# Human Rights for the Planet

**Proceedings of the High-level International Conference on Human Rights and Environmental Protection**
**Strasbourg, 5 October 2020**

organised by
the Ministry of Foreign Affairs
of Georgia

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

COUNCIL OF EUROPE
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European Court of Human Rights
Council of Europe
F-67075 Strasbourg Cedex
France
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**Natalia Kobylarz and Klaudiusz Ryngielewicz**

# Contents

# Preface

A Clean environment is a precondition to the enjoyment of human rights, as everyone's rights to life, health, quality private and family life or home, or the right to peaceful enjoyment of possessions, depend on healthy ecosystems, stable climate, as well as on unpolluted air water and soil.

The European Convention on Human Rights and its Protocols do not guarantee a right to a healthy environment, and yet the ECHR organs have ruled in hundreds of cases concerning various forms of environmental risk and harm. By incrementally broadening the scope of political and civil rights, the European Court of Human Rights has acknowledged that human rights and a healthy environment are intrinsically linked. By doing so, it has played an important role in developing environmental human rights law that offers a subsidiary protection of the environment in Europe.

Since the 1960s, the Court has thus balanced the policies of sustainable use of natural resources or the protection of endangered species with the anthropocentric right to a peaceful enjoyment of property. It has also examined ecologically unsound operations and urban development, causing pollution, occupational illnesses or nuisance, mainly, under the redefined right to respect for home and private life. The Court has also found Member States responsible for the effects of man-made and natural environmental disasters under the right to life. In the context of ecological activism, the Court has greatly strengthened participatory rights, namely the rights to information, public participation in a decision-making process and to access to justice.

Environmental protection through the judicial activity of the Court is reinforced by the work of the other organs of the Council of Europe and its programmes. The Committee of Ministers ensures that States comply with the Court's judgments by redressing the ECHR's violations and preventing their recurrence. The Convention on the Conservation of European Wildlife and Natural Habitats lays down binding obligations of the conservation of wild fauna and flora. Its Standing Committee monitors compliance through a system of complaints and recommendations. The European Landscape Convention promotes the protection, management and planning of the landscapes. Its Working Programmes contribute to the implementation of the UN Sustainable Developments Goals. The EUR-OPA Major Hazards Agreement aims at the prevention of environmental disasters and the mitigation of their consequences, through disaster prediction research, risk management, post-crisis analysis and rehabilitation. The European Social Charter guarantees a right to health, which has found its application in the context of chemical pollution of air and water. The Charter's Collective Complaints Procedure enables various organisations to directly apply to the European Committee of Social Rights for rulings on possible non-compliance.

**Climate change, loss of biodiversity, depletion of natural resources and chemical pollution bring new challenges for the Court, the Council of Europe and for the Governments of Member States.**

On 5 October 2020 the Ministry of Foreign Affairs of Georgia organized a High-level International Conference on Human Rights and Environmental Protection, which was entitled "Human Rights for the Planet" and which was held at the European Court of Human Rights. The Conference was a sequel to another High-level Conference – Environmental Protection and Human Rights, organized on 27 February 2020 under the aegis of the Georgian Presidency of the Committee of Ministers of the Council of Europe.

The Conference Human Rights for the Planet facilitated a debate between renowned practitioners and academic experts in the field of international environmental law and human rights law. The Conference and the ensuing publication offer a general and conceptual reflection on the role of international human rights tribunals in reviewing Member States' efforts to comply with their obligations under the environmental law to mitigate and adapt to the effects of the climate crisis and to stop nature's degradation.

The Ministry of Foreign Affairs of Georgia wish to thank the European Court of Human Rights and the Conference Organising Committee for organizing the Conference and for editing the ensuing publication.

**Irakli Giviashvili**
Ambassador, Permanent Representative
of Georgia to the Council of Europe

# Opening of the conference

**Robert Spano**
President of the European Court
of Human Rights

Madame Secretary General,
UN High Commissioner for Human Rights,
President of the Parliamentary Assembly of the Council of Europe,
Ambassadors,
Distinguished colleagues and guests,

It is my great pleasure and honour to welcome you all to the European Court of Human Rights for this highly topical and important conference.

Some of you are here with us in Strasbourg and others further afield. Indeed, even before the COVID-19 crisis began, it had been intended that overseas speakers would make their presentations via live webcam in order to reduce their carbon footprint.

At the beginning of the year this type of "hybrid" event would have seemed a little unusual to say the least. Now of course, we have all grown quite accustomed to engaging in virtual debates with colleagues thousands of kilometers away. There are, after all, some advantages to the turbulent period we are all living through.

As you are aware, this conference was due to take place in April this year under the Georgian presidency of the Committee of Ministers. It now takes place in October under the Greek presidency. Let me thank wholeheartedly the Georgian authorities who made environmental issues a priority theme of their presidency and who organized the high-level conference on environmental protection and human rights in February this year. I would also like to thank warmly the Greek presidency which has kindly agreed to hold this event now.

Indeed, the outgoing Georgian presidency, the then incoming Greek and German presidencies showed their strong commitment to environmental issues through a joint declaration in May this year. The declaration called upon the Committee of Ministers to invite its Steering Committee for Human Rights (CDDH) to elaborate a draft non-binding instrument on human rights and the environment for the possible adoption by the Committee of Ministers at the latest by the end of next year.

All three States acknowledged the growing threats to the climate and the environment and the urgent need to act in an ambitious and concerted manner at the global level to better ensure their sustainability and protection.

Dear Guests,

Whatever one's views on the legal issues implicated by the environmental challenges we are facing, which will be explored in-depth today, it is clear that we are dealing with matters of planetary importance. We are pleased to welcome renowned academics

and legal experts in the field of environmental law and climate change as well as Judges of our Court. The conference's focus is not just on the relationship between human rights and the environment, but also on what should be the role of domestic and International courts, including the European Court of Human Rights, in this field.

I mentioned the COVID-19 pandemic at the beginning of these opening remarks and I would like to demonstrate a certain symbiotic relationship which the health crisis has with the climate emergency we are facing. The pandemic we are fighting and climate change have an important element in common when it comes to the development of law and policy which bears emphasising.

Both phenomena bring us back to first principles, to a renewed and stark understanding that whatever our differences, we are, all of us, at our core the same, human beings that inhabit this planet together. Both are existential crises that impact us all. The pandemic does not discriminate between peoples and respect geographical boundaries. In the same way, climate change affects everyone of us and will impact the future of all humanity. I hope that today's conference will contribute meaningfully to the on-going global conversation which is required to address these challenges for the good of mankind.

Dear Guests,

I am now delighted to hand over the floor to former President, my good friend Judge Sicilianos, for his own words of welcome. Thank you and enjoy the conference.

**Linos-Alexander Sicilianos**
Judge and former President of
the European Court of Human Rights

Dear Secretary General, Dear Presidents, Dear colleagues, Excellencies, Dear friends,

It is a great pleasure for me that this Conference, carefully planned and organised by a committed team from the Registry, initially under the Georgian Chairmanship and now under the Greek one, can finally take place today.

As it was said by President Spano, the climate emergency is an existential crisis without frontiers. It has a planetary remit. The title of the Conference – Human Rights for the Planet – is meant to reflect this global environmental urgency.

1. The interaction between human rights and the environment becomes more and more obvious over the years, including in the case law of the European Court of Human Rights. Under Article 8 of the Convention – right to respect for private life and home – the Court has examined a series of cases concerning air pollution and many other forms of environmental degradation. After all, our "home" is not only our place of residence. Our "home" is also the environment in which we live.

The case law of international tribunals will be the topic of our first panel today, which will discuss the so-called anthropocentric and the ecocentric approaches to human rights. These two approaches should not be seen as conflicting ones, but as mutually reinforcing. The anthropocentric approach is an approach centered on the human being – άνθρωπος in Greek. It is not and it should not be an egocentric, an individualistic or an egoistic approach. When examining cases under the right to property, for instance, the Court has often accepted limitations of this individual right, taking into account the general interests of society at large, including especially the protection of the environment.

The ecocentric approach, on the other hand, derives from the Greek word "οικοκεντρικός". "Οίκος" in Greek means "home". In other words, the so-called ecocentric approach is the one centered on the protection of our common home, our environment, our planet. Striking the right balance between individual rights and general interests, this is the real challenge and this is exactly the lens through which the Court has examined a number of environmental cases under a series of Articles of the Convention and its Protocols.

2. This brings me to the second panel of our conference. It deals with an aspect of central importance for striking this balance, the so-called environmental democracy. By this term we mean the participation of civil society in the environmental protection process, the right to information about environmental risks and other related rights. Participation rights have been recognized in the Aarhus Convention and in the case law of our Court. Are they sufficient? What is the attitude of State authorities in this

respect? Do we need to strengthen the relevant legal framework? What about the *locus standi* of individuals and NGOs before national and international courts and tribunals? In *Cordella v. Italy* the Court, without recognising an *actio popularis*, tried to take into account the broader context: the impact of pollution to the entire community of all the people concerned. Will this help provide an adequate response? These are some of the questions to be dealt with by our speakers.

3. The third panel will try to further explore other issues related to national and international litigation. What is the role of the judiciary in cases of air pollution and environmental disasters? Is criminal law an effective tool for the protection of the environment? Does Article 6 of the Convention on the right to fair trial offer an effective legal basis for our Court to supervise the fairness of domestic proceedings in environmental cases? What about the execution of our own judgments in such cases? What would be the most effective mechanism for the supervision of execution of this particular type of judgments?

4. Last but not least, the question arises whether climate change and the protection of the environment is a political matter or a human rights issue. Without wishing to pre-empt our distinguished speakers, I would say that it is both. Effective action to protect the environment presupposes a strong political will. A real commitment to achieve the necessary goals. Only last week the EU and 64 States signed a political declaration so as to give an impetus to the UN Summit on Biodiversity. We shall see whether States will take the necessary measures to honour their own commitments. At the same time, a robust human rights approach is equally necessary to foster a transformative change in respect of environmental protection. What, therefore, would be the role of our Court in this context? Do we need a new Protocol to the European Convention on the Protection of the Environment?

I am confident that today's Conference will stimulate dialogue on these and other important issues and will contribute to put the environment squarely on the agenda of the Council of Europe and its member States. The fact that this planetary existential issue is among the priorities of the Georgian, the Greek and the German Presidencies of the Committee of Ministers seems to suggest that there is a political will for this Organisation to more effectively contribute to environmental protection.

I thank you for your kind attention.

**Marija Pejčinović Burić**
Secretary General
of the Council of Europe

Monsieur le Président de la Cour européenne des droits de l'homme,
Madame la Haute-Commissaire aux droits de l'homme,
Monsieur l'ancien Président Sicilianos, Mesdames et Messieurs les juges de la Cour,
Monsieur l'Ambassadeur Giviashvili, Excellences,
Mesdames et Messieurs,

Nous vivons une période de menaces environnementales sans précédent, notamment la terrible réalité du changement climatique.

Mais cette période est aussi marquée par une meilleure compréhension de ces dangers, et par l'existence d'une pression et d'une volonté massive de lutter contre ces menaces.

Le Conseil de l'Europe ne fait pas exception.

Cette conférence, les questions complexes qu'elle abordera, ainsi que le profil et l'expertise des participants en sont la preuve.

Initialement prévu par la présidence géorgienne du Comité des Ministres, qui avait inscrit les droits de l'homme et l'environnement au nombre de ses principales priorités, cet évènement a été reporté en raison de la pandémie de COVID-19.

Mais il était important qu'il ait lieu.

Il fait suite à la conférence de haut niveau sur la protection de l'environnement et les droits de l'homme, organisée en février dernier, et à la signature, au mois de mai, de la Déclaration conjointe sur les droits de l'homme et l'environnement par la présidence géorgienne sortante, la présidence grecque entrante et la future présidence allemande du Comité des Ministres.

Ces évènements redisent l'urgence et renouvellent l'élan de notre démarche en la matière.

Mais il importe de rappeler que notre engagement ne date pas d'hier.

Le rôle du Conseil de l'Europe est de défendre les droits de l'homme, la démocratie et l'État de droit.

Et lorsque l'état de l'environnement – lorsque les atteintes à l'environnement – menacent l'accès des citoyens à nos normes communes, il est de notre devoir d'agir.

L'interprétation de la Convention européenne des droits de l'homme par cette Cour a suscité une importante jurisprudence en la matière.

Tel est également le cas pour la Charte sociale européenne, particulièrement en ce qui concerne le droit à la protection de la santé.

Par ailleurs, le Conseil de l'Europe a mis en place des instruments spécifiques de sauvegarde de l'environnement, dont la Convention européenne du paysage et la Convention relative à la conservation de la vie sauvage et du milieu naturel de l'Europe.

Drawing on all of this, there is a determination within the Organisation to move forward in a proactive manner, within the boundaries of our mandate.

For example, our Steering Committee for Human Rights is looking at the potential for a new recommendation on human rights and the environment.

The European Committee on Crime Problems is considering how our Convention on the Protection of the Environment though Criminal Law could be updated to provide clearer legal obligations – and stronger sanctions – when it comes to combatting environmental crimes.

And following ratification by Ukraine this summer, our Tromsø Convention on Access to Official Documents will enter into force on the first of December, guaranteeing public scrutiny of decision-making on environmental issues.

Additionally – and across the Organisation – there is a range of awareness-raising and co-operation activities.

A new online HELP module will soon be made available to legal professionals, enabling them to better understand and apply the law in this area.

Our next World Forum for Democracy will bring together key politicians, experts and activists to debate whether democracy can save the environment.

And the Council of Europe Bank has prioritised the transition to more green and sustainable economies and lent its members hundreds of millions of euros to invest in reducing greenhouse gas emissions, improving energy efficiency and supporting adaptation strategies that build climate change resilience.

I also want to pay tribute to the work that is being done by the Parliamentary Assembly, which is preparing reports that will look at a range of the central issues.

All of those panels will address complex legal questions that will be pivotal to the progress we go on to make.

We need clarity on the scope, process and capacity of this Court – and our Organisation – to ensure that the quality of the environment enables Europeans to benefit from the human rights, democracy and rule of law standards to which they are entitled.

And I have no doubt about the capacity of this Conference to contribute to that end.

I wish you all every success.


**Michelle Bachelet**
United Nations High Commissioner
for Human Rights

I am pleased to address this important conference.

The climate crisis, environmental degradation, biodiversity loss and pollution constitute some of humanity's gravest challenges, contributing both directly and indirectly to human rights violations around the world.

As in the COVID-19 pandemic, the most affected are often those already in vulnerable situations. Indeed, intersecting environmental, health and socio-economic crises are reversing global development gains and placing people and planet under stress.

In the face of environmental harm and injustice, the law is one of our most effective tools to hold Governments to account, to uphold our rights and to protect human health and the Earth's natural systems.

Consider the Council of Europe.

Neither the European Convention on Human Rights nor its Protocols bear any explicit reference to the environment.

However, the European Court of Human Rights has ruled in nearly 300 cases related to environmental harms affecting the enjoyment of a broad range of human rights, such as the right to life and rights to private and family life.

And, for its part, the European Committee of Social Rights has found that in the European Social Charter, the right to protection of health includes the right to a healthy environment.

The fundamental role of the Courts is to deliver justice through fair and effective application of existing laws and principles that place human dignity at their heart.

If the law does not explicitly address an issue, it is both proper and right for Courts to interpret and develop it in order to deliver justice, including through the innovative application of norms and standards at hand.

Even in the absence of an explicitly recognized right to a healthy environment in the European Convention on Human Rights, judicial systems have taken steps to protect people from environmental harms.

Take climate change.

According to the United in Science 2020 report launched last month, the five-year period since the signing of the Paris Agreement will be the hottest on human record.

The increasing frequency and intensity of extreme weather events, sea level rise and glacial melt, droughts and floods, coral bleaching, oceanic dead-zones and extensive wildfires severely affect countless lives and our natural systems.

Time is running out to keep global average temperature rise to 1.5 degrees Celsius.

We need urgent and ambitious climate action.

Yet around the world, Governments are still holding back.

The response have been clear. Millions have taken to the streets in climate marches and a cascade of lawsuits around the world have demanded more ambitious climate action now.

In one such case, the *Urgenda Foundation v. Netherlands*, the Dutch Supreme Court drew on the jurisprudence of the European Court and found climate change posed an imminent danger to the rights to life and to private and family life.

Taking into consideration the best available science and the full spectrum of international law, the Court ordered the Government of the Netherlands to undertake substantial, specific steps to increase its climate mitigation efforts.

The application of human rights law in the *Urgenda* decision empowers people across the States members of the Council of Europe to demand more of their governments to address the climate crisis.

It has further energized a rights-based movement for climate action not just in the Netherlands, but around the world.

A movement demanding the recognition of a safe and stable climate as a matter of right.

I stand by it and reiterate my call for global recognition and effective implementation of the human right to a healthy environment.

According to the Special Rapporteur on human rights and the environment, more than 150 countries already recognize it, showing a growing legal and normative consensus.

The European Parliament has already called for all people in Europe to be granted the right to a healthy environment.

And three consecutive presidencies of the Council of Europe's Committee of Ministers have called for the elaboration of a legal instrument in the area of human rights and the environment.

Whether or not formally on the books, the right to a healthy environment is, in reality, a fundamental prerequisite for the enjoyment of all other rights.

Explicit recognition will lead to more effective laws and policies and promote accountability within judicial systems for their implementation.

Adopting a new protocol to the European Convention that explicitly recognizes such a right would be a major step in the right direction.

I trust you will lead the way.

Thank you.

**Irakli Giviashvili**
Ambassador, Permanent Representative
of Georgia to the Council of Europe

High level International Conference on Human Rights and Environmental Protection: **Human Rights for the Planet,** organized on 5 October 2020 by the European Court of Human Rights together with the Ministry of Foreign Affairs of Georgia was an excellent opportunity to bring together renowned practitioners and academic experts in the field of international human rights law and international environmental law.

The conference allowed for a coherent continuation, albeit from a different prism, of the discussion which took place at another High-level Conference – Environmental Protection and Human Rights, organized on 27 February 2020 under the aegis of the Georgian Presidency of the Committee of Ministers of the Council of Europe which not only culminated in the adoption of the final Declaration by the Georgian Presidency on the topic, but also paved the way to the joint Declaration on Human Rights and the Environment adopted by the outgoing (Georgia) and incoming (Greece and Germany) presidencies of the Committee of Ministers of the Council of Europe.

It is my believe, that the discussion on the interplay between human rights and environmental protection, one of the priorities of the Presidency of Georgia of the Committee of Ministers of the Council of Europe (November 2019 – May 2020) will advance further and result not only in the revision of the pertinent Council of Europe instruments, but also different initiatives at universal, regional or national levels.

It is also my hope that the findings of the Conference contained in this publication will be used extensively by the 47 member states of the Organization for the protection of individuals and communities against environmental harm.

# Anthropocentric or ecocentric human rights? The environment in the case-law of international tribunals

# Overview of environmental case-law of the ECtHR

**Natalia Kobylarz**
Senior lawyer at the Registry of the European Court of Human Rights

## Introduction

I would like to present an overview of the European Court of Human Rights' environment-related case-law in a way to make an introduction to the topics that are going to be discussed in detail by the other panelists throughout the conference.

I would like to focus on five specific topics which trigger the most debate at the junction where international human rights law meets international environmental law, and where these two meet the claims of today's society insofar as people are affected by environmental degradation and climate change. It is within these five areas that important developments have emerged from other international human rights bodies and domestic superior courts.[1] It is also here that expectations have been raised as to the possible evolution of the Strasbourg case-law.

1. In 2017, the Inter-American Court of Human Rights declared that economic, social and cultural rights – which included the right to a healthy environment –, and civil and political rights, were 'an indivisible whole based on the recognition of the dignity of the human being.' It also stated that a healthy environment was 'a universal interest' and 'a fundamental right for the existence of humankind. Taking note of the trend to recognise legal personality of nature, the San Jose court also stressed that 'the right to a healthy environment as an autonomous right differs from the environmental content that arises from the protection of other rights, such as the right to life or the right to personal integrity" in that it "protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals … it protects nature and the environment, not only because of the benefits they provide to humanity or the effects that their degradation may have on other human rights, such as health, life or personal integrity, but because of their importance to the other living organisms with which we share the planet that also merit protection in their own right." see Inter-American Court of Human Rights, Advisory Opinion OC-23/17 of 15 November 2017, §§ 47, 57, 59, 62 and 63. In 2020, the Inter-American Court of Human Rights confirmed this approach in a contentious case. In its judgment, the IACtHR held that the right to a healthy environment was an autonomous right tightly related to the rights to food and water, as well as, in respect of indigenous peoples – also to the right to cultural identity, see *Case of the Indigenous Communities Members of the Lhaka Honhat (Our Land) Association v. Argentina*, Inter- American Court of Human Rights, judgment of 6 February 2020, § 243. A number of superior national courts have ruled that the environment's value is measured with regards to the utility and availability of natural resources not only to current but also to future generations, as well as to a global human community (biocentrism) and recognised that the environment had two dimensions in that it had a utility for humans and an intrinsic value of itself (ecocentrism), see *Centro de Estudios para la Justicia Social 'Tierra Digna' and Others v President of the Republic and Others,* T-622, Corte Constitucional [Constitutional Court of Colombia], 10 November 2016, § 5.8 et al.; Suprema Corte de Justicia de la Nación [National Supreme Court of Justice of Mexico] no. 649/2019, 11 March 2020, page 7 and 8; Sala Constitucional de la Corte Suprema de la Justicia [Constitutional Court of Costa Rica], no. 24513 – 2019, 6 December 2019. See also *Urgenda Foundation v. The Netherlands,* Supreme Court of the Netherlands, 20 December 2019 on climate mitigation obligations under Articles 2 and 8 of the European Convention on Human Rights.

For each of these five topics I will start with a restatement of the relevant case-law of the Court. I will then briefly hint at the possible directions that an international human rights system could hypothetically take. I will mainly ask questions, however. In this sense, I hope to trigger a cross-fertilising conversation between us all.

## Scope of protection

As it is well known, the European Convention on Human Rights or its Protocols do not guarantee a substantive right to a healthy environment. The lack of such a formal legal basis has led the Court to reject applications that were seeking a general protection of the environment or nature.[2] On the other hand, the Court has an impressive record of rulings concerning situations where various environmental harms or risks have directly affected human rights that *are* guaranteed by the Convention and its Protocols.[3]

The foundational principle from *López Ostra* states that severe environmental harm that adversely affects individuals' well-being to a sufficiently serious degree, can be considered as interference with the right to respect for private and family life or for home within the meaning of Article 8 of the Convention.[4] The Court has indeed examined complaints about environmental harms such as air or water pollution, as well as noise, smell or dust disturbance. The Court has relied on this provision where environmental harm caused either nuisance or the actual impacts on health.[5]

The Court has also employed Article 2 of the Convention – the right to life – where human activities or natural occurrences seriously endangered or actually took human life.[6] Where the result was the destruction of someone's property, the Court has applied Article 1 of Protocol no. 1 to the Convention.[7]

The Court has reviewed obligations of States vis-a-vis humans in the context of industrial activities, urban development, as well as anthropogenic and even, natural disasters. But in none of these rulings, did the Court derive from the above-mentioned provisions, the right to a safe, clean, healthy and sustainable environment.

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2. *X. v. Federal Republic of Germany* (dec.), no. 7407/76, 13 May 1976; *Unver v. Turkey* (dec.), no. 36209/97, 26 September 2000; *Ogloblina v. Russia* (dec.), no. 28852/05, §§ 20-22, 26 November 2013; see also *Kyrtatos v. Greece*, no. 41666/98, § 52, ECHR 2003-VI; *Hamer v. Belgium*, no. 21861/03, § 79, ECHR 2007-V (extracts); *Turgut and Others v. Turkey*, no. 1411/03, § 90, 8 July 2008; and *Dubetska and Others v. Ukraine*, no. 30499/03, § 105, 10 February 2011.
3. N Kobylarz, 'The European Court of Human Rights, an Underrated Forum for Environmental Litigation' in H Tegner Anker and B Egelund Olsen (eds), Sustainable Management of Natural Resources, Legal Instruments and Approaches (Intersentia 2018) 99-118.
4. *Lopez Ostra v. Spain*, no.16798/90, § 51, 9 December 1994: '[S]evere environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.'
5. For example, *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, ECHR 2003-VIII; *Giacomelli v. Italy*, no. 59909/00, ECHR 2006-XII, 2 November 2006; *Otgon v. the Republic of Moldova*, no. 22743/07, 25 October 2016; *Jugheli and Others v. Georgia*, no. 38342/05, 13 July 2017; and *Cordella and Others v. Italy*, no. 54414/13, 24 January 2019.
6. For example, *Oneryıldız v. Turkey* [GC], no. 48939/99, ECHR 2004-XII; *Budayeva and Others v. Russia*, nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, ECHR 2008 (extracts); and *Kolyadenko and Others v. Russia*, nos. 17423/05 and 5 others, 28 February 2012.
7. Ibid.

Why is this relevant? – for a number of reasons.

One, is that it would appear that the existence of the right to a healthy environment – whether as a derived or as a self-standing right – is the premise that has allowed other human rights or fundamental rights jurisdictions[8] to gradually depart from that anthropocentric legal paradigm that currently underlies the European Court's approach.

Jorge Calderon and Professor Catherine Redgwell will elaborate on this further, so I will end this section with the following questions.

First, **is there a room in the European human rights law for a biocentric[9] or immersive anthropocentric[10] vision that entails a recognition that the well-being or the lives of individuals in current and future generations greatly depend on ecosystem services?**[11]

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8. Supra 1.
9. According to one understanding of 'biocentrism', the environment's value is measured with regards to the utility and availability of natural resources not only to current but also to future generations, as well as to a wider (global) human community, see Centro de Estudios para la Justicia Social 'Tierra Digna' and Others v President of the Republic and Others, no. T-622, Corte Constitucional [Constitutional Court, Colombia] 10 November 2016, paragraph 5.8. Pursuant to another definition, 'biocentrism' is a type of 'ecocentrism', and as such, it is concerned with the protection of living components of the environment because of their intrinsic value, regardless of any utility to humans.
10. As opposed to 'extractive anthropocentrism', E Lambert, 'The Environment and Human Rights, Introductory Report to the High-level Conference Environmental Protection and Human Rights, Strasbourg, 27 February 2020, 4. This notion also operates as responsible, dilute or weak anthropocentrism, or indirect instrumentalism, T Sparks, 'Protection of Animals Through Human Rights, The Case-Law of the European Court of Human Rights' (MPIL Research Paper Series 2018) 12; and C Redgwell, 'Life, the Universe and Everything: A Critique of Anthropocentric Rights' in A Boyle and M Anderson (eds) Human Rights Approaches to Environmental Protection (Oxford 1998) 71, 73.
11. Ecosystem services comprise: (i) provisioning services, which include food, water, medicine, timber, and fibre; (ii) regulating services, which are concerned with the regulation of climate, floods, disease, waste and air and water quality; (iii) cultural services, which include recreation, aesthetic enjoyment, and spiritual fulfilment; and (iv) supporting services, which are responsible for soil formation, photosynthesis, and nutrient cycling. See for example, IUCN Global Ecosystem Typology 2.0 : descriptive profiles for biomes and ecosystem functional groups (March 2021); Millennium Ecosystem Assessment, 2005. Ecosystems and Human Well-being: Biodiversity Synthesis. World Resources Institute, Washington, DC, p. 19. IPBES (2019): Global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services. ES Brondizio, J Settele, S Díaz and HT Ngo (eds), Chapters 2.3 and 4. https://ipbes.net/library; and Connecting Global Priorities: Biodiversity and Human Health. A State of Knowledge Review, World Health Organisation and Secretariat of the Convention on Biological Diversity, 2015; and Millennium Ecosystem Assessment, Ecosystems and Human Well-being: Biodiversity Synthesis (World Resources Institute, Washington, D.C., 2005), p. 30-37; A State of Knowledge Review, World Health Organisation and Secretariat of the Convention on Biological Diversity, 2015, pp. 11, 39, 72, 75, 76, 77, 146, 157, and 158; and Seventy-first World Health Assembly, "Health, environment and climate change. Human health and biodiversity", Report by the Director-General, A71/1, 29 March 2018, point 7, p. 2 and A State of Knowledge Review, World Health Organisation and Secretariat of the Convention on Biological Diversity, 2015, pp. 14, and 200-220.
Sala Constitucional de la Corte Suprema de la Justicia [Constitutional Court of Costa Rica], no. 24513 – 2019, 6 December 2019, § VIII, in which it was recognised that the use of neonicotinoids in agriculture could constitute a risk for the populations of honey bees and that 'the reduction of the pollinator population is a threat to food security, the export of agricultural products and biodiversity'; Suprema Corte de Justicia de la Nación [Supreme Court of Mexico], no. 649/2019, 11 March 2020, page 19 and 20, in which the court made legal standing conditional on ecosystem services: '[t]he right to a healthy environment entails the capacity of every person, as part of a community, to demand effective protection of the environment, without it being necessary to demonstrate that another right is violated, for example, the right to health. … Legal standing … depends on the special position of the person or community within the ecosystem that is allegedly harmed, particularly, with [its ecosystem] services. ... [t]he deprivation or interference with ecosystem services is what qualifies the position of petitioner to seek [legal] protection'.

