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STEERING COMMITTEE FOR HUMAN RIGHTS
COMITÉ DIRECTEUR POUR LES DROITS DE L'HOMME

(CDDH)

DRAFTING GROUP ON HUMAN RIGHTS AND ENVIRONMENT
GROUPE DE RÉDACTION SUR LES DROITS HUMAINS ET L'ENVIRONNEMENT

(CDDH-ENV)

**Written contributions received from member States and Participants
on the draft CDDH report on the need for and feasibility of a further
instrument or instruments on human rights and the environment**

**Contribution écrites reçues des États membres et des participants
sur le projet de Rapport du CDDH sur la nécessité et la faisabilité d'un
nouvel instrument ou d'instruments sur les droits humains et
l'environnement**

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Le Gouvernement français remercie le Secrétariat du CDDH-ENV et la Rapporteuse du groupe pour leur travail d'élaboration d'un projet de rapport de faisabilité et d'opportunité d'un ou plusieurs nouveaux instruments sur les droits de l'Homme et la protection de l'environnement.

Lors de la 7^e réunion du CDDH-ENV, les membres du groupe sont convenus de soumettre des contributions écrites afin de permettre à la Rapporteuse du groupe de présenter, lors de la prochaine réunion du CDDH-ENV, un projet de texte révisé pour les chapitres I et II du rapport et un projet de texte pour le chapitre III du rapport.

Le Gouvernement français formule les observations complémentaires suivantes, s'agissant des éléments qui pourraient figurer dans les parties II et III du projet de rapport.

Partie II – Nécessité d'un ou plusieurs instruments supplémentaires

Le rapport devrait mettre en avant la particularité des problèmes environnementaux, qui revêtent par nature une dimension collective. Le rapport devrait souligner la nécessité de formuler des réponses tenant compte de cette dimension, que le système actuel des droits garantis dans la Convention et ses protocoles, ne permet d'appréhender qu'imparfaitement.

Le rapport pourrait souligner l'étroite interdépendance entre les droits de l'Homme et la protection de l'environnement, mais aussi la nécessité de concevoir des droits de l'Homme environnementaux qui, bien qu'attachés à l'individu, permettent de répondre de manière adéquate aux défis actuels posés pour la protection de l'environnement, afin qu'un cercle vertueux puisse se créer. C'est cette approche qui avait inspiré la proposition française d'un pacte mondial pour l'environnement.

Par ailleurs, le rapport devrait mettre en avant le fait que plusieurs contentieux climatiques sont actuellement pendants devant la Cour européenne des droits de l'Homme et que la solution retenue par la Cour dans ces affaires permettra de mieux comprendre où se trouvent les limites du système actuel face aux questions posées par la triple crise planétaire actuelle, dont le changement climatique.

Tout en tenant compte de l'issue de ces contentieux, le rapport pourrait mentionner que le fait de renforcer la protection des droits de l'Homme liés à l'environnement constitue l'un des objectifs principaux auxquels un nouvel instrument pourrait répondre. Le rapport pourrait mentionner, en particulier, l'objectif de renforcer la protection de la santé en lien avec l'environnement, au regard de la triple crise planétaire.

Toutefois, le rapport pourrait aussi souligner que le droit international de l'environnement est une matière technique et très fragmentée, et qu'un nouvel instrument sur les droits de l'Homme et l'environnement pourrait servir de fil conducteur pour les Etats comme pour les juges dans cette matière également. Au niveau national, la consécration de droits environnementaux a

généralement eu un effet positif sur le niveau d'ambition des normes relatives à la protection de l'environnement¹.

Le rapport pourrait mettre l'accent sur le droit à un environnement propre, sain et durable, dont la reconnaissance juridique pourrait figurer comme un argument en faveur d'un nouvel instrument.

A cet égard :

- Un argument en faveur d'un nouvel instrument serait de clarifier le droit à un environnement propre, sain et durable, qui n'a pas encore valeur contraignante au niveau international et dont les éléments constitutifs restent débattus. Le rapport pourrait souligner l'importance de la reconnaissance politique de ce droit au niveau international, et souligner que s'il apparaît, sous différentes formes, dans un grand nombre de droits nationaux ainsi que dans plusieurs instruments régionaux, il n'a pas encore été consacré juridiquement au niveau international.
- Le rapport devrait souligner les différentes dimensions que ce droit peut prendre, en ce qu'il est reconnu par lui-même afin d'être reconnu pour chacun.
- Un autre argument serait d'harmoniser la reconnaissance et l'application du droit à un environnement sain entre les Etats membres du Conseil de l'Europe. Les réponses au questionnaire transmis dans le cadre du CDDH-ENV ont montré que ce droit existait sous des formes très variées, répondant à des régimes et procédures différents, dans les différents Etats membres du Conseil de l'Europe. Cela pourrait aussi avoir un effet en matière d'harmonisation des normes environnementales auxquelles sont soumises les entreprises au niveau du continent.
- Un autre argument serait d'augmenter le niveau d'ambition dans les Etats membres du Conseil de l'Europe, que ce soit pour les Etats qui n'ont pas encore consacré ce droit dans leur droit national, ou pour les Etats qui disposeraient déjà d'une forme du droit à un environnement sain mais dont le niveau de protection pourrait être relevé. Un autre argument en faveur d'un nouvel instrument serait de renforcer le rôle du Conseil de l'Europe en matière de protection des droits de l'Homme en lien avec la protection de l'Environnement. L'existence du droit à un environnement sain dans d'autres instruments régionaux des droits de l'Homme pourrait être soulignée. Garantir une meilleure protection des défenseurs des droits de l'homme en matière d'environnement pourrait également figurer, en tant que tel, comme un argument en faveur d'un nouvel instrument. Un autre argument en faveur d'un instrument supplémentaire concerne la responsabilité sociétale et environnementale des entreprises, la contribution des acteurs privés aux atteintes pouvant toucher l'environnement et les droits de l'Homme à l'échelle globale étant régulièrement mise en avant par différents acteurs, notamment la société civile.

Enfin, plusieurs acteurs, y compris lors de la conférence organisée au Conseil de l'Europe le 3 mai 2023, ont souligné le rapport entre pouvoir judiciaire et pouvoirs législatif/exécutif.

Plusieurs intervenants lors de cette conférence ont souligné que des affaires environnementales seraient sans aucun doute introduites de plus en plus devant les juges, compte tenu de l'urgence de la triple crise planétaire, et que ces juges seraient amenés à rendre des décisions quand bien même les Etats ne conviendraient pas de nouveaux instruments. Un nouvel instrument comprenant des droits et mécanismes adaptés aux caractéristiques des atteintes liées à la triple crise planétaire pourrait constituer un outil précieux pour les juges saisis de tels dossiers.

¹ Voir notamment : https://www.unep.org/resources/assessment/environmental-rule-law-first-globalreport?_ga=2.250883136.758171032.1687174563-1704725550.1681402918.

Partie III – Faisabilité d'un instrument ou instruments additionnels

Sur les différents types d'instruments

(i) Protocole additionnel à la Convention européenne des droits de l'Homme S'agissant d'un protocole additionnel à la Convention, le rapport pourrait faire état des observations apportées par l'ancien président de la Cour européenne des droits de l'Homme, M. Robert Spano, lors de la conférence organisée au Conseil de l'Europe le 3 mai 2023.

