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STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

**[DRAFT] CDDH study on the need for and feasibility of a further instrument
or instruments in the field of human rights and the environment**

I. Introduction – background, terms of reference and procedure

1. The terms of reference of the CDDH for 2024-2027 require it to prepare a study on the need for and feasibility of a further instrument or instruments in the field of human rights and the environment (“Study on need and feasibility”).¹

2. The CDDH entrusted preparatory work to its Drafting Group on human rights and environment (CDDH-ENV). The CDDH-ENV devoted six meetings to this task between September 2022 and March 2024. The first of these meetings involved an exchange of views with independent experts and representatives of the Parliamentary Assembly and the European Committee on Social Rights (ECSR).² Representatives of the secretariats of the Parliamentary Assembly, the European Social Charter (ESC), the Conference of International NGOs, and other relevant Council of Europe bodies, as well as members of the Registry of the European Court of Human Rights and the office of the Council of Europe Commissioner for Human Rights, along with representatives of the Office of the UN High Commissioner for Human Rights, the European Network of National Human Rights Institutions (ENNHRI), and a number of international non-governmental organisations participated in the meetings of the CDDH-ENV.

3. In May 2023, the members of the CDDH-ENV participated in the High-level Conference on the right to a healthy environment in practice, organized by the Icelandic Presidency of the Committee of Ministers.³

4. The CDDH-ENV finalised a “draft CDDH report on the need for and feasibility of a further instrument or instrument on human rights and the environment” at its meeting in March 2024. In April 2024, the European Court of Human Rights (the Court) issued rulings in three cases concerning the effects of climate change. In June 2024, the CDDH exchanged views with Professor Helen Keller on these rulings. The CDDH noted that the rulings were relevant to a number of fundamental issues in its ongoing work and considered that their meaning and implications would require detailed examination in its Study on need and feasibility. The CDDH therefore decided to ask the Committee of Ministers for an extension of the deadline for completion of the present Study on need and feasibility. The Committee of Ministers subsequently granted an extension until 31 December 2024.

5. The CDDH adopted the present Study on need and feasibility at its 101st meeting in November 2024. The Study summarises much of the background information and analysis contained in the CDDH-ENV document. Readers wishing to explore in detail the preparatory work conducted by the CDDH-ENV are invited to consult the “Background document prepared by the CDDH-ENV”.⁴

¹ This instruction was a continuation of an earlier decision of the Committee of Ministers inviting the CDDH to “prepare a report on the need for and feasibility of a further instrument or instrument on human rights and the environment, bearing in mind Recommendation 2211 (2021) of the Parliamentary Assembly [entitled “Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe”].”

² The invited participants were Prof. Helen Keller, Sébastien Duyck, Prof. John H. Knox, Dr Lea Raible, Prof. Elisabeth Lambert, Simon Moutquin (Parliamentary Assembly), and Prof. Giuseppe Palmisano (ECSR). The [programme](#) of the exchange of views is available online.

³ The [programme](#) and [proceedings](#) of the conference are available online.

⁴ This document, in effect the “draft CDDH report on the need for and feasibility of a further instrument or instrument on human rights and the environment” prepared by the CDDH-ENV but retitled in order to avoid confusion with the present document, is available online.

II. The Council of Europe and the environment

6. The Council of Europe has a long history of activity relating to the environment, including the connections between the environment and human rights. The organisation's focus on environmental issues has intensified in recent years. In 2022, for example, the Committee of Ministers adopted Recommendation CM/Rec(2022)20 to member States on human rights and the protection of the environment, and in 2021 the CDDH adopted the updated 3rd edition of its Manual on Human Rights and the Environment.

7. This tendency was underlined in May 2023 at the Fourth Summit of Heads of State and Government of the Council of Europe. Amongst other things, this initiated the "Reykjavík Process", encouraged the establishment of a new intergovernmental committee on environment and human rights ("Reykjavík Committee"), and called for the conclusion of the CDDH's feasibility study as soon as possible.⁵ On 10 July 2024, as follow-up to the Fourth Summit, the Committee of Ministers established an Ad hoc Multidisciplinary Group on the Environment (GME), instructing it "to prepare a draft Council of Europe Strategy on the Environment and a related Action Plan for its implementation in accordance with the Reykjavík Declaration, focusing on areas where the Council of Europe has a comparative advantage and/or unique legal instruments and expertise, ensuring an inclusive consultation process, and leveraging synergies with partners and stakeholders with a view to providing added value."⁶

A. Activities relating directly to the environment

8. The Council of Europe has adopted a number of specific instruments on environment-related issues. Notable examples include the 1979 Convention on the Conservation of European Wildlife and Natural Habitats (the Bern Convention, ETS No. 104), the 1987 EUR-OPA Major Hazards Agreement,⁷ and the 2000 Landscape Convention (ETS No. 176), along with its 2016 amending protocol (CETS No. 219). There are also Council of Europe treaties on the use of detergents, intended in part for the protection of nature, and on various issues relating to animals (animal experimentation, pets, farm animals, and international transport of animals).⁸

9. Two other environment-related conventions have been adopted but have not entered into force due to insufficient ratifications. These are the 1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (ETS No. 150) and the 1998 Convention on the Protection of the Environment through Criminal Law (ETS No. 172). In November 2022, the Committee of Ministers established a Committee of Experts on the Protection of the Environment through Criminal Law (PC-ENV) to work, under the authority of the European Committee on Crime Problems (CDPC), on a new draft Convention superseding and replacing the European Convention on the Protection of the Environment through Criminal Law.

⁵ See in particular the Reykjavík Declaration, Appendix V.

⁶ See doc. CM/Del/Dec(2024)1504/4.1. **The Reykjavik Declaration was adopted at the Fourth Summit of Heads of State and Government of the Council of Europe (see further below).**

⁷ Committee of Ministers Resolution 87(2) setting up a co-operation group for the prevention of, protection against, and organisation of relief in major natural and technological disasters.

⁸ For further details, see doc. CDDH-ENV(2023)06REV4, para. 3.

B. Activities relating to human rights in the environmental context

10. Neither of the Council of Europe's two principal human rights conventions – the Convention and the ESC – protects a right to the environment as such. They have, however, been applied in such a way as to ensure protection, respect and fulfilment of numerous rights against harm that emerges in the environmental context (often referred to as the “greening of human rights”).⁹ These issues are examined further below.

11. The 2009 Convention on Access to Official Documents (CETS No. 205, Tromsø Convention) is the only international legal instrument which guarantees a general right to access to official documents held by public authorities, including documents concerning environmental matters. Its preamble refers to the 1998 United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).

12. Council of Europe bodies, including the Committee of Ministers and several of its recent presidencies, the Parliamentary Assembly, and the Congress of Local and Regional Authorities, have engaged in activities relating to human rights and the environment. The subject was also addressed at the 9th edition of the Council of Europe's World Forum for Democracy in 2020.¹⁰

III. International human rights law and the environment

13. Before exploring the relationship between international human rights law (IHRL) and the environment, it is important to distinguish between IHRL and international environmental law (IEL). IHRL and IEL have developed as separate regimes. IEL aims primarily to address negative impacts on the environment, with the objective of protecting and conserving the environment; whilst IHRL is principally concerned with the protection of human rights. Although they are two different branches of international law, it is recognised that they complement one another on some issues.

14. As per the current state of law, while certain IEL instruments grant limited directly actionable rights to individuals or groups that can be invoked before national courts or international monitoring mechanisms,¹¹ IEL does not grant to individuals or groups any general, directly actionable right to an environment of a certain standard.¹² By contrast, IHRL usually grants directly actionable rights to individuals and groups, including oversight at the international level by courts and treaty bodies.¹³ However, where IEL sets rules to which States must adhere in relation to the natural environment,¹⁴ IHRL does not grant direct protection to the environment.¹⁵

⁹ Further information on the ways in which the Court and the ECSR have elaborated the relationship between rights protected under respectively the Convention and the ESC and the environment can be found in the 3rd edition of the [CDDH Manual on human rights and the environment](#). It should be recalled that the 3rd edition of the Manual was adopted in 2021, before the Court issued its climate change rulings.

¹⁰ For further details, see doc. CDDH-ENV(2023)06REV4, paras. 7 – 12.

¹¹ Report of the Secretary-General, Gaps in international environmental law and environment-related instruments: towards a global pact for the environment, 30 November 2018, UN doc. A/73/419.

¹² Notable exception exists under the Escazú Agreement. There are divergent views on whether the Aarhus Convention codifies procedural components of the human right to a healthy environment.

¹³ See, for example, the Right of individual application to the European Court of Human Rights (art. 34 of the Convention).

¹⁴ See, for example, Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972 A/CONF.48/14/Rev.1, Principle 2; The World Charter for Nature, 28 October 1982, A/RES/37/3, general principles.

¹⁵ It only does so indirectly, through the application of certain human rights in an environmental context. See e.g. *López Ostra v. Spain*, application no. 16798/90, judgment of 9 December 1994, §51.

15. Taking into account its terms of reference, composition, and field of expertise, the CDDH in the present Study on need and feasibility will focus on the situation under IHRL, whilst recognising that protection of the environment under IEL may contribute indirectly to the full enjoyment of human rights. Since there is no European (regional) or international (global) binding human rights instrument guaranteeing the right to a clean, healthy and sustainable environment (“right to a healthy environment”), this issue will be addressed in a separate section of the present Study on need and feasibility.

A. The European Convention on Human Rights, as interpreted and applied in the caselaw of the European Court of Human Rights

16. While the Convention does not mention the environment, the Court has so far ruled in over 300 environment-related cases involving a wide range of environment-related considerations.¹⁶ Under Article 2 (the right to life) and Article 3 (prohibition of inhuman or degrading treatment), the Court has examined situations concerning dangerous industrial activities, exposure to nuclear radiation, industrial emissions, natural disasters and passive smoking in prison. Under Article 6(1) (right to a fair trial), the Court has addressed the issues of access to court concerning environmental matters and failure to enforce final judicial decision on those matters. The Court’s caselaw under Article 8 (right to respect for private and family life and home) concerns issues such as environmental risk and access to information, industrial pollution, noise pollution, mobile phone antennas, emission from diesel vehicles, soil and water contamination, urban development, and waste collection, management, treatment and disposal. Under Article 10 (freedom of expression), the Court has examined issues concerning the freedom to receive and impart information on environmental matters and under Article 11, (freedom of assembly and association) it has addressed issues relating to collective action in environmental matters. The Court’s caselaw on Article 1 of Protocol No. 1 to the Convention (protection of property) covers issues ranging from the obligation to tolerate hunting on land owned by those who object to hunting on ideological grounds, to States’ positive obligations to protect property in case of natural disasters. Under Article 13 (the right to an effective remedy), the Court has examined the availability of remedies for alleged violations of the substantive rights listed above.

17. The Court develops its interpretation of the Convention and its Protocols in response to legal, social, ethical or scientific developments, by application of the “living instrument doctrine” according to which “the Convention [...] must be interpreted in the light of present-day conditions”.¹⁷ This allows the Court to respond to new challenges if their subject-matter falls within the scope of the Convention.