**Could the affected individuals validly ask for human rights protection, where such Earth's processes are threatened or disturbed by environmental degradation or climate change, insofar as attributable to the actions or omissions of public authorities?**

Secondly, could we go one step farther and take an ecocentric[12] approach according to which nature[13] has a value of its own, that is to say, irrespective of any benefits that it may generate for humans?[14]

We all know about the attribution of legal personality to exotic rivers and forests, or Mother Nature.[15] But if we think about it, the intrinsic value of nature is a *universal* undertaking that is the foundation of the modern-times regimes of international wildlife law.[16] This has already been recognised by the ECtHR with reference to endangered species of seabirds and turtles, as well as forest or coastline habitats. Various national policies of nature conservation have been sanctioned by the Court as a legitimate aim, in certain circumstances, even to the point of trumping the right to property of businesses or house owners.[17]

In this sense the Court's rulings have reinforced States in their environmental policies vis-a-vis individual holders of human rights.

But what happens if non-State actors want to protect nature or the environment?

It is true that the Court has recognised nature protection as a legitimate public interest to be defended by environmental activists who stage protests or disseminate information.[18] But an "interest" is not the same as a "right" which brings me to the next topic.

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12. Also referred to as a pluricentric approach.
13. Nature as the environment per se stricto sensu, not as a space for human existence.
14. See separate opinion of Judge Pinto de Albuquerque in *Herrmann v. Germany* [GC], no. 9300/07, 26 June 2012 "Wild, abandoned or stray animals are also protected by the Convention as a part of a healthy, balanced and sustainable environment."
15. *Recognition of Ganges and Yamana rivers as juridical persons, see Salim v. State of Uttarakhand and Others (High Court of Uttarakhans at Nainital, Writ Petition (PIL) no. 126 of 2014, 2017; recognition of legal personhood of the Atrato River and Amazon Forest, see, respectively Centro de Estudios para la Justicia Social 'Tierra Digna' and Others v President of the Republic and Others,* T-622, Corte Constitucional [Constitutional Court of Colombia], 10 November 2016, 'Atrato River Case'; Andrea Lozano Barragan, Victoria Alexandra Arenas Sanchez, Jose Daniel y Felix Jeffry Rodriguez Pena y otros v Presidente de la Republica y otros, STC4360-2018, Corte Suprema de Justicia [Supreme Court of Colombia], 5 April 2018, 'Amazon Case'; Constitutions of Bolivia and Ecuador that create a new political and legal subject: nature – Pachamama -Mother Earth, see Constitución Política del Estado Plurinacional de Bolivia 2009, Preámbulo and Parte I, Título I, Capitulo 2, Articulo 8.1 and Constitución de Ecuador 2008, Título II, Capítulo primero, Articulo 10; D Bonilla Maldonado, 'The Rights of nature and a new constitutional environmental law', in E Daly and JR May (eds) Human Rights and the Environment, Legality, Indivisibility, Dignity and Geography (Elgar 2019) VII 315.
16. P Birnie, A Boyle, C Redgwell, 'International Law & the Environment (Oxford 2009), 596.
17. For example, *Matos e Silva, Lda., and Others v. Portugal*, 16 September 1996, Reports of Judgments and Decisions 1996-IV; *Hamer v. Belgium*, no. 21861/03, ECHR 2007-V (extracts); *Z.A.N.T.E. – Marathonisi A.E. v. Greece*, no. 14216/03, 6 December 2007; *Malfatto and Mieille v. France*, nos. 40886/06 and 51946/07, 6 October 2016.
18. *Appleby and Others v. the United Kingdom*, no. 44306/98, ECHR 2003-VI; *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, ECHR 2013 (extracts); *VgT Verein gegen Tierfabriken v. Switzerland*, no. 24699/94, ECHR 2001-VI; *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (no. 2) [GC], no. 32772/02, ECHR 2009; and *Guseva v. Bulgaria*, no. 6987/07, 17 February 2015.

## Standing

Public-interest litigation (*actio popularis*) is excluded from the jurisdiction of the Court.[19] In the environmental context, a "victim" under Article 34 of the Convention, denotes a person *directly affected*[20] by the alleged violation of his or her Convention rights.[21] It is therefore clear that, as things stand now, natural or legal persons who pursue their duty to protect the natural environment,[22] but who cannot prove any negative and serious impacts on their well-being, life or patrimony, have no substantive right to rely on before the Court.

Moreover, the "direct victim requirement" also implies that the ECtHR will not entertain applications in which a legal entity relies on a Convention right which is inherently attributable to natural persons only – such as the right to respect for private life or for home.[23]

What about the procedural or participatory rights then?

The Court has indeed applied Article 6 to proceedings which were brought by environmental-protection associations to challenge the authorisation of activities dangerous to public health and the environment.[24] But the Court has not been consistent in this practice.[25]

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19. *Perez v. France* [GC], no. 47287/99, § 70, CEDH 2004-I; *Di Sarno and Others v. Italy*, no. 30765/08, § 80, 10 January 2012; and *Cordella and Others v. Italy*, no. 54414/13, § 100, 24 January 2019.
20. The notion of indirect victims is also present in the Court's case-law. The term indirect victims denotes those to whom the violation would cause harm or who would have a valid and personal interest in seeing it brought to an end, see *Vallianatos and Others v. Greece* [GC], no. 29381/09, § 47, 7 November 2013.
21. *Klass and Others v. Germany*, 6 September 1978, § 33, Series A no. 28; *Crash 2000 Ood and Others v. Bulgaria* (dec.), no. 49893/07, § 84, 17 December 2013; *Fadeyeva v. Russia, no. 55723/00,* § 88, *ECHR 2005-IV*; and *Cordella and Others v. Italy*, no. 54414/13, § 101, 24 January 2019.
22. On duty to protect the environment, see for example the French "Charte de l'environnement", "Article 2. Toute personne a le devoir de prendre part à la préservation et à l'amélioration de l'environnement"; Loi constitutionnelle n° 2005-205 du 1er mars 2005 relative à la Charte de l'environnement; and Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), 25 June 1998. "Recognizing also that every person has ... the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generation".
23. *Federation of Heathrow Anti-noise Group v. the United Kingdom*, (dec.), no. 9310/81, 15 March 1984; *Association des Residents du Quartier Pont Royal, la commune de Lambersart and Others v. France* (dec.), no. 18523/91, 8 December 1992; *Asselbourg and 78 others and Greenpeace Association-Luxembourg v. Luxembourg* (dec.), no. 29121/95, ECHR 1999-VI; *Aly Bernard and 47 others and Greenpeace – Luxembourg v. Luxembourg* (dec.), no. 29197/95, 29 June 1999; *L'Association des Amis de Saint-Raphael et de Frejus and Others v. France*, no. 45053/98, 29 February 2000; and *Greenpeace e. V. and Others v. Germany* (dec.), no. 18215/06, 12 May 2009; compare with *Urgenda Foundation v. The Netherlands,* Supreme Court of the Netherlands, 20 December 2019, point 5.9.3. "As the Court of Appeal rightly held in para. 35, the fact that Urgenda does not have a right to complain to the ECtHR on the basis of Article 34 ECHR, because it is not itself a potential victim of the threatened violation of Articles 2 and 8 ECHR, does not detract from Urgenda's right to institute proceedings. After all, this does not deprive Urgenda of the power to institute a claim under Dutch law in accordance with Article 3:305a DCC on behalf of residents who are in fact such victims (no. ECLI:NL:HR:2019:2007).
24. *Collectif national d'information et d'opposition à l'usine Melox – Collectif Stop Melox and Mox v. France* (dec.), no. 75218/01, § 4, 28 March 2006.
25. *Lesoochranarske zoskupenie Vlk v. Slovakia* (dec.), no. 53246/08, §§ 77, 78, and 88, 2 October 2012.

**Should a non-governmental organisation for the protection of the environment or other person be entitled to allege a violation of the right to have access to information, right to participate in a decision-making process and the right to have access to justice in environmental matters even in the absence of direct harmful effect?**

Judge Chanturia, Fiona Marshall, James Thornton and Ugo Taddei will further explore the topic of participatory rights.

## Harm and Causality

The doctrine of direct harmful effect makes the status of a victim conditional on material causality[26] between the alleged environmental harm (triggering situation) and the alleged "human rights harm."[27]

For the applicability of Articles 2, 6 and 8 of the Convention, the Court starts with the high-threshold tests of *direct and immediate link* between the impugned situation and somebody's Convention right.[28]

Within the context of Article 6 and the alleged *risks* of a human rights harm, the Court requires applicants to show that they are personally exposed to a *serious, specific and imminent danger*.[29] Only exceptionally, the risk of a future violation may confer the status of a potential victim on an applicant. It is if the applicant produces reasonable and convincing evidence of the probability of harm.[30]

In the context of Article 2, the Court has held that States must mitigate (natural) environmental hazards where they are *imminent and clearly identifiable*.[31]

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26. P Baumann, Le droit à un environnement sain en droit de la Convention européenne des droits de l'homme, Thèse présentée et soutenue à Nantes, le 16 novembre 2018, pp. 300 et seq.
27. The Court looks for a sufficiently direct link between 'the applicant and the harm (he believes he has suffered as a result of the alleged violation)' for the purposes of a victim status, see *Gorraiz Lizarraga and Others v. Spain*, no. 62543/00, § 35, ECHR 2004-III.
28. In respect of harm produced, see for example, *Guerra and Others v. Italy*, 19 February 1998, § 57, Reports of Judgments and Decisions 1998-I; *Fadeyeva v. Russia*, no. 55723/00, § 68, ECHR 2005-IV; *Băcilă v. Romania*, no. 19234/04, §64, 30 March 2010. In respect of risk of harm, see for example, *Balmer-Schafroth e.a v. Switzerland* [GC], no. 22110/93, § 40, 26 August 1997; *Athanassoglou and Others v. Switzerland* [GC], no. 27644/95, § 51, ECHR 2000-IV; *Folkman and Others v. the Czech Republic* (dec.), no. 23673/03, 10 July 2006.
29. *Balmer-Schafroth e.a v. Switzerland* [GC], no. 22110/93, § 40, 26 August 1997; *Tauria and 18 others v. France* (dec.), no. 28204/95, 4 December 1995; *Asselbourg and 78 others and Greenpeace Association-Luxembourg v. Luxembourg* (dec.), no. 29121/95, ECHR 1999-VI; and *Athanassoglou and Others v. Switzerland* [GC], no. 27644/95, § 51, ECHR 2000-IV.
30. *Tauria and 18 others v. France* (dec.), no. 28204/95, 4 December 1995; *Asselbourg and 78 others and Greenpeace Association-Luxembourg v. Luxembourg* (dec.), no. 29121/95, ECHR 1999-VI; see also *Centre for Legal Resources on behalf of Valentin Campeanu v. Romania* [GC], no. 47848/08, § 101, ECHR 2014.The Court has indeed dismissed applications on the grounds that the risks invoked were too unspecific or too remote, see *Aly Bernard and 47 others and Greenpeace – Luxembourg v. Luxembourg* (dec.), no. 29197/95, 29 June 1999 – risks allegedly inherent in the production of steel from scrap iron where the steelworks in question had been built or *Luginbuhl v. Switzerland* (dec.), no. 42756/02, 17 January 2006 – undetermined consequences to health of electromagnetic emissions caused by a mobile phone antenna.
31. *Budayeva and Others v. Russia*, nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, § 137, ECHR 2008 (extracts) – "In the sphere of emergency relief, where the State is directly involved in the protection of human lives through the mitigation of natural hazards, these considerations should apply in so far as the circumstances of a particular case point to the imminence of a natural hazard that had been clearly identifiable, and especially where it concerned a recurring calamity affecting a distinct area developed for human habitation or use."

A *direct and immediate link* is also required for Article 8.[32]

It would appear, however, that the Court sometimes relaxes these tests, matching them to the particular circumstances of these inherently factually-complex cases.

In practice, the Court has looked for a link either with the alleged nuisance,[33] with a general health vulnerability,[34] or with specific impacts on health where those were additionally alleged by the applicant.[35]

In many cases under Article 8 the Court was satisfied with a *sufficiently close link*[36] including where such link was established on the basis of a cumulation of factors such as statistics and reports on *general* causation.[37]

A clarification may therefore be needed: **Can it be said that in the absence of a "direct causal link", the Court employs the test of a "sufficiently close link"? Is this sufficiently close link essentially the same as *causation on the basis of probabilities* which could be attained through the presumption of serious, specific and consistent facts and statistical correlation?**[38]

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32. *Ivan Atanasov v. Bulgaria*, no. 12853/03, § 66, 2 December 2010.
33. *Dees v. Hungary*, no. 2345/06, § 22, 9 November 2010; *Ivan Atanasov v. Bulgaria*, no. 12853/03, § 76, 2 December 2010; *Dubetska and Others v. Ukraine*, no. 30499/03, §§ 106 and 112, 10 February 2011; and *Di Sarno and Others v. Italy*, no. 30765/08, § 108, 10 January 2012.
34. *Fadeyeva v. Russia*, no. 55723/00, § 88, ECHR 2005-IV; *Jugheli and Others v. Georgia*, no. 38342/05, § 71, 13 July 2017 *Cordella and Others v. Italy*, no. 54414/13, § 105, 24 January 2019.
35. *Tătar v. Romani*a, no. 67021/01, §§ 105-111, 27 January 2009; *Calancea and Others v Moldova* (dec.), no. 23225/05, § 31, 6 February 2018.
36. In respect of harm, see *Cordella and Others v. Italy*, no. 54414/13, 24 January 2019. In respect of risk of harm, see *Dzemyuk v. Ukraine*, no. 42488/02, §§ 81 and 84, 4 September 2014; *Hardy and Maile v. the United Kingdom*, no. 31965/07, §§ 189 and 192, 14 February 2012; *Tătar v. Romani*a, no. 67021/01, § 106, 27 January 2009; *Taşkın and Others v. Turkey*, no. 46117/99, § 113, ECHR 2004-X.
37. *Fadeyeva v. Russia*, no. 55723/00, § 88, ECHR 2005-IV; *Tătar v. Romani*a, no. 67021/01, § 97, 27 January 2009; *Dubetska and Others v. Ukraine*, no. 30499/03, §§ 111-123, 10 February 2011; and *Cordella and Others v. Italy*, no. 54414/13, §§ 163-165, 24 January 2019. The Court has also acknowledged that quantifying the effects of environmental harm on a person could be impossible because of the influence of other factors, see for example *Cordella and Others v. Italy*, no. 54414/13, § 160, 24 January 2019.
38. *Fadeyeva v. Russia*, no. 55723/00, §§ 79 and 88, ECHR 2005-IV In the *Fadeyeva* case, concerning industrial emissions of a steel-plant, the Court established causal link on the basis of the following elements: a) concentration of several polluting substances in the air of the city continuously exceeded safe levels, established by the domestic legislation; b) the applicant lived in the sanitary security zone in which the domestic law prohibited any permanent dwelling because of the dangers it represented; c) reports confirmed that the over-concentration of certain pollutants in the town's air caused an increase in the morbidity rate for the city's residents; *Fadeyeva v. Russia*, no. 55723/00, §§ 11, 14, 33, 45 and 46, ECHR 2005-IV. In that case the Court did not establish that the applicant's health had deteriorated solely because of her living within the zone. Nevertheless, the Court found that the excessive levels of industrial pollution inevitably made her more vulnerable to various diseases. In the case of *Dzemyuk*, concerning contamination of soil, drinking and irrigation water by an illegal cemetery, the Court attached importance to the fact that the distance between the cemetery and the applicant's dwellings was much shorter than what was permitted under the domestic law; that environmental dangers have been acknowledged by the authorities on numerous occasions, including, by prohibiting the use of the illegal cemetery for burials and by the offer to resettle the applicant; that high level of E. coli had been found in the drinking water of the applicant's well greatly exceeding permitted levels, even if the source of E. coli had not been established; *Dzemyuk v. Ukraine*, no. 42488/02, §§ 82 and 83, 4 September 2014. The Court concluded that the high level of E. coli, regardless of its origin, coupled with clear and blatant violation of environmental health safety regulations confirmed the existence of environmental risks, in particular, of serious water pollution, to which the applicant was exposed.

Another question that arises in the area of causation is: **Where the applicant makes a *prima facie* case, couldn't the burden shift to the State to produce convincing evidence to show that there is no harm to the alleged victim's human rights?**

Judge Eicke will provide more insights on causality in the context of pollution and environmental disaster cases.

## Balancing of interests

The protection of many Convention rights depends on the weighing of various interests which may be at stake in a democratic society. This balancing is present both in vertical and horizontal relations.[39]

Given the principle of subsidiarity,[40] States enjoy a certain margin of appreciation in choosing by which means they want to ensure human rights protection. It is up to the Court to determine the extent of the margin[41] that will be left to the State in a particular case. Pursuant to the current case-law, the margin of appreciation is wide where the activities at stake fall within an area that is of a certain technicality and complexity.[42] Environmental matters belong to this area.[43]

The Court has afforded the same wide discretion to States whether the general aim they pursued, was environmental protection (including nature's conservation) or economic well-being of a country.[44] The court has repeatedly held that both of these interests are important,[45] although a mere reference to the economic stability would not necessarily outweigh the rights of others affected by environmental harm.[46]

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39. In respect of the right to life, States are expected to discharge their positive obligations only as long as this does not burden them in an 'impossible or disproportionate' manner. To this end, the Court will thus give consideration to the operational choices which national authorities must make in terms of priorities and resources. See Oneryıldız v. Turkey [GC], no. 48939/99, § 71, ECHR 2004- XII; *Budayeva and Others v. Russia*, nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, § 128, ECHR 2008 (extracts). In the context of the right to respect for private and family life, States have an obligation to strike a "fair balance""between the competing interests of the individual and the community as a whole". See *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 98, ECHR 2003-VIII; *Cordella and Others v. Italy*, no. 54414/13, § 158, 24 January 2019.
40. According to this principle, it is 'first and foremost the responsibility of the States Parties to guarantee the application and implementation of the Convention', see Interlaken Declaration, cited in *G.I.E.M. S.R.L. and Others v. Italy* [GC], no. 1828/06, 28 June 2018, separate opinion of Judge Pinto de Albuquerque.
41. *Handyside v. the United Kingdom*, 7 December 1976, §§ 48-50, Series A no. 24.
42. Conversely, the discretionary power of the State is reduced for example in the sphere of individuals' privacy, see *Dudgeon v. the United Kingdom*, no. 7525/76, § 52, 22 October 1981.
43. The doctrine of a wide margin of appreciation in environmental matters is based on the assumptions that domestic authorities have direct democratic legitimacy and that, in view of the difficulty implicit in the social and technical aspects of environmental issues, they are better placed than an international court to decide what exactly should be done to stop or reduce environmental harm or nuisance. See, *Powell and Rayner v. the United Kingdom*, no. 9310/81, § 44 in fine, 21 February 1990; *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 97, ECHR 2003-VIII; *Giacomelli v. Italy*, no. 59909/00, § 80, ECHR 2006-XII, 2 November 2006; and *Mileva and Others v. Bulgaria,* nos. 43449/02 and 21475/04, § 98, 25 November 2010.
44. The economic well-being of the country is a clause which appears in § 2 of Article 8.
45. *Hamer v. Belgium*, no. 21861/03, § 79, ECHR 2007-V (extracts); *Turgut and Others v. Turkey*, no. 1411/03, § 90, 8 July 2008; *Varnienė v. Lithuania*, no. 42916/04, § 54, 12 November 2013; and *S.C. Fiercolect Impex S.R.L.*, no. 26429/07, § 65, 13 December 2016.
46. The margin of appreciation is equally wide whether the enjoyment of someone's Convention rights is affected by environmental harm or by measures of environmental protection.

Both, economic growth and healthy environment constitute sustainable development goals[47] and have been considered as equal by many national superior tribunals. So this is an awkward question: **For the purpose of human rights litigation, shouldn't the States have a narrow margin of appreciation in environmental matters?** Perhaps this question is not so appalling. After all, we are in the midst of a climate and environment crises. 1,769 jurisdictions (cities, countries, regions) in thirty countries have declared a climate emergency. In November 2019, the European Parliament adopted a resolution on the climate and environment emergency.[48]

**Could therefore human rights law require that States, in balancing these interests must be guided, among other factors, by the existing environmental and climate emergency?**[49]

## Redress

The last topic I would like to address is that of remedies for environmental human rights violations. Article 41 of the European Convention on Human Rights accords great discretion to the Court in terms of the measures it may impose on a State which violated the Convention. The aim of individual measures is that of restoration to original condition *(restitution in integrum)* in respect of specific applicants. General measures, in turn, are ordered to prevent similar violations occurring in the future.

The European human rights system is a *judicial and political* tandem in that the Court issues judgments and the Committee of Ministers supervises their execution.[50] This to me has several important implications for environmental cases.

Firstly, we avoid the dilemma of whether the environment belongs to the sphere of political or legal regulation. Yes, it is a court that finds a human rights violation in the context of a particular environmental matter. The Court, however, does not have to specify the measures of redress, as it is ultimately the State concerned

47. 17 Sustainable Development Goals, in particular Goals 8, 13.14 and 15, the 2030 Agenda for Sustainable Development, adopted by all United Nations Member States in 2015.
48. https://climateemergencydeclaration.org/climate-emergency-declarations-cover-15-million-citizens/; European Parliament's resolution of 28 November 2019 on the climate and environment emergency (2019/2930(RSP)): Declares a climate and environment emergency; calls on the Commission, the Member States and all global actors, and declares its own commitment, to urgently take the concrete action needed in order to fight and contain this threat before it is too late; 2. Urges the new Commission to fully assess the climate and environmental impact of all relevant legislative and budgetary proposals, and ensure that they are all fully aligned with the objective of limiting global warming to under 1,5 °C, and that they are not contributing to biodiversity loss. https://www.europarl.europa.eu/doceo/document/TA-9-2019-0078_EN.html
49. The Court noted in that case that at the time when the policy decision on the increase of night flights was made no attempt was made to quantify the aviation and economic benefits in monetary terms; whilst it is, at the very least, likely that night flights contribute to a certain extent to the national economy as a whole, the importance of that contribution has never been assessed critically, whether by the Government directly or by independent research on their behalf, only limited research had been carried out into the nature of sleep disturbance and prevention, *Hatton and Others v. the United Kingdom*, no. 36022/97, § 100-103, 2 October 2001; judgment reversed by *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, §§ 105 and 122, ECHR 2003-VIII.
50. Article 46 § 2 ECHR.

– under the supervision of other States within the framework of the Committee of Ministers – who chooses its plan of action and the best fitting measures to bring about the compliance.

Secondly, supervision of enforcement of the judgment is ensured for as long as it takes for the State to remove the causes of the violation. In this sense, the system is similar to the writ of continuing mandamus which has been widely practiced by green courts in India, Philippines and Pakistan, as well as by the Supreme Court of Argentina.[51]

Clare Ovey will offer an insider's view on human rights remedies and the execution of the ECtHR's judgments. So let me close with a question of substance.

**Where a violation stems from an environmental harm, could human rights law shift its focus from restoring an individual to restoring the environment?** This would have to entail the recognition of damage suffered to the elements of the environment and to ecosystem functions (*préjudice* écologique *pur*[52]). In such event, **could a human rights mechanism require ecological remediation and restoration as the principal measures of redress?**

51. One of the first examples of comprehensive remedies for violations of environmental human rights came from the Supreme Court of Argentina and the *Matanza-Riachuelo River Case*, concerning a multi-sourced and disastrous contamination of a river and adjacent areas. The court ordered regular inspections of polluting enterprises and implementation of waste water treatment plant; closure of all illegal dumps, redevelopment of landfills, and cleanup or the riverbanks; improvements of the drinking water and sewage systems, as well as storm-water discharge infrastructure in the river basin; development of a regional environmental health plan, including contingencies for possible emergencies; and supervision, by the federal Auditor General, of the budget allocation for implementation of the restoration plan. The judgment is subject to progressive execution, meaning that, beyond the declaratory court decision, new remedies are ordered as the situation develops and the case has not been closed. The overarching aim of that judgment is to trigger cooperation between all three branches of State power, to 'approach, guide and direct communities and actors [concerned] in order to resolve the problem,' see *Mendoza, Beatriz Silvia y otros c/ Estado Nacional y otros s/ daños y perjuicios* [Supreme Court of Argentina] no. M.1569.XL, 8 July 2008, Considerando 15 and subsequent orders; see also D Boyd, 'Catalyst for Change' in J Knox and R Pejan (eds) Human Right to a Healthy Environment, (Cambridge University Press 2018), 17, 34; and R Lorenzetti, 'Trends in Environmental Law, Nuevas Tendencias en Derecho Ambiental', WCEL Environmental Law Lectures, 14 April 2020 (online recording).
52. The example of the French law and judicial practice could be followed, insofar as it is required that ecological damage be first and foremost restituted in kind, and where this was impossible, that payment be made towards environmental remediation Article 1249 of the French Civil Code. See also L Neyret and G J Martin, 'De la nomenclature des préjudices environnementaux' (2012) 19 La Semaine Juridique, 940-942. Reparations for ecological damage were also ordered by the International Court of Justice in the case of *Costa Rica v. Nicaragua*. The redress in that case took the form of indemnisation for the restoration of the damaged environment. The ICJ took into consideration material damage (i.e. loss of trees) and resulting loss of ecosystem service. The exact calculation method, however, was not explained by the international court; Certain Activities Carried Out By Nicaragua In the Border Area (Costa Rica v. Nicaragua) Compensation Owed By The Republic Of Nicaragua To The Republic Of Costa Rica, International Court of Justice, 2 February 2018.

## Conclusion

My conclusion also starts with a question: **How will international human rights law and the European Court of Human Rights respond to the claims arising from the new planetary reality?**

Nobody can answer this question today. But this is not a "wait and see" matter. After all, human rights treaties are living instruments, to be interpreted in light of present-day conditions and in harmony with international *corpus iuris*, including international environmental law.

To keep alive, the European system depends on three actors: firstly, on the people who bring applications to the ECtHR; secondly, on the Judges who rule on these cases, often creating foundational principles. Thirdly, it depends on the Member States of the Council of Europe who are in power to adopt and implement new treaties.

## Inter-American approaches to the right to a healthy environment and the rights of nature

**Jorge Calderón Gamboa**
Secretary at Suprema Corte de Justicia de la Nación and former Senior Lawyer at the IACtHR

The Inter-American System, which covers more than 600 million people in the Americas, has approached the issue of Environmental Protection through different avenues of interpretation, both indirect (through the protection of civil and political rights) and direct (as an autonomous right), but always, through orders of comprehensive reparation that seek to remedy environmental damage.

The topics that I will explore during the presentation are:

**I.** Indirect Approaches through the protection of civil and political rights

**II.** ESCER Approach: Environmental Rights as Autonomous Rights

**III.** Domestic Approaches in the Americas

**IV.** Final Reflections.

### Indirect approaches through civil and political rights (2001-2016)

Since the American Convention on Human Rights does not explicitly mention the right to a healthy environment and the Inter-American Court cannot rule on alleged violations of this right under the San Salvador Protocol, the Inter-American Tribunal has protected different dimensions of this right through its interpretation of civil and political rights under the American Convention, at least in two different ways:

**1)** First, through the protection of **Procedural Rights**, for example:

i. Environmental defenders´ rights to personal integrity, freedom of association and political rights (i.e. *Kawas Fernández Vs. Honduras, Luna López Vs. Honduras)*[53];

ii. The right to access to information on environmental matters, as part of the right to freedom of expression (i.e. *Claude Reyes et al. Vs. Chile)*[54];

53. I/A Court H.R., Case of Kawas Fernández v. Honduras. Merits, Reparations and Costs. Judgment of April 3, 2009. Series C no. 196; I/A Court H.R., Case of Luna López v. Honduras. Merits, Reparations and Costs. Judgment of October 10, 2013. Series C no. 269.

54. I/A Court H.R., Case of Claude Reyes et al. v. Chile. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C no. 151.

iii. The protection of the environment due to its public utility, when interpreting the right to private property in cases of expropriation (i.e. *Salvador Chiriboga Vs. Ecuador)*[55]*;*

iv. The adoption of Provisional measures to protect natural resources, based on the right to personal integrity and the right to an effective remedy (i.e. *Matter of the Communities of Jiguamendó and Curvaradó regarding Colombia)*[56].

