

Abilities of European Court of Human Rights to protect environment from nuclear accidents

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ABSTRACT

The aim of this study was to assess the abilities of European Court of Human Rights (ECtHR) to adjudicate upon cases concerning violations to environment upraised from nuclear accidents. This was non-causal research, based on qualitative methods. With respect to information gathering, the document and library research process were employed, then qualitative method was applied to analyse the information, by which international rules governing the issue and related case law of ECtHR was studied, assessed and analysed. Findings indicated that ECtHR has accepted the environment rights by broad interpretation of article 8 of the European Convention on Human Rights (ECHR). However, in the Court's precedent, applications with no actual victim were not considered as violation in the convention. The latest approach taken by ECtHR, taking prevention principle into account, could improve its abilities to protect potential victims of violations caused by nuclear accidents due to environmental rights. In conclusion, despite some barriers against the complaint processes in the Court, new approach was recognised as a more protective one.

Keywords: European Court of Human Rights, European Convention on Human Rights, Environmental rights, Nuclear accidents, Prevention principle.

INTRODUCTION

Nuclear accidents may have impacts on human rights. Radioactive particles emissions cause nuclear pollution. Due to long lasting nature of such particles, future generations can be affected by such pollution. One of the rights that are affected by such accidents, is environmental right. The pollutions caused by the spread of radioactive materials, results in severe environmental changes, leading to intra-generational and inter-generational impacts. Widespread use of nuclear energy in energy sector and other sectors such as medicine, agriculture, industries and army on the one hand, as well as direct and indirect activities done each day, such as transportation of usable or used nuclear material on the other hand, may lead to nuclear accidents, influencing human rights, e.g., environmental rights. States and international organisations have considered preventing nuclear accidents and decreasing its impacts on humans, societies and environment, especially after Chernobyl accident in 1986. Some international conventions accompanied with several other binding and non-binding international instruments and documents on the one hand, as well as national regulations and regional standards on the other hand, are considered as a result of efforts in international and domestic environmental and nuclear law. However, Fukushima Daiichi accident in 2011 revealed one more time that humans, societies and environment are still at risk. European Union, as a union of industrialised states, in which a big portion of energy is provided by nuclear power plants, is a region in which there are concerns about nuclear accidents. These concerns may result in civil society campaigns against nuclear activities, such as campaign against Tihange Nuclear Power Plant in Belgium, which was also supported by nearby towns in Netherlands and Germany.

However, it seems that in the European Human Rights Protection System, human protection against severe pollutions caused by nuclear accidents is needed. Although there is no reference to environmental right in European Convention on Human Rights (ECHR), such a right has been recognised in some cases decided by the European Court of Human Rights (ECtHR). This could be considered through interrelationship of human rights. Obviously, in the case of an environmental crisis, a brim-full of human rights would be affected and the most important one is the life right. In ECtHR jurisprudence, protection of environmental right has been developed in context of article 8 of ECHR. This article, entitled "Right to respect for private and family life" provides: "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".

Some authors have paid attention to protection of environmental right through jurisprudence of ECtHR. Referring to prevention principle in some cases has been evaluated as a positive effort, but not enough (Quirico & Boumghar, 2015). There has also been other research published by the Council of Europe (Council of Europe 2018). This research aims to assess and analyse the abilities of ECtHR to examine applications concerning losses concerning to environmental right raised from nuclear accidents. The question this study aimed to answer is whether does ECtHR protect the environmental rights of victims of potential nuclear accidents, relating to its jurisprudence. With respect to its history and also comprehensive and coherent jurisprudence, such protection is presumed to be expected. In this study, non-causal, qualitative and documentary method was hired and information was gathered through library sources and legal instruments, then qualitatively analysed. At first, the study focuses on impacts of nuclear accidents on humans, societies and environment, then gives examples exhibiting breaches of environmental right. Thereafter, concisely introduces ECHR and ECtHR and their relations with impacts of nuclear accident on environmental right. In addition, cases concerning environmental damages affecting environmental right in ECtHR jurisprudence would be given and finally, ECtHR jurisprudence dealing with nuclear accidents and damages will be analysed.