18. The operation of the Convention’s procedural requirements and the application of its substantive standards for arguing a case before the Court may influence the extent of the indirect protection of the environment that occurs when Convention rights are protected from the effects of environmental considerations.

i. Implications of the Convention’s procedural requirements

19. Article 1 of the Convention states that a Contracting Party must ‘secure’ the protected rights and freedoms to persons within its ‘jurisdiction’. The State’s jurisdiction under Article 1 is primarily territorial, i.e. the victim is within the national territory of the State. If the victim is outside a State’s territory, extraterritorial jurisdiction may exceptionally be established if (i) the State

¹⁶See https://www.echr.coe.int/documents/fs_environment_eng.pdf and the CDDH Manual on Human Rights and the Environment (3rd Edition, adopted in 2021).

¹⁷ *Tyrer v. the United Kingdom*, application no. 5856/72, judgment of 25 April 1978, §31.

exercises power (or control) over the victim (personal concept of jurisdiction), or (ii) the State exercises effective control over the territory in which the alleged violation occurs (spatial concept of jurisdiction).¹⁸ The Convention's jurisdictional requirements may thus delimit the Court's competence to address environmental cases, in particular in cases of transboundary environmental harm, where pollution originating in one state has an impact on individuals in another.¹⁹

20. The Court's decision in the *Duarte Agostinho* case, brought by a group of young Portuguese individuals against Portugal and 32 other States Parties to the Convention, confirmed this approach to jurisdiction in cases involving the adverse effects of climate change. It found that none of the existing grounds applied to establish extraterritorial jurisdiction of the respondent States other than Portugal.²⁰ It also comprehensively rejected the applicants' arguments in favour of a more expansive view of extraterritorial jurisdiction. The suggestion that the respondent States other than Portugal should be held "accountable" for the impact of climate change on the applicants' Convention rights was dismissed on the basis that "jurisdiction should be differentiated from the issue of responsibility".²¹ The Court dismissed the suggestion that extraterritorial jurisdiction could be based on "control over the applicants' Convention interests", considering that this would lead to an "untenable level of uncertainty for the States", involving an "unlimited expansion of States' extraterritorial jurisdiction under the Convention and responsibilities under the Convention towards people practically anywhere in the world. This would turn the Convention into a global climate-change treaty."²² It also declined to find that the materials presented by the applicants concerning jurisdiction under certain other international instruments provided support for establishing extraterritorial jurisdiction under the Convention in this case.²³

21. The Court in *Duarte Agostinho* did, however, specify that its findings were specific to cases concerning the adverse effects of climate change and did not deal with possible issues of extraterritorial jurisdiction that may arise, for instance, in the context of more localised transboundary environmental harm.²⁴ The *Duarte Agostinho* judgment thus does not prejudice the possibility of further development of the Court's caselaw on extraterritorial jurisdiction in a possible future case not involving climate change.

22. Under Article 34 of the Convention, the Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation. Article 34 excludes the possibility of *actio popularis*, i.e. public-interest applications that do not directly concern the applicant's individual rights. For this and other reasons, applications cannot be made by or on behalf of future generations.

23. The Court's judgment in the *Klimaseniorinnen* case involved a significant development in the interpretation and application of the victim status requirement under Article 34 in climate cases.²⁵ In short, the Court developed special rules for the application of Article 34 in climate

¹⁸ Specific circumstances of a procedural nature have also been used to justify the application of the Convention in relation to events which occurred outside the respondent State's territory, however, this is not relevant in the present context, see *M.N. and Others v. Belgium* (dec.) [GC], no. 3599/18, 5 May 2020 §107.

¹⁹ Summary, Raible, p. 5-6.

²⁰ *Duarte Agostinho and Others v. Portugal and 32 Others*, application no. 39371/20, Grand Chamber judgment of 9 April 2024, paragraphs 181-183.

²¹ *Duarte Agostinho*, paragraph 202.

²² *Duarte Agostinho*, paragraph 208.

²³ *Duarte Agostinho*, paragraph 211.

²⁴ *Duarte Agostinho*, paragraph 167.

²⁵ *Verein Klimaseniorinnen Schweiz & Others v. Switzerland*, application no. 53600/20, Grand Chamber judgment of 09 April 2024.

change cases. Individuals will still be able to bring cases, but only in exceptional circumstances. Associations will be allowed to bring cases, though not in the sense of *actio popularis*, but rather in a representative capacity, subject to certain conditions. For further examination of the *Klimaseniorinnen* judgment and its implications in this and other respects, see below.

24. Article 35(1) of the Convention allows the Court to deal with a matter only after all domestic remedies have been exhausted. The application of this requirement in cases involving the impact of climate change on Convention rights was examined by the Court in its *Duarte Agostinho* judgment. The Court confirmed its existing approach, finding that “it cannot be considered that there were any special reasons for exempting the applicants from the requirement to exhaust domestic remedies in accordance with the applicable rules and the available procedures under domestic law”.²⁶ It also rejected the argument that the novel and supranational nature of issues in the case meant that the Court should provide guidance to States on their Convention obligations in relation to climate change,²⁷ before the opportunity has been given to domestic courts to do so, recalling that “it is not a court of first instance”.²⁸

ii. Implications of the Convention’s substantive standards

25. Environmental factors such as pollution only engage Convention rights if their adverse impact reaches a certain level of severity. In cases under Articles 2 (right to life) or 3 (prohibition of inhuman or degrading treatment), the level of severity is inherent in the nature of the subject-matter. Severe environmental pollution may also affect individuals’ well-being in a way that does not seriously endanger their health but which may adversely affect their private and family life.²⁹ An issue may thus arise under Article 8 (right to respect for private and family life) where an individual is directly and seriously affected by some form of pollution or nuisance.³⁰ Even if the environment itself has been severely damaged, however, the Convention is not engaged unless that damage directly affects an individual’s rights.³¹ Article 8 of the Convention cannot be invoked every time environmental harm or the risk thereof occurs.³²

26. In general, the Court applies the principle that the party making an allegation must prove that allegation. It also generally applies the standard of proof of “beyond reasonable doubt”; such proof may follow from “the coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact.”³³ In environmental cases in general, and pollution cases in particular, evidentiary difficulties arise due to the complex interlinkages between environmental harm and the health risks or effects that an applicant must demonstrate, as the Court has recognised: “[...] it is often impossible to quantify the effects of serious industrial pollution in each individual case and to distinguish them from the influence of other relevant factors, such as age, profession or personal lifestyle.”³⁴ The Court may not always apply the principle that the party making an allegation must prove that allegation, however, notably in circumstances where only the respondent Government has access to information capable of corroborating or refuting the applicant’s allegations.³⁵

²⁶ *Duarte Agostinho*, paragraph 226.

²⁷ *Duarte Agostinho*, paragraph 133.

²⁸ *Duarte Agostinho*, paragraph 228.

²⁹ *Kyrtatos v. Greece*, application no. 41666/98, judgment of 22 May 2003, §52.

³⁰ *Hatton & Others v. United Kingdom*, application no. 36022/97, Grand Chamber judgment of 8 July 2003, paragraph 96.

³¹ *Kyrtatos*, §53.

³² *Jugheli and Others v. Georgia*, application no. 38342/05, judgment of 13 July 2017, §62; and *Çiçek and Others v. Türkiye* (dec.), application no. 44837/07, 4 February 2020, §22.

³³ *Fadeyeva v Russia*, application no. 55723/00, judgment of 09 June 2005, §79.

³⁴ *Jugheli*, paragraph 63.

³⁵ *Fadeyeva*, paragraph 79.

B. The European Social Charter, as interpreted by the European Committee on Social Rights

27. The ESC does not explicitly contain a right to a healthy environment as such. The ECSR, through its activity of monitoring and interpreting the ESC, has nevertheless been able to clarify and put into practice the relationship between environmental protection and social rights, in particular, with regard to the application and interpretation of the right to protection of health, which is enshrined in Article 11 of the ESC. The ECSR holds that public health systems must respond appropriately to risks that can be controlled by human action, which include environmental threats. Consequently, the ECSR has interpreted the right to protection of health to include the right to a healthy environment.³⁶

28. The ECSR monitors compliance with the ESC under two separate procedures: (i) regular reporting by States parties on their implementation of the ESC, and (ii) collective complaints lodged by the social partners and non-governmental organisations. National reports are examined by the ECSR, which determines whether the national situations they describe comply with the ESC. In this framework, the ECSR adopts conclusions which are published every year. Insofar as they refer to binding legal provisions and are adopted by a monitoring body established by the ESC, the conclusions and decisions of the ECSR represent an authoritative interpretation of the ESC's provisions. States Parties have an obligation to cooperate with the ECSR and its decisions and conclusions that arises from the application of the principle of good faith to the observance of all treaty obligations. Follow-up to the conclusions of the ECSR is ensured by the Committee of Ministers.

29. The collective complaints procedure entitles social partners and non-governmental organisations to lodge collective complaints concerning alleged violations of the ESC.³⁷ The complaint is examined by the ECSR, which declares it admissible if the formal requirements have been met.³⁸ The ECSR then takes a decision on the merits of the complaint, which it transmits to the parties concerned and to the Committee of Ministers in a report. Based on the report, the Committee of Ministers adopts a resolution. In case violations have been found by the ECSR, the Committee of Ministers may recommend that the State concerned take specific measures to bring the situation into line with the ESC.

30. The operation of the ESC's procedural requirements and the application of its substantive standards for arguing a case before the ECSR may influence the extent of indirect protection.

i. Implications of the ESC's procedural requirements

31. The ESC's collective complaints mechanism is only applicable with respect to States that have ratified the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints. 16 of the 43 Parties to the ESC have done so.

³⁶ *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, complaint no. 30/2005, decision on the merits of 6 December 2006, §§194-195, §202.

³⁷ Organisations entitled to lodge complaints: trade unions and employers' organisations (national and international), national and international non-governmental organisations and, in certain circumstances, national non-governmental organisations (Articles 1 and 2 of the Additional Protocol to the ESC Providing for a System of Collective Complaints).

³⁸ Under Article 4 of the Additional Protocol, "complaints shall be lodged in writing, relate to a provision of the Charter accepted by the Contracting Party concerned and indicate in what respect the latter has not ensured the satisfactory application of this provision."

