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Complementing the Surveillance Law Principles of the ECtHR with its Environmental Law Principles: An Integrated Technology Approach to a Human Rights Framework for Surveillance

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Introduction

The PRISM scandal has stricken us with its naked truth: in a world in which surveillance programmes spy on citizens and data leaks are reported on a daily basis, privacy is eroded slowly but irreversibly. Among other things,¹ PRISM has given us a clue as to the vulnerability of personal data and how they proliferate in computer servers in a stepping-stone process while originating private life infringements.² From a more general perspective, surveillance exacerbates the risk of irreversible damage to privacy thus turning it into a fragile value. If we consider private life infringements in terms of interference intensity, we can assimilate them to environmental damages. Parallels between privacy and environmental violations are not a novelty in the human rights literature. While the latter expose the environment and individuals to pollution, privacy interferences make individuals more transparent³ so polluting their intimate sphere. The increasing interaction between privacy and environmental law is not only confirmed by dynamics such as the ‘greening of existing human rights laws’⁴ or the ‘opening up of an environmental horizon of human rights’,⁵ but is also in line with recent policy developments. In the last few decades environmental and privacy policies have been brought into alignment along risk assessment and risk management patterns. Impact assessments nowadays represent a common practice not only in the environmental sector (Environmental Impact Assessment, EIA) but also in privacy matters (Privacy

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1 See for example the recent briefing note presented to the European Parliament on PRISM. C. Bowden, *The US surveillance programmes and their impact on EU citizens’ fundamental rights*, 2013, European Parliament, Directorate-General for Internal Policies, Policy Department Citizens’ Rights and Constitutional Affairs, PE 474.405.

2 For the purpose of this paper, ‘private life’ refers to all four rights included in the text of Art. 8(1) ECHR, namely private and family life, home and correspondence, if not otherwise indicated.

3 M. Gadzheva, ‘Privacy in the age of transparency. The new vulnerability of the individual’, 2008 *Social Science Computer Review* 26, no. 1, pp. 60-74. P. De Hert & S. Gutwirth, ‘Privacy, data protection and law enforcement. Opacity of the individual and transparency of the power’, in E. Claes et al. (eds.), *Privacy and the criminal law*, 2006, pp. 61-104.

4 A. Boyle, ‘Human rights and the environment. Where next?’, 2012 *The European Journal of International Law* 23, no. 3, pp. 613-642. A. Boyle, ‘Human rights and environmental rights. A reassessment’, 2007 *Fordham Environmental Law Review* 18, p. 471.

5 F. Francioni, ‘International human rights in an environmental horizon’, 2010 *The European Journal of International Law* 21, no. 1, pp. 41-55.

Impact Assessment, PIA).⁶ The same logic is applied in the elaboration of the upcoming Surveillance Impact Assessment (SIA).⁷ Moreover, we notice that the set of principles that constitute the cornerstones of environmental law and policies are increasingly adopted to regulate privacy matters. This is the case of the principle of precaution, for example, which is often considered as an effective tool to mitigate the impact of surveillance-related interferences.⁸ While in the environmental field precaution is required to prevent environmental hazards and damage, in the privacy sector it is used to minimise the risks posed by surveillance and new technologies in general because of their ‘inestimable potential impacts on society’.⁹

Privacy and environmental violations are both dealt with by the Court in the context of Article 8 European Convention on Human Rights (ECHR) protecting homes, communications, family and private lives. As we will illustrate in Section 1, the meaning of the expression ‘private life’ encompasses several different aspects which involve not only privacy but also the enjoyment of one’s life which may be undermined by environmental infringements. Although Article 8 ECHR does not contain any provision which refers explicitly to the environment, the case law of the European Court of Human Rights (ECtHR) tells us that specific environmental-related obligations descend from this article. It is more than evident to inquire whether these human rights obligations also exist in other Article 8 areas. It is not unimportant to note that moves towards a precautionary approach can be found both in the Court’s case law on surveillance matters and in European privacy laws.¹⁰ While highlighting the main approaches and inconsistencies emerging from the case law of the ECtHR on Article 8 ECHR, this paper will address the following questions: would it be possible to create a more coherent and systematic legal framework to regulate private life interferences by integrating environmental principles into surveillance matters? How should this happen? Should we encourage such a development? As we will argue in Section 9, the regulation of surveillance interferences should rely on the environmental principles stemming from Article 8 ECHR in order to reach a more harmonised approach to private life interferences within the case law of the ECtHR. From our surveillance scholar’s perspective this integrated approach would be desirable and should be encouraged.

According to the case law of the Court of Strasbourg private life infringements fall under the general and wide category of ‘interferences’ (Article 8(2) ECHR). Although the definition of this term is quite problematic, it is possible to get its meaning from the case law of the ECtHR. The Court calls ‘private life interference’ any intrusion or violation of private life perpetrated by public authorities or private entities, provided that such intrusions impact on the rights enumerated in Article 8(1) ECHR and do not fulfil the requirements laid down in Article 8(2) ECHR. In essence Article 8(2) ECHR, as understood by the ECtHR, contains the following requirements or principles, namely: legality, legitimacy and necessity & proportionality. This paper analyses the legal principles and requirements stemming from Article 8(2) ECHR and deriving from the case law of the Court of Strasbourg. In particular, we will discuss aspects relating to the legality requirement: lawfulness (Section 2), accessibility (Section 3), and foreseeability (Section 4); aspects relating to the legitimacy requirement (Section 6); and aspects relating to the

6 D. Wright & P. De Hert (eds.), *Privacy Impact Assessment*, 2012. For an historical and comparative perspective on EIA and PIA see R. Clarke, ‘Privacy impact assessment: its origins and development’, 2009 *Computer, Law and Security Review* 25, pp. 123-135.

7 D. Wright, & C.D. Raab, ‘Constructing a surveillance impact assessment’, 2012 *Computer, Law and Security Review* 28, no. 2, pp. 613-626.

8 D. Wright, et al. ‘Minimizing technology risks with PIAs, precaution and participation’, 2011 *IEEE Technology and Society Magazine*, no. 4, pp. 47-54.

9 C. Som et al., ‘The precautionary principle in the information society’, 2004 *Human and Ecological Risk Assessment* 10, pp. 787-799. See also B.J. Koops et al., ‘Bridging the accountability gap: rights for new entities in the information society’, 2010 *Minnesota Journal of Law, Science & Technology* 11, no. 2, pp. 497-561. R. Leenes & B.J. Koops, ‘“Code”: privacy’s death or saviour?’, 2005 *International Review of Law, Computers and Technology* 19, no. 3, pp. 329-340.

10 Despite remarkable incentives and significant efforts to bring privacy and environmental violations under the same regulatory framework, it is hard to derive from Article 8 ECHR a coherent set of principles applicable to all private life interferences and to privacy and environmental violations in particular. This difficulty has been emphasised by the work of Murphy and Ó Cuinn who commented upon the lack of a unique stance on new technologies in the case law of the ECtHR. T. Murphy & G. Ó Cuinn, ‘Work in progress. New technologies and the European Court of Human Rights’, 2010 *Human Rights Law Review*, pp. 601-638. It is important to note here that while the paper by Murphy and Ó Cuinn examines the case law of the ECtHR on new technologies in general (from wiretapping to biotechnology), we focus on those technologies that fall within the surveillance and environmental fields only. In addition, this is echoed by an increasing feeling of frustration by surveillance scholars in protecting Article 8 ECHR rights alongside the development of new surveillance technologies and the implementation of new surveillance practices. A. Galetta, ‘The changing nature of the presumption of innocence in today’s surveillance societies: rewrite human rights or regulate the use of surveillance technologies?’, 2013 *European Journal of Law and Technology* 4, no. 2.

proportionality requirement: proportionality *sensu lato* (Section 5); necessity & proportionality *sensu stricto* (Section 7); and access to legal review (Section 8). This review process of the Court's case law will lead to the design of a more coherent and systematic legal framework to assess private life interferences (Section 9). Lastly, we will elaborate our findings and draw our conclusions in Section 10. From a detailed analysis of the jurisprudence of the Court it emerges that the application of Article 8(2) ECHR principles is far more complex than it actually appears. The reasoning developed by the Court is dependent on the specific interference at stake and interferences are dealt with on a case-by-case basis.¹¹ It is noteworthy that this is the case of negative and positive obligations which derive from Article 8 ECHR and in particular of surveillance-related and environmental-related interferences that constitute a violation of Article 8 ECHR.

1. A remarkable threshold for Article 8(1) ECHR: not all privacy-related surveillance is privacy-protected

In the words of the European Convention, Article 8(1) ECHR safeguards the right to respect for private and family life, the home and correspondence. Despite the defined catalogue of rights protected by this provision, the scope of Article 8 ECHR is much broader and covers a wider field of application. An analysis of the case law of the Court of Strasbourg reveals that at least the following fifteen aspects are brought under the umbrella of Article 8 ECHR, namely: 'the physical and psychological integrity of a person; aspects of an individual's physical and social identity; one's name; one's picture; one's reputation; gender identification and transsexuality; sexual orientation; sexual life; the right to personal development and to establish and develop relationships with other human beings and the outside world; the right to self-determination and personal autonomy; activities of a professional or business nature; files or data gathered by security services or other organs of the state; information on risks to one's health; searches and seizures; and surveillance of communications and telephone conversations'.¹² More synthesis is given by Moreham who identifies five main sub-categories of rights derived from Article 8 ECHR namely: the right to be free from interference with physical and psychological integrity; the right to be free from unwanted access to and collection of information; the right to be free from serious environmental pollution; the right to be free to develop one's personality and identity; and the right to be free to live one's life in a manner of one's choosing.¹³

The length of this catalogue suggests that many of our daily actions could either be protected by Article 8 ECHR, or be seen as possible violations of Article 8 ECHR. Of course this does not mean that every daily action that is perceived to be privacy intrusive will be looked at by the Court under the angle of Article 8 ECHR (e.g. not all CCTV use will be equated as privacy interference).¹⁴ Equally, the broad approach towards Article 8 ECHR by the Court does not imply that every interference with the private life of the citizen is condemned. Human actions can therefore be classified into the following three categories:

1. actions (or measures) that do not interfere with Article 8 ECHR;
2. actions (or measures) that do interfere with Article 8 ECHR but are compatible with the requirements laid down in Article 8(2) ECHR (legality, legitimacy, necessity and proportionality);
3. actions (or measures) that do interfere with Article 8 but are not compatible with the requirements laid down in Article 8(2) ECHR.

11 Apparently there are two mistakes a lawyer can make in this area, namely: a) believing that there is one general approach to the principles determining the lawfulness and conformity with the Convention of an interference in the context of Arts. 8, 9, 10 and 11 ECHR. Although these provisions are drafted in similar ways, the respective rights are not identical and we feel, without being able to substantiate this claim here, that the Court uses less the *raison d'état* argument in the area of, for instance, Art. 10 (freedom of expression) than in the area of Art. 8 ECHR; b) believing that within the scope of Art. 8 ECHR the Court will always apply the same conformity test. Actually, not all interests brought within the scope of this provision carry the same societal weight. Again, we do not substantiate this position here but our claim(s) explain our starting point to look closely at every conformity testing carried out by the Court.

