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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**

(with a view to the 8th CDDH-ENV meeting - 25 – 29 September 2023)

**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**

(en vue de la 8^e réunion du CDDH-ENV - 25 – 29 septembre 2023)

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BELGIUM / BELGIQUE
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- 2003⁶ Revised Convention for the Protection of Animals during International Transport (ETS No. 193). The revised convention builds on the lessons learnt since adoption of Convention ETS 193 and contains provisions designed to overcome defects and to facilitate the implementation of the principles of the convention. 13 member States have ratified the revised convention, most recently Türkiye in 2019.

Page 7**II. Potential need for a further instrument or instruments****Page 10**

34. Based on the text adopted by the HRC, the UN General Assembly, on 28 July 2022, with a record vote of 161 States (including those of all Council of Europe member States) in favour, zero against and eight abstentions, adopted resolution 76/300 recognising the right to a clean, healthy and sustainable environment as a human right (GA Resolution).¹ Among the co-sponsors of the GA Resolution were 243⁶ Council of Europe member States.² The GA Resolution was also accompanied by a number of explanations of votes, including of Council of Europe member States. The present report goes into more detail on these votes in paragraph 94 below.

Page 12 – Footnotes 40 and 41.

Human Rights Committee, *Teitiota v. New Zealand*, UN Doc. CCPR/C/127/D/2728/2016 (2020); UN Committee on the Rights of the Child, *Sacchi et al v Argentina et al.*, UN Doc. CRC/C/88/D/1047/2019 (2021).

¹UN Committee on the Rights of the Child, CRC/88/D/104/2019⁹⁸.

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57. 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,³ and to protect the population against, for example, nuclear hazards⁴ as well as against health risks related to asbestos.⁵ 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.⁶ 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 11.⁷ The ECSR has also emphasised that States have positive obligations

Commented [A1]: In order for this section to be able to provide convincing rationales for the potential development of one or more further instruments, a solid theoretical framework and identification of gaps within this framework is needed. It would therefore be helpful to include a basic comparison of the IHRL and IEL frameworks and their characteristics. The identification of gaps is also very much dependent on whether an anthropocentric or ecocentric approach to the right to a healthy environment is taken, and whether the focus is on an individual or a collective right. It would therefore be helpful to explain this difference more generally, and to indicate, where relevant, whether the different gaps stem from anthropocentric or ecocentric approach.

Commented [A2]: See Addendum to the draft resolution of the General Assembly on the human right to a clean, healthy and sustainable environment (28 July 2022), *UN Doc. A/76/L.51/Add.1* (2022).

¹ UN General Assembly resolution, The human right to a clean, healthy and sustainable environment, 26 July 2022, A/RES/76/300.

² 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, Sweden, Switzerland and Ukraine.

³ Ibid. §§ 203, 209, 210 and 215.

⁴ Conclusions XV-2 (2001), France; Conclusions XV-2 (2001), Denmark.

⁵ Conclusions XVII-2 (2005), Latvia.

⁶ Conclusions 2013, Georgia.

⁷ Conclusions XVII-2 (2005), Portugal.

in order to combat air pollution.⁸ States are required to take measures to remove the causes of ill-health from environmental threats such as pollution, within a reasonable time, by showing measurable progress and making best possible use of the resources at their disposal.⁹

Footnotes 66 and 67

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

International Commission of Jurists v. Portugal, Complaint No. 1/19989, 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.

Page 18 – Footnote 77

C-237/07 Janecek (2008), C-75/08 Mellor (2009), C-2463/09 Djurgården (2010), C-240/09 LZ or Slovak Brown Bear (2011), C-115/09 Trianel (2011), C-128/09 Boxus, C-182/10 Solvay (2012), C-72/12 Altrip (2014), C-404/13 ClientEarth (2014), and C-243/15 Slovak Brown Bear II (2016).

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C. Material Scope of the human right to a clean, healthy and sustainable environment

71. Although the right to a clean, healthy and sustainable environment has been recognised politically at global level in UN General Assembly Resolution 76/300 (see further below), it is not yet legally protected at either global or European level. This means that there is not yet any common understanding amongst Council of Europe member States of the “nature, content and implications” of the right (to use the language of Recommendation CM/Rec(2022)20).

72. The present section therefore gives an overview of existing codifications, political endorsements and jurisprudential recognition of the right to a clean, healthy and sustainable environment or aspects thereof in different jurisdictions. The description, content and nature of the right in different instruments varies. ~~The section~~ uses the term “right to a healthy environment” as a generic, “shorthand” term regardless of the specific that incorporates the qualifying adjectives used in the different instruments, as this is the adjective that is most commonly used.¹⁰ The aim of this section is to clarify the material scope of this right as it is currently set out in various instruments so as to provide a basis for the considerations in Section III of this report.

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b) The right to a healthy environment in multilateral environmental agreements (MEAs)

88. Two treaties recognise the right to a healthy environment in an indirect manner: the Aarhus Convention¹¹ at the European level, and, more recently, the Escazú Agreement¹² 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.

⁸ *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, Complaint No.30/2005, decision on the merits of 6 December 2006, §203; and the CDDH Manual on Human Rights and the Environment (3rd Edition, adopted in 2021), p. 118.

⁹ *Ibid.*, §204.

¹⁰ See Centre for International Environmental Law, ‘Interpreting the Meaning of “Safe”, “Clean”, “Healthy”, and “Sustainable”, in the Right to Environment, 21 May 2020.

¹¹ 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).

¹² 2018 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean; see, however, the understanding expressed by the United Kingdom of Great Britain and Northern Ireland upon signature and confirmed upon ratification that Article 1 is understood “to express an aspiration”, rather than a right.

~~Whereas the Aarhus Convention aims to contribute to the protection of the right to live in an environment adequate to his or her health and well-being, the Escazú Agreement aims to contribute to the protection of the right to live in a healthy environment, thereby “contributing” to the protection of the “right of every person of present and future generations to live in a clean environment”.~~¹³ They are widely seen as codifying procedural components of the right to a **clean healthy** environment.¹⁴ While the Aarhus Convention obliges States to ensure that **environmental human rights defenders shall those exercising their rights under the Convention shall not** be penalised, persecuted or harassed in any way, the Escazú Agreement goes one step further by including specific rights of environmental human rights defenders.