32. The personal scope of the ESC includes foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned.³⁹ The ECSR has, however, considered that the restriction on the personal scope should not be read in such a way as to deprive foreigners coming within the category of irregularly present migrants of the protection of the most basic rights enshrined in the ESC or to impair their fundamental rights such as the right to life or to physical integrity or the right to human dignity.⁴⁰

ii. Implications of the ESC's substantive standards

33. The ESC protects the environment only insofar as it has an impact on ESC rights. Under Article 11 of the ESC, the ECSR has clarified that measures must be designed by States to remove the causes of ill-health resulting from environmental threats such as pollution,⁴¹ and to protect the population against, for example, nuclear hazards⁴² as well as against health risks related to asbestos.⁴³ Likewise, situations where availability of drinking water represents a problem for a significant proportion of the population have been considered by the ECSR to be in breach of Article 11 of the ESC.⁴⁴ The ECSR has also emphasised that States have positive obligations in order to combat air pollution.⁴⁵ States are required to take measures to remove the causes of ill-health from environmental threats such as pollution, within a reasonable time, by showing measurable progress and making best possible use of the resources at their disposal.⁴⁶ In addition, the ECSR has considered that States are under an obligation to apply the precautionary principle when there are reasonable grounds to believe that there is a risk of serious damage to human health.⁴⁷

C. Other IHRL instruments

34. Issues related to human rights and the environment have also been addressed by the treaty bodies monitoring States parties' compliance with core UN human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention on the Rights of the Child (CRC). (It should be noted that – like the ECSR, but unlike the Court – these treaty bodies do not adopt legally binding decisions.)

35. The UN Human Rights Committee, which monitors the ICCPR, issued General Comment No. 36 on the right to life in 2018, emphasising that States' obligation to protect life also entails that they should take adequate measures to alleviate societal conditions that may threaten life, such as environmental degradation. Moreover, it stated that "environmental degradation, climate change, and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life. The obligations of States parties under international environmental law should thus inform the content of article 6 of the

³⁹ Appendix to the European Social Charter (Revised), CETS 163, §1.

⁴⁰ *International Federation of Human Rights Leagues v. France*, Complaint No. 14/2003, decision on the merits of 8 September 2004, §§30 and 31; *Defence for Children International v. the Netherlands*, Complaint No. 47/2008, decision on the merits of 20 October 2009, §19.

⁴¹ *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, Complaint No. 30/2005, decision on the merits of 6 December 2006, §§203, 209, 210 and 215.

⁴² Conclusions XV-2 (2001), France; Conclusions XV-2 (2001), Denmark.

⁴³ Conclusions XVII-2 (2005).

⁴⁴ Conclusions 2013, Georgia.

⁴⁵ *Marangopoulos Foundation for Human Rights (MFHR)*; see also the CDDH Manual on Human Rights and the Environment (3rd Edition, 2021), p. 118.

⁴⁶ *Ibid*, §204.

⁴⁷ *International Federation of Human Rights Leagues (FIDH) v. Greece*, Complaint No. 72/2011, decision on the merits of 23 January 2013, §§150-152.

Covenant [right to life], and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law.”⁴⁸

36. The UN Human Rights Committee has also addressed environment-related cases under its individual communications (complaints) procedure. These have included allegations of violation of the right to life and the right to private and family life due to failures to adequately regulate the use of toxic agrochemicals and investigate the death of an individual exposed to such chemicals;⁴⁹ an allegation that the removal of the complainant to an island that climate change would ultimately render uninhabitable would violate his right to life;⁵⁰ and an allegation that failure to adequately protect the indigenous inhabitants of certain islands against adverse impacts of climate change would violate their rights to respect for private, family and home life and the rights of ethnic, religious or linguistic minorities.⁵¹

37. The UN Committee on Economic, Social, and Cultural Rights (CESCR) has interpreted the ICESCR rights to the enjoyment of the highest possible standard of health (Article 12)⁵² and to an adequate standard of living (Article 11)⁵³ to include “the requirement to ensure an adequate supply of safe and potable water and basic sanitation [and] the prevention and reduction of the population’s exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health.”⁵⁴

38. In its General Comment No. 26 on children’s rights and the environment, with a special focus on climate change, the UN Committee on the Rights of the Child stressed the principle of intergenerational equity and the interests of future generations, stating that “States bear the responsibility for foreseeable environment-related threats arising as a result of their acts or omissions now, the full implications of which may not manifest for years or even decades”. Section II of the General Comment describes the connections between the environment and provisions of the CRC. Section III concerns the right to a clean, healthy and sustainable environment and will be discussed in more detail in Section C below. Section IV is devoted to general measures of implementation, and Section V deals with climate change.

39. The UN Committee on the Rights of the Child, in *obiter dicta*, has stated that extraterritorial jurisdiction may be established under the CRC “if there is a causal link between the acts or omissions of the State in question and the negative impact on the rights of children located outside its territory, when the State of origin exercises effective control over the sources of the emissions in question”, adding that “the alleged harm suffered by the victims needs to have been reasonably foreseeable to the State party at the time of its acts or omissions.”⁵⁵ The complaint in question, which concerned alleged violations of the CRC due to insufficient cuts to greenhouse gas emissions and failure to use available tools to protect children from the adverse effects of climate change, was found inadmissible for failure to exhaust local remedies.⁵⁶

⁴⁸ Paragraph 65.

⁴⁹ *Portillo Cáceres and others v. Paraguay*, No. 2751/2016 (2019), §7.5.

⁵⁰ *Teitiota v New Zealand*, Human Rights Committee, 24 October 2019, §8.6.

⁵¹ Human Rights Committee, views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 3624/2019, CCPR/C/135/D/3624/2019.

⁵² CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12).

⁵³ CESCR General Comment No. 15: The Right to Water.

⁵⁴ CESCR General Comment No. 14.

⁵⁵ *Sacchi et al. v Argentina, Brazil, France, Germany and Türkiye*, UN Committee on the Rights of the Child, CRC/88/D/104/2018, §10.7.

⁵⁶ *Ibid.*, §§8 and 7.

40. In 2019, five UN human rights treaty bodies issued a joint statement on climate change calling for States to implement policies aimed at reducing emissions, so as to realise the objectives of the Paris Agreement.⁵⁷

IV. The right to a healthy environment

A. Recognition of the right to a healthy environment – the international situation at global and regional levels

41. On 28 July 2022, the UN General Assembly, with a record 161 States (including all Council of Europe member States) voting in favour, zero against and eight abstentions, adopted resolution 76/300 on the human right to a clean, healthy and sustainable environment (UNGA resolution).⁵⁸ 38 Council of Europe member States co-sponsored the UNGA Resolution.⁵⁹ The UNGA resolution was accompanied by a number of Explanations of Votes, including from Council of Europe member States, some noting the lack of international consensus on the legal basis of the right and on what it comprises, or that political recognition did not have legal effect. The UNGA resolution followed UN Human Rights Council (HRC) resolution 48/13 on “[t]he human right to a clean, healthy and sustainable environment”, which had been adopted on 8 October 2021.⁶⁰

42. The UNGA resolution recognises the right to a clean, healthy and sustainable environment as a human right that is related to other rights and existing international law. Its preambular paragraphs recognise that the exercise of human rights, including the rights to seek, receive and impart information, to participate effectively in the conduct of government and public affairs and to an effective remedy, is vital to the protection of a clean, healthy and sustainable environment.

43. UN treaty bodies have also addressed the right to a healthy environment. In its General Comment No. 26, the UN Committee on the Rights of the Child affirmed that “[c]hildren have the right to a clean, healthy and sustainable environment”, which is “implicit” in the CRC and “directly linked” to other rights. The CESCR, in 2022, adopted General Comment No. 26 on Land and Economic, Social and Cultural Rights, holding that “[t]he sustainable use of land is essential to ensure the right to a clean, healthy and sustainable environment and to promote the right to development, among other rights”. The UN Committee on the Elimination of Discrimination against Women, in its 2022 General Recommendation No. 39 on the rights of Indigenous women and girls, urged States to “[a]dopt legislation to fully ensure the rights of Indigenous women and girls to land, water and other natural resources, including their right to a clean, healthy and sustainable environment”.⁶¹

44. At the regional level, the 1981 African Charter on Human and Peoples Rights (the African Charter) provides that “all peoples shall have the right to a general satisfactory environment

⁵⁷ <https://www.ohchr.org/en/statements/2019/09/five-un-human-rights-treaty-bodies-issue-joint-statement-human-rights-and>.

⁵⁸ UN General Assembly resolution, The human right to a clean, healthy and sustainable environment, 26 July 2022, A/RES/76/300.

⁵⁹ See Addendum to the draft resolution of the General Assembly on the human right to a clean, healthy and sustainable environment (28 July 2022), UN Doc. A/76/L.51/Add.1 (2022): Albania, Andorra, Armenia, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czechia, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lichtenstein, Lithuania, Luxembourg, Monaco, Montenegro, Netherlands, Portugal, Republic of Moldova, Romania, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland and Ukraine.

⁶⁰ According to the core group president (Costa Rica), the word “safe” had been removed from the draft text of resolution 48/13 so that it refers to a right to a clean, healthy and sustainable environment more faithfully capturing the results of the consultations and dialogues, as the adjective “safe” was not clear enough for the parties involved, see the presentation of the draft resolution: <https://media.un.org/en/asset/k1g/k1g6cdjnxl>

⁶¹ General recommendation No. 39 (2022) on the rights of Indigenous women and girls, CEDAW/C/GC/39, p. 9, point e); see also in the same, p. 24 et seq.

favorable to their development” (article 24). The 2003 Protocol to the African Charter on the Rights of Women in Africa states that women “shall have the right to live in a healthy and sustainable environment” (article 18) and “the right to fully enjoy their right to sustainable development” (article 19). The 1988 Additional Protocol to the American Convention on Human Rights (Protocol of San Salvador), states that “everyone shall have the right to live in a healthy environment” (article 11(1)). The 2004 Arab Charter on Human Rights includes a right to a “safe environment” as part of the right to an adequate standard of living that ensures well-being and a decent life (article 38). The Human Rights Declaration adopted by the Association of Southeast Asian Nations (ASEAN) incorporates a “right to a safe, clean and sustainable environment” also an element of the right to an adequate standard of living (para. 28 (f)); this declaration, however, is a soft law document.

45. The human right to a healthy environment also appears in the Aarhus Convention,⁶² adopted under the auspices of the UN Economic Commission for Europe.⁶³ The stated aim of the Aarhus Convention is to contribute to the protection of “the right of every person of present and future generations to live in an environment adequate to his or her health and well-being” by each Party guaranteeing “the 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 (art. 1). There are divergent views on whether the Aarhus Convention codifies procedural components of the human right to a healthy environment (see further below).⁶⁴

46. Decisions adopted in the context of certain environmental agreements also refer to the human right to a healthy environment. These include the Sharm el-Sheikh Implementation Plan,⁶⁵ and the UAE Consensus,⁶⁶ and the Kunming-Montreal Global Biodiversity Framework.⁶⁷ The Global Framework on Chemicals, as well as five resolutions adopted during the Sixth United Nations Environment Assembly in February-March 2024, refer to the right to a clean, healthy and sustainable environment.

47. Unlike the African, Inter-American, and Arab regional human rights systems, the European system provides no explicit guarantee of a right to a healthy environment. Committee of Ministers Recommendation CM/Rec(2022)20 merely calls on member States to “reflect on the nature, content and implications of the right to a clean, healthy and sustainable environment and, on that basis, actively consider recognising at the national level this right as a human right that is important for the enjoyment of human rights and is related to other rights and existing international law”. The Recommendation implies a need for further clarification of the right, reflecting a lack of consensus amongst Council of Europe member States on its nature, content and implications (see further below).

