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AIRSPACE TRIBUNAL

The right to live without physical or psychological threat from above

Established by Shona Illingworth and Nick Grief in 2018, the Airspace Tribunal involves an international series of hearings that examine the case for and against the recognition of a new human right to protect the freedom to live without physical or psychological threat from above. The inaugural hearing at Doughty Street Chambers, London, was followed by hearings in Sydney, Toronto, and Berlin and included representations from a wide range of expertise and lived experience from around the world.

The hearings consider the perception and significance of airspace and outer space in the light of rapidly developing military, commercial, technological, and environmental change. Challenging the traditional state-centric view of how international law is created, the Tribunal's members ("judges") are an invited cross-section of the general public who are involved as participants. The process is led by Counsel to the Tribunal, who questions each of the experts after they deliver their statements and then opens the floor to questions from invited participants and the wider audience. The hearings are recorded and transcribed to document the drafting history of this proposed new human right and, in turn, support a people-focused proposal to present to the United Nations and other international bodies.

The Airspace Tribunal forms an integral part of the development and production of *Topologies of Air* (2021).

Nick Grief

THE AIRSPACE TRIBUNAL: DEVELOPING THE HUMAN RIGHTS DIMENSION OF AIRSPACE AND OUTER SPACE

On March 1, 1954, the United States carried out a thermonuclear weapon test, codenamed Castle Bravo, on Bikini Atoll in the Marshall Islands. It was one thousand times more powerful than the bomb that destroyed Hiroshima. Some sixty-two years later, on March 8, 2016, in his opening statement to the International Court of Justice in the case between the Marshall Islands and Pakistan, Tony de Brum, the Marshall Islands' co-agent, recalled how, as a nine-year-old boy, he had seen children playing in the radioactive dust that had fallen from the skies:

> Yesterday was a beautiful morning here in The Hague that featured a picture-perfect snowfall. As a tropical state, the Marshall Islands has experienced "snow" on one memorable and devastating occasion, the 1954 Bravo test of a thermonuclear bomb that was one thousand times the strength of the Hiroshima bomb. When that explosion occurred, there were many people, including children, who were a far distance from the bomb, on our atolls which, according to leading scientists and assurances, were predicted to be entirely safe. In reality, within five hours of the explosion, it began to rain radioactive fallout on Rongelap. Within hours, the atoll was covered with a fine, white, powdered-like substance. No one knew it was radioactive fallout. The children thought it was snow. And the children played in the snow. And the children ate the snow. So one can understand that snow, while beautiful, has a tragic and dark history in the Marshall Islands.[1]

Those words were a key catalyst and inspiration for the establishment of the Airspace Tribunal with its task of examining the case for and against a proposed new human right to live without physical or psychological threat from above. One of the things the Marshallese lost as the "snow" fell was the freedom to look up at the sky and not feel threatened.

The Legal Status of Airspace

The legal status of airspace has been settled for over a hundred years. In October 1919, the Convention Relating to the Regulation of Aerial Navigation was concluded in Paris. For the first time, a treaty proclaimed that every state has complete and exclusive sovereignty over the airspace above its territory. Twenty-five years later, that principle was confirmed and restated in a new treaty. The Chicago Convention on International Civil Aviation 1944 is still in force and, with 193 states parties, has virtually universal adherence. The fundamental principle of treaty law is expressed in a Latin maxim, *pacta sunt servanda*: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."[2] Those treaty provisions recognizing that every state enjoys complete and exclusive sovereignty over the airspace above its territory also represent "firmly established and longstanding tenets of customary international law", a separate source of international law evidenced by the general practice of states accepted as law.[3] So the sovereignty principle is expressed in two distinct but equally state-centric sources, which, according to a positivist understanding of international law, are both underpinned by consent, which is

1 Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan), International Court of Justice, Oral Proceedings, March 8, 2016, Opening Statement, para. 2, https://www.icj-cij.org/public/files/case-related/159/159-20160308-ORA-01-00-BI.pdf.

2 Vienna Convention on the Law of Treaties 1969, Article 26.

3 Case concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America), Merits, ICJ Reports 1986, 14, para. 212.

the basis of international law as a legal system. Not surprisingly, as we shall see, there is a tension between that understanding and the "inherent dignity" of all human beings and their "inalienable" human rights.