Commented [A3]: The formulation of the right in both instruments is slightly different and we would prefer to see this reflected in the report.

Commented [A4]: The Aarhus Convention does not include the term 'environmental human rights defenders'. The protection from persecution, harassment and punishment applies to everyone who exercises their rights under the Convention. The Escazú Agreement includes specific rights of the broader group of human rights defenders.

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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.¹⁵ 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.¹⁶ According to para. 18 of the Annex to decision I/7, the 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*.¹⁷ A similar regime is established under Article 18 of the Escazú Agreement, 18, which established the Committee to Support Implementation and Compliance as a subsidiary body of the Conference of the Parties to the Escazú Agreement. This Committee is of a consultative and transparent nature, non-adversarial, non-judicial and non-punitive. (see new footnotes)

Commented [A5]: This is not correct. Citation from the Aarhus Implementation Guide (which itself cites a decision by the Compliance Committee): "The Convention is intended to allow a great deal of flexibility in defining which environmental organizations have access to justice. On the one hand, the Parties are not obliged to establish a system of popular action (*actio popularis*) in their national laws, with the effect that anyone can challenge any decision, act or omission relating to the environment. On the other hand, the Parties may not take the clause "where they meet the criteria, if any, laid down in its national laws" as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organizations from challenging acts or omissions that contravene national law relating to the environment" (p. 198)

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¹³ 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."

¹⁴ See Peters, Clean and Healthy Environment, Right to, International Protection, MPEPIL, January 2021, para. 10.

¹⁵ 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>.

¹⁶ 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.

¹⁷ Report of the first meeting of the Parties, Decision I/7, ECE/MP.PP/2/Add.8, para 18 "the expiry of twelve months from either the date of adoption of this decision or from the date of the entry into force of the Convention with respect to a Party, whichever is the later, communications may be brought before the Committee by one or more members of the public concerning that Party's compliance with the Convention, unless that Party has notified the Depositary in writing by the end of the applicable period that it is unable to accept, for a period of not more than four years, the consideration of such communications by the Committee."

¹⁸ The Committee to Support Implementation and Compliance is a subsidiary body of the Conference of the Parties to the Escazú Agreement to promote the implementation of the Agreement and support Parties in that regard. It is of a consultative and transparent nature, non-adversarial, non-judicial and non-punitive. The rules relating to the structure and functions of the Committee were adopted at the first meeting of the Conference of the Parties; see further https://repositorio.cepal.org/bitstream/handle/11362/48347/3/S2200737_en.pdf.

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102. The Framework Principles set out further linkages between human rights, as relating to the environment, and potential substantive elements of the right to a clean, healthy and sustainable environment, including (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;¹⁹ (vii) non-discrimination in relation to enjoyment of a healthy environment;²⁰ (viii) the maintenance of non-retrogressive substantive environmental measures in relation to the progressive realization of economic, social, and cultural rights;²¹ (ix) the monitoring and effective enforcement of compliance with the standards by private actors as well as governmental authorities;²² (x) internal cooperation with respect to global or transboundary environmental harm that adversely affects human rights;²³ ~~and (xi) the protection of the rights of those who are particularly vulnerable to environmental harm, including environmental human rights defenders and indigenous peoples²⁴, and (xii) to provide a safe and enabling environment in which individuals, groups and organs of society that work on environmental issues can operate free from threats, harassment, intimidation and violence.~~ In addition, the Framework Principles suggest that States^{25,26}

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105. In Section IV on general measures of implementation, the Committee considers that “States must take deliberate, specific and targeted steps towards achieving the full and effective enjoyment of children’s rights related to the environment, including their right to a healthy environment”.²⁷ One may assume that the Committee, having recalled that “children have the right to a clean, healthy and sustainable environment”, intends other implementation measures also to apply to the right to a healthy environment. These measures ~~could~~ include child rights impact assessments, the obligation to protect against the abuse of child rights by third parties, including business enterprises, access to justice, and international cooperation. The General Comment gives further details of such measures.

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108. To the first question, 20 member States 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, 19 member

¹⁹ Ibid, paras 10-30 (Framework Principles 5-10).

²⁰ Ibid, paras 7-9 (Framework Principle 3)

²¹ Ibid, paras 31-33 (Framework Principle 11)

²² Ibid, paras. 34-35 (Framework Principle 12).

²³ Ibid, paras. 36-39 (Framework Principle 13).

²⁴ Ibid, paras. 10-11, 40-53 (Framework Principles 4, 14, 15).

²⁶ Ibid. Paras 54-55 (Framework Principle 6).

²⁷ Ibid. para 71.

Commented [A6]: In accordance with the Framework Principles, a distinction needs to be made between the obligation to provide a safe and enabling environment in which individuals, groups and organs of society that work on environmental issues can operate free from threats, harassment, intimidation and violence (Framework Principle 4) and the obligation to protect the rights of those who are particularly vulnerable to environmental harm (Framework Principle 14). While the first obligation pertains to environmental human rights defenders, the second obligation focuses on those who are at greater risk from environmental harm (e.g. women, children, persons living in poverty, members of indigenous peoples and traditional communities, older persons, persons with disabilities, ethnic, racial or other minorities and displaced persons).

Commented [A7]: Principle 4

Commented [A8]: Would it be possible to include a footnote here?

States have answered in the positive by providing examples with 8 (Andorra, Armenia, Belgium, Denmark, Estonia, Malta, the Netherlands, Sweden and the UK) answering in the negative.

Commented [A9]: The Belgian Constitutional Court has in several cases ruled on whether legislative acts respect article 23, third Alinea, 4°, of the Belgian Constitution, which enshrines the right to the protection of a healthy environment.

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118. At the national level, 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 permitted 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 bodies²⁸, others provide for the possibility of *actio popularis*²⁹. ~~Other member~~Several States which recognize the right to a healthy environment in their national law, however, do not conceive of the right as being justiciable.

