CHECK AGAINST DELIVERY

"HUMAN RIGHTS AND CLIMATE CHANGE: WHAT ROLE FOR THE EUROPEAN COURT OF HUMAN RIGHTS"[1]

Inaugural Annual Human Rights Lecture

Department of Law, Goldsmiths University

2 March 2021

Tim Eicke

Judge, European Court of Human Rights

1. It is a great honour to have been invited to give the inaugural annual Human Rights Lecture organised and hosted by the Department of Law at Goldsmiths University. I am just sorry that circumstances are such that I cannot be with you in person. As much as Zoom seems almost to have become the new normal, it cannot replace the personal exchange with the students and other participants – both generally and bi-laterally over the after-event coffee or drink - which events like these facilitated and which for me are almost invariably the most enriching aspects of an evening like today. Let's hope that we will soon be in a position to get together again to debate the pressing issues of the day; and, of course, no issue is more pressing than the topic of this lecture: Climate Change. In fact, it has recently been described as "the biggest threat to security that modern humans have ever faced".[2]

2. Let me start with a slightly longer quote from the same source:

> *… today there are threats to security of a new and unprecedented kind. … They are: rising global temperatures; the despoiling of the ocean, that vast universal larder on which people everywhere depend for their food; changes in the pattern of weather worldwide that pay no regard to national boundaries, but that can turn forests into deserts, drown great cities and lead to the extermination of huge numbers of the other creatures with which we share this planet.*
>
> *No matter what we do now, some of these threats will assuredly become reality within a few short years. Others could, in the lifetime of today's young people, destroy entire cities and societies, even altering the stability of the entire world. The heating of our planet has already reached the point that the impacts on the poorest and most vulnerable people are profound. But this is only the beginning of this crisis.*
>
> …

> *We are today perilously close to tipping points that, once passed, will send global temperatures spiralling catastrophically higher. If we continue on our current path, we will face the collapse of everything that gives us our security: food production, access to fresh water, habitable ambient temperature and ocean food chains. And if the natural world can no longer support the most basic of our needs, then much of the rest of civilisation will quickly break down.*
>
> *… We have left the stable and secure climatic period that gave birth to our civilisation. There is no going back. No matter what we do now, it's too late to avoid climate change. And the poorest and most vulnerable – those with the least security – are now certain to suffer.*
>
> *Our duty right now is surely to do all we can to help those in the most immediate danger. But of course we have a parallel duty, and it's here where I think there are grounds for hope. While it's true we can never go back to the stable benign climate that enabled us to flourish for the past 10,000 years, I do believe that if we act fast enough, we can reach a new stable state.*

3. These are the words of Sir David Attenborough in his address to the UN Security Council little more than a week ago.

4. There can no longer be any doubt about the scale of the problem and the science behind it; the real challenge is what concrete steps are we, individually and collectively, willing and able to take in order to reach that "new stable state". Sir David highlighted an important aspect of the challenge this poses when he said to the UN Security Council:

> *Climate change is a threat to global security that can only be dealt with by unparalleled levels of global co-operation. It will compel us to: question our economic models and where we place value; invent entirely new industries; recognise the moral responsibility that wealthy nations have to the rest of the world; and put a value on nature that goes far beyond money.*

5. In a world that continues to be structured on the basis of sovereign equality between nation states – and in an era in which past and future moves towards a post-Westphalian model are actively being called into question - it is only appropriate that the first port of call for idenfiying and making the systemic changes necessary to meet this challenge as well as the necessary global cooperation are the respective legislatures as well as the executive. This is one of the hallmarks of living in a democratic society governed by the rule of law.

6. The deliberative process this involves has, of course, led to a number of positive developments both nationally and internationally. To name but a few, one might

point to the UK Climate Change Act 2008 (and the independent Climate Change Committee set up thereunder), the relevant EU Climate Change legislation binding on the now 27 Member States, the Aarhus Convention or the 2015 Paris Agreement.

7. On the other hand, this process has also exposed the scale of the challenge(s), both political (including in the sense of involving party or election politics) as well as social - identified by Sir David - in adopting the necessary standards as well as in their implementation. Again, just two examples: the first is the debate currently going on in France where, in 2019, President Macron created a "Citizens' Convention on Climate", consisting of 150 citizens selected at random, with a promise that he would be "submitting [their] legislative and regulatory proposals 'without a filter' either to a referendum, to a vote in Parliament or to direct implementation".[3] However, the recently presented Climate Bill has been subject to considerable criticism for only reflecting a small proportion of the Convention's more than 150 (inter-related) proposals.[4] The most obvious other, international, example is of course the withdrawal (now reversed) of the US from the Paris Agreement and the accompanying domestic policies adopted under the previous administration; not to speak of some of the policies of other major polluting nations.

8. But even leaving these difficulties aside, the deliberative processes involved always take a considerable amount of time – time which Sir David reminds us we do not have – and ultimately frequently only lead to legislative texts which either commit States (i.e. largely the executive) to adopt or operate by reference to certain standards or which impose certain standards on private actors, all of which requires further practical implementation and supervision.

