Migration, Security and Law: the Challenge of Human Rights and Cultural Diversity

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Border control is fundamental to the existence of a State. The borders of a territory are of maximum importance to both public administration and national security. However, frequently these two realities are in conflict, when migration is investigated, during times of peace or conflict. It is intended to analyze to what extent the concepts of national security and border clash with the observation of human rights, especially for migrants.

Keywords: security, human rights, migration, national defence, borders

1. Introduction

The State is a political unit, *par excellence*, in the contemporary world. Today, there is an inevitable trend towards the recognition of the human being as the subject of international law,[1] which is against the classic doctrine that only States could exert rights and obligations to act internationally. However, human beings are the lifeblood of the State, and this intellectual opening could locate the human being as a key player in this process: it creates a debate on the need to ensure the security of the State and at the same time to ensure the protection of human rights.

2. State, Border, Security and National Defence

The concept of State holds key elements. The State is a political unit with a population in an organized territory, under a jurisdiction[2]. This synthetic definition has three fundamental aspects: a human element, without which there is no reason to be a State; a geographical feature, the territory where the state projects its authority, the space where a society is organized; and an element of power, sovereignty, something that makes legitimate to set rules, which means exclusivity of jurisdiction of States over their territories[3].

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[1] A.A. Cançado Trindade, *Desafios e conquistas do Direito Internacional dos Direitos Humanos no inicio do Século XXI*, In Organization of American States (Ed.), Course in International Law, Inter-American Juridical Committee, Washington 2007, pp 407-490.

[2] A. Slitz, *Nations, States, and Territory*, Berkeley Journal of International Law, Vol. 10, No. 5, 2008, pp 1-39.

[3] Miyoshi Masahiro *Sovereignty and International Law*, in 20th anniversary of the founding of the International Boundaries Research Unit, 1-3 April 2009, Durham, United Kingdom https://www.dur.ac.uk/resources/ibru/conferences/sos/masahiro_miyoshi_paper.pdf (20 January 2015).

Thus, considering the elements that involve the construction of the State as legal entity, the importance of the human factor and territorial legitimacy should be stressed out.

Borders –as territory limits of action of a State - are associated with the concept of sovereignty, which is the paradigmatic axis consolidated through Westphalian logic[4]. Representing a key element in the contemporary international system, it sets new rules between peoples, including recognition of reciprocity among States as autonomous entities, the establishment of a regulated International Law and the liberalization of the seas. It also represents the onset of *Raison d´État* and the recognition of sovereignty[5]. In addition, the rise of sovereignty means there is no more space for State recognition through religious arguments. It also means that when the political units begin to accept sovereignty, the notion of border gains more strength to be defended. Moreover, not only the principle of territoriality is established, contributing to the determination of the geographic borders of the sovereign power, but also political autonomy is strengthened, determining the legitimacy of laws that organize the domestic legal-political order.

Therefore, the protection of borders consolidates discussions about the survival of the State. This includes not only the heightened state imposition of domestic authority, but also the State's need to permanently expand influence if it wishes to survive. Consequently, the borders of a State are one of the most sensible areas, mainly when security issues became paradigmatic as after 11th September 2011.

Nevertheless, what kind of security should be analyzed, State or human security? State security has a collective component that includes the intention to protect individuals within a national territory. Human security identifies itself with individual rights in a generic sense[6]. Nonetheless, States must maintain the security of the general population. Many examples illustrate the cardinal importance of this duty *eg.* when terrorist groups and drug dealers try to express political positions through violent extremism. However, to set stereotypes is not always effective, especially when they include cultural and religious elements as a parameter to block borders: there are practices that demonstrate disagreement with international rules on the protection of the human person. In short, borders must be protected and effectively controlled, without migrant criminalization[7].

Traditionally, migration has been treated as a phenomenon associated with technical and geographical criteria. Human mobility is among the oldest historical evidences: for 20 thousand years, mankind migrated from Africa to Asia and then to other parts of the world[8]. However, in the contemporary world, migration operate differently: it became a political, economic and legal matter[9].

