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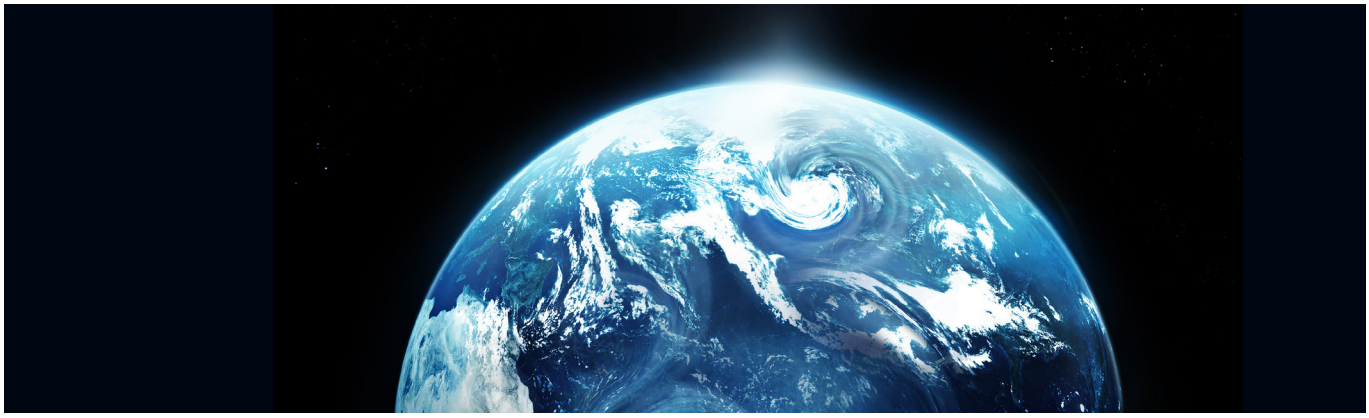

CLIMATE CHANGE LAW. CURRENT PERSPECTIVES.

Climate Change before the European Court of Human Rights

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Background to the case

The world of litigation is often dominated by adults, but in the field of climate change, a number of significant cases are being instigated by children and young people. One such case is *Duarte Agostinho and Others v Portugal and 32 Other States*. Here, the Applicants are six children and young people (born between 1999 and 2012) living in Portugal. Supported by the Global Legal Action Network, they have filed a claim in the European Court of Human Rights ("the Court") against 33 Member States of the EU and the Council of Europe, arguing that those States are failing to do enough to tackle climate change and that this failure amounts to a violation of their rights under the European Convention on Human Rights ("the Convention"). Specifically, the Applicants rely upon Articles 2 (right to life), 3 (prohibition of torture or inhuman or degrading treatment), 8 (right to respect for private and family life) and 14 (prohibition of discrimination).

The claim was filed in September 2020, and has been granted priority treatment by the Court pursuant to Rule 41 of the Rules of Court. It is currently at the written pleadings phase. Observations from all Parties are now before the Court, along with observations from a wide range of interveners including: the Council of Europe Commissioner for Human Rights; the UN Special Rapporteurs on human rights and the environment, and on toxics and human rights; Save the Children; and Amnesty International.

The case places squarely before the Court the extent to which the Convention can address the profound challenges which climate change poses to humanity. As articulated by Judge Spanó (now President of the Court):

"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".

The facts

Certain key facts are clear. Ensuring that global warming does not exceed 1.5°C (above pre-industrial levels) is essential if the world is to avert a climate catastrophe – a catastrophe that would seriously affect the lives of all humanity including the Applicants. As recorded in the Glasgow Climate Pact 2021, "climate change has already caused and will increasingly cause loss and damage and that, as temperatures rise, impacts from climate and weather extremes, as well as slow onset events, will pose an ever-greater social, economic and environmental threat."

Reduction in the emission of greenhouse gases ("GHG") is key to achieving that long term temperature goal ("LTTG") of 1.5°C or less, yet GHG emissions continue to rise globally (both in terms of total net anthropogenic GHG emissions and cumulative net CO2), with a current trajectory recently projected as leading to a median global warming of 3.2°C by 2100 (see IPCC 2022 summary report at B.1 and C.1).

