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THE ENVIRONMENT AND HUMAN RIGHTS

Introductory Report to the High-Level Conference *Environmental Protection and Human Rights*

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by

Elisabeth LAMBERT

CNRS Research Director, SAGE Research Unit, University of Strasbourg



“A convergence of crises constitutes the greatest single danger that humanity has ever faced. In essence, the impending menace is this: Humanity is unable to attain humanity.”
***(Stéphane Hessel and Edgar Morin,
The Path to Hope, Other Press, 2012, Chap. 1).***

“The resilience of the community of life and the well-being of humanity depend upon preserving a healthy biosphere with all its ecological systems [...]”
(Earth Charter, Preamble, earthcharter.org)

EXECUTIVE SUMMARY

This report begins by outlining, by way of introduction, how legal doctrine has changed with regard to the interaction between human rights and the environment, moving towards an ecocentric approach and the middle way of “project Nature”. The second section offers an overview of previous work by the Council of Europe, reflecting its traditionally twofold approach: on the one hand, the Organisation has blazed a trail with binding treaties containing key principles for nature protection – treaties that not enough member states have ratified (and some of which have not even come into force yet), which ought now to be reconsidered or taken up in new forms; on the other hand, owing to the failure of various initiatives for an additional protocol to the European Convention on Human Rights concerning the right to a “healthy environment”, not only the decisions of the European Committee of Social Rights on the right to health but also the Court’s judgments relating to various articles of the European Convention show a very cautious stance, restricted to environmental health protection, and reflecting a now outmoded anthropocentric approach with too large a margin of appreciation allowed to states for economic interests. In the third section, the author propounds five priority areas for thinking about the environmental/ecological rights of the future. It is suggested that we should recognise an individualised right, both personal and collective, to a “decent” or “ecologically viable” environment, a broader concept than that of the right to a “healthy environment” and one that embraces an ecocentric view and an intergenerational approach. This right should be interpreted in the light of the specific features of the environmental field, such as the precautionary approach and the concept of environmental commons. It would be timely for Council of Europe member states to think about formulating the rights of Nature, with the latter represented by a limited *actio popularis* or a group action restricted to environmental associations. It is also proposed to end the impunity of non-state actors by making provision for a system of complaints against businesses. Other substantive rights, such as the right to environmental education and greater protection of environmental activists, might be considered. Lastly, the right of access to environmental justice should be strengthened, and a model for environmental proceedings might be developed at the European level. All the rights and principles discussed are already recognised in positive law in various sets of legislation and legal systems at the national, regional and UN levels. Bearing in mind existing rights, developments at different levels, and current expectations regarding the environment emergency, the author suggests urgently considering the advisability of adopting a binding European pact on environmental human rights including these various rights, responsibilities and principles, together with a monitoring mechanism, preferably judicial with a European Environmental Court, or, failing that, an Ombudsman or a High Commissioner for the Environment. Since a certain number of states might not be willing to embark on this path at present, the drafting of an enlarged partial agreement would offer some very useful flexibility and pave the way for some tangible results, which might have a positive ripple effect.

1. INTRODUCTION

A. Terms of reference and methodology

The terms of reference were to explore in broad outline the role that the Council of Europe and its member states might play in providing fresh impetus for a human rights approach to environmental protection and in particular to clarify the specific subjects on which these states and the Organisation should be working. The report was also to explain how existing tools and mechanisms might be used to achieve this.

The method consists mainly in a critical synopsis of the environmental work done by the Council of Europe, and indirectly at the national level, to date and a careful reading of legal doctrine in this field in the French- and English-speaking worlds. Reference is also made, where deemed relevant to the 47 states of the Council of Europe, to projects or developments in other regional contexts and particularly at the UN level.

B. Conceptual background: towards ecological human rights

The 1972 Stockholm Declaration and Conference undoubtedly mark the beginning of legal recognition of the interaction between human rights and the environment. As the former United Nations rapporteur, J. H. Knox, puts it, although the two areas developed separately, their interdependence has become more and more evident in the last two decades.¹ The first principle of the Stockholm Declaration clearly set the scene by recognising that “[m]an 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”.² A pivotal aspect here is the now clearly acknowledged link between human dignity and protection of the environment.³ Similarly, in its 1997 *Gabčíkovo-Nagymaros* judgment, the International Court of Justice (ICJ) recognised that “the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn”.⁴

Although the two areas, each with its own focus (Nature for environmental law, and human beings for human rights), were long thought of as separate, this approach is now strongly contested. There is broad agreement concerning the unavoidable interdependence of humans and Nature, since human beings have vital need of ecosystems and the latter need human beings in order to survive. This view rejects the previous approach premised on man’s domination of his environment based on a utilitarian and anthropocentric Cartesian rationale⁵ whereby Nature was solely an object of law, an approach radically challenged by the deep ecology movement, for which Nature is a subject, and subsequently giving way to a third, intermediate, approach called “project Nature” by François Ost⁶ intended to define an ethics of responsibility to protect the environment. Its logical outcome is a duty to respect all forms of life as a fundamental ethical principle. This new outlook more generally entails a transition from “environmental”

¹ Knox J. H. and Pajan R. (2018), Introduction, *The Human Right to a Healthy Environment*, Cambridge University Press, Cambridge, p. 1. Also, UN General Assembly, Human Rights Council (2009), “Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights”, A/HRC/10/61, 15 January 2009, para. 18. Further, UN Human Rights Council, Resolution 16/11 of 24 March 2011 on human rights and the environment.

² Declaration of the United Nations Conference on the Human Environment, 16 June 1972, Stockholm.

³ Daly E. and May J. R. (2019), “Exploring environmental justice through the lens of human dignity”, *Widener Law Review* Vol. 25, p. 177.

⁴ ICJ, *Gabčíkovo-Nagymaros Project*, judgment of 25 September 1997, Reports 1997, para. 53.

⁵ See, among many other sources, Barrière O. et al. (eds) (2019), *Coviability of Social and Ecological Systems: Reconnecting Mankind to the Biosphere in an Era of Global Change*, Springer, Cham.

⁶ Ost F. (2003), *La nature hors la loi : l’écologie à l’épreuve du droit*, La Découverte, Paris.

to “ecological” human rights,⁷ replacing the anthropocentric view with an ecocentric view, brought into being by the World Charter for Nature in 1982.⁸ Consequently, “we have to adopt a holistic view of life”, for, “by severing our umbilical cord with the Earth, we are threatening our own existence”.⁹ Therefore, the concept of “humanity” becomes particularly significant, since “it will no longer be possible for us to injure Nature wantonly, as this would mean injuring an integral part of ourselves”.¹⁰

This new “ecological law” trend¹¹ has resulted in a large amount of literature¹² and even the launch of a new think tank, the [Ecological Law and Governance Association](#) (ELGA), at the University of Siena in October 2017,¹³ with the Oslo Manifesto as its basis.¹⁴ At the same time, the United Nations instituted the Harmony with Nature initiative in 2009, leading to the adoption of ten resolutions and the hosting of interactive dialogues.¹⁵ Also, according to the 2011 report of the High Commissioner for Human Rights, “[...] the need to protect and promote a healthy environment is indispensable not only for the sake of human rights, but also to protect the common heritage of mankind”.¹⁶ Yet the anthropocentric approach is not entirely a thing of the past, since it is only human beings who are conscious of the need to protect the environment and the fact that interdependence between humans and the natural environment is inevitable, which is why “extractive anthropocentrism” is being overtaken by “immersive anthropocentrism”: “man is immersed *in* Nature, mainly because he *is* a body; man’s duties ought to follow...naturally”.¹⁷

According to a study produced as part of an extensive academic programme, the problems in moving towards “ecological law” are more political than legal.¹⁸ This “ecological human rights” approach builds on the previous human rights approach by adding a new component to protect the natural environment

⁷ Taylor P. E. (1998), “From environmental to ecological human rights: a new dynamic in international law?”, *Georgetown International Environmental Law Review* Vol. 10, pp. 309-397. Since the 1990s there has been an abundance of literature on the need to move beyond the anthropocentric view.

⁸ UN General Assembly (1983), Resolution 37/7, World Charter for Nature, A/RES/37/7.

⁹ Cabanes V. (2016), *Un nouveau droit pour la terre. Pour en finir avec l’écocide*, Anthropocène, Seuil, Paris, pp. 262 & 264.

¹⁰ Rothenberg D. (1989) “Introduction: Ecosophy T – from intuition to system”, in Naess A., *Ecology, Community and Lifestyle*, Cambridge University Press, Cambridge, p. 2.

¹¹ Garver G. (2019), “Confronting remote ownership problems with ecological law”, *Vermont Law Review* Vol. 43, p. 428. Berry T. (1999), *The Great Work: Our Way into the Future*, Bell Tower, New York.

¹² Jennings B. (2016), *Ecological Governance: Toward a New Social Contract with the Earth*, West Virginia University Press, Morgantown. Taylor P. E. (1998).

¹³ <https://www.iucn.org/news/world-commission-environmental-law/201801/launch-ecological-law-and-governance-association-elga-environmental-law-ecological-law> (accessed 18 December 2019).

¹⁴ <https://www.elga.world/oslo-manifesto/> (accessed 18 December 2019). Para. 6: “In other words, ecological law reverses the principle of human dominance over nature, which the current iteration of environmental law tends to reinforce, to a principle of human responsibility for nature.”

¹⁵ <http://harmonywithnatureun.org/>.

¹⁶ UN General Assembly, Human Rights Council (2011), “Analytical study on the relationship between climate change and human rights”, Report of the United Nations High Commissioner for Human Rights, A/HRC/19/34, 16 December 2011, para. 24.

¹⁷ Papaux A. (2016), “Droits de l’homme et protection de l’environnement: plaidoyer pour davantage d’anthropocentrisme et d’humanité”, in Ziegler A. R. and Küffer J. (eds), *Minorities and the Law: Liber Amicorum for Professor Barbara Wilson*, Schulthess, Zurich, pp. 375-387. He even infers that “human rights in environmental matters suffer from a lack rather than an excess of anthropocentrism”, since human beings should step in to protect nature from the activities of other human beings (pp. 385-386).

¹⁸ Taylor P. E. (1998), p. 336.

in its own right; it is therefore stressed that the human rights approach is considered a promising means of meeting the ecological challenge that we are facing.¹⁹

C. The environment emergency: following up the draft Global Pact for the Environment

The environment emergency is now real, and this report is not going to cite at length the extremely well-researched and alarming scientific and policy papers on the state of the planet and the degradation of our natural environment. In Mireille Delmas-Marty's words, "the awakening could be very sudden if we wait for the dream to turn into a nightmare of direct confrontation between states and between human beings forced to live together, in ever greater numbers, on an ever less habitable planet".²⁰

At the same time, a review of the legal studies published over the past fifteen years concerning cases involving the intersection between human rights and the environment offers a number of lessons: (1) the courts' limited ability to accommodate the need for better environmental protection (the Dutch Supreme Court judgment of 20 December 2019 in the Urgenda case is a noteworthy exception²¹), (2) a widely varying and fragmented judicial response because of insufficiently detailed and, above all, insufficiently binding rules,²² (3) the fresh merit of a human rights approach,²³ particularly owing to the options of legal action and remediation claims, and lastly (4) the very significant limitations of the existing framework because of a view that is too anthropocentric and too focused on civil and political rights,²⁴ which is something that we shall find with the ECHR.

Against this background, in May 2018 the United Nations General Assembly passed a resolution with 143 votes in favour (5 against and 7 abstentions) to adopt by 2022 a Global Pact for the Environment (or a political declaration). In the preamble to this draft pact, the parties acknowledge "the growing threats to the environment and the need to act in an ambitious and concerted manner at the global level to better ensure its protection". It is obvious that the adoption of such a pact by consensus at international level will probably prove much harder than a European initiative in this field, and the latter could provide an extremely positive impetus.

It is now important to appraise the past work of the Council of Europe in order to understand the overall vision behind it, its advantages and its limitations, and thus determine the kind of future action that might be required.

2. ENVIRONMENTAL PROTECTION IN THE PAST: COUNCIL OF EUROPE CONVENTIONS

In line with the twofold approach of the 1970s, Council of Europe work on environmental human rights has focused on two separate fields: environmental protection on the one hand and human rights on the

¹⁹ Weston B. H. and Bollier D. (2014), *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons*, Cambridge University Press, Cambridge.

²⁰ Delmas-Marty M. (2019), *Sortir du pot au noir. L'humanisme juridique comme boussole*, Buchet/Chastel, Paris, p. 56.