MATERIALS AND METHODS

The method in this study is non-causal, qualitative and document-oriented, with respect to its subject. In non-causal study, circumstances, but not causal relations, are assessed. So that, no intervention is implemented in situation or circumstances; rather circumstances are studied and reported. In other words, in experimental studies, variables are manipulated by researcher, but in non-experimental ones, variables are merely observed and described (Hasanzadeh 2014). In qualitative study, researcher does not aim to achieve quantitative data. Instead events and phenomena in natural situation are directly studied, i.e., quality of relations, activities, situations or conditions are to be studied (Hasanzadeh 2014). In document-gathering method, the study is based on examine and analyzing documents and opinions. In this study, international and regional rules, instruments, documents and ECtHR decisions, which are directly or indirectly related to the subject have been qualitatively analysed and assessed in compliance with legal approach. International treaties are instruments regarded as a principal source of international law (International Court of Justice Statute, article 38(a)). "The whole point of making a binding agreement is that each of the parties should be able to rely on performance of the treaty by the other party or parties, even when such performance may have become onerous or undesirable to such other party or parties. A treaty is therefore one of the most evident ways in which rules binding on two or more States may come into existence, and thus an evident formal source of law" (Thirlway 2019). To study general commitments of states relating to nuclear safety, we investigate Nuclear Safety Convention (1994), Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, Vienna (1997), Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (1986) and Convention on Early Notification of a Nuclear Accident (1986). Moreover, couples of international documents are used in this study, which some are not binding. However, they are useful guides of the study in soft law context. These documents are as follows: Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration 1972), Rio Declaration on Environment and Development (Rio Declaration 1992), Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention 1998), Paris Agreement under the United Nations Framework Convention on Climate Change (Paris

Agreement 2015). Related regional documents are African Charter on Human and Peoples' Rights (Banjul Charter 1981), Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights (Protocol of San Salvador, 1988), and the last but not the least, European Convention on Human Rights (1950). Decisions made by international tribunals show consolidation of a rule, as well as its range of inclusion. In this study, ECtHR decisions are assessed, in order to describe the ability of article 8 of ECHR to include environmental right. Regarding lack of case in ECtHR concerning nuclear accidents, assessment of such ability is done through drawing an analogy between similar subjects and nuclear accidents. In the case of any decision on this matter, it is possible to reach more conclusive results.

RESULTS AND DISCUSSION

Impacts of Nuclear Accidents on Right to Environment

The danger from nuclear energy results from a by-product of the fission process. In addition to heat, some energy is released as radioactivity, which is highly poisonous. Exposure to large doses of radioactivity can interfere with cell development. Such exposure can lead to cell death or a change of cell structure called mutation –the origin of cancer – in plants, animals, and humans (Ingram 2005).

This uncontrolled exposure to nuclear materials and radiation touches several couples of human rights, including environmental rights. Impacts on human rights has been reflected in international documents; *inter alia*: article 1 (2) of Convention on Nuclear Safety 1994 and article 1 (2) of Vienna Joint Convention 1997, both aim to protect humans, societies and environment against harmful impacts of nuclear radiations. It is also remarked in Early Notification Convention, 1986 and Assistance Convention, 1986 about potential risks of nuclear activities for humans. This clause included in the documents, resulted in the main aim of nuclear safety conventions in protecting people and environment against radiations arising from nuclear activities (Salimi Torkamani 2015).

Within the first weeks after Chernobyl disaster, 31 people died as a direct result of being exposed to high-level radiation and three more people died a year after the accident. However, it is extremely difficult to assess the real impact of this accident on human health, the environment and properties, even within the exclusive zone, where the power plant was located (Sabouri 2009-2010). These evidences and the scientifically verified fact that ionisation nature of nuclear radiation damages alive cells (Dadashi & Mashadi 2016), lead to the conclusion that nuclear accidents have negative impacts on environmental rights.

