safe levels by 1998. In 1995, the applicant (*Fadeyeva*), with her family and various other residents of the block of flats where she lived, filed a court action seeking resettlement outside the buffer zone. The applicant claimed that the concentration of toxic substances and the noise levels in the sanitary security zone exceeded the maximum permissible limits established by Russian legislation. The court observed that, according to the applicant's submission, her health had deteriorated as a result of her living near the steel plant. The only medical document produced by the applicant in support of this claim is a report drawn up by a clinic in St Petersburg (see paragraph 45 of the judgment). The court found that this report did not establish any causal link between environmental pollution and the applicant's diseases. The applicant presented no other medical evidence that would clearly connect her state of health to high pollution levels at her place of residence. The court recalled at the outset that, in assessing evidence, the general principle has been to apply the standard of proof 'beyond reasonable doubt'. Such proof may follow from the co-existence of sufficiently strong, clear, and concordant inferences or of similar, unrebutted presumptions of fact. It should be noted also that it has been the court's practice to allow flexibility in this respect, taking into consideration the nature of the substantive right at stake and any evidentiary difficulties involved. In certain instances, solely the respondent government has access to information capable of corroborating or refuting the applicant's allegations; consequently, a rigorous application of the principle *affirmanti, non neganti, incumbit probatio* is impossible.

In addition to a high standard of proof, the problem consists also, as is stated above, in the fact that as a general rule the ECHR requires the presence of damage, the fact that a person has been transformed into a victim of a violation that already has taken place. This principle does not enable protection of persons who endure risk of possible violation. The Commission and the ECHR have taken a similar approach in other cases also, such as the cases *L, M, and R v. Switzerland*<sup>20</sup> and *Balmer-Schafroth and others v. Switzerland*.<sup>21</sup>

As regards the standard of proof and presence of damage, a significantly milder position can be observed in cases of other human rights protection bodies — e.g., the American Human Rights Commission in the case of the Yanoman Indians. The Yanoman claimed that their right to life was violated by the fact that building a speedway on their lands might bring with it migration of strangers, who might, in turn, bring infectious diseases thus far unknown to the Yanoman. The court upheld the complaint, finding that danger of emerging damage constitutes sufficient grounds for presence of violation.<sup>22</sup> M. Kamminga argues that the American Human Rights Commission is softer, too, regarding the standard of proof and does not require application of the standard 'beyond reasonable doubt', instead applying assessment of the balance of probability.<sup>23</sup>

To return to the practice of the ECHR, it has to be noted that, regardless of general requirement of the existence of damage and favouring *ex post* defence, hints to application of precaution do exist in the practice of the ECHR also. In several cases, regarding homosexuals and single mothers, the court has not required proof of the complainants already having become victims of violation of the rights protected by the European Convention on Human Rights. It was enough for the plaintiffs if they were able to prove that a 'risk' of such a violation existed.<sup>24</sup>

From the standpoint of application of the precautionary principle in the context of civil and political rights, the above-mentioned case of *Balmer-Schafroth and others v. Switzerland* is remarkable. Plaintiffs who lived in close proximity to the Mühleberg nuclear power station (in the first emergency zone) asserted that the power station did not conform to safety requirements and that, because of the mistakes made in constructing the station, the risk of accidents at this station was higher than usual. On the basis of articles 6 and 13 of the European Convention on Human Rights, the plaintiffs required necessary safety measures to be applied as a preliminary measure. The court found that the complaint was not justified, as the plaintiffs had failed to prove direct connection between the operation of the nuclear power station and alleged violation of their rights. The

<sup>19</sup> *Fadeyeva v. Russia*, judgment of 9 June 2005, application No. 55723/00. — Reports of Judgments and Decisions 2005-IV. Also available at <http://cmiskp.echr.coe.int/tkp197/search.asp?sessionid=1367215&skin=hudoc-en> (15.07.2007).

<sup>20</sup> *L, M and R v. Switzerland*, decision of 1 July 1996, application No. 30003/96. Available at <http://cmiskp.echr.coe.int/tkp197/search.asp?sessionid=1367215&skin=hudoc-en> (15.07.2007).