- Le rapport pourrait mentionner le caractère contraignant d'un protocole additionnel et la compétence de la Cour européenne des droits de l'Homme pour se prononcer sur le respect de ses dispositions par les Etats contractants. Le rapport pourrait mentionner que, pour cette raison, l'option d'un protocole additionnel est défendue par la société civile et l'APCE.
- Le rapport pourrait indiquer que l'adoption d'un protocole additionnel poserait la question de la formulation du droit à un environnement sain qui serait retenue pour ce protocole. A cet égard, le rapport pourrait rappeler que les résolutions adoptées par le CDH et l'AGNU mentionnent le « droit à un environnement propre, sain et durable ».
- Le rapport pourrait aussi poser la question des obligations positives que la Cour européenne des droits de l'Homme pourrait tirer de ce nouveau droit.
- Le rapport pourrait mentionner les difficultés juridiques posées par l'option d'un protocole additionnel, qui impliqueraient pour la Cour de revoir certains principes établis de sa jurisprudence – qualité de victime, seuil minimum de gravité, balance des probabilités, juridiction. Le rapport pourrait s'interroger sur la possibilité de pallier ces difficultés sans déstabiliser le système existant de la Convention et de ses protocoles.
- Le rapport pourrait souligner l'effet d'un protocole additionnel sur la marge d'appréciation des Etats.
- Le rapport pourrait aussi traiter de la question de la balance des intérêts si le droit à un environnement sain reconnu dans un nouveau protocole additionnel devait être en tension avec un ou plusieurs autres droits garantis par la Convention et ses protocoles.
- Le rapport pourrait mentionner la nécessité d'obtenir un nombre de ratifications suffisant du protocole additionnel envisagé.

(ii) Convention-cadre

S'agissant de l'option d'une convention-cadre, le rapport pourrait également reprendre certains des arguments mentionnés par M. Robert Spano lors de la conférence organisée au Conseil de l'Europe le 3 mai 2023.

Sur le contenu de l'instrument, M. Spano a indiqué qu'une convention-cadre permettrait de définir des standards communs s'agissant des différents éléments du droit à un environnement sain. Le rapport pourrait ainsi détailler quels pourraient être les divers éléments constitutifs de ce droit. Le rapport devrait sur ce point utiliser, autant que possible, des définitions existantes.

- Sur la formulation, le rapport pourrait rappeler que les résolutions adoptées au CDH et à l'AGNU mentionnent le « droit à un environnement propre, sain et durable ».
- Le rapport pourrait indiquer que le droit à un environnement propre, sain et durable peut avoir un volet matériel (notamment, le droit de vivre dans un environnement respectueux de la santé) et un volet procédural (notamment, la réalisation d'études d'impact et l'existence de voies de recours adéquates). Le rapport pourrait donner différents exemples d'efforts de définition de ce droit (rapport de J. Knox par exemple) et renvoyer également

aux formes prises par le droit à un environnement sain dans différents contextes nationaux au sein du Conseil de l'Europe (renvoi aux réponses au questionnaire).

- Le rapport pourrait aussi inclure des éléments relatifs à la définition du droit à un environnement sain dans d'autres systèmes juridiques, en particulier dans le système de la Convention interaméricaine des droits de l'Homme.
- Le rapport pourrait indiquer qu'il serait envisageable d'intégrer également à une convention-cadre :
 - o des dispositions afférentes à l'information et à la participation du public ;
 - o des dispositions afférentes à l'éducation en matière d'environnement ;
 - o des dispositions afférentes à la protection des défenseurs des droits de l'Homme en matière environnementale ;
 - o des dispositions afférentes à la responsabilité des acteurs privés.
- Le rapport pourrait indiquer la complémentarité avec des droits à dimension collective, tels que le sont les droits économiques et sociaux.
- Le rapport pourrait indiquer la possibilité d'intégrer des principes issus du droit international de l'environnement, tel que le principe de non-régression.

Sur les mécanismes de contrôle, le rapport pourrait souligner que de nombreuses possibilités existent et qu'une combinaison de mécanismes est possible, voire une adaptation des mécanismes selon les différents aspects des droits environnementaux. Le rapport pourrait mettre en avant la nécessité de concevoir des mécanismes de contrôle adaptés aux particularités des droits environnementaux. Le rapport pourrait souligner que les experts entendus dans le cadre du CDDH-ENV ont mis en avant la nécessité de prendre en compte le caractère collectif des problématiques environnementales. Les contentieux en cours devant la Cour questionnent la possibilité pour le système des requêtes individuelles de traiter de telles problématiques. Plusieurs experts, dont Mme Lambert, ont souligné qu'un mécanisme de plaintes/communications collectives sur le modèle des réclamations collectives devant le Comité européen des droits sociaux serait une piste intéressante à explorer.

Le rapport pourrait contenir une liste d'options, accompagnées d'exemples issus d'instruments existants. Notamment :

- Requêtes individuelles (Cour européenne des droits de l'Homme)
- Réclamations collectives (Comité européen des droits sociaux)
- Communications individuelles (type procédures spéciales des Nations-Unies)
- Avis consultatifs (type Convention d'Oviedo)
- Comité d'experts indépendants
- Système de reporting, suivant l'exemple de l'article 21 du projet de Pacte mondial pour l'environnement
- Procédure de contrôle par les pairs (rapports et auditions)
- Commissaire
- Médiateur
- Ombudsman
- Mécanisme d'enquête

Ainsi :

- Le rapport pourrait mentionner qu'une convention-cadre permettrait une certaine adaptabilité des droits environnementaux et des mécanismes de contrôle au regard des besoins actuels ;

- Le rapport pourrait cependant indiquer les aspects logistiques et financiers afférents à la négociation d'une convention-cadre et à la mise en place de nouveaux mécanismes de contrôle.

Sur les questions transversales

Le rapport devrait mettre l'accent sur la question de l'articulation du ou des nouveaux instruments avec les instruments du droit international de l'environnement existants, en particulier la Convention d'Aarhus. A cet égard, le rapport pourrait souligner la nécessité d'une complémentarité entre les instruments existants et le ou les instruments envisagés, y compris les textes adoptés au niveau de l'Union européenne et les Objectifs de Développement Durable. Le rapport pourrait mentionner la nécessité de ne pas multiplier les indicateurs et les collectes de données déjà opérées par ailleurs, ou alors de prévoir une coopération pour les mutualiser. Le rapport pourrait mentionner la possibilité de prévoir des règles spécifiques pour la résolution des conflits normatifs qui pourraient naître entre les différents instruments. Le rapport pourrait mentionner également la possibilité d'inclure des clauses de renvoi.

Le rapport pourrait mentionner les moyens nécessaires à la mise en œuvre et au suivi de chaque type d'instrument, et la question de la contribution financière des Etats.



Para. on the relationship between IEL and IHRL

International Environmental Law (IEL) aims to address the negative impacts that humans or human actions have on the environment with the objective of protecting and conserving the environment. Consequently, IEL sets rules States must adhere to in relation to the natural environment. Its rules do not grant any directly actionable right to individuals or groups to an environment of a certain standard because IEL primarily regulates the relationship between States, nor does it provide for a supervisory mechanism where individuals or groups can invoke any such right.

International Human Rights Law (IHRL) is principally concerned with the protection of human rights. It grants directly actionable rights to individuals and groups, including oversight at the international level by courts and treaty bodies. The material scope of IHRL does not generally extend to the environment as such in the sense that IHRL grants direct protection to the environment. It only does so indirectly, through the application of certain human rights in an environmental context.

The **material scope of application** of IEL does extend to issues relating to the environment, but it is limited in that it does not as such include a human right to an environment of a certain standard. The material scope of IHRL does extend to human rights, but it is limited in that it does not extend to the direct protection of the environment.

The **personal scope of application** of IEL extends to States, but is limited in that it does not grant rights to individuals or groups. Individuals and groups accordingly are not granted a justiciable right at the national or international level. The personal scope of application of IHRL extends to States as well as individuals and groups. These actors can have recourse to actionable rights at the national and international levels.