²¹ <https://www.urgenda.nl/en/themas/climate-case/>

²² See, for example, Voigt C. and Makuch Z. (eds) (2018), *Courts and the Environment*, Elgar Publishing, Cheltenham, p. xiv.

²³ Daya-Winterbottom T. (2018), "The legitimate role of rights-based approaches to environmental conflict resolution" (Chapter 3), in Voigt C. and Makuch Z. (eds), *Courts and the Environment*, Elgar Publishing, Cheltenham. Also, Bratspies R. M. (2017), "Claimed not granted: Finding a human right to a healthy environment", *Transnational Law and Contemporary Problems* Vol. 26, p. 274.

²⁴ Shelton D. (2012), "Human rights and the environment", in Daya-Winterbottom T. (ed.) *The Salmon Lectures: Justice and the Environment* (2nd edn), Thomson Reuters, Wellington, pp. 6-7.

other, even though some conventions from the 1970s onwards acknowledged the interdependence of human beings and their natural environment.

A. Regional treaties on environmental protection

In chronological order, **the first convention to be signed was the Bern Convention on the Conservation of European Wildlife and Natural Habitats of 19 September 1979**. This convention, whose aim is “to conserve wild flora and fauna and their natural habitats”, has 51 ratifications, since the European Union and five non-member states of the Council of Europe are also parties to it; of the Council of Europe member states, San Marino and the Russian Federation have not ratified it. The level of protection depends on the “ecological, scientific and cultural requirements” which must be weighed against “economic requirements”, for example. States undertake to adopt the requisite policies and standards to ensure this protection. Exceptions are permitted, including in the interests of public health. A standing committee ensures application of the convention.

The Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment of 21 June 1993 has been signed but not ratified by nine countries. Its preamble states that “one of the objectives of the Council of Europe is to contribute to the quality of life of human beings, in particular by promoting a natural, healthy and agreeable environment”. This convention has the merit of covering all environmentally hazardous activities performed “professionally” by both public and private entities.²⁵ Article 4 stipulates that “[t]his Convention shall not apply to damage caused by a nuclear substance”. It has the further advantage of recognising no-fault liability²⁶ and acknowledging the specific nature of “pure” ecological damage (“impairment of the environment”). Its other virtue is that it considerably broadens *locus standi* to include environmental associations and foundations (Article 18), even if they can only obtain compensation for personal injury. Article 14 provides for the right of access to “information relating to the environment held by public authorities”, but Article 16 also provides for conditions of access to information held by operators. The convention also applies the “polluter pays” principle, as pointed out in the preamble. This “polluter pays” principle is central to Directive 2004/35/EC of 21 April 2004 “on environmental liability with regard to the prevention and remedying of environmental damage”, which requires states to make provision for corporate liability.²⁷ This convention is therefore particularly substantive and would be worth giving further attention.

The Strasbourg Convention on the Protection of the Environment through Criminal Law of 4 November 1998 is undoubtedly one of the Council of Europe’s most noteworthy achievements in this field. The preamble to the 1998 Convention provides that “the life and health of human beings, the environmental media and fauna and flora must be protected by all possible means” and works on the assumption that “whilst the prevention of the impairment of the environment must be achieved primarily through other measures, criminal law has an important part to play in protecting the environment”. Criminal offences cover harm to both human beings and the environment, whether living or not, and deliberate or not, and therefore the approach here is overarching, acknowledging the interaction between human beings and their natural environment. The principle of specific remediation by “reinstatement of the environment” is provided for in Article 8. Above all, Article 9 provides that states must make provision for criminal (or administrative) sanctions on legal entities (in addition to the liability of natural persons) – a crucial contribution since we know that businesses are responsible for the largest share of environmental

²⁵ Martin G. J. (1994), “La responsabilité civile pour les dommages à l’environnement et la Convention de Lugano”, *Revue juridique de l’environnement* Nos. 2-3, pp. 121-136.

²⁶ Thieffry P. (1994), “Environmental liability in Europe: The European Union’s projects and the Convention of the Council of Europe”, *The International Lawyer* Vol. 28, No. 4, pp. 1083-1085.

²⁷ Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

damage. Lastly, Article 11 allows each state party to “grant any group, foundation or association which, according to its statutes, aims at the protection of the environment, the right to participate in criminal proceedings concerning offences established in accordance with this Convention” and thus introduces *actio popularis*. Described as the “first binding international instrument dedicated to harmonising the whole of criminal law on the environment”,²⁸ as well as the “only general convention”,²⁹ and welcomed as “a very important development in the international law of the environment”,³⁰ it is unfortunate that it has a total of 13 signatures not followed by ratifications and only one ratification (by Estonia),³¹ despite the fact that it is open to ratification by non-European states as well, that it would enter into force with three ratifications and that it has been adopted by the European Union through Directive 2008/99/EC.³²

Although they have not come into force, the Strasbourg Convention and the Lugano Convention have affected the development of European and national law.³³ However, the work to be done in this field, as with the prosecution of multinationals committing environmental violations, is enormous, given how some environmental offences, by their seriousness, clearly threaten the existence of humanity and life on earth and therefore require an effective criminal response.³⁴ Its effectiveness is contingent on a clearer definition of offences and sanctions (and on these aspects the Strasbourg Convention is definitely too vague; provision must be made, for example, for deterrent financial penalties depending on a business’s turnover and the seriousness of offences in order to finance restoration of nature), standardisation of offences at national level and closer judicial co-operation at the international level, since pollution has no borders. Quite apart from any action on the part of the European Union, this work ought to be taken up by the Council of Europe quickly. As one author writes, “international treaties requesting states to punish the most serious environmental crimes in the same way are too few to count on even one hand.”³⁵ The same author suggests recognising universal jurisdiction for punishment of the most serious environmental offences, since humanity as a whole is affected.³⁶ Moreover, it should be noted that attempts have been made for a number of years to have the crime of ecocide included in the Rome Statute of the ICC, and this is still under discussion. The content of the Strasbourg Convention ought to be supplemented accordingly, and Council of Europe member states should provide support by ratifying it. Failing that, its content should be incorporated into the European Environmental Pact that is proposed below.

The Florence Landscape Convention of 20 October 2000 and its protocol of 1 August 2016

Twenty years ago, the Council of Europe made an innovation by adopting a convention devoted solely to the protection, management and planning of landscape in Europe and to co-operation between states on landscape issues, with an extremely broad definition of the concept of landscape again emphasising the

²⁸ Szönyi Dandachi A. (2003), “La convention sur la protection de l’environnement par le droit pénal”, *Revue juridique de l’environnement* No. 3, pp. 281-288, p. 282.

²⁹ Jaworski V. (2014), “Les instruments juridiques internationaux au service du droit pénal de l’environnement”, *Revue juridique de l’environnement* Vol.39, pp 115-128, footnote 6.

³⁰ Collantes J. L. (2001), “The Convention on the Protection of the Environment through Criminal Law: Legislative obligations for the States”, available at: <https://huespedes.cica.es/gimadus/06/THE%20CONVENTION%20ON%20THE%20PROTECTION%20OF%20THE%20ENVIRONMENT%20THROUGH%20CRIMINAL%20LAW.htm>, accessed 12 December 2019.

³¹ As at 12 December 2019.

³² Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, in force since 26 December 2010.

³³ Canivet G. and Guihal D. (2004), “Protection de l’environnement par le droit pénal : l’exigence de formation et de spécialisation des magistrats”, address given on 26 April 2004.

³⁴ Sizaire V. (2019), “Peut-il exister un droit pénal de l’environnement ?”, *Délibérée* No. 8, pp 42-49 (available at cairn.fr), p. 45.

³⁵ *Ibid.*, p. 47.

³⁶ *Ibid.*, p. 49.

interaction between human beings and natural environments. Article 1(a) defines landscape as “an area, as perceived by people, whose character is the result of the action and interaction of natural and/or human factors”. Landscape, whether everyday or outstanding, is acknowledged as “an important part of the quality of life for people everywhere”³⁷ and therefore understood as “a contribution to a better quality environment”,³⁸ entailing “rights and responsibilities for everyone”.³⁹ In conjunction with the 1998 Aarhus Convention, reference is made to information and public participation. In the Florence Convention, the Council of Europe acknowledges “the social function of landscape”⁴⁰ and natural environments. While the convention does not recognise a right “to landscape”, it actively paves the way for it. The term “landscape” also enables the concept of sustainable development to be approached through its four dimensions: natural, cultural, social and economic.⁴¹

The Florence Convention, prepared by the Congress of Local and Regional Authorities and adopted on 19 July 2000, in force since 1 March 2004, has 40 ratifications and one signature not followed by ratification. The additional protocol has been ratified by 38 states and has also been in force since 1 March 2004. Implementation of the convention is monitored by a committee of experts, namely the Steering Committee for Culture, Heritage and Landscape (CDCPP), which makes recommendations to the Committee of Ministers, which remains the decision-making body.

Lastly, **the Tromsø Convention on Access to Official Documents of 18 June 2009**, although not specific to the environment, may also be relevant, but it has not yet entered into force.

Assessment

It can be seen from this very brief summary that this standard-setting is evidence of a real determination, from the 1970s onwards, to regulate environmental damage. Two guiding principles are worth emphasising: firstly, the concern to approve mandatory standards (not just recommendations) binding on states and, secondly, recognition of the interaction between human interests and nature protection. It seems important to pursue this dual hallmark of the Council of Europe.

However, this standard-setting has significant limitations: civil society and individuals, both of which now play a key role in environmental protection in the international and national arena,⁴² all too often cannot avail themselves of its provisions, which are not directly applicable in domestic legal systems. This is because, apart from the fact that they have been ratified by far too few states, these treaties have a serious flaw in that there is no recognition of rights conferred on individuals or associations, and there are no effective independent compliance or monitoring mechanisms; as a result, their implementation has proved to be extremely limited. In this respect, **the fundamental rights approach is actually better**. Moreover, beyond the Council of Europe, the think tank, Le Club des Juristes, has noted a profusion of sectoral conventions on the environment but very few treaties with monitoring mechanisms.⁴³ Hence in 2015 it recommended adopting a binding treaty with a monitoring mechanism, which would give a role

³⁷ Preamble to the Convention.

³⁸ Prieur M. (2003), “La convention européenne du paysage”, *Revue européenne de droit de l’environnement* No. 3, pp. 258-264, p. 258.

³⁹ Preamble to the Convention.

⁴⁰ Priore R. (2000), “La convention européenne du paysage ou de l’évolution de la conception juridique relative au paysage en droit comparé”, *Revue européenne de droit de l’environnement* Vol. 4, No. 3, pp. 281-299.

⁴¹ Dejeant-Pons M. (2006), “The European Landscape Convention”, *Landscape Research* Vol. 31, No. 4, pp. 363-384.

⁴² Le Club des Juristes (2015), “Increasing the effectiveness of international environmental law: Duties of States, rights of individuals”, report, available at <http://www.globalforumlijd.com/resources/report-increasing-effectiveness-international-environmental-law-duties-states-rights>, accessed 24 January 2020.

⁴³ *Ibid.*, p. 97. There are apparently over 500 treaties concerning environmental matters, some 300 of which are regional.

to civil society and grant individuals the right to take legal action to enforce the duty of states to protect the environment more effectively.⁴⁴ In its 2019 report, UNEP confirmed that there was as yet no global environmental rights treaty and that current treaties were “often of limited if any utility to individuals”.⁴⁵ ***The Council of Europe could therefore meet this need by preparing a mandatory instrument binding on states and businesses with a European compliance or monitoring mechanism and legally enforceable rights for individuals and civil society, drawing on some of the achievements of the conventions mentioned above.***

B. The human rights approach: the European Social Charter and the European Convention on Human Rights

“Neither the Convention nor the Charter are designed to provide a general protection of the environment as such and [they] do not expressly guarantee a right to a sound, quiet and healthy environment. However, the Convention and the Charter indirectly offer a certain degree of protection with regard to environmental matters.”⁴⁶

(1) European Social Charter

Even in its revised version, the European Social Charter does not include the right to a healthy environment. Only Article 11 of the Revised Charter recognises that “[e]veryone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable”.⁴⁷ On this basis, the Committee of Social Rights has interpreted the right to health as including access to a “healthy environment” and therefore requires states, when submitting their periodic reports, to identify measures taken with a view to ensuring such an environment for individuals (and not just workers). Only recently, the Committee has stated that issues such as the creation and protection of a healthy environment are central to the Charter’s system of guarantees.⁴⁸

The Committee has typically focused on the following subjects: ambient and indoor air pollution, water quality, waste management, exposure to chemicals and ionising radiation, food poisoning and food safety more generally,⁴⁹ noise pollution and asbestos. The Committee endeavours to obtain factual data on levels of pollution and the implementation of national action plans.⁵⁰ It has found that the measures taken in this field comply with the Charter (Article 11.3) for a number of states parties, whilst frequently noting insufficient information from states⁵¹ and sometimes deferring its conclusions pending receipt of further

⁴⁴ Ibid., p. 107.

