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STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

**DRAFTING GROUP ON HUMAN RIGHTS AND ENVIRONMENT
(CDDH-ENV)**

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

I. Introduction

1. The present report has been prepared pursuant to the Committee of Ministers' invitation to the CDDH, "in the context of its ongoing work on human rights and the environment, to consider the need for and feasibility of a further instrument or instruments, bearing in mind [Recommendation 2211 \(2021\)](#)" of the Parliamentary Assembly on "Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe".¹

2. The CDDH recalls that the Council of Europe has a long history of activity relating to the environment, including the connections between the environment and human rights.

3. As regards protection of the environment, the Council of Europe has adopted a number of conventions and agreements. These include the following:

- 1968 European Agreement on the Restriction of the Use of certain Detergents in Washing and Cleaning Products (ETS No. 064), which aims to ensure the control of fresh water not only from the standpoint of human needs but also to ensure the protection of nature in general.
- 1983 Protocol amending the European Agreement on the Restriction of the Use of certain Detergents in Washing and Cleaning Products (ETS No. 115), which aims to accommodate scientific and international developments since 1968, notably to take account of two European Community Directives.
- The EUR-OPA Major Hazards Agreement, which was established in 1987 by a resolution of the Committee of Ministers.²
- 1993 Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment (ETS No. 150), which aims at ensuring adequate compensation for damage resulting from activities dangerous to the environment and also provides for means of prevention and reinstatement. It considers that the problems of adequate compensation for emissions released in one country causing damage in another country are also of an international nature.
- 1998 Convention on the Protection of the Environment through Criminal Law (ETS No. 172). This convention is aimed at improving the protection of the environment at European level using the solution of last-resort – criminal law – in order to deter and prevent conduct which is most harmful to the environment.
- 2000 Council of Europe Landscape Convention (ETS No. 176), which aims to encourage public authorities to adopt policies and measures at local, regional, national and international level for protecting, managing and planning landscapes throughout Europe. It covers all landscapes that determine the quality of people's living environment.
- 2016 Protocol amending the Landscape Convention (CETS No. 219), which aims to promote European co-operation with non-European States who wish to implement the provisions of the convention by opening it to their accession.

4. Broadly speaking, the instruments above can be divided into two groups. The first group, ETS Nos. 064, 104 and 176 (plus a subsequent protocol), addresses public policy to protect and preserve aspects of the natural environment. The second group, ETS Nos. 172 and 176 (plus a subsequent protocol), sought to establish legal protection of the environment through civil and criminal liability.

¹ See doc. CM/Del/Dec(2021)1416/3.1, 3 November 2021.

² 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.

5. In addition to the above instruments, the Council of Europe's European Convention on Human Rights (the Convention) and European Social Charter (the Charter) provide important protections with respect to environmental matters, as demonstrated respectively by the caselaw of the European Court of Human Rights (the Court) and the conclusions and decisions of the European Committee on Social Rights (ECSR). These key human rights instruments have been applied in such a way as to protect numerous rights against harm caused by environmental circumstances (often referred to as the "greening of human rights"). In the case of the Convention, these include the right to life, the prohibition on inhuman and degrading treatment, the right to respect for private and family life and the home, protection of property, and procedural rights such as participation in decision-making, and access to justice and other remedies. In the case of the Charter, they include the rights to just conditions of work, to safe and healthy working conditions, to protection of health, and to housing.

6. The way in which the Convention and the Charter reflect the relationship between human rights and the environment is explored in detail in the [CDDH Manual on Human Rights and the Environment](#) (3rd Edition, adopted in 2021).

7. As well as binding instruments, the Committee of Ministers has also adopted non-binding instruments, most recently [Recommendation CM/Rec\(2022\)20](#) to member States on human rights and the protection of the environment, which was drafted by the CDDH. Environment-related standard-setting work has also continued in other Council of Europe bodies, such as the Consultative Council of European Prosecutors (CCPE), which has adopted Opinion No. 17 (2022) on the role of prosecutors in the protection of the environment. These have been supplemented with information and awareness-raising materials, including the HELP (Human rights Education for Legal Professionals) course on the environment and human rights, launched in 2021, and the Court's Case-law Guide on the environment, last updated in August 2022.

8. The Council of Europe's engagement with the issue of human rights and the environment has also been demonstrated through a series of high-level events, including two high-level conferences on environmental protection and human rights, one organised by the Georgian Presidency of the Committee of Ministers in February 2020 and the other by the Ministry of Foreign Affairs of Georgia and the European Court of Human Rights in October 2020. In April 2021, a high-level workshop was organised by the German Presidency of the Committee of Ministers in cooperation with the CDDH, on the topic "Environment, Human Rights and Business: a framework for addressing environmental protection challenges". This workshop stimulated dialogue on possible actions by the Council of Europe, including standard-setting work and greater engagement with private business actors, to support an enhanced understanding and full protection of human rights and the environment by businesses. On 3 May 2023, the Icelandic Presidency of the Committee of Ministers in cooperation with the CDDH held a high-level conference on "The Right to a Clean, Healthy and Sustainable Environment in Practice". The conference **[to be completed in light of the group's discussion]**.

9. The 9th edition of the World Forum for Democracy in November 2020 explored the question, "Can Democracy Save the Environment?"

10. In February 2022, the Committee of Ministers held a thematic discussion on the issue of human rights and the environment during its exchange of views on the United Nations (human rights questions), with the participation of Mr David R. Boyd, UN Special Rapporteur on human rights and the environment. The same issue was the focus of an informal meeting of the Committee of Ministers organised by the Irish Presidency in October 2022.

11. The Parliamentary Assembly has adopted a number of relevant resolutions and recommendations. These include the aforementioned Recommendation 2211 (2021), which amongst other things calls for the adoption of additional protocols to the Convention and the Charter protecting the right to a clean, healthy and sustainable environment. The Assembly has also established a [Network of Contact Parliamentarians for a healthy environment](#),³ which aims to anchor the right to a clean, healthy and sustainable environment in law, policy, practice and public awareness in Europe and beyond.

12. Against this institutional background, and the wider background of European and international law generally, the present report will *inter alia* address the need for and feasibility of binding and/ or additional non-binding Council of Europe instruments, as well as the possible content of any such instrument(s). It will in particular examine the need for and feasibility of codifying the right to a clean, healthy and sustainable environment in a Council of Europe legal instrument.

13. Work on the present report began at the 5th meeting of the CDDH drafting group on human rights and the environment (CDDH-ENV) in September 2022. At this meeting, the CDDH-ENV held a two-day exchange of views with external independent experts and representatives of the Parliamentary Assembly and the ECSR, with the participation of Prof. Helen Keller, Mr Sébastien Duyck, Prof. John H. Knox, Dr Lea Raible, Prof. Elisabeth Lambert, Mr Simon Moutquin (Parliamentary Assembly), and Prof. Giuseppe Palmisano (ECSR).

14. At the same meeting, the CDDH-ENV adopted a questionnaire to member States on recognition and protection of the right to a healthy environment in national law.⁴ 27 member States replied to this questionnaire, including Andorra, Armenia, Austria, Azerbaijan, Belgium, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Italy, Latvia, Malta, Netherlands, Norway, Poland, Portugal, Slovak Republic, Slovenia, Sweden, Switzerland, Türkiye, and the United Kingdom.

II. The need for a further instrument or instruments

15. Today humanity is facing an unprecedented challenge in the form of environmental degradation and the triple planetary crisis of climate change,⁵ nature and biodiversity loss,⁶ and

³ 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.

⁴ See Appendix I.

⁵ IPCC, 2022: Summary for Policymakers [H.-O. Pörtner, D.C. Roberts, E.S. Poloczanska, K. Mintenbeck, M. Tignor, A. Alegría, 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. Alegría, 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)

⁶ 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.

pollution.⁷ While almost all individuals and communities around the world are affected by environmental degradation and the triple planetary crisis, the consequences are most severe for those who are already in vulnerable situations and will be felt even more strongly by the younger and future generations. These are common concerns requiring urgent action, including as a matter of inter-generational solidarity.⁸

16. These crises – which have significant negative implications for the effective enjoyment of human rights⁹ – mutually reinforce and exacerbate each other and are facilitated by human actions such as the use of fossil fuels, deforestation, and the exploitation of natural resources.¹⁰

17. Undoubtedly, these crises affect the enjoyment of human rights. The full enjoyment of rights, such as the right to life and/or health, depend on an environment that is healthy for human beings.¹¹ Furthermore, the effective exercise of human rights, which include the right to freedom of expression and peaceful association; the right to information, participation in governance or access to justice, is cardinal for environmental protection efforts.

18. The acknowledgment of the linkages between human rights and the environment has grown significantly in recent years. The quantity and breadth of international and domestic regulations, legal rulings, and academic research on the connection between human rights and the environment are quickly expanding. Nevertheless, many questions about the relationship between human rights and the environment remain unanswered and must be examined further.

19. The urgency of this common concern is also voiced by civil society. The Conference of International Non-Governmental Organisations (INGOs) of the Council of Europe, in the context of climate change, demanded that international negotiations go beyond the strict context of greenhouse gas reductions and include the protection of the fundamental rights of all human beings, taking into account the impact of all phenomena related to climate change on the enjoyment of these rights.¹² At the high-level conference on environmental protection and human rights, organised by the Georgian Presidency of the Committee of Ministers of the Council of Europe in February 2020, the President of the Conference of INGOs called upon the Committee of Ministers to define environmental issues as a priority.¹³

⁷ 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).

⁸ See Recommendation CM/Rec(2022)20 of the Committee of Ministers to member States on human rights and the protection of the environment; UN General Assembly resolution, The human right to a clean, healthy and sustainable environment, 26 July 2022, A/RES/76/300.

⁹ Framework Principles on Human Rights and the Environment (2018), p. 6.

¹⁰ IPCC 2022 Report.

¹¹ UN Human Rights Committee (HRC), General comment no. 36, Article 6 (Right to Life), 3 September 2019, CCPR/C/GC/35 [General comment No. 36].

¹² Recommendation on ‘climate change and human rights’ for the United Nations Climate Change Conference (COP24) to be held in Katowice, Poland, from 3 to 14 December 2018 Adopted by the Standing Committee on behalf of the Conference of INGOs, CONF/PLE(2018)REC3.

¹³ Intervention by Anna Rurka, President of the Conference of INGOs of the Council of Europe, high-level Conference on Environmental Protection and Human Rights, CONF/PRES/SPEECH(2020)1.

20. As there is no overarching normative framework for the protection of human rights and the environment, the question remains whether the already existing level of protection is sufficient to meet the critical human rights challenges posed by environmental degradation and the triple planetary crisis. The present feasibility report sets out to clarify whether there is a need for a further Council of Europe instrument or instruments on human rights and the environment to address these challenges, and to examine what instrument or instruments would be a feasible response to this need.