International judicial oversight is absent under IEL. In so far as IEL does have mechanisms for international supervision, their procedures are non-adversarial and they are not empowered to take binding decisions. IHRL does include international judicial oversight in the form of human rights courts which can take binding decisions. Human rights treaty bodies also engage in other forms of non-binding supervision of treaty implementation.]

The above demonstrates a gap, in so far as individuals and groups are not able to invoke a directly actionable right in respect of their environment. This gap could be filled by tying IEL and IHRL together, thereby potentially offering better protection of human rights against environmental degradation, and better protection of the environment.

Working definition on the right to a clean, healthy and sustainable environment

A working definition of the right to a clean, healthy and sustainable environment could be an individually actionable human right to an environment of a certain standard. This means, first of all, that environmental protection, which is in principle an obligation of the State under international law and not necessarily a right for citizens, is linked to a clear human right. The applicable standard is then that the environment must at least be 'clean', 'healthy' and 'sustainable'. While no specific definitions exist on the meaning and/or scope of these adjectives, several interpretations are possible on the basis of existing international (environmental) law and reports of, for example, UN Special Rapporteurs.²

- The 'environment' has no specific definition in the legal sense, but can be broadly interpreted as the 'living space',³ comprising the atmosphere, soil, water, flora and fauna, ecosystems and natural processes.⁴
- 'Clean' may imply pure, or as free as possible from polluting ingredients or substances, which therefore mainly refers to pollution of the environment.
- 'Healthy' may include having good health based on a clean and healthy environment, and may also refer to the health of ecosystems themselves.
- 'Sustainable' is open to different interpretations. On the one hand, in this context, the term indicates that human use of the environment should not deplete natural resources and that degradation of the environment should be avoided. On the other hand, according to the common definition in the context of sustainable development, 'sustainable' means leaving room for choices between economic, social and environmental interests. In this sense, a 'sustainable' environment can create tension with a 'clean' and 'healthy' environment.

Furthermore, in line with the work of the UN Special Rapporteurs, it can already be noted here that the right has substantive and procedural components.

- The substantive component refers to the environmental principles as outlined in international environmental law (see for example the adjectives above);
- The procedural component refers to participation rights and access to justice, as also laid down in the Aarhus Convention.

² See the several thematic reports of the UN Special Rapporteurs, available online: <https://www.ohchr.org/en/special-procedures/sr-environment>

³ ICJ *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (ICJ Reports 1996), para 29.

⁴ See, for example, Principle 2 Stockholm Declaration; The World Charter for Nature 28 October 1982, A/RES/37/3, preamble; P.M. Dupuy & J.E. Vinuales, *International Environmental Law*, Cambridge: Cambridge University Press 2018 (2e ed.) pp. 31-38; See B. Lewis, *Environmental Human Rights and Climate Change. Current Status and Future Prospects*, Singapore: Springer Nature Singapore 2018, p. 61.


SPAIN / ESPAGNE
Preliminary considerations:

This document is intended to serve as an input for the elaboration of Chapter III of the draft CDDH report on the need for and feasibility of a further instrument or instruments on human rights and the environment.

The future instrument on human rights and the environment should address at least the following issues:

- On the one hand, certain prior general decisions, such as the subjective scope of the future instrument (i.e. limiting it to the members of the Council of Europe or opening it up to a broader scope).
- On the other hand, the need to specify as far as possible the obligations which the Contracting States, on ratifying the future instrument, will assume with regard to the protection of a healthy environment.
- Furthermore, the establishment of a framework for interstate cooperation should also not be forgotten: in order to protect the environment, it is not enough to establish rights and liability mechanisms just in case they are not respected, but emphasis should be placed on joining collective efforts to address current threats to the environment. A merely reactive *ex post facto* system would be insufficient to achieve this objective.
- Finally, any right established under the general right to the environment in favour of individuals must be guaranteed through means that verify the correlative obligation of such rights being protected and respected by States.

In our view, it is difficult at this stage to examine the substantive content of the future document, since this mainly depends on the political will of Member States of the Council of Europe. Nevertheless, this contribution assumes that the working group will outline several options to be assessed in this regard.

However, whatever the outcome of these negotiations, the contribution enshrined in the current document is based on the following assumptions:

- First, the objective of the future instrument should be to make an effective contribution to increasing the protection of society in terms of its legitimate aspiration and unavoidable need to a healthy environment.
- Second, the effectiveness of such an instrument depends to a large extent on the mechanisms established to ensure compliance with the environmental obligations that the Contracting Parties decide to establish and the correlative rights they decide to grant.
- In turn, each type of mechanism for ensuring compliance with those obligations also qualify/constrain, to a certain extent, the specific scope of the correlative rights that may be enforced through such instruments.

Therefore, the purpose of this contribution is to assess the opportunities, requirements and eventual weaknesses of the potential type of mechanisms that can be used to enforce the rights that may be established under the general right to a healthy environment.

The different types of mechanism listed below are not incompatible with each other. They can in turn be established in independent instruments, or integrated into a single instrument. It is also possible to establish a general instrument setting out the general content of the protection to be afforded by States, and annexed protocols containing different enforcement instruments and their specific purpose.

Periodic reports mechanism.

One possible instrument to guarantee the effective protection of the right to a healthy environment, is the imposition on the Contracting Parties of the duty to report on the measures implemented to ensure environmental rights. In addition, a body should be established to verify compliance with the obligation to submit such reports, their content and to issue an opinion on the degree of compliance.

<i>Weaknesses</i>
<p>It is an enforcement mechanism based primarily on political pressure from peers, without specific coercive force.</p> <p>However, it should not be forgotten that it is the mechanism generally employed in the various international human rights instruments and has contributed to the advancement of this branch of international law, so its relevance should not to be underestimated.</p> <p>One mechanism to mitigate the weaknesses inherent in its nature as a political mechanism of peer-on-peer coercion is the opening to civil society of such a reporting and referral process.</p>
<i>Advantages</i>
<p>Among others, the proven experience in this type of enforcement mechanism in the field of international human rights law makes it foreseeable that there will be no obstacles to its implementation.</p> <p>The collective nature of the right to a healthy environment makes this mechanism particularly suited for such collective rights.</p>
<i>Alternatives</i>
<p>A periodic reporting system can be combined with a subject-specific reporting system. In any case, the advantage of periodic reports lies in the fact that they make it possible to draw a comparison between States and to monitor developments, which contributes more effectively to increasing the level of protection of these rights.</p> <p>As for the monitoring body, it may be an <i>ad hoc</i> body for the future instrument, or it may be assigned to a body already existing in the instruments of the Council of Europe. One option should be to assign this task to the European Committee of Social Rights, which already deals with the periodic reports provided for in the European Social Charter.</p>

<p>The assignment to the European Committee of Social Rights) has, among others, the following advantages: (a) an obvious cost saving; (b) to take advantage of the experience that the Committee already has in the application of this system; and (c) to allow a more complete analysis, given the obvious interrelation between the social rights of the Charter and the right to the environment.</p>
<p><i>To be taken into account</i></p>
<p>While this mechanism is particularly suitable for verifying the degree of implementation of collective rights and progressive implementation, greater specificity in the different aspects of the right to healthy environment, on which States must report, may be desirable for greater effectiveness of the system; or to specify the aspects on which States must report, or to establish a mechanism to determine the structure and content of such reports.</p> <p>If it is finally decided to attribute competence for the receipt and analysis of reports to the European Committee of Social Rights, it should be ascertained whether it is in a position to take on such an extra workload and make the necessary budgetary and provisioning arrangements.</p>
<p><i>Final considerations</i></p>
<p>This is a compliance mechanism which, because of its widespread use in practice and because of its few difficulties in implementation, it is desirable that it be, in any case, foreseen in the future instrument.</p>

Special rapporteurs' / fact finding mechanisms.

