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

Opening of the Judicial Year
Seminar

Environment
Human rights and the environment: an evolving relationship

Speech by Laurence Boisson de Chazournes[1]

Strasbourg, 31 January 2020

President,
Judges,
Ladies and gentlemen,

It is an honour and a pleasure for me to be taking part in this seminar organised for the opening of the judicial year in this distinguished institution.

From absence to affirmation

At the end of World War II, reconstructing the economy and respecting the fundamental freedoms were the central concerns of Europe and the then international community. The Preamble to the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms states that those freedoms "are the foundation of justice and peace in the world".[2] Environmental issues were not yet a priority at that point in history. This transpires from a series of remarkable instruments which have helped to construct modern international law, including the 1948 Universal Declaration of Human Rights, the Treaties establishing the European Communities and the European Convention on Human Rights, which do not mention environmental protection at all.

Nevertheless, from the 1960s onwards in the Council of Europe[3], and then more broadly in the early 1970s, the need to protect the environment was affirmed and its link was forged with human rights. Thus the *Declaration on the Conservation of the Natural Environment in Europe*, adopted by the European Conference on the Conservation of Nature in 1970, proposed drawing up a protocol to the European Convention on Human Rights securing everyone's right to enjoy a pollution-free environment.[4] At the global level, the *Declaration on the Human Environment* adopted at the UN Stockholm Conference in 1972, proclaims in its Preamble that "[b]oth aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human

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2 Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, Preamble; Schuman Declaration of 9 May 1950.

3 See the European Water Charter (1968), the Declaration of Principles on Air Pollution Control (1968) and the 1972 European Soil Charter (1972)

4 A. C. Kiss, *La protection de l'environnement et les organisations européennes* (Environment Protection and the European Organisations) (1973), 19 *Annuaire français de droit international*, p. 895-921, 898.

rights and the right to life itself".[5] Principe 1 of the Declaration emphasises the mutual nature of that relationship:

> *Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations*.[6]

This interdependence between human rights and the environment has gradually taken up its place in the European system of human rights protection. Ever since the 1990s, in line with its interpretation of the Convention to the effect that "the Convention is a living instrument which … must be interpreted in the light of present-day conditions",[7] the European Court of Human Rights has construed the rights enshrined in this instrument so as to take account of environmental issues. In so doing, the Court has noted that "in today's society the protection of the environment is an increasingly important consideration".[8] In fact, this development was reflected in the 1970s by the inclusion of the right to a healthy environment in a fair number of national constitutions.[9]

Environmental protection is necessary for effective human rights protection

Throughout the 1990s the European Commission and Court produced a wealth of case-law enshrining the principle that the effective protection of the rights secured under the Convention required a high-quality environment. The right to life (Article 2), the right to respect for private and family life (Article 8) and the protection of property (Article 1 of Additional Protocol no. 1,) were all conducive to opening up to environmental issues, but other rights such as the prohibition of torture (Article 3), the right to liberty and security (Article 5) and freedom of expression (Article 10) have also played their part. We can therefore note that the right to environmental protection has been established through the intermediary of existing rights.

The cases in question have often involved problems of pollution such as noise, gas emissions, smells and other similar types of nuisance.[10] In such cases the States are required to take action to reduce or put an end to the pollution. The competing interests are balanced. The measures adopted must be "reasonable and adequate" in order to strike a fair balance "between the competing interests of the individual and of the community as a whole".[11] In assessing the reasonableness of the measures, the Court grants the States some discretion in "deciding on local needs and contexts".[12] This balancing of interests can work in both directions. Considering that the environment is a matter of general interest,[13] the enjoyment of specific rights may be restricted.[14] To that effect, the Court has found that "[f]inancial imperatives and even certain fundamental rights, such as ownership, should not be afforded priority over environmental protection considerations".[15]

We might wonder in this context whether the concept of weighing up interests is still relevant where the environment is concerned. The International Court of Justice has pointed out that the latter "is not an abstraction but represents the living space, the quality of life and the very health of

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5 UN Conference on the Environment, Stockholm, 5 to 16 June 1972; Declaration on the Environment, 16 June 1972, Preamble, recital 1.

6 UN Conference on the Environment, Stockholm, 5 to 16 June 1972; Declaration on the Environment, 16 June 1972, Preamble, Principe 1.

7 See *Tyrer v. the United Kingdom*, judgment of 25 April 1978, § 31, Series A no. 26.

8 *See Fredin v. Sweden*, judgment of 18 February 1991, Series A, no. 192, § 48.

9 The first time was in Sweden in 1974, followed by Portugal in 1976, Spain in 1978, Austria in 1984, Columbia in 1991, Russia and Peru in 1993, Argentina, Belgium and Germany in 1994, Finland in 1994, Cameroon and Ghana in 1996, and Mexico in 1999.