⁶² 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 2161 UNTS 447, 38 ILM 517 (1999). It has been ratified by all Council of Europe member States with the exception of Andorra, San Marino, and Türkiye, as well as by the EU.

⁶³ The Aarhus Convention has been opened to ratification by non-European states and was ratified by Guinea-Bissau in 2023.

⁶⁴ At the Latin American and Caribbean level, the 2018 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement) is similar in purpose to the Aarhus Convention. It has among its objectives “the creation and strengthening of capacities and cooperation, contributing to the protection of the right of every person of present and future generations to live in a healthy environment and to sustainable development” (art 1). Article 4(1) of the Escazú Agreement states that “[e]ach Party shall guarantee the right of every person to live in a healthy environment”.

⁶⁵ Adopted by consensus at the 27th Conference of the Parties to the UN Framework Convention on Climate Change (COP-27).

⁶⁶ Adopted by consensus at the 28th meeting of the Conference of the Parties to the UN Framework Convention on Climate Change (COP-28): see Decision 1/CP.27: Sharm el-Sheikh Implementation Plan, Report of the Conference of the Parties on its twenty- seventh session, FCCC/CP/2022/10/Add.1, pp 8 and UAE Consensus Decision -/CM.

⁶⁷ Adopted at the 15th Conference of the Parties to the Convention on Biological Diversity: see Decision 1/COP.15: Kunming-Montreal Global biodiversity framework, CBD/COP/15/L.25, Annex, §14.

B. Recognition of the right to a healthy environment – the domestic situation in Council of Europe member States (and globally)

48. Despite the lack of a regional or global binding instrument, many Council of Europe member States recognise, either explicitly or implicitly, some formulation of the human right to a healthy environment under domestic law.⁶⁸ Most of them qualify the right by including a reference to human well-being and/or human quality of life in the relative provisions, using formulae such as a “healthy environment”⁶⁹ or an environment “favourable” or “conducive” to health.⁷⁰ Other member States use terms such as “benevolent”⁷¹ or “habitable”⁷² in relation to the environment and “decent”⁷³ or “enjoyable”⁷⁴ in relation to the quality of life. Rights holders are always human beings; no member State defines the environment or nature itself as a legal subject entitled to protection. In almost all of these member States, the Supreme and/or Constitutional Courts play an important role in applying and developing the human right to a healthy environment.⁷⁵

49. All member States that recognise the right in their national law conceive the obligations on States inherent in the human right to a healthy environment as not being limited to the negative obligation to refrain from harmful action. The positive obligation to protect the right against interference by other actors is recognised in all of these States. In addition, some member States have recognised a positive obligation to protect the environment, in the sense of positively ensuring and creating conditions for a healthy environment.⁷⁶ All member States that recognise the right in their national law leave a margin of appreciation to the legislator in deciding on the means used to fulfil their obligations.⁷⁷

50. 41 member States provide for rights of access to environmental information, public participation in environmental decision-making, and access to justice in environmental matters as a result of their ratification of the Aarhus Convention.

51. A number of member States that do not recognise a human right to a healthy environment have codified environmental protection as a constitutional principle or objective.⁷⁸ These States describe environmental protection as an objective for the national well-being, which, by virtue of the relevant constitutional provisions, must be promoted and taken into consideration in the relevant legislative, administrative and judicial decision-making processes.⁷⁹ Some constitutions even accord primacy of environmental protection over other (constitutional) principles⁸⁰ or otherwise visibly prioritise environmental protection as a leading principle within their national

⁶⁸ Andorra, Azerbaijan, Belgium, Croatia, Czechia, Finland, France, Georgia, Greece, Italy, Latvia, Malta, Netherlands, Norway, Portugal, Slovak republic, Slovenia, Türkiye.

⁶⁹ Belgium, Croatia, Finland, Georgia, Portugal, Slovenia, Türkiye.

⁷⁰ Azerbaijan, Czechia, Norway, Slovak republic.

⁷¹ Latvia

⁷² Netherlands.

⁷³ Croatia.

⁷⁴ Finland, Georgia.

⁷⁵ The information in this and following paragraphs comes from the replies received to a questionnaire sent by the CDDH to member States: see doc. CDDH-ENV(2022)09.

⁷⁶ Czechia, Georgia, Greece, Latvia, Malta, Slovenia, Türkiye.

⁷⁷ Belgium, Croatia, Czechia, Finland, Italy, Norway, France, Georgia, Greece, Latvia, Norway, Portugal, Slovak Republic, Slovenia, Türkiye.

⁷⁸ Armenia, Austria, Germany, Switzerland.

⁷⁹ Also Sweden.

⁸⁰ The Croatian Constitution for example in its Article 3 ranks the protection of the environment among „the highest values of the constitutional order of the Republic“ and declares it a „basis for interpreting the Constitution.“

constitutional framework.⁸¹ This objective guarantee of environmental protection is shaped in the jurisprudence of the domestic courts. Member States that follow this objective model of environmental protection have reported substantial jurisprudential evolutions.⁸² The combination of traditional fundamental/ human rights with a constitutional principle of environmental protection has in at least one jurisdiction been seen to generate results that are comparable to the effects of the protection of the human right to a healthy environment.⁸³

52. As regards the situation globally, the UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment reported in 2019 that the right is recognized in domestic law by more than 80% (156 out of 193) of United Nations Member States.⁸⁴ According to information received by the CDDH-ENV from the aforementioned Special Rapporteur in November 2023, another five (non-European) States had subsequently also recognised the human right to a healthy environment in their domestic law, which would amount to 83% (161 out of 193) of United Nations Member States.⁸⁵

C. The constituent elements of the right to a healthy environment

53. Various actors have proposed constituent elements of the right to a healthy environment. In 2019, the UN Special Rapporteur on human rights and the environment presented a report on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment.⁸⁶ This report identifies both procedural and substantive elements of the right. The procedural elements include (i) access to information, (ii) public participation, and (iii) access to justice and effective remedies. The substantive elements include (i) clean air, (ii) a safe climate, (iii) access to safe water and adequate sanitation, (iv) healthy and sustainably produced food, (v) non-toxic environments in which to live, work, study, and play, and (vi) healthy biodiversity and ecosystems.⁸⁷ The preamble to UN General Assembly Resolution 76/300, which recognized the right to a healthy environment, refers to other specific reports by UN Special Rapporteurs on the various substantive elements of the right.⁸⁸

54. General Comment No. 26 of the UN Committee on the Rights of the Child, having found that the right to a healthy environment is “implicit” in the CRC (see above), sets out substantive elements of the right, including “clean air, a safe and stable climate, healthy ecosystems and biodiversity, safe and sufficient water, healthy and sustainable food and non-toxic environments”. The General Comment also underlines the importance of procedural elements of the right, including access to information, participation in decision making and child-friendly access to

⁸¹ Austria, Armenia, Switzerland.

⁸² Austria, Germany, Switzerland.

⁸³ The German Federal Constitutional Court for example has derived a doctrine of so-called intergenerational equality from the objective to environmental protection in Art. 20a of the German Basic Law that is justiciable under the traditional fundamental rights guarantees.

⁸⁴ Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, HRC, 30 December 2019, A/HRC/43/53.

⁸⁵ It should be noted that the Special Rapporteur considers that ratification of the Aarhus Convention amounts to recognition of the right to a healthy environment, implying that 43 out of 46 Council of Europe member States have recognised the right. The CDDH, however, considers that divergent views exist on whether this Convention protects a human right to a healthy environment.

⁸⁶ Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (30 December 2019) UN Doc. A/HRC/43/53.

⁸⁷ See also chapter 3.2 (“The elements of the right to a healthy environment”) of the January 2023 Information Note entitled “What is the Right to a Healthy Environment?”, published by the Office of the United Nations High Commissioner for Human Rights, the United Nations Environment Programme and the United Nations Development Programme.

⁸⁸ Notably the Framework Principles on human rights and the environment (UN doc. A/HRC/37/59) and reports on clean air (A/HRC/40/55), safe and sufficient water (A/HRC/46/28), non-toxic environments (A/HRC/52/33), a safe climate (A/74/161), healthy ecosystems and biodiversity (A/75/161), and healthy and sustainably produced food (A/76/179).

justice with effective remedies. These elements correspond to those identified by the UN Special Rapporteur on human rights and the environment (see above).

55. The Working Group on the Protocol of San Salvador, which examines State reports submitted under this protocol, has identified five State obligations inherent in the right to live in a healthy environment as contained in the protocol: (1) to guarantee to everyone, without any discrimination, a healthy environment in which to live; (2) to guarantee to everyone, without any discrimination, basic public services; (3) to promote environmental protection; (4) to promote environmental conservation; and (5) to promote improvement of the environment.⁸⁹ The Inter-American Court of Human Rights, in its Advisory Opinion OC/23/17, has referred to this Working Group's specification of the obligations inherent in the right to a healthy environment.⁹⁰

V. The need for a further instrument or instruments in the field of human rights and the environment

56. A number of arguments have been presented relating to the possible need for a further Council of Europe instrument or instruments in the field of human rights and the environment.

A. Human rights and the triple planetary crisis

57. Humanity is facing an unprecedented challenge in the form of environmental degradation and the triple planetary crisis⁹¹ of climate change,⁹² biodiversity loss,⁹³ and pollution.⁹⁴ Individuals and communities around the world are affected and where there are human rights consequences,⁹⁵ they are most severe for those who are already in vulnerable and in exposed situations.⁹⁶ Regard should be had to the effects on the younger and future generations.⁹⁷

58. The climate crisis has been identified as the greatest threat to human rights by the former United Nations High Commissioner for Human Rights.⁹⁸ According to the Sixth Assessment

⁸⁹ "Progress Indicators: Second Group of Rights," November 5, 2013, OEA/Ser.L/XXV.2.1, GT/PSS/doc.9/13, §26. It may be noted that each of the items in this list corresponds to an explicit element of Article 11 of the Protocol of San Salvador, respectively the first and second parts of Article 11(1) and the three constituent elements of Article 11(2), read alongside Article 3, which contains a general prohibition on discrimination in implementation of the protocol.

⁹⁰ Inter-American Court of Human Rights, Advisory Opinion OC/23/17 of November 15, 2017, requested by the Republic of Colombia, on the environment and human rights.