12 ECtHR, *Key case-law issues. The concepts of "private and family life". Article 8 – Right to respect for private and family life*, 2007.

13 N.A. Moreham, 'The right to respect for private life in the European Convention on Human Rights: a re-examination', 2008 *European Human Rights Law Review* 1, no. 1, pp. 44-79.

14 See note 16, *infra*.

This classification mirrors the reasoning of the Court when confronted with alleged private life interferences. Type 1 actions do not constitute private life interferences (non-private life interferences). Actions of type 2 represent private life interferences that are compatible with the Convention requirements (legitimate private life interferences). Lastly, actions that fall under category 3 denote private life interferences that are not compatible with the Convention requirements (non-legitimate interferences or private life violations).¹⁵

There is in principle no legal objection to citizens submitting any actions or measures to the checklist of Article 8(2) ECHR. The existence of type 1 actions reminds us of the fact that, legally speaking, not everything we think is privacy is truly privacy (or legally protected by Article 8 ECHR). In this case the legal subject will then have to turn to other rights recognised by law or simply have to accept that human rights do not protect all interests. One sometimes has the feeling that the Court tends to assimilate actions of the second type into the first category. By stating that a certain action does not fall under the scope of Article 8 ECHR the Court avoids submitting actions or measures to the checklist of Article 8(2) ECHR. We are inclined to disapprove of this strategy on the grounds that an action or measure that does not constitute an interference is not necessarily legitimate. Counter-intuitively narrowing down the scope of the rights enshrined in Article 8 ECHR to avoid a verification of requirements such as legality, legitimacy, necessity and proportionality might not serve the idea of a rule of law-governed state.¹⁶ This exit strategy remains the exception and the ECtHR usually accepts claims instigated by citizens about Article 8 ECHR as being Article 8 ECHR-relevant. As a consequence, Article 8 ECHR has become a 'living instrument' and a sophisticated compilation of rights and interests whose scope extends far beyond the 'right to be left alone'.¹⁷ That does not mean that we now receive more privacy protection than before, when the right to privacy was still in its infancy. The extension of the scope of Article 8(1) ECHR seems to go hand in hand with more discretion from the Court when judging conformity with Article 8(2) ECHR. In former contributions we already identified the existence of 'several' proportionality tests, some looser, others stricter, implying, among other things, a check on subsidiarity ('are there alternatives that would preserve privacy better?').¹⁸ We will come back to this below (see Section 7).

Also adding to the sophisticated nature of the ECtHR's approach to Article 8(2) ECHR is the distinction between positive and negative obligations.¹⁹ As the Court stated in *Van Kück v Germany*, 'while the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.'²⁰ This distinction between negative and positive obligations does not give way to an intelligible corpus of rules with regard to private life interferences. This in turn explains why it can be difficult to bring the case law of the ECtHR on surveillance and environmental matters together although both matters are dealt with under the umbrella of Article 8 ECHR. In the Court's view surveillance interferences underlie mainly a negative obligation

15 The following sections will focus on the above-mentioned categories 2 and 3 which represent the core of the ECtHR case law on Art. 8 ECHR.

16 In *Herbecq v Belgium* the European Commission of Human Rights held that the lack of a national legislation on the use of CCTV footage did not interfere with the applicants' private life as they failed to prove that the interference at stake was disproportionate. To believe the Commission, Art. 8 ECHR simply did not apply to CCTV. See *Pierre Herbecq and the Association Ligue des droits de l'Homme v Belgium*, decision of 14 January 1998, on the applicability of the applications no. 32200/96 and 3220196 (joined), [1998] ECommHR.

17 See G. Nardell, *An Article 8 update. Supporting material for a session of the Civil Service College course. Article 8 for government lawyers*, 2005.

18 P. De Hert, 'Balancing security and liberty within the European human rights framework. A critical reading of the Court's case law in the light of surveillance and criminal law enforcement strategies after 9/11', 2005 *Utrecht Law Review* 1, no. 1, pp. 68-96; P. De Hert, *Artikel 8 ECHR en het Belgisch recht. De bescherming van privacy, gezin, woonst en communicatie* [Article 8 ECHR and the Law in Belgium. Protection of Privacy, the Place of Residence, Family and Correspondence], 1998, p. 367.

19 We note that the 'theory of positive obligations' is not limited to Art. 8 ECHR, but has equally been applied to most other Convention rights.

20 *Van Kück v Germany*, [2003] ECHR, application no. 35968/97, judgment of 12 June 2003, pp. 15-16, Para. 70. It is important here to note that the doctrine of positive obligations derives from the jurisprudence of the ECtHR in the framework of Art. 2 ECHR and, as the Court suggests, has also been transposed into Art. 8 ECHR. It imposes on public authorities a duty to guarantee the right to private life when it is threatened by persons or activities not necessarily connected to the state and hence in the relationship of individuals between themselves.

for the state not to interfere with individuals' private life,²¹ whereas environmental interferences entail mainly positive obligations to allow individuals to enjoy a certain quality of life and the amenities of the home.²² As we will argue in Section 9, although it makes sense to retain a certain distinction between negative and positive obligations in the framework of Article 8 ECHR, we claim that the approach to private life interferences could and should be more integrated.

2. The legality requirement in Article 8(2) ECHR: spelling out legal safeguards

The case law of the Court prescribes that in order for a private life interference to be in accordance with the law (and so not to violate Article 8(1) ECHR), it is necessary, first of all, that the concerned measure has a legal basis in national legislation.²³ Indeed, the expression 'in accordance with the law' means firstly that any interference must have some basis in the law of the country concerned.²⁴ As the Court underlined in *Malone v the United Kingdom*, this legal safeguard must be in place in domestic law in order to prevent the exercise of 'arbitrary interferences by public authorities' (and in particular state 'arbitrariness' in resorting to secret surveillance).²⁵ However, the criterion of lawfulness does not prescribe the mere existence of a specific law at the national level to regulate private life intrusions. On the contrary, the core of the lawfulness principle relates to the content of the law, its substantive nature and 'quality'.²⁶ In order for the concerned interference to be lawful, national law has to be particularly clear, precise and detailed. Given that the prescribed interference may cause serious harm to the individual's private life, home and correspondence, the ECtHR requires national laws to be particularly detailed, in order to prevent possible abuses. In *Malone* and *Silver and Others v the United Kingdom*, the Court pointed out that national laws must indicate the scope of the discretion conferred on the competent public authorities and the 'manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference'.²⁷ In *Huvig and Kruslin v France*,²⁸ the ECtHR was even more explicit on this point stating that national laws must indicate 'with reasonable clarity the scope and manner of exercise of the relevant discretion' of public authorities in exercising an intrusive power.²⁹

What does the legality requirement mean in the context of surveillance? Surveillance creates a very specific kind of private life interferences due to its (often) secret nature. For the European Court of Human Rights surveillance measures constitute one of the main sources of threats to privacy. The core of the case law of the ECtHR concerns the interception of communications and wiretapping.³⁰ Most of

21 See for example *Klass v Germany*, [1978] ECHR, application no. 5029/71, judgment of 6 September 1978. *Funke v France*, [1993] ECHR, application no. 10828/84, judgment of 23 February 1993.

22 See for example *Powell and Rayner v the United Kingdom*, [1990] ECHR, application no. 9310/81, judgment of 21 February 1990.

23 *Malone v the United Kingdom*, [1984] ECHR, application no. 8691/79, judgment of 2 August 1984, pp. 27-28, Para. 67. *Huvig v France*, [1990] ECHR, application no. 11105/84, judgment of 24 April 1990, Para. 28. *Kruslin v France*, [1990] ECHR, application no. 11801/85, judgment of 24 April 1990, pp. 16-21, Paras. 27 and 30-36. *Khan v the United Kingdom*, [2000] ECHR, application no. 35394/97, judgment of 12 May 2000, pp. 6-7, Para. 26.

24 *Sunday Times v the United Kingdom*, [1979] ECHR, application no. 6538/74, judgment of 26 April 1979, pp. 23-24, Para. 47. As the Court stated in *Sunday Times*, 'It would clearly be contrary to the intention of the drafters of the Convention to hold that a restriction imposed by virtue of the common law is not "prescribed by law" on the sole ground that it is not enunciated in legislation'. See also *Silver and Others v the United Kingdom*, [1983] ECHR, application no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, judgment of 25 March 1983, p. 28, Para. 86. *Malone v the United Kingdom*, [1984] ECHR, application no. 8691/79, judgment of 2 August 1984, pp. 26-28, Paras. 66-67.

25 *Malone v the United Kingdom*, [1984] ECHR, application no. 8691/79, judgment of 2 August 1984, Para. 67.

26 In fact, the Court understands the term 'law' in its substantive sense (and not in its formal one). *Malone v the United Kingdom*, [1984] ECHR, application no. 8691/79, judgment of 2 August 1984, Para. 67. *Huvig v France*, [1990] ECHR, application no. 11105/84, judgment of 24 April 1990, Para. 28. *Kruslin v France*, [1990] ECHR, application no. 11801/85, judgment of 24 April 1990, pp. 16-21, Paras. 27 and 30-36. *Khan v the United Kingdom*, [2000] ECHR, application no. 35394/97, judgment of 12 May 2000, pp. 6-7, Para. 26.

27 *Silver and Others v the United Kingdom*, [1983] ECHR, application no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, judgment of 25 March 1983, pp. 28-29, Paras. 88-89. *Malone v the United Kingdom*, [1984] ECHR, p. 28, application no. 8691/79, judgment of 2 August 1984, Para. 68.

28 *Huvig v France*, [1990] ECHR, application no. 11105/84, judgment of 24 April 1990, and *Kruslin v France*, [1990], ECHR, application no. 11801/85, judgment of 24 April 1990.

29 *Huvig v France*, *ibid.*, Para. 35. *Kruslin v France*, *ibid.*, Para. 36.

30 Apart from the *Huvig* and *Kruslin* cases, it is necessary to mention here *Klass v Germany*, [1978] ECHR, application no. 5029/71, judgment of 6 September 1978, *Malone v the United Kingdom*, [1984] ECHR, application no. 8691/79, judgment of 2 August 1984, *Halford v the United Kingdom*, [1997] ECHR, application no. 20605/92, judgment of 25 June 1997, *Kopp v Switzerland*, [1998] ECHR, application no. 23224/94,

these judgements contain an in-depth scrutiny of the lawfulness requirement and of legality in general. The overall result is a series of very precise guidelines about how national legislation has to ensure lawful surveillance. In particular, national laws establishing the criteria and conditions under which these interferences are legitimate should define the following:

1. categories of people liable to have their communications monitored;
2. the nature of the offences which may give rise to an interception order;
3. limits on the duration of such monitoring;
4. the procedure to be followed for examining, using and storing the data obtained;
5. precautions to be taken when communicating the data to other parties; and
6. circumstances in which data obtained may or must be erased or the tapes destroyed.³¹

This level of detail that the ECtHR reads into the expression ‘in accordance with the law’ (Article 8(2) ECHR) is amazing and transforms the Court into a European legislator.³² As point 5 above reads, in *Huvig* and *Kruslin* the Court prescribed a precautionary approach to legislation on surveillance-related matters. Although in these two cases the ECtHR acknowledged that such an approach should be implemented when processing data, one can hardly find references to the principle of precaution in the case law of the ECtHR on surveillance matters.