A. Recognition of the interdependence of human rights and environmental protection in international law

i. Human rights and environmental protection in the work of relevant UN organs and special procedures

21. The UN Human Rights Council (HRC) has adopted numerous resolutions on human rights and the environment. These include resolutions 44/7 of 16 July 2020 on human rights and climate change which called upon States to consider human rights within the framework of the United Nations Framework Convention on Climate Change; 45/17 of 6 October 2020 which extended the mandate of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes; 45/30 of 7 October 2020 on the rights of the child: realizing the rights of the child through a healthy environment which urged States to take the necessary measures to ensure the full enjoyment by children of all their human rights and fundamental freedoms, and to protect them from the effects of environmental harm; and 46/7 of 23 March 2021 on human rights and the environment which called upon all States to conserve, protect and restore healthy ecosystems and biodiversity and to ensure their sustainable management and use by applying a human rights-based approach.

22. On 8 October 2021, the HRC adopted Resolution 48/13 on “[t]he human right to a clean, healthy and sustainable environment”.¹⁴ The text of HRC Resolution 48/13 was proposed by, among others, two Council of Europe Member States: Slovenia and Switzerland. It was passed with 43 votes in favour and 4 abstentions.¹⁵ The HRC also established on the same day, via Resolution 48/14, a Special Rapporteur on the promotion and protection of human rights in the context of climate change.

23. HRC Resolution 48/13 recognised for the first time that having a clean, healthy and sustainable environment is a human right, while simultaneously called on UN Member States to cooperate to implement this right. Resolution 48/13 noted that the right to a clean, healthy and sustainable environment is related to other rights and existing international law and affirmed that the promotion of the human right to a clean, healthy and sustainable environment requires the full implementation of the multilateral environmental agreements under the principles of international environmental law.

¹⁴ 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>.

¹⁵ Votes in favour included the following Council of Europe Member States: Armenia, Austria, Bulgaria, Czech Republic, Denmark, France, Germany, Italy, Netherlands, Poland, Ukraine, United Kingdom.

24. Based on the text adopted by the HRC, the UN General Assembly, on 28 July 2022, with a record vote of 161 votes (including those of all Council of Europe member States) in favour, zero against and eight abstentions, adopted resolution 76/300 declaring a clean, healthy and sustainable environment, a human right (GA Resolution).¹⁶ Among the co-sponsors of the GA Resolution are 24 Council of Europe Member States.¹⁷

25. The GA Resolution follows HRC Resolution 48/13 in its wording and recognises the right to a clean, healthy and sustainable environment as a human right. Following the wording of HRC Resolution 48/13, it recognises 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. It also calls upon States, international organizations, business enterprises and other relevant stakeholders to adopt policies, enhance international cooperation, strengthen capacity-building and continue to share good practices in order to scale up efforts to ensure a clean, healthy and sustainable environment for all.

26. On 4 April 2023, the HRC adopted resolution A/HRC/52/7 on the right to a clean, healthy and sustainable environment. The resolution, among others, encourages States to ensure that projects supported by environmental finance mechanisms respect all human rights and requests the Special Rapporteur, in collaboration with the Office of the High Commissioner to convene, before the end of 2023, a one-day expert seminar on the responsibility of business enterprises to respect the human right to a clean, healthy and sustainable environment.¹⁸

27. International courts within the UN system are also being requested to interpret existing international obligations in the context of climate change further underscoring the urgency of the issue.

28. On 12 December 2022, the Commission of Small Island States on Climate Change and International Law (COSIS) asked the International Tribunal on the Law of the Sea (ITLOS) to give an advisory opinion on the interpretation of the obligation to preserve and protect the marine environment under the 1982 UN Convention on the Law of the Sea (UNCLOS) in relation to climate change impacts.¹⁹

29. On 20 February 2023, Angola, Antigua and Barbuda, Bangladesh, Costa Rica, Micronesia, Morocco, Mozambique, New Zealand, Portugal, Romania, Samoa, Sierra Leone, Singapore, Uganda, Vanuatu and Viet Nam introduced a proposal to request an advisory opinion²⁰ from the International Court of Justice (ICJ) on the obligations of States in respect of climate change. This proposal was subsequently co-sponsored by a total of 132 States.²¹ The request would seek to clarify (i) the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of

¹⁶ UN General Assembly resolution, The human right to a clean, healthy and sustainable environment, 26 July 2022, A/RES/76/300.

¹⁷ Andorra, Armenia, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Georgia, Germany, Greece, Latvia, Luxembourg, Monaco, Montenegro, Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain, Switzerland and Ukraine.

¹⁸ UN HRC resolution, The human right to a clean, healthy and sustainable environment, 4 April 2023, A/HRC/52/7.

¹⁹ Request for advisory opinion:

https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf

²⁰ Advisory opinions are non-binding; however, they serve as subsidiary means for the determination of the relevant rules of law by offering authoritative statements of interpretation, and therefore may have bearing on future decisions concerning the legal consequences of climate change.

²¹ <https://www.vanuatuicj.com/latest-news>

greenhouse gases for States and for present and future generations; and (ii) the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment. On 29 March 2023, the UN GA adopted by consensus a resolution formally requesting this advisory opinion from the ICJ.²²

30. In their oversight of States' compliance with the major human rights treaties, such as the International Covenant on Economic, Social, and Cultural Rights (ICESCR)²³ and the International Covenant on Civil and Political Rights (ICCPR),²⁴ United Nations human rights treaty bodies have applied human rights to environmental issues.

31. The UN Committee on Economic, Social, and Cultural Rights has interpreted the right to health under the ICESCR 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."²⁵

32. The UN Human Rights Committee, which supervises the ICCPR, released a General Comment on the right to life in 2018, emphasizing 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.²⁶

33. In 2019, five treaty bodies issued a joint statement on climate change calling for States to implement policies aimed at reducing emissions to realise the objectives of the Paris Agreement.²⁷ In the same year, the UN Human Rights Committee held that Paraguay had violated its obligations under Article 6 (on the right to life) and Article 17 (on the right to private and family life) of the ICCPR when it failed to adequately regulate large-scale spraying with toxic agrochemicals and investigate the death of an agricultural worker exposed to such chemicals.²⁸

34. It is evident that UN treaty bodies are increasingly being asked to decide climate cases.²⁹ In *Sacchi et al v Germany*, the UN Committee on the Rights of the Child was asked whether the respondent had violated children's rights under the UN Convention on the Rights of the Child by making insufficient cuts to greenhouse gas emissions and failing to use available tools to protect children from carbon pollution by the world's major emitters. While the Committee held that the petitioners had shown, for jurisdictional purposes, that the impairment of their rights was a result of the State party's acts or omissions regarding carbon emissions, the complaint was ultimately found inadmissible for failure to exhaust local remedies. In the case of *Teitiota v. New Zealand*, the Human Rights Committee found that countries may not deport individuals seeking asylum

²² UN General Assembly resolution, Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change, 29 March 2023, [the UN doc number is not updated yet]

²³ United Nations (General Assembly). "International Covenant on Economic, Social, and Cultural Rights." Treaty Series, vol. 999, Dec. 1966.

²⁴ United Nations (General Assembly). (1966). International Covenant on Civil and Political Rights. Treaty Series, 999, 171.

²⁵ General Comment No. 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4 (2000), para. 15.

²⁶ General comment no. 36 para. 26.

²⁷ <https://www.ohchr.org/en/statements/2019/09/five-un-human-rights-treaty-bodies-issue-joint-statement-human-rights-and>

²⁸ *Portillo Cáceres and others v. Paraguay*, No. 2751/2016 (2019), para. 7.5.

²⁹ Human Rights Committee, *Teitiota v. New Zealand*, UN Doc. CCPR/C/127/D/2728/2016 (2020); Committee on the Rights of the Child, *Sacchi et al v Germany*, UN Doc. CRC/C/88/D/107/2019 (2021).

who face climate change-induced conditions that violate the right to life. On 22 September 2022, the UN Human Rights Committee found that Australia's failure to adequately protect indigenous Torres Islanders against adverse impacts of climate change amounted to a breach of the ICCPR.³⁰

35. Currently, the UN Committee on the Rights of the Child is working on a General Comment on children's rights and the environment with a special focus on climate change.³¹

36. UN special procedures had also been developed to address the environmental concerns. The UN Special Rapporteur on human rights and the environment examines the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; promotes best practices and identifies challenges and obstacles to the global recognition and implementation of the right to a safe, clean, healthy and sustainable environment.

37. Among others, the UN Special Rapporteur reports on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment.³²

38. In 2018, the Special Rapporteur presented Framework Principles on Human Rights and the Environment, which summarise States' human rights obligations relating to the environment.³³ The Framework Principles will be explored further below, in relation to the possible content of the right to a clean, healthy and sustainable environment.

39. As can be seen from the list above, UN organs and special procedures are engaged on a wide scale with the examination of human rights and the environment with a special focus on environmental degradation and the triple planetary crisis.

ii. Human rights and environmental protection in the work of relevant Council of Europe organs

40. For the purposes of the present report, it is imperative to highlight the current status of the environmental protection afforded by the Convention and the Charter as interpreted by the Court and the ECSR respectively.

41. The Court has so far ruled on some 300 environment-related cases purporting to raise under Articles 2, 3, 6(1), 8, 10, 11, 13 and Article 1 of Protocol No.1 to the Convention.³⁴

42. 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 issue of access to court concerning environmental matters and the failure to enforce final judicial decision on those matters. The Court's Article 8 (right to respect for private and family life and home) caselaw concerns issues such as environmental risk and access to information; industrial pollution; noise

³⁰ 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.

³¹ UN Committee on the Rights of the Child draft general comment No. 26 on children's rights and the environment with a special focus on climate change [UN doc no. to be updated].

³² <https://www.ohchr.org/en/special-procedures/sr-environment/annual-thematic-reports>

³³ Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, UN Doc. A/HRC/37/59 (2018), annex.

³⁴ See 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).

pollution; mobile phone antennas; emission from diesel vehicles; soil and water contamination; urban development; or 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 whereas under Article 11 (freedom of assembly and association) it dealt with the right to assemble and associate for collective action in the interest of environmental matters. The Court's caselaw on Article 1 of Protocol No.1 to the Convention (protection of property) ranges from the revocation of licences; the withdrawal of building permits to States' positive obligations concerning the protection of property in case of natural disasters. Under Article 13 (the right to an effective remedy) it examined the issue of the right to an effective remedy pertaining to the substantive rights listed above. Thus, various environmental claims can already be brought before the Court, framed in terms of traditional civil and political rights.