The key relevant science is not in doubt. The question, then, is what this all means with respect to the existence, scope and performance of the Respondent States' Convention obligations. To echo Judge Spano's words, in the face of such a dire emergency where do the boundaries of the Court's competences lie?

The overriding obligation

While various admissibility and jurisdictional issues have been raised by the Respondent States, the purpose of this post is to consider the legal issues with respect to the *merits* of the case.

Central to the Applicants' case is the concept of the **overriding obligation**, defined as the obligation pursuant to Articles 2, 3 and 8 of the Convention to regulate and limit emissions of GHG in a manner that is consistent with achieving the LTTG of 1.5°C. If the Respondent States do not act in accordance with that overriding obligation, the Applicants submit, the severity of the consequences are such that it would necessarily entail a serious interference with the Applicants' Convention rights under Articles 2, 3 and 8. As to Article 14, the Applicants' case is that the consequences of a breach of the Respondent States' overriding obligation will have a disproportionately prejudicial effect on the Applicants as children and young people (who thus stand to live longer into the future and suffer greater impacts of climate change if the current trajectory of global warming is not averted).

The Applicants rely upon various principles to inform the existence and content of the overriding obligation, including (i) the principle of practical and effective protection of Convention rights, and (ii) a range of rules and principles of international law, including the core principles and objectives of the United Nations Framework Convention on Climate Change ("the UNFCCC") and Paris Agreement, the precautionary principle, the principle of sustainable development, the international law rights of the child, the prevention and no harm principles, as well as the right to a healthy environment as articulated more broadly in international human rights law.

The overriding obligation, as framed by the Applicants, has both a substantive and a procedural aspect. The procedural aspect concerns the scope of the assessments undertaken by the Respondent States with respect to the level of emissions reductions required to be achieved globally to achieve the LTTG of 1.5°C and the reductions that are appropriate for them to implement, as well as the provision of information to the public.

As to the acts and omissions of the Respondent States that have breached the overriding obligation, the Applicants refer to four categories of GHG emissions, namely territorial emissions, extraction of fossil fuels, imported and consumption-based emissions and overseas emissions of entities within their jurisdiction.

Importantly, the claim is not limited to territorial emissions. Noting that each form of emission contributes to global warming, the Applicants contend that an approach limited solely to territorial emissions would render the Applicants' rights theoretical and illusory.

As to how the responsibility of each of the Respondent States fits together, it is well-established that under public international law every internationally wrongful act entails the responsibility of the relevant State (Articles on the Responsibility of States for Internationally Wrongful Acts, Article 1). An internationally wrongful act of a State consists of an action or omission which is attributable to the State under international law and constitutes a breach of an international obligation of the State. Where multiple States contribute to the same damage, each State can be held individually responsible for its own acts and omissions.

Several of the Respondent States challenge whether or not it can be said that they caused the harm to the Applicants in circumstances where it is only through the collective failure of States that the temperature is rising with catastrophic consequences, and accordingly no individual State can be said to have caused the harm to the Applicants.

The Applicants argue that the relevant acts and omissions are attributable to each of the Respondent States separately, as acts of the legislature, executive, judiciary and other organs of the States, and that those acts and omissions have breached the overriding obligation, materially contributing to the risk of the indivisible injury allegedly caused to the Applicants (i.e. the impacts of climate change).

This issue has been grappled with in other environmental law claims around the globe. In its important decision in the *Urgenda* case, the Supreme Court of the Netherlands has held that each country is responsible for its own share of emissions reductions, meaning that a country cannot escape its own share of the responsibility to take

measures by arguing that a reduction of its own emissions would have little impact on a global scale. Similarly, in Germany the Constitutional Court has held that simply because no State can resolve the problems of climate change on its own does not relieve it of legal obligations to take effective action. In that case, the Court held that Germany is compelled to engage in internationally-oriented activities to tackle climate change at the global level, and is required to promote climate action within the international framework. A State cannot, it held, evade its responsibility by pointing to GHG emissions in other States.