After *Huvig* and *Kruslin* a golden question in the surveillance literature was to know whether these requirements applied to legislation on telephone tapping only or to all possible surveillance measures. Only recently, with *Uzun* that question was answered: not all surveillance measures are treated on the same footing as telephone tapping and the lawfulness test is not always grounded on these six criteria. The level of detail prescribed by the lawfulness principle depends on the interference at stake. In fact, the Court distinguishes between cases in which surveillance interferes more with the concerned person’s private life (such as wiretapping and the surveillance of telecommunications) and cases in which interferences have a lower intensity (such as GPS surveillance). In the first situation (such as in *Huvig* and *Kruslin*), national legislation must guarantee a high level of detail specifying the above-mentioned six criteria. In the latter case (such as in *Uzun v Germany*),³³ the threshold to be met to comply with the lawfulness principle is lower, as well as the level of detail required by domestic legislation. In *Uzun*, the ECtHR made this distinction clear, thereby arguing that the use of GPS does not constitute either visual or acoustic surveillance and is less susceptible of interfering with Article 8(1) ECHR through the disclosure of a person’s conduct, opinions or feelings.³⁴ On the basis of this reasoning, the Court said that domestic laws on GPS surveillance do not need to meet the six criteria mentioned above and for them it

judgment of 25 March 1998, *Khan v the United Kingdom*, [2000] ECHR, application no. 35394/97, judgment of 12 May 2000, and *Copland v United Kingdom*, [2007] ECHR, application no. 62617/00, judgment of 3 April 2007.

31 *Huvig v France*, [1990] ECHR, application no. 11105/84, judgment of 24 April 1990, Para. 34 and *Kruslin v France*, [1990], ECHR, application no. 11801/85, judgment of 24 April 1990, Para. 35.

32 P. De Hert, ‘Balancing security and liberty within the European human rights framework. A critical reading of the Court’s case law in the light of surveillance and criminal law enforcement strategies after 9/11’, 2005 *Utrecht Law Review* 1, no. 1, pp. 68-96. P. De Hert, ‘La jurisprudence européenne dans le domaine des moyens de contrainte, des écoutes policières, des prisons, de la violence policière, du terrorisme, de la détention préventive, des témoins anonymes, etc.’, 1996, *Vigiles, Revue de droit de police* 2, no. 4, pp. 26-37. Historically, the importance of these French 1990 cases, *Huvig* and *Kruslin*, cannot be underestimated. French telephone tapping ordered by investigative judges were based on a very broad, but short provision of the French Code of Criminal Procedure allowing this highest investigative magistrate to undertake ‘whatever was needed for the investigation of crimes’. In the old French paradigm the involvement of the investigative judge was seen as an important check on state powers and hence, the ‘whatever’ was deemed not to be problematic. A more bureaucratic approach (in Weberian terms) was applied by the European Court with *Huvig* and *Kruslin*. These cases led to the ‘dethronement’ of the investigative judge: even with this high-level magistrate, French law needed to be more specific and replace the ‘whatever’ with detailed descriptions of investigative powers that interfered with the private life of citizens. P. De Hert, ‘Het recht op een onderzoeksrechter in Belgisch en Europees perspectief. Grondrechtelijke armoede met een inquisitoriale achtergrond’ [The investigating judge in Belgian and European Law], 2003 *Panopticon. Tijdschrift voor strafrecht, criminologie en forensisch welzijnswerk* 24, no. 2, pp. 155-198.

33 *Uzun v Germany*, [2010] ECHR, application no. 35623/05, judgment of 2 September 2010, pp. 16-17, Para. 65. See also P. De Hert & J. Van Caeneghem, ‘Rechtens mogen GPS-toezicht toevoegen aan het bestaande wetgevende arsenaal’, annotation of *Uzun v Germany* [Judges can add GPS surveillance to the existing set of coercive powers], 2010 *European Human Rights Cases (EHRC)* 11, no. 11, pp. 1448-1460.

34 *Uzun v Germany*, [2010] ECHR, application no. 35623/05, judgment of 2 September 2010, Para. 52.

is sufficient to ensure a general ‘protection against arbitrary interference.’³⁵ As the Court underlined, this simplified lawfulness test requires anyway that national laws refer to the following elements:

1. all the circumstances of the case, such as the nature, scope and duration of the possible measures;
2. the grounds required for ordering them;
3. the authorities competent to permit, carry out and supervise them; and
4. the kind of remedy provided by the national law.³⁶

Thus, translated into more general terms, the ECtHR distinguishes privacy interferences on the basis of their likelihood to impinge on the individual’s private life. They can violate privacy to a different degree and extent and so originate different levels of liability on the part of state authorities. This interpretation given by the ECtHR mirrors the distinction between hard vs. soft surveillance, as well as thick vs. thin surveillance.³⁷ In the Court’s reasoning, the expression ‘in accordance with law’ is compatible with the establishment of legal regimes at the national level to regulate differential privacy interferences. In the case of GPS surveillance, for instance, it is not mandatory for national legislation to indicate the circumstances in which these data should be erased or destroyed. Nonetheless, when regulating soft (or thin) surveillance national law is given greater flexibility and a wider margin of appreciation as to the remedies used to counter the concerned interference and its negative effects.

This double standard of protection that emerges from the reasoning of the Court of Strasbourg leads us to two considerations. First, it is important to note that although the distinction between hard or thick interferences (such as the interception of telecommunications) and soft or thin interferences (such as GPS monitoring) constitutes a useful tool to interpret Article 8(2) ECHR, it is unsuitable to map the variety and complexity of privacy interferences with regard to surveillance. For instance, it is not apparent from the reasoning of the Court how to classify those interferences that imply both monitoring and tracking such as profiling, data mining and internet monitoring in general. At present, this is an open question in the European case law. In other terms, the Court’s distinction fails to reflect the likelihood of modern surveillance devices to interfere with private life. As it has been noted, the GPS function in smartphones is much more improved than in ‘normal’ GPS devices as monitoring is matched with tracking.³⁸ Second, we want to stress here that the criterion that should be used to modulate the standard of protection granted by Article 8 ECHR should not be the nature of the concerned information or data but its sensitivity. As has been noted, metadata for instance may become much more sensitive than data ‘when placed in a narrative of their overall communications data over an extended period of time.’³⁹ These considerations show that it is necessary to be very careful in applying the distinction between hard-thick and soft-thin surveillance in the assessment of private life violations. The standard of protection should depend more on the intensity of the interference at stake than on the *species* of interference and should somehow adapt to the advent of new technologies.

Let us turn now to environmental human rights law and see how the Court tackles the legality requirement in this area. The case law of the ECtHR in environmental matters tells us that the substantive nature of the lawfulness principle obliges national authorities not only to abstain from interfering with the individual’s private sphere (negative actions) but also to put individuals in the optimal conditions for exercising and enjoying Article 8(1) ECHR rights effectively (positive actions). Indeed, interferences with the right to respect for private and family life, the home and correspondence can descend not only from (unlawful) surveillance practices but also from the state’s negligence in protecting citizens’ health and the

35 Ibid., Para. 66.

36 Ibid., Para. 63.

37 As Torpey argues, thin surveillance ‘monitors our movements, our business transactions, and our interaction with government, but generally without constraining our mobility per se’. ‘Thick surveillance, on the other hand, involves confinement to delineated and often fortified spaces, in which observation is enhanced by a limitation of the range of mobility of those observed.’ J. Torpey, ‘Through Thick and Thin: Surveillance after 9/11’, 2007 *Contemporary Sociology* 36, no. 2, pp. 116-119, p. 116.

38 M. Vermeulen, ‘Het gebruik van location trackingtechnologieën door politiediensten: nood aan verdere regulering?’, in J. Noppe et al. (eds.), *Mensenrechten en politie, Cahiers Politiestudies, Jaargang 2013-2, nr. 27*, pp. 47-59. On the basis of this argument, Vermeulen claims that smartphones’ GPS results in heavy infringements of private life.

39 N. Ni Loideain, ‘Surveillance of communication data and Article 8 of the European Convention on Human Rights’, in S. Gutwirth et al. (eds.), *Reloading data protection: multidisciplinary insights and contemporary challenges*, 2014, pp.183-209, p. 197.

environment. This latter interpretation of Article 8 ECHR stems from the Court's consistent case law,⁴⁰ in particular on environmental matters. In *Tătar v Romania*, the ECtHR found that the environmental pollution caused by the Aurul Company could result in the degradation of the quality of life of people living in the surroundings of the Săsar plant. In turn, this could affect the well-being of the claimants, preventing them from enjoying their home, private and family life.⁴¹ The Romanian state authorities had failed to assess the potential risks linked to the dangerous industrial activity and did not take adequate measures to protect the rights of the applicants to private life, the home and the enjoyment of a safe environment.⁴²

As the Court stressed in *Tătar*, one of the main obligations emerging from Article 8(1) ECHR is for Member States⁴³ to establish a legal and administrative framework aimed at preventing risks to the environment caused by dangerous activities.⁴⁴ In case national authorities cannot ensure an effective and satisfactory protection of Article 8(1) ECHR rights, specific legislation or regulation has to be put in place at the national level taking into account the particular risk at stake. In this circumstance, national norms should:

1. set the authorisation regime of the polluting activity;
2. determine the conditions for the functioning, exploitation, security and control of the activity;
3. oblige citizens to adopt practical measures to ensure their right to respect and enjoy private life.⁴⁵

Thus, there are negative and positive obligations deriving from Article 8 ECHR which Member States have to comply with. When environmental conditions jeopardise the enforcement and enjoyment of Article 8(1) ECHR rights, national legislation has to somehow adapt to the specific circumstances of the case, setting up a detailed legal and administrative framework and specific safeguards. This demanding requirement (that in *Tătar* was attached to Article 8 ECHR) is normally prescribed by the Court with regard to Article 2 ECHR which protects the right to life.⁴⁶ In fact, as the Court recalled in *Öneryıldız v Turkey* the state obligation to safeguard Article 2 ECHR 'entails above all a primary duty on the state to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life'.⁴⁷ In *Öneryıldız*⁴⁸ and *Budayeva and Others v Russia*⁴⁹ the Court argued that this legislative and administrative framework should comprise the following elements:

1. regulation geared towards the specific features of the dangerous activity in question (particularly with regard to the level of the potential risk to human lives);
2. rules concerning the licensing, setting up, operation, security and supervision of the dangerous activity;
3. practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risk.