In this sense, the borders have multiple facets. Physically, they may be open, regulated, or enclosured by fences. The open ones have easy or facilitated access and the regulated ones are marked by ostensive

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[4] The Treaties of Mhe Tre and Osnabrsna 1648, also known as "Westphalia treaties". With these treaties the Thirty Years War ended, which was a major conflict between Catholics and Protestants in the Holy Roman Empire and involved the major powers in Europe. These peace treaties left an important legacy for the formation of the international system.

[5] The policy conceived by Cardinal Richelieu established a watershed in the relations among political units, since it promoted the reinforcement of self-interest and self-determination. It contributed to assure religion and politics as different matters and consolidate indigenous source of political power.

[6] According to: H. Mahmud & M.M. Quaisar & M.A. Sabur, & S. Tamanna, *Human Security or National Security: the Problems and Prospects of the Norm of Human Security*, Journal of Politics and Law, Vol.1, No. 4, December 2008, pp. 67-72; The Human Development Report (1994).

[7] V.O. Batista, O fluxo migratório mundial e o paradigma contemporâneo de segurança migratória, Revista Versus Vol. 3, Rio de Janeiro, July 2009, pp. 68-78.

[8] V.O. Batista, O fluxo migratório mundial e o paradigma contemporâneo de segurança migratória, Revista Versus, Vol. 3, Rio de Janeiro, July 2009, pp. 68-78.

[9] According to the immigration policy of each State the migrants can be fixed temporarily in territories, based on the interests of the national authority.

policing. The barbed wire is usually used to make more difficult to cross the border and it translates the intention to suppress migration. The existence of border-walls goes back to early historical times, when rulers used them to create effective protection and insolation. Thought, they can also be noticed in recent times *inter alia* between Mexico and the United States, and at the Israel – Palestine border. These are one of the most gruesome barriers nowadays[10].

Border control can follow a classic or a modern model. Classic control can be seen as said above, through examples such as open, regulated, fenced or walled borders, militarized or not, with or without checkpoints. Nonetheless, modern methods of control comprise biometric recognition, through the iris mapping, digital fingerprint detection, electronic passports control and facial recognition[11]. Besides, there are cases in which neutral zones were created, also known as Buffer Zones, representing geographical boundaries erected to counter the peripheral populations[12] or restrict access to specific areas[13].

Safety as a timeless and increasingly important issue in the contemporary age has great background. Even before the rise of the modern state, power and wealth were considered essential in the management of political unity. As an example Kautilya illustrated already at 300 BC the seminal importance of armies, fortifications, alliances and political leadership in the book *Arthashastra*. The European *intelligentsia* improved the debate 18 centuries later, when Niccolò Machiavelli, in the book *The Prince[14]*, developed interpretations of the major foundations of modern political thought, in which security and the concept of *Raison d'État* are burning issues[15]. Thomas Hobbes, in *The Leviathan*, emphasizes the idea that the state of nature should be always considered so people would not relapse into it[16]. Hence, according to him, defense, surveillance and vigilance are fundamental for the maintenance of one's existence. Moreover, Sir William Petty in the books *A Treatise of Taxes and Contributions* (1662) and *Political Arithmetic Posthum* (1690), regards safety as a priority: it is not only a significant issue *per se* but it is also the main reason for the building up of the economic and military resources of the State.[17] Although gradually

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[10] There are other borders controlled by conventional means *e.g.* between India and Bangladesh, India and Pakistan, Spain and Morocco, Botswana and Zimbabwe (in this case for containment of diseases, such as Foot-and-mouth disease).

[11] Portugal and Australia are highlighted in these control means. Portugal used the RAPID system, which no longer requires human intervention, introduced at first time in 2008. Australia developed the SmartGate system, which is also based on electronic passport control and face recognition (Frontex, 2010, p. 6). For more precision : S. Slama, *Politique d'immigration: un laboratoire de la frénésie sécuritaire* in L. Mucchielli (Ed.) La frénésie sécuritaire. Retour à l'ordre et nouveau contrôle social, Éditions La Découverte, Paris 2008. pp. 64-76 ; L. Amoore, *Biometric borders: governing mobilities* in *The war terror*, Political Geography, Vol. 25, No. 3, March 2006, pp. 336-351; Frontex *Biopass II : Automated biometric border crossing system based on electronic passports and facial recognition - RAPID and SmartGate* (EEC) 2010.