43. It should be noted that the Court develops its interpretation of the text of the Convention in response to legal, social, ethical or scientific developments, by application of the "living instrument doctrine".³⁵ This allows the Court to respond to new challenges. As a result, the Court's caselaw concerning environmental matters is not set in stone. The Court may further develop its jurisprudence in response to the triple planetary crises to accommodate environmental concerns more broadly.

44. Thus, there might be room for the introduction of international environmental law "ecological minimum standards" such as sustainable development, the precautionary principle or *in dubio pro natura* into the Convention system.³⁶ The Court has previously applied the "living instrument doctrine" to incorporate new concepts into the existing provision of the Convention.³⁷ It is therefore argued that through the application of this evolutive interpretation, considerations of 'ecological minimum standards' could be incorporated to the 'fair balance' review of the Court.

45. The Court is also faced with novel claims in the form of climate change applications. At present, there are three systemic climate change mitigation cases under examination by the Grand Chamber of the Court,³⁸ with six other cases adjourned until the Grand Chamber has ruled in these three cases.³⁹ The Court has previously declared two applications inadmissible for lack of victim status.⁴⁰

46. Broadly speaking, these cases concern similar procedural (the victim status of applicants or the extraterritoriality of human rights obligations) and substantive questions (the applicants in these cases variously rely on Articles 2, 3, 8, 13, 14 and Article 1 of Protocol No. 1 to the Convention), including the States' failure to adhere to their positive obligations by their alleged non-compliance with their commitments under the 2015 Paris Agreement.⁴¹

³⁵ *Tyrer v. the United Kingdom*, application no. 5856/72, judgment of 25 April 1978, § 31.

³⁶ Kobylarz, Balancing its way out of strong anthropocentrism: Integration of 'ecological minimum standards' in the European Court of Human Rights 'fair balance' review', *Journal of Human Rights and the Environment*, Edward Elgar 2022.

³⁷ The examples include: (i) the right to access to a court in civil matters and Article 6, see *Golder v. the United Kingdom*, application no. 4451/70, judgment of 21 February 1975, § 36; (ii) the right not to be compelled to join an association or a union and Article 11, *Young, James and Webster v. the United Kingdom*, application nos. 7601/76; 7806/77, judgment of 13 August 1981, § 57; or (iii) the prohibition the death penalty in all circumstances and Article 2, *Al-Saadoon and Mufdhi v. the United Kingdom*, application no. 61498/08, judgment of 2 March 2010, § 120.

³⁸ *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, application no. 53600/20; *Carême v. France*, application No. 7189/21; and *Duarte Agostinho and Others v. Portugal and 32 Others*, application no. 39371/20.

³⁹ Press Release issued by the Registrar of the Court, ECHR 035 (2023), 3 February 2023.

⁴⁰ *Human Being and Others v. the United Kingdom*, application no. 36959/22, *Plan B. Earth and Others v. the United Kingdom*, application no. 35057/22.

⁴¹ Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.

47. The currently pending climate change cases invite the Court to further develop its interpretation of the level of protection afforded by the Convention, in potentially far-reaching ways. These applications raise both substantive and procedural issues. In the context of climate change, procedural questions regarding extra-territorial jurisdiction, standing requirements, and victim status are raised. On substance, the limits of the subsidiarity principle, States' margin of appreciation, and the balancing of economic and environmental interests are among the key issues. Even if the pending applications do not result in a finding of a violation, further applications may be expected given the urgency of climate change and its current and projected impacts on the effective enjoyment of human rights.

48. As to the Charter, while it does not contain any provisions which refer expressly to environmental issues, the ECSR through its activity of monitoring and interpreting the Charter, has been able to make an important contribution to clarifying and putting into practice the relationship between environmental protection and social rights. This has been possible, in particular, with regard to the application and interpretation of the right to protection of health, which is enshrined in Article 11 of the Charter.

49. Article 11 of the Charter obliges States to take appropriate measures to remove as far as possible the causes of ill health, and to prevent epidemic, endemic and other diseases. According to the ECSR, this means that public health systems must respond appropriately to avoidable health risks, i.e. 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.⁴²

50. Following such an approach, 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,⁴³ and to protect the population against, for example, nuclear hazards⁴⁴ as well as against health risks related to asbestos.⁴⁵ Likewise, situations where availability of drinking water represents a problem for a significant proportion of the population has been considered by the ECSR to be in breach of Article 11 of the Charter.⁴⁶ It is also notable that in the case of States that have not accepted Article 31 (right to housing), the enforcement of public health standards in housing is required under Article 11.⁴⁷

51. Like the Convention, the Charter is also considered as a living instrument, in that the charter and the rights and freedoms set out in it are to be interpreted "in the light of current conditions."⁴⁸ The ECSR, similarly to the Court, is able therefore to respond to new challenges by the application of this interpretative doctrine.

52. On 27 September 2022, the Committee of Ministers adopted a reform package aimed at modernising the European Social Charter system with a view to increasing the effectiveness of

⁴² Marangopoulos Foundation for Human Rights (MFHR) v. Greece, complaint no.30/2005, decision on the merits of 6 December 2006, §§ 194-195, §202.

⁴³ Ibid. §§ 203, 209, 210 and 215.

⁴⁴ Conclusions XV-2 (2001), France; Conclusions XV-2 (2001), Denmark.

⁴⁵ Conclusions XVII-2 (2005), Latvia.

⁴⁶ Conclusions 2013, Georgia.

⁴⁷ Conclusions XVII-2 (2005), Portugal.

⁴⁸ International Commission of Jurists v. Portugal, Complaint No. 1/1999, E.C.S.R. § 32 (1999). This decision echoes the approach and the language used by the European Court of Human Rights in the context of the European Convention.

the system.⁴⁹ This reform concerns also the reporting system (one of the two existing monitoring mechanisms) under the Charter which is evolving from a general and formal reporting by States on each Charter provision, to a targeted and strategic choice of issues that States are called upon to report on. This may represent an opportunity to include environmental issues within the scope of the new formal reporting procedure.⁵⁰

53. The ECSR may also adopt “statements of interpretation” specifically dedicated to environmental issues.⁵¹ Examples of this practice in other contexts are the two Statements on the right to protection of health in times of pandemic, and on COVID-19 and social rights, that the Committee adopted in 2020 and 2021. This exercise could also encompass the impact of environmental issues on a number of social rights other than Article 11: the right to safe and healthy working conditions (Article 3 of the Charter), the right of children and young persons to protection (Article 7 and 17), the right to protection against poverty and social exclusion (Article 30) and the right to housing (Article 31).⁵²

iii. Human rights and environmental protection in the European Union

54. Besides the international instruments listed above, the European Union (EU), through its primary and secondary legislation, also offers a wide range of legal instruments for the protection of the environment; however, there is no recognition of an autonomous right to a clean, healthy and sustainable environment within the legal system of the European Union.

55. In terms of primary legislation, Article 3 of the Treaty on European Union (TEU) and Articles 6, 11, and 191 – 193 of the Treaty on the Functioning of the European Union (TFEU) set a series of principles and criteria, which must be respected by the institutions in defining and implementing the environmental policy. Moreover, the Charter of Fundamental Rights of the European Union states that “[a] high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development”.

56. In terms of secondary legislation EU institutions have adopted a range of EU instruments and procedures to ensure a high level of protection of the environment in the form of regulations and directives.

57. Moreover, EU legislation on the environment is applicable for Member States of the European Economic Area (EEA) as set out in Annex XX of the EEA Agreement.⁵³ Notably, in the preamble to the EEA Agreement, the contracting parties state their determination to preserve, protect and improve the quality of the environment and to ensure prudent and rational utilisation of natural resources on the basis of the principle of sustainable development.

58. The EU enlargement process also provides an opportunity for the protection of the environment through EU legislation as candidate countries (Albania, Moldova, Montenegro, the Republic of North Macedonia, Serbia, Turkey, Ukraine) and potential candidate countries (Bosnia

⁴⁹ CM(2022)114-final, 1444th meeting, 27 September 2022.

⁵⁰ CDDH-ENV Extended summary of the exchange of views with external independent experts and representatives of the Parliamentary Assembly and the European Committee on Social Rights (13-15 September 2022) prepared by the Secretariat [Extended Summary], p. 63.

⁵¹ Extended Summary, p. 64.

⁵² Statement of interpretation on the right to protection of health in times of pandemic (adopted by the Committee on 21 April 2020); Statement on COVID-19 and social rights adopted on 24 March 2021.

⁵³ Annex XX of the Agreement on the European Economic Area. <https://www.efta.int/media/documents/legal-texts/eea/the-eea-agreement/Annexes%20to%20the%20Agreement/annex20.pdf>

and Herzegovina, Georgia, Kosovo) are required to implement the EU *acquis* in their respective legal systems prior to becoming EU Member States.⁵⁴

B. Overview of existing Council of Europe and other international instruments relevant to the environment and human rights

59. The following table presents an overview of existing Council of Europe and other international instruments relevant to the environment and human rights.

⁵⁴ See the “Copenhagen Criteria”, <https://www.consilium.europa.eu/media/21225/72921.pdf>

Instrument	Legal Status	Material Scope	Monitoring Mechanism	Complaints procedure	Legal status of the monitoring mechanism's decisions	Ratifications by Council of Europe Member States
Council of Europe						
1950 European Convention on Human Rights (ETS No. 5)	Binding	Articles 2,3,8,10,11,6(1), 13 and Art. 1 of Protocol 1 to the Convention have been relied upon for environmental matters.	European Court of Human Rights	Individual applications lodged by any person, group of individuals, company or NGO claiming to have suffered a violation of their rights. Inter-State application. No <i>actio popularis</i> . Exceptionally, an NGO may have standing before the Court without being a victim of the alleged violation.	Binding	46
1961 European Social Charter (ETS No. 35)	Binding	Articles 2,3,11 and 31 of the Charter have been related to human rights and the environment.	European Committee of Social Rights	Collective complaints procedure lodged by the social partners and non-governmental organisations	Non-binding	42 <i>16 States have accepted the collective complaints procedure</i>

1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano) (ETS No. 150)	Binding	Aims to ensure the adequate compensation for and prevention of damage resulting from activities dangerous to the environment.	Standing Committee	No complaints procedure	-	0 (never entered into force)
1998 Convention on the Protection of the Environment through Criminal Law (ETS No. 172)	Binding	The Convention aims to protect the environment by the means of criminal law and harmonise national legislation on the subject. The preamble makes reference to the need to protect the life and health of human beings and Article 2 of the Convention obliges the Parties to adopt measures to establish criminal offences which through environmental harm causes death or serious injury to any person or creates a significant risk of causing death or injury.	European Committee on Crime Problems, or an arbitral tribunal, or the International Court of Justice, as agreed upon by the Parties concerned.	No complaints procedure	-	1 (never entered into force)
Committee of Ministers Recommendation (2022)20 to member States on human rights and the protection of the environment	Non-binding	The CM <i>i.a.</i> recommends that member States actively consider recognising the human right to a clean, healthy and sustainable environment at the national level.	-	-	-	-
United Nations						
1998 Convention on Access to Information, Public Participation in Decision-making and Access to	Binding	Procedural dimensions of the right to a healthy environment, including “access rights” to information, participation and justice. It also requires that people exercising these rights are not persecuted, penalised or harassed for doing so.	The Compliance Committee	Individual and collective mechanism allowing for members of the public including both NGOs and	Non-binding	41

