Online presentation by Elisabeth LAMBERT, DR CNRS, 16 May 2024

Ladies and Gentlemen,

I would like to warmly thank your Executive Secretary, Mr Zyman, for his invitation and the honour he has done me to join you in your reflections, and all of you for listening.

I understand that my contribution is intended to provide a basis for discussion on how your work can make a greater contribution in the future to consolidating the right to a healthy environment in the face of climate change and the risks to which we are exposed.

To do this, I have combined my previous expertise on the ECHR (including the role of local and regional authorities in its implementation), the right to a healthy environment, the right to information and public participation in environmental health matters, and the protection of the landscape and flora and fauna, with a close reading of the work and standards you have adopted in recent years. I have also taken note of the legal articles relating to the EUR-OPA agreement and the topics I will be looking at.

By way of introduction, I would like to say that I had the pleasure of producing the introductory report on the environment and human rights for the Political Conference organised in February 2020 by the Georgian Presidency, a report in which I stressed (1) the legitimacy of the Council of Europe on these issues, (2) the need for synergy within your organisation between the various departments responsible for natural elements and (3) the need for instruments beyond the ECHR and a possible additional protocol on the right to a healthy environment; I supported and still support the option of a new instrument on ecological human rights.

I am convinced that developments over the last 4 years are moving in that direction.

I would also like to point out by way of introduction (and this makes the link with the previous speaker) that the approach of the ECtHR in the judgment of 9 April in the Swiss Elders case confirms the reasoning adopted in my writings to the effect that litigation linked to climate change has specific features compared with environmental litigation as known and dealt with by the Court over the last 40 years. It is therefore clear why the Court cannot manage these challenges alone. The Court explains why the requirements to qualify as a victim will be high, and the extent to which associations, through the collective approach, without being victims, can be recognised as having the capacity to act (which is what I called for in my work) because they are better equipped to take this litigation to court.

The human rights-based approach to ecological transition is therefore supported by the Court, but the ECHR cannot respond to it alone.

I will structure my speech in 3 parts:

Firstly, on the complementarity between the objective law approach (developed in particular by the agreements you have adopted) and the subjective human rights-based approach, i.e. the right to a healthy environment;

Secondly, by detailing how the activities you have carried out within the framework of EUR-OPA are helping to make the right to a healthy environment a concrete and effective reality for present and future generations, particularly from a procedural point of view;

Thirdly, and this will be quicker, I would like to point out what I consider to be unfinished business and what needs to be strengthened in the years to come.

My comments apply to both natural and man-made risks, as well as the environmental and technological risks associated with them.

1/ Let us begin by discussing the importance of coordinating objective obligations with the human rights-based approach;

Historically, the environment has been protected on the basis of a profoundly inter-state approach and objective law; but this perspective showed its limits from the 1980s onwards.

Between 1960 and 2000, standards in environmental law were drawn up primarily as objective law, i.e. rules of law requiring the State to comply with standards. However, there are significant limits to this production of standards: their provisions, which have no direct effect in domestic law, deprive those to whom they are addressed of the right to invoke them in court. What's more, these treaties, apart from the fact that they have been very poorly ratified by States, rarely benefit from an independent and effective mechanism for monitoring their obligations, so their implementation has proved to be quite limited.

The EUR-OPA agreement adopts the same inter-state approach; for example, the revised Medium-Term Plan 2021-2025 mentions the 'the primary responsibility of States for disaster risk prevention and reduction' **(EUR-OPA, AP/CAT(2021)11, 24.11.2021, REVISED MEDIUM-TERM PLAN 2021 - 2025, p.3);**

Given the limitations of these standards, a complementary approach is now being put forward, based on human rights, which is also recognised as relevant in the context of EUR-OPA. **(EUROPA, AP/CAT(2021)11, 24.11.2021, MTP REVISED, p.4).**

What does it mean and what added value is there in supporting a subjective right to a healthy environment?
What a human rights-based approach means/involves

In addition to objective law, subjective rights, i.e. prerogatives, are recognised for an individual or a group of individuals in certain systems, so that they can defend their rights in court and demand performance from others, and thus become involved in punishing any failure to respect them.

If a right to a healthy environment has been recognised in many States, it is for the following reasons: the protection of a healthy environment (1) corresponds to interests that are worthy of a high level of protection (such as the right to freedom of expression), (2) these interests can be frequently threatened (we have sufficient scientific knowledge about the serious effects of the deterioration in the quality of the environment). The Paris Agreement makes the link between climate change and human rights (para. 11 of the Preamble). (3) This claim can only be adequately met if we grant individuals subjective rights, because objective environmental law is not sufficiently effective, as I said earlier.