[12] R.A. Del Sarto, *Borderlands: The Middle East and North Africa as the EU´s Southern Buffer Zone* in D. Bechev & K. Nicolaidis (Eds.) Mediterranean Frontiers: borders, conflicts and memory in a transnational World, 1edn, Tauris Academic Studies, London 2009, pp. 149-165.

[13] United Nations *Between the fence and a hard place: the humanitarian impact of Israeli-imposed restrictions on access to land and sea in the Gaza Strip* in Special Focus, August 2010, World Food Program. Among other cases, one of the most significant is the Israel constraint which is called green line, and on which Palestinians cannot practice agriculture or fishing, because it says that this will prevent attacks by Palestinian armed groups. However, this policy has had an impact on the life of 180,000 people because of its implementation in 2007, UN, 2010, p. 33.

[14] N. Machiavelli, *O Príncipe*, 33rd edn., Edfouro, Rio de Janeiro 2000.

[15] During the Thirty Years War, France acted in favor of the Protestant and against the Catholic faction, wishing not only to strengthen its own position in Europe, but also to contain the power of Spain and Austria. It aggregated new values into contemporary diplomacy throughout the Cardinal Richelieu administration (Carneiro, 2011, p. 176).

[16] T. Hobbes, *The Leviathan*, Oxford University Press, Oxford 2008.

[17] "*The Publick Charges of a State, are, That of its Defense by Land and Sea, of its Peace at home and abroad, as also of its honorable vindication from the injuries of other States; all which we may call the Charge of the Militia, which commonly is in ordinary as great as any other Branch of the whole ; but extraordinary (that is, in time of War, or fear of War) is much greater*" W. Petty, Aritmetica Politica, Sao Paulo, Abril Cultural, 1662/1983, p. 18.

security became a deep intellectual field, in the late twentieth century researchers complained of insufficient reflection on the matter[18].

In contemporary times, the arguments in connection with security and defense are based on political speeches. States are influenced by national interests do not follow the relevant principles of international law. Despite of the decrease in militarization in the recent past, the adopted practices effectively consider human rights are still unsatisfying.

3. Security and Human Rights in International Migration

The article 13 of the Universal Declaration of Human Rights establishes that "Everyone has the right to freedom of movement and residence within the borders of each state, and everyone has the right to leave any country, including his own, and to return to his country"[19].

Through this article the Universal Declaration of Human Rights articulates the freedom of movement *inter alia* from one State to another[20]. However, the report which can be drawn up today is no cause for celebration: freedom of movement remains very imperfectly[21]. Indeed, certain sources of international law contain limitations to this right. For example the International Covenant on Civil and Political Rights stresses out in its article 12 paragraph (3) that these "rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant"[22].

The absence of a common international definition of the concept of "National Security" leads States to use "all the sources", which sometimes leads to criticism. In fact, this unless common definition has an impact on some human rights, in particular, on the fundamental freedom of movement[23]. We shall see that this is the case in the discussion of the 13th November 2014's French law that aims in particular to forbid some of the French nationals to leave the French national territory so as to prevent the "free movement" of potential terrorists.

As mentioned before, there is no common definition of "National Security" in the field of Migration. States develop their own interpretation of this concept[24]. Indeed, as the notion of law and order, "National Security" turns out at first sight indefinable, because it is peculiar to each State.

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[18] B. Buzan, *People, State and fear*, 1edn., Wheatsheaf Books, Sussex, 1983, p.1.

[19] The Universal Declaration of Human Rights adopted by the United Nations General Assembly on 10 December 1948, Resolution 217 A (III).