⁹¹ There is no universally agreed definition on "triple planetary crisis"; as a suggestion, see <https://www.unep.org/news-and-stories/speech/triple-planetary-crisis-forging-new-relationship-between-people-and-earth>

⁹² IPCC, 2022: Summary for Policymakers [H.-O. Pörtner, D.C. Roberts, E.S. Poloczanska, K. Mintenbeck, M. Tignor, A. Alegria, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem (eds.)]. In: Climate Change 2022: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegria, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama (eds.)]. Cambridge University Press [IPCC 2022 Report]; for a definition of climate change see United Nations Framework Convention on Climate Change (UNFCCC) (1992), UNTS vol. 1771, Art. 1(2)

⁹³ Report of the Special Rapporteur on human rights and the environment, 2017, A/HRC/34/49, <https://undocs.org/A/HRC/34/49>; and IPBES (2019): Global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services. E. S. Brondizio, J. Settele, S. Díaz, and H. T. Ngo (editors). IPBES secretariat, Bonn, Germany, 11.

⁹⁴ United Nations Environment Program, Implementation plan "Towards a Pollution-Free Planet", UNEP/EA.4/3; Landrigan, Philip J., and others (2017), The Lancet Commission on Pollution and Health. Available at [https://doi.org/10.1016/S0140-6736\(17\)32345-0](https://doi.org/10.1016/S0140-6736(17)32345-0).

⁹⁵ It is important to note that human rights consequences do not necessarily entail violations of human rights.

⁹⁶ See HRC, Report of the Secretary-General, The impacts of climate change on the human rights of people in vulnerable situations, A/HRC/50/57 (2022).

⁹⁷ See also the Maastricht Principles on the Human Rights of Future Generations, developed by a group of legal and human rights experts on the basis of consultations with civil society organisations, experts, and scholars.

⁹⁸ Michelle Bachelet, former UN High Commissioner for Human Rights (September 2019), available at <https://www.theguardian.com/law/2019/sep/09/climate-crisis-human-rights-un-michelle-bachelet-united-nations>; see

Report published by the Intergovernmental Panel on Climate Change (IPCC), which was approved by all States Parties to the Council of Europe, adaptation and mitigation actions that prioritise equity, social justice, climate justice, rights-based approaches, and inclusivity, lead to more sustainable outcomes, reduce trade-offs, support transformative change and advance climate resilient development.⁹⁹ The decline in biodiversity,¹⁰⁰ coupled with air, soil, and water pollution's detrimental impact on human well-being,¹⁰¹ further underscore the potential need for enhanced protection of human rights and the environment.

59. The consequences of these environmental issues for human rights are common and urgent concerns that need to be further addressed. There is an extensive international regulatory framework concerning the protection of the environment that is already in place, which produces legal effects both under national and international law. The question nevertheless remains whether, in light of the critical human rights challenges posed by environmental degradation and the triple planetary crisis, there is a need for a new instrument or instruments on human rights and the environment within the system of the Council of Europe.

B. Protection of the right to a healthy environment

60. The human right to a healthy environment is not yet protected as such in a treaty either at global level or within the Council of Europe framework. Unlike Europe, other regional human rights systems have already legally recognised the human right to a healthy environment. It has been suggested that establishing legally binding recognition of the right in Europe would clarify the relationship between environmental protection and human rights and would reinforce the understanding that human rights norms require protection of the environment, and that environmental protection depends on the exercise of human rights. Depending on how it were done, such recognition could create a legal framework that provides rights holders with procedural tools to enforce the human right to a healthy environment, thereby providing accountability for States' actions or omissions that violate the right, which could in turn contribute to preventing violations of this right.

61. There is no common understanding of the constituent elements of the human right to a healthy environment amongst Council of Europe member States. It has been argued that a new

also Ian Fry, Special Rapporteur on the promotion and protection of human rights in the context of climate change, *Climate change the greatest threat the world has ever faced*, press release (October 2022), available at <https://www.ohchr.org/en/press-releases/2022/10/climate-change-greatest-threat-world-has-ever-faced-un-expert-warns>

⁹⁹ IPCC, *Climate Change 2023: Synthesis Report. A Report of the Intergovernmental Panel on Climate Change. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, H. Lee and J. Romero (eds.)], IPCC, Geneva, Switzerland [IPCC AR6 SYR], Section 4.4, p. 101.

¹⁰⁰ UNEP, *Human Rights and Biodiversity: Key Messages*, 2021; see also IPBES, *Global Assessment Report on Biodiversity and Ecosystem Services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services*, 2019, IPBES secretariat, Bonn, Germany at key messages A and B; Ch. 4, section 4.4.1.1.; see also Ch. 5, section 5.4.1.5

¹⁰¹ World Health Organization, *Household air pollution*, 28 November 2022, available at <https://www.who.int/news-room/fact-sheets/detail/household-air-pollution-and-health>; European Environment Agency (EEA), *Air quality in Europe 2021*, available at <https://www.eea.europa.eu/publications/air-quality-in-europe-2021/health-impacts-of-air-pollution>; EEA, *Air quality in Europe 2022*, available at <https://www.eea.europa.eu/publications/air-quality-in-europe-2022>; EEA, *Air pollution levels across Europe still not safe, especially for children*, April 2023 <https://www.eea.europa.eu/en/newsroom/news/air-pollution-levels-across-europe>; and Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, *Human rights and the global water crisis: water pollution, water scarcity and water-related disasters*, 19 January 2021, UN Doc. No. A/HRC/46/28. See also Office of the High Commissioner for Human Rights, *The water crisis has a "major impact on human rights" expert say*, 2021, available at <https://www.ohchr.org/en/stories/2021/03/water-crisis-has-major-impact-human-rights-expert-says>

instrument or instruments legally recognising the human right to a healthy environment could allow Council of Europe member States to express their understanding of the constituent elements of this right and inspire corresponding national legislation, and that this would contribute greatly to legal certainty, an important consideration. It would also allow member States to influence further developments related to the human right to a healthy environment at the international level.

62. It was argued that the effects of the recognition of the human right to a healthy environment at the Council of Europe level could produce the following legal and environmental benefits at national level: (i) stronger environmental laws and policies; (ii) improved implementation and enforcement; (iii) greater citizen participation in environmental decision making; (iv) increased accountability; (v) reduction in environmental injustices; (vi) a level playing field with social and economic rights; and (vii) better environmental performance.¹⁰² It was also argued that a new instrument or instruments on human rights and the environment could encourage States that have not yet protected the right in domestic law to do so, and encourage those States that have already done so to take further active measures to implement it.¹⁰³

63. As noted above, the operation of procedural requirements and the application of substantive standards under the ECHR and ESC may influence the reach of these instruments in cases relating to the environment. It has been argued that additional protocols to these instruments guaranteeing the human right to a healthy environment, containing explicit provisions on these requirements and standards that could deviate from those that are currently applied under the ECHR and the ESC, could provide more effective overall protection to rights-holders.¹⁰⁴

64. It has been suggested that a legally binding instrument protecting the right to a healthy environment could contribute to enhanced protection for human rights defenders in environmental matters (“environmental human rights defenders” – see further below under sub-section D).

i. The implications of the Court’s climate change rulings on the need for a new instrument or instruments

65. The Court’s judgment in the *Klimaseniorinnen* case may have implications for the arguments surrounding whether and how to protect the right to a healthy environment in the Council of Europe’s human rights protection system. These can be considered from two perspectives. First, the Court’s approach to procedural requirements under the Convention, notably the issues of victim status and standing for associations (see above): it has been argued that an additional protocol to the Convention protecting the right to a healthy environment could include special provisions on these issues that would allow for more effective protection of this right. Second, the Court’s approach to substantive standards, including evidentiary issues and States’ obligations under Article 8 in the context of the adverse impact of climate change: it has been argued that an additional protocol to the Convention protecting the right to a healthy environment would allow for more comprehensive and coherent protection of human rights in the face of adverse environmental considerations.

66. As regards evidentiary issues and the burden of proof, the Court found as basic facts that “anthropogenic climate change exists, that it poses a serious current and future threat to the enjoyment of human rights guaranteed under the Convention, that States are aware of it and

¹⁰² Boyd, D. (2018). *Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment*. In J. Knox & R. Pejan (Eds.), *The Human Right to a Healthy Environment* (pp. 17-41). Cambridge: Cambridge University Press.

¹⁰³ Summary, Knox, p 5.

¹⁰⁴ Summary, Keller p. 2, Knox p. 5, Lambert pp. 6-7.

capable of taking measures to effectively address it, that the relevant risks are projected to be lower if the rise in temperature is limited to 1.5° C. above pre-industrial levels and if action is taken urgently, and that current global mitigation efforts are not sufficient to meet the latter target.”¹⁰⁵ In doing so, it relied on the UN Framework Convention on Climate Change (UNFCCC) and subsequent international agreements including the Paris Agreement, and the internationally accepted scientific findings of the Intergovernmental Panel on Climate Change (IPCC).

67. This does not mean, however, that all future applicants’ climate change-related cases will be admissible. The Court will continue to apply the admissibility criteria under Article 34 of the Convention, including the victim-status requirement. In this connection, the Court noted that “If the circle of “victims” [...] is drawn in a wide-ranging and generous manner, this would risk disrupting national constitutional principles and the separation of powers by opening broad access to the judicial branch as a means of prompting changes in general policies regarding climate change.” On the other hand, if “this circle is drawn too tightly and restrictively, there is a risk that even obvious deficiencies or dysfunctions in government action or democratic processes could lead to the Convention rights of individuals and groups of individuals being affected without them having any judicial recourse before the Court.”¹⁰⁶ The Court has sought to resolve this dilemma by indicating specific criteria for individuals and associations complaining of the adverse effects of climate change on Convention rights.

68. With respect to individuals, in order to satisfy the victim-status requirement, an applicant must “show that he or she was personally and directly affected by the impugned failures” by the State to combat climate change. In this context, the Court will apply two tests. First, “the applicant must be subject to a high intensity of exposure to the adverse effects of climate change, that is, the level and severity of (the risk of) adverse consequences of governmental action or inaction affecting the applicant must be significant”. In effect, the severity test is shifted from the substantive merits stage, where it would be applied in cases brought under Article 8 concerning environmental factors other than climate change, to the admissibility stage. Second, and in addition, “there must be a pressing need to ensure the applicant’s individual protection, owing to the absence or inadequacy of any reasonable measures to reduce harm.”¹⁰⁷ The threshold for fulfilling these two criteria is “especially high.”¹⁰⁸ One may expect that the Court will in future admit relatively few applications concerning climate change from individuals.

69. With respect to associations, the Court first recalled that “when citizens are confronted with particularly complex administrative decisions, recourse to collective bodies such as associations is one of the accessible means, sometimes the only means, available to them whereby they can defend their particular interests effectively. This is especially true in the context of climate change, which is a global and complex phenomenon. [...] Collective action] may be one of the only means through which the voice of those at a distinct representational disadvantage can be heard”.¹⁰⁹

70. In order for an association to have standing to make an application, the Court has set out a threefold test: the association must (i) be lawfully established in the respondent State’s jurisdiction or have standing to act there, (ii) pursue, as a dedicated purpose in accordance with its statutory objectives, collective action for the protection of the human rights of its members or other affected individuals within the jurisdiction against the threats arising from climate change, and (iii) be genuinely qualified and representative to take such action on behalf of individuals

¹⁰⁵ *Klimaseniorinnen*, paragraph 436.