What are the advantages of this approach?

There are major legal and political advantages: (1) this approach raises the issue of access to a healthy environment to the level of a fundamental need, and 'takes seriously' the responsibility of States and non-State actors in the event of infringement of values such as the right of access to drinking water, the right to breathe clean air, etc... (2) It empowers citizens to act in common, in particular by exercising their rights to information, participation and legal action; by making citizens the guardians of this living heritage, and in this way it makes the ecological transition socially acceptable. In other words, it creates a new social contract based on respect for living things. I would point out that, according to the UN Special Rapporteur, the right to a healthy environment includes the right to inhabit a sustainable land, to a safe climate and to healthy

biodiversity and ecosystems (GA, UN, D. R. Boyd, A/HRC/40/55, 8.1.2019, supra, page 4). It is linked to the concept of dignified life[1].

This right belongs to everyone but is even more fundamental for vulnerable groups (as you point out in numerous documents: migrants, asylum seekers, refugees and people with disabilities). Researchers have widely documented the fact that social vulnerabilities and ecological vulnerabilities go hand in hand and reinforce each other. In law, we can emphasise the importance of the concept of intersectional discrimination (which is still used by few legal systems) qualifying discrimination linked to several grounds. These vulnerable, socially and economically fragile populations are also those most exposed to the natural risks associated with climate change.

Similarly, and this is one of the specific features of the right to a healthy environment, this right belongs to both present and future generations, which implies that present generations have responsibilities for the preservation of living organisms in order to bequeath to future generations natural resources that are at least equivalent to those they have inherited.

I would like to quote Article 14 of the 2015 Universal Declaration of Human Rights, which echoes the scientific knowledge whose importance you emphasise in your work: 'It is the duty of the present generations to direct scientific and technological progress towards preserving the health of mankind and other species'.

This brings me to my second point. How can we move from a traditional inter-state approach to one based on human rights in the face of the risks associated with climate change? A 2010 EUR-OPA publication defined one of the challenges to be met as being to put people back into the risk management process.

2/ The importance of involving citizens in the ecological transition by offering them the capacity to act for a renewed governance of risks:

A number of documents drawn up as part of EUR-OPA activities refer to the responsibility of citizens[2]. This is an important issue. In this period of transition, and this has not yet been done, we need to clearly specify the obligations of States, private players and citizens, as well as their subjective, individual and/or collective rights. It would be a mistake to try to place too heavy a burden on citizens (or associations) who have less capacity to act and fewer resources than public and industrial authorities.

Citizens can have a role to play at several levels, and the rights that I am about to set out echo your work and form part of the right to a healthy environment, especially from the procedural point of view[3].

(1) The right to information and education[4] ; Principle 10 of the 1972 Rio Declaration proclaimed the right of citizens to participate and to have access to environmental information.
According to the Medium-Term Plan 2021-2025, it is planned that 'The Agreement will favour a tripartite model (universities/businesses/public authorities) for sharing knowledge on disaster risk reduction, in which good collaborative practices will be disseminated by academia, the public sector and private entities' (EUROPA, AP/CAT(2021)11, 24.11.2021, REVISED MEDIUM-TERM PLAN 2021 - 2025, p.9). There is a tendency to focus on digitised information, considering that the digital transition and the ecological transition go hand in hand. I am aware of the

[1] AP/CAT(2023)03, 10 July 2023, pp.4-5: Mr Gruden, Director of Democratic Participation, referred in July 2023 to the fact that the Agreement must enable human rights and human dignity to be consolidated.
[2] AP/CAT(2023)03, 10 July 2023, p.12.
[3] Emily Barritt, 'The Aarhus Convention and the latent right to a healthy environment', Journal of Environmental law (2024) 36, pp.67-84.
[4] *Droit à l'éducation : Rec. « La réduction des risques de catastrophe par l'éducation à l'école » (AP/CAT(2006)47rev, 31/10/2006).*

Recommendation Use of digital tools such as social media and mobile applications to communicate effectively on disaster risks, 6 Nov. 2023, AP/CAT (2023)01 REC), which offers interesting modalities but should not be exclusive of other information modalities, notably because of the digital divide; so that vulnerable groups, often those who should receive information as a priority, would be excluded.
Researchers have documented the fact that the right to information is not very effective at national level for a number of reasons. Firstly, only information held by the public authorities is accessible to citizens: this is a major obstacle because the public authorities do not necessarily make the effort to collect information (I'll give you a specific example that I'm currently working on, which is the use of pesticides in agriculture).It is virtually impossible for people living near spraying operations to know what products they are exposed to, even though the impact on their health is real.