<sup>21</sup> *Balmer-Schafroth and others v. Switzerland*, judgment of 26 August 1997, application No. 67/1996/686/876. — Reports of Judgments and Decisions 2000-IV. Also available at <http://cmiskp.echr.coe.int/tkp197/search.asp?sessionid=1367215&skin=hudoc-en> (15.07.2007).

<sup>22</sup> See R. Desgagne, *Integrating Environmental Values into the European Convention on Human Rights*. — *American Journal of International Law* 1995 (89) 2, pp. 266–267.

<sup>23</sup> See M. Kamminga (Note 14), pp. 177–178.

<sup>24</sup> See *Ibid.*, pp. 180–183.

plaintiffs were unable to prove that they were personally placed in ‘specific, grave, and imminent danger’. In this case, the court followed the routine practice. The case is important from quite a different standpoint. That is, seven judges issued a joint dissenting opinion, based *expressis verbis* on the precautionary principle, in which they deemed it necessary to guarantee human rights also in cases involving not only dangers but possible dangers and risks also.<sup>\*25</sup>

The ECHR has demonstrated its predisposition to use ‘language’ characteristic to a precautionary principle in the *Hatton and others v. the United Kingdom* case.<sup>\*26</sup> Ruth Hatton, who lived near Heathrow Airport and suffered from sleep disturbances caused by night flights, claimed that article 8 had been violated in her regard. One of the main problems the court had to deal with was the question of to what extent night flights disturb sleep and, deriving from this, whether Hatton and the others were victims of violation or not. Research carried out by the UK government in 1992 did not confirm dangerous influence of the flights. The court admitted that, as the influence of night-time flights on sleep had not been thoroughly investigated<sup>\*27</sup>, scientific uncertainty remains. Notwithstanding the uncertainty regarding damage, the court ruled that a violation of article 8 of the European Convention on Human Rights had taken place.<sup>\*28</sup> However, no far-reaching conclusions can be drawn yet from the Hatton case because the case was appealed and not decided in favour of the applicants. Elements of precautionary language can be found also in ECHR case *Öneryıldız v. Turkey*<sup>\*29</sup>, wherein the applicant was suffering from environmental pollution that was partly covered by scientific uncertainty.

From the above, it is possible to draw the following conclusions. Amongst civil and political rights, the right to peaceful enjoyment of private and family life can be connected with environmental protection most closely. Obviously, this is caused by the stringent requirements of the ECHR. Concerning rights protecting life and property, the requirement of existence of damage (or, at least, a sufficient probability and imminence of danger) obstructs satisfaction of environment-related complaints. In cases dealing with protection of private and family life, the standards applied by the court can be fulfilled more easily. The court indicated, in the cases of *Lopez-Ostra*, *Guerra* and *Hatton* as well as in the *Öneryıldız v. Turkey* case that the constant fear of possible future damage (odours, noise, etc.) forms sufficient grounds to take this as a violation of private and family life. Such a position on the court’s part may be suited quite well to environmental protection based on the precautionary principle.

## 4. Quality of the environment — economic, social, and cultural rights

The right to health protection is, amongst economic, social, and cultural rights, connected with environmental protection and application of the precautionary principle most closely.<sup>\*30</sup>

Arising from a relatively new field of international law, international sustainable development law is a phenomenon of recent years. International health law is considered to be one component of international sustainable development law. The foundation of the latter rests on three pillars — the precautionary principle, intergenerational equity, and the right to health protection.<sup>\*31</sup> All three of these components are connected with environmental protection. Hence, international health law recognises environmental pollution as one of the most important dangers to health. At the same time, in addition to such traditional environment-related health risks, like lack of safe and potable water and adequate sanitation, the so-called ‘modern’ risks, such as pollution originating from industry, transportation, and agriculture and genetic pollution, are also taken into account. Scientific uncertainty and, deriving from this, the need for application of the precautionary principle arise often just with regard to the last risks mentioned.