The horizontal limit of a coastal state's sovereignty over the airspace above its territory usually extends to the outer limit of its territorial sea, up to twelve nautical miles from the coast. Beyond that, the freedom of overflight generally prevails, both in the exclusive economic zone, extending up to two hundred nautical miles from the coast, and beyond that, above the high seas.[4] Like most freedoms, however, the freedom of overflight in international airspace must be regulated so that it can be safely exercised by all.

The Legal Status of Outer Space

The key legal principles governing outer space crystallized as customary international law soon after space flight started in 1957. They were then codified in the Outer Space Treaty 1967, which today has 110 states parties. It declares that the exploration and use of outer space shall be the province of all humankind and that, unlike the airspace above a state's territory, outer space is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.[5] Even the airspace of the high seas, an international area where the freedom of overflight generally applies, is legally distinct from outer space.

Although there is no national sovereignty in outer space, the boundary between airspace and outer space is not defined in the Outer Space Treaty and has not yet been agreed. Various approaches to delimitation have been proposed, one of the most popular theories being that the boundary lies a hundred kilometers (62 miles) above mean sea level. This is known as the Kármán Jurisdictional Line after the Hungarian-American scientist who first calculated the altitude "where aerodynamics stops and astronautics begins".[6] A functional approach has also been suggested, whereby activities would be "regulated according to their objectives and missions rather than according to the space where these activities are carried out".[7]

But how significant is the distinction between airspace and outer space as far as the human rights of individuals on the ground are concerned? In one sense, it does not seem to matter that airspace and outer space are subject to different legal regimes, or where the boundary between airspace and outer space is, or even whether there *is* a boundary. Our human rights may be violated by harmful activity in outer space, high up in airspace, or immediately over our heads.

The Human Rights Dimension of Airspace and Outer Space

After the atrocities of World War II, the adoption of the UN Charter (1945), the Universal Declaration of Human Rights (1948), and the European Convention on Human Rights (1950) marked the inception of modern international human rights law, which constrains the exercise of state sovereignty. Described as "a landmark of incalculable importance in the struggle for human decency and mutual respect",[8] the Universal Declaration begins by recognizing that "the inherent dignity and […] the equal and inalienable rights of all members of the human family are the foundation of freedom, justice and peace in the world".[9]

Although the Universal Declaration is not a treaty, the rights proclaimed in it are recognized in two treaties that were concluded in 1966 and entered into force ten years later. Under one of those treaties, the International Covenant on Civil and Political Rights (ICCPR), each of the 173 states parties has a duty to respect the rights recognized in it and

4 UN Convention on the Law of the Sea 1982, Articles 58(1) and 87(1)(b).

5 Outer Space Treaty 1967, Articles I and II.

6 Theodore von Kármán with Lee Edson, *The Wind and Beyond: Theodore von Kármán, Pioneer in Aviation and Pathfinder in Space* (Boston: Little, Brown, and Company, 1967), 343.

7 *Max Planck Encyclopedia of Public International Law*, s.v. "Outer Space", C13.

8 Brian Urquhart, *A Life in Peace and War* (New York: Harper & Row, 1987), 117.

9 Universal Declaration of Human Rights, Preamble, first recital.

ensure those rights "to all individuals within its territory and subject to its jurisdiction".[10] The words "within its territory and subject to its jurisdiction" are interpreted disjunctively, meaning that states parties must ensure the rights laid down in the Covenant to anyone within their power or effective control, even if not located within their territory.[11]

Similarly, under the European Convention on Human Rights, the obligation to secure the Convention rights and freedoms is owed by each of the High Contracting Parties "to everyone within their jurisdiction".[12] A state's jurisdictional competence is mainly limited to its own territory, but the European Court of Human Rights has recognized that, exceptionally, acts performed or producing effects outside a state's territory can constitute an exercise of jurisdiction; in particular, where the state has effective control over an area, or there is state agent authority and control over individuals.[13]

A person's human rights can clearly be engaged as a result of acts performed in airspace, therefore, whether by the territorial sovereign or by another state. What about outer space? According to Article III of the Outer Space Treaty, states parties shall carry on activities in the exploration and use of outer space in accordance with international law, including the Charter of the United Nations. Although the UN Charter was signed twelve years before the launch of *Sputnik I*, the first artificial earth satellite, it applies in outer space no less than on earth, under the sea, and in airspace.