Justice in Environmental Matters (Aarhus Convention) (2161 UNTS 447)				individuals to make communications.		
1966 International Covenant on Civil and Political Rights (999 UNTS)	Binding	The ICCPR does not explicitly recognize a human right to a healthy environment. However, the Committee has addressed the impact of environmental harm on the enjoyment of a number of civil and political rights.	Human Rights Committee	Individual complaint procedure	Non-binding	46
1966 International Covenant on Economic Social and Cultural Rights (993 UNTS)	Binding	The ICESCR does not explicitly recognize a human right to a healthy environment. However, the Committee has interpreted the right to health to include certain environmental obligations.	Committee on Economic, Social and Cultural Rights	Individual complaint procedure	Non-binding	46
2015 Paris Agreement (3256 UNTS)	Binding	The Paris Agreement aims at enforcing a response to climate change globally. In the preamble of the agreement States are called upon, when taking action to address climate change, to "respect, promote and consider their respective obligations on human rights".	Implementation and Compliance Committee	No complaints mechanism	-	46
1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environment Modification Techniques (ENMOD)	Binding	ENMOD was adopted to prohibit the use of environmental modification techniques as a means of warfare. It recognises that military or any other hostile use of such techniques could have effects extremely harmful to human welfare and it intends to eliminate the dangers to mankind from such use.	Article V of the Convention provides for a consultation mechanism to solve any problem arising in relation to the objectives and in the application of the provisions of the Convention,	No complaints mechanism	-	27

			including the establishment of a Consultative Committee of Experts to be chaired by the Secretary-General of the United Nations.			
1972 Stockholm Declaration	Non-binding	The Stockholm Declaration is the outcome of the UN Conference in 1972. It was the first international document to recognise the link between human rights and the environment.	-	-	-	-
2020 Human Rights Council Resolution 44/7	Non-binding	On human rights and climate change.	-	-	-	-
2020 Human Rights Council Resolution 45/17	Non-binding	On the mandate of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes	-	-	-	-
2020 Human Rights Council Resolution 45/30	Non-binding	On realizing the rights of the child: through a healthy realizing the rights of the child through a healthy environment	-	-	-	-
2021 Human Rights Council Resolution 46/7	Non-binding	On human rights and the environment.	-	-	-	-
2021 Human Rights Council Resolution 48/13	Non-binding	First recognition of the right to a clean, healthy and sustainable environment as a human right.	-	-	-	-
2022 UN General Assembly Resolution (A/76/L.75)	Non-binding	This UNGA resolution recognizes the human right to a clean, healthy and sustainable environment.	-	-	-	-

2018 UN Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (A/HRC/37/59)	Non-binding	In this report the Special Rapporteur on Human Rights and the Environment presents the Framework Principles on Human Rights and the Environment which encourages States to not only 'respect, protect and fulfil' the right to a safe, clean, healthy and sustainable environment, but also to protect environmental human rights defenders and the freedom of association, expression and peaceful assembly.	-	-	-	-
Other international instruments applicable to Council of Europe member States						
1977 Geneva Conventions relating to the Protection of Victims of International Armed Conflicts (Protocol I)	Binding	Protocol I supplements earlier principles and rules of international humanitarian law, and contains some important rules prohibiting a wide range of acts destructive of the environment in time of armed conflict.	No direct monitoring mechanism	No complaints mechanism	-	46

60. The Convention on the Protection of the Environment through Criminal Law (ETS No.172) (the 1998 Convention) was the first international, legally binding instrument mandating criminalisation of behaviour that is environmentally damaging. The preamble and section 2 of the existing convention on this issue make clear that its underlying purpose is to protect human life and health. The 1998 Convention did not, however, enter into force as the required threshold of three ratifications has never been attained.⁵⁵ On 23 November 2022, the Committee of Ministers adopted Terms of Reference for the Committee of Experts on the Protection of the Environment through Criminal Law (PC-ENV) to elaborate a new convention, to supersede and replace the 1998 Convention.⁵⁶

C. The human right to a healthy environment

61. Presumably, the closest alignment and the strongest expression of the interdependence of environmental protection and human rights is achieved by the recognition of a human right to a healthy environment. Such a right has in fact been recognised, as mentioned above, in different accentuations and formulations, in a number of international, regional and national fora. The content, reach and implications of such a right, however, remain unclear.

62. The present section gives an overview of existing codifications, political endorsements and jurisprudential recognition of the right and examines, as far as possible, the content, reach and implications of the right in different jurisdictions. It uses the term “human right to a healthy environment” as a generic, “shorthand” term that incorporates the great diversity of qualifying adjectives used in the different instruments. The aim of this section is to give a better understanding of the implications and consequences of codifying the right to a healthy environment.

i. The right to a healthy environment in international law

63. The right to a healthy environment is recognized in (i) international human rights instruments; (ii) international environmental treaties; and (iii) resolutions of international and regional organisations.

a) The right to a healthy environment in regional human rights instruments

The African Charter on Human and Peoples’ Rights

64. The African Charter on Human and Peoples’ Rights (the African Charter), adopted in 1981, is the first human rights convention to include in its Article 24 the right to a healthy environment in the form of a peoples’ right,⁵⁷ which states that

All peoples shall have the right to a general satisfactory environment favorable to their development.

⁵⁵ Only Estonia ratified the Convention in 2002.

⁵⁶ Terms of reference of the Committee of Experts on the protection of the environment through criminal law (PC-ENV), https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a91ebb

⁵⁷ In addition, the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa confers the right to a healthy and sustainable environment to women.

65. Both the African Commission for Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples Rights have a broad understanding of "peoples" that covers the population as the constituent element of the State but also ethnic groups and communities within the State.

66. Article 24 of the African Charter was applied for the first time by the African Commission in the *SERAC v. Nigeria* case. The applicants, two human rights NGOs, had alleged that operations of the State oil company had caused environmental degradation and health problems among the Ogoni people.⁵⁸ The African Charter - "wisely", in the words of the Commission⁵⁹ – allows for *actio popularis*. The Commission held that article 24 of the African Charter required the State "to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources."⁶⁰ To comply with the spirit of Articles 16 and 24 of the African Charter States also need to order or at least permit independent scientific monitoring of threatened environments, require and publicise environmental and social impact studies prior to any major industrial development, undertake appropriate monitoring and provide information to those communities exposed to hazardous materials and activities and provide meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.⁶¹ Because Nigeria had not complied with these obligations, the African Commission found, *inter alia*, a violation of article 24 of the African Charter.

Association of Southeast Asian Nations (ASEAN) Human Rights Declaration

67. The ASEAN Human Rights Declaration, adopted in 2012 by Member States of the Association of Southeast Asian Nations contains the right to a safe, clean and sustainable environment as part of the right to an adequate standard of living.⁶² The Declaration is a soft law instrument that does not provide for a monitoring mechanism.

The Inter-American System for the Protection of Human Rights

68. The American Convention on Human Rights does not explicitly contain the right to a healthy environment. However, this right was included in Article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) that was adopted in 1988 and entered into force in 1999:

1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.
2. The States Parties shall promote the protection, preservation, and improvement of the environment.

⁵⁸ For analysis of the ruling see van der Linde/Louw, Considering the interpretation and implementation of article 24 of the African Charter on Human and Peoples' Rights in light of the SERAC communication, *African Human Rights Law Journal* 2003, 167 ff.

⁵⁹ Communication 155/96, ACHPR/COMM/A044/1 of 27 May 2002, para. 49.

⁶⁰ See above, para. 52.

⁶¹ See above, para. 53.

⁶² Principle 28: "Every person has the right to an adequate standard of living for himself or herself and his or her family including: (...) f. The **right to a safe, clean and sustainable environment.**"

69. As the title indicates, the Protocol of San Salvador conceives the right as an economic, social and cultural right that is to be realized progressively and is dependent on available resources.⁶³ The progressive realization of the rights contained in the Protocol of San Salvador is monitored through a State reporting system.⁶⁴ Individual applications are only possible with respect to two specific rights which do not include the right to live in a healthy environment.⁶⁵

70. The Working Group on the Protocol of San Salvador which examines State Reports has identified five State obligations inherent in the right to live in a healthy environment: (1) the duty to guarantee everyone, without any discrimination, a healthy environment in which to live; (2) the duty to guarantee everyone, without any discrimination, basic public services; (3) the duty to promote environmental protection; (4) the duty to promote environmental conservation; and (5) the duty to promote improvement of the environment.⁶⁶ It also established that the exercise of the right to a healthy environment must be governed by the criteria of availability, accessibility, sustainability, acceptability and adaptability,⁶⁷ as is the case of other economic, social and cultural rights.

71. In its Advisory Opinion OC-23/17 of 2017 (2017 Advisory Opinion) the Inter-American Court of Human Rights (IACtHR) has held that the American Convention, despite its silence on the issue, includes a right to a healthy environment.⁶⁸ In an *obiter dictum*, the IACtHR held that the right to a healthy environment is protected as an economic, social and cultural right under Article 26 of the American Convention,⁶⁹ thereby deviating from the approach of the Protocol of San Salvador and rendering the right justiciable. The IACtHR explained that the right was distinct from the environmental content of other rights such as the right to life and the right to personal integrity in that it

“protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals. This means that it protects nature and the environment, not only because of the benefits they provide to humanity or the effects that their degradation may have on other human rights, such as health, life or personal integrity, but because of their importance to the other living organisms with which we share the planet that also merit protection in their own right.”⁷⁰

⁶³ See Article 1 of the Protocol of San Salvador: The States Parties to this Additional Protocol to the American Convention on Human Rights undertake to adopt the necessary measures, both domestically and through cooperation among states, especially economic and technical, to the extent allowed by their available resources, and taking into account their degree of development, for the purpose of achieving progressively and pursuant to their internal legislations, the full observance of the rights recognized in this Protocol.

⁶⁴ See *ibid.* Article 19.

⁶⁵ *Ibid.*, Article 19 (6).

⁶⁶ “Progress Indicators: Second Group of Rights,” November 5, 2013, OEA/Ser.L/XXV.2.1, GT/PSS/doc.9/13, para. 26.