9. It is perhaps not surprising, therefore, that some concerned citizens – and we all should be concerned citizens - turn to the courts with the hope of obtaining a swifter and more concrete legal remedy towards ameliorating the consequences of past failings and towards helping us achieve the "new stable state". While parties bringing such proceedings, as in the recent judgment of the UK Supreme Court in *R(Friends of the Earth Ltd and others) v Heathrow Airport Ltd,*[5] most frequently seem to rely primarily on already existing legally binding requirements or obligations and merely seek to supplement or strengthen their arguments by also relying on the European Convention on Human Rights, there seem to be an increasing number of proceedings seeking to rely only or mainly on the ECHR.

10. The most prominent successful example of this latter kind of litigation before a national court is of course the December 2019 *Urgenda* judgment of the Dutch Supreme Court.[6] I will briefly return to this a little later.

11. There are two other cases in this latter category which I should specifically identify now but in relation to which I can say relatively little because they are

currently pending before the European Court of Human Rights ("ECtHR") and because it would be inappropriate for me, as a sitting judge, to comment on the substance or the merits of a pending case. The first is the case mentioned in the invitation to this lecture: *Duarte Agostinho et al v Portugal and 32 other States.*[7] This case was brought directly to the ECtHR and was communicated to the respondent States on 13 November 2020[8] and given priority by the President of Section IV. The applicants complain that the respondent States have failed to comply with their positive obligations under Articles 2 and 8 ECHR (as well as Article 14), read in the light of the commitments made within the context of the 2015 Paris Agreement to limit the increase of the average temperature of the planet significantly below 2°C in comparison with pre-industrial levels and to seek to limit the temperature rise to 1.5°C by comparison with pre-industrial levels. The second such case is the application brought by the *Verein KlimaSeniorinnen Schweiz* against Switzerland following their unsuccessful proceedings before the domestic courts.[9] This application was apparently submitted at the end of November 2020 and has not yet been communicated to the respondent Government.

12. After this rather long introduction, let us turn to the role the European Convention and more importantly the European Court of Human Rights in the struggle to ensure that we achieve the new stable state Sir David referred to.

13. The starting point for this part of our analysis is inevitably to note:

(a) first that the 2015 Paris Agreement itself, apparently deliberately[10] as a result of objections *inter alia* by a number of States Parties to the ECHR,[11] contains no substantive provision making the link between climate change and human rights. In fact, the only mention of human rights in the Paris Agreement is in its Preamble, "acknowledging" that "Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children"; and

(b) second that the ECHR itself is, of course, a human rights treaty, concluded as long ago as 1950 and, as a consequence, as the Court has repeatedly confirmed is not "specifically designed to provide general protection of the environment as such; to that effect, other international instruments and domestic legislation are more pertinent …."[12]

14. Despite the fact that, since about 1999, the Parliamentary Assembly of the Council of Europe has repeatedly recommended that this *lacuna* should be remedied by an amendment or an additional protocol to the ECHR, providing for the right of individuals to a healthy and viable environment[13] this recommendation has consistently been rejected by the Committee of Ministers, on the basis that "the Convention system already indirectly contributes to the

protection of the environment through existing Convention rights and their interpretation in the evolving case law of the European Court of Human Rights".[14]

15. It will not surprise you to hear that this has not, however, discouraged applicants from seeking to invoke the Convention in the name of environmental protection.

16. While there have not so far been any specific climat change decisions, a search of HUDOC, the Court's case-law database, shows that the Strasbourg organs have to date handed down more than 300 decisions and judgments in cases raising environment-related issues.

17. So let us now look at that case-law, both under the substantive provisions and the procedural requirements and both in terms of domestic proceedings as well as in relation to jurisdiction and admissibility before the ECtHR itself.

18. As long ago as 1978, in its famous *Tyrer* judgment, the Court "recalled" that "the Convention is a living instrument which … must be interpreted in the light of present-day conditions. … the Court cannot but be influenced by the developments and commonly accepted standards in … the member States of the Council of Europe".[15] This "living instrument" doctrine is a fundamental component of the Court's approach to the interpretation of the Convention as "first and foremost a system for the protection of human rights". Consequently, the Court will "have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved".[16]

19. Although the Court expressly acknowledged, as early as 1991, that "in today's society the protection of the environment is an increasingly important consideration",[17] it has not always been easy to identify the existence and/or content of these "commonly accepted standards" or any "evolving convergence" (in so far as they may be different) – at least at a macro level. By way of example, one need only compare the reluctance of States to commit to a clear linkage between human rights and climate change in the Paris Accord and the view expressed by the dissenting judges in the case of *Hatton v United Kingdom*.[18] In that case, the Grand Chamber held, by a majority, that, in adopting its 1993 policy on night flights at Heathrow, the Government had not "overstepped their [wide] margin of appreciation by failing to strike a fair balance between the right of the individuals affected … and of the community as a whole". There had, therefore, been no violation of Article 8. However, in their Dissenting Opinion Judges Costa, Ress, Türmen, Zupančič and Steiner disagreed. Relying on the "living instrument" doctrine, and referring to the 1972 UN Declaration on the Human Environment and the EU Charter of Fundamental Rights, they considered that:

These recommendations show clearly that the member States of the European Union want a high level of protection and better protection, and expect ... policies aimed at those objectives. On a broader plane the Kyoto Protocol makes it patent that the question of environmental pollution is a supra-national one, as it knows no respect for the boundaries of national sovereignty. This makes it an issue par excellence for international law – and a fortiori *for international jurisdiction. In the meanwhile, many supreme and constitutional courts have invoked constitutional vindication of various aspects of environmental protection – on these precise grounds. We believe that this concern for environmental protection shares common ground with the general concern for human rights.*

20. In order to engage Article 8, however, the Court has so far insisted that "the adverse effects of environmental pollution must attain a certain minimum level", an assessment which is by definition

... relative and depend[ing] on all the circumstances of the case, such as the intensity and duration of the nuisance, and its physical or mental effects. The general context of the environment should also be taken into account. There would be no arguable claim under Article 8 if the detriment complained of was negligible in comparison to the environmental hazards inherent to life in every modern city.[19]

As Judge Pavli noted in his Partly Dissenting Opinion in *Hudorovič and Others v Slovenia*,[20]

What matters is whether the environmental hazard has caused "significant impairment" to one's ability to enjoy one's home, considering aspects such as the intensity and duration of the nuisance ..., and its physical and mental effects on health and quality of life.

Nevertheless, the threshold is not such as to exclude claims not "seriously endangering their health".[21]

21. Perhaps most relevant to any potential climate change litigation, one can see that in these cases the Court has not limited itself to analysing the complaint in terms of an "interference by a public authority", ie a negative obligation but has frequently analysed such complaints by reference to a positive obligation on the State to take reasonable and appropriate measures to secure the applicant's rights under Article 8. Such a positive obligation may include, among others, a requirement to adopt, maintain and operate an appropriate regulatory regime. In any event, no matter how a complaint is ultimately analysed, the Court has confirmed that "the applicable principles regarding … the balance between the rights of an individual and the interests of the community as a whole are broadly similar".[22] That said, "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”.[23]

22. Under the Court’s existing case-law, certainly in cases concerning broader policy choices, the “margin of appreciation” left to States in the sphere of environmental protection has generally been held to be “wide”, leaving the Court to consider only whether there has been a “manifest error of appreciation by the national authorities in striking a fair balance between the competing interests of different private actors”. Due to the complexity of the issues involved, the Court has seen its role as primarily subsidiary, limited to examining first whether the decision-making process was fair and afforded due respect to the interests safeguarded to the individual by Article 8.[24] Only in exceptional circumstances will the Court go beyond this line and revise the material conclusions of the domestic authorities.[25] That said, in its recent judgment in *Cordella and Others v Italy*,[26] the Court did not describe the margin of appreciation as being “wide”; instead, it referred to the State enjoying a “certain” margin of appreciation. Whether this signifies a greater willingness on the part of the Court to engage with national policy remains to be seen.

23. Consequently, where the Court has found a violation of Article 8, this has frequently been in respect of a failure by authorities to comply with some aspect or other of the domestic legal or regulatory regime – such as a failure of the licensing regime[27] or a failure to comply with freedom of information legislation.[28] Nevertheless, the Court has also made clear that mere compliance with domestic law does not *per se* resolve the issue in favour of the State; domestic legality is only “one of many aspects which should be taken into account in assessing whether the State has struck a ‘fair balance’ in accordance with Article 8 § 2”.[29]

24. When confronted with environmental disasters that have caused, or threatened to cause, loss of life[30], the Court has also found – frequently in addition to Article 8, and sometimes Article 1 of the First Protocol (the protection of property) – that Article 2 (the right to life) was engaged and had been breached.

25. The Grand Chamber helpfully summarised its case law on the obligations arising under Article 2, beyond the negative obligation to refrain from the “intentional” taking of life, in its recent judgment in *Nicolae Virgiliu Tănase v Romania,*[31] in the very different context of a serious road traffic accident. They include, most relevantly in the present context, a primary substantive procedural obligation to put in place an appropriate legislative and administrative framework including the making of regulations to compel institutions, whether private or public, to adopt appropriate measures for the protection of people’s lives. In these cases, Article 2 may well apply despite the fact that there is no direct State responsibility for placing the applicant’s life in danger.[32]

26. Article 2 also imposes the further substantive positive obligation to take preventive operational measures to protect an identified individual from another, or even from themselves – the so-called "*Osman* duty". However, the Court has significantly circumscribed this obligation. On one hand, the Court has stressed that this obligation "must be interpreted in a way that does not impose an impossible or disproportionate burden on the authorities" and, on the other, it has made its application subject to the requirement that it has to be established that "the authorities knew or ought to have known at the time of a real and immediate risk to the life of an identified individual or individuals".[33] Once triggered, however, this duty requires the State to take measures within the scope of its powers that, judged reasonably, might be expected to avoid the identified risk.