¹⁰⁶ *Klimaseniorinnen*, paragraph 484.

¹⁰⁷ *Klimaseniorinnen*, paragraph 487.

¹⁰⁸ *Klimaseniorinnen*, paragraph 488.

¹⁰⁹ *Klimaseniorinnen*, paragraph 489.

within the jurisdiction who are subject to specific threats to, or adverse effects of climate change on, their Convention rights. An association may make an application even if those on whose behalf it is brought would not meet the victim status requirements for individuals in climate change cases (see above).¹¹⁰

71. The *Klimaseniorinnen* judgment thus touches upon several of the issues that could be usefully addressed by an additional protocol to the Convention, according to its advocates. Furthermore, it does this in ways that achieve results for which those advocates would hope. It should be noted, however, that the Court repeatedly states that the special rules that it develops and applies in this judgment relate only to climate change cases, and not to cases concerning the environment generally. The argumentation behind its special approach to climate change cases depends on its general findings of fact that are specific to that context.

72. As to substantive standards, the Court found that, “[i]n line with the international commitments undertaken by the member States, most notably under the UNFCCC and the Paris Agreement, and the cogent scientific evidence provided, in particular, by the IPCC, the Contracting States need to put in place the necessary regulations and measures aimed at preventing an increase in GHG concentrations in the Earth’s atmosphere and a rise in global average temperature beyond levels capable of producing serious and irreversible adverse effects on human rights”.¹¹¹ To this end, “effective respect for the rights protected by Article 8 of the Convention requires that each Contracting State undertake measures for the substantial and progressive reduction of their respective GHG emission levels, with a view to reaching net neutrality within, in principle, the next three decades.”¹¹² This implies both “immediate action” and “adequate intermediate goals”, “incorporated into a binding regulatory framework at the national level, followed by adequate implementation.”¹¹³

73. On this basis, the Court ruled that when assessing whether a State has remained within its margin of appreciation, it will “examine whether the competent domestic authorities, be it at the legislative, executive or judicial level, have had due regard to the need” to take various procedural measures relating to reduction of greenhouse gas (GHG) emissions.¹¹⁴ The Court’s assessment of whether the State’s actions are sufficient is “of an overall nature”, so that a shortcoming in relation to one measure does not necessarily mean that a State has overstepped its margin of appreciation.¹¹⁵ These measures should be “supplemented by adaptation measures aimed at alleviating the most severe or imminent consequences of climate change”.¹¹⁶ The Court will also examine whether the State’s decision-making process in the context of climate change involves public access to relevant information and public participation.¹¹⁷

74. The Court again stressed in the *Klimaseniorinnen* judgment that “no Article of the Convention is specifically designed to provide general protection of the environment as such”.¹¹⁸ “[T]he crucial element which must be present in determining whether, in the circumstances of a given case, an environmental harm has adversely affected one of the rights safeguarded by the Convention is the existence of a harmful effect on a person and not simply the general deterioration of the environment”.¹¹⁹ Under Article 8, the Court found that such harmful effects

¹¹⁰ *Klimaseniorinnen*, paragraph 502.

¹¹¹ *Klimaseniorinnen*, paragraph 546.

¹¹² *Klimaseniorinnen*, paragraph 548.

¹¹³ *Klimaseniorinnen*, paragraph 549.

¹¹⁴ *Klimaseniorinnen*, paragraph 550.

¹¹⁵ *Klimaseniorinnen*, paragraph 551.

¹¹⁶ *Klimaseniorinnen*, paragraph 552.

¹¹⁷ *Klimaseniorinnen*, paragraph 554.

¹¹⁸ *Klimaseniorinnen*, paragraph 445.

¹¹⁹ *Klimaseniorinnen*, paragraph 446.

related to individuals' "life, health, well-being and quality of life."¹²⁰ In that sense, the Court did not depart from the approach taken in previous environment-related cases, as described in Section III.A.ii. above. It may have found as fact that climate change exists and has an adverse effect on everyone's enjoyment of their Convention rights, but it limited its examination to alleged violations of those rights and did not consider any separate 'right to a safe climate'. The positive obligations that the Court identified under Article 8 may relate to reduction of GHG emissions as a climate change mitigation measure, but they are only intended to address climate change insofar as that is necessary to ensure respect for private and family life. Without the established chain of causation between GHG emissions, climate change, and adverse effects on Convention rights, the Court would have had no basis for defining positive obligations. Such a chain of causation may not be so readily or generally established in relation to other environmental considerations.

75. It has been suggested that the Court may in future build on its recent climate change rulings so as to adapt the application of procedural requirements and substantive standards in cases involving the adverse effects of environmental factors other than climate change. On a general note, one may observe that the Court found "force in the argument put forward by the UN Special Rapporteurs that the question is no longer whether, but how, human rights courts should address the impacts of environmental harms on the enjoyment of human rights" – although it should be recalled that the Special Rapporteurs' argument was presented in a third-party intervention specific to the *Klimaseniorinnen* case concerning climate change.¹²¹

[This section to be completed on the basis of discussions at the 101st CDDH meeting. In this connection, please see the Discussion Paper prepared by the Secretariat, doc. CDDH(2024)18.]

C. Business and human rights

76. Various instruments on business and human rights already exist, including the UN Guiding Principles, the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, and Committee of Ministers Recommendation CM/Rec(2016)3 to member States on human rights and business. Further environment-related human rights due diligence standards for business enterprises are still under development on international, regional and national levels.¹²²

77. It has been argued that a new instrument containing direct comprehensive environment-related human rights due diligence standards for companies and in particular provisions on access to remedies could usefully enhance the responsibility or accountability of businesses. An international [legally binding] mechanism that could provide victims of corporate environment-related human rights violations with access to a remedy, such as some form of alternative dispute resolution, does not yet exist. It has been argued that these elements could potentially be addressed by the Council of Europe, while emphasizing and strengthening synergies with existing systems and instruments such as the UNGPs, the OECD Guidelines for Multinational Enterprises, OECD Due Diligence Guidance for Responsible Business Conduct, applicable regional agreements, existing legislation at national and EU level and sectoral approaches, taking into account developments at international level such as the work of the UN Open-Ended Working Group on transnational corporations and other business enterprises with respect to human rights.

¹²⁰ *Klimaseniorinnen*, paragraph 519. These elements had been identified by the Court in previous judgments under Article 8: see e.g. *Hatton* (see footnote 30), paragraph 96, *Fadeyeva* (see footnote 33), paragraph 88, and *Ivan Atanasov v. Bulgaria*, application no. 12853/03, judgment of 02 December 2010, paragraph 67.

¹²¹ *Klimaseniorinnen*, paragraph 451.

¹²² See for example, the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (<https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc>)

D. Human rights defenders in environmental matters (“environmental human rights defenders”)

78. Despite the legal protection offered by different human rights systems, environmental human rights defenders are a group at particularly high-risk of killings, threats, and intimidation.¹²³ Many human rights bodies and organisations, including the Council of Europe Commissioner for Human Rights,¹²⁴ have issued recommendations on how national authorities might better protect and support their work.¹²⁵ The Meeting of the Parties to the Aarhus Convention decided in 2021 to establish a rapid response mechanism to protect environmental defenders, and in June 2022 elected the first special rapporteur in this new system.

79. It has been argued that recognising the human right to a healthy environment in a legally binding way could serve as a catalyst for establishing a safe and enabling environment for environmental defenders as human rights defenders. It would do this by clarifying that environmental defenders’ activities are directly connected to the protection of a legally protected human right. This could have many tangible impacts in policymaking, for example, by bringing environmental defenders into the scope of policies and programmes designed for human rights defenders.¹²⁶

VI. The expectations of independent non-governmental actors

80. The Parliamentary Assembly has made repeated calls for Council of Europe action in response to the triple planetary crisis. In 1970, with subsequent efforts in 1990, 1999, 2003, 2009 and more recently the Parliamentary Assembly proposed an additional protocol to the European Convention on Human Rights. Parliamentary Assembly Recommendation 2211 (2021) on “Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe” called for the adoption of additional protocols to the Convention and to the ESC protecting the “right to a safe, clean, healthy and sustainable environment”,¹²⁷ the preparation of a feasibility study for a convention on environmental threats and technological hazards threatening human health, dignity and life, and revision of Recommendation CM/Rec(2016)3 on human rights and business (see below). Recommendation 2211 (2021) includes a proposed text for an additional protocol to the Convention.¹²⁸ Most recently, the Parliamentary Assembly reiterated its call for additional protocols to the Convention and the ESC in Recommendation 2251 (2023) on “Policy strategies for preventing, preparing for and responding to natural disasters”. The Parliamentary Assembly has also established a Network of Contact Parliamentarians for a healthy environment,

¹²³ Global Witness publishes an annual report on the number of killings of environmental defenders, most recently in September 2023: see <https://www.globalwitness.org/en/campaigns/environmental-activists/standing-firm/>

¹²⁴ See <https://www.coe.int/en/web/commissioner/-/let-us-make-europe-a-safe-place-for-environmental-human-rights-defenders>

¹²⁵ See, e.g., 2016 Report of the Special Rapporteur on human rights defenders, UN Doc. A/HRC/31/55; Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, UN Doc. A/HRC/25/55 (23 December 2013); Report of the Special Rapporteur on the situation of human rights defenders, UN Doc. A/68/262, (5 August 2013). Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries and indigenous peoples, UN Doc. A/HRC/24/41 (1 July 2013); Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, UN Doc. A/HRC/29/25 (28 April 2015).

¹²⁶ Summary, Knox, p 5.

¹²⁷ It may be noted that the Parliamentary Assembly adopted Recommendation 2211(2021) before the UN Human Rights Council adopted Resolution 48/13, which did not retain the adjective “safe” that had commonly been used in the UN context prior to that. UNGA Resolution 76/300 also does not use the adjective “safe”.