⁶⁷ See above, para. 29.

⁶⁸ IACtHR, Advisory Opinion OC-23/17 of 15 November 2017 requested by the Republic of Colombia – The Environment and Human Rights.

⁶⁹ **Chapter III - Economic, Social, and Cultural Rights**

Article 26. Progressive Development

The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

⁷⁰ See above, para. 62.

72. However, the IACtHR did not further delve into the content of the new right. The main part of the opinion consists in a detailed analysis of environmental duties derived from the right to life and to personal integrity that had been requested by Colombia.

73. The inclusion of a right to a healthy environment in the economic, social and cultural rights of Article 26 was confirmed in the context of contentious proceedings in the case of Lhaka Honhat.⁷¹ The IACtHR repeated its findings from the 2017 Advisory Opinion and clarified the content of the right insofar as it held that the right includes an obligation to prevent environmental harm.⁷²

74. The IACtHR's progressive stance on environmental protection has been lauded by many. But its jurisprudential recognition of the right to a healthy environment as a justiciable right has also been criticized – even from within the Court⁷³ – for lacking a sound legal basis.⁷⁴ Fundamental objections have been raised with respect to the practice of the IACtHR of deriving justiciable rights from Article 26 of the American Convention in general. With respect to the right to a healthy environment in particular, it has been argued that the Charter of the Organisation of American States (OAS Charter), which was relied upon by the IACtHR for its interpretation of Article 26 of the American Convention, does not contain any reference to environmental protection. In addition, an argument is made *a contrario*, by comparison to the Protocol of San Salvador, which does not qualify the right to live in a healthy environment as a justiciable right. This criticism, however, does not question the existence of a right to a healthy environment as such, but is only directed at its justiciability. The right's justiciability should also be seen in the context of Article 44 of the Convention, which gives NGOs the right to file petitions directly with the Commission without having to obtain the prior agreement of the victims, thereby recognising the possibility of *actio popularis*.⁷⁵

75. The content of the right to a healthy environment as it results from the Court's practice is not yet settled and raises many questions: First, the Court clearly conceives of the right to a healthy environment as an economic, social and cultural right. But the exact content and implications of the right have not yet been clarified. In particular, it remains to be seen what weight the IACtHR will attach to the right in cases where it is in conflict with other American Convention rights and the conflicting rights have to be balanced. Second, as indicated above, the Court's understanding of the right is not an anthropocentric one (as a right attaching to human beings) but rather ecocentric (as a right attaching to nature/ the ecosystem). The concrete consequences of this approach remain unclear, however. Third, in its 2017 Advisory Opinion, the IACtHR affirmed the existence of the right to a healthy environment, but the main parts of the 2017 Advisory Opinion are dedicated to an analysis of the environmental dimension of the right to life and personal integrity. Given that the IACtHR derives ambitious environmental-related obligations from these two traditional rights, the added value of the new right compared to the environmental dimension of the rights to life and personal integrity is not immediately discernible.

⁷¹ IACtHR, Case of the Indigenous Communities of the Lhaka Honhat Association v. Argentina, judgment of 6 February 2020.

⁷² See above, para. 207 et seq.

⁷³ In the Advisory Opinion, see the Concurring Opinions of Judge Eduardo Vio Grossi and Judge Humberto Antonio Sierra Porto. In the Lhaka Honhat case, see their partially dissenting opinions.

⁷⁴ Diego Mejía-Lemos, The right to a healthy environment and its justiciability before the Inter-American Court of Human Rights, Review of European, Comparative & International Environmental Law (RECIEL), 2022, 317, 322 et seq. with further references; Eleanor Benz/Verena Kahl, Das Urteil im Fall Lhaka Honhat, Archiv des Völkerrechts 2021, 199 et seq.

⁷⁵ On individual petitions in the Inter-American system see Laurence Burgorgue-Larsen/Amaya Úbeda de Torres, The Inter-American Court of Human Rights, 2011, 25 et seq., 47.

76. The IACtHR may use the opportunity offered by a recent request for an Advisory Opinion by Chile and Colombia on six aspects concerning States' human rights obligations in the context of climate change to further elucidate the contours of the right to a healthy environment.⁷⁶

b) The right to a healthy environment in environmental treaties

77. Two treaties recognize the right to a healthy environment in an indirect manner: the Aarhus Convention⁷⁷ at the European level, and, more recently, the Escazú Agreement⁷⁸ at the Latin American level. Both treaties regulate rights of access to environmental information, public participation in environmental decision-making, and access to justice in environmental matters, thereby "contributing" to the protection of the "right of every person of present and future generations to live in a clean environment".⁷⁹ These treaties do not guarantee the right to a healthy environment as such, but indirectly recognize its existence. They are widely seen as codifying procedural components of the right to a clean environment.⁸⁰ In that respect, the Escazú Agreement goes one step further than the Aarhus Convention in including specific rights of environmental human rights defenders as one aspect of the human right to a healthy environment.⁸¹

⁷⁶ On the request see Juan Auz/Thalia Viveros-Uehara, Another Advisory Opinion on the Climate Emergency? The Added Value of the Inter-American Court of Human Rights, EJIL: Talk, March 2, 2023, <https://www.ejiltalk.org/another-advisory-opinion-on-the-climate-emergency-the-added-value-of-the-inter-american-court-of-human-rights/>.

⁷⁷ 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).

⁷⁸ 2018 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean

⁷⁹ Article 1 Aarhus Convention: **"In order 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,** each Party shall guarantee 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."

Article 1 Escazú Agreement: "The objective of the present Agreement is to guarantee the full and effective implementation in Latin America and the Caribbean of the rights of access to environmental information, public participation in the environmental decision-making process and access to justice in environmental matters, and 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."

⁸⁰ See Peters, Clean and Healthy Environment, Right to, International Protection, MPEPIL, January 2021, para. 10.

⁸¹ Escazú Agreement Article 9 - Human rights defenders in environmental matters

1. Each Party shall guarantee a safe and enabling environment for persons, groups and organizations that promote and defend human rights in environmental matters, so that they are able to act free from threat, restriction and insecurity.

2. Each Party shall take adequate and effective measures to recognize, protect and promote all the rights of human rights defenders in environmental matters, including their right to life, personal integrity, freedom of opinion and expression, peaceful assembly and association, and free movement, as well as their ability to exercise their access rights, taking into account its international obligations in the field of human rights, its constitutional principles and the basic concepts of its legal system.

3. Each Party shall also take appropriate, effective and timely measures to prevent, investigate and punish attacks, threats or intimidations that human rights defenders in environmental matters may suffer while exercising the rights set out in the present Agreement.

78. Under Article 15 of the Aarhus Convention, communications alleging non-compliance by a state party with the Convention may be brought before the Compliance Committee by one or more members of the public.⁸² The communication may concern a specific case of a person's rights of access to information, public participation or access to justice being violated as a result of the alleged non-compliance of the Party concerned, or relate to a general failure by the Party concerned to implement, or to implement correctly, the provisions of the Convention. NGOs can submit communications to the Compliance Committee for its consideration like any other member of the public.⁸³ It appears that members of the public submitting communications do not have to be affected by the non-compliance alleged – thus the Aarhus Convention system seems to allow *actio popularis*. A similar regime could be established under Article 18 of the Escazú Agreement.

c) The right to a healthy environment in resolutions of international organisations

79. The beginning of the debate on a right to a healthy environment in the UN political process is generally traced back to the Stockholm Declaration on Environment of 1972.⁸⁴ Subsequent UN Declarations and Summits, however, did not follow up and it was only in 2021 that a human right to a healthy environment was recognized at the level of the United Nations.⁸⁵ The right to a clean, healthy and sustainable environment was included first in the Human Rights Council Resolution 48/13 of October 2021⁸⁶ followed by General Assembly Resolution 76/300 in July 2022.⁸⁷

United Nations Human Rights Council Resolution 48/13 of October 2021

80. In its preamble, the HRC Resolution stresses the negative direct and indirect implications of environmental damage for the effective enjoyment of human rights and highlights 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 human rights, including the right to life.” The operative part recognizes the right to a clean, healthy and sustainable environment as a human right that is “related to other rights and existing international law”⁸⁸ and affirms that the promotion of the right requires the full implementation of the multilateral environmental agreements under the principles of international environmental law.

81. Many questions are left unanswered. Is the human right to a healthy environment to be categorized as a social and economic right that is to be fulfilled progressively? The wording “promotion” of the right could point in that direction. The relationship of the new right to other human rights also remains unclear. Does the new right only regroup the environmental aspects contained in pre-existing human rights, such as the right to life, privacy etc. or does it go beyond existing rights? Neither does the resolution reveal who holds the right. The preamble does give

⁸² Article 15 Aarhus Convention, see also paragraphs 18 to 24 of the annex to decision I/7 of the first session of the Meeting of the Parties to the Aarhus Convention, <https://unece.org/fileadmin/DAM/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf>.

⁸³ https://unece.org/DAM/env/pp/Publications/Guide_to_the_Compliance_Committee__second_edition__2019_/English/Guide_to_the_Aarhus_Convention_Compliance_Committee__2019.pdf.

⁸⁴ The Declaration states “Man has the fundamental right to freedom, equality, and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, ...”

⁸⁵ On the developments leading to the adoption of the resolutions in 2021 und 2022 see Peters, Clean and Healthy Environment, Right to, International Protection, Max Planck Encyclopedia of Public International Law (MPEPIL), January 2021.

⁸⁶ UN Doc. A/HRC/RES/48/13 of 18 October 2021 (HRC Resolution).

⁸⁷ UN Doc. A/RES/76/300 of 1 August 2022 (GA Resolution).

⁸⁸ HRC Resolution, 2.

an indication that present and future generations are somehow involved, but how exactly is left open.

United Nations General Assembly Resolution 76/300 of July 2022

82. In its essential elements⁸⁹, the GA Resolution, adopted nine months later, differs only marginally from the wording of the HRC Resolution. In contrast to the latter, it does not specify that the human right to a clean, healthy and sustainable environment is important to the enjoyment of all human rights, thereby potentially strengthening the understanding of the new right as a stand-alone right that is not limited to the environmental aspects of traditional human rights catalogues as interpreted by courts and treaty bodies. In other respects, the questions raised above in relation to the HRC Resolution would be relevant also here.