We rightly emphasize the Charter's prohibition of the threat or use of force in international relations and its affirmation of the inherent right of self-defense. But we should also note its emphasis on "the dignity and worth of the human person"[14] and that the purposes of the UN include "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction."[15] Whenever humans journey into outer space, therefore, they carry human rights protection with them. Similarly, all activities in space, whether involving states or corporations, humans or machines, entail human rights obligations too.

Today, space activity is not confined to states. In 2019, commercial space revenue represented about 80 percent of the global space economy.[16] Not surprisingly given its age, however, the Outer Space Treaty focuses mainly on the rights and duties of states that send objects and astronauts into space. It does not address private space companies like SpaceX, which in May 2020 became the first private company to send people into space, ferrying two NASA astronauts on a test mission to the International Space Station. In the twenty-first century, it is essential for human rights to be properly protected in the context of all space activity, including by non-state actors. For example, by making states responsible for ensuring that companies within their jurisdiction respect human rights throughout their operations no matter where they are conducted.[17]

The human rights dimension of airspace and outer space is still relatively unexplored, despite the fact that individuals are increasingly vulnerable to threats such as surveillance, location tracking, and predictive targeting. We need to reimagine what it means to call outer space "the province of humankind" and how states exercise sovereignty over the airspace above their territory, with a renewed emphasis on human rights protection. As Richard Falk has observed, "Sovereignty based on territorial boundaries and international recognition [...] tends to override human rights concerns whenever the two sources of rights clash."[18] But human rights can also be vulnerable as a result of activities in space where there is no sovereignty. To sum up, airspace sovereignty and outer space freedoms must be exercised with greater regard for human rights. In

10 International Covenant on Civil and Political Rights 1966, Article 2(1).

11 UN Human Rights Committee, General Comment No 31 [80] (2004), para. 10.

12 European Convention on Human Rights, Article 1.

13 European Court of Human Rights, "Guide on Article 1 of the European Convention on Human Rights". updated December 31, 2020, https://www.echr.coe.int/documents/guide_art_1_eng.pdf. However, the Court recently held that alleged violations of the right to life during the "active hostilities" phase of military operations by Russian forces in South Ossetia and undisputed Georgian territory did not fall within Russia's jurisdiction for the purposes of Article 1 ECHR. It attached "decisive weight to the fact that the very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos not only means that there is no 'effective control' over an area [...], but also excludes any form of 'State agent authority and control' over individuals." See Georgia v. Russia (No 2), Grand Chamber, January 21, 2021, paras. 113–44, especially para. 137. For a critique of the judgment, see Marko Milanovic, "Georgia v. Russia No. 2: The European Court's Resurrection of Bankovic in the Context of Chaos," EJIL:Talk! Blog, *European Journal of International Law*, January 25, 2021, https://www.ejiltalk.org/georgia-v-russia-no-2-the-european-courts-resurrection-of-bankovic-in-the-contexts-of-chaos/.

14 UN Charter, preamble, second recital.

15 UN Charter, Article 1(3).

16 Global Space, "'The Space Report' Finds Commercial Space Revenue Climbs to $336.89 Billion in 2019", Space Foundation, October 13, 2020, https://www.spacefoundation.org/2020/10/13/the-space-report-finds-commercial-space-revenue-climbs-to-336-89-billion-in-2019/.

particular, all people everywhere should have the right to live without physical or psychological threat from above.

Why We Need a Specific Right to Live without Physical or Psychological Threat from Above

Lived experience helps us to understand why threats from above us should be taken much more seriously than they are. We know, for example, that drones cause civilians living in war zones to suffer "anticipatory anxiety" as they are reminded of deaths in previous strikes.[19] When a threat is unseen, its psychological impact is worse because the lack of control and predictability are greater. As Catherine Loveday explained at the London hearing of the Airspace Tribunal in 2018, children are especially vulnerable in this regard.[20] This was confirmed by speakers at the Sydney and Toronto hearings. From personal experience, they explained how aerial attack causes greater anxiety and trauma because it is unexpected and how traumatic experiences become encoded in memory and haunt the future, passing down through the generations.