Although environmental rights has not been recognised by Universal Declaration of Human Rights (UDHR, 1948), International Covenant on Civil and Political Rights (ICCPR 1966), and International Covenant on Economic, Social and Cultural Rights (1966), it has been reflected in several international documents such as principle 1 of the Stockholm Declaration (1972), principle 1 of the Rio Declaration (1992), Aarhus Convention (1998) and Paris Agreement (2015). Among regional documents, it has been recognised by Banjul Charter (1981) and San Salvador Protocol (1988). It has been expressed that “the rights to a healthy environment enjoys widespread legal recognition across the world, both internationally and nationally” (Knox & Pejan 2018).

ECHR is the primary instrument governing human rights in Europe. The rights encompassed in this convention are basically derived from the first half of the UDHR. It was the first convention providing an effective implementation mechanism (Keyhanloo 2009). The substantial rights provided by ECHR are similar to the rights included in UDHR, and in fact is similar to ICCPR, which afterwards was ratified in United Nations General Assembly (Mehrpour 2017). The judicial mechanism provided for ECHR is ECtHR. Many applications are filed in ECtHR each year, concerning to acts of governments beyond their legal authorities to implement ECHR. Nuclear accident or disaster in these papers, as defined by the International Atomic Energy Agency, “is an event that has led to significant consequences to people, the environment or the facility” (IAEA 2008).

The European Court of Human Rights

ECHR is amended by Protocol No. 11 in 1998 established a new Court functioning on a permanent basis. Applicants were provided with mandatory rights to complain directly to the court. Protocol No. 14 in 2010 also amended European Court System (Leach 2011). The judicial branch of European Human Rights Protection System is ECtHR which is mandated to ensure that states parties to ECHR observe their engagements. The ECtHR is competent to interpret and find violations of ECHR on the basis of individual complaints, but the significance of these findings often goes beyond an individual case, particularly if the violation is based on legislation”

(Seibert-Fohr & Villiger 2014). Another feature of ECtHR is making decisions about interstate cases, as provided by article 33 of ECHR (Leach 2011).

It has taken pains to establish that it is not to be treated as yet a further state of appeal within the national court hierarchies. It will not overturn a national court decision just because it seems to be wrong, and is unwilling even to impose its own interpretation of national law. Only if the member state appears clearly to be in breach of the Convention will it act, and its rulings are declaratory of this breach. The Court does not try to tell member states what they must do to remedy the defect in their law, considering that to be legitimately only the concern of the state itself, though it does award damages, and its decisions are binding in international law (Robertson 2004).

European Convention on Human Rights and its relevance to nuclear Activities

ECHR has no regulation concerning nuclear activities or environment. Perhaps this lack could be justified by the date of its development. In 1950, when ECHR was signed, environment was not a trend issue and it was just during 1960s and 1970s that it could enter to public discourse (Kiss & Shelton 2007) (UNESCO Chair 2010). Nuclear activities were not as widespread in 1950 as upcoming decades, and so had not gained enough attention. Article 2 of the ECHR however protects the rights to life of citizens of contracting States. It has been described by the ECtHR as one of ‘the most fundamental provisions in the Convention’, a text that ‘enshrine(s) the basic values of the democratic societies making the Council of Europe’ (Schabas 2015).

Issues concerning the environment have been addressed under article 8, where they may concern both private life and home. Cases have dealt with noise from nightclubs, passing aircraft, electric transformers, wind turbines, commercial and industrial establishments, a military shooting range, a bar, a computer club, ferries, a nuclear power station, road works, and a dental clinic. Several applications have concerned smells, attributable to such places as a waste-treatment plant, a pigsty, and a dump (Schabas 2015). In fact, this is no doubt that the environmental rights have been protected through extending the scope of the rights to private and family life by judicial interpretation of the ECtHR, rather than text of ECHR (Quirico & Boumghar 2015). Environmental issues generally refer to positive obligations, by which they are asked to provide regulatory framework as to ensure safe and healthy environment (Schabas 2015). Despite the fact that the ECHR has plenty of imitations (Zamani & Askari 2007), judicial interpretation has opened new horizons for the European Human Rights System.