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D. Possible rationales for a further instrument or instruments

119. The following section sets out possible rationales for a new instrument on human rights and the environment and analyses their underlying assumptions. The compilation does not imply an endorsement of any argument by member States.
[...]

Commented [A10]: Where do these rationales come from? Suggestion to mention the sources.

122. The following ~~are perceived as~~have been argued to be –limitations of the Convention system as a means to address the human rights impact of the triple planetary crisis:

- A first alleged (procedural) limitation concerns the jurisdiction in extraterritorial cases. According to Article 1 of the Convention a State's jurisdiction within the meaning of Article is primarily territorial. Consequently, the victim of an alleged Convention violation needs to be within a member State's territorial jurisdiction. This occurs primarily where the victim is within the territory of the State.³⁰ Exceptionally, extraterritorial jurisdiction may be established if the victim is outside of a State's territory, but under the State's authority and control. Cases of transboundary harm and climate change typically pose extraterritoriality problems as the pollution originates in one State but impacts individuals in another state.³¹ There is no territorial control and no jurisdiction under the personal heading of extraterritorial jurisdiction or other bases of jurisdiction on the basis of the established jurisprudence of the Court. Problems of admissibility on account of failure to establish jurisdiction are therefore deplored.³² There have been developments of the Court's jurisprudence on jurisdiction,³³ but so far, unlike the UN Committee on the Rights of the Child and the IACtHR³⁴, the Court has not accepted control over the source of a harm as capable of establishing jurisdiction under Article 1.

Commented [A11]: It would be important to provide a more balanced view regarding the issue of jurisdiction. If harm was sufficient to establish jurisdiction, that would make the concept of jurisdiction rather meaningless, which would also have negative effects.

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²⁸ Estonia, Norway, Poland, Slovak Republic.

²⁹ Latvia and Portugal.

³⁰ *Ukraine v. Russia (re Crimea)* (dec.) [GC], 2020, § 345).

³¹ Extended summary, Raible, Expert contribution, p. 34.

³² Extended summary, Raible, Expert contribution, p. 35.

³³ *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.

³⁴ AO23/2017.

- A second alleged (procedural) limitation concerns the victim status requirement. Article 34 of the ECHR excludes from the Court's jurisdiction any *actio popularis*, that is to say, any public-interest applications that would not have any bearing on the applicant's individual rights. At present, an applicant must claim to have been the victim of a violation of a right protected under the Convention or its Protocols. Furthermore, the victim needs to demonstrate that he or she risks an actual or imminent violation of his or her rights under the Convention, and that he or she suffers personal harm or potential harm as a consequence of the alleged violation.

[...]

- As to the issue of future generations, under the current normative framework, the Court only has the discretion to accept the standing of a person who acts on behalf of a direct or indirect victim of an alleged violation.³⁵ In contrast, outside of the Convention system, future generations' interests have been protected by institutions like the Hungarian Ombudsperson for Future Generations, who is permitted by local law to initiate or participate in legal procedures.³⁶ It is has been argued that such protection would be needed as the effects of the triple planetary crisis risk the future impairments of fundamental rights.
- A third alleged (procedural) limitation concerns the requirement to exhaust domestic remedies. The requirement to exhaust domestic remedies, an expression of the principle of subsidiarity, has been disputed by applicants in climate change cases related to human rights and the environment as a procedural obstacle.³⁷ As global climate change by its very nature is caused by the acts or omissions of a multitude of States, applicants in cases such as *Duarte Agostinho and others v Portugal* and others argue that an application should 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 argued to be time-consuming and costly.
- A fourth alleged (procedural) limitation concerns the Court's competence to impose remedial measures. Experts posit that the Court's limited power to order individual or general measures is also considered as an obstacle.³⁸ While the payment of just satisfaction is adequate to compensate for individual harm resulting from environmental damage, remedial measures of a general nature may be required to put an end to structural environmental problems. Although the Court does occasionally indicate general measures that should be taken in execution of a judgment, in general the choice of measures required to ensure full implementation of a judgment falls to the respondent State, subject to the supervision of the Committee of Ministers under Article 46 of the Convention.
- A fifth alleged (substantive) limitation concerns the direct violation of Convention rights. The fact that in order to succeed, applicants need to show that environmental degradation

Commented [A12]: Whether this can be perceived as a limitation or not, depends on the approach taken, namely an anthropocentric or ecocentric approach. This should be explained.

Commented [A13]: We would rather see this as an example of protection of the interests of future generations at the end of the paragraph. Also we should not give the impression that there is opposition between the Convention system and protection outside of the system, as this protection is still rather rare.

Commented [A14]: This could give the impression that this is the view of the CDDH ENV. For all arguments, it should be made clear that views of others are presented and not the views of the CDDH as such. Referring to those who made the argument could help.

Commented [A15]: This is a procedural limitation, hence, for reasons of conceptual clarity, it would be better to move this paragraph to page 39

³⁵ Câmpeanu, § 103

³⁶ The office of Ombudsman for Future Generations was created by the Hungarian Parliament in 2007, see <https://www.ajbh.hu/web/ajbh-en/the-role-of-the-ombudsman>

³⁷ Keller/Pershing, Climate Change in Court: Overcoming Procedural Hurdles in Transboundary Environmental Cases, ECHRL 2022, 23, 34.

³⁸ 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.

directly affects their Convention rights can also be seen as a limitation under the Convention. The case of *Kyrtatos* highlights this gap: in 2003, the Court rejected claims arising from the destruction of a wetland adjacent to the property of the applicants, on the ground that “neither Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such.”³⁹ The Court stated, “even assuming that the environment has been severely damaged by the urban development of the area, 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.”⁴⁰ It is argued that binding recognition of the right to a healthy environment would establish the linkage between human beings and natural protection that the *Kyrtatos* decision failed to find⁴¹ and would make possible, at least in principle, for claims to be brought for substantial environmental harm that affected the applicants.