**2)** The Second avenue in this indirect approach is through the Court´s interpretation of ***Substantive rights,*** *which was developed in Cases on the rights of Indigenous and Tribal Peoples*.

In the Paraguayan Cases (*Yakye Axa, Sawayamaxam and Xakmok Kasek*[57], on the deprivation of the communities' ancestral territories and their situation of poverty and survival conditions), the Court stated that the right to life cannot be interpreted narrowly. This right includes not only the right of all human beings not to be deprived of life arbitrarily, but also the right to not be subjected to conditions that impede or hinder access to a *dignified existence*. Therefore, there is a duty for States to adopt positive and concrete measures aimed at satisfying **the right to life with dignity**, especially in the case of persons at risk who must be prioritized by the State.

In those cases, under the scope of the obligation to guarantee the right to a dignified life, the Court studied whether, in fact, the State had implemented measures for the Communities for the purpose of ensuring the rights to a healthy environment, food, health, education and the benefits of culture, all mentioned in the San Salvador Protocol (ESCR) and based on standards of the UN Committee on ESCR. However, the only violation declared was in relation to Article 4 of the American Convention on the right to life[58].

In the Case of the *Kaliña and Lokono Peoples v. Suriname* (2015)[59], (in which the State had denied Indigenous Peoples access to natural reserves), the Court recognized the complementarity between environmental rights and the rights of Indigenous and Tribal Peoples, who have, in general, played an important role in the conservation of the environment.

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55. I/A Court H.R., Case of Salvador Chiriboga v. Ecuador. Reparations and Costs. Judgment of March 3, 2011 Serie C no. 222.
56. I/A Court H.R., Matter of the Communities of the Jiguamiandó and the Curvaradó regarding Colombia. Provisional Measures. Order of the Inter-American Court of Human Rights of May 22, 2013.
57. The cases against Paraguay (*Yakye Axa, Sawhoyamaxa and Xákmok Kásek*), relate to the claims of territorial claim deprived communities of their ancestral land by the Paraguayan Chaco privatization in the mid-nineteenth century and the occupation of their land to the farm. This situation resulted in communities of poverty and survival conditions. I/A Court H.R., Case of the Xákmok Kásek Indigenous Community. v. Paraguay. Merits, Reparations and Costs. Judgment of August 24, 2010. Series C no. 214.
58. Article 4. Right to Life 1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life […].
59. I/A Court H.R., Case of the Kaliña and Lokono Peoples v. Suriname. Merits, Reparations and Costs. Judgment of November 25, 2015. Series C no. 309.

Additionally, (in the cases of *Saramaka, Sarayaku, Punta Piedra, and Kaliña and Lokono*)[60], the Court developed important standards on the execution of Environmental and Social Impact Assessments when projects for the extraction of resources can threaten the environment.

It is worth mentioning that, in its decisions, the Court has also used the UN Guiding Principles on Business and Human Rights in e-valuating environmental harm caused by transnational corporations in extractive industries, even though legal international responsibility for that harm rests principally on the State[61].

Those territorial cases were mainly examined under Articles 21 (on the right to property) and 23 (on the right to public participation) of the American Convention.

Additionally, for the collection of evidence of environmental damage, the Court has conducted *on-site visits*; received expert witnesses, and used new technologies, such as satellite imaging in order to monitor gradual deforestation[62].

Also, as measures of **comprehensive reparation** in cases using this indirect approach, under the category of rehabilitation, the Court has ordered that States rehabilitate lands affected by environmental degradation; carry out public awareness campaigns on the work of environmental defenders, as well as enact changes in the law to provide access to information in cases relating to the environment.[63]

## Environmental Rights as Autonomous Rights (ESCER Approach) (2017 – to present)

In the judgment of *Lagos del Campo v. Peru* (August 2017)[64], for the first time, the Inter-American Court opened up a new paradigm with the recognition of the direct justiciability of Economic, Social, Cultural, and Environmental Rights (*ESCER / DESCA*), based on an interpretation of Article 26 of the American Convention[65].

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60. I/A Court H.R., Case of the Saramaka People. v. Suriname. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007 Series C no. 172; I/A Court H.R., Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and Reparations. Judgment of June 27, 2012. Series C no. 245; I/A Court H.R., Case of the Garífuna Punta Piedra Community and its members v. Honduras. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 8, 2015. Series C no. 304; I/A Court H.R., Case of the Kaliña and Lokono Peoples v. Suriname. Merits, Reparations and Costs. Judgment of November 25, 2015. Series C no. 309.
61. Case of the Kaliña and Lokono Peoples v. Suriname.
62. Case of the Garífuna Punta Piedra Community and its members v. Honduras.
63. Calderón Gamboa, Jorge. *Medio Ambiente frente a la Corte Interamericana de Derechos Humanos*: Una Ventana de Protección! En Derechos Humanos y Medio Ambiente. Coord. Cancado Trindade y Cesar Barros. IBDH y IIDH. Oct 2017. Enlaces: https://www.corteidh.or.cr/tablas/r37170.pdf http://ibdh.org.br/wp-content/uploads/2016/02/44738-Derechos-humanos-y-m%C3%A9dio-ambiente.pdf
64. I/A Court H.R., Case of Lagos del Campo v. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2017. Series C no. 340.
65. CHAPTER III – ECONOMIC, SOCIAL, AND CULTURAL RIGHTS.
**Article 26. Progressive Development**. The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

Following this precedent, in December 2017, through its ***Advisory Opinion no. 23*** on the **Environment and Human Rights**[66], the Court recognized the *right to a healthy environment* as an autonomous right protected under Article 26 of the American Convention (and Article 11 of the San Salvador Protocol)[67], even though this right can also be affected when other rights are violated, such as the substantive rights to: life (article 4), personal integrity (article 5)[68], the right to not to be forcibly displaced (article 22)[69], among others; as well the procedural rights that we already mentioned.

The Court stated that the right to a healthy environment "constitutes a universal value"; that it "is a fundamental right for the existence of humankind," **and that "as an autonomous right, […] it protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals**.

The Court also stressed that **Nature and the Environment must be protected not only in connection to their usefulness to human beings or due to the effects that their degradation may have on the rights of specific persons, but because of their importance to all other living organisms with whom the Planet is shared, and who merit protection in their own right.**

Additionally, the Court held that in cases of environmental harm, a State can be liable for damages caused to persons outside of its territory (cross-border damages) if it fails to comply with international environmental obligations arising from activities within its territory or under its control.

In sum, in its Advisory Opinion, the Court established and developed State Obligations in the face of possible environmental damage which are: *I. the Obligation of Prevention; II. The Precautionary Principle; III. The Obligation to cooperate; as well as IV. Procedural Obligations.*

In the most recent indigenous case before the IACHR (*The Lhaka Honhat Association (Our Land) Vs. Argentina* of February 2020)[70], now under the Court´s new, direct approach, for the first time in a contentious case the Court recognized that the State had violated the **rights to a healthy environment**, to adequate food and to water, due to the ineffectiveness of State measures to stop activities that harmed those rights. It held that illegal logging and other activities carried out on the territory by

66. I/A Court H.R., The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights). Advisory Opinion OC-23/17 of November 15, 2017. Series A no. 23.
67. Right to a Healthy Environment
    1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.
    2. The States Parties shall promote the protection, preservation, and improvement of the environment.
68. **Article 5. Right to Humane Treatment**
    1. Every person has the right to have his physical, mental, and moral integrity respected […].
69. **Article 22. Freedom of Movement and Residence**
    1. Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law.
    2. Every person has the right to leave any country freely, including his own. […]
70. I/A Court H.R., Case of the *Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina. Merits,* Reparations and Costs. Judgment of February 6, 2020. Series C no. 400.

the non-indigenous population affected environmental rights and had had an impact on their traditional ways of obtaining food and their access to water.

The Court also recognized that the obligation to prevent the violation of environmental rights extends to the "private sphere" in order to avoid third parties violating such rights". "States are bound to use all the means at their disposal to avoid activities under its jurisdiction causing significant harm to the environment." The following are some measures that must be taken in relation to activities that could potentially cause harm: *(i) regulate; (ii) supervise and monitor; (iii) require and approve environmental impact assessments; (iv) establish contingency plans, and (v) mitigate, when environmental damage has occurred.*

As a means of **comprehensive reparation regarding the environment**, under the category of *Restitution*, the Court ordered, *inter alia*, (i) that the State implement an action plan to respond to critical situations of lack of access to drinking water and remedy its contamination; (ii) and that it recover and prevent further loss of forestry resources.

## Continental Approaches in the Americas

Briefly. This *ecocentric* tendency toward the protection of the environment has spread throughout the Americas, not only in its recognition of the right to a healthy environment, but also in its recognition of the rights of nature and the emerging concept of *Earth Jurisprudence*[71]. This can be seen in the constitutions of States such as Ecuador, Bolivia, Argentina, and in Mexico City and Guerrero, as well as in the jurisprudence of the Constitutional Court of Colombia[72], Brazil[73] and Guatemala[74] recognizing the rights of nature, and in the progressing efforts for the ratification of the *Escazú Agreement* in the region[75].

In Mexico in particular, the Supreme Court of Justice has recognized the right to the environment as an autonomous right, with both an individual and a collective dimension that allows for the protection of ecosystems and that uses the *pro natura principle* as an interpretive guide in the balancing of the interests at play. The Court

71. UN Harmony with Nature. http://www.harmonywithnatureun.org/ejInputs/
See also: Towards an EU Charter of the Fundamental Rights of Nature. https://www.eesc.europa.eu/sites/default/files/files/qe-03-20-586-en-n.pdf
72. The Ecuadorian constitutional reform of 2008; Law no. 71 on the Rights of Mother Earth in Bolivia; and the constitutions of the Mexican state of Guerrero in 2014 and of Mexico City in 2017 as important developments. This has been complemented by a series of legal proposals, such as the 2015 Bill on the rights of Nature in Argentina. Regarding legal decisions, the jurisprudence of the Constitutional Court of Colombia relating to the Atrato River and the recent recognition of the Colombian Amazon as a rights-holder, among others.
73. In 2019 The Superior Court of Justice (STJ), adopting an ecological perspective based on the principle of dignity of the human person, issued an historic ruling recognizing non-human animals as subject of rights. The ruling further addresses the need to change the legal anthropocentric paradigm and replace it with biocentric thinking which advances the interconnectedness and close relationship between human beings and Nature and also recognizes Nature's intrinsic value.
74. 2019 The Constitutional Court of Guatemala, on 7 November 2019, rendered a non-anthropocentric verdict recognizing the spiritual and cultural relationship between Indigenous People and the Water element acknowledging Water as a living entity.
75. Link: https://www.cepal.org/en/escazuagreement

has recognized standing to parties who can show a legitimate interest, whether that interest is individual, collective, or "diffuse". As a measure of reparation, the restoration of affected ecosystems has been at the forefront[76].

But let me focus on the decisions of the Mexican Supreme Court that have an approach more applicable to the European system.

First, the human right to a healthy environment for the development and well-being of the populace is derived from articles 4, 25, and 27 of the Mexican Constitution, but Mexico also recognizes the international treaties it has signed and the jurisdiction of the Inter-American Court on the matter. Mexico´s constitutional jurisprudence recognizes that the right to a healthy environment is an autonomous right that seeks, on one hand, to guarantee the broadest protection to persons and, on the other hand, to protect the natural environment, understood as the set of ecosystems in the which the person develops and on which his or her integral development depends. In view of this, it is not necessary to prove that environmental damage violates other rights (for example, the right to access the highest possible levels of health); instead natural resources, ecosystems and environmental services can be protected autonomously, due to their intrinsic value.

Second, the Mexican Supreme Court has recognized the protection of this right in both its individual and collective dimensions. For example, it has issued judgments on the protection of the natural heritage and on air, water or soil quality; on the reduction of environmental services provided by ecosystems; and on the increase in greenhouse gas emissions that contribute to global warming. These judgments have not been limited to cases where a person has been impacted, but have also included cases with diffuse interests, which requires finding mechanisms that allow for environmental protection as a matter of collective interest.

Regarding parties´ standing to defend the environment before the courts, the concept of "individual or collective legitimate interest" has been used, and its scope still being developed in the Mexican amparo procedure (as a judicial remedy).

In addition to the obligations to take positive and non-regressive measures for the protection of the environment, the SCJN has also adopted the principle of *in dubio pro natura*, emerging in contemporary international environmental law as a general interpretative mandate of environmental justice, requiring that the measure that is most favorable to the protection of the environment and nature be privileged, when these objectives are in collision with other interests.

As reparation measures, through what the SCJN calls the "Effects of the Judgment," the restoration of the affected ecosystems has been identified as a necessary precondition to effectively repair violations of the human right to a healthy environment. For example: 1) in a case of environmental damage to mangroves, the judgment ordered the development of a technical-scientific program for the restoration of the ecosystems and environmental services affected, to be executed by the authority

76. See cases *AR 307/2016 and AR 610/2019.* For more information see: SCJN. Contenido y alcance del derecho humano a un medio ambiente sano. Link: https://www.sitios.scjn.gob.mx/cec/sites/default/files/publication/documents/2020-07/CONTENIDO%20Y%20ALCANCE%20DEL%20DH%20A%20UN%20MEDIO%20AMBIENTE%20SANO_VERSION%20FINAL_10%20DE%20JULIO_0.pdf

and private company responsible for the damage; 2) since an official Mexican regulation that reduced the quality standards for gasoline was declared unconstitutional, considering Mexican commitments on climate change, it ordered the responsible authorities to regulate adequately, taking into account the precautionary and citizen participation principles to guarantee the protection of a healthy environment.

## Final Reflections

In closing, I would like to highlight the following 6 points:

1. In my view, the IACHR and México´s Supreme Court are moving from an anthropocentric point of view towards an *ecocentric* vision on the protection of the environment. This autonomous approach is no small step, because it positions those Tribunals as a forum where environmental issues may be litigated, even when they do not affect the human person.
2. In the current context of the ECHR, the indirect approach taken by the IACHR can act as a bridge between the jurisprudence of both international Tribunals, as a way of expanding the protection of the environment through the interpretation of civil and political rights. In particular, by opening the scope of protection not only of the right to private life (under Art. 8 of the European Convention), but also of the right to life (dignified life, under Art. 2), inhuman treatment (personal integrity, under Art. 3), and collective property rights (under Art. 1 of Protocol 1) of the European System.
3. Direct approaches that allow for the recognition of the right to environmental protection can be a jurisprudential construction for the ECHR through an evolving and systematic interpretation or through the adoption of an additional protocol[77].
4. However, in either case, it is crucial that the Court order Comprehensive or *Integral Reparations* for environmental damages, especially through ecological restoration as a means of rehabilitation and restitution. I believe that this can be possible through a re-interpretation of the concept of "just satisfaction" under Article 41 in relation to Article 46 of the European Convention[78].
5. Regarding parties´ standing before the Court, it would be necessary to rethink the scope of possible victims, including direct and indirect victims, the last of which could include persons who have a valid and personal interest in seeing environmental damage brought to an end, as well as collective and potential victims.

77. Council of Europe is considering possibility of including right to healthy environment in European Convention on Human Rights!!! https://agenceurope.eu/en/bulletin/article/12575/28
78. Article 41. Just satisfaction. If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.
Article 46. Binding force and execution of judgments 1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution. […]

6. Finally, I personally believe that based on the current situation of the Planet, where WE humans are NOT living in harmony with nature, our domestic and international systems will have to eventually recognize that:

   *A Healthy Environment is not secondary to other principles or duties of the State, but a RIGHT in itself to be respected, protected and fulfilled by law.*

# Towards environmental democracy? Participatory Rights

# Participatory rights in the case-law of the European Court of Human Rights

**Lado Chanturia**
Judge of the European Court of Human Rights

## Overview

Participatory rights – the rights to have access to information (2), to participate in a decision-making process (3) and to have access to justice in environmental matters (4) are expressly guaranteed by the 1998 Aarhus Convention[79] and the 2018 Escazu Agreement.[80] Although the European Convention on Human Rights does not enshrine the right to a healthy environment, it protects these participatory rights by deriving them from the positive obligations inherent in Articles 2, 6 and 8 of the ECHR, as well as from Article 1 of Protocol no. 1 to the Convention.

In my presentation I will address four issues:

1. Access to information;
2. Participation in a decision-making process;
3. Access to Justice;
4. Actio popularis and rights of NGOs

## Access to information

### Article 10 of the Convention

In respect of access to information, the general principle that stands for the Court is that the right to receive information under Article 10 of the ECHR does not impose on a State "positive obligations to collect and disseminate information of its own motion" or to impart State-held information to individuals seeking it.[81] As a result,

79. UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted in Aarhus, Denmark, on 25th June 1998.
80. Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, adopted at Escazú, Costa Rica, on 4 March 2018.
81. *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 156, 8 November 2016. Such obligations may arise, however, where disclosure of the information has been imposed by an enforceable judicial order. They may also arise where access to the information was instrumental for the individual's exercise of his or her right to freedom of expression and where its denial constitutes an interference with that right. Whether and to what extent the denial of access to information constitutes an interference with an applicant's freedom of expression is assessed by the Court in each individual case and in the light of its particular circumstances including: (i) the purpose of the information request; (ii) the nature of the information sought; (iii) the role of the applicant; and (iv) whether the information was ready and available.

the Court declared Article 10 inapplicable in a number of cases concerning access to information about risks stemming from exposure of local populations to chemicals,[82] and did **not subscribe to the view that Article 10 has a preventive function with respect to potential violations of the Convention in the event of serious environmental damage to the environment.**[83]

However**,** in ***Cangi v. Turkey*** (29 January 2019) the Court found a violation of Article 10. The case concerned the authorities' refusal to provide Mr Cangı with an official copy of the minutes of a meeting of the Cultural and Natural Heritage Board, concerning the conservation plans for the ancient site of Allianoi and the planned construction of the Yortanlı dam. The Court noted in particular that the information in question related to a subject of general interest, "the flooding of a historic site by water from a dam obviously being a question which is likely to create a strong controversy, which relates to a subject important social issue, or which relates to a problem of which the public should be informed."(*ibidem,* § 34). The Court also noted that the applicant was a member and representative of an NGO and that, through his action he aimed at the protection of the ancient site of Allinoi and the dissemination of information on the current procedures concerning this site, he thus exercised the role of "public watchdog" (*ibidem,* § 35)).

## Article 8 of the Convention

Issues of access to information on environmental matters can also fall within the ambit of the right to respect for private and family life, and for home – guaranteed by Article 8 of the Convention. In *Guerra and Others v. Italy* the Court has found this provision applicable where the information was such that it could either have "allayed individuals' fears or enabled them to assess the danger" to which they had been exposed.[84]

In several cases the Court confirmed the following approach: **Where a State engages in hazardous activities** – for example nuclear tests or the use of asbestos -, **which might have hidden adverse consequences on the health of those involved in such activities, Article 8 requires that an effective and accessible procedure be established to enable such persons to seek all relevant and appropriate information.**[85] In *Brânduşe v. Romania,* in a case which concerned the highly offensive smells emanating from a waste tip in the vicinity of the prisoner's cell and affecting his quality of life and well-being, **the Court also required that the public be given access to the results of environmental and health impact assessments if such**

82. *Guerra and Others v. Italy* [GC], no. 14967/89, § 53, 19 February 1998 and *Roche v. the United Kingdom* [GC], no. 32555/96, § 172, 19 October 2005.
83. *Guerra and Others v. Italy* [GC], no. 14967/89, § 52, 19 February 1998.
84. *Guerra and Others v. Italy* [GC], no. 14967/89, § 60, 19 February 1998 and *McGinley and Egan v. the United Kingdom*, Nos. 21825/93 and 23414/94, § 97, 9 June 1998.
85. *McGinley and Egan v. the United Kingdom*, Nos. 21825/93 and 23414/94, § 101, 9 June 1998; *Brincat and Others v. Malta*, Nos. 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11, 24 July 2014.

**studies are carried out,**[86] especially if this would enable the public concerned to assess the danger to which they are exposed. In *Giacomelli v. Italy* the Court found a violation of Art. 8 for the lack of prior environmental study and failure to suspend operation of a plant located close to dwellings and generating toxic emissions.[87]

In *Guerra and Others v. Italy* [GC][88], having found a violation of the applicants' right to respect for private and family life, the Court held that the Italian State had not taken the necessary steps to ensure effective protection of the applicants from the direct adverse effects of severe toxic emissions. Italy complied with the Court's judgment by developing practices ensuring that today, adequate information regarding environmental hazards is rapidly provided.[89]

In the case of *Roche v. the United Kingdom* [GC], the Court ruled under Article 8 of the Convention that a former serviceman who in the 1960s had participated in mustard and nerve gas tests conducted by the British Army, should not be required to litigate to obtain disclosure of information which would allow him to assess the health risks of the tests.[90]

## Article 2 of the Convention

According to the Court's case-law, **In situations of "real and imminent dangers" either to the applicants' physical integrity or to the sphere of their private lives,**

86. *Brânduşe v. Romania*, no. 6586/03, § 63, 7 April 2009. The government had not stated what measures had been taken by the authorities to ensure that the inmates in the local prison, including the applicant, who had asked for information about the disputed rubbish tip in close proximity of the prison facility, would have proper access to the conclusions of environmental studies and information by means of which the health risks to which they were exposed could be assessed. Consequently, the Court found that there was a violation of Article 8 based partially on the authorities' failure to secure the applicant's right to access to information.
87. *Giacomelli v. Italy*, no. 59909/00, § 83, 2 November 2006.
88. *Guerra and Others v. Italy* [GC], no. 14967/89, 19 February 1998. The applicants lived near a chemical factory producing fertilisers. Accidents due to malfunctioning had already occurred in the past, the most serious one in 1976 when an explosion allowed several tonnes of potassium carbonate and bicarbonate solution, containing arsenic trioxide, to escape. The applicants alleged in particular that the lack of practical measures to reduce pollution levels and major-accident hazards, had infringed their right to respect for their lives and physical integrity. They also complained that the relevant authorities' failure to inform the public about the hazards and about the procedures to be followed in the event of a major accident had infringed their right to freedom of information. The Court held that positive obligations to collect and disseminate information about intoxication risks by a State of its own motion cannot be derived from freedom to receive information and Article 10 of the Convention (inapplicable).
89. The factory operation ceased definitively in 1994 and the inquiries subsequently conducted by authorities have confirmed the absence ever since of any high risk activity or stock, according to the criteria established by the legislation in force in this field, see Resolution ResDH(2002)146 adopted by the Committee of Ministers on 17 December 2002.
90. *Roche v. the United Kingdom* [GC], no. 32555/96, 19 October 2005, the applicant was discharged from the British Army. 20 years later he developed high blood pressure and later suffered from hypertension, bronchitis and bronchial asthma. He was registered as an invalid and maintained that his health problems were the result of his participation in mustard and nerve gas tests conducted by the Army. The Court held that there had been a violation of Article 8 of the Convention finding that the United Kingdom had not fulfilled its positive obligation to enable the applicant to have access to information which would allow him to assess the risks of the tests.

**States have a duty to "adequately inform the public about any life threatening emergencies" stemming from man-made or natural disasters.**[91]

In its landmark judgment in the case of Öneryıldız *v. Turkey* [GC], the Court found that the administrative authorities knew or ought to have known that the residents were faced with a real and immediate risk to their physical integrity and their lives on account of the accidental explosion of the rubbish tip. In addition to not remedying the situation, the authorities failed to comply with their duty to inform the inhabitants of this area of potential health and environmental risks, which might have enabled the applicant to assess the serious dangers for himself and his family without diverting State resources to an unrealistic degree.[92]

In the cases of *Budayeva and Others v. Russia*[93] and *Kolyadenko and Others v. Russia*,[94] the Court held that **a State was duty-bound to adequately alert the public concerned about any life-threatening emergencies.**[95]

## Participation in a decision-making process

In *Hatton and Others v. the United Kingdom* the Court has held that when making decisions which relate to the environment, public authorities must take into account the interests of individuals who may be affected, in particular by giving the public a possibility to make representations to the public authorities.[96] **A governmental decision-making process concerning complex issues of environmental and economic policy must involve appropriate investigations and studies so that the effects of activities that might damage the environment and infringe individuals' rights may be predicted and evaluated in advance.**[97]

In another landmark case *Tătar v. Romania*[98] the Court held that there was a violation of Article 8 of the Convention, finding, *inter alia*, that the authorities had failed to comply with the domestic regulations as the participants in the public debates had not been given access to the findings of the study on the basis of which the compliance certificates were issued to the company, or to any other official information on the subject. In this judgment, the Court extensively drew on the Aarhus Convention.

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91. *Budayeva and Others v. Russia,* Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, § 131, 20 March 2008.
92. In this case the Court also held that even if public authorities respect the right of information this may not be sufficient to absolve the State of its responsibilities under Article 2, unless more practical measures are also taken to avoid the risks.
93. *Budayeva and Others v. Russia,* Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 20 March 2008.
94. *Kolyadenko and Others v. Russia,* Nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, 28 February 2012.
95. *Budayeva and Others v. Russia,* Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, § 131, 20 March 2008 and *Kolyadenko and Others v. Russia,* Nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, § 181, 28 February 2012.
96. *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, §§ 99 and 128, 8 July 2003 and Chapman v. the United Kingdom [GC], no. 27238/95, § 92, 18 January 2001.
97. *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 128, 8 July 2003; *Giacomelli v. Italy*, no. 59909/00, § 83, 2 November 2006 and *Lemke v. Turkey*, no. 17381/02, § 41, 5 June 2007.
98. *Tătar v. Romania*, no. 67021/01, 27 January 2009.

## Access to justice

**Where individuals consider that their interests or their comments have not been given sufficient weight in the decision-making process, they must have a right to appeal to the courts against any relevant decision, act or omission.**[99] The Court has most often derived this right from Article 6 which guarantees the right to a fair trial[100] or from Article 13 which guarantees an effective remedy to persons with an arguable claim that their Convention rights have been violated. I will only focus here on Article 6 and the determination of civil rights and obligations.

In *Zander v. Sweden*,[101] the Court recognised that the protection under Swedish law for landowners against the pollution of their water wells constituted a "civil right". Since it was not possible for the applicants to have the government's decision reviewed by a tribunal, the Court found a violation of Article 6.

In a number of cases, **the Court has also recognised that an enforceable right to live in a healthy and balanced environment constitutes a "civil right" if it is enshrined in national law**.[102] This was the case for example in *Taşkın and Others v. Turkey*.[103] Here, the Court found a violation of Article 6 on the ground that the authorities had failed to comply within a reasonable time with an administrative court judgment, later confirmed by the Turkish Supreme Administrative Court, annulling a mining permit by reason of its adverse effects on the environment and human health.[104]

## *Actio popularis* and the rights of NGOs

**The Court has always underlined that the legal standing in Strasbourg is only for those specifically affected by environmental harm. An *actio popularis* to protect the environment is not allowed by the Court**.[105]

In Ünver *v. Turkey,*[106] the applicant had a house with a panoramic view over the sea. This feature was lost due to intensive illegal construction in the area. The applicant succeeded in obtaining judicial demolition orders in respect of the developers but he failed in having these orders enforced. The applicant brought his application to the Court, restating his wish to ensure the protection of the natural beauty of the area in question for the benefit of the public in general. The Court rejected his application, finding that, notwithstanding the applicant's particular interest to preserve

99. *Giacomelli v. Italy*, no. 59909/00, § 83, 2 November 2006; *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 128, 8 July 2003 and *Taşkın and Others v. Turkey*, no. 46117/99, §§ 118 and 119, 10 November 2004.
100. *Golder v. the United Kingdom*, no. 4451/70, §§ 28-36, 21 February 1975.
101. Zander v. Sweden, no. 14282/88, 25 November 1993.
102. *Balmer-Schafroth and Others v. Switzerland [GC],* no. 22110/93, § 33, 26 August 1997; Athanassoglou and Others v. Switzerland [GC], 27644/95, § 44, 6 April 2000; and Taşkın and Others v. Turkey, no. 46117/99, § 90, 10 November 2004.
103. *Taşkın and Others v. Turkey,* no. 46117/99, §§ 130-134, 10 November 2004 and also Öçkan and Others v. Turkey, no. 46771/99, § 52, 28 March 2006.
104. *Taşkın and Others v. Turkey*, no. 46117/99, §§ 135 and 138, 10 November 2004.
105. *Ünver v. Turkey* (dec.), no. 36209/97, 26 September 2000; *Kyrtatos v. Greece*, no. 41666/98, §§ 46 and 53, 22 May 2003; and *Valentina Viktorovna Oglobina v. Russia (dec.), no. 28852/05,* §§ 20-22 and 28, *26 November 2013*.
106. *Ünver v. Turkey (dec.),* no. 36209/97, 26 September 2000.

his neighbourhood from urban development, the outcome of the proceedings was not directly decisive of any of his private rights. In particular, there was no pecuniary interest at stake as the applicant had never asserted that the development had a negative effect on the value of his property.

