Human Rights and the Planet: the future of environmental human rights in the European Court of Human Rights

On 5 October 2020 a high-level international conference, ‘Human Rights for the Planet’, was held at the European Court of Human Rights (ECtHR) in Strasbourg. The conference was organized at the initiative of the Ministry of Foreign Affairs of Georgia, the first Member State of the Council of Europe to make environmental protection a priority theme during its Presidency of the Committee of Ministers.

The conference gathered renowned practitioners and academic experts in the field of international environmental law and human rights; the UN High Commissioner for Human Rights; the Secretary General of the Council of Europe; the ECtHR’s Presidents and judges; ambassadors; politicians and decision-makers; as well as a record number of online participants comprising civil society, human rights and environment defenders, academics, students and concerned citizens. The conference aimed to facilitate a debate about European human rights law in the face of the challenge posed by climate change, loss of biodiversity, depletion of natural resources and pollution.

This debate is extended into this Special Issue (SI) of the Journal of Human Rights and the Environment and by the drafting of the Strasbourg Principles of International Environmental Human Rights Law (Strasbourg Principles). The articles featured here reflect the main themes of the conference. They address novel and complex legal issues that are emerging in the theory and practice of environmental human rights law.

The SI begins with a conversation between Robert Spano, the President of the ECtHR and Philippe Sands, a distinguished lawyer specializing in international and environmental law. The main transversal themes of this interview are the harmonious interpretation of human rights law and environmental law, the dynamic nature of the European Convention on Human Rights (ECHR) and its inherently anthropocentric focus. The debate about the role of the European Court is frank and pragmatic. The editors of the JHRE are indebted to President Spano and Philippe Sands for their willingness to contribute to this SI and for their forthright engagement with the debate regarding the role of the ECtHR in the light of new challenges arising from climate change litigation in particular, and the pressing need to address the potentially devastating consequences of environmental degradation in general.

The key themes that emerge from the conversation between Spano and Sands are interrogated in the articles that follow. The first two articles specifically question the existing anthropocentric focus of the jurisprudence of the ECtHR and argue that a paradigm shift is needed in order to address the current biodiversity and climate emergencies. These contributions offer a comparative overview of the practice of...
international tribunals and human rights bodies, as well as superior national courts, in order to illustrate how human rights and fundamental rights jurisdictions have gradually shifted from extractive anthropocentrism to biocentric and ecocentric doctrines.

The article by Natalia Kobylarz provides a comprehensive foundation for an understanding of the issues facing the ECtHR in the era of litigation concerning climate change and, more generally, the environment. Although, according to Kobylarz, express recognition of a right to a healthy environment by the Council of Europe is desirable, there are a number of obstacles which render this development uncertain in the short term. Moreover, she argues, even if this is achieved in the longer term, successful implementation of such a right requires an appropriate foundation. Kobylarz therefore advocates an approach which is simultaneously an alternative to express recognition of a substantive right and the foundation for the implementation of such a right in the future, namely transitioning to a system of ecological human rights via the integration of ecological minimum standards into the ECtHR's fair balance review. The argument presented in the article is grounded in a meticulous comparative analysis of the environmental jurisprudence of the Inter-American Court of Human Rights and that of five Latin American countries in which the right to a healthy environment is constitutionally recognized. The reasoning employed by these courts in the development of ecological human rights, argues Kobylarz, is part of the international corpus iuris and represents a growing international consensus which the ECtHR can and should take into account in the development of its own environmental jurisprudence in response to the challenges of climate change and environmental degradation. The integration of ecological minimum standards into the existing fair balance review of the ECtHR will facilitate the transition of the ECHR system from environmental to ecological human rights and lay the conceptual foundation for the recognition and implementation of the right to a healthy environment in the future.

The article by Jorge Calderón-Gamboa and Julie Recinos is grounded in a deep understanding of the Inter-American human rights system. The authors argue that the Inter-American Court has, in the course of adjudicating a small number of key cases, shifted decisively from an indirect approach to environmental rights to full recognition of an independent substantive right to a healthy environment. This shift has also entailed, significantly, the recognition of the intrinsic value of nature, which warrants protection in its own right and not merely because of its utility to humans. The article also highlights developments in the jurisprudence of the Mexican Supreme Court, which seeks to broaden access to the court for victims of environmental damage. The authors suggest that aspects of the jurisprudence and practice of the Inter-American Court and of the Mexican Supreme Court provide the ECtHR with relevant tools which could be employed in developing a jurisprudence that is consistent with developing international approaches and able to address the growing environmental and climate crises.