Although there is not a perfect correspondence between the legal requirements mentioned in *Tătar* and those prescribed in *Öneryıldız* and *Budayeva*, there is clearly a common reasoning behind them. In fact, in these three cases the national legal and administrative framework was called upon to consider the

40 *Marckx v Belgium*, [1979] ECHR, application no. 6833/74, judgment of 13 June 1979, Para. 31. *Airey v Ireland*, [1979] ECHR, application no. 6289/73, judgment of 9 October 1979, Para. 32. As the Court pointed out in *Airey*, Art. 8 ECHR does not merely compel the state to abstain from privacy interferences; 'in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life'.

41 *Tătar v Romania*, [2009] ECHR, Para. 97.

42 *Ibid.*, Para. 112.

43 For the purpose of this paper, 'Member States' are the Contracting States of the European Convention on Human Rights.

44 *Tătar v Romania*, [2009] ECHR, application no. 67021/01, judgment of 27 January 2009, Para. 88.

45 *Ibid.*

46 See for example *Osman v the United Kingdom*, [1998] ECHR, application no. 87/1997/871/1083, judgment of 28 October 1998, pp. 32-33, Para. 115. *Kiliç v Turkey*, [2000], application no. 22492/93, judgment of 28 March 2000, pp. 15-16, Para. 62.

47 *Öneryıldız v Turkey*, [2004] ECHR, application no. 48939/99, judgment of 30 November 2004, p. 29, Para. 89.

48 *Ibid.*, Para. 90.

49 *Budayeva and Others v Russia*, [2008] ECHR, application no. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, judgment of 20 March 2008, p. 25, Para. 132.

risk linked to the dangerous activity concerned, while complying with the principle of precaution.⁵⁰ In addition, the common reasoning developed in *Tătar*, *Öneryıldız* and *Budayeva* emphasises the strong link between Article 8 ECHR and Article 2 ECHR and the actual or potential threats posed by environmental conditions to the rights protected therein. As Murphy et al. underline, in *Tătar* the Court made explicit and extensive use of precaution as a principle of European law.⁵¹ Here the Court marked the evolution of the precautionary principle ‘*d’une conception philosophique vers une norme juridique*’.⁵²

One would love to see more of this environmental logic with regard to surveillance-related interferences. To our knowledge the idea of positive obligations has only been tested once in this area (and in vain) in *Pierre Herbecq and the Association Ligue des droits de l’homme v Belgium*.⁵³ In this case the applicants lodged complaints against Belgium about the absence of legislation on filming for surveillance purposes where data were not recorded in Belgium. The argument was simple: ‘we are 1998, forty years after George Orwell has written his famous 1984, Belgium is full with CCTV and there is not any law whatsoever regulating this, hence there is a violation of Article 8 ECHR’. The European Commission of Human Rights declared the application inadmissible as it considered that the photographic data had not been recorded and thus the filming did not amount to an interference with Article 8 ECHR.⁵⁴

So environmental law descending from Article 8 ECHR does better by requiring, as a positive duty, action from the national legislator. However, we observe that even though the Court of Strasbourg demands the establishment of a legal and administrative framework at the national level to legitimise private life interferences, it tends not to condemn Member States for not having adopted such a framework. Instead, in this circumstance the ECtHR prefers not to impose the adoption of national laws and to leave room for the Member States’ margin of appreciation. In *Botti v Italy*, the Court pointed out that Member States decide about what measures should be taken to comply with the norms of the Convention when regulating relations among individuals. In doing so, they benefit from a wide margin of appreciation.⁵⁵ In particular, the ECtHR realised that the national smoking ban in public places only does not entail a violation of Articles 2 and 8 ECHR with respect to the interests of a non-smoker. The same reasoning was applied in *Gaida v Germany*. Having proved that causality was lacking between the installation of telecommunication devices and the harmful effects of radiation on the applicant, the Court said that Germany did not overstep its own margin of appreciation in balancing the conflicting rights of the community and the applicant.⁵⁶

Finally, the case law of the Court tells us that the margin of appreciation recognised to Member States in implementing Article 8 ECHR is so wide that the mere existence of a legal and administrative framework at the national level (no matter what its provisions are) may exclude a violation of Article 8 ECHR. This conclusion was reached by the Court in *Hardy and Maile v the United Kingdom*.⁵⁷ In this case the Court noted that the conduct of state authorities did not amount to any interference in the context of Article 8 ECHR given that a ‘coherent and comprehensive legislative and regulatory framework’ was in place at the national level.⁵⁸ In particular, independent authorities had attested that the construction and operation of liquefied natural gas terminals did not affect the applicants’ home, family or private life. The reasoning followed by the Court in *Hardy and Maile* clarifies two main aspects. First, interferences which are against Article 8 ECHR (‘private life violations’) originate from an unfair balance between competing interests. Second, the existence of a legal and administrative framework at national level is somehow considered in itself a measure of precaution, whose aim is to strike that balance. However, if

50 D. García San José, *Environmental Protection and the European Convention on Human Rights*, 2005, Human Rights Files, No. 21, Council of Europe Publishing. D.L. Shelton, ‘*Tătar v. Romania*. European Court of Human Rights decision on protections against environmental harms and on proof of causation and damages’, 2010 *American Journal of International Law* 104, pp. 247-253. M. Fitzmaurice, *Contemporary issues in international environmental law*, 2009.

51 T. Murphy & G. Ó Cuinn, ‘Work in progress. New technologies and the European Court of Human Rights’, 2010 *Human Rights Law Review*, pp. 601-638, p. 615.

52 *Tătar v Romania*, [2009] ECHR, application no. 67021/01, judgment of 27 January 2009, Para. 69.

53 *Pierre Herbecq and the Association Ligue des droits de l’homme v Belgium*, [1998] ECommHR, (on the applicability of application nos. 32200/96 and 32201/96 (joined)).

54 *Ibid.*

55 *Botti v Italy*, [2004] ECHR, 2 December 2004 (admissibility decision), no. 77360/01.

56 *Gaida v Germany*, [2007] ECHR, 3 July 2007 (admissibility decision), no. 32015/02.

57 *Hardy and Maile v the United Kingdom*, [2012] ECHR, application no. 31965/07, judgment of 14 February.

58 *Hardy and Maile v the United Kingdom*, *ibid.*, Para. 231.

the national legislative and regulatory framework fails to attain a proper balance or to assess the risk at stake, violations of the provisions of the Convention arise. In *Kolyadenko and Others v Russia*⁵⁹ the Court found that the failure of the state to establish a 'clear legislative and administrative framework' to enable the applicants to assess the risk of flooding by the Pionerskoye reservoir entailed a violation of Article 2 ECHR.⁶⁰ Nonetheless, the negligent state conduct amounted not to an 'interference' but 'to a breach of a positive obligation' under Article 8 ECHR and Article 1 of Protocol No.1.⁶¹

3. The legality requirement in Article 8(2) ECHR: the idea of accessibility of the law

Article 8(2) ECHR requires more than just the existence of a legal basis and framework at national level to legitimise private life interferences. Member States also have to make sure that provisions which derogate from Article 8(1) ECHR are made accessible. According to the consistent case law of the ECtHR, Article 8(2) ECHR 'requires firstly that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and compatible with the rule of law'.⁶² Although the principle of accessibility is not spelled out in Article 8 ECHR, it is embedded in the expression 'in accordance with law'. It constitutes one of the main criteria to assess the lawfulness of private life interferences in the reasoning of the ECtHR. In *Silver* the Court found that specific orders and instructions given by the British Home Secretary to prison governors did not meet the accessibility test since they were not published, 'were not available to prisoners', nor were their contents 'explained in cell cards'.⁶³ In *Kuznetsov v Ukraine* the Court held that the restrictions on an inmate receiving visits from his family and communicating with his relatives in person and in writing constituted an interference with the applicant's Article 8 ECHR rights and were not 'in accordance with law'.⁶⁴ In particular, the Court found that the detention conditions concerned were governed by regulations issued by the Ministry of Justice, the Prosecutor General and the Supreme Court and constituted an internal and unpublished document.⁶⁵ The government did not make these provisions accessible to the public and hence had violated Article 8 ECHR. A similar conclusion was reached in *Liberty and Others v the United Kingdom* (see Section 4). Like lawfulness, the principle of accessibility is applied by the Court to regulate all private life interferences. It assumes peculiar connotations in the context of surveillance measures and environmental disasters or accidents. In the framework of the case law of the ECtHR in surveillance matters, accessibility prescribes that exceptions to Article 8(1) ECHR cannot be secret but have to be made accessible to citizens.⁶⁶ Secret surveillance is tolerable 'in so far as strictly necessary for safeguarding the democratic institutions'.⁶⁷ Furthermore, resorting to secret surveillance measures has to be coupled with the establishment of adequate and effective guarantees against any abuse of state powers.⁶⁸

Again we find a shift in meaning when turning to environmental matters, where accessibility is given a more active interpretation. The case law in this area tells us that the principle of accessibility recommends that citizens should be informed about any actual or potential interference through access rights and participatory mechanisms. In *Hatton and Others v the United Kingdom*⁶⁹ the Court based its

59 *Kolyadenko and Others v Russia*, [2012] ECHR, application no. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, judgment of 28 February 2012.

60 *Ibid.*, Paras. 185 and 170.

61 *Ibid.*, Para. 216.

62 *Huwig v France*, [1990] ECHR, application no. 11105/84, judgment of 24 April 1990, Para. 26. *Kruslin v France*, [1990] ECHR, application no. 11801/85, judgment of 24 April 1990, Para. 27. *Khan v the United Kingdom*, [2000] ECHR, application no. 35394/97, judgment of 12 May 2000, Para. 29. *P.G. and J.H. v United Kingdom*, [2001] ECHR, application no. 44787/98, judgment of 25 September 2001, p. 12, Para. 44. *Perry v the United Kingdom*, [2003] ECHR, application no. 63737/00, judgment of 17 July 2003, p. 11, Para. 45. *Liberty and other organisations v the United Kingdom*, [2008] ECHR, application no. 58234/00, judgement of 1 July 2008, p. 23, Para. 59.

63 *Silver and Others v the United Kingdom*, [1983] ECHR, application no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, judgment of 25 March 1983, Paras. 87-93.

64 *Kuznetsov v Ukraine*, [2003] ECHR, application no. 39042/97, judgment of 29 April 2003, pp. 30-32, Paras. 130-142.

65 *Ibid.*, Para. 138.

66 Council of Europe, *Case law of the European Court of Human Rights concerning the protection of personal data*, 2009, DP (2009) case law.

67 *Klass and Others v Germany*, [1978] ECHR, application no. 5029/71, judgment of 6 September 1978, Para. 42.

68 *Ibid.*, Para. 50.