**The Court therefore considers that Article 6 is not applicable where the right invoked by the applicants exists merely as a procedural right under administrative law while their action is, in substance, an *actio popularis*.**

**The Court also rejected applications in which legal entities relied on a Convention right – such as to respect for private life or for home -, which is inherently attributable to natural persons only**.[107]

**Environmental associations which are entitled to bring proceedings in the national legal system to defend the interests of their members may, however, invoke the right of access to a court where they seek to defend the interests of their members.** The Court ruled in this vein in the case of *Gorraiz Lizarraga and Others v. Spain*, in the context of the impacts of a hydroelectric dam's construction on the personal assets and lifestyles of the residents forming the association.[108]

**Environmental-protection associations as such can rely on the protection of Article 6 where there is a sufficient link between the "civil right" which the association is claiming and its right to enable the public to be informed and to participate in the decision-making process** – for example, in the context of activities dangerous to public health and the environment. The Court may allow such applications even where the purpose of the impugned proceedings was fundamentally to protect a general interest.[109]

## Conclusions

I would like to conclude my presentation by saying that a number of applications concerning participatory rights have recently been lodged with the Court. The Court will therefore be called to decide on various important issues. They may be quite specific, for example does the right to information comprise the right to challenge in a court, the veracity of the information provided by the State in the context of the assessment of risks stemming from a dangerous activity? They may also be of a more general nature, for example does Article 6 of the Convention entail a right to access a court to challenge a air quality or climate mitigation plan where domestic law does not give such an option for the public concerned?

107. *Federation of Heathrow Anti-noise Group v. the United Kingdom*, (dec.), no. 9310/81, 15 March 1984; *Association des Résidents du Quartier Pont Royal, la commune de Lambersart and Others v. France* (dec.), no. 18523/91, 8 December 1992; *Asselbourg and 78 others and Greenpeace Association-Luxembourg v. Luxembourg* (dec.), no. 29121/95, ECHR 1999-VI; (dec.), no. 29197/95, 29 June 1999; *L'Association des Amis de Saint-Raphael et de Frejus and Others v. France*, no. 45053/98, 29 February 2000; and *Greenpeace e. V. and Others v. Germany* (dec.), no. 18215/06, 12 May 2009.
108. *Gorraiz Lizarraga and Others v. Spain*, no. 62543/00, §§ 46 and 47, 27 April 2004.
109. *Collectif national d'information et d'opposition à l'usine Melox – Collectif Stop Melox and Mox v. France*, no. 75218/01, 12 June 2007; contrast with Lesoochranarske zoskupenie Vlk, § § 77, 78, and 88.

# Participatory rights under the Aarhus Convention – more important than ever

**Fiona Marshall**
Environmental Affairs Officer – Secretary to the Compliance Committee, Aarhus Convention secretariat, United Nations Economic Commission for Europe

Good morning distinguished Judges and participants.

For many members of the public, talk of international human rights obligations seem very far removed from their day to day reality. Visions of out of touch diplomats and academics meeting to engage in endless talks in the name of "fighting injustice" and "saving the planet". What possible relevance could idealistic notions like participatory rights have for people's day-to-day lives?

In my time this morning, I would like to share with you some examples of the concrete difference that the clear and detailed binding rights in the Aarhus Convention make for people's health and wellbeing and for environmental protection, while fighting injustice and corruption along the way.

In fact, in this time of climate emergency, mass biodiversity loss, political turmoil, economic recession and increasing inequality, the Aarhus Convention's dynamic protections for the environment and human rights are more important than ever.

I would like to thank the Council of Europe, the Court and the Government of Georgia for organizing today's prestigious event. I would also like to thank the Government of Georgia for making human rights and environmental protection key priorities during its chairmanship of the Committee of Ministers of the Council of Europe.

For those of you who do not already know, the Aarhus Convention was adopted in 1998 in the Danish city of Aarhus – hence its name – and it entered into force in 2001. To date, it has 47 Parties, spanning countries from Western Europe to Central Asia. This includes countries from a wide variety of political systems and legal traditions. It also includes countries with some of the highest GDP in the world and some of the lowest.

Of particular pertinence for today's event, 41 of the 47 Parties to the European Convention on Human Rights (ECHR) are also Parties to the Aarhus Convention. Thus, 41 of the ECHR's Parties are already bound to grant their public the detailed procedural rights set out in the Aarhus Convention.

At the moment, the Aarhus Convention is the only legally binding international instrument on procedural environmental rights in force. However, hopefully that will soon change. Following Argentina's ratification on 25 September 2020, the Escazu Agreement is now only one ratification short of the eleven it needs to enter into force.

Unlike the Escazu Agreement, which is only open to countries from Latin America and the Caribbean, the Aarhus Convention is open to accession globally by any UN member State. At next year's seventh session of the Meeting of the Parties, in October 2021, the Convention is expected to welcome its first Party from the African region, Guinea-Bissau.

The objective of the Aarhus Convention is set out in its article 1. In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of the Convention. The Convention's obligations are primarily structured around these three pillars.

Article 4 of the Convention requires each Party to make environmental information available upon request and sets down specific requirements on how requests are to be dealt with.

Article 5 requires that public authorities collect, and disseminate to the public, environmental information relevant to their functions. Article 5 also requires that, in the event of an imminent threat to human health or the environment, all information held by a public authority which could enable the public to take measures to prevent or mitigate harm is disseminated immediately to members of the public who may be affected.

Concerning public participation in decision-making, article 6 of the Convention requires early and effective opportunities to participate in decision-making on whether to permit one of the activities listed in annex I to the Convention, as well as any activity required to undergo an environmental impact assessment procedure under national law.

Article 7 requires Parties to make appropriate provisions for the public to participate during the preparation of plans and programmes related to the environment.

Article 8 requires Parties to strive to promote effective public participation during the preparation of regulations and other generally applicable legally binding rules that may have a significant effect on the environment.

The Convention's requirements for access to justice are set out in article 9 of the Convention. Pursuant to article 9(4), all the review procedures referred to in article 9 must provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.

In addition to the three pillars, article 3 of the Convention sets out a number of other important obligations. Article 3(9) makes clear that the public is entitled to have access to information, to participate in decision-making and to have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile. This is a fundamental principle in the Convention – since environmental impacts do not stop at national borders.

Article 3(4) requires Parties to provide for appropriate recognition of and support to associations, organizations and groups promoting environmental protection. Article 3(7) imposes a binding obligation on Parties to promote the principles of the Convention in any international forum in matters relating to the environment.

A, sadly increasingly, important provision is article 3(8) which requires Parties to ensure that persons seeking to exercise their rights under the Convention are not persecuted, harassed or penalized in any way for their involvement. At the upcoming 24th meeting of the Working Group of the Parties on 28-29 October 2020, the Parties will discuss a proposal to establish a rapid response mechanism under the Convention to protect environmental defenders.

I would now like to share a few examples of the concrete difference that binding participatory rights make for human rights and the environment, drawing upon recent cases of the Aarhus Convention Compliance Committee:

## Access to information – Slovakia

Communication ACCC/C/2013/89 (Slovakia) concerned access to information in the context of decision-making to extend the Mochovce nuclear power plant. The Slovak Nuclear Regulatory Authority's Directive on Sensitive Information set out a list of types of information deemed to be "sensitive" and for which no disclosure was possible.

In its June 2017 findings, the Committee found that a number of the types of sensitive information listed in the Directive on Sensitive Information were environmental information under the Convention. The Committee stressed that an approach where whole categories of environmental information were unconditionally declared as confidential and for which no release was possible was incompatible with the Convention.[110]

In May 2020, Slovakia informed the Committee that it had amended the Directive on Sensitive Information.[111] The Directive now states that each request for information has to be considered individually and any restrictions from disclosure have to be interpreted in a restrictive manner, considering the public interest served by disclosure and whether the information requested relates to emissions into the environment. The Compliance Committee will examine the extent to which the amended Directive fully complies with the Convention in its report to the seventh session of the Meeting of the Parties.

## Public participation – Ireland

Communication ACCC/C/2013/107 (Ireland) concerned section 42 of Ireland's Planning and Development Act. Section 42 had been introduced following the demise of the "Celtic Tiger" economy and was intended to be used to grant an extension of five years to developers with partly-completed construction projects who had run out of funds. In communication ACCC/C/2013/107, however, section 42 had been used to extend the permitted duration of a quarry for a further five years, without any opportunities for persons living by the quarry to be notified or consulted. In its August 2019 findings, the Committee found that a mechanism through which permits for activities subject to article 6 of the Convention might be extended for a period of up to five years without any opportunity for the public to participate, failed to comply with the Convention.[112]

110. ECE/MP.PP/C.1/2017/13, paras. 83 and 84.
111. Slovakia's amended Directive on Sensitive Information and all other documents related to the Committee's follow-up on communication ACCC/C/2013/89 are available at https://www.unece.org/index.php?id=46956.
112. ECE/MP.PP/C.1/2019/9, para. 94.

The Committee invited Ireland to provide a progress report by 1 October 2020 of the measures it had taken to implement the Committee's findings. Last Thursday, 1 October, Ireland wrote to inform the Committee that in the next few weeks, a legislative amendment should enter into force which would remove the possibility for any activity that was required to undergo an environmental impact assessment or appropriate assessment (and thus, was an activity subject to article 6 of the Convention) to be granted an extension under section 42. Instead, an application for new planning permission would have to be filed, which would include full public participation. The Compliance Committee will examine whether this amendment will fully meet the Convention's requirements in its report on communication ACCC/C/2013/107 to the seventh session of the Meeting of the Parties.

## Public participation – Kazakhstan

In May 2020, Kazakhstan asked the Committee for advice on how to carry out public participation procedures under the Convention during the COVID-19 pandemic. In particular Kazakhstan asked whether the holding of hearings through video conferencing during the pandemic would meet the requirements of the Convention.

The Committee adopted its advice on request ACCC/A/2020/2 (Kazakhstan) on 1 July 2020.[113] The Committee welcomed Kazakhstan's proactive approach in seeking the Committee's advice on how to ensure it might comply with the Convention's requirements during the pandemic. The Committee made clear that, even in the case of a crisis such as the COVID-19 pandemic, the binding rights set out in the Convention cannot be reduced or curtailed. Rather, if the usual modalities for ensuring effective public participation in decision-making cannot be used, any alternative means must fulfil the requirements of the Convention.[114]

## Access to justice – European Union

In 2008, ClientEarth, supported by a number of other NGOs and individuals, submitted a communication to the Compliance Committee alleging that, by requiring individuals and NGOs to demonstrate a "direct and individual concern" to have standing to challenge decisions of EU institutions before the EU courts, the EU failed to comply with article 9 of the Convention.

In Part I of its findings on communication ACCC/C/2008/32 (European Union),[115] adopted in 2011, the Committee found that if the jurisprudence of the EU courts were to continue, unless fully compensated for by adequate administrative review procedures, the EU would fail to comply with article 9(3) and (4) of the Convention. The Committee refrained from examining whether the Aarhus Regulation met the requirements of the Convention pending the EU courts' decision in the *Stichting Milieu* case[116].

113. The Committee's advice, together with Kazakhstan's request and all other related documents, are available at: https://www.unece.org/index.php?id=54491.
114. Committee's advice on request ACCC/A/2020/2, para. 16.
115. ECE/MP.PP/C.1/2011/4/Add.1, para. 94.
116. *Stichting Natuur en Milieu and Pesticides Action Network Europe v. Commission,* T-338/08.

In 2015, ClientEarth informed the Committee that the Court of Justice had issued its judgment on the *Stichting Milieu* case.

In its March 2017 findings on communication ACCC/C/2008/32 (European Union) (part II),[117] the Committee held that, having considered the main jurisprudence of the EU courts since part I, there had been no new direction in that jurisprudence that would ensure compliance with the Convention and that the Aarhus Regulation did not correct or compensate for the failings in the jurisprudence. Accordingly, the Committee found that the Party concerned failed to comply with article 9(3) and (4) of the Convention with regard to access to justice by members of the public.

The EU's final progress report prior to the seventh session of the Meeting of the Parties was due on 1 October 2020.[118] In its progress report of 30 September 2020, the EU stated that the Commission has commenced work towards the adoption of a proposal to amend the Aarhus Regulation in order to improve access to administrative and judicial review at the EU level for citizens and NGOs who have concerns about the legality of decisions with effects on the environment. The EU stated that it aimed to adopt the proposal and accompanying communication within the shortest possible timeframe.

Assuming the amendment to the Aarhus Regulation is indeed adopted in time, the Committee will examine whether it meets the Convention's requirements in its report to the seventh session of the Meeting of the Parties.

## Concluding remarks

In closing, I would like to look forward to how, despite the present challenging times, we can ensure the detailed participatory rights of the Aarhus Convention are ensured, and strengthened, into the future,

First, I would like to echo the call by the Council of Europe Commissioner for Human Rights, in February 2020, for the six Council of Europe member states that have not yet ratified the Aarhus Convention to do so.

Given the global importance for human rights and environmental protection of the Aarhus Convention's participatory rights, I encourage accession to the Convention by any UN member state globally.

In recognition that the Aarhus Convention's rights are even more important during times of turmoil and economic recession, I invite assistance and cooperation from other international organizations to support Parties to fully meet their obligations under the Convention. In this regard, I express my appreciation again to the Council of Europe, the Court and the Government of Georgia for providing us with today's valuable platform for exchange.

Thank you.

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117. ECE/MP.PP/C.1/2017/7, para. 121.
118. The Party concerned's final progress report and its legislative proposal of 14 October 2020 to amend the Aarhus Regulation, together with comments received thereon from communicants and observers, are available at: http://www.unece.org/?id=48110.

# Human right to clean and healthy air; Strategic air pollution law suits in Europe; Comments on legal standing of individuals, the role of the NGOs and effective remedies

**James Thornton**
CEO of Clientearth

and

**Ugo Taddei**
Head of Clean Air at ClientEarth

Dear Judges, Distinguished Speakers and Guests,

We are honoured to be invited to contribute to the discussion during the Human Rights for the Planet conference. Pollution, environmental degradation and climate change are human rights issues and we thank the Georgian Presidency of the Committee of Ministers of the Council of Europe and the European Court of Human Rights for co-organising this event and giving us the opportunity to discuss these important topics from a human rights perspective.

**Environmental harm is distributed harm.** The greater the harm, the more people are affected. Very often, it is irrevocable harm. Therefore, *locus standi* needs to be broad when addressing environmental issues. This has been understood in environmental law; for example, the Aarhus Convention, extensively discussed during today's conference, gives broad access to justice. But this is not enough. Environmental law instruments, as well-conceived as they may be, are not enough. Even if all environmental laws on the planet were properly and fully implemented (and we are not there yet), we would not be able to address the most pressing environmental problems.

At the moment we operate under Environmental Law 1.0, the first generation of environmental law. This 1.0 environmental legal framework was developed in the mid 20th century to address environmental pollution as understood back then. But the problems are increasing and intensifying. Today, science informs us more accurately about the consequences of climate change and environmental degradation. Pollution seriously erodes the right to health and the right to respect for private and family life. Climate change creates serious and imminent threats to human health and life. There are no statutory laws anywhere in the world that would address adequately

the damage to humans that is arising from climate change, pollution and environmental degradation. This is where human rights could help dramatically, changing the legal framework we operate within. There is a need for an upgrade of the existing environmental law framework, to Environmental Law 2.0, which recognises the deep connection that exists between nature, climate and human rights.

It is time to acknowledge that the existing case law of the European Court of Human Rights in the area of environmental harm has already led to a *de facto* **recognition of the right to a healthy, safe and sustainable environment within the European Convention on Human Rights. We should name it explicitly.**

Despite several pronouncements made by the Court that "[n]*either Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such*"[119], that there is "*no right to nature preservation as such*"[120], nor "*an explicit right to a clean and quiet environment*,"[121] the Court has already recognised *de facto* a right to a safe and healthy environment. It derives from the following:

- on numerous occasions the Court has confirmed that there is a right to protection against environmental hazards and, in a significant number of cases, the Court found violations of Article 8 of the Convention in the context of asbestos pollution[122], industrial pollution[123], waste pollution[124] or gold mining pollution;[125]
- the Court has also found violations of procedural safeguards related to the right to a healthy environment, such as access to environmental information, participation in decision-making processes related to the environment, and access to court to seek remedies for environmental rights violations, as well as the right of environmental defenders to freedom of expression, assembly and association;[126]
- the European Court on several occasions has referred explicitly to a right to a healthy environment, for example in *Tatar v. Romania*[127] and in *Di Sarno and Others v. Italy*.[128]

Some of the most significant human rights violations comes from environmental degradation, pollution and climate change. In recent years, the link between the environment and the enjoyment of fundamental human rights has come into sharp

119. *Kyrtatos v. Greece*, 41666/98, Judgment 22 May 2003, § 52.
120. *Fadeyeva v. Russia*, 55723/00, judgment 2005, § 68.
121. *Hatton and Others v. the United Kingdom* [GC], 36022/97, § 96.
122. *Brincat and Others v. Malta*, 60908/11, 62110/11, 62129/11, Judgment 24 July 2014.
123. *Băcilă v. Romanie*, 19234/04, Judgment 30 March 2010 (lead and zinc producer that released large quantities of sulfur dioxide and dust containing heavy metals, mainly lead and cadmium, into the atmosphere), *Fadeyeva v. Russia*, 55723/00, Judgment 9 June 2005 (steel-producing centre).
124. *López Ostra v. Spain*, 16798/90, Judgment 9 December 1994.
125. *Tătar v. Romania*, 67021/01, Judgment 27 January 2009 (gold and silver was extracted from low-grade ore by spraying it with sodium cyanide).
126. *Guerra and Others v. Italy* [GC], 14967/89, Judgment 19 February 1998; *Grimkovskaya v. Ukraine*, 38182/03, Judgment 2011; *Taşkın and Others v. Turkey*, 46117/99, Judgment 10 November 2004; *Hardy and Maile v. the United Kingdom*, 31965/07, Judgment 14 February 2012; *Costel Popa v. Romania*, 47558/10, Judgment 26 April 2016; *Mamère v. France*, 12697/03, Judgment 7 November 2006.
127. *Tătar v. Romania*, 67021/01, § 107.
128. *Di Sarno and Others v. Italy*, 30765/08, Judgment 10 January 2012, § 110.

focus. Governments and society now have a clearer understanding of how environmental degradation and climate change seriously erode the right to health, the right to clean and healthy air and water, and the right to respect for private and family life and the right to life itself. The Court's case law is consistent with an increasing awareness of the interconnection between the environment and human rights. The Court has stated many times that where an individual is affected by environmental hazards[129] reaching a certain minimum level[130], an issue will arise under Article 8.[131] Under the umbrella of Article 8 of the Convention we can recognise various environmental hazards that threaten human rights, implying a right to a healthy, safe and sustainable environment.

The time has come for the Court to take a stronger and firmer stand, using the doctrine of dynamic interpretation to identify clearly that the right to a healthy, safe and sustainable environment belongs to the rights protected by the Convention. This would be consistent also with the European consensus on that matter. As shown by a recent study of the UN Special Rapporteur on Human Rights and Environment, the right to healthy environment has been recognised by almost all 47 Member States of the Council of Europe, leaving no doubts about the European consensus regarding the need to protect the right to healthy environment.[132] By recognising this right, the Court could connect human rights law and environmental law in a deep and fundamental way. The result would be the evolution of both arenas of law in a positive way that would benefit both.

We would like to draw your attention to **concrete examples of obstacles faced by those doing legal work to ensure clean and healthy air. We see how human rights could fill the gap within the current environmental legal framework.**

Air pollution is a human rights issue. You cannot breathe dirty air and enjoy a full and healthy life.

Where States are failing to clean up the air in our cities, it is down to courts to provide protection of people's right to healthy air. Litigation by civil society in the European Union in recent years has been a key driver to make our cities cleaner and healthier. But there are still far too many barriers to clean air litigation all across Europe. That is why we believe that the role of the European Court of Human Rights can be essential to ensure a full system of protection for people affected by environmental pollution.

Air pollution is an invisible killer. It is the biggest environmental risk to human health globally. For this reason, the European Union, as early as the 1980s, has introduced air quality legislation. Currently, the main legal instrument is the **Air Quality**

129. *Grimkovskaya v. Ukraine*, 38182/03, Judgment 2011, § 58.
130. *"The assessment of that minimum level is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance and its physical or mental effects on the individual's health or quality of life"*, see *Grimkovskaya v. Ukraine*, 38182/03, Judgment 2011, § 58.
131. *Hatton and Others v. the United Kingdom* [GC], 36022/97, Judgment 2003, § 96; *Fadeyeva v. Russia*, 55723/00, Judgment 2005, §§ 68-69.
132. UN Special rapporteur on environment and human rights, Annual thematic report: Recognition of the Right to a Healthy Environment in Constitutions, Legislation and Treaties, A/HRC/43/53, **Annex VI – Eastern Europe** and **Annex VIII – Western Europe and Others**.

**Directive**.[133] It set binding rules to limit the maximum levels of pollutants in the air to be achieved in 2005, 2010 or 2015 depending on the specific pollutant. Whenever there are exceedances of air quality standards, authorities are obliged to adopt air quality plans with the necessary measures to achieve compliance in the shortest time possible. However, more than 10 years after the introduction of this legislation, there are still systemic and widespread breaches of air quality standards across the European Union.[134] In some cases, authorities are delaying compliance even beyond 2030. The impacts are devastating. An estimate of 400,000 people die early in Europe every year because of air pollution. Governments are clearly failing their people. This is the reason why we need courts to step in and provide effective protection.

**Since 2010, ClientEarth has used the law as a tool to tackle illegal and harmful levels of air pollution across Europe.**

There is no access to justice provision in the Air Quality Directive. But a number of key decisions from the Court of Justice of the European Union (CJEU) have paved the way for litigation before national courts.[135] A first precedent came from a case brought by an individual in Munich in 2007. Mr Janecek was a concerned citizen who lived close to a very polluted street and decided to challenge the local air quality plan and ask for more efficient measures to tackle air pollution. Later on, the CJEU issued three other rulings in cases ClientEarth brought and supported concerning the right of individuals and NGOs to challenge air quality measures in the United Kingdom[136], in Germany[137] and in Belgium.[138] As a result of this litigation work, the CJEU has widened standing before national courts and reaffirmed their central role in air quality matters.

It is interesting to note that, in all these cases, **the CJEU realised that there is a strict connection between environmental quality standards and human health. It was the focus on human health that led the CJEU to fill the gap on access to justice, providing to citizens the tools to protect their rights before national courts.** We draw your attention in particular to the Opinion of Advocate General Kokott in Case C-723/17 *Craeynest*.[139] AG Kokott stated that "*the rules on ambient air quality (…) are based on the assumption that exceedance of the limit values leads to a large number of premature deaths. (…) therefore* [they] *put in concrete terms the Union's obligations to provide protection following from the fundamental right to life under Article 2(1) of the Charter*".[140]

133. Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe.
134. European Environmental Agency, Air Quality in Europe, report 10/2019 https://www.eea.europa.eu/publications/air-quality-in-europe-2019
135. C-237/07 *Janecek*; C-404/13 *ClientEarth*; C-723/17 *Craeynest and Others*.
136. *C-404/13 ClientEarth*.
137. More than 30 various cases across Germany, including Case *C-752/18 Deutsche Umwelthilfe*.
138. *C-723/17 Craeynest and Others*.
139. Opinion of Advocate General Kokott delivered on 28 February 2019 in Case C-723/17 *Lies Craeynest and Others*.
140. Opinion of Advocate General Kokott delivered on 28 February 2019 in Case C-723/17 *Lies Craeynest and Others*, paragraph 53.

Using these precedents, ClientEarth has been helping citizens and NGOs to fight for clean air before national courts in almost 80 cases across more than 10 EU member states.

We have secured important successes. Our court victories in the United Kingdom and Germany, for instance, have forced authorities to adopt new air quality plans and tackle pollution from diesel vehicles in cities.

However, in many countries the case law of the CJEU is not enough. Too often, people are not able to assert their right to clean and healthy air in court. For example, national rules in Poland and Bulgaria deny standing to affected individuals and NGOs.[141] And the Supreme Courts in both countries are refusing to apply EU law and allow access to justice in this crucial field. In one of these cases the claimant has already come to this Court to highlight the barrier in access to court. We are calling on the European Court of Human Rights to be ready to listen to the voice of those people who are denied a say before national courts.

We are aware of the important rulings that the Court has already delivered in matters of environmental hazard.

**Making use of the doctrine of dynamic interpretation, the Court can take this jurisprudence further and have a tangible impact on improving the system of judicial protection against environmental human rights violations**. We especially see three important areas in which we call upon the Court to provide support: interpretation of the victim status; the role of NGOs; and the assessment of effective remedies.

We call on the Court to allow its interpretation of **victim status** and risk of harm to evolve in light of the precautionary principle and principle of prevention. Environmental pollution is often a collective (as opposed to individual) problem. As such, it broadly affects a huge number of people. Environmental pollution causes slow onset health impacts. Kids that breathe polluted air today will suffer impacts throughout their lives, but it is hard to predict when this will happen. It will be hard to establish clear causal links. When the damage to an individual materialises, it is often too late for a remedy. The Court seems to understand this. For example, in *Fadeyeva v. Russia*[142] the Court stated that "*the very strong combination of indirect evidence and presumptions makes it possible to conclude that the applicant's health deteriorated as a result of her prolonged exposure to the industrial emissions*".[143] And in Cordella and others v. Italy[144] it said expressly that "*pollution (…) becomes potentially dangerous for the health and well-being of those exposed to it*".[145]

When exposed to pollution, individuals should be able to claim breaches of their human rights before suffering the inevitable harm and without it being necessary to show damage, taking a precautionary and preventive approach. It is consistent with

141. The European Commission called on Bulgaria and Poland to remove barriers to access to justice for citizens and environmental organisations in relation to air quality plans https://www.clientearth.org/latest/press-office/press/eu-issues-legal-warning-as-bulgarian-and-polish-governments-block-right-to-clean-air/
142. Fadeyeva v. Russia, 55723/00, Judgment 9 June 2005.
143. Fadeyeva v. Russia, 55723/00, Judgment 9 June 2005, § 88.
144. Cordella and others v. Italy, 54414/13, 54264/15, Judgment 24 January 2019, §§ 102-105.
145. Cordella and others v. Italy, 54414/13, 54264/15, Judgment 24 January 2019, § 104.

the Court's interpretation of potential victim status. The potential victim is a person who would be affected or is potentially affected. The term has been developed and used to address general legislation that has discriminatory effect[146], or legislation that has a general nature and does not have individual measures for implementation, but where the applicant is required either to modify his conduct or risk prosecution, or if he is a member of a class of people who risk being directly affected by the legislation.[147] It has also been used in a large number of non-refoulement types of cases where the potential victim is an alien facing removal which, if enforced, would expose him/her to a risk of torture, ill-treatment or a violation of his right to respect for private and family life.[148] We are convinced that this is applicable to environmental degradation, pollution and climate change issues. The effect of these conditions will materialise and the science is consistent on this. What might be difficult to predict is the scale of the consequences and to what extent certain individuals will be affected. But this is exactly what the potential victim status addresses.