The second part of the SI focuses on two specific areas of environmental litigation before the ECtHR, namely clean air and climate change. Although there is already a significant body of ECHR jurisprudence that addresses the impact of air pollution on a range of rights, the increasing scale of pollution and new scientific information about pollution’s negative effects on the enjoyment of human rights pose a challenge to the interpretation and implementation of the existing legal norms, as well as to the enforcement of the Court’s judgments. The human rights impacts of climate change, in turn, is a completely new theme for the Court. At the time of publication, several applications concerning climate change mitigation are pending the Court’s
Writing from a practitioners’ perspective, Irmina Kotiuk, Adam Weiss and Ugo Taddei, of the environmental NGO, ClientEarth, consider the question of whether the ECHR includes a right to clean and healthy air. Based on a careful analysis of the case law of the ECtHR in which the adverse impacts of environmental hazards on ECHR rights is examined, the authors argue that although the ECHR does not contain an explicit provision on the right to a healthy environment, the Court has already implicitly recognized this right through its acknowledgement of the close link between a healthy environment and the protection of a range of rights such as the rights to life and respect for private life and home. This link, the authors contend ‘is the core tenet of the internationally recognized right to a healthy environment’, leading to the conclusion that the Court has already ‘recognized this right de facto’. Recognition of the right to a healthy environment, in the view of the authors, necessarily entails recognition of the right to clean and healthy air as inherent to the right. This approach, the authors argue, is consistent with current approaches in International Law as well as among the Member States of the Council of Europe, where the right to clean and healthy air is widely recognized as a component of the right to a healthy environment as well as a corollary of other human rights such as the right to health. Full implementation of this approach, the authors suggest, requires the ECtHR to ensure that effective remedies are available to safeguard clean and healthy air. Drawing on ClientEarth’s extensive experience of litigating air quality cases, the authors highlight a number of tools which are in their view important building blocks for the development of an integrated approach to climate change and other environmental challenges. Such an approach is necessary to give effect to the promise of the ECHR as a living instrument that is able to adapt to protect rights from the impact of ‘what we can all see is coming’.

Christina Voigt’s contribution specifically addresses the climate dimension of human rights obligations. She argues that the adverse impact of climate change on a range of human rights is increasingly clear and that scientific evidence indicates that this impact will be exacerbated unless action is taken by states to significantly reduce global greenhouse gas emissions. Although climate change treaties such as the Paris Agreement do not specifically address the impact of climate change on human rights, Voigt argues that interpretation of the ECHR (and other international human rights instruments) must take into account relevant international climate change law that is binding on ECHR members. Voigt considers – in particular – the interpretation of Articles 2 and 8 of the ECHR in light of the Paris Agreement and concludes that the obligation of states to ‘take all appropriate and reasonable measures’ to secure the rights under these provisions includes the obligation to comply with their climate change obligations under the Paris Agreement.

The final article provides a practitioner perspective on a number of questions that will require resolution in climate change cases such as the Portuguese Youth and

1. Uricchio v Italy and 32 other States, no 14615/21; De Conto v Italy and 32 other States, no 14620/21; Müllever Austria, no 18859/21; The Norwegian Grandparents’ Climate Campaign and Others v Norway, no 19026/21; and Carême v France, no 7189/21.
2. Duarte Agostinho and Others v Portugal and 32 other Member States, no 39371/20; Verein KlimaSeniorinnen Schweiz v Switzerland, no 53600/20; and Greenpeace Nordic and Others v Norway, no 34068/21.

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Senior Women for Climate Protection cases\(^3\) currently pending examination by the ECtHR. Monica Feria-Tinta argues that climate change raises novel issues for adjudication in human rights cases. She identifies six specific international law issues that, in her view, will determine the outcome of many climate change cases in the ECtHR, namely jurisdiction, the ‘victim’ requirement, the role of international climate change treaties in interpreting human rights obligations under the ECHR, causation, and the notions of imminence and due diligence. Resolution of these issues, in Feria-Tinta’s view, requires adherence to the principle that the ECHR is a ‘living instrument’ which is able to adapt to new circumstances, as well as to exercise rigour in its application of important international law principles such as those relating to state responsibility and systemic integration. Like other contributors to this SI, the author refers to key jurisprudential developments in other human rights courts and international organs, emphasizing the potential for cross-fertilization of ideas between the ECtHR and those institutions.