Commented [A16]: This could give the impression that this is the view of the CDDH ENV. For all arguments, it should be made clear that views of others are presented and not the views of the CDDH as such. Adding a footnote referring to those who made the argument would help.

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- A sixth alleged (substantive) limitation concerns the establishment of state responsibility. Another complicating factor argued by some authors is the assumed impossibility of establishing cause and effect when it comes to environmental implications of climate change.⁴² A human rights-based approach to establishing liability for harm purportedly caused by climate change has been criticized on account of the difficulties associated with establishing a chain of causation between the act or omission of a state on the one hand, and the infringement of a right suffered by a specific victim or group, on the other.⁴³ It has been pointed out that the establishment of legal causation is made particularly challenging by the diffuse nature of greenhouse gas emissions, the indirect nature of many of climate change’s impacts on humanity, and, crucially, the scientific uncertainty associated with definitively linking any meteorological event to climate change.⁴⁴ In order for a human right to a healthy environment to be efficient in cases concerning consequences of climate change, it might be necessary to consider how causation, foreseeability and uncertainty can be effectively addressed.
- ~~Experts also posit that the Court’s limited power to order individual or general measures is also considered as an obstacle. While the payment of just satisfaction is adequate to compensate for individual harm resulting from environmental damage, remedial measures of a general nature may be required to put an end to structural environmental problems. Although the Court does occasionally indicate general measures that should be taken in execution of a judgment, in general the choice of measures required to ensure full implementation of a judgment falls to the respondent State, subject to the supervision of the Committee of Ministers under Article 46 of the Convention.~~
- A seventh alleged (substantive) limitation concerns the applicability of principles of international environmental law. It is ~~also~~ argued that the precautionary principle and other

Commented [A17]: This is a procedural limitation, hence, for reasons of conceptual clarity, it would be better to move this paragraph to page 39

³⁹ *Kyrtatos v Greece*, application no. 41666/98, judgment of 22 May 2003, § 52.

⁴⁰ *Ibid.* para. 53.

⁴¹ Extended Summary, Knox, expert contribution, p. 27.

⁴² Fanny Thornton, The Absurdity of Relying on Human Rights Law to Go After Emitters, Debating Climate Law and Intergovernmental Panel on Climate Change, 2022.

⁴³ Rendering International Human Rights Law Fit for Purpose on Climate Change Human Rights Law Review, Volume 23, Issue 1, March 2023, Climate Change and Human Rights: Amicable or Arrested Development? (2010) 1 Journal of Human Rights and the Environment.

⁴⁴ *Ibid.*

principles of international environmental law do not play a significant role in the Court's jurisprudence.⁴⁵ While the Court has emphasized the importance of the precautionary principle in *Tatar*⁴⁶, in newer cases the Court has not developed further its use of the precautionary principle.

- A eighth alleged (substantive) limitation concerns the 'fair balance' review. [The protection of the environment may be a legitimate aim justifying interference with certain individual human rights. For example, the Court has established that the right to peaceful enjoyment of one's possessions may be restricted if this is considered necessary for the protection of the environment. However, Given that the Convention system does not recognise a right to a healthy environment, only "indisputable" environmental "imperatives" can, in principle, justify interference with certain individual rights and freedoms (for example, right to respect for private life or right to property). Under the Convention and its Protocols, interference with certain rights may be justified if it is necessary in a democratic society "for the protection of the rights and freedoms of others". In assessing whether a fair balance has been struck between competing interests of the individual and of the community as a whole, the Court distinguishes between the "rights and freedoms" that are guaranteed by the Convention or its Protocols and those that are not. Pursuant to a well-established principle, where the "rights and freedoms" are guaranteed by the Convention or its Protocols, it must be accepted that the need to protect them may lead States to restrict other rights or freedoms likewise set forth in the Convention, and Contracting States must have a broad margin of appreciation in this respect. Instead, where restrictions are imposed on a right or freedom guaranteed by the Convention in order to protect "rights and freedoms" not, as such, enunciated in the Convention or protocols, only indisputable imperatives can justify interference with enjoyment of a Convention right.⁴⁷

Commented [A18]: Suggestion to add this passage from the Manual (p.8).

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- A ninth alleged (substantive) limitation concerns the rights of environmental human rights defenders. It is further argued that the Convention does not provide sufficient protection to environmental human rights defenders, who are a particularly -high-risk group of human rights defenders.⁴⁸ While 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,⁴⁹ these efforts are seen by some as insufficient. ~~It is~~

⁴⁵ Extended summary, Keller, Expert contribution, p. 5.

⁴⁶ *Tătar v. Romania*, no. 67021/01, judgment of 27 January 2009, § 120.

⁴⁷ *Chassagnou and others v. France*, app. nos. 25088/94 28331/95 28443/95, GC judgment of 29 April 1999, § 113

⁴⁸ Special Rapporteur on the situation of human rights defenders, 24 December 2020, UN Doc. No. A/HRC/46/35, at para. 5.

⁴⁹ 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>.

~~considered~~They consider that the recognition of the right to a healthy environment in an Additional Protocol to the Convention would ensure that environmental human rights defenders are considered as defenders of a right that stands on an equal footing 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.

123. 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~~it has been argued therefore that, in its current form, the Convention system is not ~~an adequate~~the most effective forum to litigate issues of environmental justice more generally.

[...]

125. The most relevant provision of the Charter for the protection of the environment is Article 11 (right to protection of health). Under the Charter, the right to protection of health includes the right to a healthy environment. Within the periodical reporting procedure, the ECSR has examined compliance of States Parties' law and practice with Article 11 concerning environmental risks in relation to air, water, soil and noise pollution, waste management, ionising radiation, asbestos etc.⁵⁰ As noted above, however, there are relatively few decisions on collective complaints 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.⁵¹ This paucity of decisions on the matter may be attributable, among other things, to the limited number of ratifications of the 1995 Additional Protocol to the Charter,⁵² which provides for the collective complaints mechanism, as well as a wider lack of awareness of the collective complaints procedure.