27. While the Court has not yet had to decide this issue itself, one can see a potential extension of this approach in the recent decisions by the UN Human Rights Committee[34] and by the *Tribunal Administratif de Toulouse* and confirmed by the *Cour administrative d'appel de Bordeaux*[35]concerning those sometimes referred to as "climate refugees".

28. In light of what I have said so far the Secretary General of the Council of Europe, the President of the Committee of Ministers, the President of the Parliamentary Assembly, and the President of the European Court of Human Rights were probably right when – referring to the "living instrument" doctrine - they said, in their joint statement of 29 January 2020 at the launch of the 70th anniversary of the ECHR, that:

> *The Convention … has repeatedly proved itself capable of adapting to new human rights challenges …*
>
> *This adaptability will be crucial in helping the continent to face emerging challenges to individuals' rights linked to … threats to the natural environment.*[36]

29. Let us now turn from the substantive rights to the procedural aspects of the Court's case law in this area.

30. In its judgment in *Taşkın and Others v Turkey,*[37] in the context of environmental law, the Court explained that the State's procedural obligations consist of three separate obligations:

> *Where a State must determine complex issues of environmental and economic policy, the decision-making process must firstly involve appropriate investigations and studies in order to allow them to predict and evaluate in advance the effects of those activities which might damage the environment and infringe individuals' rights and to enable them to strike a fair balance between the various conflicting interests at stake.[38] The importance of public access to the conclusions of such studies and to*

information which would enable members of the public to assess the danger to which they are exposed is beyond question.[39] *Lastly, the individuals concerned must also be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process*.[40]

31. The specific article of the Convention that is invoked is of lesser relevance in this context as the Court noted that, in the context of dangerous activities, the scopes of the positive obligations under Articles 2 and 8 largely overlap. The positive obligation under Article 8 requires national authorities to take the same practical measures as those expected of them in the context of their positive obligation under Article 2 of the Convention.[41]

32. In what may be seen as an otherwise surprising dearth of references to, and reliance on, related international treaties, it is in identifying and developing these so-called "participatory rights" that the Court has most clearly drawn support and inspiration from other international instruments in the field of environmental law – especially from the 1998 Aarhus Convention.[42] This reflects the fact that the Court has elsewhere accepted "the existence of a joint European and international stance on the need to protect access to the cultural heritage", on the basis that

> *... the provisions of the Convention cannot be interpreted and applied in a vacuum. Despite its specific character as a human rights instrument, the Convention is an international treaty to be interpreted in accordance with the relevant norms and principles of public international law, and, in particular, in the light of the Vienna Convention on the Law of Treaties of 23 May 1969 ... Thus the Court has never considered the provisions of the Convention to be the sole framework of reference for the interpretation of the rights and freedoms enshrined therein. On the contrary, account should be taken, as indicated in Article 31§3(c) of the Vienna Convention, 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*.[43]

33. However, it is also in this – procedural – context that some of the main difficulties in relation to climate change litigation may arise.

34. Looking at the domestic context first, the Court made it clear that "individuals concerned must also be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process".[44] However, when it comes to asserting or defending that right by reference to Article 6 of the Convention (the right to access to court and to a fair hearing), the dominant line of the Court's case law makes it clear that, in fact, challenges by individuals to decisions of major environmental impact do not necessarily engage an individual's

"civil rights and obligations" so as to render Article 6 applicable. Article 6 will apply only where an applicant can show that it exposes them *personally* to a danger that was not only *serious* but also *specific* and, above all, *imminent*.[45] One or two decisions appear to have been more accommodating but, although they do not appear to have had any lasting impact on the underlying approach of the Court,[46] they have left the case law in a degree of uncertainty. As a result, on occasion, the Court has sought to draw a distinction between, on one hand, "the aspect of the dispute relating to defence of the public interest" that did not concern a "civil right" that the applicants could have claimed on their own behalf and, on the other, "the repercussions of the [decision] on their lifestyles and properties" which did engage Article 6.[47]

35. The only exception to this approach – if, in fact, it is an exception – can be found in a line of cases against Turkey and in which the applicants had already successfully challenged the original measures before the highest domestic courts on the basis of the risk they posed to their interests. Their complaint before the Strasbourg Court, in effect therefore was that, in breach of Article 6(1), those final judgments in their favour either had not been implemented or had been ignored by the national authorities.[48]

36. The same restrictive approach is, in fact, also reflected in the case law of the Court in relation to both the applicability *ratione materiae* of the substantive rights as well as the admissibility of an application to the Court under Article 34 of the Convention more generally.