⁴⁵ May J. R. and Daly E. (2019), *Global Judicial Handbook on Environmental Constitutionalism* (3rd edn), UNEP, p. 8: “There is as of yet no global environmental rights treaty. Moreover, multilateral and bi-lateral treaties that address environmental concerns are often of limited if any utility to individuals”.

⁴⁶ Council of Europe (2012), *Manual on Human Rights and the Environment* (2nd edn), p. 7.

⁴⁷ See corresponding Article 11: “With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed *inter alia*: (1) to remove as far as possible the causes of ill-health; [...]”

⁴⁸ European Committee of Social Rights, *ATTAC ry, Globaali sosiaalityö ry and Maan ystävät ry v. Finland*, decision on admissibility and on immediate measures, Complaint No. 163/2018, 22 January 2019, para. 12.

⁴⁹ With education and “healthy eating” components as well: European Committee of Social Rights, Conclusions XVIII-2, 30 June 2007, XVIII-2/def/LUX/11/2/EN. Food safety has been covered since 2001 following the Creutzfeldt-Jakob disease scandal. European Committee of Social Rights, Conclusions XXI-2, concerning Luxembourg, 26 March 2018, XXI-2/def/LUX/11/3/EN.

⁵⁰ European Committee of Social Rights, Conclusions 2013, 6 December 2013, 2013/def/FRA/11/3/EN.

⁵¹ For example, European Committee of Social Rights, Conclusions XX-2, for Germany, 16 January 2014, XX-2/def/DEU/11/3/EN.

information.⁵² This is above all an opportunity for the Committee to take note of the benefits of specific regulations and certain goals that states have set themselves in the environmental field, such as the Norwegian Government's goal of halting all emissions of toxins by 2020,⁵³ and to stress the importance of epidemiological surveillance plans.

Leaving aside the periodic reports, only two complaints have been lodged with the Committee regarding the right to a "healthy environment", both concerning Greece: *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, No. 30/2005, and *International Federation for Human Rights (FIDH) v. Greece*, No. 72/2011. The former case challenged the Greek Government's failure to take steps to protect workers and local residents from pollution caused by lignite mines. Having stated that the Charter was a living instrument that must be interpreted in the light of current conditions (para. 194), the Committee noted that Article 11 on the protection of health must be construed as including the right to a healthy environment, in line with the approach adopted by many states party to the Charter and by other international bodies (para. 195). It went on to say that it was guided in its interpretation of this right by the principles established by the European Court of Human Rights, the Inter-American Court of Human Rights, the African Commission on Human and Peoples' Rights, the UN Committee on Economic, Social and Cultural Rights and the Court of Justice of the European Union (para. 196). The Committee then referred to studies by WHO and "independent researchers" on the harmful effects of lignite on human health. In *FIDH v. Greece*,⁵⁴ the complainants alleged that pollution of the water of the River Asopos was having harmful effects on local residents. The Committee noted that the right to a healthy environment was included in the Social Charter, as acknowledged in that previous decision, and that the right to protection of health under Article 11 of the Charter complemented Articles 2 and 3 of the European Convention on Human Rights (para. 50) – given that health care was a prerequisite for human dignity – as well as Article 8 of the Convention (para. 51). The Committee emphasised a government's duty to take preventive measures and held that lack of scientific certainty should not be used as a reason for postponing measures (para. 145).

While the duty of states to ensure "a healthy environment" and access to healthy food is clearly part of the Committee's practice on the basis of Article 11.3 of the Charter, there remains the question of its resources for proper monitoring.⁵⁵ As shown by the Conclusions, monitoring is not thorough enough. Besides, as we shall see for the European Convention on Human Rights, environmental protection is confined to consideration of damage to human health as a result of environmental degradation.

(2) Refusal to adopt an additional protocol to the European Convention on Human Rights recognising the right to a healthy environment

Like the European Social Charter, the Convention does not explicitly recognise the right to a healthy environment, which is what makes the European human rights instruments less satisfactory than all the other regional instruments. Article 24 of the African Charter on Human and Peoples' Rights of 28 June 1981 states that "all peoples shall have the right to a general satisfactory environment favourable to their development" and makes this a group right. The African Court on Human and Peoples' Rights, in an obiter dictum in a judgment of May 2017, acknowledged that indigenous peoples had the right to a healthy

⁵² European Committee of Social Rights, Conclusions 2017, concerning Lithuania, 24 January 2018, 2017/def/LTU/11/3/EN.

⁵³ European Committee of Social Rights, Conclusions 2013, 8 January 2014, 2013/def/NOR/11/3/EN.

⁵⁴ European Committee of Social Rights, decision on the merits, Complaint No. 72/2011, 23 January 2013.

⁵⁵ The Committee has specifically said that it has taken data from the European Environment Agency and the United Nations Development Programme on a number of occasions.

environment guaranteed by Article 24.⁵⁶ Furthermore, Articles 18 and 19 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), adopted on 11 July 2003, grants women "the right to live in a healthy and sustainable environment" and "the right to fully enjoy their right to sustainable development". Elsewhere, Article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (San Salvador Protocol) of 17 November 1988 recognises that "everyone shall have the right to live in a healthy environment". Article 28(f) of the ASEAN Human Rights Declaration signed on 18 November 2012 proclaims the right to a "safe, clean and sustainable environment" as part of the right to an adequate standard of living. For its part, Article 38 of the Arab Charter on Human Rights, which entered into force on 15 March 2008, recognises the right to a "healthy" environment. Lastly, Article 1 of the Aarhus Convention refers to "the right of every person of present and future generations to live in an environment adequate to his or her health and well-being".

All the attempts to supplement the European Convention on Human Rights with an Additional Protocol along these lines have failed for reasons that it is important to remember. We have to go back to the Council of Europe Ministerial Conference on the Environment in Vienna in 1973 for the precursors to these attempts, and in particular to the 1977 initiative by the German Government, taking up a text by Professor Steiger, to draft an additional protocol guaranteeing everyone the right to enjoy a healthy environment. The Parliamentary Assembly was to resume this initial attempt on three occasions. In Recommendation 1431 (1999), for instance, the Assembly asked the Committee of Ministers to: "11.2 instruct the appropriate bodies within the Council of Europe to examine the feasibility of: [...] b. drafting an amendment or an additional protocol to the European Convention on Human Rights concerning the right of individuals to a healthy and viable environment". In response, the Committee of Ministers stated that "the recognition of the individual and legally enforceable nature of the human right to a healthy and viable environment meets at present certain difficulties, legal and conceptual".⁵⁷ Moreover, as the Aarhus Convention was not yet in force, there would have been no point in arguing for a new environmental instrument. In 2003, the Assembly, believing the national, European and international context to be conducive to the environmental cause, recommended that the Committee of Ministers "draw up an additional protocol to the European Convention on Human Rights concerning the recognition of individual procedural rights intended to enhance environmental protection, as set out in the Aarhus Convention".⁵⁸ However, the rapporteur for the Committee on Legal Affairs and Human Rights expressed serious reservations, considering "that the European Convention on Human Rights and its Court would be given tasks beyond their competence and means",⁵⁹ whilst acknowledging that the focus should be on procedural rights and that states should meanwhile be given time to recognise such rights under national laws. In its comments on Parliamentary Assembly Recommendation 1614 (2003), the Bureau of the Committee for the Activities of the Council of Europe in the field of Biological and Landscape Diversity (CO-DBP) noted: "the Convention on Human Rights does not make any specific reference to the protection of the environment, an international concern that emerged at a stage ulterior to the coming into force of the Convention. Therefore, the European Court of Human Rights cannot deal effectively with a number of 'new generation' human rights, including the right to a sound environment." The initiative was repeated

⁵⁶ App. No. 006/2012, *African Commission on Human and Peoples' Rights v. Kenya*, 26 May 2017, para. 199, concerning the Ogiek Community of the Mau Forest (indigenous minority), who had received an eviction notice from the state on the grounds that the forest was a reserved water catchment zone and was government land.

⁵⁷ Committee of Ministers, Doc. 8892, Reply to Recommendation 1431 (1999) – Future action to be taken by the Council of Europe in the field of environment protection, 20 November 2000.

⁵⁸ Parliamentary Assembly, Recommendation 1614 (2003) "Environment and human rights", preamble, 27 June 2003, para. 3.

⁵⁹ Parliamentary Assembly, Doc. 9833, 19 June 2003, "Environment and human rights", Opinion of the Committee on Legal Affairs and Human Rights, Rapporteur: Mr Erik Jurgens.

in 2009 with Recommendation 1885 (2009) entitled “Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment”, with the same reply from the Committee of Ministers.⁶⁰

The most commonly adduced counter-argument at the time (uncertainty as to the actual existence of a right conferred on individuals, or, at the very least, a right that was not adequately defined) now seems redundant. Another argument – that the European Convention on Human Rights, together with the Court, was probably unable to accommodate such cases and this specific right⁶¹ – seems the most relevant and still applicable. It should be added that, as will be shown in detail below, the pointlessness of such recognition cannot be inferred from an environmental case-law developed by the European Court (another reason given for opposing the idea of an additional protocol).

(3) The European Convention on Human Rights as interpreted by the European Court

Not only does the European Convention on Human Rights fail to recognise the right to a “healthy environment”, but the Court has also refused to recognise it explicitly,⁶² despite declaring admissible a certain number of applications that concerned it directly and sometimes finding breaches of the Convention. The Court has noted on various occasions that the Convention does not expressly recognise the right to a healthy environment,⁶³ which “has not become an autonomous right in the case law” of the Court,⁶⁴ despite the fact that it has enshrined certain rights through the latter. The Court “still refuses to enshrine it explicitly by judicial means and [...] still firmly maintains the principle of indirect protection through substantive rights and subsidiary protection through procedural rights’.⁶⁵ Since there is no explicit recognition, a “certain conceptual approximation”⁶⁶ has been noted in legal doctrine; accordingly, the

⁶⁰ Committee of Ministers, Reply to Recommendation 1883, Doc. 12298, “The challenges posed by climate change”, 19 June 2010.

⁶¹ Parliamentary Assembly, Doc. 8560, “Future action to be taken by the Council of Europe in the field of environment protection”, Report of the Committee on the Environment, Regional Planning and Local Authorities, Rapporteur: Mr Rise, 5 October 1999: “The extension of the European Convention on Human Rights to environmental rights must, however, be considered in the light of the characteristics of environmental rights.”

⁶² Even though some judges have thought that they could find indications of this right: European Court HR, GC, *Hatton and Others v. the United Kingdom*, No. 36022/97, 8 July 2003, Joint dissenting opinion of Judges Costa, Ress, Türmen, Zupančič and Steiner, para. 2. See also the partly concurring, partly dissenting opinion of Judge Pinto de Albuquerque, in *Konstantin Markin v. Russia*, No. 30078/06, 22 March 2012.

⁶³ European Court HR, *Apanasewicz v. Poland*, No. 6854/07, 3 May 2011, para. 94, whilst accepting that an issue might arise under Article 8 (and accepting that there had been a violation of Article 8 in this case). Also, European Court HR: Fifth Section, *Flamenbaum and Others v. France*, Nos. 3675/04 and 23264/04, 13 December 2012, para. 133; Third Section, *Lars and Astrid Fägerskiöld v. Sweden*, decision as to admissibility, No. 37664/04, 26 February 2008; Third Section, *Chiş v. Romania*, decision as to admissibility, No. 55396/07, 9 September 2014, para. 29; Fourth Section, *Frankowski and Others v. Poland*, decision as to admissibility, No. 25002/09, 20 September 2011; Second Section, *Aydin and Others v. Turkey*, decision, No. 40806/07, 15 May 2012, para. 24; Second Section, *Otgon v. the Republic of Moldova*, judgment, No. 22743/07, 25 October 2016, para. 15; Fourth Section, *Fieroiu and Others v. Romania*, decision, No. 65175/10, 23 May 2017, para. 18.

⁶⁴ Baumann P. (2018), “Le droit à un environnement sain au sens du droit de la Convention européenne des droits de l’homme”, Université de Nantes, 16 November 2018, available at theses.fr, p. 34.