¹²⁸ See the appendix of PACE Recommendation 2211(2021). The Parliamentary Assembly’s proposal for a draft additional protocol to the Convention guaranteeing the “right to safe, clean, healthy and sustainable environment” defined the right as meaning “the right of present and future generations to live in a non-degraded, viable and decent environment that is conducive to their health, development and well-being”.

which aims to anchor the right to a “safe, clean, healthy and sustainable environment” in law, policy, practice and public awareness in Europe and beyond.¹²⁹

81. Europe has a history of environmental activism and climate action in a variety of forms, including youth climate movements.¹³⁰ The Conference of International NGOs, including as a participant in the work of the CDDH and CDDH-ENV, has consistently advocated in favour of an additional protocol to the Convention protecting the right to a healthy environment. A large number of civil society organisations have called on the Council of Europe to “address the triple planetary crisis of climate change, biodiversity loss and pollution as a supreme human rights crisis” and more specifically to “recognise and protect a legally binding, autonomous right to a clean, healthy and sustainable environment through an additional protocol to the European Convention on Human Rights.”¹³¹ Civil society organisations have also formed a Coalition for the Right to a Clean, Healthy, and Sustainable Environment at the Council of Europe, issuing a joint “Call for the adoption of an additional Protocol to the European Convention on Human Rights on the right to a clean, healthy, and sustainable environment.”¹³²¹³³

82. The European Network of National Human Rights Institutions (ENNHRI) has also expressed its support for a binding instrument on the human right to a healthy environment. According to ENNHRI, an Additional Protocol to the European Convention on Human Rights would establish the strongest and the most effective legal protection. This form of protection could be complemented by an Additional Protocol to the European Social Charter, which would secure access to justice for civil society organisations. Should there be no political support for adopting a binding protocol to the ECHR, ENNHRI also submits that a standalone Convention on Human Rights and the Environment might be an alternative avenue, if vested with an effective compliance mechanism. ENNHRI underlines that any binding instrument adopted by the Council of Europe should be coupled with an effective oversight mechanism to ensure adequate access to justice for affected individuals and communities. Overall, ENNHRI only considers the standalone convention as an option should the additional protocol not be politically feasible for States.¹³⁴

83. In November 2023, Dr David R. Boyd and Prof. John H. Knox, at the time respectively current and former UN Special Rapporteur on obligations related to the enjoyment of a safe, clean, healthy and sustainable environment, wrote to the CDDH-ENV drafting group commenting on its work then in progress. In their letter, they expressed the belief that the Council of Europe would “reach the conclusion that most of its Member States, most of the States of the world, and every other regional human rights body have already reached: that the time has come to legally recognize the human right to a healthy environment.”¹³⁵

VII. Different options for a further instrument in the field of human rights and the environment

¹²⁹ The Network’s webpage includes links to all of the Assembly’s work on the environment, including the reference texts to all of the Assembly’s recommendations and resolutions on the environment and climate change.

¹³⁰ See the CoE Commissioner’s Report “Environmental Rights Activism and Advocacy in Europe: Issues, Threats, Opportunities” <https://rm.coe.int/environmental-rights-activism-and-advocacy-in-europe-issues-threats-op/1680a1e360>.

¹³¹ See <https://cure-campaign.org/wp-content/uploads/CSSDeclarationFinal.pdf> (at point 6).

¹³² “Call for the adoption of an additional Protocol to the European Convention on Human Rights on the right to a clean, healthy, and sustainable environment: To the Ministers of Foreign Affairs and to the Permanent Representatives of the Member States of the Council of Europe,” available here via <https://healthyenvironmenteurope.com/>

¹³³ See CDDH-ENV2024(3) for a summary of the expectations of the Conference of INGOs.

¹³⁴ See https://ennhri.org/wp-content/uploads/2024/03/ENNHRI-Statement_CDDH-ENV-March-2024.pdf

¹³⁵ “Comments on [Draft] CDDH report on the need for and feasibility of a further instrument or instruments on human rights and the environment (CDDH-ENV(2023)06”, 10 November 2023.

84. This section sets out possible further Council of Europe instruments and how they may address the relationship between human rights and the environment. The different options were variously proposed by Council of Europe bodies or experts heard by the CDDH-ENV, or during discussions within the CDDH-ENV.

A. An additional protocol to the Convention protecting the human right to a healthy environment

85. It has been argued that guaranteeing the human right to a healthy environment within the Convention system would ensure improved, integrated, consolidated, and coherent protection of the right. An additional protocol to the Convention could allow applicants access to the Court to enforce their claims in relation to environmental issues in cases where the environment does not necessarily have an impact on other Convention rights.

86. The core element of any additional protocol to the Convention would be legal protection of the human right to a healthy environment. Beyond that, it could be possible to include also constituent elements of the right and/or additional elements relating to the operation of the Convention's procedural requirements and the application of its substantive standards in environment-related cases (see further above). Consequently, three conceptual models for an additional protocol may be considered: (i) guaranteeing the human right to a healthy environment in general terms ('model I'); (ii) guaranteeing the human right to a healthy environment plus definition of its possible constituent elements ('model II'); and (iii) guaranteeing the human right to a healthy environment plus definition of its possible constituent elements of the right plus additional elements relating to the operation of the Convention's procedural requirements and the application of its substantive standards in cases brought under the protocol ("additional elements"¹³⁶) ('model III').

i. General considerations relating to an additional protocol to the Convention (all models)

87. It has been argued that some environmental issues, such as the allocation of economic cost for adverse environmental impact prevention and reduction measures or the level of environmental protection to be achieved, involve policy choices, with potentially society-wide implications. Some argue that there is a risk that the Court may not be considered a suitable body to decide on such issues and should defer to political processes at the national level. That said, the Court has an established practice of deferring to State policy choices and applying a margin of appreciation to them, particularly in issues that are complex and technical, which might allay some of the concerns about the Court's adjudication of the right.¹³⁷ In any event, the Court will only adjudicate on alleged violations of Convention rights. Guaranteeing the human right to a healthy environment, even in general terms, confirms the fact that human rights defenders working on environmental matters ("environmental human rights defenders") are indeed human rights defenders and entitled to the protection that human rights defenders enjoy.

88. An additional protocol guaranteeing the human rights to a healthy environment may result in an increased workload for the Court, which may need additional financial resources. On the other hand, it is argued that the impact of environmental degradation and the triple planetary crisis

¹³⁶ The additional elements could, for example, include provisions on jurisdiction, victim status/ NGO standing before the Court, the assessment of evidence, and/or environmental human rights defenders. Individual elements, a combination of elements, or all of the elements may be considered for an additional protocol.

¹³⁷ See, for example, *Klimaseniorinnen*, paragraph 449.

on human rights is already leading to a rise in the number of cases. It has also been argued that a new protocol could actually streamline and improve the Court's decision-making in environmental cases, replacing the current piecemeal approach to such cases and increasing legal certainty. The Court is experienced in dealing with systemic problems and, in its *Klimaseniorinnen* judgment, took an approach to victim status that was wary of the potential for extremely large numbers of future applications.¹³⁸ Furthermore, experience in national courts has shown that the recognition of the human right to a healthy environment does not necessarily increase a court's caseload.¹³⁹

89. The process of adopting a new protocol, and its entry into force, can be protracted depending on which model is adopted, with the more complex versions (Models II and III) requiring more consideration.¹⁴⁰ A limited number of ratifications of a new protocol would affect the geographical scope of its protection of the right to a healthy environment in practice.¹⁴¹

ii. Model I

90. Model I (simply guaranteeing the right to a healthy environment) would have the general advantages of any additional protocol, as described above.

91. Without specifying the constituent elements of the human right to a healthy environment, Model I would not allow member States actively to shape the constituent elements of the right. Instead, these would be shaped through the development of the Court's jurisprudence. This model would also not address the operation of the Convention's procedural requirements and the application of substantive standards, which could only be affected to a certain extent through the Court developing its jurisprudence. Finally, while it could, through positive obligations of States, indirectly enhance the international responsibility of businesses for the environmental impact of their activities, it would establish neither comprehensive environmental due diligence standards for businesses nor a right that is directly actionable against businesses.

iii. Model II

92. Compared to Model I, this model would also allow member States actively and directly to shape the content of the right. The further development by the Court of its jurisprudence on the application of existing Convention rights in environmental contexts would presumably be influenced by the way in which an additional protocol would specify the constituent elements of a new Convention on the human right to a healthy environment.

iv. Model III

93. By also addressing the operation of the Convention's procedural requirements and the application of substantive standards, this model could provide for enhanced protection of the human right to a healthy environment, beyond what would be possible under Models I or II, which would apply existing rules and procedures. Under the current understanding of jurisdiction within the meaning of Article 1 of the Convention, the potential transboundary causes of some

¹³⁸ *Klimaseniorinnen*, paragraph 483.

¹³⁹ Summary, Knox, p. 5

¹⁴⁰ For example, for Protocol no. 12 to the Convention (ETS No. 177, general prohibition on discrimination), from the beginning of drafting to its entry into force took seven years.

¹⁴¹ Only one (Protocol No. 6) of the six additional protocols to the Convention has been ratified by all of the 46 member States, and Protocol No. 12 has been ratified by only 20. Each of the others (Protocols Nos. 1, 4, 7, and 13), however, has been ratified by over 40 member States.

environmental harm might leave victims unable to invoke the Convention, or to bring their cases before the Court.¹⁴² Amendments to the rules on jurisdiction addressing such issues could allow for more comprehensive protection of individuals' human right to a healthy environment. Furthermore, granting NGOs standing to bring public interest cases could improve access to justice for collective environmental interests.¹⁴³ Easing the burden of proof on the applicants may also be considered, as well as specific provisions on environmental human rights defenders to foster a safer and more enabling environment for them.

94. It should be recalled that the Court's *Klimaseniorinnen* judgment marked a significant evolution in the Court's caselaw, recognising a possibility for representative associations to bring applications on behalf of their members in climate change cases (see further above). The Court in this judgment also appears to have left open the possibility of further developments in its caselaw concerning extraterritorial jurisdiction in cases of transboundary harm. Whilst these considerations do not relate to protection of the right to a healthy environment, they are relevant to the question of procedural requirements in environmental cases brought under existing rights.

95. Depending on what is negotiated, a Model III Protocol could require the Court to apply different standards to claims based on the human right to a healthy environment compared to claims based on other Convention rights. This could potentially lead to fragmentation of the Court's treatment of claims, depending on the right involved, even within a single application concerning the human right to a healthy environment and other rights. That said, in the *Klimaseniorinnen* case, the Court has already shown itself capable of taking a differentiated approach to cases depending on their subject-matter, by developing special rules on the issues of victim status and standing for associations intended for application only in cases concerning the adverse effects of climate change.¹⁴⁴ A Model III Protocol could also include extensive changes to the jurisdiction and admissibility requirements under the Convention. This could have profound and unprecedented implications for the way the Court adjudicates cases. That may, in turn, impact the willingness of States to ratify the Protocol, affecting the overall extent to which the Protocol can guarantee the right in practice.

B. An additional protocol to the ESC protecting the human right to a healthy environment

96. As a preliminary, it is important to note that the ESCR has already interpreted Article 11 (the right to protection of health) of the ESC to include the human right to a healthy environment. All options involving an additional protocol to the ESC therefore involve the recognition of the human right to a healthy environment as a standalone right.

97. As with the proposal of an additional protocol to the Convention, three options may be considered: (i) guaranteeing the human right to a healthy environment in general terms ('model I'); (ii) guaranteeing the human right to a healthy environment plus definition of its possible constituent elements ('model II'); and (iii) guaranteeing the human right to a healthy environment plus definition of its constituent elements plus adjusting or removing the restriction on the personal scope of the Charter and extending the reach of rights either for the Charter as a whole or solely

¹⁴² R Spano – Keynote Speech, Proceedings of the Council of Europe High-level Conference on the Right to a Clean, Healthy and Sustainable Environment in Practice, 3 May 2023, p. 27.