<sup>25</sup> *Balmer-Schafroth and others v. Switzerland*, dissenting opinion of Judge Pettiti, joined by Judges Gölcüklü, Walsh, Russo, Valticos, Lopes Rocha and Jambrek. – Reports of Judgments and Decisions 2000-IV. Also available at <http://cmiskp.echr.coe.int/tkp197/search.asp?sessionId=1367215&skin=hudoc-en> (15.07.2007).

<sup>26</sup> *Hatton and others v. the United Kingdom*, judgment of 8 July 2003, application No. 36022/97. Available at <http://cmiskp.echr.coe.int/tkp197/search.asp?sessionId=1367215&skin=hudoc-en> (15.07.2007).

<sup>27</sup> *Ibid.*, paragraph 103.

<sup>28</sup> *Ibid.*, paragraph 97.

<sup>29</sup> *Öneryıldız v. Turkey*, judgment of 30 November 2004, application No. 48939/99. – Reports of Judgments and Decisions 2004-XII. Also available at <http://cmiskp.echr.coe.int/tkp197/search.asp?sessionId=1367215&skin=hudoc-en> (15.07.2007).

<sup>30</sup> More direct connections with environmental protection can be found also in the right to healthy and safe work conditions and in the right to housing.

<sup>31</sup> See M. Segger, A. Khalfan, S. Nakhjavani (eds.). *Weaving the Rules for Our Common Future: Principle, Practice and Prospects for International Sustainable Development Law*. Montreal: Centre for International Sustainable Development Law 2002, pp. 125–128.

In the Preamble to the Constitution of the World Health Organization<sup>\*32</sup> (WHO), health is defined as follows: “health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.” Environmental conditions are indeed one of the most important factors directly affecting this kind of well-being. The European Committee of Social Rights in supervising the fulfilment of the European Social Charter<sup>\*33</sup> (ESC) has repeatedly drawn attention to ambient air pollution, for example, as a causal factor where health risks are concerned.<sup>\*34</sup>

The right to health protection as a fundamental right (the first paragraph of § 28 of the Republic of Estonia Constitution) is part of the tradition of a state with its underpinnings in social welfare and the rule of law.<sup>\*35</sup> The right to health protection functions in the system of fundamental rights as an independent fundamental right, and yet as a value that is applied in limiting other fundamental rights.<sup>\*36</sup> In addition to many national constitutions, rights related to health protection are enshrined also in article 25 (1) of the Universal Declaration on Human Rights<sup>\*37</sup>; in article 12 (1) of the International Covenant on Economic, Social and Cultural Rights<sup>\*38</sup>; in article 11 (1) of the ESC<sup>\*39</sup>, and in article 35 of the Charter of Fundamental Rights of the European Union (CESCR).<sup>\*40</sup> The right to health protection is set forth also in several special human rights treaties.<sup>\*41</sup>

The content of the right to health protection has to be disclosed before one can commence discussion related to application of the precautionary principle in guaranteeing this right. As regards the right to health protection, authors have pointed out two important elements: the right to be free from invasion of health and the right to underlying determinants of health.<sup>\*42</sup> Accordingly, the character and the amount of state obligation is the main question. The question of what may constitute violations by the state is of essential importance also.

The above question is explained in article 12 of the CESCR General Comment 14 (2000) — the right to the highest attainable standard of health.<sup>\*43</sup> The following principles of the comment should be underscored. The history of the preparation of the covenant demonstrates that the law stated in article 12 is not connected with functioning of a health care system only but imposes on the state an obligation to generate such conditions as guarantee the existence of conditions forming the basis of health. These conditions include also safe and potable water, safe working conditions and good general condition of the environment.<sup>\*44</sup> The notion of ‘the highest attainable standard of health’ takes into account both the individual’s biological and socio-economic preconditions and the state’s available resources.<sup>\*45</sup> Besides this, states are subject to various obligations that are of immediate effect.<sup>\*46</sup> The right to health, like all human rights, generally imposes three types or levels of obligations: to prevent invasions of one’s health (to respect), to prevent interference from third parties (to protect), and to adopt appropriate measures aimed at full realisation of the right to health of individuals (to fulfil).<sup>\*47</sup> All of these obligations may, under certain conditions, assume taking measures in the situation of scientifically uncertain health risks also.