Climate change and environmental degradation are complex and highly technical subjects. Individuals often lack the technical and financial means to engage in long-term environmental litigation. It takes a very motivated individual (such as Mr. Janecek, who had to keep living for several years in the most polluted road in Munich) to continue to litigate these issues. Without the help of NGOs, individuals face insurmountable challenges. It is time for the Court to fully embrace the **key role played by NGOs** for environmental protection and accept that, in the context of the exhaustion of domestic remedies, public interest litigation by environmental NGOs can exempt concerned individuals from bringing their own domestic proceedings.[149] There is also a need to allow NGOs to bring applications to the Court independently for violations of the right to a healthy, safe and sustainable environment. This would make the Court's observation on the role of the environmental NGOs fully operational and alive.[150]

**What are effective remedies in environmental pollution cases?** Once more, the importance of the precautionary and prevention principle becomes evident. These principles form a central part of the environmental law framework, because environmental harm is irrevocable harm. The lesson for courts handling environmental human rights issues is that effective remedies must come down to taking adequate measures to prevent, cease, mitigate or repair the harm caused by environmental pollution or climate change. When an individual may be able to claim monetary compensation at national level, this alone is not an adequate remedy – as they would still remain exposed to environmental hazards. What is essential is whether

146. *Burden v. the United Kingdom* [GC], 13378/05 § 33-35.
147. *Tănase v. Moldova* [GC], 7/08, § 104.
148. *Soering v. the United Kingdom*, 14038/88, Judgment 7 July 1989, § 90.
149. Mutatis mutandis *Kósa v. Hungary* (dec.), 53461/15, 21 November 2017, § 56-57, a contrario § 59, and further development of principles established in case *Gorraiz Lizarraga and Others v. Spain*, 62543/00, Judgment 27 April 2004, §§ 37-39.
150. *Collectif national d'information et d'opposition à l'usine Melox – Collectif stop Melox et Mox v. France* (dec.), 75218/01, decision 28 March 2008, § 4: "*La Cour estime cependant qu'une telle approche ne serait pas en phase avec la réalité de la société civile actuelle, dans laquelle les associations jouent un rôle important, notamment en défendant certaines causes devant les autorités ou les juridictions internes, particulièrement dans le domaine de la protection de l'environnement*".

concerned citizens can bring legal actions to ensure that the responsible authorities adopt the necessary measures that will tackle air pollution, environmental degradation or climate change and prevent further impacts on their health. Similar statement has been made by the CJEU in case *C-752/18 Deutsche Umwelthilfe* that concerned implementation of the final and binding judgment by the public authorities in Germany. The CJEU stressed that the right to an effective remedy in the area of air pollution is very important because failure to adopt the measures required by that directive would endanger human health.[151]

The Court will inevitably face this issue in many situations when it will be called upon to assess if the applicants had effective remedies at the national level at their disposal or what, if any, general measures the Court can indicate in the final judgment.

## Conclusion

To conclude, we know that environmental degradation and human rights are strictly related. This awareness can support positive developments both in the environmental and human rights worlds. Environmental and human rights law should not be considered two completely separate universes. They need to be in dialogue and influence each other.

It was the awareness about the human rights impact of environmental pollution that helped the development of the case law of the CJEU, fill the gap about access to justice in air quality matters in the EU.

We believe that also human right venues can be inspired by the application of environmental principles. The European Court of Human Rights has the possibility to use the doctrine of dynamic interpretation of key concepts under the Convention in light of the present circumstances in order to provide people stronger tools to protect their environmental human rights. This is not revolutionary. This is just a gradual evolution of the existing case law of the Strasbourg Court. But it would be invaluable to millions of people.

On this note we would like to finish and thank one more time to the Georgian Presidency and the European Court of Human Rights for letting us share our views concerning environmental human rights legal issues. We hope that this discussion will contribute to a better response to the current challenges.

Thank you very much.

151. *C-752/18 Deutsche Umwelthilfe*, § 38.

# Air Pollution and Environmental Disasters – Court Rulings and their Enforcement

# "Air pollution and risk assessment for natural disasters under the ECHR. The notions of "civil right" and specific and imminent danger under Article 6."

**Tim Eicke**
Judge of the European Court of Human Rights

## Introduction

The topic I have been asked to address this afternoon is, at least on first impression, a rather narrow and technical one. I am asked to consider the developments, in so far as there have been any, of the Court's approach to the concept of "civil right" under Article 6 § 1 of the Convention and the need to show a serious, specific and imminent danger in order to bring a legal dispute within the scope of that concept and, therefore, within the scope of application of Article 6 § 1.

That first impression, however, may be deceptive. After all, it is worth remembering that:

First, for reasons I will briefly come to later, the reach of the need to show a serious, specific and imminent danger to an identified or identifiable applicant goes well beyond the application *ratione materiae* of Article 6 § 1 but also plays a role – sometimes a decisive role – both in the context of establishing the "victim" status required under Article 34 of the Convention to confer on this Court the jurisdiction or competence to entertain the application in the first place, as well as in establishing the existence of a positive obligation under Articles 2, 3 and arguably 8 of the Convention to protect the lives and/or physical integrity of those within its jurisdiction.

Secondly, and this flows directly from the first, this question therefore has the potential of being the gateway, both in procedural as well as in substantive terms, to bringing a successful application before this Court under Article 34 of the Convention and has frequently been criticised, both internally as well as externally, as having been applied too narrowly and/or too strictly to enable the Court to act as an effective "tool" in the armoury of those seeking to advance environmental goals through human rights litigation.

I hope you will understand that, for reasons of time as well as judicial prudence, I will limit myself to the narrow topic I have been asked to address. I will however do this by casting my net wider than the case-law in relation to air pollution and risk assessment for natural disasters but look across the range of decisions and judgments in the broader environmental context in which this issue has been considered by the Court. In fact, a survey of the Court's case-law shows that few if any of the cases in which this issue has been discussed arose in this context.

That said, the continuing importance of this narrow issue in and beyond this context is not in doubt. After all, there is an increasing amount of environmental litigation before the domestic courts and, as some of recent decisions such as the judgment of the Swiss Federal Court in *Verein KlimaSeniorinnen Schweiz*[152] and the dicta – ultimately *obiter* – of the Chief Justice of Ireland in *Friends of the Irish Environment v the Government of Ireland*[153] have shown, the question of standing before the domestic courts to bring human rights based environmental challenges, and the procedural rights provided by Article 6 § 1 of the Convention once before those courts, remain live issues before the domestic courts and even there continue to be the subject to controversial debate and varying resolutions; a factor which might be said to point to an absence of a European consensus even on this narrow technical issue.

Finally, by way of introduction, I also want to make clear that there is a limit on what I can say in terms of the direction in which the case-law of this Court might develop or go in future on this issue. After all, not only might one or more of these cases ultimately make their way to this Court, but – as you will all be aware – there already are a number of relevant applications currently pending before this Court, perhaps most prominently the recent application in *Youth for Climate Justice v. Austria and 32 other Member States*, lodged on 2 September this year by six young Portuguese nationals.

## The issue

So, let us start at the beginning.

In March 1991, Mrs Ursula Balmer-Schafroth together with nine other applicants, who lived within a radius of between 4 and 5 km from the Mühleberg nuclear power station in the Canton Bern, by reference *inter alia* to the right to life as enshrined in the Swiss constitution and backed up by a number of expert reports, lodged an objection to the indefinite extension of that power station's operating licence. That objection was rejected by the Swiss Federal Council on 14 December 1992.

In its judgment, the Grand Chamber[154] restated[155] the long established requirements necessary for Article 6 § 1 to be engaged in its "civil" limb, namely:

(1) there must be a dispute ("*contestation*" in the French text);

(2) this must be over a "right" which can be said, at least on arguable grounds, to be recognised under domestic law;

(3) the dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and

(4) the outcome of the proceedings must be directly decisive for the right in question; mere tenuous connections or remote consequences are not sufficient to bring Article 6 § 1 into play.

152. 5 May 2020.
153. [2020] IESC 49 (31 July 2020).
154. *Balmer-Schafroth and Others v. Switzerland,* judgment of 26 August 1997, Reports of Judgments and Decisions 1997-IV.
155. Ibid. para. 32.

Having accepted that the first three of these requirements were satisfied, the Grand Chamber went on to consider whether the dispute was, in fact, "directly decisive" for the right in question; a right the Court defined as "the right to have their physical integrity adequately protected from the risks entailed by the use of nuclear energy".[156]

The Court concluded (12:8) that it was not "directly decisive" because the applicants: "did not … establish a direct link between the operating conditions of the power station which were contested by them and their right to protection of their physical integrity, as they failed to show that the operation of Mühleberg power station exposed them **personally** to a danger that was not only **serious** but also **specific** and, above all, **imminent**. In the absence of such a finding, the effects on the population of the measures which the Federal Council could have ordered to be taken in the instant case therefore remained hypothetical. Consequently, neither the dangers nor the remedies were established with a **degree of probability** that made the outcome of the proceedings directly decisive within the meaning of the Court's case-law for the right relied on by the applicants. In the Court's view, the connection between the Federal Council's decision and the right invoked by the applicants was **too tenuous and remote**".[157]

While this conclusion may well be described as a factual assessment rather than a statement of legal principle, this approach has in the meantime been applied by the Court in declaring inadmissible a number of environmental challenges, including in its decision of 29 February 2000 in *L'association des Amis de Saint-Raphaël et de Fréjus et autres requérants v France*[158], a challenge to the construction of a tourist complex in a *zone non-urbanisée*.

Nevertheless, a very similar scenario to that confronting the Court in *Balmer-Schafroth*, came back before the Grand Chamber of the Court in *Athanassoglou and Others v. Switzerland*.[159] This was, again, a challenge based on Article 6 § 1 of the Convention to the absence of a tribunal competent to determine the applicants' objection to the indefinite extension of the operating licence of – in this case – the Beznau nuclear power station. The applicants in that case argued that while the context was identical to that in *Balmer-Schafroth*, in their case the grant of the operating licence "effectively 'determined' their civil rights to the protection of their property and their physical integrity".[160] They further asked the Court "to clarify its case-law in so far as it required proof of a serious, specific and imminent danger as a condition for the applicability of Article 6 § 1"; suggesting a distinction between, on the one hand, the procedural Convention right to examination by a domestic court of the governmental decision to grant an extension of the operating licence and, on the other hand, the possible right under the substantive national law to have the nuclear power plant closed.

Despite these submissions, the Grand Chamber (12:5) again decided that Article 6 § 1 was not applicable because the "facts of the present case provide an insufficient basis for distinguishing it from the *Balmer-Schafroth and Others* case. In particular, it does not perceive any material difference between the present case and the *Balmer-Schafroth*

156. Ibid. para. 33.
157. Ibid. para. 40, my emphasis.
158. No. 45053/98.
159. No. 27644/95, ECHR 2000-IV.
160. Ibid. para. 38.

*and Others* case as regards the personal circumstances of the applicants. In neither case had the applicants at any stage of the proceedings claimed to have suffered any loss, economic or other, for which they intended to seek compensation".[161] The Court went on to record[162] that, in any event, "the applicants … appear to accept that they were alleging not so much a specific and imminent danger in their personal regard as a general danger in relation to all nuclear power plants; and many of the grounds they relied on related to safety, environmental and technical features inherent in the use of nuclear energy".

Even if these two cases are nowadays less frequently cited as authorities for the Court's approach to the applicability of Article 6 § 1 in this context, it is clear that to date they provide the most authoritative basis for the Court's subsequent approach to this issue.

Before considering developments since, it may be useful to just see what we can draw from the reasoning in these two Grand Chamber judgments to help understand the Court's concerns and motivation.

The first point to note is that the Court rejected the submission by the Swiss government in *Balmer-Schafroth* that "what was in issue was scarcely of a legal nature but was, on the other hand, highly technical".[163] In fact, the Court expressly confirmed that the fact that "the decision to be taken necessarily had to be based on technical data of great complexity … does not in itself prevent Article 6 being applicable".[164]

The second point to note is that the Court was clearly concerned with the separation of powers (and consequently what is saw as an expression of the principle of subsidiarity) and with avoiding what has frequently been referred to as the "judicialisation of public administration".[165] In *Athanassoglou* the Court expressly noted, and rejected, the suggestions that it was possible to "to derive from Article 6 § 1 of the Convention a remedy to contest the very principle of the use of nuclear energy, or at the least a means for transferring from the government to the courts the responsibility for taking, on the basis of the technical evidence, the ultimate decision on the operation of individual nuclear power stations".[166] On the contrary, the Court underlined that the decision "how best to regulate the use of nuclear power is a policy decision for each Contracting State to take according to its democratic processes. Article 6 § 1 cannot be read as dictating any one scheme rather than another".[167]

The third point of note is the Court's concern – not as such expressed in the judgments but accepted as a common and "obviously prudent" aim even by the dissenters in *Athanassoglou* – to avoid either the domestic courts (or this Court) being confronted with an *actio popularis*.

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161. Ibid. para. 51.
162. Ibid. para. 52.
163. Ibid. para. 35.
164. *Ibid*. para. 37.
165. A risk first identified in the context of social security legislation in the Joint Dissenting Opinion of Judges Ryssdal, Bindschedler-Robert, Lagergren, Matscher, Sir Vincent Evans, Bernhardt and Gersing in *Feldbrugge v. the Netherlands*, 29 May 1986, Series A no. 99 at § 15 and more recently by the UKSC in *Poshteh v Royal Borough of Kensington and Chelsea* [2017] UKSC 36.
166. Ibid. para. 53.
167. Ibid. para. 54.

An indication of the internal debates within the Court can be seen from the Dissenting Opinions attached to the two Grand Chamber judgments. In the Dissenting Opinion of Judges Costa, Tulkens, Fischbach, Casadevall and Maruste in *Athanassoglou*, the dissenters suggest that, in fact, it would be more appropriate to allow the domestic courts to decide whether a complaint is an *actio popularis* and that for this Court to engage in such an exercise in fact amounted to a reversal of subsidiarity.

In the earlier *Balmer-Schafroth* Judge Pettiti (joined by six of his colleagues) referred to the Court's acceptance of evidence merely showing a "potential risk" when accepting an applicant's "victim" status under Article 34 of the Convention in the context of complaints relating to secret surveillance (*Klass and Others v. Germany* judgment of 6 September 1978, Series A no. 28) as the better approach to take and expressed the wish that it would be "the judgment of the European Court that caused international law for the protection of the individual to progress in this field by reinforcing the 'precautionary principle' and full judicial remedies to protect the rights of individuals against the imprudence of authorities".

I note in passing that the arguments advanced and authorities relied on by the dissenting opinions in both cases highlight the close inter-relationship between the issue I am addressing today and the issue of "victim" status under Article 34 of the Convention.

One further thing: while it may on its face seem possible to group these cases together (and dismiss their broader precedential value) by noting that they were both concerned with the (implied) right of access to court rather than with the conduct and fairness of the underling proceedings, I would just note at this stage that in the (in-) admissibility decision in *L'association des Amis de Saint-Raphaël et de Fréjus et autres requérants*, adopted in the period between these two judgments, the applicants had, in fact, had access to court and their complaint was about the fairness of the proceedings as well as the consequent alleged interference with their rights under Article 8 of the Convention and Article 1 of the First Protocol to the Convention.

Bearing in mind the background of these two Grand Chamber judgments, let us consider what has happened since.

In 2004, a Chamber of the Court considered the issue again in *Gorraiz Lizarraga and Others v. Spain*,[168] a case concerning the construction of a dam in Itoiz (Navarre province) which would result in the flooding of three nature reserves and a number of small villages, including Itoiz itself, where the applicants lived. The applicants in that case included an association specifically set up *inter alia* to "to coordinate its members' efforts to oppose construction of the Itoiz dam". In this case, which was again concerned not with the right to access to court but with the fairness of the proceedings which had taken place, the Court – without any express engagement with the two earlier Grand Chamber judgments – found Article 6 § 1 to have been – at least partially – applicable. In so finding, the Court:

(1) drew a clear distinction between, on the one hand, "the aspect of the dispute relating to defence of the public interest" which it confirmed again did not concern a civil right which the first five applicants could have claimed on their

168. No. 62543/00, ECHR 2004-III.

own behalf and, on the other hand "the second aspect, namely the repercussions of the dam's construction on their lifestyles and properties". It went on to note that the applicant association had complained of a direct and specific threat hanging over its members' personal assets and lifestyles which, "without a doubt … had an 'economic' and civil dimension, and was based on an alleged violation of rights which were also economic";[169] and

(2) considered that despite the "ostensibly … public-law" nature of the proceedings brought, they were, in fact, "the single, albeit indirect, means available to them for complaining of interference with their property and lifestyles".[170]

While not chronologically next, it is worth referring here to the 2006 admissibility decision in *Collectif national d'information et d'opposition à l'usine Melox – Collectif Stop Melox et Mox v. France*.[171] In that case, the applicant association complained before the domestic administrative courts seeking the annulment of the authorisation for the construction of an extension to a nuclear plant which was designed to operate on the basis of mixed oxide fuel (MOX). The Court, relying on *Gorraiz Lizarraga* identified the need for a certain flexibility in considering whether Article 6 § 1 is applicable in such circumstances and went on to hold Article 6 § 1 to be applicable despite the acknowledged fact that, unlike in *Gorraiz Lizarraga*, the applicant association was not representing the personal (economic) interests of its members but was solely concerned with the general public interest of protecting the environment. This conclusion was explained on the basis that there had been no prior public enquiry to enable citizens to gain access to all relevant environmental impact information by means of "the principle of participation" laid down in the Code Rural, the relevant provisions of EU law and/or the Aarhus Convention. It was this "right" to information and public participation which was in "dispute" and the litigation was "directly decisive" in relation to that right.

On one view – certainly in relation to litigation around the right to information and participation – this decision appears to be one of the most far reaching departures from the *Balmer-Schafroth* starting point. That said, it appears that the approach adopted in this decision has achieved very little by way of following in the subsequent case-law; this admissibility decision has only been referred to once since, namely in the judgment of the Court in 2009 in *L'Erablière A.S.B.L. v. Belgique*.[172]

That case concerned the attempted judicial review by a non-profit environmental organisation of the grant of planning permission to expand a technical landfill site; a challenge based *inter alia* on the requirements for environmental impact assessments to be carried out as required by domestic and EU law. The application was dismissed by the Conseil d'Etat on the basis of deficient pleadings and the applicants applied to this Court under Article 6 § 1. In its judgment, the Court expressly acknowledged (1) that the approach adopted in *Collectif Stop Melox et Mox* had been a "new" step for the Court[173] and (2), referring to the judgment in *Gorraiz Lizarraga*, that "the supervisory

169. Ibid. para. 46.
170. Ibid. para. 47.
171. No. 75218/01, 28 March 2006.
172. No. 49230/97, 24 February 2009.
173. Ibid. para. 26.

mechanism under the Convention excludes *actio popularis*".[174] Nevertheless, drawing these strands together, the Court considered that *Collectif Stop Melox et Mox* could be distinguished and decided that Article 6 § 1 was applicable on the arguably narrower grounds that the applicant association's "aim is limited in space and in substance, consisting in protecting the environment in the Marche-Nassogne region, a region essentially covering five small municipalities in a limited area …, all the founding members and administrators of the applicant association reside in the municipalities concerned, and can therefore be regarded as local residents directly affected by the plans to expand the landfill site. Increasing the capacity of the landfill site by more than one-fifth of its initial capacity was likely to have a considerable impact on their private life, because of the nuisance it would generate for their everyday quality of life and, in turn, on the market value of their properties in the municipalities concerned, which would be at risk of depreciation as a result".[175]

There were at least two important decisions of the Court in 2010, both being issued in December of that year but by Chambers from different Sections of the Court. Unhelpfully, it appears that they point in different (if not opposing) directions.

On 2 December 2010, the Court handed down judgment in *Ivan Atanasov v. Bulgaria*,[176] in which the applicant complained that the Supreme Administrative Court had refused to consider the merits of his application for judicial review of the grant of a licence in relation to a reclamation scheme for the tailings pond of a former copper mine having been carried out illegally. Relying squarely on the judgments in *Balmer-Schafroth* and *Athanassoglou* the Court concluded that "[m]uch like the applicants in those two cases, in his application to the Supreme Administrative Court the applicant in the instant case did not point to concrete health hazards, but complained about the reclamation scheme's hypothetical consequences for the environment and human health (…). It must therefore be concluded that the connection between the proceedings – whose sole object was the lawfulness of the decision to grant a licence allowing ET Marin Blagiev to carry and lay sludge – and the right invoked by the applicant was too tenuous".[177]

Only 14 days later, the Court returned to this issue in *Elles et al v Switzerland*,[178] this time in relation to a complaint that the proceedings in judicial review proceedings against a decision to move the applicants' children to a school outside their community. The Swiss government sought to rely on *Balmer-Schafroth* to suggest that the decision in question did not concern the applicants' individual economic or pecuniary interests but were rather "state measures based on an act of sovereignty".[179] The Court found that Article 6 § 1 was applicable on the basis that (1) in contrast to the two earlier decisions, the applicants did, in fact, have access to the domestic courts to have a determination of their claim[180] and (2) applying *Gorraiz Lizarraga*

174. Ibid. para. 25.
175. Ibid. para. 28.
176. No. 12853/03, 2 December 2010.
177. Ibid. para. 92.
178. No. 12573/06, 16 December 2010.
179. Ibid. para. 14, own translation.
180. Ibid. para. 19.

*mutatis mutandis*, the applicant had, in fact, used the single, albeit indirect, means available to them for complaining of interference with their children's' well-being.

The perhaps final case in this line of cases I should mention is the 2014 judgment in *Karin Andersson and Others v. Sweden*,[181] concerning a complaint that the applicants had been denied a fair trial with regard to their civil rights, as they had been refused a full legal review of the Government's decision to permit the construction of the railway, which was situated on or close to their properties; a decision which had significantly affected the applicants' property as well as the environment in the area concerned. Having cited only *Athanassoglou*, the Court nevertheless held that Article 6 § 1 was applicable on basis that "the applicants' domestic appeals and requests were not dismissed on the ground that they were not sufficiently concerned by the construction" and "at least ten of the applicants – of which seven have their houses and land situated outside the "corridor" – have received some form of compensation".[182]

Before I draw the strands together there is one other – and in my view, despite their reference to the case-law just discussed, distinct – line of cases I ought to draw to your attention: *Taşkın and Others v. Turkey* (2004),[183] *Okyay and Others v. Turkey* (2005)[184] and *Bursa Barosu Başkanlığı and others v. Turquie* (2018).[185] These cases all concern ultimately unsuccessful challenges to the grant of permits or licences for a gold mine, a thermal power plant or a starch mill in which the Court found Article 6 § 1 to be applicable. The reason why I have separated them out and consider them to constitute, in fact, a distinct line of authority lies in the fact that in all three cases the applicants had successfully challenged the original grant of the permit or licence before the highest domestic courts on the basis of the risk they posed to the interests of the applicants. Their complaints to this Court were, in effect, limited to an argument that, in breach of Article 6 § 1, those judgments in their favour had either not been implemented or had been ignored by the national authorities. As the Court noted in *Taşkın* and reiterated in *Okyay*, "it is undeniable that, once the Supreme Administrative Court had given its judgment cancelling the permit, any administrative decision taken to circumvent it opened the way to compensation".[186]

## Conclusion

In conclusion, it is perhaps not unfair to say that – with the possible exception of the three Turkish cases just referred to – the Court's case-law remains in development with the original two Grand Chamber judgments providing the Court's starting point and, when in doubt, its fall-back position. That said, there are clearly indications that the Court, on occasion, has sought to limit the severity of their impact in individual cases without those 'variations' having crystallised into a new – environmental litigation friendlier – line of authority with sufficient weight and authority to confine

181. No. 29878/09, 25 September 2014.
182. Ibid. para. 47.
183. No. 46117/99, 10 November 2004.
184. No. 36220/97, 12 July 2005.
185. No. 25680/05, 19 June 2018; see also Dissenting Opinion of Judge Eicke in *Sine Tsaggarakis A.E.E. v. Greece*, no. 17257/13, 23 May 2019.
186. *Taşkın*, para. 133 and *Okyay.* para. 67.

*Balmer-Schafroth* and *Athanassoglou* to the annals of history. Ending on a slightly self-critical note, it should also be acknowledged that in so far as there is intended to be any development of the Court's case-law on this question (and I express no view on this either way) this is not helped by the somewhat inconsistent level of engagement with the pre-existing case-law of the Court.

## How to ensure better compliance with ECtHR judgments and prevention of violations?

**Claire Ovey**
Head of Department of the execution of judgments, Council of Europe

This afternoon I would like to present a snapshot of what the Convention system can achieve in terms of concrete improvements to peoples' lives in the context of environmental disasters and pollution.

The European Convention system is unique by virtue of its execution mechanism. Under Article 46 § 1 of the Convention, the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. Under Article 46 § 2, the final judgment of the Court is transmitted to the Committee of Ministers, which supervises its execution.

The CM is a political body, made up of the representatives of the 47 Member States of the Council of Europe. Nonetheless, in exercising its function under Art 46 § 2 it is guided by legal principles. The CM meets at least four times a year to consider the execution of individual cases, in its human rights (*droits de l'homme* or "DH") meetings. The "product" of these meetings are public decisions and resolutions, in which the CM expresses its view of the progress in the execution of an individual case or group of cases. The element of encouragement, constructive criticism and political pressure coming from the other member States can really assist in pushing forward the execution process. In addition, the CM's consistent practice, in terms of the measures it requires for similar types of violation, has authority and can be seen as a source of international law in itself.

The CM considers only the most complex and urgent cases at its human rights meetings. All other cases are dealt with mainly through bilateral contacts between the state authorities and the Execution Department within the Council of Europe Secretariat.

In common with the entire Convention system, the execution process is founded on the principle of subsidiarity. Under the CM's rules of procedure, once a judgment finding a violation becomes final the respondent State has six months to inform the Committee, through an action plan, of the measures it has taken or intends to take to execute the judgment.

In addition to the payment of any monetary compensation awarded by the Court, execution measures can be divided into two categories. **Individual measures** are measures to erase the consequences of the violation and avoid its repetition for the applicant who brought the case. **General measures** are measures to prevent repetition of the violation more generally, to protect other potential victims.

Deciding on the measures required to execute a judgment requires a close reading and analysis of the judgment itself. What does the Court say about the nature and causes of the violation? Did it result from a deficiency in the national law, or did the problem arise from the way the law was applied in this case? Was this a one-off mistake by a negligent judge, or is the fault entrenched in the national judicial practice and case-law? Once you have identified the root causes, it is usually quite obvious what sort of measures are needed to correct the problem. Sometimes the Court explicitly carries out this analysis itself and gives indications under Article 46 of the type of measures it thinks the State should take.

As just mentioned, it is in the first place for the respondent State to propose execution measures in an action plan. This is analysed by the team of independent lawyers in the Execution Department, which provides feedback to the State authorities. The process is fairly transparent: the States' action plans are published on the HUDOC-EXEC database and can be searched for by case name, respondent state and key words. Comments from the applicant and civil society are encouraged and are also published. This helps to generate a discussion at national level about the sufficiency of the execution measures being taken by the State, and to keep the Secretariat and CM informed.

We only have a short time this afternoon, but I'd like to give some examples of the types of violation found by the Court in cases concerning environmental issues, and the types of measures that States have carried out to remedy them, under the supervision of the CM.

## Reform of the legislative/regulatory framework

In some cases, the Court has found a violation of Article 8 (the right to respect for private life) arising from the absence of an adequate legislative and regulatory framework, meaning that industrial processes which are harmful to human life and health can continue without the possibility of control by the authorities and courts.

An example of such a case is *Jugheli v. Georgia*.

The case concerned a complaint of three Georgian nationals that a gas-burning power station located in close proximity to their homes in the centre of Tbilisi was causing high levels of air and noise pollution which was endangering their health and well-being. The period of time which the Court focused on was from 20 May 1999, when the European Convention on Human Rights came into force in Georgia, and 2 February 2001, when the power plant closed down most of its operations.

The main problem identified by the Court related to the absence of a regulatory framework during this period. Although Georgia had adopted legislation in 1996 requiring power stations to obtain permits based on an environmental impact assessment, the legislation did not apply to power stations which had begun operation before 1996. The one in this case started operating in 1939.

The Court's judgment, finding a violation of Article 8, became final in October 2017. By that point, the Georgian authorities had already started working on improvements to the regulatory framework to prevent future similar violations. This meant that in 2017

the parliament was able to adopt a new legislative code on environmental impact assessments. One of the main innovations was to require public involvement in the decision-making process. Subsequently, regulations on air quality were adopted, in addition to a far-reaching Law on Environmental Responsibility, which sets a framework for prevention, remediation and compensation for environmental harm.

It is quite rare for there to be no applicable regulatory framework at all. It is more common for the Court to find violations arising from a failure adequately to implement the existing domestic legislation. This type of violation can be a "one off", or it can reveal that the legal framework is inadequate and requires improvement.

An example is the case of *Tătar v. Romania.* The applicants were a father and son who lived in close proximity to a gold and silver mine and treatment facility in northern Romania. It was operated by an Australian company, using a procedure hitherto unknown in Romania, involving washing the extracts from the mine in water mixed with sodium cyanide to separate off the metals. The application was lodged with the Court following an accident in January 2000 when, following a period of heavy rain, a vast quantity of water containing cyanide was inadvertently released from the tanks, killing fish in neighbouring countries and causing a risk to the health of local people.

The Court found that the Romanian authorities had failed to comply with their own domestic law, which required them to carry out an environmental impact assessment and to inform local residents about risks to their health and the environment.

Although the Court was not explicitly critical of the domestic legal framework, during the execution process the Romanian authorities took the view that legislative changes were needed to prevent future similar violations. They adopted new legislation regulating hazardous industrial activity, which require all new industrial processes to obtain an environmental authorisation.

## Restoration of the site

Often the most important measures needed in cases of environmental accidents or pollution is restoring the site to make it safe for human habitation. This can be categorised as an individual measure, if the applicant is still living near the site in question, and a general measure because it will benefit other local people and potential victims.