37. In relation to the former, by reference to Articles 2 and 8 of the Convention as well as Article 1 of the First Protocol, the Court has made it clear that although

> *Article 8 has been relied on in various cases involving environmental concern, ... it is not violated every time that environmental deterioration occurs: no right to nature preservation is as such included among the rights and freedoms guaranteed by the Convention .... Thus, in order to raise an issue under Article 8 the interference must directly affect the applicant's home, family or private life*.[49]

38. In relation to the latter, Article 34 of the Convention of course provides that the Court "may" receive application only from an applicant "claiming to be the victim of a violation … of the rights set forth in the Convention". To date, this requirement has always been interpreted by the Court

> *... autonomously and irrespective of domestic concepts such as those concerning an interest or capacity to act. In addition, in order for an applicant to be able to claim to be a victim of a violation of the Convention, there must be a sufficiently direct link between the applicant and the harm which they consider they have sustained on account of the alleged violation*.[50]

39. This focus on a serious, specific and imminent risk to an applicant, of course, poses a very real obstacle to litigation brought by public interest organisations and non-governmental organisations ('NGOs') unless they can show, for example, that they were set up for the specific purpose of defending their members' interests before the courts, and that those members were directly concerned by the decision at issue,[51] or that a domestic judgment in their favour had been not been executed.[52]

40. This is not, however, an inadvertent development in the Court's case law, or an unintended limitation on access to the Court. Quite the contrary: the Court's consistent case law, under Article 34 as well as under Article 6 of the Convention, is that

> *… the Convention does not allow complaints in abstracto alleging a violation of the Convention. The Convention does not provide for the institution of an* actio popularis*, meaning that applicants may not complain against a provision of domestic law, a domestic practice or public acts simply because they appear to contravene the Convention. In order for applicants to be able to claim to be a victim, they must produce reasonable and convincing evidence of the likelihood that a violation affecting them personally will occur; mere suspicion or conjecture is insufficient in this respect*.[53]

This case-law, therefore, appears to leave little scope for the application of the precautionary principle.[54]

41. By contrast, it is perhaps worth noting that a request for an advisory opinion under Protocol 16 is not – as a matter of Convention law – subject to the admissibility requirements of Article 34. Protocol 16 enables the nominated "highest courts" of a party to that protocol to ask the Court for an advisory opinion on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention. Currently, the UK has neither signed nor acceded to this Protocol.

42. This *actio popularis* vs. individual victim dilemma confronting the Court has also troubled the domestic courts – and clearly continues to do so – without a clear consensus becoming apparent. By way of example, in its *Urgenda* judgment the Dutch Supreme Court overcame this difficulty by concluding that the NGO in question, which

> *… represents the interests of the residents of the Netherlands with respect to whom the [positive obligation under Articles 2 and 8] applies, can invoke this obligation. After all, the interests of those residents are sufficiently similar and therefore lend themselves to being pooled, so as to promote efficient and effective legal protection for their benefit*.[55]

By contrast, in its judgment in *Friends of the Irish Environment*, the Irish Supreme Court has again endorsed an approach under the Irish constitution akin to that adopted by the Court, namely that "a plaintiff [needs] to be able to demonstrate that they have been affected in reality or as a matter of fact by virtue of the measure which they seek to challenge on the basis that it breaches rights".[56] In its decision of 5 May 2020, in the case of the *Verein KlimaSeniorinnen Schweiz*,[57] the Swiss Federal Court adopted a similar approach. That said, in the Irish case the Chief Justice went on to accept that there might be "circumstances in which it is permissible to accord standing outside the bounds of that basic principle" but indicated that these "must necessarily be limited and involve situations where there would be a real risk that important rights would not be vindicated unless a more relaxed attitude to standing were adopted".

43. However, I should also draw attention to a connected point that arises from the Court's jurisprudence, which is the risks – perceived or real – to the separation of powers (or, at international level, to the principle of subsidiarity) and of the "judicialisation of public administration".[58] 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".[59] 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".[60]

44. This concern also appears to be reflected in the reasoning of the majority of the US Court of Appeals for the Ninth Circuit in its decision in *Juliana v United States*,[61] directing the dismissal of a group action in relation to climate change-related injuries on the basis that

> *… [a]s the opinions of their experts make plain, any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches. … These decisions range, for example, from determining how much to invest in public transit to how quickly to transition to renewable energy, and plainly require consideration of "competing social, political, and economic forces," which must be made by the People's "elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country"*.[62]

45. Connected to this is yet a further potential issue highlighted by the question posed to the CJEU in Case C-752/18 *Deutsche Umwelthilfe eV v Freistaat Bayern*,[63] namely the risk of the executive or the State failing or refusing to

implement the judgments handed down; something that would pose a real risk to the institutional balance and to the standing of the Court within the European human rights system and, ultimately, to the rule of law. In the *Deutsche Umwelthilfe* case, the CJEU was asked in apparent desparation

> *… whether EU law … must be interpreted as meaning that, in circumstances in which a national authority persistently refuses to comply with judicial decisions enjoining it to perform a clear, precise and unconditional obligation [to take the necessary measures to comply with the prescribed nitrogen dioxide emission levels] empowers or even obliges the national court having jurisdiction to order the coercive detention of office holders involved in the exercise of official authority*.[64]