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127. Another argument relating to gaps in international legal standards concerns the international responsibilities of private actors for the environmental impact of their activities.⁵³ Most environmental pollution, greenhouse gas 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. Standards applicable to States need to be translated into concrete obligations for private entities.~~ International due diligence standards with respect to the environment, however, are not yet firmly anchored in international law. The reference document for the issue of business and human rights, the United Nations Guiding Principles on Business and Human Rights (UNGP), establishes corporate responsibility to respect human rights and highlights States' duty to protect individuals against human rights abuse within their territory by business enterprises. But this document lacks specific and explicit measures relating to environmental issues. These are only covered insofar as environmental issues are human rights issues. The OECD Guidelines for Multinational Enterprises as well as the OECD Due Diligence Guidances on Responsible Business Conduct, by contrast, are broader and include environmental aspects.

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⁵⁰ ECSR, Conclusions 2021, 2017, 2013, 2009, 2005 and 2003 on Article 11§ 3

⁵¹ *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.

⁵² To date only 16 States have ratified the Additional Protocol of 1995.

⁵³ Extended summary, Lambert, Expert contribution, p. 46.

Commented [A19]: Suggestion to address the issue of limited ratifications, and hence, the fact that the collective complaints mechanism is only applicable with regard to a relatively small number of States, in a separate paragraph.

Commented [A20]: Domestic environmental law has an important role to play, which seems to be overlooked here. European, national and subnational (environmental) law create a legal framework (incl. permitting framework) and obligations for private actors. National (or European) environmental law may be enacted in order to implement international environmental law, or go beyond IEL. For example, mention can be made of a proposal on a European Directive on due diligence in supply chains. Suggestion to better explain the perceived gap and its scope.

129. The development of binding 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. It has been argued that 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 judicial remedy, 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.⁵⁴

[...]

iii. Enhancing protection for environmental human rights defenders

134. Environmental human rights defenders are a particularly high-risk group of human rights defenders in the world.⁵⁵ They should be recognised as human rights defenders and, by extension, afforded the same level of protection.

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136. In addition, in line with the recommendations under CM Rec 2022(20), a new instrument could clarify the understanding amongst Council of Europe member States of the scope and content of the right to a healthy environment and inspire corresponding national legislation. That legislation would define the ways in which States would meet the clearly defined international standard, in accordance with the principle of subsidiarity.⁵⁶

iv. Establishing the Council of Europe's role

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138. The following section sets out different Council of Europe instruments that have been proposed to address the linkages between human rights and the environment. The proposals reflected here emanate from organs of the Council of Europe, experts heard by the working group and discussions within the working group. For each instrument, the report briefly examines its possible material content. It also sets out which of the rationales identified in Section II would be covered by the respective instrument in order to allow the narrowing down of options depending on the rationales member States consider particularly relevant. Finally, arguments for and against each of the instruments are compiled as they have been put forward in the discussions. The compilation does not imply an endorsement of any argument by member States. It aims to give an overview of the state of discussions and is intended to provide a meaningful basis for a political decision on the need and feasibility of a further instrument or instruments on human rights and the environment.

[...]

b) Covered rationales

✓ Addressing gaps in international human rights law

⁵⁴ Extended summary, Lambert, Expert contribution, p. 45.

⁵⁵ Global Witness publishes an annual report on the number of killings of environmental defenders. The most recent report, entitled *Last line of Defence*, was published in September 2021 and is available at https://www.globalwitness.org/documents/20191/Last_line_of_defence_-_high_res_-_September_2021.pdf.

⁵⁶ CMRec 2022(20) para 1. „*Recommends that the governments of the member States 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*”

Commented [A21]: There is no mention in this part of the relevant initiatives undertaken within the context of the Aarhus Convention (Rapid Response Mechanism + Special Rapporteur on environmental defenders), which seems to be important to mention in this context.

Commented [A22]: It would be good to explain here what kind of protection is meant as well as the instruments the protection is offered by. Does this refer to the Declaration on Human Rights Defenders? Does it also refer to protection within the Convention system?

Commented [A23]: This is a political argument, rather than a legal or practical one. It seems therefore less well suited to be included in the report. Suggestion to not include this as a rationale.

Commented [A24]: Suggestion to differentiate between the procedural and substantive limitations, and addition of other, previously mentioned limitations.

Procedural:

- jurisdiction in extraterritorial cases
- victim requirement
- the need to exhaust local remedies

Substantive

- direct violations of Convention rights
- establishment of State responsibility
- applicability of international environmental law
- 'fair balance' review
- protection of future generations
- protection of environmental human rights defenders

An Additional Protocol would contain a legally binding codification of the right to a clean, healthy and sustainable environment and would provide individuals with a monitoring mechanism capable of issuing binding decisions with respect to the right to a healthy environment. It would provide the Court with a standard that would remedy at least to a certain extent the limits of existing Convention rights in environmental matters. The extent to which alleged protection gaps would be closed depends on the content of the Additional Protocol. One of the main questions that would need to be answered with respect to admissibility issues is whether an Additional Protocol should deviate from existing Convention standards by including *lex specialis* rules on *inter alia* jurisdiction, the victim requirement, the need to exhaust local remedies and the Court's remedial powers. With respect to the substantive scope of protection, the extent to which the precautionary principle and other principles of international environmental law as well as the protection of environmental human rights defenders and future generations would play a role in the Court's jurisprudence would need to be ascertained. ~~This could be decided by the ECtHR unless member States include provisions in the Additional Protocol in that respect. The latter approach, h-~~

Commented [A25]: If there would be no amendments for the Protocol to the current general Convention framework, it is unclear how the Court would have more leeway to make such decisions than under the current system.

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~~Deviation from existing Convention standards in the Additional Protocol,~~ however, would deviate from the approach used in other Additional Protocols to the Convention which limit themselves to stating rights in generic terms.

[...]

✓ **Shaping the content of the right to a healthy environment**

An Additional Protocol to the ECHR would ~~primarily~~ allow the Court to contribute to developing a common understanding of ~~the~~ content of the right to a healthy environment through its jurisprudence. Member States, ~~on the other hand,~~ could also actively shape the understanding of the right by defining its content in more detail in the Additional Protocol.