So, in the case I just mentioned, *Tătar v. Romania,* on-site measures were taken in 2007. In particular, the tanks which had been used for the cyanide treatment were reinforced and became subject to safety inspections at regular intervals to ensure that no more water is discharged. The local water quality is also monitored. The last check carried out in January 2016 did not find irregularities. Also in 2016, a request by the mining company for an integrated environmental authorisation to resume the extraction work was refused. The CM closed its execution supervision of this case in December 2016.

Another example is the case of *Kolyadenko v. the Russian Federation,* concerning the failure by the State to protect lives in the context of a flood near Vladivostok in

2001. Although no-one died, the Court considered that the risk to life was serious enough to find a violation of Article 2 (the right to life).

During the execution process, the authorities took steps to avert any future risk of flooding, including clearing the riverbed and repairing the catch-water system. Construction of housing around the reservoir is now prohibited. They have also put in place procedures to allow a quicker and more effective response in emergencies of a similar nature, including an early warning system. The execution of this case is still on-going and information about further measures is expected.

One of the most high-profile cases of this type currently under the supervision of the CM is *Cordella v. Italy*. The case concerns huge steelworks in Taranto, in the south of Italy. It is the biggest in Europe and employs some 11,000 people. Since it started operating in 1965, there have been serious concerns about emissions and the effect on the local population, with various studies demonstrating a reduced life expectancy and substantially higher levels of cancers and other illnesses linked to particle pollution.

The Court found violations of Articles 8 and 13, arising from the failure of the authorities to take effective measures to protect the applicants (local residents) and the lack of effective remedies which would have enabled them to secure this protection. The authorities had drawn up an environmental plan setting out the action needed to eliminate further pollution and clean up the surrounding area, but it was not implemented. This had led to infringement proceedings being brought by the European Commission in 2014 but, from the information publicly available, this has not, so far, led to any concrete results.

The judgment became final in June 2019 and the Committee of Ministers carried out its first examination in March 2020, having received information from the applicant and the government. In its decision adopted at the March meeting, the Committee stressed, as had the Court, the importance of implementing the environmental plan, which sets a deadline of August 2023 for completion of the clean-up operation. The Committee asked the authorities to provide further information by June 2020 on the concrete measures to be taken. No information has been received so far, but bilateral contacts are being carried out at high level between the Secretariat and the authorities. If necessary, the Secretariat could propose to the CM to examine the case again at early next year.

## Enforcement of domestic judgments

In the *Cordella* case, although the national courts in criminal proceedings found the directors of the steelworks guilty of environmental offences, no enforcement action was taken and the government instead issued a series of decrees ensuring that the steelworks could continue in operation and granting criminal and civil immunity to the directors.

Sometimes a judgment in an environmental case can, in this way, reveal problems with the functioning of the rule of law in the country. In some cases the focus of the application is this aspect, and the Court finds violations arising from a failure by

the national authorities to implement decisions of the national courts (violations of Article 6 of the Convention: right to a fair trial).

Two of the earliest cases of this type were *Burdov v. Russia* and *Burdov (no. 2) v. Russia*. The applicant was a Russian national who was called up by the military authorities in October 1986 to take part in emergency operations at the site of the Chernobyl disaster. He worked there for four months and suffered extensive exposure to radioactive emissions. This meant that he was entitled, under Russian law, to various social benefits. However, although the Russian courts repeatedly upheld his right to these benefits, he experienced major difficulties in getting payment from the State.

In the first case, the Court found violations of Article 6 (fair trial) and of Article 1 of Protocol no. 1 (peaceful enjoyment of property). During the execution process the Russian authorities paid the arrears owed to the applicant and also executed over 5,000 other domestic judgments ordering the payment of compensation and allowances for Chernobyl clean-up workers in the same position.

That was not the end of the story, though, because the applicant unfortunately continued to experience difficulty in enforcing payment of his benefits. He brought a second application to the Court *(Burdov (no. 2))*. In response to this judgment, the Russian authorities adopted legislation in May 2010 to ensure that all Chernobyl victims in the position of the applicant were rapidly paid their social benefits. They also acknowledged that there was a more general problem with the non-execution of domestic court judgments and took remedial action in the context of other cases.

The execution of domestic judicial decisions can be more complex when they require remedial action other than the payment of compensation. An example is the group of cases *Taşkin and Others v. Turkey,* which concerns another gold mine, this time in the Aegean region of Turkey, which also uses cyanide to extract the metal. The Court delivered four judgments between 2005 and 2017. It found violations arising from the failure of the national authorities to comply with a series of administrative court decisions, including decisions of the Supreme Administrative Court, annulling the permits required for the operation of the mine, on grounds of risk to public health and environment. Rather similarly to the events in the *Cordella* case, the authorities over-rode their own national courts' judgments and kept issuing new permits to allow the gold mine to remain in operation.

The Committee of Ministers paused its supervision of the execution of these cases because of information from the authorities that a new, positive, environmental impact assessment had been issued in 2009 and that it was being challenged by way of judicial review by the local inhabitants. Two cases again went all the way to the Supreme Administrative Court, which delivered judgments in 2018 and 2019. This time, however, the Supreme Administrative Court upheld the environmental impact assessments and found that the mine could continue operating. The position is confusing, because the new judgments do not seem to address key factors relied on by the Supreme Administrative Court in its earlier, unenforced, judgments, such as the potential dangers caused by earthquakes (the mine is in an earthquake zone) and flooding.

The Committee of Ministers examined this case at its human rights meeting last week (29 September-1 October 2020). It asked the authorities to provide full information by 31 March 2021.

Generally, where – as in *Taşkin* – the violation found by the Court is the non-execution of a domestic judgment, the obvious execution measure is to implement the national judgment. This case raises the interesting question whether that is still required when there are new domestic judgments going the other way. Hopefully the information we receive from Turkey will clarify the situation and then it will be for the CM to take a position.

I hope this brief over-view has been interesting for you. Unlike the case-law of the Court, not much is written by academics about the execution process, but there is a wealth of information to be found on the HUDOC-EXEC website and the webpage of the Department of Execution. We are currently finalising a factsheet on the execution of cases raising environmental issues, which will provide more detailed information on the cases I've mentioned this afternoon and many others.

Thank you for your attention.

# Climate change and protection of the environment, a question of policy or of human rights law?

## Climate change and protection of the environment as a question of State policy?

**Rick Daems**
President of the Parliamentary
Assembly of the Council of Europe

Distinguished President of the Court,
Distinguished Judges of the European Court of Human Rights,
Ladies and gentlemen,

It is an honour to participate in this conference which brings together judges to the European Court of Human Rights and eminent lawyers.

I am particularly pleased to address you today as the President of the Parliamentary Assembly of the Council of Europe.

The issue of environment and human rights is a political priority for the Parliamentary Assembly. We fully support the joint efforts of the Georgian and Greek Presidencies of the Committee of Ministers, as well of the Secretary General to prioritise the Organisation's work in this area. The "trialogue" approach will help us build synergies and coordinate the work of our Organisation in this regard.

Ladies and gentlemen,

The question that the organisers have put on the table for this panel cannot be answered in a simple way.

Is environmental protection an issue of policy or human rights law? I am afraid, in my view, it is not an "either – or" question.

I believe that addressing the environmental emergency requires a holistic approach in terms of both, policy and human rights law.

I am not a lawyer but a politician and a member of Parliament.

The job of parliamentarians is to translate policies into laws that set standards, rules, objectives and targets to be achieved and implemented by the executive. The role of the judiciary is to ensure that the rule of law is respected, to settle disputes and to provide legal protection of fundamental rights and freedoms.

It is clear that the environmental emergency, especially climate change as the most visible phenomenon, has to be addressed -first and foremost- from a policy perspective. This approach is enshrined in international agreements, in particular the Paris agreement, which sets specific targets and international commitments to be respected by the participating states.

Yet, it is a fact that Governments and Parliaments have been slow to act to address environmental challenges and climate change.

Where policy efforts have been insufficient, the judiciary stepped in, addressing the environmental challenges from a right's perspective, through the protection of individual's rights: to life, private and family life, receive and impart information, property, as well as the rights to an effective remedy and to a fair trial.

Thus, the past decade has witnessed a steady process of "greening" of human rights. The European Court of Human Rights has made a remarkable contribution to this process. The role of the European Committee on Social Rights is equally important when to it comes to upholding the right to the protection of health.

Other regional international human rights bodies are following suit, as does for example the Inter-American Court on Human Rights through its case law under the American Human Rights Convention and its additional San Salvador Protocol.

Most importantly, national Courts are becoming gradually involved in environmental litigation. We all know the Urgenda landmark decision where the Dutch Supreme Court recognised a positive obligation of the State under articles 2 and 8 of the European Convention on Human Rights to take action to mitigate the effects of climate change.

These are indeed progressive and positive steps that are enhancing the level of protection of our fundamental rights as well as set standards for public policies regarding environment.

But is this approach sufficient or sustainable in the long run? In other words, is environmental litigation the right way to address the environmental emergency and, in particular, climate change?

For me, as a politician and a parliamentarian, the answer is clear: further development of environment-related human rights case law needs to be anchored into solid legal foundations.

Because the right to live in a healthy, clean and safe environment should be part of the universal corpus of fundamental human rights.

We are witnessing today the emergence and development of a "new generation of rights" which includes issues such as environment or artificial intelligence. International human rights instruments must provide substantive guarantees of these rights.

As regards the environment, this is already the case in the American Human Rights Convention through the San Salvador Protocol or the African Charter on Human and Peoples' Rights, to give but two examples. However, the European Convention on Human Rights does not cover the right to a healthy, clean and safe environment as a substantive right. This is why the Parliamentary Assembly of the Council of Europe has repeatedly called for the drafting of an Additional Protocol to the Convention concerning the right to a healthy environment.

Having such a Protocol has several advantages.

Firstly, it would create a uniform and solid legal foundation for the protection of the right to a healthy, clean and safe environment for the benefit of 830 million European citizens.

Secondly, it would give an additional political push to Governments and Parliaments of member states to develop further "green" policies and legislation, thus contributing to a global effort to address the environmental challenge.

Thirdly, it would strengthen accountability for actions that potentially harm the environment.

I believe that the drafting of this Protocol should be our strategic priority. At the same time, I am well aware that the journey ahead of us might be long and difficult.

Because the drafting of an Additional Protocol brings about some risks too.

Complex legal negotiations will have to be conducted among member states which do not necessary share the same vision of how environment should be linked up to human rights.

The entry into force of the future Protocol may take a while because of the lengthy process of its ratification by Parliaments of all 47 member states.

Above all, as we embark on this ambitious project of enlarging – through a new Protocol – the scope of the rights guaranteed by the Convention, we have to make sure that our efforts do not undermine the existing acquis developed through the case law of the Court.

In this context, I believe that we should carefully assess the possible real impact of our future "Green Protocol". For instance, we know that Protocol no. 12 to the Convention on the prohibition of discrimination was adopted 20 years ago but it has largely remained a piece of paper with no case-law. We do not want our "Green Protocol" to repeat the same story.

Hence, let me put you a legal question: how do you see the best possible remedies in environmental cases? Should judicial remedies be the main avenue? Or, can we think about some other more flexible avenues? Your expert guidance will be very important for us, as politicians – parliamentarians or members of the executive.

Ladies and gentlemen,

The risks of developing an Additional Protocol are real, but I am strongly convinced that we can overcome them.

If there is a will there is a way. And the Council of Europe has not only the necessary legal expertise to find appropriate legal solutions – it has THE expertise when it comes to human rights standards.

In the meantime, we should build the political momentum for a new Protocol.

This is what we are doing today, by developing further our "soft law" through a Recommendation of the Committee of Ministers containing guidelines to be followed by member states. The work on the upgrading of our Convention on the Protection of the Environment through Criminal Law could clarify legal obligations and provide mechanisms of sanctioning environmental crimes, especially in a transnational

context. The launching of a new HELP course on environment and human rights will further build up the awareness and knowledge of legal professionals in this field.

The Parliamentary Assembly is currently preparing a series of reports dealing with environmental challenges from the angle of the rule of law, democratic participation, children's rights, artificial intelligence, migration and inequalities.

These combined joint efforts – I am confident – will help us build the case for a new Protocol to the European Convention on Human Rights.

Because environment is a human right and it must be incorporated as such in our Convention, which is and remains the constitutional instrument of Europe's public legal order.

Thank you for your attention.

# The Climate Dimension of Human Rights Obligations

**Christina Voigt**
Professor at the University of Oslo

This chapter focusses on the climate dimension of human rights obligations. It will present the argument that in order *not* to violate their positive obligation to secure human rights to life and private life from the threats of climate change impacts, states must take all adequate and appropriate measures to *globally* phase out greenhouse gas emissions by around 2050.

This chapter is divided in the following *four* parts:

- The factual linkages between climate change impacts and human systems,
- Climate change as a matter of human rights law,
- The substantive (climate) content of human rights obligations, especially under articles 2 and 8 ECHR,
- The wider "normative environment" of this positive obligation.

As a caveat, the chapter will not address matters of legal standing, jurisdiction, exhaustion of national remedies or other procedural issues.

## The factual linkages between climate change impacts and human systems

Projected climate change impacts pose significant risks to natural and human systems. The higher the temperature increase, the higher the risk.

The Intergovernmental Panel on Climate Change (IPCC) in its Special Report on Global Warming of 1.5 Degrees projected significantly higher risks at 2°C warming compared to 1.5°C.[187] The risks include: human exposure to increased flooding, freshwater water stress by up to 50% (depending on the region), smaller net yields of crops, loss of live-stock, reduction in food availability from fisheries and aquaculture, negative impacts on human health, impacts associated with sea level rise

187. Valérie Masson-Delmotte and others 'Global Warming of 1.5°C: An IPCC Special Report on the Impacts of Global Warming of 1.5°C Above Pre-Industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty' (Intergovernmental Panel on Climate Change 2018) Summary for Policy Makers.

and changes to the salinity of groundwater, severe precipitation and damage to infrastructure, increased likelihood of extreme weather events (torrential rainfall, storms, hurricanes), extended droughts and, as a result, forest fires.[188]

In addition to these "direct" impacts, climate change interacts also with and intensifies poverty, conflict, instability and unrest, resource depletion and food insecurity, loss of livelihoods, infrastructure breakdown and loss of access to essential services including electricity, water, sanitation and health care, as well as relocation and migration.

Each one of these impacts is deeply worrisome. Yet it is first when we look at the *sum*, the accumulation, of those impacts that the entire *alarming* picture emerges. Addressing the causes and finding remedies to these adverse effects to human systems is an unprecedented challenge in scope, scale and urgency.

## Is climate change a matter of human rights law?

These climate change effects have a major impact on a wide range of human rights already today and could have a *cataclysmic* impact in the future unless ambitious actions are undertaken immediately.[189] Among the human rights being violated or threatened are the rights to life, health, food, water and sanitation, a healthy environment (where it exists), an adequate standard of living, housing, property, development and culture.[190]

The matter of climate change is being addressed in separate treaty systems. On the international level, we have the Paris Agreement, adopted under the UNFCCC, and in domestic law we have – often – special climate regulations. But these treaties and laws do seldom, if ever, address the human rights impact of climate change. They look at the reduction of greenhouse gas emissions ("mitigation") or technical solutions to adapt to the adverse effects. Human rights are largely outside their scope.

Due to the fragmented structure of international law, the laws and regulations to address climate change and human rights exist in different "silos".[191] This is aptly expressed in the Paris Agreement, which in its preamble acknowledges that "Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights". The formulation "[t]heir *respective* obligations" refers to *existing* treaty or customary law obligations on human rights that state parties *already* have[192] – in other words, the Paris Agreement throws the ball back into the international regimes, including human rights courts.

But there are more substantive linkages, too, not just the factual ones highlighted above.

188. *Ibid*.
189. Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, United Nations General Assembly, A/74/161, 15 July 2019.
190. Ibid.
191. Margaret Young (2015) *Regime Interaction in International Law, Facing Fragmentation* (CUP); Harro van Asselt (2014) *The Fragmentation of Global Climate Governance* (Edward Elgar Publishing).
192. Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani (2017) *International Climate Change Law*, Oxford University Press.

States have the obligation to ensure human rights to everyone within their jurisdiction. The foreseeable and potentially catastrophic effects of climate change on the enjoyment of a wide range of human rights, everywhere in the world, including also in Europe, give rise to extensive duties of States to take *immediate actions to prevent those harms*.

Moreover, approaching climate change from a human rights perspective highlights the principles of universality and non-discrimination, emphasizing that rights are guaranteed for all persons, including vulnerable groups. A human rights-based approach could serve as a catalyst for accelerated action to achieve a healthy and sustainable future.

Importantly, and different from the international climate regime, the observance of those rights can be *ensured by a specialized court*, which makes a human rights-based approach a sought-after avenue.

## The content of human rights obligations with respect to climate change

There are both procedural, substantive obligations human rights obligations which apply to states. In the following, this chapter will focus only on the substantive obligation: the climate dimension of human rights obligations.

To start with, the most advanced regional rights system in terms of recognizing a human right to a safe and healthy environment appears to be the Inter-American system. The Inter-American system contains a right to a healthy environment: The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) establishes in Article 11 a Right to a Healthy Environment. It states that:

> "1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.
>
> 2. The States Parties shall promote the protection, preservation, and improvement of the environment."

Based on this protocol, the practice of the Inter-American Court on Human Rights has been rather progressive in filling this right with content and substance; in particular in its Advisory Opinion on the Environment and Human Rights (2017)[193] and most recently in its judgment in the contentious case of the *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina,* 6 February 2020.[194]

On that occasion, the Court stated that the right to a healthy environment "constitutes a universal value"; it "is a fundamental right for the existence of humankind," and that "as an autonomous right [...] it protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals. This means that nature must be

193. ICtHR, Advisory Opinion (OC-23/17)
194. ICtHR, The *Indigenous Communities Members Of The Lhaka Honhat (Our Land) Association V. Argentina* (2020).

protected, not only because of its benefits or effects for humanity, "but because of its importance for the other living organisms with which we share the planet."[195]

The European human rights system is different. There is no environmental right in the European Convention on Human Rights; neither is there any additional protocol – like the San Salvador Protocol – that would recognize such right.

But this does not mean that the European system is blind to environmental conditions for the necessary for the enjoyment of other, existing human rights. The European Court on Human Rights has long recognized parties' *positive* obligation to securing human rights.[196] This imposes the duty on national authorities to adopt *reasonable and adequate*[197] measures to effectively[198] protect rights and to provide deterrence against threats, including proportionate measures against risks that may materialize in the longer term[199], such as some climate change impacts.

A central question therefore is: when have states fulfilled their positive obligation? And the relatively easy answer is: when the measures they have adopted are aimed at and effective to prevent dangerous levels of climate change. However, given the current trajectory of global warming, which is projected to exceed "safe levels" of climate change by several degrees, the adopted measures so far must be *presumed* to be inadequate. In other words, there is a presumptive responsibility that states prima facie are violating their human rights obligations.

Focus, therefore, needs to be directed to defining *which* climate mitigation measures would be reasonable and adequate. In answering this question, the European Court on Human Rights should take into account elements of international law and, thus, interpret the obligations consistently with the legal environment in which they exist.[200]

This applies, in particular, to the Paris Agreement to which all member states are a party. Art. 2.1(a) of the Agreement sets the goal of holding temperature increases to well below 2°C, and pursuing efforts to limit increases to 1.5°C. This goal is informed by best available science, which is provided by the IPCC. The IPCC is clear that in order

195. Ibid.
196. *Brincat and Others v. Malta* para. 102, and Kolya*denko and Others v. Russia* para. 216.
197. Öner*yildiz v. Turkey* [GC] para. 89, Buda*yeva v. Russia* para. 129, *Kolyadenko and Others v. Russia* para 157, López *Ostra v. Spain* para. 51, *Cordella et Autres c. Italie* para. 158, *Tătar c. Roumani*e para 88, Jugheli and *Others v. Georgia* para. 64.
198. Öner*yildiz v. Turkey* [GC] para. 90, Buday*eva v. Russia* para. 129, *Kolyadenko and Others v. Russia* para 158, *Tătar c. Rou*manie para. 88; Kot*ilainen v.* Finland para. 66.
199. Cordella *et Autres c. Italie* para. 158 and Jugheli *and Others v. Georgia* para. 74.
200. See art. 31.3(c) Vienna Convention of the Law of Treaties to which the ECtHR referred to in *Naït-Liman* [Grand Chamber] (2018), where the Court held that "account should be taken, as indicated in Article 31 § (3)(c), of "any relevant rules of international law applicable in the relations between the parties…, and in particular the rules concerning the international protection of human rights". See for an overview, see: Geir Ulfstein, *Interpretation of the ECHR in light of the Vienna Convention on the Law of Treaties*, The International Journal of Human Rights Volume 24, 2020 - Issue 7: The Relationship Between the European Convention on Human Rights and Wider International Law, 917-934; and Geir Ulfstein, Morten Ruud and Andreas Føllesdal, *Editorial: The European Convention on Human Rights and other parts of international law*, The International Journal of Human Rights Volume 24, 2020 - Issue 7, 913-916.

to not overshoot that goal, global net $CO_2$ emissions need to be reduced by 40-60% from 2010 levels by 2030 and need to reach *net zero* around 2050.[201]

To this extent, Parties have committed to that each Party´s nationally determined contribution will reflect its "highest possible ambition" (Art. 4.3). This is a *due diligence* obligation according to which Parties need to take all appropriate and adequate measures to achieve the temperature goals of the Agreement.[202] This includes a duty of conduct to use all measures at their disposal, especially the adoption and implementation of laws and regulations, including to address private behaviour, monitoring as well as their enforcement.

This is similar to the practice of the ICtHR. The court stated in the *Lakha* judgment that:

"Regarding the right to a healthy environment … it should be pointed out States not only have the obligation to respect this, but also the obligation established in Article 1(1) of the Convention to ensure it…. In this regard, the Court has indicated that, at times, the States have the obligation to establish adequate mechanisms to monitor and supervise certain activities in order to ensure human rights... Specifically with regard to the environment, it should be stressed that the principle of prevention of environmental harm forms part of customary international law and entails the State obligation to implement the necessary measures *ex ante* damage is caused to the environment, taking into account that, owing to its particularities, after the damage has occurred, it will frequently not be possible to restore the previous situation. Based on the duty of prevention, the Court has pointed out that "States are bound to use all the means at their disposal to avoid activities under its jurisdiction causing significant harm to the environment." This obligation must be fulfilled in keeping with the standard of due diligence, which must be appropriate and proportionate to the level of risk of environmental harm. Even though it is not possible to include a detailed list of all the measures that States could take to comply with this obligation, the following are some measures that must be taken in relation to activities that could potentially cause harm: (i) regulate; (ii) supervise and monitor; (iii) require and approve environmental impact assessments; (iv) establish contingency plans, and (v) mitigate, when environmental damage has occurred. (paras 207-208).[203]

In light of the magnitude of the climate risk, the clear science and the urgency of the task, this due diligence implies therefore, both in the Inter-American system as well as in the European human rights system to take all appropriate and adequate measures to prevent climate change damages.

Traditionally, the state has a wide margin of appreciation in determining which measures to apply. The ECtHR determines the width of the margin on a case-to-case

201. Valérie Masson-Delmotte and others 'Global Warming of 1.5°C: An IPCC Special Report on the Impacts of Global Warming of 1.5°C Above Pre-Industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty' (Intergovernmental Panel on Climate Change 2018) Summary for Policy Makers.
202. Voigt, Christina and Ferreira, Felipe (2016) *"Dynamic Differentiation": The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement*, 5 Transnational Environmental Law 2, 285-303.
203. ICtHR, The *Indigenous Communities Members Of The Lhaka Honhat (Our Land) Association V. Argentina* (2020).

basis, taking into account the importance of the interest at stake, the existence of a European consensus in the field, whether the State must strike a balance between competing private and public interests or Convention rights.

The Court has afforded a wide margin of appreciation in several environmental cases.[204] The widest one is perhaps the *Fadeyeva* case.[205] The Court here state that only "in exceptional circumstances" where there has been "a manifest error of appreciation by the national authorities" may the Court revise the material conclusions of the domestic authorities. This is a high threshold for revision, which afford the national authority an extensive margin of appreciation. However, these criteria's have not been followed-up in later jurisprudence.

The Court generally state that "an impossible or disproportionate burden must not be imposed on the authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources; this results from the wide margin of appreciation States enjoy, as the Court has previously held, in difficult social and technical spheres".[206]

In some later environmental cases under Article 8, the Court has held that it is not the Court's task to determine what exactly should have been done in a situation, but that it is certainly within the Court's jurisdiction to assess whether the Government approached the problem with due diligence and gave consideration to all the competing interests.[207] The same consideration can be found under Article 2, where the Court states that

> "As to the choice of particular practical measures, the Court has consistently held that where the State is required to take positive measures, the choice of means is in principle a matter that falls within the Contracting State's margin of appreciation. There are different avenues to ensure Convention rights, and even if the State has failed to apply one particular measure provided by domestic law, it may still fulfil its positive duty by other means."[208]

In light of the magnitude of the risk, the clear science and the urgency of the task, this implies taking all measures that are *not impossible* or disproportionately economically burdensome with the objective of reducing global GHG emissions to net zero and below by 2050.

In a recent joint statement, five UN Human Rights Treaty Bodies called upon states that '[i]n order ... to comply with their human rights obligations, and to realize the objectives of the Paris Agreement, they must adopt and implement policies aimed at reducing emissions, which reflect the *highest possible ambition [article 4.3]*, foster climate resilience and ensure that public and private invest- ments are consistent

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204. *Hatton and Others v. the United Kingdom* [GC], §§ 100 and 122, *Fadeyeva* para. 103, Powell and Rayner para. 44.
205. *Fadeyeva v. Russia* para. 105.
206. Budaye*va v. Russia* para. 135, *Kolyadenko and Others v. Russia* para. 160.
207. In environmental cases, see *Cordella et Autres c. Italie* para. 161, *Jugheli and Others v. Georgia* para 78, Fa*deyeva v. Russia* para. 128. In other cases, see Kotila*inen v. Finland* para. 84, 85.
208. *Kolyadenko and others vs. Russia*, para. 160.

with a pathway towards low carbon emissions and cli- mate resilient development'.[209] In other words, articles 2.1 and 4.3 of the Paris Agreement together are being used to determine the substance of human rights obligations with respect to climate change. In this statement, they further refer to an earlier (2018) statement by the Committee on Economic, Social, and Cultural Rights which observed that "human rights mechanisms have an essential role to play in ensuring that States avoid taking measures that could accelerate climate change, and that they dedicate the *maximum available resources* to the adoption of measures aimed at mitigating climate change."[210]

Similarly, in a recent communication to the UN Committee on the Rights of the Child, the petitioners (16 children and youths) claim that international hu- man rights obligations are informed by the rules of international environmental law, and that the Convention on the Rights of the Child must be interpreted taking into account the respondents' obligations under international law.25[211] Accordingly, they argue that the respondents (ie Brazil, Argentina, Germany, France and Turkey) by not reducing their emissions at the 'highest possible ambition' according to article 4.3 of the Paris Agreement, have failed to comply with their human rights obligations.26 Reducing emissions at the highest possible ambition, they claim, implies *inter alia* using maximum available resources. This amounts to a *due diligence* standard for complying with human rights obligations, according to which states must take all appropriate measures to address climate change and its adverse effects, employ their best efforts or, simply, do 'as well as they can'.[212]

In sum, the argument can be made Parties have, in fact, a narrow margin of appreciation, if any, when it comes to the ambitions of each state. Given the potential costs of unabated climate change and the very small window of opportunity, there is no discretion anymore as to the level of ambition. Discretion only applies to the *choice of measures* applied to reach this goal (the "how") – but no longer to the "what and why".[213]

The duty of care or "positive obligation" therefore is clear: in order to secure the rights under, e.g. arts. 2 and 8 ECHR, each Party must have a *long-term plan* in place as well as *corresponding measures* reflecting its "highest possible ambition" at the level of its maximum available resources for how it contributes to reaching *global* net zero emissions around 2050 ("carbon neutrality"). This implies that states with greater capacity and responsibility will have to reduce their emissions to zero and below faster and deeper, even *before* that time, in order to give states that might need longer the possibility to get there, too.