The key issues and ideas proposed by the contributors to this SI are to a large extent summarized in the final contribution, namely the Strasbourg Principles of International Environmental Human Rights Law.

The Strasbourg Principles were drafted by a group of human rights and environmental law experts who were brought together by the 2020 Conference ‘Human Rights for the Planet’ and by the present SI. The Strasbourg Principles are a uniform restatement of general principles that have emerged in international human rights law in the context of the environment. They are intended to assist courts, lawyers and litigants engaged in international litigation of environmental matters.

The Strasbourg Principles respond to the pressing doctrinal and practical challenge brought to international human rights law by the severe adverse human rights consequences of environmental harm and by disasters caused by loss of biological diversity, depletion of natural resources, land system change and environmental pollution – including noise, air, water, soil, chemical and plastic pollution – as well as by climate change. The principles are based on the premise that a healthy environment is both a human right and a duty. The latter must be fulfilled by urgent action on the part of all actors, including national courts and international human rights organs.

The ensuing general principles are divided into ten categories, preceded by a restatement of several conclusions concerning the science about the causes and human rights effects of environmental degradation and climate change. The first group of principles concerns the right to a safe, clean, healthy and sustainable environment, which is an autonomous human right with both anthropocentric and eco-centric dimensions and which comprises substantive and procedural elements. The second group concerns the interpretation of the notion of a victim for the purposes of legal standing and representation in international environmental human rights litigation. The third group of principles comprehensively addresses the issue of harm. These principles explain the relationship between environmental and human rights harm, and propose parameters (including legal presumptions) for the legal assessment of the risk of harm and of the severity of harm. The principles in the fourth group address the burden of proof and, where appropriate, propose its reversal. The fifth group contains a single principle pursuant to which extraterritorial jurisdiction for transboundary environmental harm can be established where there is a cause-and-effect link between the activity under effective control of a State and the element of foreseeability of transboundary harm. The sixth group concerns the applicability

\(^3\) ibid.
of specific provisions of human rights treaties in the context of international environmental human rights litigation. The principles address, in particular, the right to access to a court for the purpose of judicial review of decisions concerning environmental matters. The seventh group contains a single comprehensive principle regarding the exhaustion of domestic remedies, a requirement that operates under the ECHR and, more generally, across international jurisdictions. The general principles in group eight are intended to guide the balancing of environmental interests with conflicting individual or general interests, such as those of the economic well-being of a country or of the protection of fundamental rights. Numerous principles in the ninth group define the human rights obligations of states that may arise in the context of environmental harm or risk of such harm. Finally, the tenth group, pertaining to the redress of environmental and human rights harm, proposes that preventive measures, ecological remediation and restoration should be the preferred and principal measures of redress ordered by courts.

The Strasbourg Principles are drafted in juridical terms as they are primarily intended to be used by judges and other legal professionals engaged in international human-rights-based litigation of environmental matters. The editors of the Journal of Human Rights and the Environment would like to thank all those who have contributed to the reflection and/or the drafting of the Strasbourg Principles.

As Christina Voigt highlights in her contribution to this SI, climate change is ‘already having a major impact on a wide range of human rights and could have a cataclysmic impact in the future unless ambitious actions are undertaken immediately’. The impacts of other environmental problems such as biodiversity loss, pollution and depletion of natural resources are potentially equally serious and demand equally urgent action. The ECHR was adopted by the Council of Europe more than 70 years ago in the wake of the devastation wrought by the Second World War. Since then, the ECtHR has delivered more than 23,000 judgments which have moulded the ECHR into a ‘dynamic and powerful instrument in response to new challenges and the ongoing promotion of human rights and democracy in Europe’, as the Council of Europe proudly states on its website.4 Environmental degradation and the climate crisis are perhaps the most serious human rights challenges confronting communities everywhere. As the ECtHR faces its first climate change cases, the articles that follow demonstrate that it is well placed to continue to provide the protection promised more than 70 years ago.

Natalia Kobylarz
Senior Lawyer at the Registry of the European Court of Human Rights

Evadne Grant
Associate Lecturer at the University of the West of England, UK and Senior Editor, Journal of Human Rights and the Environment