83. The GA Resolution was accompanied by a number of explanations of votes, some of which question basic tenets of the resolution. One UN member State has held that it was “important to establish a common understanding of the right so that States have clarity as to its scope, as there is not yet a shared view of the basis for the right or of its scope.”⁹⁰ A right to a clean, healthy, and sustainable environment, the State continues “has not yet been established as a matter of customary international law; treaty law does not yet provide for such a right; and there is no legal relationship between such a right and existing international law.” One Council of Europe member State noted that “there is no international consensus on the legal basis of the human right to a clean, healthy and sustainable environment”, that the right was recognized “without due consideration and a common understanding at an international level” of what the right comprises and expressed its understanding “that the right to a clean, healthy and sustainable environment derives from existing international economic and social rights law - as a component of the right to an adequate standard of living, or the right to the enjoyment of the highest attainable standard of physical and mental health”.⁹¹ Another Council of Europe member State noted that “[p]olitical recognition does not have any legal effect” and that it would have liked to see “a reference to future discussions on a human right to a clean, healthy and sustainable environment”, and another that “the potential legal implications of the new right envisioned in the resolution remain to be determined”.⁹²

⁸⁹ GA Resolution, 1 – 3.

⁹⁰ Explanation of Position on the Right to a Clean, Healthy, and Sustainable Environment Resolution by the United States of America, <https://perma.cc/KQQ6-7EMA>; see also ‘The United States Recognizes the Human Right to a Clean, Healthy, and Sustainable Environment’, AJIL 2023, 128 et seq.

⁹¹ <https://www.gov.uk/government/speeches/explanation-of-vote-on-resolution-on-the-right-to-a-clean-healthy-and-sustainable-environment>

⁹² See the explanation of Norway on the Right to a Clean, Healthy and Sustainable Environment Resolution, <https://press.un.org/en/2022/ga12437.doc.htm>.

d) UN Special Rapporteurs' Framework Principles on Human Rights and the Environment

84. In 2018, the UN Special Rapporteur on human rights and the environment, John H. Knox, presented Framework Principles on Human Rights and the Environment (Framework Principles) which reflect “the application of existing human rights obligations in environmental context”.⁹³

85. The Framework Principles set out basic human rights obligations for States as they relate to the enjoyment of the human right to a healthy environment. The Framework Principles intend to help “explain what the content of such a right would include”.⁹⁴

86. The first two principles require states to protect human rights by ensuring a healthy environment and, as a corollary, to respect human rights in order to ensure a healthy environment.⁹⁵ Thus, the Framework Principles highlight the interdependence of human rights and the protection of the environment.

87. Further obligations enunciated by the Framework Principles include the obligation: (i) to respect and protect the rights to freedom of expression, association, and peaceful assembly in relation to environmental matters; (ii) to provide for environmental education and public awareness; (iii) to provide public access to environmental information; (iv) to require the prior assessment of the possible environmental and human rights impacts of proposed projects and policies; (v) to provide for and facilitate public participation in decision-making related to the environment; (vi) to provide for access to effective remedies for violations of human rights and domestic laws relating to the environment;⁹⁶ (vii) non-discrimination in relation to enjoyment of a healthy environment;⁹⁷ (viii) the maintenance of non-retrogressive substantive environmental measures in relation to the progressive realization of economic, social, and cultural rights;⁹⁸ (ix) the monitoring and effective enforcement of compliance with the standards by private actors as well as governmental authorities;⁹⁹ (x) internal cooperation with respect to global or transboundary environmental harm that adversely affects human rights;¹⁰⁰ and (xi) the protection of the rights of those who are particularly vulnerable to environmental harm, including environmental human rights defenders and indigenous peoples.¹⁰¹ In addition States should fulfill their human rights obligations when pursuing sustainable development.¹⁰²

The Council of Europe

88. A more cautious approach is apparent in Recommendation CM/Rec(2022)20 of the Committee of Ministers to member States on human rights and the protection of the environment. Rather than recognizing, as preliminary drafts of the recommendation had done, the right to a clean environment, the Recommendation calls on States to

⁹³ UN General Assembly, ‘Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment’ (24 January 2018) UN Doc. A/HRC/37/59.

⁹⁴ Extended summary, Knox, Expert contribution, p. 27.

⁹⁵ Ibid. paras 4-6 (Framework Principles 1-2).

⁹⁶ Ibid. paras 10-30 (Framework Principles 5-10).

⁹⁷ Ibid. paras 7-9 (Framework Principle 3).

⁹⁸ Ibid. paras 31-33 (Framework Principle 11).

⁹⁹ Ibid. paras. 34-35 (Framework Principle 12).

¹⁰⁰ Ibid. paras. 36-39 (Framework Principle 13).

¹⁰¹ Ibid. paras. 10-11, 40-53 (Framework Principles 4, 14, 15).

¹⁰² Ibid. Paras 54-55 (Framework Principle 6).

“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”.

89. The Recommendation presupposes the existence of the right, but does not recognize it. At the same time it acknowledges the difficulties in conceptualizing and delimiting the right, by inviting States to reflect on its nature, content and implications.

ii. The right to a healthy environment in national law

90. The following section describes the state of national laws with respect to the right of a healthy environment on the basis of the answers to a questionnaire addressed by the expert group to member States. The questionnaire posed the following questions: (i) is some explicit form of human right to a healthy environment protected under the constitution, legislation or jurisprudence, and if so in what terms; (ii) is the right justiciable, and if so on what conditions; (iii) what, if anything, have the domestic courts said about this right in their caselaw?

91. To the first question, 20 member States have answered in the positive with 7 member States (Austria, Denmark, Estonia, Germany, Sweden, Switzerland and the UK) answering in the negative. To the second question, 16 member States have answered in the positive with 11 member States (Armenia, Austria, Belgium, Denmark, Estonia, Germany, Malta, the Netherlands, Sweden, Switzerland and the UK) answering in the negative. To the third question, 18 member States have answered in the positive by providing examples with 9 (Andorra, Armenia, Denmark, Estonia, Malta, the Netherlands, Sweden, Switzerland and the UK) answering in the negative.

92. Due to the limited number of replies and the inherent limitations of such an approach, this section cannot draw an exhaustive picture. Rather, it provides a broad overview and identifies general trends.

93. The right to a healthy environment is recognized at national level as a human/ fundamental right in a majority of Council of Europe member States. These member States mostly mention the protection of the environment in the human rights section of their constitutional texts and thus formally recognise it as a fundamental right. Most member States define the scope of the right by including a reference to human well-being and/or human quality of life in the relative provisions. The most common wording for the illustration of this link of environmental protection to the individual is the guarantee of a “healthy environment” or an environment “favorable/ conducive to health”. Other member States use attributes such as “benevolent” or “habitable” in relation to the environment and “decent” or “enjoyable” in relation to the quality of life. Right holders are always human beings; no member State defines the environment or nature itself as a legal subject entitled to protection.

94. Most of the human rights provisions on the environment are rather vague about the content of the right to a healthy environment, leaving the subject to legislative or judicial concretization. Some member States, however, provide more details on the protected environmental goods. In almost all member States, the Supreme and/ or Constitutional Courts play an important role in applying and developing the right to a healthy environment. The level of ambition varies greatly depending on national particularities and on the type of cases brought before these courts so far.

95. All member States conceive the obligations on States inherent in the 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 recognized everywhere. In addition, some member States have recognized a positive obligation to protect the environment, in the sense of positively ensuring and creating conditions for a healthy environment. All Member States leave a vast margin of appreciation to the legislator in deciding on the means used to fulfill their obligations. In several member States, international treaties such as the Paris Agreement or the Aarhus Convention and the law of the European Union are seen as limiting the discretionary power of the legislator, thereby narrowing the competence to decide over the adoption of specific measures.

96. The answers to the questionnaire do not allow one to draw conclusions on the extent to which the right to a healthy environment is considered to be relevant for cases concerning the direct impact of environmental degradation or the triple planetary crisis on individuals. National courts in some member States seem to see the right to a healthy environment as being engaged in these cases even if no specific consequences for individuals are established.¹⁰³

97. As a corollary to the right to a healthy environment, most member States provide for rights of access to environmental information, public participation in environmental decision-making, and access to justice in environmental matters. For member States that are party to the Aarhus Convention, these provisions are mandatory.

98. In most member States that provide for the right to a healthy environment as a human right in their national law, the right is justiciable in the same way as other human rights. This means that notably the admission of annulment actions against administrative decisions and - if generally admitted in the domestic judicial system – the constitutional review of legislative acts is possible. Some Member States give a right of action to non-governmental organisations and/or local and regional public territorial bodies, others even provide for the possibility of *actio popularis*. Other Member States which recognize the right to a healthy environment in their national law, however, do not conceive the right as being justiciable.

99. It is to be noted that a number of member States that do not recognize a human right to a healthy environment have codified environmental protection as a constitutional principle or objective. These States describe the maintenance of a healthy environment 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. Some constitutions even accord primacy of environmental protection over other (constitutional) principles¹⁰⁴ or otherwise visibly prioritise environmental protection as a leading principle within their national constitutional framework. As is the case with a fundamental right to a healthy environment, this objective guarantee of environmental protection is open to judicial interpretation and is, as demonstrated by the answers, effectively shaped in the jurisprudence of the domestic courts. Member States following this objective model of environmental protection have reported on substantial jurisprudential evolutions. The combination of traditional

¹⁰³ The Portuguese Supremo Tribunal de Justiça for example established that the constitutional right to a „healthy environment“ also includes the conservation of biodiversity.

¹⁰⁴ 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.“

fundamental/human rights with a constitutional principle of environmental protection generates results that are usually associated with the human right to a healthy environment.¹⁰⁵

iii. Content and justiciability of the right to a healthy environment

100. At this point in time, the right to a healthy environment proves to be elusive. While there is no doubt that it is recognised as a justiciable right in several regional human rights systems, its status in general international law is less clear and controversial. At this stage it may best be described as a slowly developing norm (of customary international law). Just as for its status, its content remains uncertain and interpretations vary widely. The preeminent importance of courts in shaping the contours of the new right is a cross-cutting feature in all jurisdictions examined. It has been suggested that in the end, the right to a healthy environment is nothing new;¹⁰⁶ others consider the right to be revolutionary, or to be somewhere in between. These differing views, however, are not surprising with respect to a new right of a general and abstract nature that has not yet been sufficiently applied by human rights bodies so as to allow the deduction of general standards. One of the fundamental questions left open is the extent to which the existence of a right to a healthy environment allows individuals or NGOs to make claims related to the public interest of environmental protection without being affected personally in a direct way. Another unanswered question relates to the role of the right in inter-environmental conflicts, just as in conflicts with traditional human rights. There is also uncertainty with respect to the holder of the right: Might nature as such be considered as right-holder as the practice of the IACtHR seems to suggest? Are future generations right-holders?

101. This assessment of the situation under national laws shows that strong environmental protection may also be achieved in the absence of a right to a healthy environment when traditional fundamental/human rights interact with a constitutional principle of environmental protection.