States also need to ensure [that public and private investments (and actions) are consistent with a pathway towards low carbon emissions and climate resilient development (Art. 2.1(c) Paris Agreement. In their measures, they need to ensure]

209. Committee on the Elimination of Discrimination Against Women et al, *Joint Statement on 'Human Rights and Climate Change'* (16 September 2019) [11] <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998&LangID=E> (emphasis added).
210. Ibid, para. 7, emphasis added.
211. Petitioners' Legal Representatives, Communication to the Committee on the Rights of the Child in the case of *Chiara Sacchi et al v Argentina* (23 September 2019) [14], [174], [182].
212. Ibid, 178.
213. Based on the risk at state, the margin of appreciation, as established in *Hatton v. the United Kingdom* [Grand Chamber] (2003), is arguably reduced to a minimum.

that their own "carbon neutrality" measures do not lead to rising emissions in other parts of the world, due to "exported" emissions. This occurs where the production processes of goods that are consumed here are outsourced to other states and lead to increasing emissions there. Moreover, this does not mean that states can delay ambitious actions. Rapid and deep emission reductions have to happen *now*. The IPCC warns that "every year's delay before initiating emission reductions *decreases by approximately two years* the remaining time available to reach zero emissions on a pathway consistent with 1.5°C».

In sum, it implies that every state ought to employ its highest possible level of ambition and act according to its best capabilities, or simply "do the best it can". This level is more rigorous if the risk is higher – such with climate change – and involves the requirement of a state to use all measures that are not disproportionately economically burdensome or even its "*maximum available resources*", now, to address this risk. Only such measures can be considered reasonable and adequate.

Put simply, complying with human rights obligations requires *dramatically accelerated* climate action. By *not* reducing emissions at that level of ambition, states fail to prevent foreseeable human rights harms caused by climate change – and thereby violate their obligations.

This is the central claim of a case which has just arrived at the doors of the ECtHR. On 2 September 2010, six Portuguese youth (8-21 years of age) brought a case against 33 member states of the ECHR where they argue that inadequate emissions cuts violate their human rights to life and private life under the ECHR.[214]

The claimants state that "assessment of compatibility of a state´s mitigation measures with the 1.5°C target must be based upon the emission reductions entailed by those measures, including emissions that materialize outside their territory. Given that global warming is on course to vastly exceed the 1.5°C target, the respondents mitigation measures must be presumed inadequate….Failure to limit through regulation contributions of these types is per se a violation of the …duty [to protect the right to life].[215]

This means that when the respondents seek to demonstrate the adequacy of their mitigation measures, they must be required to do so according to relatively more demanding approaches to measuring their "fair share"; greater emphasis must be placed on the extent to which those measures are consistent with their "highest possible ambition." Importantly, the expectation in the Paris Agreement that developed countries take the lead in the area of mitigation justifies the application of this approach with greater force to such countries.

In brief, what they say is that each responded by not putting it targets in its NDC at the level of its highest possible ambition it is violating its positive obligation to adopt all necessary and appropriate means to ensure human rights.

214. *Youth for Climate Justice vs. Austria et al.* (2020).
215. Application by the claimants; para. 29.

## The wider "normative environment" of this positive obligation

Net zero emissions means that all greenhouse gas emissions that cannot be phased out ("residual emissions") will have to be offset. This can happen by carbon dioxide removal, through reforestation, land restoration, soil carbon sequestration, bioenergy with carbon capture and storage, and just carbon capture and storage. Implemented well, some $CO_2$ removal tools could provide co-benefits to biodiversity, improved soil quality and local food security. But done poorly, $CO_2$ removal efforts could displace other land uses, potentially causing adverse effects on food security, biodiversity and human rights.

The picture is complex and the considerations that need to be taken into account are many, and can be partly conflicting. It might therefore, indeed, be opportune to consider a human right to a clean and healthy environment as an appropriate framework for weighing the various environmental and social implications in a more holistic and comprehensive manner, rather than by looking at them through the very narrow lens of a right to life or private life.

This would also better recognize the planetary emergency of the climate crisis.

The right to a clean and healthy environment is recognized in law by at least 155 states. One way to recognize such right on the regional (EU) level would be to add a new protocol recognizing the right to a healthy environment. A second legal pathway, employed by courts in about twenty States, is to rule that the right to a healthy environment is implicit in the right to life.

## Conclusions

One of the questions in this article is whether climate change is a matter for human rights courts. The answer, based on the arguments above is: yes, absolutely. When states do not live up to their human rights obligations, this is a *matter of law*, not of politics. This does not mean that the court should be prescriptive in what each and every state has to do or which exact type of measures to adopt. It should not. But it should be possible for the court to ask whether the measures adopted are reasonable and adequate to prevent harm from climate change. And the test question for this is: are the measures aimed at and effective for achieving a rapid deep decarbonization and eventually a global phase out GHG emissions around 2050?

And if they are not, the court might want to tell states to revisit their policies and plans (their regulatory and administrative framework) with the aim of not just doing better – but doing *the best they can (their utmost)* – in addressing climate change by significantly raising ambition.

## "Should the European Court of Human Rights become Europe's environmental and climate change court?"

**Robert Spano**
President of the European
Court of Human Rights

Dear fellow panellists,

Dear colleagues and guests,

The theme of our last panel is climate change and the protection of the environment. My fellow panellists, who I thank warmly for their thought-provoking interventions, have addressed the question whether protecting the planet and its inhabitants from climate change a matter of State policy or a question of human rights law.

Allow me to begin my own intervention by making the classic extra-judicial caveat of a serving judge and also the current President of the Court. As much as I would like to engage with all of the very salient and timely issues in this debate that have been raised today, I am restrained by the natural confines of my judicial role and the duty of impartiality which comes with it. So, please do not understand my silence on some of these very important issues as in any shape or form conveying a lack of interest or, indeed, understanding of the immense and grave challenges raised by climate change.

The caveat expressed above does not however preclude me from, firstly, elaborating, albeit briefly and in a general manner, on the current position of the Court in relation to environmental disputes and then, in my second part, reflect on some arguments for and against a positive answer to the question posed, admittedly broadly and quite provocatively, whether the European Court of Human Rights should become, and I quote, "Europe's environmental and climate change court".

### An environmental court for Europe?

So, to my first part, the current position of the Court. It is important to appreciate that the European Court is already to some extent an international environmental court in the field of human rights. To be clear, no direct and specific right to a healthy environment, environmental protection or nature conservation exists as such in the Convention nor was any contemplated at a time when environmental issues were not yet considered topical or a priority. The European Convention differs in this respective from some of the other regional human rights instruments Of course, the Convention's focus is on protecting the rights of individual persons. It is true that it is in this sense anthropocentric. In other words, it does not in terms protect biodiversity (including endangered species and irreplaceable habitats), protected landscapes or built heritage.

However, two elements, in particular, have permitted the Court to develop its current environmental case-law in a manner which to some extent has already accepted that the human rights of the individual person, as protected by the substantive provisions of the Convention, cannot be completely divorced from his ecological surroundings. These two elements are the living instrument doctrine and developments in international law as analysed through the principle of harmonious interpretation.

Allow me to briefly explain further these two elements, because when coming to the question of what, if any, may be the role of the Court in this area in the future, both of these elements will, I venture to argue, play a crucial role.

So firstly, the **living instrument doctrine and its emphasis on present day conditions**. No-one would deny that environmental concerns have become more important nationally and internationally since 1950. As the Court stated in a judgment against Sweden already in 1991: "*In today's society the protection of the environment is an increasingly important consideration*".[216] Indeed, since the 1990s the Court has interpreted the rights enshrined in the Convention so as to take into account environmental issues. As I stated just a moment ago, it is now been accepted that human rights and the environment are interrelated.

The Court has thus developed quite a rich case-law on environmental issues under certain articles of the Convention, most importantly, the right to life; the right to private and family life; access to court; the right to property and freedom of information, which I am not going to rehearse here as you have already been presented with an overview in the first panel this morning.

However, I would like to mention one recent judgment as a further important example. In *Cordella and Others v. Italy*, from January 2019, 180 applicants complained about the effects of toxic emissions from the Ilva steelworks in Taranto. In considering whether Article 8 was applicable, in relation to the rights to a home and private life, the Court made clear that when environmental risks reach a certain level of gravity significantly limiting an applicant's ability to enjoy these rights, then an arguable claim could be made under this provision. This reasoning is important for present purposes, as I will revert to in a moment. The Court then went on to find a violation of Articles 8 and 13 of the Convention. Under Article 46 the Court stressed that the work to clean up the factory and the region affected by the environmental pollution was essential and urgent. Thus, the environmental plan approved by the national authorities, which indicated the necessary measures and actions to provide environmental and health protection to the population, ought to be implemented as rapidly as possible.

Secondly, as I mentioned a moment ago, **developments at the international level** have enabled the Court to strengthen its reasoning in protecting individuals affected by environmental issues. The Court has relied on a selection of international instruments in its judgments over the years.[217]

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216. *Fredin v. Sweden (no. 1)*, 18 February 1991, Series A no. 192.
217. The Rio Declaration on Environment and Development (1992), the Council of Europe Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment (1993), the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters (1998), the Convention on the Protection of the Environment through Criminal Law (1998), as well as various EC directives.

As the Court has stated on many occasions, the Convention cannot be construed in a vacuum and must thus be interpreted in harmony with other rules of international law, of which it forms part. It is worth noting, however, that many of these references are somewhat dated and that the Court has not, as yet, mentioned more recent climate change texts such as the United Nations Framework Convention on Climate Change nor the Paris Agreement. On this issue, I note the argument presented this morning by Professor Christina Voigt pleading for the Court to interpret the States positive obligations under Articles 2 and 8 consistently with provisions of the Paris Agreement.

As we have seen, the Court has already developed an environmental human rights jurisprudence. This is an important starting-point when I now turn to my second part and reflect on some of the arguments for and against a positive answer to the question posed whether courts, and in particular the European Court of Human Rights, should become "Europe's environmental and climate change court".

## Arguments for and Against Active Judicial Engagement with Climate Change Litigation

Climate-induced dangers such as heat-waves, the rise in sea-levels, desertification and wildfires pose a risk to human rights according to five UN Human Rights Treaty bodies who issued a joint statement on human rights and climate change in September 2019.[218] They welcomed the fact that national judiciary and human rights institutions are increasingly engaged in ensuring that States comply with their duties under existing human rights instruments to combat climate change.

The global trend of climate change litigation has seen actions brought against State actors and private companies, both at the national and international level and seems to be growing in momentum. In the so-called *Urgenda* case, which has been cited repeatedly today, the Dutch Supreme Court, upholding the judgment of the national Court of Appeal and relying on the Convention, ordered the Dutch government to reduce greenhouse gas emissions by 25% by the end of 2020 in line with its human rights obligations.

In July this year, the Supreme Court of Ireland in the 'Climate Case Ireland' quashed the government's National Mitigation Plan and ordered the Irish government to take more aggressive action on climate change.

Other examples of climate change actions include the complaint launched by 16 young people, including Greta Thunberg, before the United Nations Committee on the Rights of the Child in September 2019 and the very recently lodged complaint before the Strasbourg Court by 6 children and young adults against 33 Member States which is now pending.

So what are broadly the arguments for and against the Court's engagement with climate change issues.

218. https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998&LangID=E

Firstly, it is argued that climate change is damaging our full enjoyment of human rights and that States have legally binding obligations, based on human rights law, to take preventive and precautionary measures. In this regard, it is claimed that classical civil and political rights, such as some of the ones found in the European Convention, as well as some economic, social and cultural rights are already amenable to being interpreted so as to grant effective protections in climate change related disputes through the use of evolutionary or living instrument type approaches.

Secondly, emphasis has been placed on States not being on track to meet their global or regional targets and the political challenges faced with securing lasting policy solutions, for example in reducing greenhouse gas emissions and that climate change denial is growing.

Thirdly, given what is at stake if we do not act, or if we hesitate for too long, some claim that every avenue for achieving change must be explored. They say that the urgency of the situation requires the courts to step in.

On the other hand, arguments have been addressed against an active role of courts as well as the European Court in this area.

Firstly, it has been argued that the principle of the separation of powers requires that it is up to elected politicians and administrators to decide on environmental policy and budgetary details, and not the courts.

Secondly, some argue that in a healthy democracy, the judicial branch should work in partnership with the other branches, rather than seek to impose the last word; that judges do not have the technical knowledge, resources nor expertise to adjudicate climate change cases and that in any event States should have a wide margin of appreciation in this area; also it is emphasised that implementing court judgments requires political will and non-enforcement of court judgments would risk undermining the Convention system.

Finally, more provocatively, it is argued by some that judicial activism should not spill over into judicial adventurism because this could be damaging to the trust which citizens place in the court system.

All of these arguments for and against active engagement by courts in this issue require sustained reflection and debate. I would only say this: To the extent that climate change implicates already existing norms of a binding nature in the field of human rights, amenable to judicial enforcement, it is the province and duty of judges to interpret and apply such norms. Courts are regularly faced with new phenomena. The novelty of the issue and or its complex characteristics cannot therefore, as such, be dispositive in this regard.

When we consider potential climate change litigation before the Court, there are a number of further, more technical, elements which may fall for discussion. I raise one, without prejudice to any particular case.

As has already been demonstrated today the European Court of Human Rights has consistently held that the Convention does not provide for the institution of an *actio popularis* and that its task is not normally to review the relevant law and practice *in abstracto*, but to determine whether the manner in which they were applied to or affected the applicant gave rise to a violation of the Convention. Therefore, to

succeed before the Court applicants must show that they have been directly affected by the alleged violation.

Therefore, since there is no right to nature preservation as such under the Convention, in order to fall within the scope of private and family life, complaints relating to environmental issues have to show that there was an actual interference with the applicant's private sphere, and that a level of severity was attained.[219] Therefore, by its very nature, and due to requirements of causality and harm, the adjudication of climate change disputes poses some challenges for the traditional way these legal doctrines have been construed in practice.

Here again, before concluding, allow me to recall that it is not the first time that the Court has been faced with challenges of this nature.

Moreover, the already established case-law in environmental cases before the Court demonstrates a certain conceptual trajectory, the logical extension of which remains to be determined by the Court using its traditional methodological approaches. The outcome of the Court's deliberations in this field will come soon, I am sure. In this regard it bears reiterating that the Council of Europe is at this very moment reflecting on what role it should play to give a new impulse to protecting the environment. The path taken will be very important for the way in which the law will eventually develop.

## Conclusion

Dear Guests,

Allow me then to conclude.

As I stated in my opening remarks this morning, we are present in a transformative moment in human history, a moment of planetary impact and importance. No one can legitimately call into question that we are facing a dire emergency that requires concerted action by all of humanity. For its part, the European Court of Human Rights will play its role within the boundaries of its competences as a court of law forever mindful that Convention guarantees must be effective and real, not illusory.

Thank you for your attention.

219. *Fadeyeva v. Russia*, no. 55723/00, § 70, ECHR 2005-IV.

# Conclusions

**Françoise Tulkens**
Judge Emeritus at the European Court of Human Rights

Nous avons assisté à une journée intense, d'une très grande qualité aussi bien sur le plan juridique et politique que social et humain. Comme le disait dans son Introduction le juge Linos-Alexandre Sicilianos, ancien président de la Cour européenne des droits de l'homme, l'environnement est une question qui a une dimension planétaire et j'ajouterai, existentielle. Merci à toutes celles et tous ceux qui ont pensé, voulu, préparé cette conférence et je pense particulièrement à Natalia Kobylarz, Klaudiusz Ryngielewicz et Yves Winisdoerffer qui en sont les têtes pensantes et les chevilles ouvrières. Merci aussi à vous toutes et tous qui y ont contribué et participé d'une manière ou d'une autre, dans des conditions parfois difficiles. Il y a plus de 1500 participants devant les écrans, signe d'une intelligence collective qui est un atout précieux et un gage pour l'avenir. Quelles que soient nos différences, nous sommes tous concernés par le futur de notre humanité.

## Le temps de l'action

Quel était l'objectif de cette conférence ? Il ne s'agissait pas de se limiter à rappeler les relations, évidentes et certaines, entre droits humains et environnement. C'est un acquis ou, du moins, je l'espère. Dès l'ouverture de la conférence, les interventions croisées de Madame Marija Pejčinović Burić, Secrétaire générale du Conseil de l'Europe et de Madame Bachelet, Haute commissaire aux droits de l'homme des Nations Unies ont bien montré l'enjeu et la nécessité de passer de la parole aux actes. Sur le terrain du droit, il est urgent de mener des actions et penser la complémentarité de ces actions. Chaque institution doit prendre sa part dans le cadre de ses compétences et de ses responsabilités. D'un côté, il est essentiel que les États s'engagent dans des textes normatifs et tant le Conseil de l'Europe que les Nations Unies sont des organes moteurs en la matière. D'un autre côté, les cours et les tribunaux nationaux et internationaux à travers le monde, au premier rang desquels la Cour européenne des droits de l'homme où se déroule symboliquement cette rencontre, ont un rôle à jouer dans la protection de l'environnement par des décisions judiciaires. Dans la fameuse balance des intérêts pour déterminer si une ingérence dans un droit fondamental est nécessaire dans une société démocratique, le juge des droits humains doit aussi placer l'urgence environnementale et climatique. A l'horizon mais un horizon qui se rapproche comme on l'a bien perçu pendant la journée, se profile la reconnaissance et la mise en œuvre d'un droit autonome à un environnement sain.

Quels ont été les points forts de cette conférence ? Celle-ci était très bien construite, dans une belle progression intellectuelle.

## Le point de départ

Dans le premier panel présidé par le juge Paul Lemmens, nous avons eu ce qui était indispensable, à savoir un aperçu général de la jurisprudence des tribunaux internationaux.

De manière dynamique et ouverte, la jurisprudence de la Cour européenne des droits de l'homme est analysée par Natalia Kobylarz autour de certains aspects dans lesquels des développements significatifs ont émergé d'autres organes internationaux de protection des droits humains ainsi que des cours supérieures nationales. Ces développements suscitent des attentes quant à une évolution de la jurisprudence européenne par rapport aux requêtes environnementales qui arrivent à la Cour. La Convention est un instrument vivant qui doit répondre aux réalités du temps présent. Dans ce contexte, trois questions significatives sont retenues qui ne sont pas exclusives l'une de l'autre mais complémentaires.

Tout d'abord, le champ de la protection. Dans certains arrêts de la Cour européenne, notamment ceux qui concernent les activités industrielles, le développement urbain ou encore les désastres naturels, Natalie Kobylarz observe que la Cour évolue progressivement – ou devrait évoluer- d'une approche fondée sur la personne (*anthropocentric*) vers une approche centrée sur l'environnement (*écocentric*). Actuellement, il est reconnu que la jouissance des droits garantis par la Convention européenne des droits de l'homme dépend aussi de la jouissance des droits liés à l'environnement et la jurisprudence de la Cour semble s'être « stabilisée » sur les articles 2 et 8[220]. En ce qui ci concerne le droit à la vie privée et familiale et le droit à un environnement sain, il n'y pas « de cloison étanche » pour reprendre une formule bien connue qui traduit l'indivisibilité et l'interdépendance des droits humains fondamentaux.

Ensuite, la question toujours épineuse la causalité où des suggestions intéressantes sont formulées. D'une part, en l'absence de lien causal direct, la Cour ne pourrait-elle pas développer le critère du « lien étroit suffisant » (*sufficiently close link*) ; d'autre part, le renversement de la charge de la preuve ne devrait-il pas être envisagé ? Dans ce cas, il incomberait à l'État de prouver qu'il n'y a pas eu dommage.

Enfin, en ce qui concerne le préjudice et les mesures de réparation des dommages écologiques, le président Sicilianos a évoqué un mécanisme qui existe en Grèce et qu'il faudrait creuser comme exemple de mesures de réparation non conventionnelle.

En contrepoint, Jorge Calderon Gamboa évoque la philosophie de la Convention américaine relative aux droits de l'homme (1969) ainsi que la jurisprudence de la Cour interaméricaine dont l'importance et l'influence sont reconnues[221]. L'approche est différente dans la mesure où la protection de l'environnement est envisagée à la fois de manière indirecte à travers la protection d'autres droits et de manière directe comme droit autonome. Dans les deux cas, l'accent est mis est sur les obligations de réparation du dommage environnemental. L'essentiel est ceci : « un environnement

220. E. Mazzanti, "Environmental rights and criminal protection: the dialogue between EU and ECHR", *Revue internationale de droit penal*, numéro special The Criminal Law Protection of our Common Home, 2020, p. 70.
221. Voy. « Environnement et droits de l'homme », sous la direction de Ch Cournil, *Journal européen des droits de l'homme*, 2020 (octobre), pp. 189 et s.

sain n'est pas secondaire par rapport aux obligations de l'État mais un droit en lui-même qui doit être protégé, respecté et mis en œuvre par la loi ». L'objection traditionnelle de la justiciabilité, liée à la génération des droits, semble dépassée. Dans le débat avec les participants, Paul Bauman, auteur d'une thèse de doctorat en droit soutenue en 2018 à l'Université de Nantes sur *Le droit à un environnement sain et la Convention européenne des droits de l'hommes*, enchaine[222]. Il estime que la Cour européenne des droits de l'homme est à un tournant. Pour affronter le défi planétaire, elle ne peut se limiter à une approche indirecte.

Au regard des limites inhérentes à l'action des différents instruments européens et internationaux de protection des droits de l'homme, Catherine Redgwell développe une idée forte. Il ne suffit plus « d'ajuster » les droits humains à l'environnement mais il est maintenant nécessaire de penser un véritable changement de paradigme. Reconnaître le droit à un environnement sain est considérer l'environnement, *per se*, comme un bien public qui mérite, sans aucun doute, le statut de droit économique et social.

## Vers une démocratie environnementale

Sous ce bel intitulé, le second panel, sous la direction du vice-président Jon Fridrik Kjolbro, s'attache à la question des droits de participation. Il s'agit des droits d'avoir accès à l'information, de participer au processus de prise de décision, de pouvoir saisir la justice pour faire valoir les droits liés à l'environnement, tels qu'ils sont notamment expressément reconnus dans la Convention d'Aarhus et l'Accord d'Escazú de 2018.

Le juge Lado Chanturia fait justement remarquer que, dans ce domaine comme dans beaucoup d'autres, la Cour européenne des droits de l'homme « compense » d'une certaine manière le fait qu'elle ne garantit pas le droit à un environnement sain en tant que tel (*as such*) par la reconnaissance d'obligations procédurales positives. On en voit de nombreux exemples dans la jurisprudence en ce qui concerne les articles 2, 6 et 8 de la Convention ainsi que l'article 1er du Protocole n°1. Cette tendance pourrait (devrait ?) certainement s'étendre à l'article 10, tant il est vrai que désormais chaque droit substantiel reconnu par la Convention secrète des garanties d'ordre procédural afin de contribuer à son effectivité.

Une observation importante se dégage quant à l'accès à la Cour européenne des droits de l'homme : le rôle des associations est essentiel pour introduire des requêtes au nom de ses membres, ce qui implique un élargissement de la notion de victime au sens de l'article 34 de la Convention. Sans soulever le spectre de l'*actio popularis*, une évolution douce se met heureusement en place dans la jurisprudence de la Cour.

Cela étant, l'accès à l'information soulève en cascade de nombreuses questions que la Cour européenne devra nécessairement affronter. Ainsi, par exemple, le droit à l'information comprend-t-il aussi le droit de mettre en cause la véracité des informations de l'État dans l'évaluation des risques qui résultent d'une activité dangereuse ?

222. Sa thèse a reçu le prix de la Société française pour le droit de l'environnement. Elle vient d'être publiée. P. Bauman, *Le droit à un environnement sain et la Convention européenne des droits de l'homme*, Paris, LGDJ, 2021.

Dans la période critique que nous vivons, la protection assurée par la Convention d'Aarhus sur la protection de l'environnement et les droits humains est plus importante que jamais. 41 des 47 États membres du Conseil de l'Europe en sont parties et donc liées par les standards qui sont établis. A cet égard, il est très important de rappeler le principe fondamental de non-régression (*standstill*)[223]. Cependant, dans les faits, nous sommes loin des objectifs annoncés et de ce qui pourrait faire une réelle différence. Par rapport à l'accès à l'information et à la justice, la participation du public au processus décisionnel ou encore la protection des défendeurs de l'environnement, les exemples – ou plutôt les contre-exemples- donnnés par Fiona Marshall sont sérieusement préoccupants.

Maintenant faut-il encore continuer à « tourner autour du pot » ? se demande à juste titre James Thornton. Certes, la Cour européenne des droits de l'homme à un rôle à jouer pour contribuer à la lutte contre la destruction de l'environnement qui menace les droits garantis par la Convention, mais n'est-il pas temps et urgent de défendre l'idée tout simple que le droit à un environnement sain, qui inclut le droit à la santé, à la qualité de l'air, à l'eau, etc. *est* un droit garanti par la Convention ? Des arguments forts appuient cette suggestion qui n'est plus de l'ordre de l'utopie ou de la provocation. Outre que ce droit est est reconnu dans la Constitution de nombreux États membres, un consensus se dégage en Europe sur la nécessité d'assurer la protection du droit à un environnement sain.

Ugo Taddei ajoute un bémol mais aussi une suggestion. Comme le droit à l'environnement n'est quand même pas toujours reconnu dans certains pays, privant de nombreuses personnes d'une protection judiciaire adéquaté, un forum européen devrait se mettre en place pour prendre le relai. Au niveau de la Cour elle-même et pour améliorer son impact, le rôle des associations est à nouveau mis en avant. Les ONG doivent pouvoir intervenir à toutes les étapes de la procédure pour porter les demandes des personnes en situation de désavantage ou de vulnérabilité. En ce qui concerne la saisine de la Cour, une interprétation de la notion de victime pourrait s'étendre à la la victime potentielle à la lumière du principe de précaution et de prévention. Le message adressé à la Cour est fort et il doit être entendu : elle peut avoir un impact dans l'amélioration des systèmes nationaux de protection à l'encontre de la détérioration de l'environnement, notamment quant à l'évaluation du risque, des dommages et des remèdes.

## Le contentieux de la Cour européenne des droits de l'homme

Le troisième, panel, sous la présidence de l'Ambassadeur Irakli Giviashvilli, approfondit le contentieux de la Cour européenne au regard de deux questions particulières : la pollution de l'air et les désastres environnementaux. En toile de fond, nous pensons évidemment aux procès climatiques menés contre les États (peut-être demain

223. Voy. l'ouvrage de référence, I. Hachez, *Le principe de standstill dans le droit des droits fondamentaux : une irréversibilité relative* (Bruxelles, Bruylant, Athènes, Sakkoulas, Baden-Baden, Nomos Verlagsgesellschaft, 2008, 693 p.

contre les entreprises) aux Pays-Bas, en France, en Belgique, en Suisse[224]. La requête *Claudia Duarte Agostino et autres c. le Portugal* et 32 autres États est pendante devant la Cour européenne des droits de l'homme et elle a été communiquée (en priorité) aux gouvernements défendeurs le 30 novembre 2020. Les requérants se plaignent du non-respect par les 33 États membres de leurs obligations positives au titre des articles 2 et 8 de la Convention, lus à la lumière des engagements pris dans le cadre de l'Accord de Paris sur le climat en 2015.

Le juge Tim Eicke s'attache plus particulièrement à la jurisprudence de la Cour au regard de l'article 6 de la Convention, lequel subordonne les garanties du procès équitable aux « contestations sur des droits et obligations de caractère civil » ou au « bien-fondé d'une accusation en matière pénale ». Même si on peut observer une certaine évolution dans la jurisprudence qui semble chercher à limiter la « sévérité » initiale, ce développement ne s'est pas encore cristallisé dans une nouvelle approche plus « environmentally-friendly »

La question incontournable reste celle de l'exécution des arrêts de la Cour afin de garantir l'effectivité des décisions judiciaires et, partant, la prévention des violations. Clare Ovey montre bien les différentes formes que peuvent prendre les mesures de réparation selon la nature de la violation en cause. Il y a des exemples où le comité des ministres a soutenu la restauration de sites endommagés sur base du constat de violations des droits de la Convention dues à des dommages environnementaux. Mais deux problèmes subsistent et non des moindres. D'une part, jusqu'où peut s'étendre la *restitutio in integrum* dans les situations de pollution et de catastrophes écologiques ? D'autre, part, quels sont les moyens du Comité des ministres du Conseil de l'Europe par assurer la mise en œuvre effective des arrêts environnementaux ? O. L.eclerc estime que « le manque d'experts et leur indépendance est un problème réel à ne pas sous-estimer »[225].

## Une question de politique ou de droits humains ?

Le dernier panel, sous la présidence de la juge Ksenija Turkovic, soulève cette (insoluble) interrogation. Les deux évidemment car l'un ne va pas sans l'autre. L'environnement et le changement climatique relèvent *et* du politique *et* du droit.

Du côté politique, le président de l'Assemblée parlementaire du Conseil de l'Europe Rik Daems constate la résistance et la lenteur du politique en Europe- « ce n'est pas une priorité », un argument insupportable et aveugle-, aiguillonné maintenant par le judiciaire. Le moment est propice et le temps n'est-il pas est venu d'adopter un protocole additionnel à la Convention européenne des droits de l'homme ? Celui-ci garantirait le droit individuel à un environnement sain et lui donnerait ainsi de solides fondations. Certes cette proposition est discutée mais il est urgent précisément de la mettre publiquement en discussion afin que différentes voies puissent être explorées.