⁶⁵ *Ibid.*, p. 490.

⁶⁶ *Ibid.*, p. 9.

right may be to an environment that is “clean and quiet”,⁶⁷ “healthy and protected”⁶⁸ or “balanced and healthy”.⁶⁹

Attention is drawn to the factsheet entitled *Environment and the European Convention on Human Rights*⁷⁰ for a list describing the content of European Court of Human Rights judgments and decisions in the environmental field. The present report is intended to complement this review by the Court itself and the *Manual on Human Rights and the Environment* updated by the CDDH⁷¹ by offering a critical assessment of the contributions and limitations of such cases, drawing on what is now extremely well documented in legal doctrine.

After some unsuccessful attempts at the outset (resulting in findings of inadmissibility), the first environmental application was declared admissible by the European Commission of Human Rights on 15 July 1980.⁷² The European Court of Human Rights delivered its first environmental judgment in the field of procedural rights in 1983.⁷³ As for the figures, one author has noted that “while some 70% of applications have been found admissible *ratione materiae*, only 38% have led to findings of a breach of the Convention (30% for Article 8, which is the most frequently enforced right in this field)”,⁷⁴ whereas the overall rate for findings of violations across all judgments is much higher (84%).⁷⁵

Because no explicit right to a healthy environment has been acknowledged and because protection is afforded only indirectly, such as through Article 8, this means that there are a lot of limitations, which are out of keeping with social realities today. For instance, serious general damage to the environment per se that does not at the same time violate other individual rights in the Convention cannot be held to be in breach of the Convention. This fundamental limitation, created by an anthropocentric outlook, has been justifiably criticised by legal writers.⁷⁶ As one parliamentarian has written: “Interference with the environment that does not endanger life, health or property is scarcely covered by the existing instruments. Moreover, the restriction imposed by Article 8(2) of the Convention involves a danger of overemphasising the community’s economic well-being.”⁷⁷ In fact, and this is the second fundamental limitation, the weighing against economic interests, which in practice results in the latter being given priority, means that “a high severity threshold is required, which automatically leads the Court to consider only the worst possible situations.”⁷⁸ Thirdly, and this explains the low percentage of findings of violations in these cases, we also find “allowance of a considerable domestic margin of appreciation affecting the extent of supervision by the European Court of Human Rights and, in addition, the fact that findings of violation are almost systematically contingent on violation of the domestic law of the state concerned”.⁷⁹

⁶⁷ European Court HR, *Fägerskiöld v. Sweden*, No. 37664/04, 26 February 2008.

⁶⁸ European Court HR, *Tătar v. Romania*, No. 67021/01, 27 January 2009, para. 107.

⁶⁹ European Court HR, *Băcilă v. Romania*, No. 19234/04, 30 March 2010, para. 71.

⁷⁰ European Court HR, Factsheet, *Environment and the European Convention on Human Rights*, June 2019.

⁷¹ Council of Europe (2012), *Manual on Human Rights and the Environment*.

⁷² European Commission of Human Rights, *E. A. Arrondelle v. the United Kingdom*, decision, No. 7889/77, 15 July 1980.

⁷³ European Court HR, *Zimmermann and Steiner v. Switzerland*, No 8737/79, 13 July 1983.

⁷⁴ Baumann P. (2018), p. 34.

⁷⁵ European Court HR, *ECHR: Overview 1959-2018*, March 2019, p. 3.

⁷⁶ Maljean-Dubois S. (2017), “International litigation and State liability for environmental damages: recent evolutions and perspectives”, in Yeh J. R. (ed.), *Climate Liability and Beyond*, National Taiwan University Press, Taipei, Part I.

⁷⁷ PACE, Doc. 9791, “Environment and human rights”, Report of the Committee on the Environment, Agriculture and Local and Regional Affairs, Rapporteur: Ms Agudo, 16 April 2003, para. 28.

⁷⁸ Misonne D. and Ost F. (2013), “L’illusion du juste équilibre ou la variabilité de la jurisprudence du juge européen portant sur la balance des intérêts entre environnement et enjeux économiques”, in *Pour un droit économique de l’environnement, Mélanges en l’honneur de Gilles J. Martin*, Frison-Roche, Paris, p. 361. Baumann P. (2018), p. 34.

⁷⁹ Baumann P. (2018), p. 34.

When a domestic response has been offered in an attempt to mitigate environmental damage, the Court therefore sets such a high threshold that there is virtually no hope that a breach of the Convention will be found, leading legal writers to conclude that the Court has reached the end of the road with regard to environmental protection.⁸⁰ For eminent experts on the Convention such as Frédéric Sudre, this case law shows a “debasement of the proportionality test”,⁸¹ since the Court is satisfied with a procedural test alone. The explanation would seem to lie in “the specificity of the judicial treatment of environmental cases under the European Convention on Human Rights”,⁸² a specificity that directly affects how environmental protection is enforced.⁸³ This treatment is described as “residual protection, with a penalty being imposed only in the event of an obvious misinterpretation or particularly glaring errors of procedure”.⁸⁴ Furthermore, and this is another serious limitation, the Court is entirely impervious to the key principles of environmental law, starting with the precautionary approach.

Paul Baumann divides the past into two periods, the first, fairly progressive, continuing until 2003, a year which marked a standstill.⁸⁵ The case law, which was sometimes progressive but has recently been more retrograde,⁸⁶ has been called “disconcerting”.⁸⁷ In the *Kyrtatos v. Greece* judgment of 22 May 2003, for instance, it is expressly stated that “[n]either Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such; to that effect, other international instruments and domestic legislation *are more pertinent* in dealing with this particular aspect”,⁸⁸ thereby upholding a position that is now familiar⁸⁹ and leading some authors to call this a “sacrosanct” boundary.⁹⁰ For the same writer, when the Court justifies its decision of inadmissibility in *Aydin and Others v. Turkey* concerning the building of a dam and hydroelectric power stations on the grounds that “the project will not have caused any significant damage to the environment”, “the Court’s contentions nevertheless show that it does not have any real expertise in the matter, and destruction of biodiversity cannot, when it comes to measuring the seriousness of environmental damage, be compared to pollution”.⁹¹ In Camila Perruso’s view, such cases have two basic limitations. Firstly, as already stated above, natural elements cannot be protected per se, yet we must recognise that “natural elements also belong, when decompartmentalised, to the very concept of ‘human beings’”. “Secondly, existing human rights cannot be used to defend the rights of future generations directly”, despite the fact that

⁸⁰ Pedersen O. W. (2018), “The European Court of Human Rights and international environmental law”, in Knox J. H. and Pejan R. (eds), *The Human Right to a Healthy Environment*, Cambridge University Press, Cambridge, p. 89, p. 90: “[...] it suggests that the Court’s case-law may well be at a standstill or, at the least, that the Court has reached the end point of how far it is willing to expand the Convention to cover environmental issues”.

⁸¹ Sudre F. (2015), “Convergence des jurisprudences de la Cour européenne des droits de l’homme et du Comité européen des droits sociaux et droit de l’homme à un environnement sain”, in *Mélanges en l’honneur du Professeur H. Oberdorff*, LGDJ, Issy-les-Moulineaux, pp. 25-36, p. 36.

⁸² Sudre F. (2017), “La Cour européenne des droits de l’homme et le principe de précaution”, *Revue française de droit administratif*, Dalloz, p. 1039.

⁸³ Baumann P. (2018), p. 38.

⁸⁴ *Ibid.*, p. 490.

⁸⁵ *Ibid.*, p. 36.

⁸⁶ Pedersen O.W. (2018), p. 87.

⁸⁷ Marguénaud J.-P. (2013), “Faut-il adopter un Protocole n°15 relatif au droit à l’environnement ?”, in Robert L. (ed.), *L’environnement et la Convention européenne des droits de l’homme*, Bruylant, Brussels, p. 79.

⁸⁸ European Court HR, *Kyrtatos v. Greece*, No. 41666/98, 22 May 2003, para. 52, author’s emphasis. Shelton D. (2018), “Complexities and uncertainties in matters of human rights and the environment: Identifying the judicial role”, in Knox J. H. and Pejan R. (eds), *The Human Right to a Healthy Environment*, p. 104.

⁸⁹ *Ivan Atanasov v. Bulgaria*, No. 12853/03, 2 December 2010.

⁹⁰ Michallet I. (2013), “Cour européenne des droits de l’homme et biodiversité”, in Robert L. (ed.), *L’environnement et la Convention européenne des droits de l’homme*, p. 95.

⁹¹ *Ibid.*, p. 96.

“intergenerational equity [...] has become a moral imperative in a context of environmental crisis”.⁹² We shall in fact return to this specific feature of ecological human rights, which is ignored by the Convention. On top of all these limitations, there are others relating to *locus standi* and remedies. The fact that only an individual victim can lodge an application with the Court is wholly unsuited to environmental litigation, as “groups of individuals are in a better position to lodge applications for environmental protection than a single individual [...]”.⁹³ Furthermore, the specific nature of remedying environmental damage has not been grasped by the European Court of Human Rights or the Committee of Ministers: a pecuniary response is not appropriate.⁹⁴ We know, for example, that “restoration” is absolutely essential, and this includes “seeking an ecological equivalent of the resources permanently lost”⁹⁵ when the damage for which the ruling has been obtained is irreversible. Consequently, pecuniary compensation must be very much the exception.

It is worth noting that the Court’s lack of ambition and courage in environmental matters is almost unanimously recognised by legal writers.⁹⁶ The desire to move beyond the current view by introducing rights of Nature and an autonomous right to a healthy environment has even prompted research into rewriting the Court’s case law.⁹⁷ The present assessment suggests that the European Court has acknowledged the existence of a right to environmental health and safety⁹⁸ rather than a right to a healthy environment or, still less, a right to protection of the environment. In R. Bentirou Mathlouthi’s view, this is at most a “right to an environment in good health”.⁹⁹ We cannot but agree with P. Baumann that “there is no getting away from the fact that the European Court did not want to take the necessary steps to deal properly with these cases either”.¹⁰⁰

We must therefore conclude that the attempts by the European Committee of Social Rights and the European Court of Human Rights to make good the lack of a right to a healthy environment are unconvincing and today seem wholly incommensurate with the environment emergency and the expectations of civil society. According to P. Baumann, “the situation regarding the right to a healthy environment in European case law seems unlikely to change in the absence of an additional protocol specifically on this subject”.¹⁰¹ Is it even desirable to reopen the debate today, or is it already too late?

We must therefore explore the huge task that the Council of Europe ought to tackle.

⁹² Perruso C. (2019), “Le droit à un environnement sain en droit international”, thesis, Université de Paris 1/University of Sao Paulo, 15 October 2019, p. 406.

⁹³ *Ibid.*, p. 407.

⁹⁴ *Ibid.*

⁹⁵ APCEF (2016), Ecological Damage Committee, chaired by L. Neyret, *La réparation du préjudice écologique en pratique*, p. 27.

⁹⁶ Cournil C. (2016), “‘Verdissement’ des systèmes régionaux de protection des droits de l’homme : circulation et standardisation des normes”, *European Journal of Human Rights* No. 1, p. 8.

⁹⁷ Heiskanen H.-E. (2018), *Towards greener human rights protection: Rewriting the environmental case-law of the European Court of Human Rights*, academic dissertation, University of Tampere, 11 May 2018, 204 pp. This author believes that the Court could have opted for a more environment-friendly interpretation, p. 175.

⁹⁸ Bentirou Mathlouthi R. (2018), *Le développement d’un consensus sur la sécurité environnementale à la lumière des synergies “écologiques” des jurisprudences européennes*, thesis, Communauté Université Grenoble Alpes and Université de Neuchâtel, 19 January 2018, p. 174.

⁹⁹ *Ibid.*, p. 467.

¹⁰⁰ Baumann P. (2018), p. 36.

¹⁰¹ *Ibid.*, p. 37.

3. DEVISING FUTURE ECOLOGICAL/ENVIRONMENTAL RIGHTS: THE TASK FOR THE COUNCIL OF EUROPE AND ITS MEMBER STATES

Within the limited scope of this report, the focus will be on the most significant shortcomings that the Council of Europe and its member states could address in the months ahead. Procedural and, above all, substantive elements must be considered. There are five priorities.

A. The need to recognise an individual right to a “decent” or “good-quality” environment taking an ecocentric and intergenerational approach

At the European level, the substantive limb is without any doubt the *poorest* relation of the right to a healthy environment.¹⁰² With the benefit of hindsight, explicit recognition of a right to a “healthy environment” would have two advantages: firstly, it would be an incentive for stronger domestic environmental laws and a more protection-focused approach by the Court, and, secondly, it would make it easier for victims to lodge applications for remedies.¹⁰³ It has not been shown that there is any frivolous litigation.¹⁰⁴ Recognising an autonomous right to a healthy environment would have the benefit of allowing a violation to be found irrespective of whether another right had been breached¹⁰⁵ and would therefore raise the profile of the right.