Although these decisions relate to the domestic legal framework in the relevant States, the Applicants argue that a similar approach is appropriate – and indeed vital – at the international level, to ensure that States cannot evade their legal obligations by pointing to other States who are doing the same. (The Applicants do, however, also argue that the remedies granted by the Dutch and German courts in those cases were inadequate in that they give their respective Governments a level of latitude in setting carbon reductions which, if applied globally, would not ensure that the 1.5°C target is met).

Applicable principles of international environmental law

The Applicants argue that, in interpreting and applying the Convention rights in the context of this case, the Court should take account of a range of other international law rules and principles. It is not possible to review all of these within the confines of this post. However, in the context of climate change, two key international treaties are referred to.

The first of these is the UNFCCC, which entered into force on 21 March 1994 and has been ratified by 197 States. The UNFCCC is a framework agreement, designed to be broad in scope and for subsequent agreements and treaties to be made under its umbrella. The UNFCCC provides for an "ultimate objective" of

"stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner".

The second is the Paris Agreement, the latest treaty to be adopted under the UNFCCC, which entered into force on 4 November 2016 and has 193 Parties. The treaty aids the implementation of the objective of the UNFCCC by requiring States to hold:

"the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursu[e] efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change".

In addition to these key environmental treaties, the Applicants also rely upon the precautionary principle, arguing that it is a central principle of international environmental law. The Rio Declaration states that the precautionary principle requires that "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation". The UNFCCC includes the same requirement in the context of climate change.

The Court has had regard to this principle when interpreting what is required of a State to satisfy its obligations under the Convention in the context of a risk of serious and irreversible damage to the environment. It has recognised that under the precautionary principle any lack of certainty in the light of current scientific and technical knowledge cannot justify the State delaying the adoption of effective and proportionate measures aimed at preventing a risk of serious and irreversible damage to the environment.

The Applicants also rely upon what the UN Human Rights Council has recognised to be "the right to a safe, clean, health and sustainable environment as a human right that is important for the enjoyment of human rights". While the Convention does not expressly provide for the right to a healthy environment in the text of the treaty, the Applicants' case is that the right to a healthy environment under international law is relevant to the interpretation of obligations arising under the Convention, which they suggest reflects the approach of UN treaty bodies and other supranational human rights courts.

Lastly, the Applicants seek to rely upon the principle of intergenerational equity, which states that there is

a need to preserve natural resources for the benefit of future generations who are not here to object to climate change policies currently being enacted. The UN Human Rights Council has said that there is a "duty on current generations to act as responsible stewards of the planet and ensure the rights of future generations to meet their developmental and environmental needs".

In light of the grave environmental impacts of climate change, the Applicants argue that States are required to consider the intergenerational and intragenerational impact of their contributions and ensure the sustainable and equitable use of natural resources within their jurisdictions.

The role of the United Nations Convention on the Rights of the Child

Also relevant to the Applicants, given their age, are the rights enshrined in the United Nations Convention on the Rights of the Child (the UNCRC). Article 3(1) of the UNCRC requires that in all actions concerning children, the best interests of the child shall be a primary consideration. The Court has previously made clear that, in cases involving children, the Convention obligations must be interpreted by taking this Article into account.

The Applicants argue that:

a. Article 3(1) is a substantive right which gives children the right to have their best interests assessed and taken into account as a primary consideration when different interests are being considered as part of decision-making (with the interests of children being a priority when there are other competing interests).

b. Where a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should prevail.

c. Article 3(1) also places a procedural obligation upon States to take the child's interests into account when relevant policies are determined. Where a decision is made which will affect children, decision-makers must evaluate the possible positive and negative impacts on the children concerned.

The Applicants argue that the rights of the child are of particular relevance in the context of global warming, as children are uniquely vulnerable to its effects. This is reflected in the preamble to the Paris Agreement, which includes children in the category of persons whose rights are at particular risk from climate change.

Conclusion

The case is currently pending before the Court, and will require it to consider important questions of how the Convention rights – first adopted in the post-war period to deal with very different threats to human rights – are to be interpreted and applied in the context of climate change.

The authors are part of the legal team which represents the Applicants in their case before the Court. This post is written in their personal capacity, and is published with the consent of GLAN. It is intended to provide an objective summary of the case as advanced by the Applicants.

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