[20] However, it is also in the same territory. The context of the time urged for an improved possibility of migration through the reduction of border obstacles and also urged for a strengthening of human rights more broadly.

[21] We can see that the States put the aliens into categories.

[22] The International Covenant on Civil and Political Rights was adopted and opened for signature, ratification and accession by General Assembly, Resolution 2200A (XXI) of 16th December 1966 and entered into force on 23rd March 1976.

[23] We use here fundamental freedom of movement in the global direction of the term but it is important to stress that there exists an asymmetry between the emigration which is recognized as a human right and the immigration which is considered as a question of national sovereignty.

[24] The concept of security is treated here under a wide angle and following the definition given by Salmon J. in *Sécurité de l'État sur son propre territoire contre les dangers internes. La notion se confond ici avec celle de sûreté nationale et ordre public* 2001, p.1025.

As reminded by the former Canadian Minister of Foreign Affairs, Lloyd Axworthy, the first objective of National Security consists of protecting territorial integrity and political sovereignty against outside attacks[25].

The demarcation of this concept thus remains dependent on the discretionary power of States by virtue of the principle of national sovereignty. Here, it is necessary to understand the principle of national sovereignty in the direction defined by Jules Basdevant given during his course at The Hague Academy of International Law[26]. This principle corroborates a classic definition that the State does not contain limitation *rationae personae* or limitation *rationae materiae*. The only limitation is *rationae loci*, which is a territorial limitation.

Nevertheless, the attributes of the sovereignty evoke the principle of the obligation of the State to submit itself to International Law. This compounds the principle of sovereignty as well as imposes limitations of the exercise of the human rights protection[27]. Therefore, a common definition is essential in order to guarantee the human rights protection and free movement.

3.1. The 13th November 2014's French Law: Restricting Freedom of Movement

The concept of "national security" is used to curb the freedom of movement. Indeed, we can notice that more and more States justify a limitation and even a violation of human rights on a preventive base. According to the 13th November 2014's French law "Strengthening measures relative to the fight against terrorism,"[28] citizens could not leave or come back to the national territory when there were reasons for believing that their traveling had a terrorist purpose or that their return would strike a blow at law and order.

This law is clearly open to criticism because it restricts the freedom of movement of the some French citizens, based on an allegation of protection of "national security". This law would be in against of numerous international texts as the article 13 paragraph 2 of the Universal Declaration of Human Rights or the article 2 paragraph 2 of the Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, as well as the Protocol No.11, that also guarantees specific rights. It demonstrates that criminalization of migrants has been used by States to legitimize a national legislation, with no respect for fundamental rights.

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[25] In 1996 Canada, led by Foreign Minister Lloyd Axworthy, the Freedom from Fear approach was adopted as the principle of its foreign policy, Tadjbakhsh 2009, p. 5.

[26] He defines the sovereign power as "The power to decide in a completely free way and without being subjected to any rule, the sovereign power of the State is incompatible with the existence of international law." (personal translation), in Basdevant Jules, *Les règles du droit de la paix*, R.C.A.D.I., t. 58, 1936-IV, p. 578-582 ; Politis N., *Le problème de la limitation de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux*, R.C.A.D.I., t. 6, 1925,-I, pp. 12-14.

[27] For more details on sovereign power and international law, you can consult Sarolea Sylvie 2006, pp. 19-30.

[28] Law No. 2014-1353 of November 13th, 2014, *JORF* No. 0263 of November, 14th 2014, p. 19162, which intervenes in a series of concrete measures within the framework of the European Union, elaborated during a working meeting on initiative of France and Belgium, held on July 7th, 2014. We can specify that the first implementing decree of this law was adopted on January, 14th 2015 (Decree No. 2015-26 of January, 14th, 2015, *JORF* No. 0012 of January, 15th, 2015, p. 629), just after the French attacks in Paris. This decree concerns the prohibition on exit of the territory of the French nationals that could intend to participate in terrorist activities abroad.