46. Before concluding, let me raise one final issue that will almost inevitably arise in climate change-related litigation as a result of the interplay between: (1) the fact that climate change is a global problem that needs to be solved globally and that emissions of greenhouse gases take place from the territories of all countries, that all countries are affected and that measures will have to be taken by all countries; and (2) the (perhaps old-fashioned) Westphalian framework of reference underlying the Convention; that is, the focus set out in Articles 1, 19 and 34 ECHR, on the individual State as a respondent, and that state's obligations to "secure to everyone within its jurisdiction" the rights under the Convention. This issue is, of course, brought into sharp relief by the application in *Duarte Agostinho et al v Portugal and 32 other States*.[65] As this is currently pending before the Court, I will say no more about it other than to identify the issue and draw attention to some of the relevant case law.

47. This concerns an application in relation to the destruction of a site of historic and scientific interest brought against Turkey, Austria and Germany. The Court indicated that, as all measures were taken in, and all relevant legal proceedings had been before the courts of, Turkey, the fact that Austrian and German companies were directly involved in the actual destruction was not *per se* sufficient to bring a case against those States. The application against them was rejected as inadmissible *ratione personae* by reference to the Court's established case law to the effect that a States' jurisdiction was primarily territorial and that extra-territorial jurisdiction would only exceptionally be found (namely in cases of State-agent control or effective control over an area outside their territory).[66]

48. It has repeatedly been suggested that the Court might be able to resolve this issue by reference to the concept of State responsibility and the recognition, in Article 47 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, that "where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act". Again, no doubt arguments to this effect may well be developed before us in an appropriate case, but it is worth noting that the Court

has so far taken the position that “the test for establishing the existence of ‘jurisdiction’ under Article 1 of the Convention has never been equated with the test for establishing a State’s responsibility for an internationally wrongful act under general international law”, the latter being logically dependent upon the former having been established.[67]

49. That said, in a more recent development in the context of cross-border crime, in emphasising the Convention’s “special character as a treaty for the collective enforcement of human rights and fundamental freedoms”, the Court has indicated that this special character “may, in some circumstances, imply a duty for Contracting States to act jointly and to cooperate in order to protect the rights and freedoms they have undertaken to secure within their jurisdiction”.[68] It remains to be seen how far this duty to cooperate will be confined to the context of cross-border crime and the consequent procedural obligation to investigate arising under Article 2 of the Convention.

50. Having taken you on this tour of the Court’s existing case law and, I hope, identified some of the opportunities and challenges in using the European Court and the Convention of Human Rights as a forum for climate change litigation, let me finish by quoting what the current President of the Court, Judge Spanó, said at a conference held as part of the celebrations of the 70th anniversary of the Convention:[69]

> *… 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. … 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.*

---

[1] This lecture builds upon and develops some of the themes first expressed by the author in the Macfadyen lecture in Edinburgh (virtually) on 5 November 2020 and published by the Scottish Council of Law Reporting at https://www.scottishlawreports.org.uk/publications/macfadyen-lectures/climate-change-and-the-convention/

[2] Sir David Attenborough in his address to the UN Security Council on 23 February 2021 (https://www.gov.uk/government/speeches/pm-boris-johnsons-address-to-the-un-security-council-on-climate-and-security-23-february-2021)

[3] https://www.conventioncitoyennepourleclimat.fr/en/

[4] See e.g. Le Monde "*La convention citoyenne pour le climat juge sévèrement la prise en compte de ses propositions par le gouvernement*" 28 February 2021.

[5] [2020] UKSC 52, § 113; see also the recent successful proceedings brought before the French *Conseil d'Etat* (19 November 2020; https://www.conseil-etat.fr/en/press-releases/greenhouse-gas-emissions-the-government-must-justify-within-3-months-that-the-reduction-path-to-2030-can-be-achieved) and the *Tribunal Administratif de Paris* (3 February 2021; http://paris.tribunal-administratif.fr/Media/TACAA/Paris/00communiques_de_presse/laffairedusiecle)

[6] ECLI:NL:HR:2019:2007; available at: https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf

[7] no. 39371/20; the respondent States being Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Germany, Greece, Denmark, Estonia, Finland, France, Croatia, Hungary, Ireland, Italy, Lithuania, Luxembourg, Latvia, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Russia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, the United Kingdom, Turkey and Ukraine)

[8] http://hudoc.echr.coe.int/eng?i=001-206535

[9] judgment of the Swiss Federal Court in *Verein KlimaSeniorinnen Schweiz* (1C_37/2019; https://www.bger.ch/ext/eurospider/live/fr/php/aza/http/index.php?highlight_docid=aza%3A%2F%2Faza://05-05-2020-1C_37-2019&lang=de&zoom=&type=show_document) (5 May 2020)

[10] Article 2 of an earlier draft contained an express obligation to implement the United Nations Framework Convention on Climate Change 'on the basis of respect for human rights' (see the Draft Paris Agreement, Draft conclusions proposed by the Co-Chairs of 5 December 2015: FCCC/ADP/2015/L.6. Available at: https://unfccc.int/files/bodies/awg/application/pdf/draft_paris_agreement_5dec15.pdf).