10 See, for example, *Powell and Rayner v. the United Kingdom,* judgment of 21 February 1990; *López Ostra v. Spain*, judgment of 9 December 1994; *Giacomelli v. Italy*, judgment of 2 November 2006; and *Borysiewicz v. Poland*, judgment of 1 July 2008.

11 See *Hatton and Others v. the United Kingdom,* Grand Chamber, judgment of 8 July 2003, § 98, and *López Ostra v. Spain*, judgment of 9 December 1994, §§ 55-58.

12 Ibid.

13 See, for example, *Valico S.R.L. v. Italy*, judgment of 21 March 2006, decision on admissibility.

14 See, for example, *Fredin v.* Sweden, judgment of 18 February 1991, and *Pine Valley Developments Ltd and Others v. Ireland*, 29 November 1991.

15 See *Hamer v. Belgium,* judgment of 27 November 2007, § 79; see also *Lazaridi v. Greece*, judgment of 13 July 2006, § 34; *O'Sullivan McCarthy Mussel Development Ltd v. Ireland*, 7 June 2018; and *Yaşar v. Romania*, 26 November 2019.

human beings, including generations unborn".[16] And the International Court adds that "safeguarding the ecological balance has come to be considered an 'essential interest' of all States".[17] It is becoming clear that the requirements of environmental protection are now in the interests both of the individual and of the national community as a whole, and must therefore benefit from protection at all levels.

Cases of industrial or natural disaster have also provided an opportunity for the Court to specify the States' obligations. It is no doubt in this sphere that the Court has been most daring. For instance, where certain activities prove dangerous to the environment, the States must put in place a legislative and administrative framework "to ensure the effective protection of citizens whose lives might be endangered by the inherent risks" of the activity in question.[18] The Court also points out that that framework "must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures".[19] In the sphere of natural disasters, States must mitigate their effects "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".[20] In any/either case the Court has emphasised that the States have a positive obligation to prevent risks. It has thus addressed both definite risks and uncertain hazards covered by the precautionary principle. The appraisal of whether or not this obligation has been met will depend on such factors as the origin of the threat and the dangerousness of activities. Account is also taken of the capacity for anticipation and the possibility of mitigating specific natural hazards.[21]

In this connection I would like to highlight the recent decision of the Supreme Court of the Netherlands, which relies on this prevention requirement – which the Supreme Court sees as deriving from Articles 2 and 8 of the European Convention one Human Rights – to impose an obligation on the State to take action to combat climate change; the aim being to limit the harmful effects causing the temperature of the earth to rise. The court's reasoning also applies to other global issues such as the protection of biodiversity and forests. It would be desirable for the Court to have a say concerning public policies to protect the global environment, relying on the aforementioned case-law arsenal. This would highlight the close relationship between the local and the global environment.

Importance of procedural obligations

Alongside these substantive obligations, the Court has also noted that a number of procedural obligations in the sphere of environmental protection can help guarantee the exercise of the rights secured under the Convention. This applies to the obligation to ensure a fair and informed decision-making process.[22] European case-law has rightly noted that that process 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"[23]. Outlining a new form of "environmental democracy", the Court recommends that the general public should be brought into the decision-making process, that the views of individuals should be taken into account[24] and that the findings of the surveys conducted should be made public.[25] This emphasis on

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16 See *Legality of the Threat or Use of Nuclear Weapons*, Advisory opinion, I.C.J. Reports 1996, p. 241-242, para. 29.

17 See International Law Commission, *Yearbook of the International Law Commission*, 1980, Vol. II, Part II, p. 38, para. 14; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, judgment, I.C.J. Reports 1997, p. 41, para. 53.

18 See *Öneryıldız v. Turkey*, Grand Chamber, judgment of 30 November 2004, ECHR 2004-XII, § 90.

19 See *Budayeva and Others v. Russia*, judgment of 20 March 2008, §§ 131-132, 138, 159, and *Öneryıldız v. Turkey*, Grand Chamber, judgment of 30 November 2004, ECHR 2004-XII, §§ 89-90.

20 See *Budayeva and Others v. Russia*, judgment of 20 March 2008, §§ 135 and 137.

21 Ibid., § 137.

22 See *Taşkın and Others v. Turkey*, judgment of 10 November 2004, § 118.

23 See *Giacommelli v. Italy*, judgment of 2 November 2006, § 83; see also *Hatton and Others v. the United Kingdom*, judgment of 8 July 2003, § 128, and *Tătar v. Romania*, 27 January 2009, § 101.

24 See *Taşkın and Others v. Turkey*, judgment of 10 November 2004, § 118.

25 See *Tătar v. Romania*, 27 January 2009, § 101.

the local level is a highly valued aspect of environmental protection which should be the driver of global action. Human rights should provide the foundation for such a bottom-up approach.