[...]

✓ **Enhancing the protection for environmental human rights defenders**

Recognition ~~of the right to a healthy environment in an Additional Protocol~~ would clarify that the right to a healthy environment is on the same level as other human rights, thereby recognising environmental human rights defenders as human rights defenders and, by extension, affording them the same level of protection. In addition, the Additional Protocol could include specific provisions on environmental human rights defenders.

[...]

✓ **Establishing the Council of Europe's role**

An Additional Protocol ~~recognising the right to a healthy environment~~ would affirm the leading role of the Council of Europe in the area of human rights by being the first international organisation to ~~contribute to addressing~~ ~~meet~~ the challenges posed by the triple planetary crisis with a ~~binding recognition of the right to a healthy environment in a~~ human rights instrument.

Commented [A26]: It would be good to explain here what kind of protection is meant as well as the instruments the protection is offered by. Does this refer to the Declaration on Human Rights Defenders? Does it also refer to protection within the Convention system?

Commented [A27]: This is a political argument, rather than a legal or practical one. It seems therefore less well suited to be included in the report. Suggestion to not include this as a rationale. If a choice would be made by the group to include this element, some changes, as suggested, would be needed.

Commented [A28]: As unfortunately this would not solve the triple planetary crisis

Commented [A29]: As the ECHR has relevance for the environment as well.

Commented [A30]: Depending on choices made in the instrument.

Commented [A31]: Governments are already accountable. Judicial intervention is only one of the options to make governments accountable for their actions.

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c) Arguments for an Additional Protocol

[...]

+ An Additional Protocol ~~could~~ address almost all of the rationales identified in Section II.

+ ~~Only~~ ~~The possibility of~~ ~~Judicial intervention~~ ~~would provide a way to hold governments to account for their actions and and lack thereof regarding the respect for a healthy environment. This could in some cases help ensure that the necessary action is taken to address the triple planetary crisis, may break the current deadlock of perceived inaction of States concerning the triple planetary crisis by making governments accountable.~~

Commented [A32]: An additional argument against an Additional Protocol relates to the fact that the European Court of Human Rights is already faced with a huge backlog and has insufficient resources. The (extra) task of monitoring an Additional Protocol might undermine the existing legal regime.

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d) Arguments against an Additional Protocol

- To allow effective implementation of the right to a healthy environment, it has been argued that major adjustments to basic tenets of the Convention system would be needed. It has been argued that special provisions would be required *inter alia* on the jurisdiction requirement, the victim status requirement, the need to exhaust domestic remedies and the Court's remedial powers as well to evidentiary standards and processes. Deviating from established Convention principles with respect to the right to a healthy environment, however, would lead to a fragmentation of applicable standards that could be difficult to justify.
- The right to a healthy environment is different in nature from the other Convention rights that essentially protect subjective interests of individual human beings, insofar as it arguably also recognises and protects the collective interest in a clean, healthy and sustainable environment and/or the intrinsic value of the environment as such. The ECHR system provides a system of access to justice for the pursuit of subjective rights. It is not well suited for the enforcement of collective interests or ecocentric objectives. ~~At the same time, it is said that the process of "greening human rights" has contributed to new interpretations of the content of human rights law with respect to environmental protection. Moreover, both HRC Resolution 48/13 and GA Resolution 76/300 specifically noted that "the right to a clean, healthy and sustainable environment is related to other rights and existing international law". It is thus argued that the recognition of the right to a healthy environment in a protocol to the Convention 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. Introduction of the right to a healthy environment would therefore provide a stronger basis for the Court to consider environmental claims and to strengthen its existing environmental human rights jurisprudence.~~

Commented [A33]: These two do not always go hand in hand

Commented [A34]: These counterarguments do not address the issue of collective interests or ecocentric objectives, as the process of 'greening human rights' and establishing a link with other rights and existing international law do not alter the fundamental focus on the protection of subjective interests of individual human beings within the Convention system.

Commented [A35]: Added as it is likely that this doesn't completely solve the issue

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Possible solutions or mitigations:

- Detailed definition of the nature, content and implications of the right by member States

- Progressive Court judgments imposing policy choices on States based on the right to a healthy environment risk not being implemented. In the long run, this undermines the Court's authority.
- The Court has limited capacities which are already stretched thin. An Additional Protocol would further increase the number of pending applications.

Commented [A36]: Suggestion to elaborate this argument. The Court does not only have limited capacities, but is also faced with a huge backlog. There is a risk that this (extra) task might undermine the legal regime.

Possible solutions or mitigations:

- additional financial resources for the ECtHR
- ~~standing for NGO's could limit the burden on the Court's environmental case-load~~

Commented [A37]: This needs to be substantiated, as it could also be argued that standing for NGOs would increase the Court's environmental case-load.

- The Court lacks the scientific expertise required to decide environmental cases. 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. For example, the Court has an established practice of adjudicating on cases related to issues of medical negligence where expert opinions play a key role.⁵⁸

Possible solutions or mitigations:

- *stronger reliance on expert testimony*

- The content of the right to a healthy environment is uncertain; there is a need for robust standard-setting. ~~If the right -with the uncertainty that comes with it- would be included in the Convention, it would be further interpreted by the court, giving the Court leeway to interpret it in its own way, which could create uncertainty.~~

Possible solutions or mitigations:

- *member States could themselves define the right to a healthy environment, as protected under the Convention system. This solution, however, would deviate from the approach adopted in all other Additional Protocols which are limited to setting out the rights covered in generic terms.*

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b) Covered rationales

- ✓ Addressing gaps in international human rights law

An Additional Protocol would contain a legally binding codification of the right to a clean, healthy and sustainable environment and would also provide a monitoring mechanism. Although decisions of the European Committee on Social Rights are non-binding on member States, the ESC system with its collective complaints procedure would provide a way for non-governmental organisations and social partners to lodge complaints with respect to the right to a healthy environment without the need for a *lex specialis* provision as in the ECHR system. It would provide the European Committee on Social Rights with a standard that would remedy at least to a certain extent the limits of existing Charter rights in environmental matters. The extent to which alleged protection gaps would be closed depends on the content of the Additional Protocol. One of the main questions that would need to be answered with respect to admissibility issues is whether an Additional Protocol should extend the territorial and personal reach of the Charter which is even more restricted than that of the ECHR. With respect to the substantive scope of protection, the extent to which the precautionary principle and other principles of international environmental law as well as the protection of environmental human rights defenders would play a role in the Committee's practice depends on how far the substantive standards of international environmental law are understood to be incorporated in the right to a healthy environment. This would be decided by the European Committee on Social Rights unless member States include provisions in the Additional Protocol in that respect.