69 *Hatton and Others v the United Kingdom*, [2003] ECHR, application no. 36022/97, judgment of 8 July 2003.

judgment on two different aspects. First, it assessed whether the state decision allowing night flights at Heathrow Airport was compatible with Article 8 ECHR. Second, it considered whether the state decision-making process had duly taken into account the applicants' interests in enjoying their private life, given the sleep disturbances. Having proved that the state measure caused a certain disturbance to the applicants,⁷⁰ the ECtHR pointed out that the decision to allow flights at night had been taken on the basis of a series of investigations and studies carried out by the government over a long period. Some of them dealt with noise assessment.⁷¹ Most of all, the introduction of this decision was announced to the public through a Consultation Paper. Published in 1993, it was sent to people living near the airport and made accessible to them, before the practical implementation of the contested scheme which the applicants at first did not oppose.⁷² As a consequence, the Court concluded that the government had balanced the conflicting interests at stake fairly by complying with the principle of accessibility and thus found no violation of Article 8 ECHR.

In *Taşkin and Others v Turkey*⁷³ the Court illustrated the content of the principle of accessibility in environmental matters in more detail, while referring to the 'procedural aspects' that substantiate an interference in the context of Article 8 ECHR. In the present case the Turkish government had authorised the operation of a mine which extracted gold by sodium cyanide leaching. Several reports had highlighted the dangers and risks linked to the activity of the mine and the Turkish Administrative Court had also stated that the government authorisation was not compatible with the public interest. Notwithstanding the guarantees offered by the Turkish legislation and by the judgment of the Turkish court, the government issued a new authorisation in 2002 for the continuation of production at the gold mine. Mentioning the findings in the *Hatton* case, the ECtHR recalled that 'where a State must determine complex issues of environmental and economic policy, the decision-making process must firstly involve appropriate investigations and studies.'⁷⁴ They allow state authorities to predict and determine in advance the risk at stake and enable them to strike a fair balance between conflicting interests. Secondly, citizens must be given access to investigations and studies to assess the danger they are exposed to. As the Court argued, this access should be granted 'beyond question.'⁷⁵ Thirdly, the ECtHR included in the category of accessibility also the right to appeal to the courts against any decision, act or omission which does not give sufficient weight to the interests of the applicants.⁷⁶ The Court followed the same reasoning in *Grimkovskaya v Ukraine*.⁷⁷ In this case the Court found that the construction of a large motorway in Ukraine was not preceded by an adequate feasibility study and so did not allow the applicants to contribute to the government's views on the project.⁷⁸ In addition, the government did not take measures aimed at an effective and meaningful environmental management so as to counter the harmful environmental impacts. Before assessing the breach of Article 8 ECHR, the Court stressed that public participation in environmental decision-making is a 'procedural safeguard for ensuring rights protected by Article 8 of the Convention.'⁷⁹

Accessibility and participation are recurring principles in the case law of the ECtHR in environmental matters. They are both enshrined in the Aarhus Convention of 1998 on access to information, public participation in decision-making and access to justice in environmental matters.⁸⁰ The ECtHR often refers to the Convention and its provisions,⁸¹ thus creating a link between Article 8 ECHR and the citizen's

70 Ibid., p. 26, Para. 118.

71 Ibid., Para. 128.

72 Ibid.

73 *Taşkin and Others v Turkey*, [2004] ECHR, application no. 46117/99, judgment of 10 November 2004.

74 Ibid., pp. 23-24, Para. 119.

75 Ibid.

76 Ibid.

77 *Grimkovskaya v Ukraine*, [2011] ECHR, application no. 38182/03, judgment of 21 July 2011.

78 Ibid., pp. 17-18, Para. 67.

79 Ibid., p. 18, Para. 69.

80 United Nations Economic Commission for Europe (UNECE), *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, 1998, <<http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>> (last visited 27 June 2013).

81 *Taşkin and Others v Turkey*, [2004] ECHR, application no. 46117/99, judgment of 10 November 2004, Para. 99; *Tătar v Romania*, [2009] ECHR, application no. 67021/01, judgment of 27 January 2009, Para. 118; *Grimkovskaya v Ukraine*, [2011] ECHR, application no. 38182/03, judgment of 21 July 2011, Paras. 39, 69 and 72; *Di Sarno and Others v Italy*, [2012] ECHR, application no. 30765/08, judgment of 10 January 2012, Paras. 76 and 107.

rights safeguarded by the Aarhus Convention. Moving from the jurisprudence of the Court, it makes sense to claim that access to information, public participation and access to justice are embedded in Article 8 ECHR, through the doctrine of positive obligations. It follows that according to the case law of the Court of Strasbourg accessibility entails positive obligations for public authorities to ensure citizens' access to information, public participation and access to justice. They contribute to defining the set of obligations that stem from Article 8 ECHR and the burden of responsibility which public authorities have to bear in order to protect private life.

Although the Court has not yet used an Environmental Impact Assessment (EIA) 'to describe the procedural aspect of Article 8',⁸² the case law of the Court confirms that EIA bears a certain relevance in the Court's reasoning when considering private life interferences on the grounds of Article 8 ECHR. As the ECtHR established in the cases mentioned above, it is not only imperative for Member States to conduct feasibility and risk assessment studies before starting activities that are or could be harmful to the environment and individuals but it is also important to ensure the participation of citizens in environmental decision-making so that the contested activity could attain a certain degree of social acceptance. If we turn our attention to the case law of the Court on surveillance matters we see that accessibility does not have this significance. Although scholars advocate PIA and SIA,⁸³ the Court of Strasbourg has still to express itself on the need to use risk assessment arguments when dealing with surveillance-related interferences (see Section 9).

4. The legality requirement in Article 8(2) ECHR: the idea of the foreseeability of the law

Foreseeability is another requirement that intervenes in the assessment of the lawfulness of private life interferences. Abundant details about the meaning and content of this principle can be found in the surveillance case law. In the Court's view, foreseeability implies that national law must be 'sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence'.⁸⁴ As the Court stressed in *Doerga v the Netherlands* a rule is foreseeable 'if it is formulated with sufficient precision to enable the person concerned – if need be with appropriate advice – to regulate his conduct'.⁸⁵ However, foreseeability does not mean that individuals should be able to foresee when public authorities are likely to adopt surveillance measures targeting them so that they can adapt their conduct accordingly.⁸⁶ Instead, the principle of foreseeability requires national law to be particularly precise in derogating from Article 8(1) ECHR. It represents a guarantee given to citizens to prevent the exercise of unfettered and arbitrary state powers. Thus, it is meant to make individuals aware of the likelihood of them being the target of surveillance measures or private life interferences.

The true value of the principle of foreseeability for human rights protection emerged clearly in the case *Liberty and Others v the United Kingdom*.⁸⁷ The applicants argued that the state obligation to make 'arrangements' when an interception warrant was issued (according to the Interception of Communications Act of 1985) constituted an interference with Article 8(1) ECHR rights and was against the requirement of foreseeability. The Court found that in principle any person could have had communications intercepted between 1990 and 1997 in the UK on the basis of an interception warrant. This amounted to the exercise

82 Council of Europe, *Manual on human rights and the environment. Principles emerging from the case-law of the European Court of Human Rights*, 2006, Council of Europe Publishing.

83 D. Wright & P. De Hert (eds.), *Privacy Impact Assessment*, 2012. D. Wright, & C.D. Raab, 'Constructing a surveillance impact assessment', 2012 *Computer, Law and Security Review* 28, no. 2, pp. 613-626.

84 *Malone v the United Kingdom*, [1984] ECHR, application no. 8691/79, judgment of 2 August 1984, Para. 67.

85 *Doerga v the Netherlands*, [2004] ECHR, application no. 50210/99, judgment of 27 July 2004, Para. 50.

86 *Malone v the United Kingdom*, [1984] ECHR, application no. 8691/79, judgment of 2 August 1984, Para. 67. *Liberty and Others v the United Kingdom*, [2008] ECHR, application no. 58234/00, judgement of 1 July 2008, Para. 93. *Weber and Saravia v Germany*, [2006] ECHR, 29 June 2006, (admissibility decision), application no. 54934/00, Para. 93.

87 In the *Liberty* case three human rights organisations (Liberty, the British Irish Rights Watch and the Irish Council for Civil Liberties), (the applicants), claimed that between 1990 and 1997 their communications (telephone, facsimile, email and data communications) had been intercepted by the ETF (Electronic Test Facility), operated by the Ministry of Defence. *Liberty and Others v the United Kingdom*, [2008] ECHR, application no. 58234/00, judgement of 1 July 2008.

of an unfettered surveillance power.⁸⁸ Moreover, details about the ‘arrangements’ to issue interception warrants were not regulated in legislation and made available to the public.⁸⁹ Thus, the Court recognised that a violation of Article 8 ECHR had occurred because national legislation failed to provide ‘adequate protection against abuse of power’ and to indicate ‘the scope and manner of exercise of the very wide discretion conferred on the State to intercept and examine external communications’.⁹⁰

Like accessibility, the principle of foreseeability is embedded in the expression ‘in accordance with law’ of Article 8(2) ECHR and is a corollary of legality. This principle has emerged from the case law of the Court of Strasbourg since the 1990s, with the cases *Huvig* and *Kruslin*.⁹¹ Although foreseeability has been increasingly applied by the Court in surveillance-related cases, it is also part of the European case law in environmental matters. As explained above, in *Tătar* the ECtHR derived from Article 8(1) ECHR the obligation for Member States to set a legal and administrative framework at the national level to prevent environmental threats effectively.⁹² Even though the Court did not refer to foreseeability explicitly, it insisted on the need for national legislation to be particularly detailed when authorising the operation of dangerous activities.⁹³ The same level of detail was required in *Öneryildiz*⁹⁴ and *Budayeva and Others v Russia*.⁹⁵ As we have seen in *Huvig* and *Kruslin*, the ECtHR also prescribes a high level of detail when assessing the conformity of surveillance measures with the principle of lawfulness. However, harder and softer tests are somehow adjusted to the specific surveillance measure at stake (see Section 2 above).

5. The proportionality (*sensu lato*) requirement in Article 8(2) ECHR

According to Article 8(2) ECHR, interferences with private and family life, the home and correspondence must be ‘necessary in a democratic society’. Necessity is a tricky principle which represents a synthesis of conflicting interests. Article 8 ECHR neither provides a definition of ‘democratic society’, nor specifies what its necessities are. Although the case law of the ECtHR provides an effective interpretive guide to establish what is necessary in a democratic society, as Greer points out the ‘content of the “democratic necessity” test remains highly fluid and indeterminate’.⁹⁶ This is partly due to the fact that there is not a fixed balance of rights and interests in the framework of Article 8 ECHR and, similarly, the catalogue of norms and exceptions is not defined *a priori*.