However, procedural obligations are not confined to the decision-making process. They include a requirement to keep the public informed of the possible risks and dangers of their environment. This obligation to inform encompasses the duty to provide "all relevant and appropriate information"[26] and to facilitate access to the information held.[27] The purpose of these requirements is to allow local populations to assess the danger to which they are exposed.

Those obligations, together with the previously mentioned substantive obligations, are broad in scope. States must implement them in the framework of their activities, and they are also required to ensure that the various public and private operators observe and comply with them in their mutual relations.[28]

The place of the standards and principles of international environmental law

It is interesting to note that for the purposes of interpreting the precise scope of the obligations on States, the Court "take[s] into account elements of international law other than the Convention"[29], where such rules and principles are accepted by a large majority of States and "show, in a precise area, that there is common ground in modern societies".[30] Thus, in the context of environmental protection, the following have been mentioned: the Rio Declaration on Environment and Development, the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, the precautionary principle and the European Directives on the protection of the environment.[31] Legislative developments in international environmental law can help to bring the European Convention on Human Rights to life. That having been said, this approach of referencing other standards would be well worth following more explicitly and systematically, as the Court seldom spells out the conclusions which it draws from its perusal of other rules and principles of international environmental law.[32]

Crossing the Rubicon - or not, as the case may be

Ladies and gentlemen, in conclusion let me point out that in a number of different judgments the Court has stated that "[t]here is no explicit right in the Convention to a clean … environment"[33], nor does the instrument "provide general protection of the environment as such".[34] Some judges have disagreed with those positions, particularly in the case of *Hatton and Others* as regards the existence of a right to a healthy and quiet environment.[35] This means that the Court has not crossed the Rubicon in terms of explicitly recognising a right to a healthy environment. But is it really up to the judicial authority to recognise such a right on its own? Is it not time the Parliamentary Assembly and the Committee of Ministers of the Council of Europe readdressed this issue? In the past the Parliamentary Assembly has on various occasions pondered the expediency of adding an explicit right

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26 See *McGinley and Egan v. the United Kingdom*, judgment of 9 June 1998, §§ 97 and 101; see also *Guerra and Others v. Italy*, judgment of 19 February 1998, §§ 48 and 60; *Öneryıldız v. Turkey*, Grand Chamber, judgment of 30 November 2004, ECHR 2004-XII, § 90; and *Tătar v. Romania*, 27 January 2009, § 113.

27 See *Roche v. the United Kingdom,* Grand Chamber, judgment of 19 October 2005, § 162.

28 See *Hatton and Others v. the United Kingdom,* Grand Chamber, judgment of 8 July 2003, §§ 98 and 119.

29 See *Demir and Baykara v. Turkey*, Grand Chamber, judgment of 12 November 2008, § 85, and *Saadi v. the United Kingdom*, Grand Chamber, judgment of 29 January 2008, § 63.

30 See *Demir and Baykara v. Turkey*, Grand Chamber, judgment of 12 November 2008, §§ 76 and 86.

31 See, for example, *Guerra and Others v. Italy*, judgment of 19 February 1998, § 34; *Taşkın and Others v. Turkey*, judgment of 10 November 2004, §§ 98-100; and *Di Sarno v. Italy*, judgment of 10 January 2012, §§ 71-77.

32 See *Tătar v. Romania*, 27 January 2009, § 111-112.

33 See *Jugheli v. Georgia,* judgment of 13 July 2017, § 62; see also *Hatton and Others v. the United Kingdom,* Grand Chamber, judgment of 8 July 2003, § 96.

34 See *Kyrtatos v. Greece*, judgment of 22 May 2003, § 52

35 See *Hatton and Others v. the United Kingdom,* joint dissenting opinion by Judges Costa, Ress, Türmen, Zupančič and Steiner, §§ 1-2.

to a healthy, viable environment, but all those attempts have failed.[36] Surely these endeavours should be resumed? That would enable us to take into account the constitutional and legislative developments that have occurred in many member countries of the Council of Europe and at EU level.[37] It would also allow us to consider the political, legal and judicial expediency of affirming such a right at the European level, particularly at a time of increasing citizen involvement in the fight against climate change.

Thank you.

[36] See, as regards proposals put forward between 1970 and 1980, D. Shelton, "Human Rights, Environmental Rights, and the Right to Environment", (1991) 28 Stanford Journal of International Law, pp. 103-138, 132; see also Parliamentary Assembly Recommendation 1614, "Environment and human rights", of 27 June 2003.

[37] Although the EU Charter of Fundamental Rights lags behind somewhat. Article 37 of the Charter provides: "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development ."