<sup>32</sup> Available at [http://www.who.int/governance/eb/who\\_constitution\\_en.pdf](http://www.who.int/governance/eb/who_constitution_en.pdf) (17.09.2007).

<sup>33</sup> Available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/163.htm> (15.07.2007).

<sup>34</sup> See for example the Conclusion of the European Committee of Social Rights XVII – 2. Available at <http://hudoc.esc.coe.int/esc/search/default.asp?mode=esc&language=en&source=co> (17.09.2007).

<sup>35</sup> R. Alexy. Põhiõigused Eesti põhiseaduses (Fundamental Rights in Estonian Constitution). – Juridica eriväljaanne (Juridica special issue) 2001, p. 75 (in Estonian).

<sup>36</sup> Panel of editors led by E.-J. Truuväli. Eesti Vabariigi põhiseadus: kommenteeritud väljaanne (Constitution of the Republic of Estonia: Commented Edition). Tallinn: Juura, Õigusteabe AS 2002, p. 253 (in Estonian).

<sup>37</sup> “Everyone has the right to a standard of living adequate for the health and well-being of himself and his family [...]”.

<sup>38</sup> Member States of the Covenant recognise “the right of everyone to the enjoyment of the highest attainable standard on physical and mental health”.

<sup>39</sup> “With a view to ensuring the effect in exercise of the right to protection of health, the contracting parties undertake, either directly or in co-operation with public and private organisations, to take appropriate measures designed *inter alia* [...] to remove as far as possible the causes of ill-health [...]”

<sup>40</sup> Charter of Fundamental Rights of the European Union. Available at [http://www.europarl.europa.eu/charter/default\\_en.htm](http://www.europarl.europa.eu/charter/default_en.htm) (15.07.2007). Article 35: “Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.”

<sup>41</sup> E.g., United Nations Convention on the Elimination of All Forms of Discrimination against Women (1979). Available at <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> (15.07.2007); United Nations Convention on the Rights of the Child (1989). Available at <http://www.unhcr.ch/html/menu3/b/k2crc.htm> (15.07.2007); and Council of Europe Convention on Human Rights and Biomedicine (1997). Available at <http://conventions.coe.int/Treaty/en/Treaties/Word/164.doc> (15.07.2007).

<sup>42</sup> See T. Annus, A. Nõmper. The Rights to Health Protection in the Estonian Constitution. – Juridica International 2002 (7), pp. 121–122.

<sup>43</sup> E/C.12/2000/4, CESCR comment 14, 11 August 2000.

<sup>44</sup> *Ibid.*, paragraph 4.

<sup>45</sup> *Ibid.*, paragraph 9.

<sup>46</sup> *Ibid.*, paragraph 30.

<sup>47</sup> *Ibid.*, paragraph 33.

Core obligations related to the right to health protection in the context of the ESC are to take measures to avoid pollution of water and ambient air and to avoid dangers and risks originating from radioactive materials and noise.<sup>\*48</sup> Protection of the health of those people living close to nuclear power stations has been given special attention also.<sup>\*49</sup> Hence, it can be said that such minimum core obligations include implementation of basic requirements of environmental quality.<sup>\*50</sup>

No mechanism for individual complaints exists in Europe as regards economic, social, and cultural rights. Therefore, it is impossible to analyse in this case the practice of the supervisory bodies regarding the question — is it considered to be a violation when a person's right to protection of health is violated directly, or does the mere presence of the risk of damage to the health suffice? Fortunately, there have been quite a few cases in the European Court of Justice (ECJ) dealing with human health protection amid conditions of uncertain risks. Similar cases have been dealt with in the framework of the World Trade Organization also.