Existing human rights such as the right to respect for one's private life do not adequately address this increasingly sinister threat from above. Although the notion of "private life" includes the protection of physical and psychological integrity,[21] stand-alone recognition of the right to live without physical or psychological threat from above is needed to highlight the particular gravity of such threats and their insidious contribution to human fear and anxiety in the context of ongoing, rapid technological change. Such recognition would set an appropriate standard of conduct, fulfill an important educational role (by ensuring that the human rights dimension was more fully understood), and hopefully, in time, promote a culture of compliance.

There is precedent for specific rights being carved out of more general ones as technology advances (such as the right to the protection of personal data, derived from the right to respect for private life) or in light of lived experience. The right not to be subjected to enforced disappearance, specifically recognized in a UN treaty in 2006, emerged as a result of several decades of lived experience, even though such treatment was a flagrant breach of multiple existing human rights of victims and their families.

A Qualified Right—And Non-derogable?

The proposed new right to live without physical or psychological threat from above would be qualified, not absolute. Restrictions would be permitted if they were "prescribed by law" and no greater than "necessary" to achieve a legitimate aim such as public safety or crime prevention. For example, aerial surveillance is not always harmful. It is helping to identify environmental destruction and human rights abuses. In September 2020, for the first time, drone footage helped to convict a human trafficker moving defenseless people across the English Channel from France to the UK.

More difficult is the question of whether the proposed right should be subject to derogation "in time of war or other public emergency threatening the life of the nation".[22] Derogation from human rights obligations is permitted "to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with [the derogating state's] other obligations under international law."[23] However, certain human rights are considered so fundamental that they are non-derogable, i.e., they cannot be suspended by a state under any circumstances. For example, the European Convention and the International Covenant both include the right to life

17 See Office of the High Commissioner for Human Rights, "Guiding Principles on Business and Human Rights", United Nations OHCHR, 2011, 3–4, I.A.2, https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

18 C. J. Polychroniou, "Human Rights, State Sovereignty, and International Law: An Interview with Richard Falk", *Global Policy Opinion*, September 11, 2018, https://www.globalpolicyjournal.com/blog/11/09/2018/human-rights-state-sovereignty-and-international-law-interview-richard-falk.

19 International Human Rights and Conflict Resolution Clinic and Global Justice Clinic, "Living under Drones: Death, Injury, and Trauma to Civilians from US Drone Practices in Pakistan", IHRCRC, Stanford Law School, and GJC, NYU School of Law, September 2012, 81–82, https://www-cdn.law.stanford.edu/wp-content/uploads/2015/07/Stanford-NYU-Living-Under-Drones.pdf.

20 Catherine Loveday (University of Westminster), London hearing of the Airspace Tribunal, Doughty Street Chambers, September 21, 2018.

21 Tănase v. Romania, European Court of Human Rights, Grand Chamber, June 25, 2019, para. 126.

22 ECHR, Article 15; cf. ICCPR, Article 4.

23 ECHR, Article 15(1); cf. ICCPR, Article 4(1).

and freedom from torture and from inhuman or degrading treatment or punishment in their lists of non-derogable rights.[24]

Should the proposed right to live without physical or psychological threat from above also be non-derogable? If we compare it with the right to respect for private life on the basis that "private life" includes a person's physical and psychological integrity, the answer is probably no, since the right to respect for private life is not one of the few non-derogable rights. In view of the potentially long-lasting, traumatically intrusive, trans-generational impact of threats from above, however, a better comparison may be with the right to freedom from ill-treatment, in which case, there are stronger grounds for non-derogability.

Implications for International Humanitarian Law

If the proposed new human right existed, it would not prevent a state from using armed force in accordance with the UN Charter, i.e., in self-defense or with the authority of the UN Security Council. Indeed, if the freedom to look up and not feel threatened were specifically recognized in International Human Rights Law (IHRL), this could enhance protection under International Humanitarian Law (IHL), designed to spare civilians and other non-combatants from the effects of hostilities. In particular, it could help to ensure recognition of the psychological harm caused by aerial threats, especially harm over time.