¹⁴³ The concept of "public interest cases", also known as *actio popularis*, should be distinguished from the conditional standing for representative associations that was recognised in the *Klimaseniorinnen* judgment (paragraphs 500-502) – see following paragraph.

¹⁴⁴ See footnote 24.

for an additional protocol on the human right to a healthy environment,¹⁴⁵ along with the possibility of accepting the collective complaints procedure only in relation to the additional protocol ('model III') (together referred to as "additional elements").

i. General considerations relating to an additional protocol to the ESC (all models)

98. It has been argued that the ESC's monitoring mechanism, combining a reporting procedure and an optional complaints procedure, may be appropriate in an area where difficult policy choices need to be made. It has also been argued that a human right to a healthy environment could be easily integrated into a system of social rights such as the ESC.¹⁴⁶ In addition, rights already protected under the Charter reflect both positive and negative obligations, which would be suitable for the protection of the human right to a healthy environment.

99. Since decisions of the ECSR are non-binding on member States, however, there may be a higher possibility of non-implementation as compared to binding judgments by a body such as the Court. In addition, an additional Protocol to the ESC guaranteeing the human right to a healthy environment may result in an increase of the caseload of the ECSR, which may as a result need additional financial resources.

100. The process of adopting a new protocol, and its entry into force, can be protracted depending on which model is adopted, with the more complex versions (Models II and III) requiring more consideration.

ii. Model specific considerations – model III

101. A variant on model III that extends the collective complaints procedure to the right to a healthy environment could provide a way for non-governmental organisations and social partners to lodge complaints concerning this right. There would be no requirement for the complainant to have exhausted domestic remedies or itself to be a victim of the alleged violation, since these are not admissibility criteria under the ESC system (unlike the Convention system).

102. Depending on what is negotiated, a Model III Protocol could require the ECSR to apply different standards to claims based on the human right to a healthy environment. This could potentially lead to fragmentation of the ECSR's treatment of claims, depending on the right involved, even within a single collective complaint should it concern the human right to a healthy environment and other rights. That may, in turn, impact the willingness of States to ratify the protocol, affecting the extent to which the protocol can guarantee the right.

C. A standalone convention protecting the human right to a healthy environment

103. Rather than protecting the right to a healthy environment within the system of one of the Council of Europe's existing core human rights treaties, an alternative would be to establish a standalone convention devoted specifically (or primarily) to protection of the right. There are two options for doing this: (i) guaranteeing the human right to a healthy environment including its possible constituent elements ('model I'); and (ii) guaranteeing the human right to a healthy environment (including its constituent elements) plus additional elements as described below ('model II').

¹⁴⁵ See the Appendix to the European Social Charter, §1 second sentence: "This interpretation would not prejudice the extension of similar facilities to other persons by any of the Parties."

¹⁴⁶ Summary, Palmisano, pp. 2-3

i. Model I

104. This option would allow member States actively and directly to shape the constituent elements of the human right to a healthy environment. Legal recognition of the right through a standalone convention would confirm that human rights defenders working on environmental matters (“environmental human rights defenders”) are indeed human rights defenders and entitled to the protections enjoyed by human rights defenders generally.

ii. Model II

105. In addition to guaranteeing the human right to a healthy environment and setting out its constituent elements, this model could include additional elements aimed at enhancing the protection of the right. Various approaches to monitoring of implementation could be envisaged, such as a State reporting system as found in several Council of Europe treaties (including the ESC) and UN human rights treaties. This could be combined with an individual and/or collective complaints-based monitoring mechanism issuing non-binding or binding decisions, bearing in mind that binding decisions provide for greater accountability and enforceability. Admissibility requirements could be tailored to the specificities of the convention’s content and could differ from those under the Convention or the ESC. Another possibility would be to allow for requests for Advisory Opinions from the Court, as foreseen in the Convention on Human Rights and Biomedicine (ETS No. 164, Oviedo Convention), which allows the Court to give advisory opinions on legal questions concerning the interpretation of that convention at the request of any of the Parties or the Council of Europe committee designated to this end by the Committee of Ministers.

106. A standalone convention could also include provisions aimed at enhancing the accountability of businesses through, for example, due-diligence obligations for businesses or the creation of a mechanism of alternative dispute resolution that involves business entities.

D. Standalone monitoring mechanism

107. Another option is a standalone monitoring mechanism to deal with issues of human rights and the environment. This could take the form of a committee of independent experts, similar to the European Commission against Racism and Intolerance (ECRI). Its tasks could be organised around three pillars: (i) country monitoring, involving ongoing dialogue with member States, identification of solutions to problems, and promotion of good practice, along with regular country visits; (ii) thematic work, with policy recommendations to member States; and (iii) outreach to society at large, including as a forum for dialogue with civil society and young people, and through contacts with business enterprises.

108. Another form of mechanism would be a new Council of Europe Commissioner on environment and human rights, elected by the Parliamentary Assembly. The office-holder would be empowered to engage systematically in a permanent dialogue with member States, provide early warning and rapid reaction and offer relevant assistance, in close co-operation with key parts of the Council of Europe Secretariat and institutions. Yet other forms may be possible.

109. A standalone monitoring mechanism that acts through dialogue and recommendations could contribute to member States’ understanding of the constituent elements of the human right to a healthy environment, thereby to a limited extent improving national protection of the right. However, member States would not be able to shape the content of the right. To a limited extent, by engaging in dialogue with business entities, it could indirectly enhance international responsibilities of businesses for the environmental impact of their activities. Through its thematic

work, it could indirectly encourage the development of further international jurisprudence/ practice on environmental degradation and the triple planetary crisis.

110. Non-binding monitoring may be more easily introduced in an area where complex domestic policy choices need to be made. It would, however, be an addition to the multiple existing international monitoring mechanisms and the multiple UN and other special rapporteurs working on human rights and the environment. There would also be a risk of overlap with existing Council of Europe bodies, including the Commissioner for Human Rights. A new mechanism may suffer from a relative lack of practical impact, yet nevertheless require funding by member States.

E. Mentioning environmental protection in the preamble of the Convention

111. It has been suggested that a mention of environmental protection could be added to the preamble of the Convention by way of an amending protocol. Through the interpretative function of the preamble,¹⁴⁷ this could provide additional legitimacy to the Court's jurisprudence addressing environmental degradation and the triple planetary crisis, and encourage its further development. However, this option – even with an explanatory memorandum clarifying the aim of the addition – would leave States with no possibility to shape the way the Court would use the addition to the preamble, other than through pleadings in the course of Court proceedings.

112. A protocol amending the existing preamble (as was done by Article 1 of Protocol No. 15) would have to be ratified by all member States in order to enter into force. This process is time and resource intensive at both Council of Europe and national levels.¹⁴⁸

F. Mentioning environmental protection in the preamble of the ESC

113. It has similarly been suggested that a mention of environmental protection could be added to the preamble of the ESC by way of an amending protocol. This could provide additional legitimacy to the ECSR's environmental practice and encourage its further development in accordance with the existing procedural requirements and substantive standards. However, this option – even with an explanatory memorandum clarifying the aim of the addition – would leave States with no possibility to shape the way the ECSR will use the addition to the preamble, other than pleading in favour of certain interpretations as a respondent.

114. Although the Charter is silent on the process of amending the preamble, amendments to the Charter are considered under Article J of the Charter which provides for a simplified procedure.¹⁴⁹ Because the preamble does not concern the extension of rights which can be accepted individually by the Parties, it could be amended similarly to Parts III to VI of the Charter, which require acceptance by all Parties. Therefore, unlike the corresponding proposal concerning the Convention, amendment of the preamble of the ESC does not necessarily require the adoption of an amending protocol.

G. A non-binding instrument recognising the right to a healthy environment

¹⁴⁷ See the Vienna Convention on the Law of Treaties, Article 31(2).

¹⁴⁸ Protocol No. 15 was opened for signature in June 2013 and entered into force, following its ratification by all Contracting Parties to the Convention, eight years later in August 2021.

¹⁴⁹ Article J "Amendments" of the Charter does not refer to the procedure of amending the Preamble specifically. Under Article J(4) of the Revised Charter: "Any amendment to Parts III to VI of this Charter shall enter into force on the first day of the month following the expiration of a period of one month after the date on which all Parties have informed the Secretary General that they have accepted it."

115. The existing Committee of Ministers Recommendation CM/Rec(2022)20 does not recognise the human right to a healthy environment. A new recommendation could either (i) follow the path of UNGA Resolution 76/300 and explicitly recognise the right or (ii) recognise the right and, in addition, recognise possible constituent elements of the right.

116. As all Council of Europe member States voted in favour of UNGA resolution 76/300, recreating the content of that resolution within the Council of Europe framework would have limited additional effect. It would not establish legally binding recognition of the human right to a healthy environment in the Council of Europe framework. To a limited extent, it could influence the development of the Court's jurisprudence and the ECSR's practice, as both monitoring mechanisms take into account Council of Europe non-binding instruments where appropriate.

117. The process of negotiating and adopting a non-binding instrument is usually less labour and resource intensive than the adoption and ratification of binding instruments and such soft law standard-setting can facilitate consensus-building. The inclusion of environment-related due diligence standards for businesses could be envisaged in a non-binding instrument. Rather than requiring a new instrument, although this could also be done through revision of Committee of Ministers Recommendation CM/Rec(2016)3 to member States on human rights and business, as proposed by the Parliamentary Assembly in its Recommendation 2211(2021).

118. If the non-binding instrument were also to specify possible constituent elements of the right, it could give States an opportunity to actively shape the right by allowing them to negotiate and determine a common understanding of those elements. This could serve as a catalyst for future binding codification work. It would allow subsequent harmonisation of implementation of the right at national levels, thereby to a certain extent improving national protection of the right.

H. A combination of different instruments

119. Finally, the following non-exhaustive list of combinations of instruments have been discussed: (i) additional protocols to both the ECHR and the ESC; (ii) a standalone convention on human rights and the environment plus inclusion of environmental protection in the preamble of the ECHR; (iii) additional protocol to the ECHR and/or the ESC combined with a standalone monitoring mechanism (e.g. an ECRI-style committee) or a commissioner type mechanism; and (iv) a standalone convention on human rights and the environment combined with a standalone monitoring mechanism.

120. The overall benefit of these various options is that they combine the advantages of the respective instruments whilst potentially avoiding certain conceivably negative considerations. They would, however, pose other challenges due to the complexities involved in drafting, combining, and adopting different instruments.

I. The option of not adopting any new instrument

121. If it is considered either that there is no need for a new instrument, or that none of the above options is 'feasible', then a final option could be not to adopt any new instrument. This would not necessarily be a final, definitive decision. It could instead be intended to allow the Court more time to develop further its caselaw in environment-related cases, including those involving the adverse effects of climate change. The situation could be reassessed at some later stage against the eventual effects of any such developments.

VIII. Conclusions and recommendations

122. *[Conclusions on the need for a further instrument or instruments in the field of human rights and the environment]*

123. *[Conclusions on the feasibility of options for a further instrument]*