The ECJ and the Court of First Instance (CFI) have had to control the lawfulness and justification of application of the precautionary principle in many cases. Though the EC Treaty specifies the precautionary principle as a principle of environmental policy and law, it has been used in fact in other areas too — e.g., as regards food safety.<sup>\*51</sup> To be precise, protection of health cannot yet be treated separately from environmental protection, because, according to article 174 of the EC Treaty, protection of human health is one of the main objectives of European Union (EU) environmental policy.<sup>\*52</sup> Application of the precautionary principle in health protection and management of uncertain risks in the framework of the EU is therefore also a prescription directly proceeding from the EC Treaty, not a manifestation of common sense that is applied *ad hoc*.

The first case related to health protection and the precautionary principle that came before the ECJ was the British BSE case.<sup>\*53</sup> The Commission banned export of British beef because of the opinion of the scientific committee advising the Commission, according to which it could not be excluded that BSE could have been a cause of the outbreak of Creutzfeldt-Jakob disease in the United Kingdom, which took place at the same time. But the United Kingdom considered assumptions made on the basis of such incomplete information, and decisions based thereon, to be groundless, not proportional, and denying of legal certainty. The ECJ rejected all of the UK's allegations and admitted in its judgment that “where there is uncertainty as to the existence or extent of risks to human health, the institutions could take protective measures without having to wait until the reality and seriousness of those risks become fully apparent”.<sup>\*54</sup> Though the ECJ did not apply the precautionary principle in this case *expressis verbis*, the principle was applied, no doubt, in substance. The ECJ admitted that a possible connection between the BSE and Creutzfeldt-Jakob diseases already constituted sufficient grounds to take precautionary measures, and that the seriousness of human health risks excludes in this case the controversy surrounding principles of proportionality and legal certainty.

Since the 1990s, different antibiotics have been used in cattle breeding. There is a risk that eating the meat of animals treated with antibiotics may have a negative impact on human health; namely, a resistance to antibiotics may develop, which fact could present serious danger to human health. The Council prohibition of use of certain antibiotics as additives in foodstuffs in 1998<sup>\*55</sup> was a typical precautionary measure. It was stated that the existence or absence of the risk is not proven but the appearance of such a risk may be assumed. The measure set forth in the regulation reads as “an interim protective measure taken as a precaution”. Naturally, a solution of this kind did not satisfy the manufacturers of antibiotics. Toolex Alfarma, Inc., one of the largest manufacturers of antibiotics, pleaded that the CFI repeal the regulation mentioned, finding that in this instance the precautionary principle was misapplied, as objective risk assessment was absent. The CFI did not honour the complaint in this case. The CFI agreed with the Council, according to the statement of which measures may be taken in cases of existence of a fundamental health hazard, without the necessity of waiting for final proof to be presented. Yet more important is the standpoint of the CFI, according to which “the protection of human health, may justify adverse consequences, and even substantial adverse consequences, for certain traders [...]. The protection of public health, which the contested regulation is intended to guarantee, must

<sup>48</sup> See Conclusions of the European Committee of Social Rights XVII – 2. Available at <http://hudoc.esc.coe.int/esc/search/default.asp?mode=esc&language=en&source=co> (17.09.2007).

<sup>49</sup> See Conclusions of the European Committee of Social Rights XVIII – 1. Available at <http://hudoc.esc.coe.int/esc/search/default.asp?mode=esc&language=en&source=co> (17.09.2007).

<sup>50</sup> See S. Leckie. Another Step Towards Invisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights. – Human Rights Quarterly 1998 (20), p. 101.

<sup>51</sup> See Commission White Paper on Food Safety, COM (1999) 719 (Final).

<sup>52</sup> See in addition J. Jans. European Environmental Law. Gröningen: Europe Law Publishing 2000, pp. 26–27.

<sup>53</sup> UK v. Commission, case C-180/96. Available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en> (15.07.2007). The abbreviation ‘BSE’ stands for Bovine Spongiform Encephalopathy, colloquially known as the ‘mad cow disease’.