We refer to the possibility of appointing independent experts to investigate specific risks or violations of the right to a healthy environment (for instance, on the model of the UN Special procedures envisaged in Human Rights Council Resolutions 5/1 and 16/21).

<p><i>Weaknesses</i></p>
<p>The limited scope of the mandate of the Special Rapporteur, as well as the lack of enforcement of their conclusions are obvious shortages of this enforcement mechanism.</p> <p>Possible criticism about independence, accountability and accuracy should not be disregarded.</p>
<p><i>Advantages</i></p>
<p>The possibility of a fact finding mechanism has an obvious deterrent effect, especially for the most serious violations.</p>

Likewise, the outcome of the Special Rapporteur's findings can serve as basis, or support, for individual complaints at both national and international level for violations of the right to a healthy environment.
<i>Alternatives</i>
<p>An option to be considered is having the rapporteurs, instead of being appointed on a case-by-case basis, as part of a permanent body or institution within the Council of Europe.</p> <p>This would allow for better specialization (especially valuable given the factual and legal complexity of the investigation of environmental violations), as well as a greater guarantee of objectivity and independence.</p>
<i>To be taken into account</i>
The effectiveness of this mechanism depends to a large extent not only on the provision of material means, but also on the future binding instrument being endowed with sufficient powers to carry out its work (gathering information and collaboration from national authorities, visiting affected sites, confidential interviews with those affected, etc.).
<i>Final considerations</i>
This could be a useful enforcement mechanism, provided that it is combined with other measures and with the necessary means and guarantees.

Inter-State Claims.

We refer to the possibility for a Contracting State to sue, before an impartial body, another State for non-compliance with the obligations set forth in the future instrument.

In dealing with this mechanism, we understand that it should not be limited to the model of inter-State claims provided for in Article 33 of the European Convention on Human Rights: the different nature of the rights currently provided for in the Convention, in relation to the collective (and even diffuse) rights protected under the general right to a healthy environment, together with the difficulties for the exhaustion of domestic judicial remedies that can sometimes arise, makes it convenient to take into consideration the classic models of dispute settlement on the occasion of the interpretation and application of treaties, as well as the demand for international responsibility for unlawful acts, either by the States affected by an action harmful to the environment (i. e. transboundary pollution), or by the States affected by an action harmful to the environment (i. e. transboundary pollution).

Weaknesses

Once again, we are faced with a mechanism of a political nature that places in the hands of States collective interests intimately linked to the rights of individuals. However, the political force that this type of claim can have and its deterrent effect mean that, , it cannot be, *prima facie*, ruled out in a future instrument.

Advantages

Besides the strong political effect, it is an instrument widely well-established at the international level and whose implementation would not meet general reticence, except for what will follow on the operational difficulties regarding the attribution of jurisdiction to hear these inter-State claims.

Alternatives and aspects to be taken into account

If this instrument is given a broader scope, which would be desirable, it raises the problem of the body to be entrusted with the resolution of disputes over the interpretation and application of the instrument. Theoretically, the options could be:

(a) The case-by-case establishment of an ad hoc body (arbitration or similar). The *erga omnes* nature, in which all States have an interest in verifying compliance with obligations related to a healthy environment, render an arbitration system (more appropriate to bilateral claims) not completely suitable.

(b) The attribution to the International Court of Justice. Politically, this may raise some concerns: in particular, due to the intervention of a body outside the Council of Europe (unless the decision is that the treaty is open to other States), and in general by the sensitive nature of the environmental matter in which there may be conflicting interests between the signatory states and other states, which could also intervene in a proceeding before the ICJ.

(d) Attribution to an existing body, such as the European Court of Human Rights or the complex European Committee of Social Rights-Committee of Ministers. This represents saving time and money compared to the previous option, but it also has a number of disadvantages that must be carefully assessed and addressed:

- a. Firstly, it would mean including among the powers of the Court or the Committee a competence that clearly exceeds those they are currently exercising, which is particularly outstanding in the case of the ECtHR. This would mean that the future instrument cannot be limited to attributing this competence to one of these two bodies, but also to carefully establish the necessary adaptations in terms of operation and procedure that will allow the Court or Committee to correctly exercise these new competences.
- b. Secondly, even if the use of this type of inter-State claims is not massive but rather occasional, the organizational and purely "jurisdictional" challenges (the intervention of multiple parties, the assessment of complex legal and factual issues, the need to gather evidence that is equally numerous and demanding, among others) necessarily require an

assessment of the adequate provision of resources to one body or the other. Attributing jurisdiction/competence without the proper arrangement in terms of means and budget could lead to a collapse in the functioning of the Court or the Committee that would result, not only in the uselessness of the instrument, but also in the loss of effectiveness in the protection of the rights currently entrusted to one body or the other, given the impossibility of attending to the new and current competences.

Final considerations

This is a mechanism that should be valued, but which presents practical difficulties that need to be addressed.

Collective complaints.

The possibility of including the protection of the right to a healthy environment among the rights susceptible of protection through the mechanism provided for in the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints is discussed below.

Weaknesses

One problem is the non-strictly binding nature of the decisions of this procedure, although the obligation to attend in good faith to the Committee's recommendations and the undoubtedly political should not be underestimated.

Another concern is the fact that the current number of ratifications of the protocol is relatively low (14 ratifications as of today <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=158>), a trend that could also occur with the new instrument.

Advantages

The main advantage is that the collective nature of the rights encompassed by the general right to a healthy environment adapts particularly well to the characteristics of the system of collective claims, in which it is not necessary to prove the violation of individual rights in specific cases (nor to exhaust domestic remedies to remedy such violations), but rather to assess whether or not a legislation or administrative practice complies with the obligations assumed by the State to protect these collective rights.

Alternatives

The question may arise as to whether the system of *numerus clausus* of the parties entitled to bring claims should be reviewed in the future instrument. Given that the *numerus clausus* system attempts to strike a balance between the desire not to excessively restrict standing, but without

jeopardizing the operability of the system (see explanatory report on the Optional protocol, <https://rm.coe.int/16800cb5ec> para. 18 to 24), and the fact that the current group of entities with *locus standi* may well serve to address violations of these collective rights, it seems advisable not to modify the current system on this point.

To be taken into account

The current system of collective complaints, despite the small number of States that have accepted it and the small number of new complaints, is experiencing an average increase in processing time (40 months in 2021, compared to an average of 17.5 months in the period from 1998 to 2021, Activity report of 2021, paragraph 3.1 <https://rm.coe.int/ecsr-activity-report-2021/1680a923d0>).

In such a context of increase of pending cases and delay in their processing, the assumption of new competences and the eventual workload derived from the new collective claims in the field of the right to a healthy environment may cause a collapse of the Committee that may jeopardize not only the effectiveness of the new instrument, but also the current system of protection of the rights of the European Social Charter. Accordingly, the attribution of this new competence to the Committee must be preceded by a careful analysis of workload, the provision of financial and human resources, and the allocation of the necessary financial and human resources to the Committee.

Moreover, it may eventually be necessary to adapt the procedural rules required to deal with the peculiar characteristics of collective claims in environmental matters -in particular, evidentiary issues that are likely to be more complex than in current collective claims, which are normally limited to strictly legal matters.

Final considerations

The extension of the system of collective complaints of the ESC to the right to a healthy environment could be a feasible option to be included in the new instrument, provided that adequate and sufficient means are allocated in favour of the European Committee of Social Rights.

Individual Applications before the ECtHR.

In this section we address the possibility of adding rights related to a healthy environment to the rights whose violation is addressed by the ECtHR in accordance with its jurisdiction over individual complaints under Article 34 ECHR.

Weaknesses

The current configuration of individual applications before the ECtHR requires that there be a concrete violation of one of the fundamental rights of a person (the victim) and that the prior

judicial remedy has been exhausted in the light of the principle of subsidiarity that characterizes the ECHR system.