In the case *Klass v Germany* the ECtHR recognised that highly sophisticated forms of espionage and terrorism represented serious threats to democracy and thus justified the resort to ‘secret surveillance of subversive elements’.⁹⁷ The Court admitted that ‘the existence of some legislation granting powers of secret surveillance over the mail, post and telecommunications is, under exceptional conditions, necessary in a democratic society in the interests of national security and/or for the prevention of disorder or crime’.⁹⁸ The Court acknowledges that public authorities have a leading and crucial role in defining their necessities in a democratic society and have a certain discretion as regards the fixing of the conditions for the operation of surveillance systems. Nonetheless, the ECtHR is aware of the threats that can result from secret surveillance and of the dangers of such measures of ‘undermining or even destroying democracy on

88 *Liberty and Others v the United Kingdom*, *ibid.*, Para. 64.

89 *Liberty and Others v the United Kingdom*, *ibid.*, Paras. 66-67.

90 *Liberty and Others v the United Kingdom*, *ibid.*, Para. 69.

91 *Huvig v France*, [1990] ECHR, application no. 11105/84, judgment of 24 April 1990, Para. 29. *Kruslin v France*, [1990] ECHR, application no. 11801/85, judgment of 24 April 1990, Para. 30.

92 *Tătar v Romania*, [2009] ECHR, application no. 67021/01, judgment of 27 January 2009, Para. 88.

93 In fact, ‘lorsqu’il s’agit d’activités dangereuses, il faut, de surcroît, réserver une place singulière à une réglementation adaptée aux spécificités de l’activité en jeu notamment au niveau du risque qui pourrait en résulter. Cette obligation doit déterminer l’autorisation, la mise en fonctionnement, l’exploitation, la sécurité et le contrôle de l’activité en question ainsi qu’imposer à toute personne concernée par celle-ci l’adoption de mesures d’ordre pratique propres à assurer la protection effective des citoyens dont la vie risque d’être exposée aux dangers inhérents au domaine en cause’. *Ibid.*

94 *Öneryildiz v Turkey*, [2004] ECHR, application no. 48939/99, judgment of 30 November 2004, Para. 90.

95 *Budayeva and Others v Russia*, [2008] ECHR, application no. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, judgment of 20 March 2008, Para. 132.

96 S. Greer, ‘The exceptions to Articles 8 to 11 of the European Convention of Human Rights’, 1997 *Human Rights Files*, no. 15, Council of Europe Publishing.

97 *Klass v Germany*, [1978] ECHR, application no. 5029/71, judgment of 6 September 1978, Para. 48.

98 *Ibid.*, Para. 48.

the ground of defending it.⁹⁹ As a consequence, public authorities cannot enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance. Instead, the Court is particularly keen in requiring Member States to set up ‘adequate and effective guarantees against abuse’ in resorting to secret surveillance.¹⁰⁰ Furthermore, the margin of appreciation given to national authorities in striking a fair balance between public and private interests is subject to European supervision (see also Section 7).¹⁰¹ In *Peck v the United Kingdom* the ECtHR argued that the disclosure of relevant CCTV footage can be considered necessary in a democratic society if the reasons adduced to justify the disclosure are ‘relevant and sufficient’ and the measures are proportionate to the legitimate aims pursued.¹⁰² We will come back to the different sub-principles of proportionality, after a brief discussion of the legitimacy requirement.

6. The legitimacy requirement in Article 8(2) ECHR

Article 8(2) ECHR prescribes that interferences with the exercise of Article 8(1) ECHR rights are legitimate if they are undertaken ‘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’. As a consequence, in these circumstances surveillance-related and environmentally-related violations of Article 8 ECHR cannot be successfully invoked by the applicant. Although verdicts of the ECtHR rarely hinge on legitimacy, this principle has been used by the Court to fix the acceptability threshold of new technologies in our everyday life and to find out whether their deployment is truly against Article 8 ECHR.¹⁰³ In *S. and Marper v the United Kingdom* the Court found that the principle of legitimacy was fulfilled as the retention of fingerprint and DNA information pursued the legitimate purpose of detection and the prevention of crime.¹⁰⁴ In *Peck* the Court acknowledged the usefulness of CCTV in combating crime and admitted that ‘it is not disputed that the CCTV system plays an important role in these respects.’¹⁰⁵ Lastly, in *Kennedy v the United Kingdom* the ECtHR stated that secret surveillance is only tolerated under Article 8 ECHR to the extent that it is ‘necessary for safeguarding democratic institutions.’¹⁰⁶

Turning to environmental cases in the framework of Article 8 ECHR, we find that the assessment of the ‘legitimate aim’ follows the same logic. In *Zammit Maempel v Malta*¹⁰⁷ the Court recognised that Article 8(1) ECHR rights had not been infringed by the letting off of fireworks near the applicants’ houses because the contested activity constituted a legitimate exception under the terms of the Convention.¹⁰⁸ In particular, the ECtHR accepted the claim of the Maltese government that the firework displays were part of the Maltese character and culture, and were one of the major tourist attractions during summertime. They created substantial economic activity and had a positive impact on the national economy. Thus, the Court considered the concerned interference as necessary in the interests of the economic well-being of Malta, according to Article 8(2) ECHR.¹⁰⁹

If we compare the ECtHR case law on surveillance and environmental matters, we see that the Court uses different arguments to legitimise private life interferences. In the first case, the reasoning of the Court finds its ‘point of no return’ when confronted with the state’s interest in ensuring national security, whereas in the case of environmental interferences the interest in safeguarding the national economic well-being does sometimes prevail. The broad scope of the term national security has often been used by Member States to justify their wide margin of appreciation, in particular in cases of secret surveillance

99 Ibid., Para. 49.

100 Ibid., Para. 50. *Malone v the United Kingdom*, [1984] ECHR, application no. 8691/79, judgment of 2 August 1984, Para. 81.

101 *Funke v France*, [1993] ECHR, application no. 10828/84, judgment of 23 February 1993, Para. 55. *Peck v the United Kingdom*, [2003] ECHR, application no. 44647/98, judgement of 28 January 2003, Para. 77.

102 *Peck v the United Kingdom*, *ibid.*, Para. 76.

103 T. Murphy & G. Ó Cuinn, ‘Work in progress. New technologies and the European Court of Human Rights’, 2010 *Human Rights Law Review*, pp. 618-633.

104 *S. and Marper v the United Kingdom*, [2008] ECHR, application no. 30562/04 and 30566/04, judgment of 4 December 2008, pp. 31-32, Para. 100.

105 *Peck v the United Kingdom*, [2003] ECHR, application no. 44647/98, judgement of 28 January 2003, Para. 79.

106 *Kennedy v the United Kingdom*, [2010] ECHR, application no. 26839/05, judgment of 18 May 2010, Para. 153.

107 *Zammit Maempel v Malta*, [2011] ECHR, application no. 24202/10, judgment of 22 November 2011.

108 Ibid., Paras. 73-74.

109 Ibid., Para. 64.

(see Section 7). Most of all, the case law mentioned in this section shows that the ECtHR opposes neither the use of new technologies for law enforcement purposes, nor the exercise of certain activities which are or could be against Article 8(1) ECHR. Nonetheless, the declination of exceptions enumerated in Article 8 ECHR is the expression of other human rights that, like private life, deserve protection under the Convention. It follows that, as highlighted earlier, necessity and legitimacy substantiate the balance of opposing interests in which the Court engages itself not as a tireless defender of private life interests but rather as the guardian of the Convention and of European law.

7. Proportionality as part of the necessity requirement (proportionality *sensu stricto*)

Proportionality is part of the necessity requirement test of the ECtHR. The Court has been developing specific criteria to assess whether a certain private life interference can be considered proportionate in a democratic society. As argued in *Klass*, the proportionality test of a surveillance measure must be carried out taking into account ‘all circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering such measures, the authorities competent to permit, carry out and supervise such measures, and the kind of remedy provided by the national law’.¹¹⁰

The ECtHR has provided useful guidelines to explain the meaning of the proportionality requirement which underlies Article 8(1) ECHR and so for balancing the conflicting interests that are enshrined therein. In *Peck* the Court found that the disclosure of CCTV footage related to an attempted suicide was not proportionate given that the objective of crime prevention could have been achieved through more proportionate means and options. In particular, this aim could have been attained by identifying the applicant beforehand and obtaining his consent prior to the disclosure of film footage. Furthermore, images could have been masked in order to safeguard the applicant’s right to respect for his private life or measures could have been taken to ensure that media, to which the disclosure was made, masked those images.¹¹¹ From a more empirical perspective, the core of the proportionality requirement consists of balancing conflicting rights and interests. The ECtHR stressed this point in *S. and Marper*. The Court highlighted that the protection of Article 8 ECHR would be ‘unacceptably weakened’ if the use of modern surveillance techniques in the criminal justice system were allowed ‘at any cost and without carefully balancing the potential benefits of the extensive use of such techniques against important private life interests’.¹¹² The ECtHR found that the ‘blanket and indiscriminate’ retention of fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences ‘failed to strike a fair balance between competing public and private interests’ and thus the retention at issue constituted a disproportionate interference with Article 8 ECHR.¹¹³

The proportionality principle is far more developed in the case law of the ECtHR when the breach of a negative obligation occurs than in the Court’s assessment of a positive obligation. In the latter case the test applied by the Court on the basis of Article 8 ECHR is composed of two different steps. Firstly, the Court considers whether a certain state action, omission or decision was compatible with Article 8 ECHR. Secondly, it judges whether, given the risk or threat at stake, the state struck a fair balance between opposing interests.¹¹⁴ As the Court established in *Van Kück*, proportionality consists of balancing the general interest and the interest of the individual.¹¹⁵ In doing this, the state enjoys a certain margin of appreciation whose limits are set by the provisions of Article 8(2) ECHR. In *Leander v Sweden* the Court underlined that the scope of the state’s margin of appreciation is related not only to the nature of the

110 *Klass v Germany*, [1978] ECHR, application no. 5029/71, judgment of 6 September 1978, Para. 50. See also *Malone v the United Kingdom*, [1984] ECHR, application no. 8691/79, judgment of 2 August 1984, Paras. 66-68 and *Liberty and Others v the United Kingdom*, [2008] ECHR, application no. 58234/00, judgement of 1 July 2008, Para. 93-94.

111 *Peck v United Kingdom*, [2003] ECHR, application no. 44647/98, judgement of 28 January 2003, Para. 80.

112 *S. and Marper v the United Kingdom*, [2008] ECHR, application no. 30562/04 and 30566/04, judgment of 4 December 2008, pp. 31-32, Para. 112.

113 *Ibid.*, pp. 34-35, Para. 125.

114 See for example *Hatton and Others v the United Kingdom*, [2001] ECHR, application no. 36022/97, judgment of 8 July 2003; *Taşkın and Others v Turkey*, [2004] ECHR, application no. 46117/99, judgment of 10 November 2004; and *Giacomelli v Italy*, [2006] ECHR, application no. 59909/00, judgment of 2 November 2006.