Another rule of ECHR relevant to this subject is provisions of article 34, which provides that applicants should claim that they have been personally and directly victims of a violation (Zamani & Askari 2007) (Leach 2011). As it will be discussed, this provision is a barrier to NGOs and civil society preventing environmental degradation or file applications on behalf of victims.

Protection against environmental accidents in jurisprudence of the European Court of Human Rights

The ECtHR has protected environmental rights in several cases. In *Oneryildiz v. Turkey*, the applicants submitted that the national authorities were responsible for the deaths of their close relatives and for the destruction of their property as a result of a methane explosion in 1993 at the municipal rubbish tip in Istanbul. Decisions made by both Administrative Council and Criminal Court declared that two mayors are responsible. They were sentenced to the minimum term of imprisonment provided for it, although it was never realised (ECtHR, 2004-1). The Court determined that Turkey had breached the rights to life, property and effective remedy under Articles 2 and 13 of ECHR, and 1 Additional Protocol 1, for not effectively preventing the environmental accident resulting in the death of the applicant’s relatives and damage to their house and other belongings (Quirico & Boumghar 2015). The damages caused by accident in *Oneryildiz v. Turkey* is an example of relatively severe damages violating (*inter alia*) article 8 of the ECHR. It is possible to imagine more severe damages in nuclear accidents. In *Lopez Ostra v Spain* case, the Court ruled that severe environmental pollution could interfere with the rights to respect for private and family life (and home) by potentially affecting individuals’ well-being and preventing them from enjoying their homes, thus adversely affecting their private and family life (Council of Europe 2018). In this case, a company owning several tanneries in a district in Spain had a plant for the treatment of liquid and solid waste built with a State subsidy on municipal land few metres away from the applicant’s home (ECtHR 1994). The Court considered that “the State did not succeed in striking a fair balance between the interest of the town’s economic well-being i.e., having a waste-treatment plant and the applicant’s effective enjoyment of her rights with respect to her home and her private as well as her family life”, therefore a violation of Article 8 has been occurred (ECtHR 1994).

It could be presumed that in case of nuclear material emission into the environment, this criterion, severe environmental pollution, which has been taken into account by the ECtHR would be drawn to the Court. In *Guerra and Others v Italy*, the ECtHR made decision about the case of people living in Manfronia, Italy.

The local population was not provided with essential information that would have enabled them to assess the risks they and their families might run if they continued to live near a chemical factory, right up until the production of fertilisers ceased in 1994 (Council of Europe 2018). The court considered that “severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely” (*mutatis mutandis*, the *López Ostra v. Spain* Case) and so, “that the respondent State did not fulfil its obligation to secure the applicants’ rights to respect for their private and family life, in breach of Article 8 of the Convention” (ECtHR, 1998-1). Additionally, the States, as in this case, have positive obligations to prevent pollution and damages. This criterion is also applicable in nuclear accidents. In *Asselbourg and 78 Others and Greenpeace Luxemburg v Luxemburg*, the ECtHR adjudicated on damage to the environment that affected the applicants’ quality of life and deprived them of the peaceful enjoyment of their homes (or of their registered office in the case of the association Greenpeace), in such a way as to infringe their rights to respect for their private and family life, safeguarded by Article 8 of the ECHR.

The Court considered that “a non-governmental organisation cannot claim to be the victim of an infringement of the rights to respect for its “home”, within the meaning of Article 8 of the ECHR, merely because it has its registered office close to the steelworks that it is criticising, where the infringement of the rights to respect for the home results, as alleged in this case, from nuisances or problems which can be encountered only by natural persons (ECtHR 1999). This criterion makes it difficult to NGOs and civil society to complain on behalf of natural persons. This is the provision of Article 34 of ECHR cited before.