However, such an advance would be meagre and, above all, already out of date,¹⁰⁶ since, in the light of what has been said above, the expression “right to a decent environment” or to a “good-quality environment” should be preferred to the more restrictive term “right to a healthy environment”, which covers only environmental damage affecting human health or well-being. The right to a “decent” environment adopted by the Committee of Ministers in 2004¹⁰⁷ was a formulation already used by the OECD since 1984.¹⁰⁸ A “decent” environment means understanding the link between fundamental rights, our environment and sustainable development, and it also covers protection of the natural environment¹⁰⁹ in line with today’s ecological outlook. In its celebrated advisory opinion of 2017, the Inter-American Court of Human Rights held that this right protected the components of the natural environment, such as forests, rivers and other natural elements.¹¹⁰

Recognition of the right to a good-quality environment in ecocentric (rather than solely anthropocentric) terms has quickly gathered pace over the past thirty years among member states of the Council of Europe.¹¹¹ According to David R. Boyd, a real constitutional “revolution” has actually taken place since the

¹⁰² Bentirou Mathlouthi R. (2018), p. 466.

¹⁰³ Boyd D.R. (2018), “Catalyst for change: Evaluating forty years of experience in implementing the right to a healthy environment”, in Knox J.H. and Pejan R., *The Human Right to a Healthy Environment*, Cambridge University Press, pp. 17-41, pp. 26-27. The success rate is apparently over 50%.

¹⁰⁴ *Ibid.*, p. 37.

¹⁰⁵ Perruso C. (2019), p. 405.

¹⁰⁶ Baumann P. (2018), pp. 491-492. Boyle A. (2012), “Human rights and the environment: Where next?”, *European Journal of International Law* Vol. 23, No. 3, pp. 613-642, p. 616.

¹⁰⁷ Reply from the Committee of Ministers, Doc. 10041, “Environment and human rights”, 24 January 2004: “The Committee of Ministers recognises the importance of a healthy, viable and decent environment [...]”

¹⁰⁸ OECD (1984), “Responsibility and liability of States in relation to transfrontier pollution”, *Environmental Policy and Law* Vol. 13, p. 122.

¹⁰⁹ Boyle A. (2015), “Human rights and the environment: Where next?”, in Boer B. (ed.) *Environmental Law Dimensions of Human Rights*, Oxford University Press, p. 208.

¹¹⁰ Inter-American Court of Human Rights, Advisory opinion, OC-23/17, 15 November 2017, para. 62.

¹¹¹ For an exhaustive list of related instruments, see: Rodríguez-Rivera L.E. (2018), “The human right to environment in the 21st century: A case for its recognition and comments on the systemic barriers it encounters”, *American University International Law Review* Vol. 34, p. 143, which concludes that this recognition “is robust, to say the least” (p. 203).

1970s,¹¹² with **Portugal** being the first country to recognise a constitutional right to a “healthy and ecologically balanced human environment” in its 1976 constitution. According to Article 112 of the **Norwegian** Constitution: “Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well.” Article 1 of the **French** Charter for the Environment refers to the right to “a balanced environment which shows due respect for health”. At present, about half the countries of the world recognise the right to a healthy environment or, more broadly, a “good-quality” one.¹¹³ Although the extent of recognition varies, and it has a whole range of practical consequences, the inclusion of this right has had the positive effect of strengthening the legislative and judicial arsenal at national level¹¹⁴ and prompting the public authorities to take a number of environmental and public health measures.¹¹⁵ This constitutionalism, which goes beyond recognition of a good-quality environment for human beings, “is playing an important role in recognising the human rights implications of environmental degradation and climate disruption”.¹¹⁶ A compilation of good practices has been produced by the United Nations rapporteur.¹¹⁷ Article 1 of the draft Global Pact for the Environment produced by an international group of experts calls for recognition of the right to live in an “ecologically sound environment” and Article 2 affirms a duty to take care of the environment.

There is no longer any doubt that this right is now being clearly defined in the legal community. For example, the right to a good-quality environment must be understood as embracing, amongst other things, the right to live in a pollution-free environment.¹¹⁸ In this respect, the report of 8 January 2019 by the United Nations Special Rapporteur, David R. Boyd, is particularly instructive,¹¹⁹ considering the “right to breathe clean air” to be “one of the vital elements of the right to a healthy and sustainable environment, along with access to clean water and adequate sanitation, healthy and sustainable food, a safe climate, and healthy biodiversity and ecosystems”.¹²⁰ Poor air quality leads to over half a million deaths in Europe every year (para. 26), and “more than 90 per cent of the world’s population lives in regions that exceed WHO guidelines for healthy ambient air quality” (para. 25). According to David R. Boyd, the right to clean air is just as legitimate as the right to clean water, since “both are essential to life, health, dignity and well-being”.¹²¹ The UN Committee on the Rights of the Child has therefore already acknowledged that “States should take measures to address the dangers and risks that local environmental pollution poses to children’s health in all settings”.¹²² According to the Special Rapporteur’s report, it follows from this recognition of the right to breathe clean air that states have seven obligations: “monitor air quality and impacts on human health; assess sources of air pollution; make information

¹¹² Boyd D. R. (2012), *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment*, UBC Press, Vancouver/Toronto.

¹¹³ May J. R. and Daly E. (2019), p. 7.

¹¹⁴ Boyd D. R. (2018), pp. 17-23.

¹¹⁵ UN General Assembly (2018), “Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment”, A/73/188, 19 July 2018, and references to various studies in footnote 18 and following.

¹¹⁶ May J. R. and Daly E. (2019), p. 8.

¹¹⁷ UN General Assembly (2015), “Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox. Compilation of good practices”, A/HRC/28/61, 3 February 2015. See also A/73/188 (footnote 115 above).

¹¹⁸ Prieur M. (2005), “Les nouveaux droits”, *Actualité juridique droit administrative*, p. 1157.

¹¹⁹ UN General Assembly (2019), “Issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment”, Report of the Special Rapporteur, A/HRC/40/55, 8 January 2019.

¹²⁰ *Ibid.*, p. 4.

¹²¹ *Ibid.*, p. 9.

¹²² Committee on the Rights of the Child (2013), General Comment No. 15(2013) on the right of the child to the enjoyment of the highest attainable standard of health, para. 49.

publicly available, including public health advisories; establish air quality legislation, regulations, standards and policies; develop air quality action plans at the local, national and, if necessary, regional levels; implement an air quality action plan and enforce the standards; and evaluate progress and, if necessary, strengthen the plan to ensure that the standards are met".¹²³ The substantive limb should also cover the right of every individual (and not just workers in their occupational environment¹²⁴) not to be exposed to harmful substances. The issue of air pollution has also been discussed at the Parliamentary Assembly of the Council of Europe.^{125 126}

In 1990 one European state suggested recognising "(1) the right to ecologically clean foodstuffs; (2) the right to ecologically harmless consumer goods; (3) the right to engage in productive activities in ecologically harmless conditions; (4) the right to live in ecologically clean natural surroundings; and (5) the right to obtain and disseminate reliable information on the quality of foodstuffs, consumer goods, working conditions, and the state of the environment".¹²⁷

Other examples from outside Europe could serve as inspiration. The South African Constitution offers an example of the incorporation of human rights-based individual and collective rights into environmental protection, stating: "Everyone has the right: a) to an environment that is not harmful to their health or well-being; and b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that: i) prevent pollution and ecological degradation; ii) promote conservation; and iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."¹²⁸ Another example is provided by the Constitution of the Dominican Republic, according to which, "Every person has the right, both individually and collectively, to the sustainable use and enjoyment of the natural resources; to live in a healthy, ecologically balanced and suitable environment for the development and preservation of the various forms of life, of the landscape and of nature." Reference may also be made to Article 5 of the 2015 Universal Declaration of the Rights of Humankind, where it is stated, "Humankind, like all living species, has the right to live in a healthy and ecologically sustainable environment." The report on the Declaration points out that the expression "ecologically sustainable" draws attention to the vital link between humankind and nature and creates a continuum with protection of nature itself".¹²⁹ In his 2018 report, the United Nations Special Rapporteur, John Knox, therefore concluded: "Given the importance of clean air, safe water, healthy ecosystems and a stable climate to the ability of both current and future generations to lead healthy and fulfilling lives, global recognition of the right to a safe, clean, healthy and sustainable environment should be regarded as an urgent moral imperative."¹³⁰

Such recognition would have the great advantage of acknowledging an individual and collective right to protection of the human environment, of enabling states, and if possible, businesses, too (see below), to be held liable and of making it possible to obtain restoration of the natural environment. This right has to be directly applicable and able to be invoked by individuals and civil society at the domestic and European

¹²³ UN General Assembly (2019), A/HRC/40/55, p. 11, para. 61.

¹²⁴ UN General Assembly, Human Rights Council (2018), "Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes", A/HRC/39/48, 3 August 2018.

¹²⁵ PACE (2019), Doc. 14888, "Air pollution: a challenge for public health in Europe", report, 9 May 2019.

¹²⁶ See also Post H. H. G. (2019), "The state of a human right to a healthy environment", *Israel Yearbook on Human Rights* Vol. 49, pp. 171 ff.

¹²⁷ It was Ukraine: cited in Shelton D. (1991), "Human Rights, environmental rights and the right to environment", *Stanford Journal of International Law* Vol. 28, p. 137, fn. 135.

¹²⁸ See May J. R. and Daly E. (2019), pp. 19-20.

¹²⁹ Lepage C. et al. (2015), Report on the 2015 Universal Declaration of the Rights of Humankind, p. 36, available at <https://www.vie-publique.fr/sites/default/files/rapport/pdf/154000687.pdf> (in French), accessed 15 January 2020.

¹³⁰ UN General Assembly (2018), A/73/188, p. 19 and references to various studies in footnote 18 and following.

levels without having to possess the status of victim, if it is not to remain a dead letter. This individual right to live in a good-quality environment must be complemented by the duty of public and private institutions and natural and legal persons to protect the environment.¹³¹

This recognition ought to take the form of a *specific instrument*, since ecological/environmental rights do not obey the same logic as civil and political rights on the one hand and social and economic rights on the other. Recognition of this right from the ecocentric standpoint explained above should therefore be accompanied by inclusion of principles specific to this field, such as the principle of prevention, the precautionary approach (Principle 15 of the Rio Declaration¹³²) and the “polluter pays” principle, all of which are closely linked with the concept of environmental justice¹³³ and a reconfiguration of markets to take account of respect for living organisms.¹³⁴ The principle of non-regression should also be added, with the dual purpose of preventing backsliding in environmental standards and achieving steady improvement.¹³⁵

As for other specific features needing acknowledgment, there is one that is now extremely well-researched, namely the issue of who holds this right to a good-quality environment, since the bearers are not only the present generation but also **future generations**. The question of protecting future generations arose after the Second World War, with the realisation that humanity, to use Jean-Paul Sartre’s words, was now “in possession of its own death”.¹³⁶ The International Court of Justice has recognised that “the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn”.¹³⁷ At United Nations level generally, discussion of legal acknowledgment of the needs and rights of future generations is gathering pace.¹³⁸ The 1982 World Charter for Nature recognised the concept of future generations for the first time.¹³⁹ In 1997, UNESCO adopted its Declaration on the Responsibilities of the Present Generations Towards Future Generations;¹⁴⁰ Article 5 provides (in paragraph 1) that present generations should therefore “preserve living conditions, particularly the quality and integrity of the environment” and (in paragraph 2) “ensure that future generations are not exposed to pollution which may endanger their health or their existence itself”. However, as Catherine Le Bris has pointed out with respect to international covenants – and the argument can be transposed here to the European Convention on Human Rights – these texts are designed solely to protect individuals at the present time rather than future generations, even if UN Committees refer to intergenerational equity in their comments.¹⁴¹ More recently, Article 11 of the 2015

¹³¹ See Article 2 of the draft Global Pact for the Environment.

¹³² “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.”

¹³³ Pedersen O. W. (2010), “Environmental principles and environmental justice”, *Environmental Law Review* Vol. 12, No. 1, pp. 26-49.

¹³⁴ Garver G. (2019), p. 431.

¹³⁵ Baumann P. (2018), p. 492. Prieur M. and Sozzo G. (eds) (2012), *La non-régression en droit de l’environnement*, Bruylant, Brussels.