D. Rationales for a further instrument

102. The following section sets out possible rationales for a new instrument on human rights and the environment and analyses their underlying assumptions.

i. Addressing gaps in member States' international legal obligations

a) Gaps in international environmental law

103. One rationale put forward for a further instrument is the need to address gaps in member States international obligations of environmental law. Most of the arguments focus on the issue of climate change which has turned out to be a catalyst for the discussion on the codification of the right to a healthy environment in the Convention system. The Paris Climate Agreement is based on the voluntary reduction of carbon emissions and there is a prevalent sentiment – borne

¹⁰⁵ 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.

¹⁰⁶ Extended summary, Knox, Expert contribution, p. 27: “The human right to a healthy environment is not an empty vessel waiting to be filled; on the contrary, its content has already been clarified, through recognition by human rights authorities that a safe, clean, healthy and sustainable environment is necessary for the full enjoyment of many human rights, including the rights to life, health, and private and family life.”

out by the latest IPCC report, which describes an “emissions gap” between States’ commitments and the results of the measures they have taken¹⁰⁷— that States are not doing enough to reach these targets. The Paris Climate Agreement itself, however, does not include an enforcement mechanism. Against this background, the human rights framework and in particular the Convention system with its authoritative Court and its binding judgments becomes attractive as a way to force States to live up to their commitments.¹⁰⁸ In this perspective, the Court could become “a shield against a global threat which cannot be adequately addressed through the other rules and systems that the broader international legal order contains”.¹⁰⁹ The lack of binding rules on mitigation measures in international environmental law together with a lack of enforcement mechanisms at international level constitute gaps that should be filled, it is argued, by having recourse to human rights. It has also been pointed out that international environmental law has a strong focus on transboundary harm but lacks standards that address pollution as such. A human rights approach would allow to address these issues which international environmental law does not.¹¹⁰

104. At the same time, framing climate change issues or environmental issues more generally as human rights issues meets scepticism or even open criticism.¹¹¹ Several objections are being raised:

- Human rights bodies have no mandate to enforce international environmental law. Unlike a national court bound by a state’s international legal obligations, the Court’s mandate, under Article 19 of the Convention, is limited to ensuring the observance of the States parties’ Convention obligations.¹¹² This does not mean that international environmental law is irrelevant for the Court,¹¹³ but that its impact is less direct than in the case of national courts.
- A human rights-focused approach looks exclusively at the relationship between the applicant and the State. Climate change issues in particular, as well as other environmental issues, however, are multidimensional and involve issues of distributive justice. They therefore require a holistic approach:¹¹⁴ Who has to bear the economic costs of reduction measures? How to solve trade-offs between fighting climate change and other

¹⁰⁷ See A. 4.3 of the Synthesis Report of the IPCC, Sixth Assessment Report (ar6), Summary for Policymakers, IPCC AR6 SYR.

¹⁰⁸ Keller/Pershing, *Climate Change in Court: Overcoming Procedural hurdles in Transboundary Environmental Cases*, ECHRL 2022, 23, 27.

¹⁰⁹ Tzevelekos and Dzehtsiarou, *Climate Change: The World and the ECtHR in Uncharted Waters*, ECHRLR 3(1), 1-7 (2022).

¹¹⁰ Extended summary, Knox, Expert contribution, p. 25.

¹¹¹ See for example Benoit Meyer, *Climate Change Mitigation as an Obligation Under Human Rights Treaties?*: American Journal of International Law 2021, 409, 451: “International human rights law encourages each state to protect the rights of individuals within its territory rather than to cooperate on the global common good. This inherent tension between national interests and international cooperation will not be solved through an incremental extension of international human rights law, be it through the recognition of new rights (e.g., to a healthy environment or a sustainable climate), the identification of fictitious rights-holders (e.g., “future generations” or “Mother Earth”), or the extension of the extraterritorial application of human rights treaties—not, that is, without betraying the text, and the object and purpose, of human rights treaties, and using them as a Trojan horse at the service of extraneous objectives.”

¹¹² Eicke, *Climate Change and the Convention: Beyond Admissibility*, European Convention of Human Rights law Review (ECHRL), 2022, 8, 12.

¹¹³ See on the challenge of the interaction between the Convention and other branches of international law the report of the CDDH adopted at its 92nd meeting (Strasbourg, 26–29 November 2019) on *The Place of the European Convention on Human Rights in the European and International Legal order*.

¹¹⁴ Tzevelekos/Dzehtsiarou, *Climate Change: The World and the ECtHR in Uncharted Waters*, ECHRL 2022, 1, 5 et seq.

objectives such as environmental protection? How to provide for intergenerational equity?¹¹⁵ These issues, it is argued, require policy choices¹¹⁶ made and implemented in the democratic process. The fundamental principle of separation of powers precludes courts from making these choices.

- Human rights bodies lack expertise in environmental issues.¹¹⁷ Climate change in particular involves highly technical questions and requires scientific knowledge. It is true that this would not be the only instance where human rights bodies would depend on outside expertise. Depending on the extent of such reliance and its relationship with the existing nature of proceedings before such bodies, it could fundamentally change the nature of human rights litigation.
- If human rights bodies force States' hand in environmental issues, this may raise renewed questions about the extent of the Court's jurisdiction and "judicial activism".
- If a regional human rights body such as the Court applies the Convention in such a way as to, in effect, enforce international environmental treaties such as the Paris Agreement, this could be seen as creating differential treatment of the parties to the treaties.

b) Gaps in international human rights law

105. Another line of argument focuses on gaps in the human rights system and in particular the system of the Convention and the Charter itself.

The European Convention on Human Rights

106. The current jurisprudence of the Court in particular is seen as establishing obstacles to litigation of human rights cases with environmental aspects. Very often, an emphasis is being made here as well on climate change litigation which is seen to be different in nature from the more traditional environmental cases the ECtHR has decided so far: "Claims in relation to climate change are much more complex in terms of causes and effects, indeterminate in terms of individualised harm, and unclear as to the possible measures to be adopted."¹¹⁸

107. The obstacles and limits that are mainly being deplored are the following:

- According to Article 1 of the Convention, the victim of an alleged Convention violation needs to be subject to a Member State's jurisdiction. This is the case where the victim is within a territory under the effective control of a State or under the authority and control of a state agent. Cases of transboundary harm and climate change typically pose extraterritoriality problems as the pollution originates in one State but impacts individuals in another state.¹¹⁹ There is no territorial control and no jurisdiction either under the personal heading or under the approach used by the Court so far. There have been

¹¹⁵ The explanatory report to CM/Rec(2022)2 noted that the expression "intergenerational equity" "implies that present generations should take account of the environmental impact of their activities on future generations"; see also the UN Framework Convention on Climate Change, Article 3.1.

¹¹⁶ Pedersen, Any Role for the ECHR when it comes to climate Change?, ECHRL 2022, 17, 19.

¹¹⁷ Tzevelekos and Dzehtsiarou, Climate Change: The World and the ECtHR in Uncharted Waters, ECHRL 2022, 1, 4 et seq.

¹¹⁸ Ibid., 1, 3.

¹¹⁹ Extended summary, Raible, Expert contribution, p. 34.

developments of the Court's jurisprudence on jurisdiction,¹²⁰ but so far, unlike the United Nations human rights treaty bodies, the Court has not accepted control over the source of a harm as capable of founding jurisdiction under Article 1. Very often, therefore, climate change cases as well as cases of transboundary harm may encounter problems of admissibility on account of failure to establish jurisdiction.¹²¹

- The victim requirement (Article 34 ECHR) in principle excludes *actio popularis*. Non-governmental organisations may only bring applications in their own name, as long as they are themselves negatively affected by the measure which is the object of the application.¹²² NGO standing without the need to establish victim status, however, is seen as necessary to alleviate the burden on individual victims, by facilitating access to justice for those who are poorly placed to commence litigation because they lack the time, resources, or expertise.¹²³ NGO standing would also allow the Court to circumvent the potential issue of mass individual applications and thereby alleviate the burden on the Court.
- The requirement to exhaust domestic remedies, an expression of the principle of subsidiarity, places a high burden on applicants in climate change cases.¹²⁴ As global climate change by its very nature is caused by the acts or omissions of a multitude of States, an application needs to be brought against a multitude of States if it is to lead to a practically effective outcome. The need to exhaust local remedies in each of these States – an issue which is also being examined by the Court in the cases currently before it – is time-consuming and costly.
- The Convention is limited to individual rights, it does not recognize collective rights. Neither does it protect the rights of future generations.
- The fact that in order to succeed applicants need to show that environmental degradation affects their Convention rights limits the provision of environmental justice under the Convention.¹²⁵ The right to privacy as enshrined in Article 8 of the Convention does offer the possibility for a broader inclusion of environmental concerns. The Court has held that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.¹²⁶ However, the applicant still needs to show the existence of a harmful effect on his or her private or family life and not simply the general deterioration of the environment.¹²⁷ This criterion is difficult to fulfill with respect to loss of biodiversity for example as the case of *Kyrtatos v Greece* illustrates. In that case,

¹²⁰ *Carter v. Russia*, application no. 20914/07, judgment of 21 September 2021; *Georgia v. Russia (II)* application no. 38263/08, Grand Chamber judgment of 21 January 2021; *Ukraine and The Netherlands v. Russia*, applications nos. 8019/16, 43800/14 and 28525/20, Grand Chamber decision of 30 November 2022.

¹²¹ Extended summary, Raible, Expert contribution, p. 35.

¹²² There are exceptions, however, see *Centre for Legal Resources on Behalf of Valentin Câmpeanu v. Romania*, application no. 47848/08, Grand Chamber judgment of 17 July 2014., § 104 et seq.

¹²³ Extended summary, Keller, Expert contribution, p. 6-7; Lambert, Expert contribution, p. 44 ; Keller/ Pershing, *Climate Change in Court: Overcoming Procedural Hurdles in Transboundary Environmental Cases*, ECHRL 2022, 23, 37 et seq.

¹²⁴ Keller/Pershing, *Climate Change in Court: Overcoming Procedural Hurdles in Transboundary Environmental Cases*, ECHRL 2022, 23, 34.

¹²⁵ Extended summary, Knox, Expert contribution, p. 26. ECtHR, *Pavlov and others v. Russia*, no. 31612/09, 11 October 2022, Concurring opinion of Judge Serghides, no. 21.

¹²⁶ *Lopez Ostra v. Spain*, application no. 16798/90, judgment of 9 December 1994, § 51.