<sup>54</sup> *Ibid.*, paragraph 4.

<sup>55</sup> Council regulation 2821/98 of 17 December 1998 amending, as regards withdrawal of the authorisation of certain antibiotics, Directive 70/524/EEC concerning additives in feedingstuffs. – OJ L 351, 29.12.1998, pp. 4–8.

take precedence over economic considerations”.<sup>56</sup> From the standpoint of environmental protection and the precautionary principle, such a prioritisation of health protection is a very important sign, as the majority of cases of environmental pollution have a negative impact on human health. Developers and manufacturers of certain substances cannot dispute prohibition of these substances on the basis of the great expenses they have accrued. At the same time, one cannot draw overly general conclusions from such a standpoint of the court and claim that health protection always outweighs economic considerations. In certain cases, application of the proportionality principle may yield a different solution.

An attempt to require repeal of the above-mentioned regulation was made also by another manufacturer of antibiotics, Pfizer. This complaint was rejected as well. But Pfizer appealed further. The appeal was grounded in the assumption that precautionary prohibitions may be applied only when sufficiently persuasive proof exists that the product poses a danger in itself, either really or assumedly.<sup>57</sup> The ECJ did not overturn the ruling and agreed with the CFI, according to which assumed existence of risk is, in itself, sufficient argument for applying measures and economic considerations do not outweigh interests connected with protection of health.

The precautionary principle has also been applied by the ECJ and the CFI, directly or indirectly, in several other health-related cases.<sup>58</sup>

Application of the precautionary principle in the context of health protection has also been discussed repeatedly in the framework of the WTO. The application of the precautionary principle in the context of health protection was dealt most thoroughly in the Beef Hormones Case. This concerned the regulation of imports of hormone-treated beef by the EU. The Dispute Settlement Body of the WTO started to examine the complaint of the United States<sup>59</sup> and Canada<sup>60</sup> against the EU prohibition of imports of meat and meat products derived from cattle to which either certain natural hormones or synthetic hormones had been administered for growth promotion purposes, in 1996. The complaint was related in particular to Council Directive 96/22/EC<sup>61</sup>, of 29 April 1996, which established the above-mentioned prohibition and listed six prohibited hormones.<sup>62</sup> The directive was grounded on the assumption that hormone-treated meat may pose an essential threat to human health and on the fact that members of the WTO are entitled to apply trade restriction measures to eliminate this kind of danger. As a result of research into the effects of five growth hormones that was carried out in Europe in the mid-1980s, it was found that three of the five hormones are harmful to human health. As regards two other hormones — zeranol and trenbolone — no direct essential dangers to health were found.<sup>63</sup> This notwithstanding, use of meat treated with any of these growth hormones (including the ‘harmless’ zeranol and trenbolone) was banned. Acting EU agricultural commissioner F. Andriessen explained that “scientific opinion on the case was essential, but not determinative”.<sup>64</sup> The prohibition was repeated in a new directive in 1998.

To prove the inconsistency of the risk assessment carried out in Europe, the United States and Canada stressed that the research had not provided persuasive proof of the risks originating from growth hormones, and that the research had not been scientific enough, with plenty of unscientific assumptions being added. The EU stressed continuously that the results of the scientific research that was carried out demonstrate quite clearly that the concept of danger to human health deriving from growth hormones is adequately sound.

The WTO Appellate Body did not accept the application of the precautionary principle. The Appellate Body had a good opportunity to express its point of view as regards the status of the precautionary principle in international law. Unfortunately, the opportunity was not taken. The Appellate Body declined a direct answer and pointed at the existing uncertainty regarding the content and status of the precautionary principle.

The hormones case is significant particularly for demonstrating once again the solid stance of the EU as regards the application of the precautionary principle, but it proved at the same time also that there are plenty of aspects of the principle on which different opinions exist.

<sup>56</sup> *Alpharma Inc. v. Council*, judgment of 11 September 2002, case T-70/99, paragraph 356. – OJ C 289, 23.11.2002, p. 21.