We need to define what information should be available, and in what form; sufficiently clear and exhaustive information is important for public confidence. Contrary to what is sometimes written, it is the absence of information that causes anxiety, not the other way round.
As you may know, the CJEU has adopted a broad interpretation of 'emissions into the environment' (covered by the right to public information) as including, beyond the

industrial pollution (to which the Commission wanted to limit the scope of application) 'the release into the environment of products or substances, such as plant protection products or biocides and substances contained in such products, provided that such release is actual or foreseeable under normal or realistic conditions of use "[5], on the grounds that disclosure "is deemed to be in the overriding public interest as compared with the interest derived from the protection of the commercial interests of a particular natural or legal person".

In a risk-based society, information serves multiple purposes: providing information about risks enables people to understand them and therefore to accept them more readily; moreover, the central purpose of information, according to the approach taken in European law, is to enable people to protect themselves from the risks to which they are exposed. This is why the right to information is recognised as the tool par excellence for the governance of environmental risks. To enable people to protect themselves, information must be provided before the risk occurs and must be sufficiently detailed and precise, rather than general. Hence the importance of the local level. I can give the example of pesticide spraying for local residents.

(2) This is not unrelated to another important point: the right to scientific knowledge. There is a major imbalance between the number of risks, pollutants and chemical substances authorised on the market in the name of economic freedom, innovation and industrial productivity, and the increasingly limited resources available for serious, independent public research, with the result that the delay in producing scientific knowledge penalises access to information and deprives the preventive approach of sufficient effectiveness.

This role of science is recognised, for example, in the 2010 Recommendation on reducing vulnerability to climate change (28 September 2010), but how has it been implemented?

Encouraging scientific research is also one of the priorities of the current action plan (EUROPA, AP/CAT(2021)11, 24.11.2021, REVISED MEDIUM-TERM PLAN 2021 - 2025, p.8).

The issue today is above all to ensure support for independent, robust and serious scientific production. This is a cross-cutting issue that is not only relevant to EUR-OPA.

[5] CJUE, C-673/13 P, op. cit, para.62.

(3) The right to information and the right to produce science are not unrelated to the **right to citizen participation.**

This right to citizen participation is perfectly well recognised but once again totally ineffective at both national and European level. It has rightly been pointed out that 'the institutions are not sufficiently prepared for citizen participation in crisis management' (M. Galichet, AP/CAT(2023)03, 10 July 2023, p.13). The right to participation certainly implies consulting the public, but also allowing them to co-decide and co-draft risk prevention plans. We need to move beyond a vertical logic of governance towards a logic of participatory and inclusive democracy[6].

It also seems that NGOs have not yet made much use of this right to participate, partly because of their limited resources and the fact that they do not always consider themselves to have the necessary powers.
sufficient expertise[7]. Hence the need to turn to broader citizen consultations, paying close attention to selection methods, access to information and science for these individuals, the mandate given to them, the purpose of the consultation, etc.
As the Office of the UN High Commissioner for Human Rights points out: 'Meaningful, informed and effective participation by all is not only a fundamental right, it also promotes more effective, equitable and inclusive environmental action"[8]. As one author points out, 'The right to participate in public affairs and decision-making is essential for developing policies and strategies for a just transition"[9].
Citizen participation is therefore essential for an effective and just transition.

(4) This citizen participation, which must be made effective in European states, goes hand in hand with a strengthening of local governance to ensure the necessary prevention of and response to natural and technological risks. In an article I published on the role of local and regional authorities in the implementation of judgments handed down by the European Court of Human Rights, I drew 2 major conclusions: (1) the implementation of the ECHR has everything to gain from greater involvement of sub-national authorities; (2) the implementation of the judgments has in fact done less to strengthen local democracy than to oblige national and local bodies to better coordinate their actions and strengthen their synergies.

The Congress of Local and Regional Authorities also clearly highlighted the limited capacity (in terms of staff, but also financial) of these local and regional authorities in some States.

The need to strengthen local governance is the conclusion reached by a consortium of researchers as part of the ESPREssO (Enhancing Synergies for Disaster Prevention in the European Union) project. The article also highlights the need for cross-border cooperation between local and regional authorities.