[11] See Keina Yoshida and Joana Setzer, 'The trends and challenges of climate change litigation and human rights' [2020] EHRLR 140.

[12] *Kyrtatos v Greece*, No 41666/98, § 52, ECHR 2003 VI (extracts); see, most recently, *Cordella and Others v Italy*, Nos 54414/13 and 54264/15, § 100, 24 January 2019.

[13] Such a right is, of course, contained in Article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ('the Protocol of San Salvador'), which entered into force on 16 November 1999 and formed one of the 'building blocks' of the Advisory Opinion of the Inter-American Court of Human Rights of 15 November 2017, *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-23/18, Inter-Am Ct HR, (Ser A) No 23).

[14] *Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment*, Reply to Recommendation, Doc 12298, 19 June 2010, § 9; this "indirect contribution" is helpfully summarised in the regularly updated *Manual on Human Rights and the Environment* compiled by the Steering Committee for Human Rights ('CDDH') on the instructions of the Committee of Ministers (available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806962d1)

[15] *Tyrer v United Kingdom*, 25 April 1978, § 31, Series A No 26.

[16] *Christine Goodwin v United Kingdom* [GC], No 28957/95, § 74, ECHR 2002-VI.

[17] *Fredin v Sweden (No 1)*, 18 February 1991, § 48, Series A No 192.

[18] *Hatton and Others v United Kingdom* [GC], No 36022/97, ECHR 2003-VIII.

[19] *Fadeyeva v Russia*, No 55723/00, § 69, ECHR 2005-IV; see also *Dzemyuk v Ukraine*, 42488/02, § 78, 4 September 2014.

[20] Nos 24816/14 and 25140/14, 10 March 2020, referring to *Udovičić v Croatia*, No 27310/09, §139, 24 April 2014; and see *Fadeyeva v Russia*, cited above, § 69.

[21] *López Ostra v Spain*, 9 December 1994, § 51, Series A No 303-C; see also *Tătar v Romania*, No 67021/01, § 85, 27 January 2009.

[22] *Fadeyeva v Russia*, cited above, § 94.

[23] Ibid, § 96.

[24] See *Buckley v United Kingdom*, judgment of 25 September 1996, *Reports* 1996-IV, pp 1292–93, §§ 76–77; and *Fadeyeva v Russia*, cited above, § 105.

[25] See*Taşkın and Others v Turkey*, No 46117/99, § 117, ECHR 2004-X; and *Fadeyeva v Russia* (cited above), § 105.

[26] Nos 54414/13 and 54264/15, § 158, 24 January 2019.

[27] *López Ostra v Spain*, cited above.

[28] *Guerra and Others v Italy*, 19 February 1998, Reports of Judgments and Decisions 1998-I.

[29] *Fadeyeva v Russia*, cited above, § 98.

[30] such as a methane explosion in a large rubbish tip (*Öneryıldız v Turkey* [GC], No 48939/99, 30 November 2004), a mudslide (*Budayeva and Others v Russia*, Nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 20 March 2008) or heavy flash floods caused by the sudden release of water from a reservoir without any warning (*Kolyadenko and Others v Russia*, Nos 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, 28 February 2012).

[31] *Nicolae Virgiliu Tănase v Romania* [GC], No 41720/13, 25 June 2019.

[32] Ibid, § 135.

[33] Ibid, § 136; see also the judgment of the Supreme Court of Norway in *People v Arctic Oil* (22 December 2020; available at https://www.klimasøksmål.no/wp-content/uploads/2021/01/judgement_translated.pdf) at §§ 164 to 176.

[34] *Teitiota v New Zealand*, no. 2728/2016, 23 September 2020 (available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/127/D/2728/2016&Lang=en)

[35] Judgment of 18 December 2020 (though without any express reference to the ECHR; available at https://www.dalloz.fr/documentation/Document?id=CAA_BORDEAUX_2020-12-18_20BX02193_dup#_)

[36] Available at: https://www.coe.int/en/web/portal/-/70th-anniversary-of-european-convention-on-human-rights-a-convention-for-the-people.

[37] No 46117/99, § 119, ECHR 2004-X; see also *Giacomelli v Italy*, No 59909/00, § 83, ECHR 2006-XII; and *Tătar v Romania*, No 67021/01, § 113, 27 January 2009.

[38] See also see *Hatton and Others*, cited above, § 128.

[39] See also, *mutatis mutandis*, *Guerra and Others v Italy*, cited above, § 60; and *McGinley and Egan v United Kingdom*, judgment of 9 June 1998, *Reports* 1998-III, § 97.

[40] See, *mutatis mutandis*, *Hatton and Others*, cited above, § 127.