¹³⁶ Sartre J.-P. (1945), “La fin de la guerre”, *Les Temps Modernes* No. 1, 1 October 1945, p. 165.

¹³⁷ ICJ (1996), Legality of the threat or use of nuclear weapons, Advisory opinion of 8 July 1996, ICJ Reports, pp. 241-242, para. 29.

¹³⁸ UN General Assembly (2013), “Intergenerational solidarity and the needs of future generations”, Report of the Secretary-General, A/68/322, 5 August 2013.

¹³⁹ UN General Assembly, World Charter for Nature, 28 October 1982, available at https://digitallibrary.un.org/record/39295/files/A_RES_37_7-EN.pdf, accessed 15 January 2020.

¹⁴⁰ UNESCO, Declaration on the Responsibilities of the Present Generations Towards Future Generations, 12 November 1997.

¹⁴¹ Le Bris C. (2018), “Humanité : des générations présentes aux générations futures”, in Grosbon S. (ed.), *Résistance et résilience des pactes internationaux des droits de l’Homme à l’épreuve d’une société internationale post-moderne*, Pedone, Paris, pp. 76-77.

Universal Declaration of the Rights of Humankind recognises that: “The present generations have a duty to ensure respect for the rights of humankind, as that of all living species. Respect for the rights of humankind and of man, which are indivisible, apply in respect to successive generations.” Further, according to Article 14, “The present generations have a duty to guide scientific and technical progress towards the preservation and health of humans and other species.” Nor is the concept wanting at the European level: Article 1 of the Aarhus Convention acknowledges “rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention” “[i]n order to contribute to the protection of the right of every person of present and future generations”. Some European states have also made provision for the rights of future generations; for instance, the state must be mindful of its “responsibility towards future generations” according to the *German Constitution* (Article 20a). In the same vein, Article 45, paragraph 2, of the *Spanish Constitution* states that “the public authorities shall watch over rational use of all natural resources with a view to protecting and improving the quality of life and preserving and restoring the environment, by relying on an indispensable collective solidarity”, with provision in the following paragraph for “criminal or, where applicable, administrative sanctions” as well as an obligation “to repair the damage caused”. Similarly, Article 112 of the *Norwegian Constitution* provides as follows: “Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well.” The same article also makes provision for an obligation by the state to provide citizens with “information on the state of the natural environment”.

Yet the *intergenerational dimension* is crucial in the environmental field.¹⁴² It is time to reread Hans Jonas, who in 1984 wrote in his celebrated book, *The Imperative of Responsibility*, “Act so that the effects of your action are compatible with the permanence of genuine human life.”¹⁴³ Article 3 of the 2015 Universal Declaration of the Rights of Humankind states: “The principle of continuity of human existence guarantees the preservation and protection of humankind and the earth, through prudent human activities respectful of nature, particularly of life, human and non-human, taking every step to prevent all transgenerational consequences, serious or irreversible”. According to Article 8: “Humankind has the right to the preservation of common goods, especially air, water and ground, and universal and effective access to vital resources. Future generations are entitled to the transmission thereof.” The concept of **commons**, familiar to jurists, is also pivotal, since “the environment is nobody’s property and the use made of it is common to all”.¹⁴⁴ The commons and human rights approach would also necessitate new forms of governance on various scales, including self-organisation and a bottom-up rule-making process.¹⁴⁵ We are in fact seeing a proliferation of citizen initiatives, such as the Citizens’ Convention on Climate at present in France.

It may therefore be concluded that it would be timely for the Council of Europe to promote recognition at the national and European levels of an autonomous individual and collective right to a decent environment embracing an intergenerational outlook and an ecocentric approach, backed up by the requisite duties and principles.

¹⁴² See also UN General Assembly (2013), A/68/322.

¹⁴³ Jonas H. (1984), *The Imperative of Responsibility: In Search of Ethics for the Technological Age*, University of Chicago Press, p. 11.

¹⁴⁴ Jadot B. (2019), “L’environnement n’appartient à personne et l’usage qui en est fait est commun à tous”, in Ost F. and Gutwirth S. (eds), *Quel avenir pour le droit de l’environnement ?*, Presses de l’Université Saint-Louis, Brussels.

¹⁴⁵ Weston B. H. and Bollier D. (2014).

B. The newer issue of the rights of Nature and Nature's legal representation

This second priority has a substantive limb and a procedural limb. As Valérie Cabanes writes, “two stages in legal doctrine seem necessary to restore the Earth’s balance: the first, already under way, is to recognise our interdependence with all living things on Earth in law; the second, more groundbreaking, would be to grant rights to the Earth’s ecosystems in order to ensure their inviolability”.¹⁴⁶ Everyone has to agree that Europe has so far failed to contribute to recognising the rights of Nature. Since Christopher Stone’s 1972 paper,¹⁴⁷ the question has arisen as to whether Nature should be granted legal personality, something the Ecuadorian Constitution has made a reality by becoming, in 2008, the first constitution to grant rights to Nature, in its preamble and in Articles 71 and 72.¹⁴⁸

The Western approach has traditionally been to consider nature an “object in the service of human beings”. Taking the intermediate perspective proposed by F. Ost and outlined in the introduction above, the 2015 Declaration adopted a “third way”, “an eco-anthropocentric outlook”, interpreting Nature as a “project” *with rights but without legal personality*. This third way seems better suited to the continent of Europe. Recognition of the rights of Nature (such as the right of preservation and the right of restoration, including by equivalence), in keeping with the standards previously developed by the Council of Europe, ought to be considered in the light of the most recent developments, and it is important to set out in detail the resulting duties for both public and private sectors. In addition, the question of how to organise the legal representation of Nature ought to be tackled.¹⁴⁹ *Actio popularis* does not exist in the European Court of Human Rights, as reiterated in *Bursa Barosu Başkanlığı and Others v. Turkey*,¹⁵⁰ and this is regarded as a serious obstacle to environmental protection.¹⁵¹ Only personal interests are accepted by the European Court (or else a sum of personal interests), which is often totally inappropriate, since “these personal interests, presented to the court as such, afford representation for Nature only through the interests of the person bringing the proceedings”.¹⁵² While the reluctance of a (judicial or quasi-judicial) European monitoring body to accept *actio popularis* (namely, the capacity of an individual to act in the collective interest, which cannot be reduced to the sum of individual interests) is understandable, it might be possible at least to confer standing on environmental organisations or associations better able to present environmental cases, which very frequently transcend individual interests. Some researchers have recently suggested thinking about the advisability of introducing *actio popularis* for environmental cases, at least domestically,¹⁵³ or relaxing the conditions for *locus standi*, as already allowed in some European states;¹⁵⁴ at the supranational level, consideration might be given to a *limited actio popularis* restricted to people in the vicinity of the environmental damage.¹⁵⁵ This approach would also entail first recognising “ecological damage”, as has been the case in French law since the law of 8 August 2016,¹⁵⁶

¹⁴⁶ Cabanes V. (2016), p. 267.

¹⁴⁷ Stone C. (1972), “Should trees have standing? Toward legal rights for natural objects”, *Southern California Law Review* Vol. 45, pp. 450-501.

¹⁴⁸ Lefort-Martine T. (2018), *Des droits pour la Nature ? L'expérience équatorienne*, L'Harmattan, Paris.

¹⁴⁹ Camproux Duffrène M.-P. and Sohnle J. (eds) (2015), *La représentation de la nature devant le juge : approche comparative et prospective*, special issue, No. 22, Vertigo.

¹⁵⁰ European Court HR, *Bursa Barosu Başkanlığı and Others v. Turkey*, No. 25680/05, 19 June 2018.

¹⁵¹ Shelton D. (2018), p. 104.

¹⁵² Camproux M.-P. (2015), Foreword, in Camproux Duffrène M.-P. and Sohnle J. (eds) (2015), para. 22.

¹⁵³ Truihlé E. and Hautereau-Boutonnet M. (eds) (2019), *Le procès environnemental. Du procès sur l'environnement au procès pour l'environnement*, Final research report (Mission de recherche droit et justice), p. 12.

¹⁵⁴ In Belgium, France, the Netherlands and Portugal: *ibid.*, p. 83.

¹⁵⁵ *Ibid.* p. 81. In *Cordella and Others v. Italy*, the application was lodged by 161 victims, but 265 000 people were potential victims of the same pollution: European Court HR, Nos. 54414/13 & 54264/15, 24 January 2019.

¹⁵⁶ Camproux Duffrène M.-P. (2020), “Réflexion critique sur l'attribution de droits aux écosystèmes. Pour une approche par les communs”, in Vidal C. and Marguénaud J.-P. (eds), *Droits des êtres humains et droits des autres entités : une nouvelle frontière ?*, Mare et Martin, Paris, forthcoming.

with Article 1246 of the Civil Code whereby “any person responsible for ecological damage is liable for the remediation thereof”. Such damage is defined as “consisting in significant harm to elements or functions of ecosystems or collective benefits derived from the environment by human beings” (Civil Code, Article 1247). Convictions have been obtained on this basis. Ecological damage has also been recognised in other countries, including the United States. With regard to *locus standi*, since “ecological damage is not the sum of injury to individual interests but the injury to a common interest consisting of various human and non-human interests considered collectively [...] the connection between the interest injured and the representative of this interest is specific”.¹⁵⁷ Thus, in French law, a non-exhaustive list of bodies with standing has been laid down in Article 1248 of the Civil Code, “such as the state, the French Agency for Biodiversity, local authorities, [etc.]”.

“Shifting the balance of legal protection in favour of nature”¹⁵⁸ can also take other forms, such as limitations on the right of ownership and recognition of the environmental commons (public goods), mentioned above and requiring special legal arrangements (the category of humanity’s environmental commons being narrower¹⁵⁹).

C. Ending the impunity of non-state actors responsible for environmental damage

There is one fact on which everyone today is agreed: multinational corporations have the potential to breach fundamental rights and environmental standards just as much as states and ought also to be accountable for violations of this kind caused by their activities.

Internationally there have been some developments which have made it possible to lay down guidelines. In Resolution 17/4 of 16 June 2011, for instance, the UN Human Rights Council approved the Guiding Principles on Business and Human Rights. These principles were prepared by Professor Ruggie, appointed Special Rapporteur in April 2008, and hinge on the need to “protect, respect and remedy”. They apply to all states and all business enterprises, both transnational and others, regardless of size, sector, location, ownership or structure. In addition, the OECD Guidelines for Multinational Enterprises, as updated on 25 May 2011 by the 42 OECD member countries, include detailed recommendations in line with the UN Guiding Principles, with a whole section on human rights (Chapter IV) and a special section entitled “Environment” (Chapter VI). There is broad agreement on these common principles internationally and in Europe, although they are not formally binding. According to the OECD’s official commentary on the “Environment” chapter: “The text of the Environment Chapter broadly reflects the principles and objectives contained in the Rio Declaration on Environment and Development, in Agenda 21 (within the Rio Declaration). It also takes into account the (Aarhus) Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters [...]. Sound environmental management is an important part of sustainable development, and is increasingly being seen as both a business responsibility and a business opportunity.”¹⁶⁰ Enterprises are urged to introduce “a system of environmental management” covering “environmental, health and safety impacts”.¹⁶¹ In addition, General Comment No. 24 adopted in 2017 as a supplement to the International Covenant on

¹⁵⁷ Ibid.

¹⁵⁸ Lefort-Martine T. (2018), p. 11. Article 72 of the Ecuadorian Constitution recognises that nature has the right to be restored. According to Article 71, nature “has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes. All persons, communities, peoples and nations can call upon public authorities to enforce the rights of Nature.”

¹⁵⁹ Le Bris C. (2017), “Les biens communs environnementaux et la protection des intérêts de l’humanité”, in Makowiak J. and Jolivet S. (eds), *Les biens communs environnementaux : quel(s) statut(s) juridique(s) ?*, PULIM, Limoges, p. 109.

¹⁶⁰ OECD (2011), *OECD Guidelines for Multinational Enterprises*, p. 44, paras. 60 and 61.

¹⁶¹ Ibid., p. 42, para. 1.