During armed conflict, the protection offered by IHRL continues to apply alongside IHL, except by the operation of a formal derogation, where permitted. While rules of IHL may be relevant to the interpretation and application of IHRL, the reverse is also true: rules of IHRL can influence the interpretation and application of IHL. This is reflected in Article 21(3) of the Rome Statute of the International Criminal Court, which states that the Court's application of the Statute and of the principles and rules of international law, including the established principles of IHL, "must be consistent with internationally recognized human rights".[25] This applies to every article of the Statute.[26] IHL includes the rule of proportionality prohibiting attacks that may be expected to cause excessive incidental injury, i.e., incidental injury to civilians that would be excessive compared to the anticipated military advantage—a war crime under Article 8(2)(b)(iv) of the Rome Statute. A Chatham House research paper found that while there is no reason, in principle, to exclude mental harm from that proportionality assessment, most of the state practice considered did not take such harm into account. It was unclear whether that was because states did not consider that they were legally obliged to do so or because of perceived difficulties in identifying and quantifying the mental harm expected from an attack.[27] By removing any doubt that mental harm must be taken into account as part of the proportionality assessment, recognition of the proposed new human right to live without physical or psychological threat from above would help to stimulate a better understanding of the psychological effects of attacks and incentivize belligerents to develop more appropriate ways of assessing proportionality in relation to mental harm, including harm over time.

Conclusion

Consistent with the aim of giving individuals greater agency in the international legal order, the Airspace Tribunal is a people's tribunal. It is challenging the state-centric nature of international law and the dominance of powerful military and commercial interests by giving people around the world, including the Global South, the

24 ECHR, Article 15(2); ICCPR, Article 4(2). However, the former permits derogation from the right to life "in respect of deaths resulting from lawful acts of war."

25 In paragraph three of his Separate Opinion in Prosecutor v. Lubanga, International Criminal Court Appeals Chamber, Decision on the Prosecutor's Application for Leave to Reply to "Conclusions de la défense en réponse au mémoire d'appel du Procureur", September 12, 2006, Judge Pikis opined that "Internationally recognised may be regarded those human rights acknowledged by customary international law and international treaties and conventions", https://www.icc-cpi.int/CourtRecords/CR2006_03055.PDF. See also Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which provides that when interpreting a treaty, "There shall be taken into account […] any relevant rules of international law applicable in the relations between the parties."

26 Situation in the Democratic Republic of the Congo, International Criminal Court Appeals Chamber, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's March 31, 2006, Decision Denying Leave to Appeal, July 13, 2006, para. 38, https://www.legal-tools.org/doc/a60023/pdf.

27 Emanuela-Chiara Gillard, "Proportionality in the Conduct of Hostilities: The Incidental Harm Side of the Assessment", Chatham House, December 10, 2018, para. 115, https://www.chathamhouse.org/2018/12/proportionality-conduct-hostilities-incidental-harm-side-assessment.

right to be heard at its hearings and by respecting the conclusions they reach as its judges. Their views are captured in the hearing transcripts that will form part of the proposed new right's drafting history, along with expert and lived experience testimony and the submissions of Counsel to the Tribunal.

Realistically, if the proposed right is to be formally added to the catalog of human rights set out in global and regional treaties, it will need to be championed by states in the UN, the Council of Europe, or other organizations. But in the ongoing struggle for human decency and mutual respect, authentic and diverse voices and experience are being recognized and valued. Meanwhile, lawyers can use the Airspace Tribunal transcripts to argue that the proposed right should be recognized through a creative interpretation of existing rights, when arguing cases before national courts or representing people in international bodies like the UN Human Rights Committee (which supervises the implementation of the ICCPR through, *inter alia*, its consideration of individual complaints[28]) or the European Court of Human Rights.

28 Where the state party in question is also a party to the First Optional Protocol on individual complaints. See further OHCHR, "Civil and Political Rights: The Human Rights Committee", Fact Sheet No. 15 (Rev.1), https://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf.