Such characteristics mean that the right to a healthy environment, a collective right whose violation is not normally predicated on specific victims, does not *per se* fit properly into the current system of individual claims.

This, however, can be overcome if, instead of attributing knowledge in general of a collective right such as the right to a healthy environment, individual rights are identified in the future instrument (for example, rights of access to information, participation and access to justice in environmental matters as set out in the Aarhus Convention), related to the overall right to a healthy environment, and which can be assimilated to the rights currently under the jurisdiction of the ECtHR. In this way, without distorting the function entrusted to the ECtHR under the ECHR, the protection afforded to these individual instrumental rights would result in the protection of a healthy environment.

Another weakness is that the system of individual complaints determines that the ECtHR's finding of injury takes place once domestic remedies and the procedure before the ECtHR itself have been exhausted, which means a considerable time lag between the violation of the right and its finding. Given the pressing need to tackle the current threats to the environment, this protection mechanism must be complemented by others, such as those described in the preceding sections.

Advantages

Notwithstanding the abovementioned difficulties, the advantages of this protection mechanism are evident, not only because of the legal effects of the judgment, but also because of the Court's own *auctoritas*.

To be taken into account

In addition to the necessary establishment of the individual rights that can be added to those already protected by the ECtHR (without a general extension to the collective right to a healthy environment being feasible), a serious caveat must also be taken into account.

The ECtHR, as is well known, has faced a crisis of excessive workload and increase of pending cases that determined a serious analysis of the reform of the court to face this and other challenges (Interlaken process). After managing to reduce the number of pending cases, in recent years there has again been an increase (from 56,200 in 2018 to almost 75,000 in 2022, according to the latest statistics published by the Court https://www.echr.coe.int/Documents/Stats_analysis_2022_ENG.pdf) which shows that the problem is not completely overcome.

The extension of the Court's jurisdiction to the knowledge of rights related to the environment (in addition to the existing ones) may lead to a further increase in the workload that would again place the court in a situation of collapse that would put at risk the entire system established by the European Convention on Human Rights. Therefore, as a prerequisite for such a new jurisdiction, provided that it is established in the new instrument, an exhaustive

analysis of the foreseeable new workload is required, together with material and human resources to be provided to the Court in order to cope with

If required, it may be useful to assess whether it is necessary to adapt the procedural rules contained in the ECHR and in the Court's rules derived from the special nature of the applications that have these new rights as their object.

Final considerations

The application of the mechanism of individual claims to the field of the right to a healthy environment necessarily requires specifying the individual rights that it is considered appropriate to protect in this way, and previously providing the Court with sufficient material and human resources to deal with this jurisdiction. It is also desirable that this will not be the only mechanism provided to ensure the due application of the rights covered by the general right to a healthy environment.

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I. URGENCY OF THE TRIPLE PLANETARY CRISIS

While the study acknowledges the seriousness of the triple planetary crisis, in order to convey the urgency of ongoing environmental degradation for human rights, the study would benefit from a more detailed, explicit explanation of what such environmental degradation means for human rights, in practice.

In addition to the following paragraph, which is already reflected in the draft:

Today humanity is facing an unprecedented challenge in the form of environmental degradation and the triple planetary crisis of climate change, nature and biodiversity loss, and pollution. While 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 and exposed 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 justice.

the addition of the following language would help to ensure that the urgency of the situation is adequately conveyed and serve to exemplify the inextricable linkages between human rights and the environment:

A polluted and toxic environment negatively affects a broad range of human rights, including the rights to life and health, as well as the right to a clean, healthy, and sustainable environment: according to the World Health Organization, air pollution alone causes the premature death of more than 7 million people every year⁵ (300,000 of them in Europe,⁶ of which 1,200 are children);⁷ around the world, water pollution is steadily worsening with billions of people lacking access to clean drinking water while 80% of wastewater is discharged into the environment untreated, contaminating surface water, groundwater, soil, and the oceans;⁸ at every stage of its lifecycle – from extraction and manufacturing to use and disposal – plastic pollution is profoundly impacting human rights, livelihood and well-being;⁹ ¹⁰ per- and polyfluoroalkyl substances (PFAS), also known as “forever chemicals,” are now found in a wide range of products (including clothing, cosmetics, food packaging, paints, paper), and have been linked to health issues such as decreased fertility, cancer, thyroid disease, liver damage;¹¹ and exposure to toxic substances on the job has been accredited, among other things, for the premature death of 750,000 workers every year.¹² Pollution (today, the largest source of premature death in the developing world¹³) is now a global crisis with widespread, devastating ramifications on human rights.

Biodiversity loss and ecosystem degradation threaten a broad spectrum of human rights, including the rights to life, health, food, water, culture and non-discrimination, as well as the right to a clean, healthy, and sustainable environment. The ongoing loss of entire ecosystems and disappearance of species at an unprecedented rate has been proven to impact people’s right to food and to access to water, it contributes to decreasing the resilience of entire communities and significantly impoverishes the planet, thus affecting

⁵ World Health Organization, Household air pollution, 28 November 2022, available at <https://www.who.int/news-room/fact-sheets/detail/household-air-pollution-and-health>

⁶ European Environment Agency (EEA), *Air quality in Europe 2021*, available at <https://www.eea.europa.eu/publications/air-quality-in-europe-2021/health-impacts-of-air-pollution>; EEA, *Air quality in Europe 2022*, available at <https://www.eea.europa.eu/publications/air-quality-in-europe-2022>.

⁷ EEA, *Air pollution levels across Europe still not safe, especially for children*, April 2023 <https://www.eea.europa.eu/en/newsroom/news/air-pollution-levels-across-europe>

⁸ Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, *Human rights and the global water crisis: water pollution, water scarcity and water-related disasters*, 19 January 2021, UN Doc. No. A/HRC/46/28. See also Office of the High Commissioner for Human Rights, *The water crisis has a “major impact on human rights” expert say*, 2021, available at <https://www.ohchr.org/en/stories/2021/03/water-crisis-has-major-impact-human-rights-expert-says>.

⁹ UNEP, *Plastic Pollution*, available at <https://www.unep.org/plastic-pollution>. See also UNEA, *End plastic pollution: towards an international legally binding treaty*, UN Doc. No. UNEP/EA.5/Res.14.

¹⁰ Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and waste, *The stages of the plastics cycle and their impacts on human rights*, 22 July 2021, UN Doc. No. A/76/207.

¹¹ Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, 2019, UN Doc. No. A/74/480; see also Harvard T. H. Chan - School of public health, *Protecting against “forever chemicals,”* 2023, available at <https://www.hsph.harvard.edu/news/hsph-in-the-news/protecting-against-forever-chemicals/#:~:text=Known%20as%20%E2%80%9Cforever%20chemicals%E2%80%9D%20because,%2C%20cosmetics%2C%20and%20toilet%20paper>

¹² Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment and Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, *The right to a clean, healthy and sustainable environment: non-toxic environment*, 2022, UN Doc. no. A/HRC/49/53.