[41] See *Budayeva and Others*, cited above, § 133; *Kolyadenko and Others v Russia*, cited above, § 216; and *Brincat and Others v Malta*, Nos 60908/11 and four others, § 102, 24 July 2014.

[42] The United Nations Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters; see e.g. *Di Sarno and Others v Italy*, No 30765/08, § 107, 10 January 2012.

[43] *Ahunbay and Others v Turkey*, No 6080/06, § 23, 29 January 2019, even though it went on to declare the application inadmissible *ratione materiae* on the basis that it nevertheless did not detect a European consensus that this gave rise to a universal individual right to the protection of a given cultural heritage.

[44] *Taşkın and Others v Turkey*, cited above, at § 119

[45] See *Balmer-Schafroth and Others v Switzerland*, 26 August 1997, § 40, *Reports* 1997-IV; *Athanassoglou and Others v Switzerland* [GC], No 27644/95, §§ 46-55, ECHR 2000-IV; and *Ivan Atanasov v Bulgaria*, No 12853/03, § 92, 2 December 2010.

[46] See, eg, *Collectif national d'information et d'opposition à l'usine Melox – Collectif Stop Melox et Mox v. France*, No 75218/01, 28 March 2006.

[47] *Gorraiz Lizarraga and Others v Spain*, No 62543/00, §§ 46 – 47, ECHR 2004-III; see also *L'Erablière ASBL v Belgique*, No 49230/97, 24 February 2009 and, most recently, *Stichting Landgoed Steenbergen and Others v. the Netherlands*, no. 19732/17, § 30, 16 February 2021.

[48] *Taşkın and Others v Turkey*, cited above; *Okyay and Others v Turkey,* No 36220/97, 12 July 2005; and *Bursa Barosu Başkanlığı and Others v Turkey*, No 25680/05, 19 June 2018; see also Dissenting Opinion of Judge Eicke in *Sine Tsaggarakis AEE v Greece*, No 17257/13, 23 May 2019.

[49] *Fadeyeva v Russia*, cited above (n 17), § 68.

[50] *Gorraiz Lizarraga and Others v Spain*, cited above (n 44), § 35; see also, among other authorities, *Tauira and Others v France*, No 28204/95, Commission decision of 4 December 1995, Decisions and Reports (DR) 83-B, p 112; *Association des amis de Saint-Raphaël et de Fréjus and Others v France*, No

38192/97, Commission decision of 1 July 1998, DR 94-B, p 124; *Comité des médecins à diplômes étrangers v France and Others v France* (dec), Nos 39527/98 and 39531/98, 30 March 1999.

[51] *Gorraiz Lizarraga and Others v Spain*, cited above (n 44), § 39.

[52] *Bursa Barosu Başkanlığı and Others v Turkey*, cited above (n 45).

[53] *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania* [GC], No 47848/08, § 101, ECHR 2014 and the case law cited therein (in relation to Article 34); and *Gorraiz Lizarraga and Others*, cited above (n 44), § 46; and *L'Erablière ASBL v Belgique*, cited above (n 44), § 25 (in relation to Article 6).

[54] See the Dissenting Opinion of Judge Pettiti (joined by six of his colleagues) in *Balmer-Schafroth v Switzerland*, cited above (n 42), in which he 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'.

[55] ECLI:NL:HR:2019:2007, § 5.9.2.

[56] Judgment of Mr Justice Clarke, Chief Justice, at § 7.21.

[57] *Verein KlimaSeniorinnen Schweiz*, 1C_37/2019, cited above.

[58] A risk first identified in a different context 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.

[59] *Athanassoglou and Others v Switzerland*, cited above (n 42), para 53.

[60] Ibid, para 54.

[61] Of 17 January 2020 (available at: https://cdn.ca9.uscourts.gov/datastore/opinions/2020/01/17/18-36082.pdf, application for En Banc Rehearing rejected on 10 February 2021).

[62] Ibid, p 25.

[63] ECLI:EU:C:2019:1114 (19/12/19); see also the subsequent order of the Administrative Court (Verwaltungsgericht) Stuttgart in Case No Az: 17 K 5255/19 (21 January 2020).

[64] Ibid, § 29.

[65] Cited above

[66] *Ahunbay and Others v Turkey, Austria and Germany (Dec)*, No 6080/06, § 94, 21 June 2016.

[67] *Jaloud v The Netherlands* [GC], No 47708/08, § 154, ECHR-2014 and *Catan and Others v Republic of Moldova and Russia* [GC], No 48787/99, § 115, ECHR 2004-VII; most recently confirmed in *Georgia v Russia (II) [GC]*, § 163, 21 January 2021.

[68] *Güzelyurtlu and Others v Cyprus and Turkey* [GC], No 36925/07, § 232, 29 January 2019 and *Romeo Castaño v Belgium*, § 81, 9 July 2019.

[69] Conference of 5 October 2020, afternoon (at https://vodmanager.coe.int/coe/webcast/coe/2020-10-05-4/en; from ca. 1:33:00)