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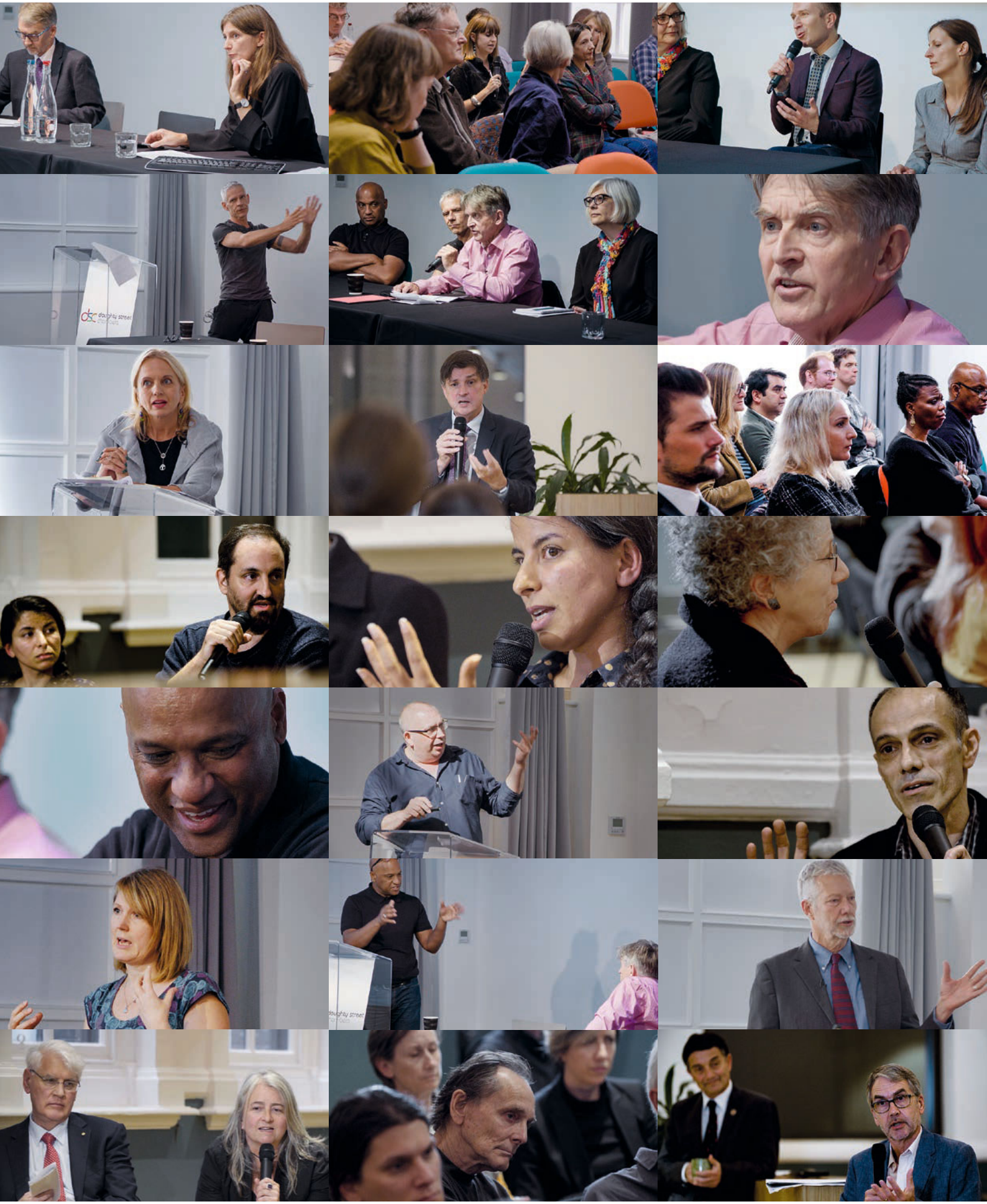
Opposite: Airspace Tribunal hearing, Doughty Street Chambers, London, September 21, 2018; Airspace Tribunal hearing, Ethics Centre, Sydney, October 14, 2019.
Overleaf: Airspace Tribunal hearing, The Power Plant, Toronto (online), November 1, 4, 7 and 14, 2020; Airspace Tribunal hearing, The European Center for Constitutional and Human Rights (ECCHR), Berlin (online), June 9 and 11, 2021.



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