¹³ UNHCHR & UNEP, Human Rights and Hazardous Substances, <https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/materials/KMHazardousSubstances25febLight.pdf>

the rights of future generations. In its fifth edition of the Global Biodiversity Outlook, the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) clearly sounded the alarm on the ongoing decline of biodiversity worldwide, stating that this is happening “faster than at any time in human history,”¹⁴ and that around 25% of animal and plant species are currently threatened, with an estimated 1 million of them facing extinction within a few decades. Biodiversity decline, short of extinction, is expected to take millions of years for recovery. At this rate, future generations can expect to live in a biologically impoverished world. This translates directly into costs for human well-being because human rights depend on a healthy biosphere.¹⁵

The climate crisis has been defined by the former United Nations High Commissioner for Human Rights, Michelle Bachelet, as the greatest threat ever to human rights: “The world has never seen a human rights threat of this scope.”¹⁶ The most recent report published by the Intergovernmental Panel on Climate Change (IPCC), which was politically endorsed by all the States Parties to the Council of Europe, has been very clear: the window for action on climate change that will allow the world to avoid catastrophic consequences on human rights and secure a liveable and sustainable future for all is rapidly closing, and action must be taken in the next decade.¹⁷ Furthermore, the IPCC has clearly stated that equity, climate and social justice, and a rights-based approach to mitigation and adaptation are needed to effectively accelerate necessary action and achieve more ambitious results.¹⁸ Already at 1.2°C, the world is experiencing climate-induced flooding, heatwaves, droughts, mass coral bleaching events, glaciers and ice-sheet loss, hurricanes and other forms of extreme weather that are claiming lives and affecting the human rights of millions. According to the UN's refugee agency, more than 20 millions people are forcibly displaced every year by such extreme weather-related events.¹⁹ In Europe alone, tens of thousands of individuals die every summer as a result of continental heatwaves.

It is clear that more must be done to meet the critical human rights challenges posed by environmental degradation: by grappling with hard facts such as these, the study can start from this outset, and more readily turn to the question of whether better protection can be provided through a legally binding instrument or through other means.

¹⁴ IPBES, *Global Assessment Report on Biodiversity and Ecosystem Services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services*, 2019, IPBES secretariat, Bonn, Germany at key messages A and D.

¹⁵ UNEP, *Human Rights and Biodiversity: Key Messages*, 2021; see also IPBES, *Global Assessment Report on Biodiversity and Ecosystem Services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services*, 2019, IPBES secretariat, Bonn, Germany at key messages A and B; Ch. 4, section 4.4.1.1.; see also Ch. 5, section 5.4.1.5

¹⁶ Michelle Bachelet, former UN High Commissioner for Human Rights (September 2019), available at <https://www.theguardian.com/law/2019/sep/09/climate-crisis-human-rights-un-michelle-bachelet-united-nations>; see also Ian Fry, Special Rapporteur on the promotion and protection of human rights in the context of climate change, *Climate change the greatest threat the world has ever faced*, press release (October 2022), available at <https://www.ohchr.org/en/press-releases/2022/10/climate-change-greatest-threat-world-has-ever-faced-un-expert-warns>.

¹⁷ IPCC, *Climate Change 2023: Synthesis Report. A Report of the Intergovernmental Panel on Climate Change. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, H. Lee and J. Romero (eds.)], IPCC, Geneva, Switzerland [IPCC AR6 SYR].

¹⁸ IPCC AR6 SYR at Summary for Policy Makers C.5.

¹⁹ See e.g., <https://www.weforum.org/agenda/2019/12/extreme-weather-climate-change-displaced/>

Notably, as explained in the suggested text below, the evidence supporting explicit recognition of the right is well-documented. As David Boyd states, “The ultimate test in evaluating the right to a healthy environment is whether it contributes to healthier people and healthier ecosystems. The evidence in this regard is impressive. Numerous studies have concluded that recognition of this right has a positive causal influence on environmental performance in areas including improved air quality, increased proportion of the population with access to safe drinking water, and decreased greenhouse gas emissions.”²⁰

In light of all of the above, the inextricable linkages between human rights and environmental protection have increasingly been acknowledged around the world, by human rights experts, scientists, non-governmental organisations, and political institutions (including most recently by the Parliamentary Assembly²¹ and the Committee of Ministers²² of the Council of Europe). This has resulted in the increased recognition – at the national, regional²³ and international²⁴ levels – of the autonomous right to a clean, healthy and sustainable environment. Today, the right to a healthy environment is reflected in the majority of the world's constitutions, beginning with Slovenia, Portugal and Spain in the 1970s. Among Council of Europe Member States, 91% (42 out of 46) already recognize this right in law, either through constitutions, legislation, or as parties to the Aarhus convention.²⁵

As a result, following this global development in human rights law, the practical impacts and consequences stemming from recognition of this right have been documented and studied. Significantly, the past several decades of experience provide unequivocal evidence that recognition of the right to a healthy environment serves as a catalyst for a number of benefits, including stronger environmental laws and policies, improved implementation and enforcement of those laws and policies, increased public participation in environmental decision-making, and reduced environmental injustices. More importantly, time and time again, recognition of the right to a healthy environment has

²⁰ David Boyd, “Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment,” *The Human Right to a Healthy Environment*, Cambridge University Press (2018), available at <https://www.cambridge.org/core/books/human-right-to-a-healthy-environment/catalyst-for-change/46EB145CB4BEB4B596B25E4718DD3A6B>

²¹ PACE Recommendation 2211(2021), *Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe* (September 2021).

²² Committee of Ministers Recommendation CM/Rec(2022)20, *Recommendation of the Committee of Ministers to member States on human rights and the protection of the environment* (September 2022).

²³ See for instance African Charter on Human and Peoples’ Rights, adopted June 27, 1981 – entered into force on October 21, 1986, 1520 UNTS 217 at Art. 24; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (San Salvador Protocol), adopted November 17, 1988 – entered into force on November 16, 1999, at Article 11; Arab Charter on Human Rights, adopted May 22, 2004 – entered into force on March 15, 2008, at Article 38; ASEAN Human Rights Declaration, adopted on 18 November 2012, at Article 28 (f); Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement), adopted on March 4, 2018 – entered into force on April 22, 2021, at Article 1.

²⁴ See UN General Assembly, *The human right to a clean, healthy and sustainable environment*, July 2022, UN Doc. No. A/RES/76/300; Human Rights Council, *The human right to a clean, healthy and sustainable environment*, October 2021, UN Doc. no. A/HRC/RES/48/13; Human Rights Council, *The human right to a clean, healthy and sustainable environment*, April 2023, UN Doc. No. A/HRC/RES/52/23.

²⁵ See Summary report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, *Good practices of States at the national and regional levels with regard to human rights obligations relating to the environment*, 2020, A/HRC/43/53, at Annexes II, VI and VIII, available at <https://www.ohchr.org/en/special-procedures/sr-environment/good-practices-right-healthy-environment>

been shown to contribute to improved environmental performance, including cleaner air, enhanced access to safe drinking water, and reduced greenhouse gas emissions.²⁶

Nonetheless, against this context, the European human rights framework has not taken the step of recognising the autonomous human right to a clean, healthy, and sustainable environment yet.

II. HUMAN RIGHTS GAP: THE LACK OF EXPLICIT RECOGNITION

Rather than taking outset in the deficiencies of international environmental law, and questioning whether the human rights system will be expected to address environmental problems stemming from the triple-planetary crisis, this study should take outset in the human rights challenges that environmental degradation presents, which the European human rights system is already handling and will assuredly continue to be facing.

As noted in the following paragraph, which is already reflected in the draft:

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. 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.

Along with this point, the following point, which only surfaces far later in the draft, should be added here:

The strongest expression of the interdependence between human rights and environmental protection is found in the recognition of the autonomous human right to a clean, healthy and sustainable environment.

As recognized by all 46 Member States of the Council of Europe in supporting the UN General Assembly resolution, the existence of the human right to a clean, healthy, and sustainable environment is no longer in question. The right exists. What remains to be seen in Europe is the explicit recognition of the right in a legally-binding instrument. Moreover, although the content and interpretation of the right and its elements continue to evolve, it should be noted that this point is not unique to this particular human right, but rather remains true for all human rights. Accordingly, the principle question that the study should clarify is the significance and impact of the fact that the European human rights framework provides only indirect protection for the human right to a clean, healthy, and sustainable environment, as a result of the absence of an explicit, legally binding recognition of this autonomous human right at the European level.