[...]

- ✓ Shaping the content of the right to a healthy environment

Depending on the content: an Additional Protocol to the ESC would ~~primarily~~ allow the Committee to contribute to developing a common understanding of the content of the right to a healthy environment through its jurisprudence. Member States, ~~on the other hand,~~ could also actively shape the understanding of the right by defining its content in more detail in the Additional Protocol.

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- ✓ Enhancing the protection for environmental human rights defenders

Recognition would clarify that the right to a healthy environment is on the same level as other human rights thereby, recognising environmental human rights defenders and human rights defenders and, by extension, affording them the same level of protection. In addition, the Additional Protocol could include specific provisions on environmental human rights defenders.

⁵⁸ Lopes de Sousa Fernandes v. Portugal (GC), application no. 56080/13, judgment of 19 December 2017 para 217.

Commented [A38]: It would be good to explain here what kind of protection is meant as well as the instruments the protection is offered by. Does this refer to the Declaration on Human Rights Defenders? Does it also refer to protection within the Convention system?

[...]

Establishing the Council of Europe's role

An Additional Protocol recognising the right to a healthy environment would affirm the leading role of the Council of Europe in the area of human rights by being the first international organisation to meet contribute to addressing the challenges posed by the triple planetary crisis with a binding human rights instrument recognising the right to a healthy environment.

Commented [A39]: This is a political argument, rather than a legal or practical one. It seems therefore less well suited to be included in the report. Suggestion to not include this as a rationale.

Commented [A40]: As unfortunately this would not be sufficient to solve the triple planetary crisis and as the ECHR is also a binding human rights instrument with relevance for the environment.

c) Arguments for an Additional Protocol

[...]

Possible solutions or mitigations:

- *The ECSR has considered that the restriction on the personal scope should not be read in such a way as to deprive foreigners coming within the category of irregularly present migrants of the protection of the most basic rights enshrined in the Charter or to impair their fundamental rights such as the right to life or to physical integrity or the right to human dignity.⁵⁹ Thus, it can be envisaged that the ECSR may extend the personal scope of the right to a healthy environment should it be added to the ESC via an Additional Protocol.*

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~~A non-binding monitoring system could steer governments to take action to address the triple triple planetary crisis, but this would be a softer incentive than Without binding judgments by an authoritative entity such as the ECtHR would be. - current deadlock of perceived inaction of States concerning the triple planetary crisis will not cease.~~

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- Individuals would not have the possibility to seize the European Social Committee.

[...]

3. Standalone Convention on Human Rights and the Environment

142. To address the linkages between human rights and the environment through robust standard-setting, the drawing-up of a self-standing Council of Europe Convention on Human Rights and the Environment has been proposed.

Commented [A41]: Suggestion to add a footnote referring to reports/ experts putting forward this proposal

a) Possible content

143. A standalone cConvention is a particularly flexible instrument; its content can be adapted according to the needs identified by member States. The cConvention could codify the human right to a healthy environment. In addition, it could provide detailed substantive standards on the interaction between human rights and protection of the environment. The Convention could also contain provisions on the responsibilities of private actors. It has also been suggested that a self-standing Convention could set out substantive environmental standards that would become a point of reference for the Court's jurisprudence.

Commented [A42]: As the term convention is used in a generic way and not referring to a particular convention, capital letter does not seem necessary

Commented [A43]: It is not clear what kind of substantive standards are being referred to. Is this about providing a detailed definition of the nature, content and implications of the right to a healthy environment as referenced above in the part on an additional protocol or are also other standards meant? If so, which ones could that be?

144. The flexibility also concerns possible monitoring mechanisms. Different options have been discussed put forward: a state reporting system as foreseen for UN human rights treaties is-would be conceivable. This could (but doesn't have to) be combined with a system of individual and/or collective complaints to a committee. Admissibility requirements could be tailored to the specificities of the Convention's content and could deviate from ECHR provisions. A peer review process modeled on the UPR has also been proposed. If the Convention's focus is on the

Commented [A44]: Would this not also be possible in a protocol?

Commented [A45R44]: Te vragen aan Philippe en Isabelle

Commented [A46]: It would be good to explain here what substantive environmental standards are meant

Commented [A47]: A footnote seems useful here

⁵⁹ International Federation of Human Rights Leagues v. France, Complaint No. 14/2003, decision on the merits of 8 September 2004, §§ 30 and 31; Defence for Children International v. the Netherlands, Complaint No. 47/2008, decision on the merits of 20 October 2009, §19

responsibility of private actors, the creation of a mechanism of alternative dispute resolution that involves business entities could also be an option. Another possibility would be to provide for the possibility to request Advisory Opinions from the ECtHR as foreseen in the Oviedo Convention.

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b) Covered rationales

[...]

✓ Enhancing the protection for environmental human rights defenders

A Convention that recognizes the right to a healthy environment would clarify that the right to a healthy environment is on the same level as other human rights, thereby recognising environmental human rights defenders and human rights defenders and, by extension, affording them the same level of protection. In addition, the Convention could include specific provisions on environmental human rights defenders.

[...]

✓ Establishing the Council of Europe's role

A Convention on Human Rights and the Environment would affirm the leading role of the Council of Europe in the area of human rights by being the first international organisation to contribute to addressing meet the challenges posed by the triple planetary crisis with a binding human rights instrument that recognises the human right to a healthy environment.