3.2. National Security and the Freedom of Movement in the European Union

Today, we witness an opening of the borders, although a pernicious effect contributes to strengthening the controls against the flow of people between regions. This has been justified by the necessity to protect national interests. Within the European Union, the EU citizens have the right of free movement. It is gradually more difficult for not EU citizens to cross the European Union's borders, because of the new regulation instruments for border control that are being erected in the European Union[29].

Originally, the free movement of persons aimed to facilitate the migration of workers between member states in the European Union. However, the evolution came true in a larger direction: there is a process of free movement between European Union members, which are not restrict for workers[30].

In fact, the European Union made an effort to create a "space of freedom, security and justice" open for all European Union citizens. The freedom of movement became one of the objectives of the Union[31]. The article 67 paragraph 1 of the Treaty on the Functioning of the European Union (from now on TFEU) establishes the general principles concerning the realization of this "space of freedom, security and justice" because it indicates that the "Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States". The paragraph 1 is completed with the paragraph 2[32] and asserts very clearly the intention to build a common policy on migrations: this is confirmed by the article 21 paragraph 1 of the TFEU which indicates clearly that "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect".

As reminded by the European Court of Justice in 2008, the right of a citizen to leave his own country can be restricted only when "the personal conduct of that national constitutes a genuine, present and sufficiently serious threat to fundamental interests of society and the measure does not go beyond what is necessary to attain it."[33]

Here, as in the national legislations, these articles remain very indistinct and incomplete[34]. This indistinctness can favor misuses, in particular, towards the freedom of movement of EU citizens. It is important to remember that each State has its own definition of the "national security" and the "public policy" and that there is at the moment no common definition for both these concepts in the European

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[29] *E.g.* with the implementation of police forces of control which make almost impossible the crossing of certain borders of the European Union, for example of the difficult crossing of the borders by Gibraltar because of the strengthening of the controls in Morocco. We have to remind that the European Union attributes each year financial supports for these cross-border countries without to be preoccupied by the respect for human rights by these countries. European Union releases a part of its responsibility by this process.

[30] The free traffic of European citizens allows integrating a bigger number of persons and the granting of a bigger number of rights.

[31] This free circulation evolved step by step. Firstly, the Schengen agreement spurred a process of cooperation which allowed creating the European Union as a space of freedom without internal borders. Then, the Amsterdam Treaty allowed a "space of freedom, security and justice", complemented by the Lisbon Treaty, which made it one of the main objectives of the European Union. More recently the elaboration of the Stockholm Program occurred, which provides a new roadmap to these subjects. Today the Schengen area covers 26 States of the European Union, four non-member States of the European Union (Iceland, Liechtenstein, Norway, Swiss) and three de facto European micro-states (Monaco, San Marino, and Vatican).

[32] This paragraph specifies that the Union "shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals".

[33] Case C-33/07, Ministerul Administraţiei şi Internelor - Direcţia Generală de Paşapoarte Bucureşti v. Gheorghe Jipa 2008.

[34] These limitations are referred to in Arts. 45§ (3) and 52§(1) of the Treaty on the functioning of the European Union and this limitation is resumed by the right by-product with the Directive No. 2004 / 38 in its Art 27.

Union law. So the EU law opted for a supervision of these concepts in their scope and in their effects. This supervision allows protecting in particular the freedom of movement.

Nevertheless, it is important to observe that, in spite of an increasing will of the European Union to strengthen migrant rights, the European Union "shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States"[35]. However, despite this frame, man could think that over the European Union territory looms the presence of some sort of "transparent borders".

In the clearing of the outside borders, the European Union delegates more and more administrative functions to certain agencies in the field of control of borders and in the application of the legislation of international protection.[36] Nevertheless, it is important to remember that the European Union as well as its Member States undertook through numerous sources of international law to respect and to protect human rights. These commitments pushed the European Union to set up effective mechanisms of control in order to ensure the respect for fundamental rights in the various activities of its agencies. Indeed, in time these agencies began to become emancipated and more and more criticisms are made towards the functioning and the activity of these agencies. For example, the agency FRONTEX[37] "suffered" numerous criticisms on its operating modes, notably concerning the absence of differentiation in its methods of assessment or even the interventions outside the territory of the European Union.