III. This brings me to my third and final point. I want to emphasise a few key points:
As you are now aware, the right to a healthy environment has both an individual and a collective dimension, which requires major public action at various levels: local/regional/national/global (EUROPA, AP/CAT(2021)11, 24.11.2021, REVISED MEDIUM-TERM PLAN 2021 - 2025, p.4): the question of scale (in addition to the cultural dimension) is crucial. (CPLR)

First area of action: The rules of the game have to change if we are to make a success of the transition. I am convinced that, with the Parliamentary Assembly and the Congress of Local and Regional Authorities in

[6] « consulter systématiquement le public et les populations concernées lors de l'élaboration de ces plans » (EUROPA, AP/CAT(2021)11, 24.11.2021, **PLAN À MOYEN TERME 2021 – 2025 RÉVISÉ,** p.10) : est-ce suffisant ?
[7] C. Abbot & M. Lee, "NGOS shaping public participation through law: the Aarhus Convention and legal mobilization", Jl of Environmental law (2024)36, pp.85-106.
[8] Office of the High Commissioner for Human Rights, 'Placer les droits humains au cœur de la réponse à la crise : Droits Humains, Environnement et Covid-19', p. 4
[9] J. Gilbert, Les droits humains comme prisme d'analyse de la transition écologique, Cahiers de recherche, ed. AFD, May 2024, p.36.

particular, action must be taken at all levels of decision-making to take the step towards a real mode of governance that is more inclusive, more participatory and involves all the players to ensure that the transition is not imposed and does not exacerbate the socio-economic and cultural inequalities that are already extremely deep.

This is what the Sendai framework (priority no. 2)[10] provides for, albeit too vaguely.

In some European countries, citizens‘ conventions have demonstrated their effectiveness; I'm thinking in particular of the work done by the citizens’ convention on climate in France, the results of which have unfortunately not been taken into account by the public authorities. We are talking about future generations, but they are not currently represented. How can we involve scientists more effectively? These are a series of questions that arise in the context of EUR-OPA, but which also involve many departments at the Council of Europe.

The second fundamental aspect is that without a **monitoring mechanism** in place, no significant progress can be made. In my introductory report on the environment and human rights, I sketched out ways of recognising ecological rights and stressed the importance of a monitoring mechanism (which cannot be reduced to a court). It is essential to ensure that all recognised standards are effective, and this is far from being the case: much remains to be done, particularly in terms of the rights to information/education, scientific production, participation, etc.

I completely agree with the observation made in 2018 that the evaluation of the implementation of the actions carried out by EUR-OPA is inadequate.[11]

A 2020 study carried out by a researcher (using a quantitative and qualitative method)[12] on the supervisory mechanism of the Aarhus Convention calculated a compliance rate of around 41% with the decisions of the Committee of this Convention, estimating that it is not so much the fact that this is a non-judicial body, but the effectiveness at national level depends on other factors, and in particular the way in which the recommendations are formulated by the Committee. Since 2002, the Committee has been able to receive complaints, including from individuals. This observation ties in with my work on the implementation of ECtHR rulings in that it is more the lack of synergies at national level (between stakeholders), the lack of capacity of local and national players and at European level due to the imprecise wording of the rulings and the lack of clarification as to the most appropriate measures for compliance that constitute obstacles.

Given the similarity between EUR-OPA activities and those relating to the Bern Convention, or even the Landscape Convention, it would be conceivable to set up a Monitoring Committee based on what is already done with the Bern Convention on complaints sent in by associations. These information/complaints would be examined by a Committee (involving these different mechanisms, or even a representative of the Congress of Local and Regional Authorities) and would give rise to specific recommendations to the stakeholders in the State in question (authorities with powers at the level in question). In order to be implemented, the recommendations must be precise, relevant and addressed to the competent authorities.

[10] ‘Empower local authorities, as appropriate, with the regulatory and financial means to act collaboratively and in coordination with civil society, communities and indigenous peoples and migrants to manage disaster risk at the local level’.

[11] ‘Many reviews of programmes and activities express their concern that problems are known, the knowledge required to act exists, and recommendations have been given to push action, but too little is carried out and put into practice - be it the translation into policies or implementation on the ground’ (T-PVS-Inf(2018)11, p.20).

[12] Gor Samvel, ‘Non-judicial, advisory, yet impactful? The Aarhus Convention compliance committee as a gateway to environmental justice", Transnational Environmental Law (2020)9:2, pp.211-238.The cases of violation of the Convention mainly concern the ineffectiveness of NGOs' access to justice.

The aim is to ensure that the already sufficient standards that have been drawn up to deal with climate risks are actually implemented.

Finally, I would like to say how much the recent actions carried out within the framework of the EUR-OPA agreement are making a real and concrete contribution to the emergence of a right to a healthy environment for present and future generations, particularly from a collective and preventive point of view. Cooperation with academic bodies seems to me to be an appropriate way of carrying out joint actions, bearing in mind also that more funding for participatory science (with socio-professional players) is now available in our universities.

Thank you for your attention.
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