In *Taskin and others v Turkey*, the ECtHR referred to Principle 10 of the Rio Declaration 1992, Aarhus Convention 1998 and some other international documents (ECtHR 2004-2) to recognise the environmental rights and decided that Article 8 of the ECHR is relevant in this case (ECtHR 2004-2). This case concerned the granting of permits to operate a gold mine in a district in Turkey. The applicants alleged that, as a result of the gold mine’s development and operation, they had suffered and continued to suffer the effects of environmental damage (ECtHR, 2004-2). In *Hatton and Others v the United Kingdom*, “the applicants complained that the government policy on night flights at Heathrow introduced in 1993 violated their rights under Article 8” of the ECHR (ECtHR, 2003). The ECtHR stated that “where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8” (ECtHR 2003). Therefore, Article 8 of the ECHR does not imply the prevention of environmental degradation or pollution in itself and any “issue under Article 8. The environmental pollution must have direct and immediate consequences for the rights to respect for the home” (Council of Europe 2018) to fall within Article 8. In *Tatar v Romania*, the ECtHR adjudicated upon an environmental accident occurred in Baia Mare gold mine, releasing about 100,000 m³ cyanide-contaminated tailings water into the environment. The Applicants filed various administrative complaints concerning the risk incurred by him and his family as a result of the use of sodium cyanide by the operator in its extraction process (ECtHR 2009).

They complained that the “technological process” used by the operator “put their lives in danger” and Romanian State failed to take adequate action, in spite of the complaints they had filed.

The Court concluded that the Romanian authorities had failed in their duty to assess, to a satisfactory degree, the risks that the company’s activity might entail, and to take suitable measures in order to protect the rights of those concerned to respect for their private lives and homes, within the meaning of Article 8, and more generally their rights to enjoy a healthy and protected environment (ECtHR 2009). Although the case in issue concerned more the health of the applicants than the enjoyment of the amenities of home, the ECtHR examined the facts exclusively under Article 8 ECHR (Quirico & Boumghar 2015).

In the ECtHR’s opinion, the effective enjoyment of the rights to respect for one’s home requires the State adopting all the reasonable and appropriate measures needed to protect individuals from serious damage to their environment (Council of Europe 2018). Although this case was concerning rights to health, rather than enjoyment of home, the ECtHR decided under provisions of the Article 8 of ECHR. In all these cases, this interpretive shift ultimately led the ECtHR to extend the scope of the rights to private and family life, so as to include the ‘enjoyment of a healthy and protected environment’ (Quirico & Boumghar 2015) and exhibits a recent approach in the ECtHR on environmental issues.

Protection against Radioactivity in Jurisprudence of the European Court of Human Rights