<sup>57</sup> *Pfizer v. Council*, order of 18 November 1999, case 329/99, paragraph 47. Available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en> (15.07.2007).

<sup>58</sup> *Association Greenpeace France and Others v. Ministère de l’Agriculture et de la Pêche and Others*, Case C-6/99; *Kemikalieinspektionen v. Toolex Alpha AB*, Case C-473/98; *Commission of the European Communities v. Portuguese Republic*, Case C-392/99. Available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en> (15.07.2007).

<sup>59</sup> *Complaint by the US — document WT/DS26/R/USA*. Available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/distab\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm) (12.12.2006).

<sup>60</sup> *Complaint by the US — document WT/DS48/R/CAN*. Available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/distab\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm) (12.12.2002).

<sup>61</sup> OJ L 125, 29.05.1996, pp. 3–9.

<sup>62</sup> Exemption was made to use of hormones for medical purposes.

<sup>63</sup> D. Vogel. *Barriers or Benefits: Regulation in Transatlantic Trade*. Washington DC: Brookings Institute Press 1997, p. 15.

<sup>64</sup> *Ibid.*, p. 16.



One can draw a conclusion from the above that, unlike civil and political rights, with the exception of the right to enjoy private and family life, the right to human health protection, a component of economic, social, and cultural rights, is generally suitable in assuring precautionary environmental protection. The position according to which measures have to be taken to manage health risks covered by uncertainty has quite clear support in the framework of the EU. Yet problems arise in applying the precautionary principle in the framework of the WTO, dispute settlement bodies of which thus far have not accepted radical application of the precautionary principle as a basis for trade restrictions prompted by health risks.

## 5. Conclusions

Contemporary environmental law proceeds from the principle that it is better to avoid environmental damage than to try to compensate for or mitigate its consequences *ex post*. The precautionary principle adds to this principle a dimension of managing environmental and health risks covered by scientific uncertainty. Thus, environmental law presumes taking immediate measures to control both proven dangers and risks not yet proved.

The European system of civil and political rights protection requires at the same time being a victim of an actual violation and the existence of damage or at least proof that this imminent damage exists. Therefore, as a rule, toleration of possible risk is not grounds for a political rights protection mechanism to start functioning. Only single exemptions from this general rule exist. For example, in some discrimination-related cases the ECHR has deemed mere risk of damage to be sufficient. In cases related to the right to enjoy private and family life, the court has presented milder requirements as regards proof of the violation and has deemed sufficient the fact of living in fear of possible future violation and being worried about this, as argument that a violation of the convention on human rights exists. Regardless of these specific exceptions, the main demand of the ECHR has involved the requirement of being a victim of a violation that has already taken place. This requirement indeed is not in concordance with the precautionary principle. Civil and political rights are therefore applicable in environmental protection only to a limited extent. More possibilities for this are offered only by the right to enjoy private and family life, in connection with which the court has expressed its readiness to apply indirectly language appropriate to the precautionary principle.

Amongst economic, social, and cultural rights, the right to health protection is the one most closely connected with environmental quality. Health protection not only presumes avoiding health violations but also requires the state to guarantee that the actions of third parties do not violate the right to health protection. The latter obligation finds its expression, for example, in granting of environmental permits and in control systems over chemicals and application of the precautionary principle therein. The negative aspect of the right to health protection from the standpoint of environmental protection is that environmental protection cannot be reduced solely to anthropocentric and instrumental environmental values. Consequently rights to health protection, like civil and political rights, are applicable in environmental protection only to a limited extent.

Summarising the above argumentation, the author of this article finds that making use of classical human rights (civil and political rights, as well as economic, social, and cultural rights) is not enough to imply the entry of environmental protection into the sphere of human rights. These rights afford certain possibilities for protecting the environment, but at the same time these possibilities are clearly limited, in two main respects — firstly, by the fact that protection is granted, as a rule, only in cases of violations that already have taken place and, secondly, in that human-centred classical human rights leave out a considerable portion of environmental protection based on indirect values related to the environment.