Economic, Social and Cultural Rights reiterates these state obligations.¹⁶² In 2018, the twelfth framework principle on human rights and the environment, prepared under the authority of J. H. Knox, provided that “States should ensure the effective enforcement of their environmental standards against public and private actors”, which entailed their “preventing, investigating, punishing and redressing violations of the standards by private actors as well as governmental authorities”.¹⁶³

However, there is no effective complaints mechanism at European or international level enabling proceedings to be brought against private companies. At best, there are the National Contact Points set up by countries under the OECD Guidelines for friendly settlement in a number of “specific instances”. But this non-mandatory settlement mechanism has a number of flaws and has quickly shown its limitations.¹⁶⁴ For this reason, a draft treaty on the responsibility of multinationals, supported by the European Economic and Social Committee, is currently under discussion. In an opinion of 11 December 2019, the Committee stated: “Human rights infringements can be better prevented when there is an internationally agreed binding standard, designed to be implemented and protected by states. The EESC welcomes an approach recognising that it is the duty of states to protect, promote and fulfil human rights and that businesses have to respect those rights.”¹⁶⁵ It very rightly added: “Despite much-welcomed major progress, especially in Europe, in relation to non-binding guidelines for respecting human rights in the business context [...], **a binding treaty is important for those businesses that are not yet taking their responsibilities seriously.**”¹⁶⁶ The draft global treaty emphasises the right to redress and remedy for victims of damage caused by multinationals and asks states to provide for criminal, civil and administrative corporate liability. In 2018, Canada became the first country to establish an independent Ombudsperson for Responsible Enterprise.

At the same time, the Council of Europe has begun to involve itself in this field: in 2014 the Committee of Ministers called on states to “take appropriate steps to protect against human rights abuses by business enterprises”.¹⁶⁷ In particular, it adopted Recommendation CM/Rec(2016)3, in which it encourages states to implement the UN Guiding Principles on Business and Human Rights and share good practice and National Action Plans. The implementation of the Recommendation is to be examined by 2021 “with the participation of the relevant stakeholders”. The concept of “due diligence” is very widely accepted today in a large number of European countries.

It is now *necessary to go further*, since these guides to good practice, not being binding, have proved largely ineffective. As early as 2007, Professor Olivier de Schutter, for the European Coalition for Corporate Justice, called for fresh discussion in the European Union to make progress with implementation of corporate accountability.¹⁶⁸ He suggested, amongst other things, appointing a special rapporteur or working group mandated to receive complaints relating to abuses committed by transnational

¹⁶² UN Economic and Social Council (2017), *General comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, 10 August 2017.

¹⁶³ United Nations (2018), *Framework Principles on Human Rights and the Environment*, p. 18.

¹⁶⁴ OECD (2019), *Annual Report on the OECD Guidelines for Multinational Enterprises 2018*.

¹⁶⁵ <https://www.business-humanrights.org/en/eu-european-economic-and-social-committee-supports-proposed-treaty-on-business-human-rights> (accessed 14 January 2020).

¹⁶⁶ *Ibid.*, para. 1.7 (author’s emphasis).

¹⁶⁷ Declaration of the Committee of Ministers on the UN Guiding Principles on Business and Human Rights, 16 April 2014.

¹⁶⁸ Schutter O. (de) (2007), *Towards Corporate Accountability for Human and Environmental Rights Abuses*, European Coalition for Corporate Justice (ECCJ), Discussion Paper 1.

corporations.¹⁶⁹ In 2018 a United Nations report noted advances in a number of states with regard to publicising the duty of due diligence for business and the need to scale up action.¹⁷⁰

The author of the present report therefore believes that, given its endorsement of the OECD principles in 2016, the progress made in a number of states and its expertise in complaints mechanisms in the field of fundamental rights, the Council of Europe is an appropriate framework in which to provide some real momentum for this major concern.

D. Recognising other substantive rights

Other rights ought also to be acknowledged at European level. Since the present report is intended simply as an introduction, only a brief list will be offered here. Given the importance of the state of **scientific knowledge** for preservation of the environment and human health, particularly when applying the precautionary principle (for example, with regard to marketing, or prohibiting, potentially toxic chemicals), and the danger of leaving such scientific output mostly in the hands of manufacturers, thought should be given to requiring states not only to monitor scientific output (as recognised by the European Court of Human Rights) but also to support such output by independent institutions. It is equally important to think about limits on scientific research that might infringe the rights of present and future generations. Article 13 of the draft Global Pact for the Environment provides an excellent starting point here by adding an obligation for states to co-operate.¹⁷¹ The **right to environmental education** is also starting to emerge. It is provided for in the draft version of the 2015 Universal Declaration of the Rights of Humankind, Principle 18 of which stated, “Closely linked to the rights to life, dignity, freedom, equality, democracy, peace and justice, humankind’s right to the environment, like the rights of individuals, peoples and Nature shall be taught, instructed and put into practice in all States.” The question of **better protection for environmentalists/whistle-blowers** and civil society more generally is just as essential. Too many activists are being prosecuted with the aim of intimidating them, which has led some states to pass anti-SLAPP (strategic lawsuit against public participation) legislation.

E. Bolstering the procedural limb and giving thought to a model of procedural environmental law

The procedural limb is certainly the most developed at the European level as a result of the advances in the Aarhus Convention, to which the European Court of Human Rights has actually referred in part,¹⁷² with an increasingly procedural approach to rights over the past ten years.¹⁷³ Already in 1992 the Rio Declaration proclaimed, in Principle 10, a right of public participation and access to environmental information held by public authorities, together with a right of redress and remedy.¹⁷⁴ These three pillars

¹⁶⁹ Ibid., p. 10.

¹⁷⁰ UN General Assembly (2018), “Working Group on the issue of human rights and transnational corporations and other business enterprises”, A/73/163, 16 July 2018.

¹⁷¹ “The Parties shall promote, to the best of their ability, the improvement of scientific knowledge of ecosystems and the impact of human activities. They shall co-operate through exchanges of scientific and technological knowledge and by enhancing the development, adaptation, dissemination and transfer of technologies respectful of the environment, including innovative technologies.”

¹⁷² A jurist of the Court registry has noted that such references have their limits: Winisdoerffer Y. (2013), “L’intégration des principes définis par la Convention d’Aarhus dans la jurisprudence de la Cour européenne des droits de l’homme”, in Berg L. et al. (eds), *Cohérence et impact de la jurisprudence de la Cour européenne des droits de l’homme, Liber Amicorum Vincent Berger*, Wolf Legal Publishers, Oisterwijk, p. 457.

¹⁷³ Gerards J.H. and Brems E. (eds) (2017), *Procedural Review in European Fundamental Rights Cases*, Cambridge University Press, Cambridge.

¹⁷⁴ Principle 10: “Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the

were bolstered by the Aarhus Convention, which has been ratified by 40 of the 47 states party to the European Convention on Human Rights. In his report on the right to breathe clean air, the Special Rapporteur added that when it came to enforcing this right, the right of access to information and the public right to participate, especially for vulnerable people (the elderly, children, women) must be guaranteed, as must protection of environmental defenders.¹⁷⁵

As for the Council of Europe, considering the narrow approach of the European Court of Human Rights, a right of access to some environmental information (concerning risks to life, health and well-being) has been recognised in *Tătar v. Romania* and *Branduse v. Romania*, amongst others, as well as *Öneryildiz v. Turkey*.¹⁷⁶ However, a right of access to environmental information in the broad sense is not accepted. Public participation in the decision-making process has been recognised in *Taşkin and Others v. Turkey* and *Giacomelli v. Italy*,¹⁷⁷ for example, but here again only to the extent that activities seriously affect human health or life. Right of access to the courts is also restricted, by the constraints of Article 6(1), to “civil rights and obligations”.

The merit of the Aarhus Convention (Article 9) is to allow legal proceedings on the basis of *actio popularis*. This is a basic difference from human rights courts and is crucial for recognition of a right to a decent environment.¹⁷⁸ However, Article 9(3) of the Aarhus Convention does not provide for an unqualified right of access. Comprehensive studies on implementation of access to justice in environmental matters have been produced by the EU and nationally (state by state), to which the reader is referred.¹⁷⁹ According to a number of well-researched studies, significant hurdles remain, particularly regarding access to national courts for environmental NGOs and individuals.¹⁸⁰ It would therefore be advisable not only to have the rights established by the Aarhus Convention recognised by the 47 Council of Europe member states but also to bolster the pillar on access to environmental justice.

More generally, we are witnessing the emergence of *environmental courts and tribunals*, numbering some 1 200 in 44 states if we include all the courts at local and national levels.¹⁸¹ “Environmental divisions” are also appearing in national courts. It is important to consider whether urgent legal proceedings for environmental matters (urgent environmental applications) should be introduced.¹⁸² Even more than in protection of fundamental rights, legal proceedings are viewed here really as a vehicle for enforcing environmental standards¹⁸³ in terms of prevention, punishment and remediation. The rules governing legal proceedings and the jurisdiction of national courts ought to be broadened. Similarly, thought should

environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”

¹⁷⁵ A/HRC/40/55, page 11, para. 62.

¹⁷⁶ European Court HR: *Tătar v. Romania*, No. 67021/01, 27 January 2009; *Öneryildiz v. Turkey*, No. 48939/99, 30 November 2004.

¹⁷⁷ European Court HR, *Taşkin and Others v. Turkey*, No. 46117/99, 10 November 2004.

¹⁷⁸ Boyle A. (2015), p. 218.

¹⁷⁹ https://e-justice.europa.eu/content_access_to_justice_in_environmental_matters-300-en.do, accessed 15 January 2020. Truihlé E. and Hautereau-Boutonnet M. (eds) (2019), Chapters 1 and 2.

¹⁸⁰ European Commission (2019), “Report on European Union implementation of the Aarhus Convention in the area of access to justice in environmental matters”, Commission staff working document, SWD(2019) 378 final, Brussels, 10 October 2019, p. 28. Pallemarts M. (2013), “Environmental human rights: Is the EU a leader, a follower, or a laggard?”, *Oregon Review of International Law* Vol. 15, pp. 7-42, p. 27). Inventory of EU Member States’ measures on access to justice in environmental matters, European Commission (11 January 2013), available at <https://ec.europa.eu/environment/aarhus/studies.htm>

¹⁸¹ UNEP (2016), *Environmental Courts and Tribunals: A Guide for Policy Makers*.

¹⁸² Truihlé E. and Hautereau-Boutonnet M. (eds) (2019), p. 13.

¹⁸³ *Ibid.*, p. 21; and p. 24: procedural law is described as “acting as substantive law for the environment”.

be given to “procedural environmental law”, since environmental proceedings call for specific arrangements in order to ensure effective court action.¹⁸⁴ A “model for environmental proceedings” has therefore been the subject of academic research and concrete proposals,¹⁸⁵ which the Council of Europe might draw on in preparing common standards in this field.

These various themes are some key aspects of the “qualitative leap” that might be taken by the Council of Europe in the months ahead.

4. HOW TO FACILITATE THIS QUALITATIVE LEAP BY THE COUNCIL OF EUROPE IN ADDRESSING THE ENVIRONMENT EMERGENCY

A Working Group on Environment (GT-DEV-ENV) set up within the CDDH met just once in 2011 owing to the limited budgetary resources available.¹⁸⁶ It therefore confined itself to supervising the updating of the *Manual on Human Rights and the Environment* that was to appear in 2012¹⁸⁷ and making a few very broad recommendations to states concerning the importance of providing and updating information on their national legislation and practice in the following five areas: “embedding environmental rights in the national policy and legal framework; establishing control over potentially harmful environmental activities; requiring environmental impact assessments; securing public participation and access to information on environmental matters; making environmental rights judiciable and the environment a public concern”.¹⁸⁸

A “**qualitative leap**” is needed at this juncture, now that the evidence of environmental damage is accumulating and posing an irremediable threat to human health and our natural environment. The term “qualitative leap” is borrowed from René-Jean Dupuy, who in 1989 wrote that “the transition from man to family, regional, national and international groupings is the result of quantitative progress; to achieve the ideal of humanity requires a qualitative leap. Once it is made, humanity itself must enjoy rights, otherwise men will lose theirs”.¹⁸⁹

In view of the ecocentric conceptual approach now unanimously accepted and, given the intellectual and standard-setting heritage of the Council of Europe, the author of this report would like to suggest urgently considering the advisability of developing **a new instrument enshrining human rights (and responsibilities) with an ecocentric and intergenerational approach**. This instrument would take the form of **a new treaty or binding pact specific to this field**, incorporating existing achievements, covering various procedural and substantive environmental rights, including those referred to in the previous section, and supporting the environmental principles and specificities also mentioned, such as the precautionary principle. The pact must contain rights that are directly applicable and can be exercised in the courts by their holders.¹⁹⁰

The writer of this report will not revisit the minimum proposal of simply recognising an explicit right to a “healthy environment”, which is far too restrictive, as explained at length above. There are some who might want to settle for adding a right to a decent or ecologically viable environment (itself a broader concept than that of the right to a healthy environment) to the European Convention on Human Rights in

¹⁸⁴ Ibid., pp. 20-21.