115 *Van Kück v Germany*, [2003] ECHR, application no. 35968/97, judgment of 12 June 2003, Para. 71.

legitimate aim pursued but also to the particular nature of the interference involved.¹¹⁶ Here the ECtHR recognised that the interest of the state in protecting its national security must also be balanced against the ‘seriousness of the interference with the applicant’s right to respect for his private life.’¹¹⁷ This finding was further confirmed in the *Peck* case in which the Court stated that the margin of appreciation enjoyed by national authorities in the exercise of surveillance powers depends on the nature and seriousness of the interests at stake and the gravity of the interference.¹¹⁸

Although proportionality does not come up so blatantly in this double review of the Court, it is dealt with when analysing the alternative actions or decisions that the state could have taken to prevent environmental damages or hazards. In *Kolyadenko* the Court underlined that the margin of appreciation of state authorities was compatible with their duty to clean up the Pionerskaya River in order to prevent floods and did not constitute an ‘impossible or disproportionate burden.’¹¹⁹

Even though proportionality is not explicitly mentioned in Article 8(2) ECHR, it is one of the main requirements that the Court considers when assessing private life interferences. In fact, it constitutes the final test in the Court’s reasoning and sometimes represents its decisive point. On the basis of the cases mentioned above, it is possible to deduce that there is no exhaustive definition of proportionality. Moreover, the concept of proportionality is made even more complex if we consider the German constitutional understanding (and tradition) of proportionality.¹²⁰ Several sub-principles are attached to the principle of proportionality. In general, a certain action or measure meets the proportionality requirement if:

1. it is proportionate to the legitimate aim pursued (proportionality in the narrow sense);
2. there are relevant and sufficient justifications to legitimise the concerned action or measure;
3. there are no alternatives to pursue the legitimate aim at stake (the principle of subsidiarity);
4. there is a pressing social need.¹²¹

It is important to note that, although some of these sub-principles have been stated by the ECtHR, they are rarely integrated in the review of the Court on the proportionality principle. In our view, the Court applies a strict (when it reviews all the above-mentioned sub-principles) and a looser (when it looks at goals and instruments only) proportionality test without giving explanations for its choice. The Court often leaves the subsidiarity principle out of the picture when carrying out strict reviews since it is too political. It is reasonable to claim that the discretion of the Court in undertaking a strict or a loose proportionality test represents an instrument to challenge effectively the discretionary power of the state in the context of Article 8 ECHR and its margin of appreciation. This comparative analysis of the proportionality test in the ECtHR’s case law on surveillance and environmental matters allows us to deduce that the Court applies a looser test in the area of positive obligations than in the case of negative obligations. In the former case the ECtHR seems to be less bound by the requirements of Article 8(2) ECHR and prefers to allow the Member States to set the proportionality threshold via the margin of appreciation doctrine. This approach can be found in the Court’s case law on environmental matters. On the contrary, we observe that the assessment of the proportionality requirement has been unexpectedly strong in cases in which negative obligations were dealt with, such as in *Peck* and *Marper*.

Hence, if the Court’s proportionality check depends on the margin of appreciation granted to state authorities, one should be able to somehow predict the Court’s reasoning by assessing the width of the state’s margin of appreciation. A wide margin of appreciation should originate a strict proportionality test by the ECtHR, whereas a narrow margin of appreciation should result in a loose test. Indeed, this logic

116 *Leander v Sweden*, [1987] ECHR, application No. 9248/81, judgment of 26 March 1987, p. 21, Para. 59.

117 *Ibid.*

118 *Peck v the United Kingdom*, [2003] ECHR, application no. 44647/98, judgement of 28 January 2003, Para. 77.

119 *Kolyadenko and Others v Russia*, [2012] ECHR, application no. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, judgment of 28 February 2012, Paras. 160 and 183.

120 Y. Arai-Takahashi & J. Crawford, *The margin of appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR*, 2002. M. Cohen-Eliya & I. Porat, *Proportionality and constitutional culture*, 2013.

121 The European Court of Human Rights highlighted this aspect in *Sunday Times v the United Kingdom*, [1979] ECHR, application no. 6538/74, judgment of 26 April 1979, Para. 59.

is followed by the Court in the assessment of Article 8 ECHR violations.¹²² Murphy et al. identified three factors affecting the breadth of the margin of appreciation while analysing the case law of the ECtHR on new technologies. In particular, the state enjoys a narrow margin where a particularly important aspect touching upon an individual's existence or identity is dealt with. By contrast, the margin becomes wider where there is no consensus among Member States of the Council of Europe as to the importance of the interest at stake or as to how to protect it. Similarly, a wide margin applies when Member States have to strike a balance between competing public and private interests or Convention rights.¹²³ These guidelines allow us to understand how the margin of appreciation is applied in the context of Article 8 ECHR, that is like a squeeze-box device to which the proportionality principle adapts accordingly. Moreover, they confirm that the Court's test is more demanding for surveillance-related interferences (which do normally affect the individual's identity) than for environmentally-related interferences, in which case state authorities have to balance conflicting public and private interests. From a broader perspective, the same differences in the implementation of the margin of appreciation doctrine apply to negative and positive obligations in the framework of Article 8 ECHR. Finally, it should be kept in mind that substantial differences in the application of the margin of appreciation doctrine do not impinge on the Court's discretion and case review.

8. Access to judicial review

As stressed earlier, a positive obligation to grant citizens access to judicial review emerges from the case law of the Court of Strasbourg on Article 8 ECHR. The right to have access to judicial review is established in Articles 6 and 13 ECHR. Although access to judicial review is not part of the requirements or guarantees of Article 8 ECHR, it has to be included in the catalogue of rights and principles that regulate private life interferences. Like legality, necessity and proportionality, access to judicial review is a safeguard citizens can invoke against the exercise of unfettered state powers. While the ECtHR repeatedly refers to the right to have access to judicial review when it deals with environmental matters,¹²⁴ this guarantee seems to be somehow underdeveloped in the case law on surveillance.

In the surveillance-related case of *Kennedy* the Court stated that in order to assess whether an individual can claim an interference as a result of the existence of legislation permitting secret surveillance measures, 'the Court must have regard to the availability of any remedies at the national level'.¹²⁵ Most of all, the ECtHR underlined that the impossibility for an individual to challenge the application of secret surveillance measures at the national level justifies 'widespread suspicion and concern among the general public that secret surveillance powers are being abused'.¹²⁶ As a consequence, in such cases there is a greater need for scrutiny by the Court of Strasbourg. In the recent case *Söderman v Sweden* the Court found that the act of the applicant's stepfather in covertly filming the applicant naked in the bathroom amounted to a violation of Article 8 ECHR as it harmed her integrity. Here the Court emphasised the lack of both civil and criminal remedies set at the national level that would have enabled the applicant to obtain effective protection. Accordingly, the ECtHR condemned the Swedish government on these grounds.¹²⁷

In the Court's view, although Article 8 ECHR does not contain any procedural requirement, access to judicial review must be guaranteed to counterbalance the state's decision-making process and the wide margin of appreciation it enjoys in setting private life interferences. Referring to the *Hatton* judgment, in *Giacomelli v Italy* the ECtHR argued that individuals concerned by a certain measure of a state must be able to appeal to the courts against any decision, act or omission where they consider that their interests

122 See *Evans v the United Kingdom*, [2007] ECHR, application no. 6339/05, judgment of 10 April 2007, Paras. 77-81.

123 T. Murphy & G. Ó Cuinn, 'Work in progress. New technologies and the European Court of Human Rights', 2010 *Human Rights Law Review*, pp. 633-635.

124 See for example *Taşkin and Others v Turkey*, [2004] ECHR, application no. 46117/99, judgment of 10 November 2004, Para. 119; *Giacomelli v Italy*, [2006] ECHR, application no. 59909/00, judgment of 2 November 2006, Para. 83; and *Hardy and Maile v the United Kingdom*, [2012] ECHR, application no. 31965/07, judgment of 14 February, Para. 221.

125 *Kennedy v the United Kingdom*, [2010] ECHR, application no. 26839/05, judgment of 18 May 2010, Para. 124.

126 *Ibid.*

127 *Söderman v Sweden*, [2013] ECHR, application no. 5786/08, judgement of 12 November 2013, Para. 117.

or comments ‘have not been given sufficient weight in the decision-making process.’¹²⁸ Most of all, the Court stressed that when the concerned applicant claims that the state failed to strike a fair balance between competing interests, the courts must examine whether ‘sufficient procedural safeguards’ were available to him or her.¹²⁹ It follows that in the Court’s reasoning access to judicial review participates in the evaluation of trade-offs between opposing parties and interests, like the other principles enshrined in Article 8 ECHR. In *Taşkin* (see also Section 3 above) the ECtHR underlined the important role played by national courts in balancing conflicting interests while ensuring a proper administration of justice. The Court pointed out that when state or administrative authorities refuse or fail to comply with the rule of law (or even delay in doing so), the procedural guarantees enjoyed by a litigant ‘are rendered devoid of purpose.’¹³⁰ Hence, the Court of Strasbourg said that in these circumstances national authorities ‘deprived the procedural guarantees available to the applicants of any useful effect’¹³¹ and so turned the right of access into a void expression.

As suggested by Article 6 ECHR, the right of access to judicial review concerns also the conditions under which claimants are given access to justice. The case law of the ECtHR in environmental matters prescribes that proceedings have to be swift in order to safeguard the rights and interests of the claimants. In *Oluic v Croatia*¹³² the Court found that a violation of Article 8 ECHR had occurred as a result of the persistent exposure of the applicant to excessive levels of noise coming from a bar situated on the ground-floor of her house. In particular, the Court highlighted that the applicant had lodged an administrative claim in 2003 and that the Croatian Administrative Court had decided thereon almost four years later. This long delay ‘made the remedy used by the applicant ineffective and resulted in her suffering prolonged nightly exposure to excessive noise.’¹³³ Nonetheless, the case law of the ECtHR prescribes that judicial reviews have to be reasoned and detailed.¹³⁴ This aspect emerged in *Grimkovskaya* where the Court found that neither the first-instance court, nor the highest courts’ judgments explained why they considered that the government’s policy protected the applicant’s rights. Given that national courts dismissed the case without any further explanation, the ECtHR concluded that the applicant did not have ‘a meaningful opportunity to adduce her viewpoints before an independent authority.’¹³⁵

Thus, as the Court held in *Tătar*, the right of access to judicial review must be recognised to all individuals concerned by a state decision so as to challenge any action or omission which is irrespective of the applicant’s interests.¹³⁶ The case law of the ECtHR in environmental matters illustrates the close link between Article 8, and Articles 6 and 13 ECHR. Nonetheless, this jurisprudence emphasises the need to safeguard procedural guarantees and to adopt adequate standards of protection in light of the principle of precaution.

9. Designing a more coherent and systematic legal framework to assess private life interferences

The analysis undertaken in this paper allows us to draw the following considerations about the approach of the ECtHR in the assessment of private life interferences, in particular concerning surveillance and environmental matters.