To this end, in addressing rationales for an additional legal instrument, it would be helpful to start with this most conspicuous gap in the European Convention on Human Rights, as exemplified by the following language:

²⁶ See e.g., Boyd, *ibid.* See also IPCC AR, Synthesis Report, Summary by Policy Makers, finding C.5.2: (“Adaptation and mitigation actions, that prioritise equity, social justice, climate justice, rights-based approaches, and inclusivity, lead to more sustainable outcomes, reduce trade-offs, support transformative change and advance climate resilient development.”)

The main rationale put forward to justify the adoption of a further instrument on human rights and the environment is the urgent need to address the currently existing gap within the European human rights system, in the direct and common protection of the human right to a clean, healthy, and sustainable environment.

The content, scope and implications of this right have been addressed and developed over the last several decades by UN treaty bodies and Special Procedures, as well as by several regional and national human rights bodies and courts.²⁷ It is important to recall that the right to a healthy environment does not constitute “an empty vessel waiting to be filled.”²⁸ Its content and scope have been clarified through the years by human rights institutions and judicial bodies that have consistently found that a clean, healthy and sustainable environment is necessary to fully enjoy all human rights. While not all States have formally accepted all of these norms, the coherence of the interpretations of human rights bodies is strong evidence of the converging trends towards greater uniformity and certainty in the application of human rights law to the environment. Former UN Special Rapporteur on Human Rights and the Environment John Knox, in his Framework Principles on human rights and the environment, laid out a non-exhaustive list of actions that States should comply with in order to respect, protect and fulfil the right to a healthy environment.²⁹ While the content and scope of the right to a healthy environment are already quite well-defined, certain technical questions remain - for instance around its enforcement, or around the standards for its justiciability.

Before these more detailed aspects can be considered, however, it must be noted that, when it comes to the Council of Europe, there is a glaring absence of a common, legally binding recognition and delimitation of this right – despite recurring calls, in the past twenty years, by the Parliamentary Assembly in this direction.³⁰

The lack of such autonomous recognition of this right, whose significance is predominant at a time of multiple environmental crises, from which the questions of European implementation could follow, represents a threat to the pluralist democracy, universality of rights and non-discrimination principles whose protection constitutes the Council of Europe’s core mission.

Although the right to a healthy environment is already recognized at national level by the majority of Member States of the Council of Europe,³¹ national recognition is not uniform,

²⁷ OHCHR, UNEP, UNDP, *What is the Right to a Healthy Environment?*, 2023, p. 8 available at <https://www.undp.org/sites/g/files/zskgke326/files/2023-01/UNDP-UNEP-UNHCHR-What-is-the-Right-to-a-Healthy-Environment.pdf>

²⁸ 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, p. 27.

²⁹ Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 2018, UN Doc. No. A/HRC/37/59, at Annex Framework Principles on Human Rights and the Environment.

³⁰ PACE Recommendation No. 1431(1999), *Future action to be taken by the Council of Europe in the field of environment protection* (1999); PACE Recommendation No. 1614(2003), *Environment and human rights* (2003); PACE Recommendation No. 1885 (2009), *Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment* (2009); PACE Recommendation 2211(2021), *Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe* (2021).

³¹ According to a survey conducted by the UN Special Rapporteur on human rights and the environment, 42 out of 46 Member States of the Council of Europe recognize this right. See Summary report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, *Good*

both in terms of the level of recognition (at times constitutional, legislative, or as Parties to the Aarhus Convention) and of the delimitation and development of the right. Although it is crucial and commendable that Member States recognize the right to a healthy environment within their jurisdictions, forty-six different conceptualisations of the same right – without any common guidance or standards provided at the European human rights level to ensure consistency in the development of the protection of this right – will inevitably lead to fragmentation and dispersion in the protection of human rights.

Notably, the CDDH-ENV's own recommendation, which fails to provide clarity, and instead is seen as "acknowledging the difficulties in conceptualising and delimiting the right, by inviting States to reflect on its nature, content and implications" makes this risk apparent. Rather than achieving continuity in Europe, this approach invites divergence. This problem is also reflected in the comments to the draft submitted by the UK regarding the non-binding nature of the Framework Principles, which the UK clarifies merely "suggest" that States "should" fulfil their human rights obligations. The Framework Principles intend to help "explain what the content of such a right would include". Notably, even though this is a quote, the UK wants to change this "would" to "could", making clear that until these principles have been codified in a legally-binding instrument in Europe, their agreed value in ensuring alignment throughout Europe as to the content of the right risks remaining elusive. With an Additional Protocol, such divergence would be resolved.

Furthermore, judicial courts in Europe routinely deal with environment- and climate-related cases, developing a rich but not always harmonious body of jurisprudence to face the impacts of environmental degradation on human rights. An increasing amount of environment-related litigation is also being and will be brought in front of the European Court of Human Rights, and in the absence of clear guidance and standards on how to interpret violations of the human right to a healthy environment due to the pollution, biodiversity loss and climate change crises, the Court will be placed at a disadvantage, and will be forced to address these violations only indirectly, through the violation of other human rights. Recognition of this autonomous human right would permit the existing "normative acquis" to be consolidated instead of being fragmented across a range of instruments. In a similar vein, it would allow the Court to adjudicate consistently on the substantive contents of such a right.³²

Adoption of different solutions by different actors at national and regional level, due to a lack of direct guidance and standards in the European human rights framework, is resulting in an inconsistent, indirect, piecemeal approach to the recognition, protection and enforcement of the right to a healthy environment throughout Europe. This, in turn, results in legal uncertainty for rights-holders in Europe, for Member States regulating the right, and for judicial bodies ruling in cases regarding human rights and the environment. To avoid such an inconsistent and uncertain approach, the political institutions of the Council of Europe must explicitly recognize the autonomous right to a healthy environment in an Additional Protocol to the European Convention on Human Rights and provide a common regulation for it, thus ensuring a harmonious and uniform response to violations of human rights in environmental circumstances.

practices of States at the national and regional levels with regard to human rights obligations relating to the environment, 2020, A/HRC/43/53, at Annexes VI and VIII, available at <https://www.ohchr.org/en/special-procedures/sr-environment/good-practices-right-healthy-environment>

³² Marcos Orellana, "Quality Control of the Right to a Healthy Environment," in *The Human Right to a Healthy Environment*, 2018, pp. 169, 176; see also Extended Summary, J. Knox, Expert Summary, p. 27.

In this sense, a legally binding instrument in the form of an Additional Protocol to the European Convention on Human Rights would be best placed to provide guidance while also ensuring consistency.

III. PROTECTION OF ENVIRONMENTAL HUMAN RIGHTS DEFENDERS

The study should devote additional attention to the value that explicit recognition of the right to a clean, healthy and sustainable environment in a legally-binding instrument provides for environmental human rights defenders. The following drafting recommendations aim to draw attention to the importance of recognition of this right in conferring legitimacy to environmental human rights defenders by recognizing them as defenders of a human right that is on equal foot with all rights recognized, protected and enforced in the European human rights system. Of particular importance, the extraterritorial dimension of obligations under the European Convention on Human Rights means the protection of environmental human rights defenders also extends outside the European territory (where their rights are often most at risk) for activities under the control of public and private actors from Europe.

Environmental human rights defenders are the most at-risk category of human rights defenders.³³ Over the past decade, one environmental human rights defender has been killed every two days, and the number of deaths has only increased in recent years.³⁴ In addition to the killings, environmental human rights defenders, as well as their families and communities, are routinely subject, around the world, to death threats, enforced disappearances, illegal surveillance, travel bans, blackmail, sexual harassment, judicial harassment, criminalization and strategic lawsuits against public participation.³⁵ Member States of the Council of Europe have made important efforts to protect environmental human rights defenders in recent years, especially in the context of the Aarhus Convention.³⁶ Nevertheless, these efforts have so far proven to be insufficient. In particular, although the open nature of the Aarhus Convention was a positive signal of Member States's will to expand the protection of environmental human rights defenders

³³ Special Rapporteur on the situation of human rights defenders, 24 December 2020, UN Doc. No. A/HRC/46/35, at para. 5.