¹⁸⁵ Ibid.

¹⁸⁶ CDDH, GT-DEV-ENV(2011)02, 24 February 2011.

¹⁸⁷ Council of Europe (2012).

¹⁸⁸ CDDH, GT-DEV-ENV(2011)02, para. 10.

¹⁸⁹ Dupuy R.-J. (1989), *La clôture du système international. La cité terrestre*, PUF, Paris, p. 156.

¹⁹⁰ May J. R. and Daly E. (2019), *Global Judicial Handbook on Environmental Constitutionalism*, p. 57.

order to use the existing mechanism with the European Court. That would, of course, be a first step but would probably still not be enough in the current context. It is important to bear in mind that rights relating to environmental protection cannot be linked to either the civil and political rights (“freedoms from”) or the social and economic rights (“rights to”) recognised after the Second World War. They come under the “solidarity rights” identified by Karel Vasak in the late 1970s and may be compared to the right to peace, the right to development, etc., in that they go beyond the traditional framework of the nation state, like the phenomenon of globalisation.¹⁹¹ In fact, the right to environment is also a composite right, in that, without it, the other rights become weaker. But the right to environment has the specificity of being “both a human right and beyond a human right”.¹⁹² The right to environment would actually seem to be on the borderline between third- and fourth-generation rights, the latter having been identified by Professor Marcus-Helmons as rights “that must protect human dignity from certain abuses of science”,¹⁹³ with humankind now the right holder. It therefore becomes clear why environmental protection rights are ill-suited for use in either the ECHR or the Social Charter system, since both confine them within limits that are too narrow. Recognising this fact, Yann Aguila from Le Club des Juristes has therefore proposed a third international human rights pact in the form of a universal environmental charter.¹⁹⁴

Politically and symbolically, the Council of Europe is expected to send a powerful signal rising to current challenges. **For the continent of Europe, this signal cannot be less ambitious than similar projects developed in other, broader, bodies.** The **draft Global Pact for the Environment, the draft UN treaty on responsibility of transnational corporations** (both currently under discussion), **the World Charter for Nature** and the 2015 **Universal Declaration of the Rights of Humankind** could therefore be taken as the main models, not to mention the Council of Europe conventions in this field. The 2015 Declaration takes as its starting point the recognition that “humankind is facing a **major and unprecedented risk**”,¹⁹⁵ that “the existence and the future of humanity are inseparable from its natural environment”¹⁹⁶ and that “the rights of humankind serve both present and future generations as well as nature and the living world in general”.¹⁹⁷ The Declaration has the goal of “permanently securing enjoyment of fundamental rights, whether individual or collective” and of recognising “rights” and “duties” that “help to build a shared vision of universal responsibility, transcending both time and space”.¹⁹⁸ Such rights presuppose a new legal paradigm, since they introduce the concept of duties towards future generations.¹⁹⁹ Unlike home, reputation, work or even life, the object protected is not only a private good but also a public good,²⁰⁰ which the state must preserve. Environmental proceedings seldom concern individual interests (as must be the case before the European Court of Human Rights) but much more often relate to collective human interests and even shared damage (since ecological damage covers both human and non-human interests, which cannot be reduced to the sum of individual interests). According to Michel Prieur, rights in this field are therefore mixed, being both individual and collective. While, with the human rights approach, “it is

¹⁹¹ Gaillard E. (2012), Chapter 1, “Pour une approche systémique, complexe et prospective des droits de l’homme”, in Colard-Fabregoule C. and Cournil C. (eds), *Changements environnementaux globaux et droits de l’homme*, Bruylant, Brussels, pp. 45-67, p. 47.

¹⁹² *Ibid.*, p. 52.

¹⁹³ Marcus-Helmons S. (2000), “La quatrième génération des droits de l’homme”, in *Mélanges en hommage à Pierre Lambert, Les droits de l’homme au seuil du troisième millénaire*, Bruylant, Brussels, p. 551.

¹⁹⁴ Le Club des Juristes (2015).

¹⁹⁵ Universal Declaration of the Rights of Humankind, Final report delivered on 25 September 2015, p. 5 (in French). The text of the declaration can be consulted on the official website: <http://droitshumanite.fr/the-declaration/?lang=en>, accessed 15 January 2020.

¹⁹⁶ Universal Declaration of the Rights of Humankind, preamble, Recital 7.

¹⁹⁷ Universal Declaration of the Rights of Humankind, Final report, p. 9 (in French).

¹⁹⁸ *Ibid.*

¹⁹⁹ Gaillard E. (2012), p. 65.

²⁰⁰ PACE (2003), “Environment and human rights”, Report of the Committee on the Environment, Agriculture and Local and Regional Affairs, Rapporteur: Ms Agudo (Spain/SOC), Doc. 9791, para. 27.

not the earth that is at issue but rather the human adventure on our small blue planet, human rights will be unable to avoid the second trap: thinking in terms of (almost exclusively) individualist answers to problems that are experienced (mainly) as collective and, to an even greater extent, global. **It is therefore clear that an *ad hoc* response (because *individual*), even if amplified by the existence of various subjects of law, cannot attain a scale such as to achieve noteworthy results in the environmental field.**²⁰¹

Similar initiatives have already occurred in the past, with, for example, Recommendation 1431 (1999) of the Parliamentary Assembly of the Council of Europe entitled “Future action to be taken by the Council of Europe in the field of environment protection”, paragraph 11.2 of which recommended that the Committee of Ministers: “instruct the appropriate bodies within the Council of Europe to examine the feasibility of: a. developing, possibly through a European charter for the environment, general obligations of states to apply the precautionary principle and promote sustainable development, protect the environment and prevent transfrontier pollution”. Perhaps this initiative was before its time. In 2003, a draft European Charter on General Principles for Protection of the Environment and Sustainable Development was being discussed, a draft supported by the researcher, Alexandre Charles Kiss. The arguments in favour of this independent charter were that it would “identify the fundamental principles and values that have guided Council of Europe action in this field, explore new concepts and propose innovative work”, as well as providing “better visibility and coherence for our Organisation in environmental matters”. These arguments are now more relevant than ever. The draft was intended to cover the field fully by including, for example, the “environmental rights and duties of individuals and communities”, the precautionary approach, environmental education, science, natural and biological diversity, etc.²⁰²

The future treaty or pact ought to include a European complaints mechanism relating to both states AND private firms, widely open to states, individuals and civil society, preferably with recognition of a limited *actio popularis* and/or a group action restricted to environmental associations, supplemented by a **mechanism for monitoring** measures taken by a defendant following a finding of non-compliance. Alan Boyle has highlighted the contrast between human rights treaties and the Aarhus Convention, with only the latter allowing NGOs and environmental activists to bring legal proceedings without requiring standing as victims themselves. In his view, transposing the Aarhus Convention model makes sense if the aim is to use human rights instruments to recognise the right to a decent environment and protect the environment in itself.²⁰³ The monitoring body would help to clarify the rules governing the specific redress required for damage to the environment and human health. The draft Global Pact for the Environment also provides for such a mechanism in the shape of a committee of experts. The ineffectiveness of environmental law is in fact a major challenge.²⁰⁴ A binding mechanism (and the European Court of Human Rights is an exemplar for Europe here) guarantees the effectiveness of rights and the lawfulness of political action. As is pointed out in the opening sentences of the introduction to the third edition (2019) of UNEP’s *Global Judicial Handbook on Environmental Constitutionalism*: “Courts matter. They are essential to the rule of law. Without Courts, laws can be disregarded, executive officials left unchecked, and people left without recourse. And the environment and the human connection to it can suffer.”²⁰⁵ Unsurprisingly,

²⁰¹ Papaux A. (2016), p. 2.

²⁰² CM/Notes/835/9.1, Draft European Charter on General Principles for Protection of the Environment and Sustainable Development, 4 April 2003.

²⁰³ Boyle A. (2015), p. 218.

²⁰⁴ Maljean-Dubois S. (ed.) (2017), *The Effectiveness of Environmental Law*, Intersentia, Cambridge.

²⁰⁵ May J. R. and Daly E. (2019), p. 7.

therefore, if a parallel justice system (in the form of “people’s tribunals” or “civil tribunals”,²⁰⁶ such as the International Monsanto Tribunal in 2016 – whose presiding judge was a former Vice-President of the European Court of Human Rights, Françoise Tulkens – or the International Tribunal for the Rights of Nature in 2015) has grown up to expose impunity in cases of environmental damage, it is specifically to attempt to make up for the shortcomings of the official justice system. *Consequently*, it would be desirable to establish a select specialist judicial body, namely a **European Environmental Court** or, failing that, a European **High Commissioner or Ombudsman** assisted by experts and supported by an independent secretariat responsible for handling complaints. It is obvious that what has been achieved in terms of protecting fundamental rights in Europe would not have been the same at all without the European Court of Human Rights. This will also hold true for the environmental field.²⁰⁷

There ought to be an instrument that has a positive ripple effect and is open to ratification by both non-European states and the European Union. It is conceivable that some European states may not be ready for this qualitative leap at present but, given the urgency of the situation, it might be possible to introduce **an enlarged partial agreement** between states wishing to embark on this path. This would have the advantage of allowing a flexible accession procedure, offering the budgetary flexibility of this type of instrument and providing reference to the Council of Europe’s existing corpus whilst incorporating some of the additional rights and principles listed above and introducing a monitoring system to ensure effectiveness. For the reasons outlined earlier, settling for the development of an additional protocol to the European Convention on Human Rights, or a non-binding declaration, or a binding treaty with no complaints mechanism, would rightly be perceived by the European community as a failure.

CONCLUSION

To paraphrase Marc Pallemarts on the European Union, while in the past the Council of Europe has seemed to be a leader with the adoption of a number of flagship conventions, seen from abroad, it is now clearly a laggard in environmental matters. The moment has come for the Council of Europe to provide new impetus here, at the same time as acting as a leader in the field of fundamental rights protection. If it fails to do so, piecemeal initiatives will be taken at national level, and the legitimacy of the Council of Europe will be seriously affected as a result.

Our colleague, Émilie Gaillard, wrote in 2015: “At the beginning of the 21st century, it is becoming increasingly obvious that we need a new Enlightenment specifically to shed a different light on our relationship to the world and the future. [...] In other words, while the law of the past was put together in total ignorance of the future, today’s law must undergo a transformation if it is to take account of the future, however far away or unrelated to humankind. [...] It is important to show the advance of a new humanism that seeks to guarantee the survival of humanity and the chances of healthy life across time.”²⁰⁸ We may conclude with Mireille Delmas-Marty, in the opening words of her most recent book, that “[t]o

²⁰⁶ Cournil C. (2016), “Réflexions sur les méthodes d’une doctrine environnementale à travers l’exemple des tribunaux environnementaux des peuples”, *Revue juridique de l’environnement* Vol. 41, special issue, pp. 201-218, p. 218, for whom these tribunals “are forums for publicising and spreading legal opinion on the environment”.

²⁰⁷ On the initiative of Corinne Lepage, the Brussels Charter was signed on 30 January 2014 by a number of associations calling for the “establishment of a European Environmental Criminal Court”: Professor Abrami, Vice-Chair of the International Academy of Environmental Sciences, *Les Annonces de la Seine* No. 11, 27 February 2014, p. 16. Initiatives are currently afoot in the International Criminal Court to extend the ICC’s jurisdiction to the crime of ecocide.

²⁰⁸ Gaillard E. (2015), “Vers un nouvel humanisme ? Entre un humanisme de séparation et un humanisme d’interdépendance, transnational et transtemporel (générations futures)”, Chapter XVIII, in Bréchnac C., Broglie G. (de) and Delmas-Marty M. (eds), *L’environnement et ses métamorphoses*, Hermann, Paris, pp. 217-229, p. 219.

call yourself a humanist, it is not enough to put humankind and its values at the heart of your concerns.”²⁰⁹
Further concrete steps are now required...

Let us end by pointing out the extent to which all the rights, duties and principles discussed in this report wholly reflect standards that already belong to positive law in a number of legal systems or are reflected in standard-setting instruments. The member states of the Council of Europe are therefore not being asked to make *a leap of faith* but are simply being requested to **intelligently combine these existing achievements and good practice so that the Council of Europe will not only stand as the most sophisticated model of European human rights protection in the 20th century but also become a benchmark for ecological human rights in the 21st century.**

²⁰⁹ Delmas-Marty M. (2019), p. 9.