1. The definition of the term ‘interference’ that emerges from the case law of the ECtHR is broad and encompasses any action or omission which may affect private life either actually or potentially. The Court of Strasbourg regulates private life interferences on a case-by-case basis, taking into account

128 *Giacomelli v Italy*, [2006] ECHR, application no. 59909/00, judgment of 2 November 2006, Para. 83.

129 *Ibid.*, Para. 84.

130 *Taşkin and Others v Turkey*, [2004] ECHR, application no. 46117/99, judgment of 10 November 2004, Para. 124.

131 *Ibid.*, Para. 125.

132 *Oluic v Croatia*, [2010] ECHR, application no. 61260/08, judgment of 20 May 2010.

133 *Ibid.*, Para. 64.

134 *Grimkovskaya v Ukraine*, [2001] ECHR; *Hardy and Maile v the United Kingdom*, [2012] ECHR, application no. 31965/07, judgment of 14 February.

135 *Grimkovskaya v Ukraine*, [2001] ECHR, application no. 38182/03, judgment of 21 July 2011, Para. 71.

136 *Tătar v Romania*, [2009] ECHR, application no. 67021/01, judgment of 27 January 2009.

all the circumstances of the case, as well as the different rights and interests at stake. It follows that the regulatory regime changes depending on the nature of the obligation descending from Article 8 ECHR (positive obligations vs. negative obligations); on the category of interference (surveillance-related vs. environmentally-related interferences); and on the specific type of interference within a certain category (i.e. GPS surveillance vs. wiretapping).

2. The principles of lawfulness, accessibility, foreseeability, necessity, proportionality and access to legal review provide useful guidelines to interpret Article 8 ECHR. However, they are applied on the basis of the specific interference concerned. The state's failure to comply with a negative obligation such as a surveillance measure is lawful if it has (among other things) a legal basis in domestic law. Similarly, the state's failure to comply with a positive obligation is lawful if it is based (among other things) on a legal and administrative framework at the national level. While in surveillance matters the principle of accessibility is meant to prevent any resort to secret surveillance, it guarantees access rights and participatory mechanisms in environmental matters. Moreover, the principles of foreseeability, necessity and proportionality are more developed in the case law of the ECtHR when negative obligations are dealt with than in the case of positive obligations. Conversely, access to judicial review has a longer tradition in cases concerning positive obligations.
3. Member States enjoy a certain margin of appreciation in ensuring compliance with Article 8 ECHR rights. The ECtHR recognises that it serves the purpose of balancing conflicting and opposing interests and applies both in the case of positive and negative obligations. However, the width of the margin of appreciation is dependent on the rights and interests that are or could be concerned by the interference, as well as on the specific interference at stake. In the case of surveillance-related interferences the margin of appreciation recognised by the Court is narrower than in the case of environmentally-related interferences. As the *Huvig* and *Kruslin* cases confirm, the margin of appreciation of Member States has to follow specific requirements and conditions. Moreover, in the case of surveillance interferences the margin of appreciation is also adjusted on the basis of the concerned interference (like in *Uzun*).¹³⁷ Nonetheless, although the Court has made clear that in environmental matters the margin of appreciation is wide, judicial review is needed to assess whether domestic legislation strikes a fair balance between competing interests.

Rebus sic stantibus, the regulation of surveillance interferences is mainly inspired by leading jurisprudential cases of the ECtHR, such as *Huvig*, *Kruslin*, *Uzun* and *Marper*. We recognise that a case-specific approach is necessary when dealing with private life interferences, as has been noted.¹³⁸ However, it is now apparent that the legal framework that applies to privacy infringements is not solid enough to face new surveillance challenges and threats. First, we find that there are inconsistencies and ambiguities in the way the Court applies a double standard of protection in the assessment of surveillance-related interferences (see Section 2 above). As it has been pointed out, the impossibility of fully characterising the Court's stance on surveillance matters is linked to the fact that the case law of the ECtHR in this area is best seen as 'work in progress'.¹³⁹ Second, as the PRISM scandal suggests, there are grounds to fear that the existing legal framework that regulates privacy infringements is not so robust as to counter illegitimate surveillance moves. European scholars and institutions will necessarily have to address such privacy concerns in the future.

Let us now return to the second main question raised in this paper: would it be possible to design a more coherent and systematic legal framework to regulate surveillance-related interferences? We claim that this aim could be attained by integrating environmental principles stemming from Article 8 ECHR

137 Leaving aside the comparison between surveillance and environmental interferences, it is important to underline that, as Loideain points out, in cases concerning covert surveillance by public authorities the Court has tended to grant a wide margin of appreciation in matters of national security 'in light of the sensitive and confidential nature of the information involved'. N. Ni Loideain, 'Surveillance of communication data and Article 8 of the European Convention on Human Rights', in S. Gutwirth et al. (eds.), *Reloading data protection: multidisciplinary insights and contemporary challenges*, 2014, pp.183-209.

138 B.J. Koops & J.P. Sluijs, 'Network neutrality and privacy according to Art. 8 ECHR', 2012 *European Journal of Law and Technology* 3, no. 2, pp. 1-23.

139 T. Murphy & G. Ó Cuinn, 'Work in progress. New technologies and the European Court of Human Rights', 2010 *Human Rights Law Review*, pp. 601-638, p. 615.

into surveillance matters. Moreover, we encourage such a development on the following grounds. As argued earlier, environmental and privacy violations entail irreversible damage to private life. Because of this, it would be appropriate to implement a precautionary approach in the assessment of privacy violations. Nonetheless, precaution is promoted not only through Environmental Impact Assessments, but also with Privacy Impact Assessments and Surveillance Impact Assessments. Recent developments in data protection confirm that privacy is not immune to a precautionary approach and that the European legislator favours an integration of the precautionary principle into privacy matters.¹⁴⁰ Indeed, data protection impact assessment constitutes one of the main pillars of the proposed reform (Article 33 of the proposed Regulation) and is considered as one of the main responsibilities of the data controller (Article 22).¹⁴¹ Environmental and privacy infringements are both regulated by Article 8 ECHR and on the basis of the same principles, despite the specificities and nuances highlighted by the case law of the ECtHR. Although the principles of public participation, access to information and access to judicial review are rooted in environmental law, they can also be found in the Court's surveillance-related case law. Assessments as to whether individuals have been made aware of the use of surveillance devices, as to whether the public has been consulted before deciding on the deployment of surveillance measures and as to whether individuals have been given the possibility to challenge such decisions would certainly help the Court to ascertain the legitimacy of surveillance interferences.

Furthermore, we claim that the integration of environmental principles in the assessment of surveillance-related interferences is in line with the existing jurisprudence of the ECtHR. The word 'precaution' is not unknown to the ECtHR itself when dealing with surveillance interferences (see the *Huwig* and *Kruslin* cases). As the Court stressed in *Taşkin*, Member States have a range of procedural duties that descend from Article 8 ECHR and that oblige them to 'afford due respect to the interests of the individual'.¹⁴² In addition, the suggested integration is based on a broader assessment by the Court of positive and negative obligations stemming from Article 8 ECHR. As the Court recognised in *Van Kück* and in the more recent case *Evans v the United Kingdom*, 'the boundaries between the state's positive and negative obligations under Article 8 do not lend themselves to precise definition'.¹⁴³ Moreover, the applicable principles are 'nonetheless similar'.¹⁴⁴ Hence, the ECtHR itself acknowledges that the boundary between positive and negative obligations is blurring within Article 8 ECHR and that the principles enshrined in Article 8(2) ECHR should be applied in both cases, in a similar way.

10. Conclusions

As mentioned in Section 9, although the ECtHR has derived and developed from Article 8 ECHR a set of principles to counter both privacy and environmental interferences, they are applied in different ways and generate different *species* of legal protection. The case-specific approach of the Court of Strasbourg to all these interferences reflects the complex systems of rights and interests protected under Article 8 ECHR, while bringing to light inconsistencies and uncertainties in the application of the Court's reasoning. Given the difficulty in dealing with all these interferences in a systematic way, the question is thus: why is the Court of Strasbourg reluctant to implement a harmonised approach to such interferences within Article 8 ECHR? Several reasons could justify this choice by the Court and here we would like to highlight two of them.

Firstly, the approach of the ECtHR to the private life interferences analysed in this paper could simply explain the decision of the Court not to adopt the same legal reasoning with regard to surveillance

140 P. De Hert et al., 'Principles and the Proposed New Data Protection Regulation', 2012 *Innovation. The European Journal for Social Science Research* 26, no. 1, pp. 1-12.

141 European Commission, *Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)*, 25.01.2012, COM(2012) 11 final. Art. 33.1 of the proposed Regulation establishes that 'where processing operations present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes, the controller or the processor acting on the controller's behalf shall carry out an assessment of the impact of the envisaged processing operations on the protection of personal data'.

142 *Taşkin and Others v Turkey*, [2004] ECHR, application no. 46117/99, judgment of 10 November 2004, Para. 118.

143 *Van Kück v Germany*, [2003] ECHR, application no. 35968/97, judgment of 12 June 2003, Para. 71. *Evans v the United Kingdom*, [2007] ECHR, application no. 6339/05, judgment of 10 April 2007, Para 75.

144 *Ibid.* This argument was stressed both in *Van Kück* (Para. 71) and *Evans* (Para. 75).

and environmental interferences. This choice would be more than legitimate considering the wide spectrum of rights and interests that deserve protection under Article 8 ECHR. Nonetheless, it has to be recognised that environmental law and privacy law protect values that are different in nature and substantive differences can also be found between these two bodies of law. Secondly, the position held by the Court in *Botti v Italy* allows us to think that the Court prefers not to create links between these different bodies of law and leaves open the possibility of Member States to do so via national legislation.

Most of all, the double approach of the Court brings us to the following question: do we really need to have a harmonised view on private life interferences and in particular on environmental and surveillance matters in the framework of Article 8 ECHR? By contrast, is it better to keep those approaches separate as the Court does? We do not think so, at least not in the area that interests us. The normative framework that applies to surveillance is evolving nowadays and it is searching for new regulatory paths. We find that the principles that govern environmental interferences in the context of Article 8 ECHR (and in particular the principles of access to information, public participation in decision-making and access to judicial review) suit those regulatory needs in surveillance matters. These elements are asked for in the surveillance literature and are integrated in new regulatory instruments regarding surveillance. In our view the Court should not await these new instruments, but investigate their proper role and the possibility of applying its environmental law principles to surveillance issues (and why not also the other way around?). Both areas are the result of the deployment of technologies and the question about an integrative approach is thus more than reasonable. An attempt to look for common ground beyond the differences would help the Court to widen and deepen its legal reasoning when confronted with surveillance interferences. As highlighted above, the possibility to bring environmental principles (and ideas) into the surveillance discourse has already been addressed and this paper tried to analyse this possible evolution in the context of Article 8 ECHR. However, the case law of the Court of Strasbourg has not so far developed an integrated approach to surveillance and environmental interferences in the context of Article 8 ECHR. ¶