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224. Voy. « Environnement et droits de l'homme », sous la direction de Ch Cournil, *Journal européen des droits de l'homme*, 2019 (décembre), pp. 198 et s. En ce qui concerne une position qualifiée de « décevante » de la CJUE, cf. E. Brosset et E. Truilhé, « Procès climatique à Luxembourg : l'affaire Sabo n'est pas l'affaire du siècle ! », *Le club des juristes*, 21 février 2021.
225. O. Leclerc, « La prise en compte de la science dans le litige environnemental », *in* Mission droit et justice, *Justice pour l'environnement,* 7 octobre 2020 (vidéo)

Ainsi, C. Le Bris suggère une voie plus ambitieuse, celle d'un nouvel instrument obligatoire présentant un caractère autonome et qui consacrerait un droit collectif[226].

Du côté droit humain, Christina Voigt nous ramène aux fondamentaux. Oui, le changement climatique porte atteinte au droit à la vie et s'immisce dans de nombreux autres droits, la vie privée et la vie familial, celle de nous tous mais surtout celles des pauvres, des migrants, des femmes. Oui, les États sont tenus de respecter les obligations positives qui leur incombent et donc de prendre les mesures adéquates et proportionnées pour lutter contre ces violations potentielles. Oui, un contrôle européen indépendant et impartial doit être préservé à tout prix et mené avec force.

## Et la Cour ?

En sa qualité de président de la Cour européenne des droits de l'homme, Robert Spano comme gardien du temple nous ramène à la question des compétences. Est-ce la fonction de la Cour d'être une Cour du droit de l'environnement ? Non bien sûr mais, *with due respect*, je ne pense pas que c'est ainsi que le problème se pose. La Convention européenne des droits de l'homme ne fonctionne pas dans un vide mais dans la société Elle est un instrument vivant (*living instrument*) appelé non seulement à sauvegarder mais à développer les droits de l'homme et les libertés fondamentales (Préambule). L'intelligence de la Convention est de permettre que celle-ci fasse l'objet d'une interprétation ouverte, évolutive, dynamique, susceptible de donner sens et effet, dans le temps présent, aux droits garantis. S'il n'en était pas ainsi, la Convention serait un « manuscrit de la mer morte » comme le disait l'ancien juge français Petiti.

Prenons l'exemple des droits économiques et sociaux[227].Dans l'esprit de ses pères fondateurs, la Convention européenne devait être un instrument dont la « juridicité » serait incontestable et dont les dispositions se prêteraient à un contrôle juridictionnel, au sens fort du terme, tant devant le juge national que devant le juge international. Ce souci les conduisit à n'insérer dans la Convention de 1950 que les droits dont le contenu pouvait s'appuyer sur un consensus politique suffisamment solide et qui pouvaient, en conséquence, être coulés dans des définitions juridiques fermes et précises. Dans les textes, s'ébauchait donc un cloisonnement juridique rigoureux et une stricte division des tâches qui rendait, *a priori*, illusoire toute perspective de voir l'un ou l'autre droit social effectuer une percée significative dans le droit de la Convention européenne des droits de l'homme Un tel cloisonnement ne résista cependant pas longtemps à l'épreuve des faits. Appréhendant et faisant siennes les intuitions qui soutiennent le principe de l'indivisibilité des droits fondamentaux, la Cour européenne des droits de l'homme aperçut rapidement que l'effectivité des droits civils et politiques dont elle avait la garde ne pouvait se concevoir, dans

226. C. Le Bris, « Assurer le droit à un environnement sain au niveau supranational. Pour une action renforcée du Conseil de l'Europe sur les changement climatiques », *Rev. trim. D.H.*, 2021 (à paraître).
227. Fr. Tulkens et S. Van Drooghenbroeck, « La place des droits sociaux dans la jurisprudence de la Cour européenne des droits de l'homme. La question de la pauvreté ,in Commission nationale consultative des droits de l'homme, *La déclaration universelle des droits de l'homme (1948-2008). Réalité d'un idéal comun ? Les droits économiques, sociaux et culturels en question*, Paris, La documentation française, coll. « Les colloques de la CNCDH », 2009, pp. 105-116.

certains cas, qu'à charge d'admettre les prolongements sociaux de ces droits. Ainsi, dès le début des années 1980, la Convention européenne des droits de l'homme, grâce au dynamisme interprétatif de la Cour, s'écartait progressivement des rails sur lesquels ses auteurs l'avaient placée et se montrait, selon la belle expression d'un de ses commentateurs, « perméable aux droits sociaux »[228]

Profondément attachée à la Convention européenne des droits de l'homme, nous avons tous je pense pu constater que les plus belles pages de la Convention ont souvent été écrites en marge. Ce n'est d'ailleurs pas un hasard si le séminaire d'ouverture de l'année judiciaire de la Cour européenne des droits de l'homme le 31 janvier 2000, sous le signe des 70 ans de la Convention, a choisi parmi les thèmes retenus l'environnement et l'interprétation évolutive[229]. J'espère que les travaux de cette journée pourront être une source d'inspiration pour la Cour et lui donner une impulsion significative dans la résolution créative et responsable des affaires environnementales dont elle est et sera saisie. La protection de l'environnement est notre bien commun.

228. Cf. F. Sudre, « La perméabilité de la Convention européenne des droits de l'homme aux droits sociaux », *Mélanges offerts à J. Mourgeon,* Bruxelles, Bruylant, 1998, p. 46.
229. Cour européenne des droits de l'homme, Dialogue des juges. *La Convention européenne ses droits de l'homme : un instrument de 70 ans*, Strasbourg, 2020 (vidéo)

## Closing remarks

**Robert Spano**
President of the European
Court of Human Rights

Firstly, let me thank all our moderators and speakers today for their contributions. I would like to pay a special thanks to the Organising Committee, Klaudiusz Ryngielewicz, Natalia Kobylarz and the team for putting together this event. Thanks again to the Georgian and Greek presidencies for their commitment to the topic of the environment and their support for today's conference.

Thanks should also go to our participants in Strasbourg, including a number of Court Judges, as well as Ambassadors and their representatives, and those who have logged on remotely. We have had an extremely high interest expressed in joining this conference remotely, including questions and comments put, and I think this attests to the importance of the topic and the interest in it.

Finally, thank you, Francoise, for having provided our conference conclusions in such a comprehensive manner. We have had four very rich and dense panels today. This is a technical subject and a number of our panels have focused on precise issues of our case-law. Yet, I believe that one of the consequences of today's conference has been a very positive show-casing of the Court's existing environmental case-law.

Today, we have continued an urgent and global conversation on the environment which we started in February during the High-level conference on environmental protection and human rights. I am particularly pleased that we have been able to hear views this morning from the United Nations' perspective, as well as from the Inter-American system, as I consider it is important for us, at the European level, to widen our approach in finding solutions to these environmental problems which face us.

What has been the common thread which has linked our discussions today? From different perspectives, the judicial, the academic, civil society, and from different continents, we have asked how international human rights law can respond to the new climate reality.

We have also discussed the limits to using human rights law as a tool to responding to environmental and climate disasters. I think we agree that there are difficult questions which need to be resolved concerning our existing legal architecture, particularly in regards to the European Convention on Human Rights. We have heard of them today: admissibility, causality to name but two.

Whilst our perspectives may be different, I believe that our aim is a common one: How do we better protect our global environment?

While there may be no easy answers, by asking these questions, we ignite a spark (not a wildfire I hasten to add) and I am confident this will lead to a new impetus in the Council of Europe's response to environmental challenges.

# Illustrations de la conférence

**Samuel Bollendorff**
Photographe et réalisateur

« J'ai fait le tour de la Terre en 2018. Ça ne prend que quelques heures tant elle est petite, fragile. Et où que mon regard se soit porté, il s'est perdu dans l'obscurité. »

Samuel Bollendorff est photographe et réalisateur. Enseignant à l'École nationale supérieure Louis Lumière, il propose un regard social sur les institutions et interroge la place de l'humain dans les sociétés du XXIe siècle.

Pionnier du documentaire interactif et des projets transmédias, il explore les nouvelles formes d'écritures audiovisuelles et leur transposition dans l'espace public.

Parmi ses réalisations on compte Voyage au bout du charbon (Prix SCAM 2009), À l'abri de rien (Prix Europa 2011), Le Grand Incendie (Visa d'or du documentaire interactif) La Parade ou encore La Nuit Tombe sur l'Europe.

Dans sa création Contaminations : après moi le déluge, dont certaines œuvres illustrent la présente publication, Samuel Bollendorff propose une réflexion sur les pollutions industrielles irrémédiables, transformant pour des décennies, voir des siècles, des territoires en zones impropres au développement de la Vie.

# Contaminations, après moi le déluge

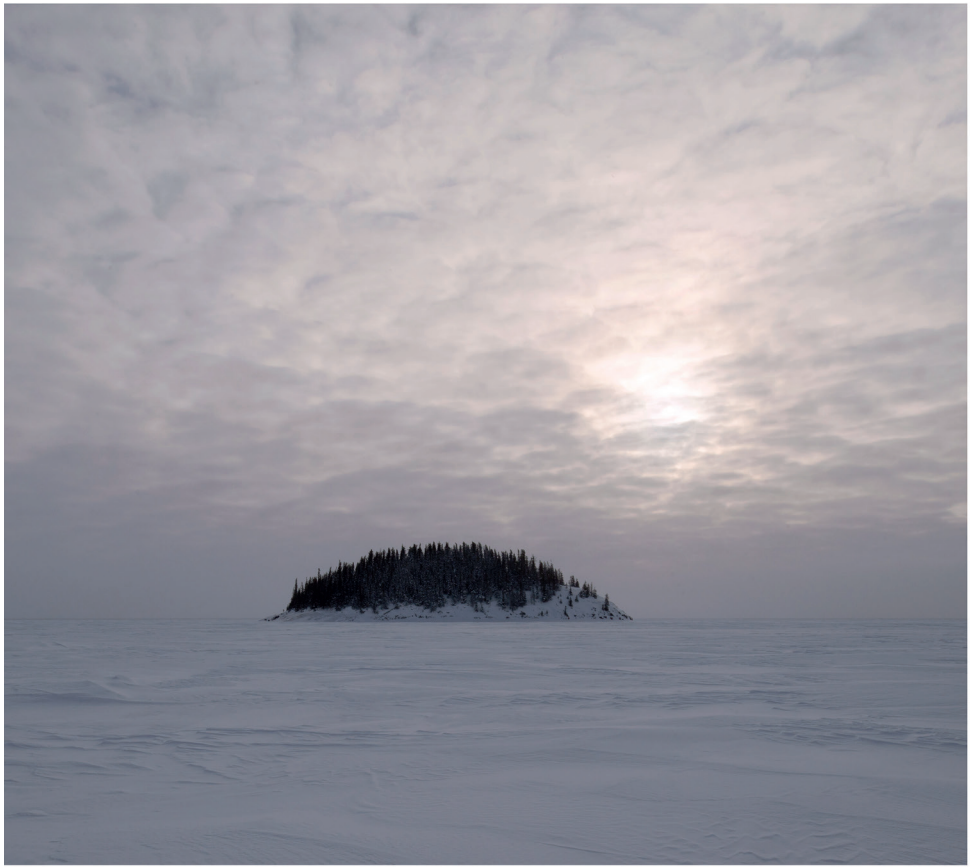
J'ai fait le tour de la Terre en 2018. J'ai vu combien elle est petite, fragile. Et où que mon regard se soit porté, il s'est perdu dans l'obscurité. Un fleuve mort sur 650 km, des poissons déformés, des forêts radioactives, des enfants qui naissent sans yeux, des mafieux qui trafiquent des déchets nucléaires, des déchets plastiques à la dérive au milieu d'un océan devenus les premiers maillons d'une chaîne alimentaire dégénérée... Qu'avons-nous laissé faire ?

*Après moi le déluge* propose une réflexion sur les pollutions industrielles irrémédiables, transformant pour des décennies, voire des siècles, des territoires en zones impropres au développement de la Vie. Un tour du monde de zones contaminées par l'Homme du XXIe siècle et ses industries chimiques, minières ou nucléaires, qui laissent des pans entiers de notre planète souillés, en héritage pour les générations à venir.

Méthane, acide prussique, phosgène, phosphore rouge, oxyde d'éthylène, chlorure de vinyle, phénols, dérivés d'arsenic, de cyanure, de chlore, sulfure d'hydrogène, soude caustique, pétrole, bisphénol, DDT et PCB sont autant de molécules et de produits de synthèse dont les concentrations dans les sols, les eaux et la chaîne alimentaire, prendront des décennies, des siècles, parfois des milliers d'années, à retrouver des concentrations viables pour l'humain.

Face à ces constats, les discours de communication des industriels sont d'une cynique violence. Les porte-paroles des compagnies pétrolières revendiquent une « énergie verte » à propos des sables bitumineux ; les pollueurs brésiliens, connus pour leur corruption, ne sont pas condamnés ; à Fukushima, l'exploitant de la centrale fait du lobbying pour rejeter ses millions de litres d'eaux contaminées dans l'océan... et les taux de cancer augmentent en flèche. Mais les industriels n'ont « pas un dollar à perdre ». Après moi le Déluge !

Depuis 20 ans j'ai travaillé sur des sujets de précarité. Longtemps j'ai imaginé que ces histoires n'étaient pas les miennes. Croyant peut-être pouvoir me protéger du poids des témoignages des plus fragiles en imaginant avoir la chance de ne pas être dans les situations que je photographiais. Aujourd'hui, j'ai fait le tour de la Terre, et je l'ai vu si petite, si fragile... Et nos déchets sont partout, contaminant les terres, les eaux et les airs. Nos océans immenses sont souillés jusqu'en Arctique, des milliers de tonnes de déchets polluent déjà l'Espace. Continuer c'est être aveugle, ces histoires sont la nôtre.



La Mère Nature.
Alberta - Canada

*Une prophétie disait qu'un jour les leaders seraient contrôlés par le côté obscur*

*On était au paradis. Nous vivions depuis des milliers d'années en harmonie avec la Nature, notre Mère. La terre nous donnait tout ce dont nous avions besoin. Les arbres étaient verts, l'eau était bleue. Il y a 50 ans, les blancs nous ont dit que notre mode de vie était en train de mourir, qu'il n'était plus adapté.*
*Quand les usines sont arrivées, la neige est devenue jaune et grise, les animaux ont commencé à mourir, les oiseaux ne volaient plus comme avant. Et un jour on s'est mis à pêcher des poissons déformés.*
*Aujourd'hui les déchets toxiques et l'arsenic sont dans l'eau, les arbres sont contaminés... Les fumées se rependent et impactent les plantes. Les animaux meurent et les caribous disparaissent. Beaucoup d'entre nous meurent de cancer, même nos jeunes....*

François Paulette
Chef de la communauté de Fort Smith - Territoires du Nord ouest

En Alberta se joue la plus grande ruée vers l'or noir de l'ère moderne. Plus de 170 milliards de barils de pétrole à extraire des sables bitumineux, soit la deuxième réserve du monde, sont enfouis sous la forêt boréale, sur une superficie équivalente au quart de la France. Bitume, acides naphténiques, cyanure, phénols, arsenic, cadmium, chrome, cuivre, plomb et zinc… Mille milliards de litres de résidus toxiques, des boues tamisées du processus minier, sont déversés dans d'immenses lacs de retenue pollués d'hydrocarbures contenant plusieurs agents cancérogènes, mutagènes et tératogènes dans lesquels viennent mourir les canards sauvages.

Une des dernières forêts primaires de la planète est rasée, des rivières sont détournées et polluées, la quasi-totalité des caribous ont disparu... et le taux de cancers dans les villages du lac Athabasca est de 30 % plus élevé que dans le reste de la province..

Le trou noir.
Dzerjinsk – Russie

*J'aimerais oublier tout ça*
*et vivre comme les russes !*

*On déversait tout sur le sol, vers la rivière Oka. Avant on fermait les yeux sur certaines règles mais il n'y avait pas de corruption comme maintenant. Aujourd'hui on peut acheter n'importe quoi, n'importe quelle décision sanitaire ou écologique.*

M. Levachov, ancien ouvrier des usines Plexiglas. Il travaillait à la production d'éther et de polymères d'acrylique.

Un lac sans eau, uniquement composé de déchets toxiques, où l'air est irrespirable. Les berges sont molles et des filaments marron restent collés aux semelles. On l'appelle le trou noir. Sa consistance chimique est très variée, mais surtout inconnue. Même les ministères n'ont pas de données. On sait seulement que 6 000 m3 sont des déchets liquides, 9 000 m3 sont semi-liquides et 55 000 m3 sont polymérisés, durcis. Le trou noir, profond de 18 mètres, est directement relié à la nappe phréatique qui n'est qu'à quelques mètres profondeur.

Près de 300 000 tonnes de déchets chimiques neurotoxiques ont été enfouies dans la campagne alentour. Acide prussique, phosgène, oxyde d'éthylène, chlorure de vinyle, phénol, dérivés d'arsenic, de cyanure et de chlore ; c'est ce que respiraient les 300 000 habitants de la « ville la plus chimiquement polluée du monde » selon le Blacksmith Institute..

Le triangle des tumeurs.
Casale di Principe - Italie

*Tous les villages sont contaminés. Les habitants risquent de mourir du cancer, il leur reste peut-être vingt ans à vivre."*

Carmine Schiavone, mafieux repenti.

On l'appelle la Campanie heureuse et fertile. À Casal di Principe, la mafia brûle et enfouit des déchets de toute provenance depuis des années. Les témoignages de repentis estiment que plus de 10 millions de tonnes de déchets toxiques auraient été déversées dans la région entre 1991 et 2013, citant même l'utilisation de 400 000 semi-remorques qui auraient transporté les déchets d'au moins 443 entreprises italiennes confiés à la Camorra.

Scories de la pyrométallurgie de l'aluminium, poussières de fumées, boues de peinture, déchets liquides contaminés par des métaux lourds, amiante, boues de tannerie, jusqu'à des déchets atomiques de centrales nucléaires allemandes, autrichiennes ou suisses ont été jetés, brûlés et enterrés dans la première décharge industrielle illégale d'Europe entre Naples et Caserta, jusqu'aux pentes du mont Vésuve.

Même le gouvernement italien qualifie maintenant la région de « terra di tumori » ou « terre des tumeurs ».

La ville toxique
Anniston - Alabama - USA

*Pour ne pas perdre un dollar de vente !*

Ce n'est pas seulement le poison du XXe siècle, c'est aussi celui du XXIe. Avant de se consacrer aux biotechnologies agricoles, la société Monsanto s'est développée dans l'industrie chimique. On lui doit notamment la production de l'agent orange déversé sur les populations pendant la guerre du Vietnam, mais également, tout au long du XXe siècle, la commercialisation des PCB dans le monde entier.

Les PCB sont toxiques, écotoxiques et reprotoxiques. Y compris à faibles doses, ils provoquent des cancers, des effets sur le système immunitaire, le système reproducteur, le système nerveux, le système endocrinien... Cette famille de 209 dérivés chimiques chlorés ont été utilisés notamment pour la fabrication de systèmes isolants dans les condensateurs et les transformateurs électriques, du frigo à la centrale thermique.

Extrêmement volatiles, ils voyagent dans les airs et on en trouve jusque dans l'Arctique. Les PCB sont persistants, certains éléments mettront jusqu'à 2 700 ans à se décomposer.

La petite ville d'Anniston en Alabama, 20 000 habitants, est le Ground Zero du PCB. Ici, entre 1929 et 1971, la société Monsanto a fabriqué 308 000 tonnes de PCB, connus en France sous le nom de pyralène. Pendant cette période, l'usine a rejeté 27 tonnes de PCB dans l'atmosphère, 810 tonnes ont été déversées dans le ruisseau voisin, et 32 000 tonnes de déchets ont été reléguées dans une décharge à ciel ouvert en pleine ville. Les habitants sont partis, abandonnant tout, laissant des centaines de maisons en ruine.

On appelait Anniston « Model City ». On l'appelle désormais « Toxic Town ».

Le fleuve mort
Minas Gerais - Brésil

*Il y a eu cette odeur pestilentielle. Puis le voisin est venu me dire de fuir.*
*J'ai quitté ma maison, sans rien, sans chemise.*
*Je n'ai eu que le temps d'emmener ma vie.*
Jose de Nascimento de Jesus

Le 5 novembre 2015, le barrage de rétention des boues polluées de la mine de fer Samarco, une filiale des géants miniers australien BHP Billiton et du brésilien Vale, s'est rompu, déversant 62 milliards de litres - l'équivalent de 187 pétroliers - de matières contaminées, de fer, d'aluminium, de mercure, de plomb, de manganèse, de sélénium, de cadmium ou encore d'arsenic dans le 5ème fleuve du Brésil. Le tsunami de boue toxique a enseveli trois villages, asphyxié les poissons, dévasté la faune, la flore, et emporté sur sa route chevaux, vaches, voitures en fauchant 19 personnes. Les corps ont été retrouvés démembrés sur dix kilomètres de distance.

Tous les corps vivants ont été asphyxiés. Tous les organismes du fleuve sont morts. Des espèces ont totalement disparues, 3 réserves naturelles et 500 000 personnes ont été touchées par la pollution la plus grave de l'histoire minière.

Le « fleuve doux » a changé de nom. On l'appelle désormais le fleuve mort.

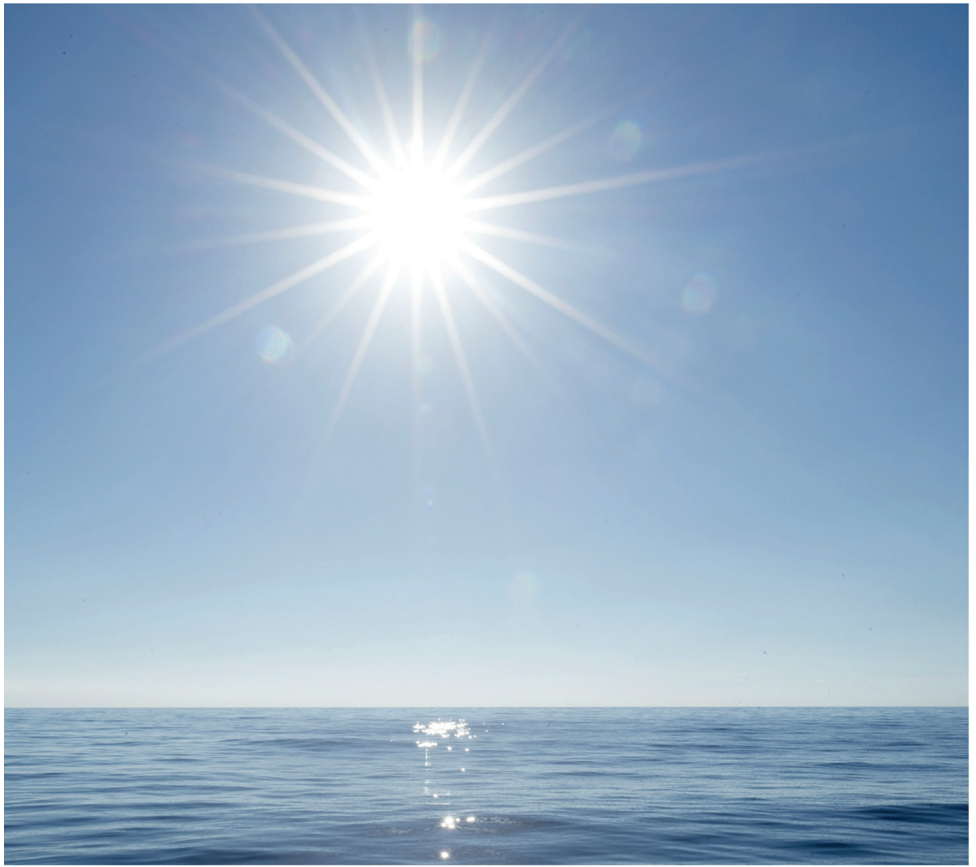
La forêt de la Nuit.
Fukushima - Japon

*Du ciel tombaient des flocons de l'explosion,*
*je me suis demandéquand nous allions mourir.*
Katsutaka Idogawa, ancien maire de Futaba

Le 11 mars 2011, à la suite d'un tremblement de terre d'une puissance de 9 sur l'échelle de Richter et du tsunami qui a suivi, trois réacteurs de la centrale nucléaire de Fukushima ont explosé.
La centrale, une des 25 plus grandes au monde, fournissait 10 % de l'électricité du Japon. 32 millions de Japonais ont été exposés aux radiations. Le nombre de cas de cancers de la thyroïde chez les enfants a été multiplié par 500 dans la région depuis la catastrophe.

Sept ans après, les fuites radioactives se poursuivent. Mais à moins de 5 kilomètres de la centrale, des zones sont progressivement rouvertes. Le gouvernement japonais presse les populations pour qu'elles reviennent s'installer dans la région alors que beaucoup de zones sont encore contaminées.

La préfecture de Fukushima (littéralement « île du bonheur ») est constituée de 80 % de forêts. Aucune décontamination n'a été opérée dans les bois remplis de poussières de césium de 2 micromètres que les vents déplacent à foison. La radioactivité y est 15 à 20 fois supérieure aux normes. L'érosion et le ruissellement ont commencé à transporter les sédiments plus contaminés des montagnes vers les plaines à nouveau cultivées.



Les larmes de sirènes
Océan Pacifique Nord

Chaque année, 8 millions de tonnes de plastique sont déversées en mer. Des déchets ménagers, des filets de pêche, des « larmes de sirènes » (des microbilles servant de matière première dans l'industrie), et surtout des plastiques à usage unique. Des emballages utilisés quelques secondes qui contamineront les océans pour des siècles. Lorsqu'une bouteille de plastique se fragmente, au fil de l'eau, de l'attaque des UV et de quelques bactéries, elle produit à elle seule 20 000 morceaux de microplastiques d'un millimètre ou de quelques dizaines de microns.

Des éléments confondus avec le phytoplancton et ingérés par les poissons. Les polymères fragmentés libèrent alors leurs toxiques — bisphénol A, phtalates, DDT, PCB… — et contaminent les tissus des poissons qui les absorbent. Certaines zones présentent des concentrations de plastique jusqu'à dix fois plus importantes que le plancton.

Ainsi entrées dans la chaîne alimentaire, les traces de plastique se retrouvent partout, jusqu'en Arctique. Une moule ou une huître contiennent une centaine de microbilles de plastique utilisées pour la fabrication des crèmes de gommage ou des pâtes dentifrice.

Depuis son invention, 8,3 milliards de tonnes de plastique ont été produites. Il ne se dégrade pas, il est toujours là. Au milieu de l'océan Pacifique Nord, entre Hawaï et la Californie, se trouve la plus grande des six concentrations de plastique des océans.

Sur une zone de 3,43 millions de kilomètres carrés, soit près d'un tiers de la superficie de l'Europe, ce qu'on appelle « le continent de plastique » ressemblerait plutôt à une soupe mortelle faite de 1 800 milliards de microplastiques à peine visibles à l'oeil nu, chargés d'adjuvants, de PCB, de toxiques persistants.

Aujourd'hui, il est difficile de trouver un endroit sans aucune trace de plastique sur notre planète. Il y en a partout, dans tous les cours d'eau, dès le début de la chaîne alimentaire et jusque dans le corps humain. On estime que les hommes auraient perdu jusqu'à 75 % de leur fertilité à cause des perturbateurs endocriniens contenus, entre autres, dans le plastique.

**Climate change, loss of biodiversity, depletion of natural resources and chemical pollution bring new challenges for the European Court of Human Rights, the Council of Europe and the Governments of its Member States.**

How to address human rights class-actions stemming from large-scale environmental pollution? Where to draw the line between a policy decision within the State's margin of appreciation and a State's failure to strike the right balance between conflicting interests? Whether to allow legal standing to applicants who vindicate collective and intergenerational rights? Ought the ECtHR rely on the precautionary principle and adopt a new causation test in applications concerning global warming and environmental degradation? Or should it rather refrain from taking up the role of Europe's environmental tribunal? In the event violations are found, what measures of redress and prevention should be imposed on Member States? How to ensure better State compliance?

These and related questions were debated during a High-level International Conference on Human Rights and Environmental Protection – Human Rights for the Planet. The Conference was organised by the Ministry of Foreign Affairs of Georgia. It was held on 5 October 2020 at the European Court of Human Rights in Strasbourg, France.

This publication contains speeches and lectures that were delivered by the Conference speakers, renowned practitioners and academic experts in the field of international environmental law and human rights law.

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