³⁴ Global Witness publishes an annual report on the number of killings of environmental defenders. The most recent report, *Decades of Defiance*, was published in September 2022 and is available at https://www.globalwitness.org/en/campaigns/environmental-activists/decade-of-defiance/?gclid=Cj0KCQjwIPWgBhDHARIsAH2xdNcBmaL7-XV-zii9qQsgTmkObAkHO0FiF7fpRcC5Q3YjpjXsqf10gF0aAqzAEALw_wc

³⁵ Special Rapporteur on the situation of human rights defenders, 3 August 2016, UN Doc. No. A/71/281.

³⁶ Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, adopted on June 25, 1998 – entered into force on October 30, 2001, 2161 UNTS 447, 38 ILM 517 (1999).

See also the establishment, in October 2021, of a rapid response mechanism for environmental defenders, and the election, in June 2022, of Michel Forst as the first Special Rapporteur on environmental defenders under the Aarhus Convention. See Meeting of the Parties to the Aarhus Convention, *Decision VII/9 on a rapid response mechanism to deal with cases related to article 3(8) of the Convention on access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, October 2021, UN Doc. No. ECE/MP.PP/2021/2/Add.1; see also Article 3(8) of the Aarhus Convention, stating that “Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings;” see also Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, *Report of the third extraordinary session of the Meeting of the Parties*, June 2022, ECE/MP.PP/2022/2. See also UNECE, *World's first Special Rapporteur on environmental defenders elected under the Aarhus Convention*, 24 July 2022, available at <https://unece.org/environment/press/worlds-first-special-rapporteur-environmental-defenders-elected-under-aarhus>.

beyond the European territory, in practice – with only one non-European country becoming party to the Convention in over 25 years – this potential impact has not been effectively achieved.³⁷

The difficulties encountered by the autonomous Aarhus Convention in effectively protecting environmental human rights defenders around the world are a clear sign that, in order to duly safeguard this category of defenders,³⁸ the adoption of an Additional Protocol to the European Convention on Human Rights is necessary, equipping environmental human rights defenders around the world with the tools to activate the implementation and enforcement mechanisms proper to the European human rights framework. The recognition of the autonomous right to a clean, healthy and sustainable environment has been indicated as one of the most powerful tools to ensure the effective protection of environmental human rights defenders and their recognition as human rights defenders, forestalling any claim against this stance and equipping them with a “stronger backbone to their [...] advocacy”.³⁹ In particular, the recognition of the right to a healthy environment in an Additional Protocol to the European Convention on Human Rights would be the most straightforward way to ensure that, legally and judicially, environmental human rights defenders are considered as defenders of a right that stands on equal foot with all the other rights legally recognized in the European human rights system - putting an end to attempts to delegitimize and isolate environmental human rights defenders with suggestions that they are acting contrary to other important rights and collective interests.

Lastly, the effective recognition of the right to a healthy environment, especially through its procedural elements (including access to information, participation in decision-making and access to justice), will contribute to fostering public engagement and will result in a greater safeguard of the civic space,⁴⁰ thus creating a safer space in which environmental human rights defenders can operate.

EUROPEAN NETWORK OF NATIONAL HUMAN RIGHTS INSTITUTIONS (ENNHRI)

The European Network of National Human Rights Institutions (ENNHRI) represents more than 40 independent National Human Rights Institutions (NHRIs) established by constitution or law to protect and promote human rights in accordance with the [United Nations Paris Principles](#) and the [Council of Europe Committee of Ministers Recommendation 2021/1](#). ENNHRI is prioritising environmental- and climate-related human rights work – including by establishing a Climate Working Group; publishing a position paper on Climate Change and Human Rights in the European Context; and submitting third-party interventions to the European Court of Human

³⁷ 7th meeting of the Parties to the Aarhus Convention, *Decision VII/10 on accession by Guinea-Bissau to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (October 202).

³⁸ On the key contributions of environmental human rights defenders to the enjoyment of human rights and environmental protection, see UN Human Rights Council, *Recognizing the contribution of environmental human rights defenders to the enjoyment of human rights, environmental protection and sustainable development*, 2019, UN Doc. No. A/HRC/RES/40/11.

³⁹ John H. Knox, *Environmental Human Rights Defenders: A Global Crisis*, 2017, available at <https://www.universal-rights.org/urg-policy-reports/environmental-human-rights-defenders-ehrds-risking-today-tomorrow/>, at p. 21

⁴⁰ Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, July 29/18, UN Doc. No. A/73/188.

Rights (ECtHR) in a series of landmark climate cases⁴¹, underlining States' responsibility to combat climate change effectively in order to protect the right to life.

A safe, clean, healthy and sustainable environment is essential to realising the right to life and all other human rights. Therefore, ENNHRI welcomes Member States' commitment, enshrined in the [Reykjavik Declaration](#), to make human rights and the environment a visible priority of the Council of Europe, and to strengthen the work of the Council of Europe in this field. To make the commitment a reality, **ENNHRI reiterates its recommendation that the Council of Europe should adopt a binding instrument recognising the right to a healthy environment at the Council of Europe level.**

While ENNHRI [welcomes](#) the [Council of Europe recommendation](#) on human rights and the protection of the environment, which calls on member States to actively consider recognising the right to a clean, healthy and sustainable environment, only a legally binding instrument would obligate States to address the human rights impacts of climate change and environmental degradation. The time is now to ensure that the 830 million people protected by the European Convention on Human Rights (ECHR) are afforded a legally binding right to a healthy environment. It is also crucial that such an instrument should be established without prejudice to the level of environmental protection afforded under already existing human rights obligations, as interpreted dynamically by the European Court of Human Rights.

In light of the above, ENNHRI submits that **the CDDH report on the need for and feasibility of a further instrument or instruments on human rights and the environment, which is currently being drafted, should further focus on the advantages of establishing a regional mechanism to enforce human rights-based protection for the environment.** Furthermore, **Chapter 4 of the draft feasibility report should address the potential added value of recognising the right to a healthy environment in a legally binding instrument** in detail and in a depth, which matches the analysis regarding possible counterarguments that the draft report already lists.

ENNHRI recommends that such a new, legally binding instrument at the regional level should provide an effective enforcement mechanism to remedy environmental human rights violations across the whole region. This would also enhance access to effective access to justice, regardless of availability of similar national mechanisms. Such an instrument could also clearly signal the emergence of a new European consensus on the need for and content of a human rights-based protection of the environment, by drawing on normative good practices arising at the national level.

To achieve the above, ENNHRI reiterates the arguments in favour of an **Additional Protocol to the European Convention on Human Rights (ECHR)**. Such a Protocol would provide the most effective legal protection of the right to a healthy environment because it would be enforceable by the European Court of Human Rights, which can issue legally binding judgements in individual complaints. As an Additional Protocol must be signed and ratified by a State, this solution would also enable those States who wish to move ahead to do so, while allowing others to join later. The development of an Additional Protocol to the ECHR the clear next step for realising the commitment made by CoE Member States in the Reykjavik Declaration regarding human rights and environment.

⁴¹ ENNHRI has so far intervened in the ECtHR's cases of *Greenpeace Nordic and others v. Norway*, *Duarte Agostinho and Others v. Portugal and Others*, *Verein KlimaSeniorinnen Schweiz and others v. Switzerland*, and *Carême v. France*.