¹²⁷ *Kyrtatos v Greece*, application no. 41666/98, judgment of 22 May 2003, § 53.

the applicants complained about the destruction of a swamp adjacent to their property that was an important natural habitat for various protected species (such as birds, fishes and sea-turtles) by an urban development. The Court held that “the applicants have not brought forward any convincing arguments showing that the alleged damage to the birds and other protected species living in the swamp was of such a nature as to directly affect their own rights under Article 8 § 1 of the Convention.”¹²⁸ In addition, the threshold of severity or seriousness that is required according to the Court’s jurisprudence is also mentioned as an obstacle that seriously curtails the possibility for applicants to rely on Conventions rights in cases of environmental harm.¹²⁹

- The Court’s limited power and/or willingness to order environmental remedies is also deplored.¹³⁰ While the payment of just satisfaction is adequate to compensate for individual harm resulting from environmental damage, remedial measures of a general nature are required to put an end to structural environmental problems.
- The precautionary principle and other principles of environmental law do not play a sufficient role in the Court’s jurisprudence.¹³¹ While the Court has applied the principle in *Tatar*¹³², in newer cases the Court is seen to have been more reluctant to do so.
- The Court does not provide sufficient protection to human rights defenders.¹³³

108. In essence, many of these obstacles may be traced back to the nature of the Convention as a human rights treaty that centers around individual justice and is limited to civil and political rights. They illustrate the fact that under its current design, the Convention system, while providing individual justice in the environmental context, is not an adequate forum to litigate issues of environmental justice more generally. Naturally, these obstacles can be overcome by changing the rules. These changes, however, are not benign. They constitute a departure from well-established procedural and substantive approaches of human rights law and thereby fundamentally alter the nature of the ECHR system. Changing the Convention in a way that the Court would be able to rule on the substance of the *Kyrtatos* case for example would mean that the Court would rule on cases where there is no discernible individual interest engaged, but only the public/collective interest¹³⁴ in preserving biodiversity.

109. At the same time, it is said that the process of “greening human rights” had already clarified the content of human rights law with respect to environmental protection. This is reflected in the Framework Principles which set out the already existing obligations of States. Consequently, the recognition of the right to a healthy environment would not create new obligations, but would rather permit the existing “normative *acquis*” to be consolidated instead of being fragmented across a range of instruments.¹³⁵ Introduction of the right to a healthy environment would therefore

¹²⁸ Ibid.

¹²⁹ Extended summary, Keller, Expert contribution, p. 2.

¹³⁰ Extended summary, Keller, Expert contribution, p. 3.; Lambert, Expert contribution, p. 4 ; Moutquin, Expert contribution p. 56;; Keller/Heri/Piskóty, Something Ventured, Nothing Gained? – Remedies before the ECtHR and Their Potential for Climate Change Cases, *Human Rights Law Review* 2022, 1 et seq.

¹³¹ Extended summary, Keller, Expert contribution, p. 5.

¹³² *Tătar v. Romania*, no. 67021/01, judgment of 27 January 2009, § 120.

¹³³ Extended summary, Lambert, Expert contribution, p. 45.

¹³⁴ In the course of discussions in the drafting group, it has been proposed that the term “diffuse” interests would be more adequate.

¹³⁵ Marcos Orellana, “Quality Control of the Right to a Healthy Environment,” in *The Human Right to a Healthy Environment*, pp. 169, 176.

provide a stronger basis for the Court to consider environmental claims and to strengthen its existing environmental human rights jurisprudence.

The European Social Charter

110. The Charter does not contain any provision which refers expressly to environmental issues or to the right to a healthy environment. Nevertheless, as explained above, the ESCR has engaged with the issue of environmental protection and social rights, including in decisions on collective complaints against States Parties about alleged failures to give effect to the Charter adequately.

111. The most relevant provision of the Charter for the protection of the environment is Article 11 (right to protection of health). As noted above, however, there are relatively few decisions on the scope and application of Article 11 of the Charter for the purpose of the protection of the environment. So far, only two complaints have been lodged with the ESCR regarding the right to a healthy environment under Article 11, both concerning Greece.¹³⁶ This paucity of decisions on the matter may be attributable, among others, to the limited number of ratifications of the Additional Protocol of 1995 to the Charter¹³⁷ which provides for the collective complaints mechanism, and to the fact that the Charter system is a system of *menu à la carte* that is to say member States may decide not to accept certain provisions of the Charter and have no obligations *vis-à-vis* the provisions they have not accepted.¹³⁸

112. The protection offered by the Charter is furthermore limited by its personal scope which requires reciprocity. According to the annex to the Charter,¹³⁹ the States Parties are not obliged, to apply the provisions of the Charter to persons who are not nationals of other States Parties to the Charter or to those who do not regularly work or legally reside in the territories of the States Parties. This constraint limits the potential of the Charter to address recurrent issues of environmental protection such as transboundary harm.

113. Finally, it is argued that the right to a healthy environment should not be identified only as a economic, social or cultural right as it also has deep connections to civil and political rights. Consequently, the entire normative content envisaged for the right to a clean, healthy and sustainable environment could not be covered by the Charter alone.¹⁴⁰

114. In conclusion, the Charter's reach is limited, both from a substantive and a procedural standpoint, since it does not contain explicit obligations on the protection of the environment and is subject to jurisdictional constraints.

¹³⁶ Marangopoulos Foundation for Human Rights (MFHR) v. Greece, Complaint no. 30/2005, decision on the merits of 6 December 2006; International Federation of Human Rights Leagues (FIDH) v. Greece, Complaint no. 72/2011, decision on the merits of 23 January 2013.

¹³⁷ To date only 16 States have ratified the Additional Protocol of 1995.

¹³⁸ CDDH-ENV(2021)05, Expert Contribution of Giuseppe Palmisano, para 4.

¹³⁹ Appendix to the European Social Charter (Revised), CETS 163, § 1.

¹⁴⁰ Extended Summary, Knox, Expert contribution, p. 28.

c) Gaps with respect to the international responsibilities of private actors for the environmental impact of their activities

115. Another argument relating to gaps of the international legal order concerns the international responsibilities of private actors for the environmental impact of their activities.¹⁴¹ Most environmental pollution, carbon emissions and loss of biodiversity is caused by private actors. To effectively fight against environmental degradation and the triple planetary crisis, the involvement of private actors is key. International standards, however, are still lacking or are only in the process of being developed. The reference document for the issue of business and human rights, the United Nations Guiding Principles on Business and Human Rights (UNGPs), postulates a corporate responsibility to protect human rights and highlights States' duty to protect against human rights abuse within their territory by business enterprises. But they are silent on environmental issues. These are only covered insofar as environmental issues are human rights issues. Some of the due diligence legislation that has been or is being adopted in Member States and the European Union go beyond the UNGPs and explicitly incorporate certain environmental aspects into their due diligence obligations without establishing a link to human rights. The UNGPs +10 Roadmap¹⁴² conceives the UNGPs as a compass for meeting global challenges such as just transition and sustainable development and makes reference in this context to the Human Rights Council's recognition of the human right to a clean, healthy and sustainable environment. The human right to a healthy environment is thus seen as crucial for integrating environmental concerns in the business and human rights regime.

116. The development of environmental due diligence standards for business enterprises – whether conceived as environmental due diligence or as human rights due diligence taking into account environmental issues through the human right to a healthy environment - is still at its beginnings. A lot of work remains to be done, in particular with respect to access to remedies for environmental human rights violations caused by private actors. An international forum that could provide victims of corporate environmental human rights violations with access to a remedy such as a mediation procedure or other form of alternative dispute resolution does not yet exist. This gap, it has been argued, could be closed by a further Council of Europe instrument.¹⁴³

117. In this context it should be noted that the CDDH has decided to continue its review of the implementation of Recommendation CM/Rec(2016)3, with a thematic focus on the implementation of the standards of the Recommendation on due diligence and access to effective remedies in particular in the field of environmental protection.¹⁴⁴ It has also invited this Drafting Group to explore the possibility of using the due diligence approach in the context of human rights and the environment, and examine the issue of due diligence of business enterprises, including identification, assessment, prevention, mitigation, monitoring, communication, accountability for, addressing and remedying the potential and/or actual adverse impacts on human rights and the environment, including climate change.¹⁴⁵

¹⁴¹ Extended summary, Lambert, Expert contribution, p. 46.

¹⁴² https://www.ohchr.org/sites/default/files/documents/issues/business/ungps10/2022-11-08/UNGPS_ROADMAPPLUS10_EN.pdf.

¹⁴³ Extended summary, Lambert, Expert contribution, p. 45.

¹⁴⁴ Recommendation CM/Rec(2016)3 of the Committee of Ministers on human rights and business.

¹⁴⁵ Steering Committee for Human Rights, Report on the implementation of the Recommendation CM/Rec(2016)3 of the Committee of Ministers to member States on Human Rights and Business, CDDH(2021)R95 Addendum 2, para. 220.

ii. Strengthening the discourse on human rights and the environment

118. It has also been argued that Member States need to send a political signal to strengthen the discourse on human rights and the environment.¹⁴⁶ The lack of a clear mandate for the Court to tackle environmental issues is seen as an obstacle to the development of a robust environment-friendly jurisprudence in particular with respect to climate change.¹⁴⁷ It is also held responsible for the fact that the Court allegedly ascribes environmental protection with less value in comparison with other public interests such as the economic well-being of the country.¹⁴⁸ Others see the need to shield already the existing ECtHR's environmental jurisprudence from criticism. In a nutshell, this rationale for a new instrument centres on providing legitimacy for the development of the Court's jurisprudence on environmental protection.

iii. Improving national protection of the right to a clean, healthy and sustainable environment

119. Another rationale for a new instrument on human rights and the environment could be as a signal to Member States to undertake greater efforts at environmental protection and climate change mitigation.¹⁴⁹ The new instrument would only set minimum standards, but through the principle of subsidiarity these could work as a pull-factor in increasing the level of environmental protection in member States.

¹⁴⁶ Extended summary, Knox, Expert contribution, p. 26.

¹⁴⁷ Eicke, Climate Change and the Convention: Beyond Admissibility, ECHRL 2022, 8, 12.

¹⁴⁸ Extended summary, Keller, Expert contribution, p. 3 with reference to *Greenpeace e.V. and others v Germany*, application no. 18215/06, judgment of 12 May 2009; Pedersen, Any Role for the ECHR when it Comes to Climate Change?, ECHRL 2022, 17, 20 et seq.

¹⁴⁹ *Pavlov and others v. Russia*, application no. 31612/09, judgment of 11 October 2022, Concurring opinion of Judge Serghides, § 21.

APPENDIX I

QUESTIONNAIRE TO MEMBER STATES

with a view of the preparation of a study on the need for and feasibility of a new instrument on human rights and the environment

QUESTION 1

Is some explicit form of human right to a healthy environment protected under the constitution, legislation or jurisprudence, and if so in what terms?

QUESTION 2

Is the right justiciable, and if so on what conditions?

QUESTION 3

What, if anything, have the domestic courts said about this right in their caselaw?