In *L.C.B v. UK*, the applicant's father was serving as a catering assistant in the Royal Air Force. He was present at Christmas Island during four nuclear tests in 1957 and 1958. He also participated in the clean-up programme following the tests (ECtHR 1998-2). The applicant was born in 1966. In or about 1970 she was diagnosed as having leukaemia, a cancerous disease of the organs producing blood. Her records of admission to hospital state, under the heading "Summary of Possible Causative Factors", "Father – Radiation exposure" (ECtHR 1998-2). However, the causal link between her father's exposure to radiations and her leukaemia could not be verified (ECtHR 1998-2). This case shows the difficulty of proving the casual linkage in nuclear issues. This is known in ECtHR case law that applicants bear the burden of verification to exhibit that he/she has been directly and personally victim of a violation (Leach 2011). This criterion imposes a high threshold for (alleged/potential) victims of environmental damages, caused by nuclear activities and accidents. In *Balmer-Schafroth and Others V. Switzerland*, the applicants lived in three villages within a radiation of between four and five kilometres from a nuclear power station. The station was given an extension of its operating licence for an indefinite period and permission to increase production by 10%. Their application was concerning Article 6(1) of the ECHR, alleging that they have been deprived of an opportunity to bring objection to the Federal Council's permission (ECtHR 1997). However, the ECtHR decided that "the applicants [...] failed to show that the operation of Mühleberg power station exposed them personally to a danger that was not only serious but also specific and, above all, imminent (San Jose 2005)." The reason was their failure to "establish a direct link between the operating conditions of the power station which were contested by them and their rights to protect their physical integrity" (ECtHR 1997). In *Athansoglou and Others V. Switzerland*, the case was again referred to Article 6(1) (*Mutatis mutandis*, *Balmer-Schafroth and Others V. Switzerland*). The ECtHR asserted that "Article 6 (1) cannot be read as dictating any one scheme rather than another. What Article 6 (1) requires is that individuals be granted access to a court whenever they have an arguable claim that there has been an unlawful interference with the exercise of one of their (civil) rights recognised under domestic law" (San Jose 2005); while nuclear activities are not unlawful. The ECtHR also declared that "in the event of an arguable claim of violation of Articles 2 and 8 as a result of the operation of the Beznau nuclear power plant, the [Swiss] Civil Code action relied on providing an effective remedy for the purposes of Article 13 by the Government (ECtHR 2000)". It could be alleged that the provision of prevention principle has not been reflected in any case in the ECtHR concerning nuclear activities. The ECtHR does not intervene in internal matters of the States and this is shown in this case. Victim requirement, as set in Article 34 of the ECHR is also encompassed in this case, preventing the ECtHR from deciding about merits. The only exception is when a potential victim alleges that the domestic law is a violation of the ECtHR in itself (Leach 2011). The reason of ECtHR's reference to Swiss domestic law is to manifest that criteria and thresholds of Article 34 of the ECHR have not been met in these two cases.

CONCLUSION

The case law brought in these papers show that the ECtHR is only sensible of occurred violations and due to Article 34 of the ECHR, does not determine its jurisdiction in probable violations. In another hand, despite decades of nuclear activities in Europe, these activities are considered as domestic matters of States and the ECtHR has not intervened in it. This is understood from jurisprudence of ECtHR that only if a nuclear accident is happened, it is possible to file an application and this is not admissible if prevention is requested. Moreover, proving the impacts of radioactivity on human rights and establishing a causal connection is seldom easy. In addition, victims should file their application and complaints brought by NGOs and civil society on behalf of victims are not admissible. These are barriers of the ECtHR to nuclear accident prevention. However, as seen in *Tatar V. Romania*, the ECtHR follows the international environmental law and it is possible to prospect a more preventive approach in future.

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ظرفیت دیوان اروپایی حقوق بشر در حمایت از حق بر محیط زیست در برابر حوادث هسته‌ای

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چکیده

دیوان اروپایی حقوق بشر از طریق توسیع تفسیر ماده ۸ کنوانسیون اروپایی حقوق بشر حق بر محیط زیست را به رسمیت شناخته است. با این حال، در رویه قضایی این دیوان، مواردی که قربانی نداشته باشد مورد پذیرش قرار نگرفته است. رویکرد جدید این دیوان در لحاظ کردن اصل احتیاط می‌تواند ظرفیت دیوان اروپایی حقوق بشر را در حمایت از قربانیان احتمالی حوادث یا خسارات هسته‌ای افزایش دهد. پژوهش حاضر با مطالعات منابع کتابخانه‌ای موجود و مورد کاوی رویه قضایی دیوان اروپایی حقوق بشر، در صدد ارزیابی ظرفیت قضایی این دیوان برای حمایت از حق بر محیط زیست در مورد حوادث هسته‌ای بود. با وجود برخی موانع در راه طرح و اثبات شکایت در این دیوان، رویکرد جدید در شناسایی اصل احتیاط در دیوان به‌عنوان رویکردی حمایتی‌تر ارزیابی شد.

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