The European Union decided to react with the adoption of Regulation 1168/2011/EU.[38] In addition to this regulation, a consultative forum and an officer of the fundamental rights were set up to control the FRONTEX agency. Even more recently, the European Union created a European system of surveillance of the borders (EUROSUR). The aim of EUROSUR is the progressive implementation of a "system of the systems" to improve the knowledge of the situation and increase the States' capacities of reaction to fight "against irregular immigration and against cross-border crime"[39].

But even here, it is necessary to pay attention that perverse effects do not hinder the good functioning and that this system of cross-border control does not strengthen a European security policy to the detriment of the respect and of the conservation of human rights.

4. Conclusion

To protect and strengthen the rights of migrants, it is essential to elaborate at the international level a common bundle of indications allowing a clear and precise definition of "National Security" within the international Community which would avoid numerous abnormalities realized by States.

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[35] Art. 5§(2) of Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union - Consolidated version of the Treaty on European Union - Protocols - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, 2007, OJ C326.

[36] *E.g.* FRONTEX, EUROJUST, EUROPOL or even more recently EUROSUR.

[37] The FRONTEX agency (European Agency for the management of the outside borders) was organized with the Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Frontiers. You can consult FRONTEX on: http://frontex.europa.eu/assets/About_Frontex/frontex_regulation_en.pdf. Frontex official website: http://frontex.europa.eu/.

[38] This regulation modifies the 2007/2004/EC Frontex regulation.

[39] Regulation EU No. 1052/2013 of 22th October 2013 establishing the European Border Surveillance System (EUROSUR) 2013, OJ L 295/11.

Thus, the conservation and the intensification of the rights of migrants for the borders also have to pass through a better frame of analysis for the agencies of surveillance and control on the borders. The intensification of rights also has to be undergirded by States and regional institutions when these exist and are concerned. And finally, we could not imagine – as Antoine Pécoud and Paul De Guchteneire [40] propose – the creation of a world without borders, where border controls would be abolished and where people could move freely worldwide because at the national level, the States don't be ready for that and at the international level, the instruments of protection of the free circulation and more widely rights of the migrants are still too scattered.

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[40] Pécoud A., De Guchteneire P., *Migrations sans frontières, essais sur la libre circulation des personnes*, Paris, Unesco 2009, p. 383.

Questions of a Comprehensive Protection of the Right to a Healthy Environment in Strasbourg

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Intergenerational equity expresses the responsibility of every generation to give over the Earth to future generations in a condition not worse than in which it was received from previous generations. It forms the basis of the well-known term 'sustainable development' which plays a major role in international environmental protection policy. Intergenerational equity is connected with the right to a healthy environment too, as this right intends to protect not only the present generation but future generation as well. Yet how does the European Court of Human Rights take into account the interests of future generations?

Keywords: human right to a healthy environment, intergenerational equity, intragenerational equity, sustainable development, environmental protection, human rights protection, ECtHR case law

1. Introduction

The European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms, hereinafter Convention or ECHR) is the most significant cornerstone of human rights protection in Europe. Despite the ongoing debate on the interdependent and indivisible relationship between human rights and the environment, the right to a healthy environment is not included explicitly among the human rights protected by the Convention. However, based on the living instrument character of the Convention, the European Court of Human Rights (hereinafter Strasbourg Court or ECtHR) derived this right from other provisions of the Convention. Is this kind of indirect regulation of the right to a healthy environment sufficient in a Convention which represents the basis of the European human rights protection? The first step towards answering this question is to examine the right to a healthy environment through all its aspects. The present paper argues that one significant aspect of the right to a healthy environment is intergenerational equity. Intergenerational equity does not only form the basis of the term sustainable development, but it is also strongly related with the right to a healthy environment, as this right intends to protect the present generation and the future generation as well. Yet how does the Strasbourg Court assure the right to a healthy environment? Does it consider – if possible at all – the interests of the future generation regarding the right to a healthy environment?