Commented [A48]: What does this mean? Suggestion to add footnotes (e.g. Declaration on Human Rights Defenders, other documents within the Council of Europe)

Commented [A49]: This is a political argument, rather than a legal or practical one. It seems therefore less well suited to be included in the report. Suggestion to not include this as a rationale.

Commented [A50]: Changed in line with suggested changes to similar paras above

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c) Arguments for a Convention

+ A binding codification of the right to a healthy environment possibly combined with a monitoring mechanism will contribute decisively to the further development of the right to a healthy environment. member States would have the possibility to influence actively this development and give further guidance regarding the nature, content and implications of this right.

+ ~~The political recognition of the human right to a healthy environment has triggered a need for a convention could provide~~ robust normative standards that merge human rights and environmental standards and provide orientation for States in the fight against the triple planetary crisis.

[...]

d) Arguments against a Convention

- ~~A Convention could include a monitoring system which could steer governments to take the necessary action to address the triple planetary crisis, but this would be a softer incentive than Without binding judgments by an authoritative entity such as the ECtHR would be , current deadlock of perceived inaction of States concerning the triple planetary crisis will not cease.~~

- The new Convention would be in addition to an already existing landscape of multiple international instruments without the authoritative force of an established mechanism such as the Court. The risk is that the new Convention could be perceived by member States as another cumbersome routine. Formal ratification of treaties does not always generate changes in member States' domestic human rights practices.

Commented [A51]: Changed in the same way as similar paragraphs above

Commented [A52]: What kind of standards would this be? Specific substantive content given to the right to a healthy environment, or also other standards going beyond this? What is meant here?

4. Self-standing monitoring mechanism

21. Another option that has been raised in the course of the working group's discussions is the creation of a self-standing monitoring mechanism within the Council of Europe that deals with issues of human rights and the environment. The idea of the establishment of a new

intergovernmental committee on environment and human rights (“Reykjavik Committee”) has also been encouraged by the Heads of State and Government of the Council of Europe in the Reykjavik Declaration.

Commented [A53]: But this didn't seem to be intended as a monitoring mechanism

Page 56

d) Arguments against a self-standing monitoring mechanism

- Monitoring based on dialogue may steer governments to take the necessary action to address the triple planetary crisis, but this would be a softer incentive than binding judgments by an authoritative entity such as the ECtHR would be. will not be able to break the current deadlock of perceived inaction of States concerning the triple planetary crisis since it lacks enforcement power, limiting. This would limit its ability to induce significant changes in State behavior and address environmental human rights issues effectively.
- The optional nature of monitoring diminishes the-its political and legal significance, potentially leading to selective engagement by States and a lack of accountability for violations.

Page 57

d) Arguments against inclusion of environmental protection in the ECHR's preamble

- Member States have no control over the way the Court will use the addition to the preamble.

Possible solutions or mitigations:

- *use an Explanatory Memorandum to clarify the aim of the addition*

Page 59

d) Arguments against a non-binding instrument

- The recognition of the right to a clean, healthy and sustainable environment in a non-binding Council of Europe instrument would not be the decisive step that is needed to boost the fight against the triple planetary crises.
- The Council of Europe does not usually “recognise” human rights. Either a human right is contained in a binding instrument or it is not.
- The implications of recognising a human right are unclear. The Recommendation could be perceived as a purely symbolic instrument. In that case, the Court could decide to deviate from this instrument, contributing to the risk of legal uncertainty.

Commented [A54]: Suggest to delete as the wording is unclear and the third bullet also deals with lack of effect of a non binding instrument.

Commented [A55]: Suggestion to further elaborate this argument.

DENMARK / DANEMARK

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35. The climate crisis is, defined as the greatest threat to human rights by the former United Nations High Commissioner for Human Rights,⁶⁰ requires a rights-based approach to mitigation

⁶⁰ 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

~~and adaptation. According to the report published by the Intergovernmental Panel on Climate Change (IPCC) which was politically endorsed by all States Parties to the Council of Europe, adaption 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.⁶¹ The alarming decline in biodiversity,⁶² coupled with air and water pollution's detrimental impact on human well-being,⁶³ could suggest further underscores the a need for environmental protection to ensure the full enjoyment of human rights.~~

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E. Material Scope of the ~~human~~ right to a clean, healthy and sustainable environment

Commented [A56]: Denmark suggests these changes so that the reference to the report by IPCC is more accurate to the wording thereof.

The suggested wording is from section C.5.2 of the report.

Commented [A57]: The report from 2021 does not mention an "alarming decline in biodiversity"?

Commented [A58]: Denmark suggests the following changes to this sentence.

Commented [A59]: Denmark suggests this change, hence the sections below, which only refers to "a right to a clean, healthy and sustainable environment".

FRANCE

Pages 2 / 3

- la Convention européenne de 1968 sur la protection des animaux en transport international (STE n° 065), qui fixe des normes obligatoires concernant l'espace, l'aération, l'hygiène, les moyens de transport, la nourriture et l'eau, le chargement et le déchargement des bêtes ainsi que l'assistance vétérinaire. 13 États membres ont ratifié cette convention, la dernière en date étant Türkiye en 2019.
- la Convention européenne de 1976 sur la protection des animaux dans les élevages (STE n° 087), qui vise à éviter de causer à l'animal toute souffrance ou tout dommage inutile, en raison de ses conditions d'habitat, d'alimentation ou de soins. 33 États membres ont ratifié cette convention, la dernière en date étant Türkiye en 2018, ainsi que l'UE.

<https://www.ohchr.org/en/press-releases/2022/10/climate-change-greatest-threat-world-has-ever-faced-un-expert-warns>

⁶¹ 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].

⁶² 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

⁶³ World Health Organization, Household air pollution, 28 November 2022, available at <https://www.who.int/news-room/fact-sheets/detail/household-air-pollution-and-health>; European Environment Agency (EEA), Air quality in Europe 2021, available at <https://www.eea.europa.eu/publications/air-quality-in-europe-2021/health-impacts-of-air-pollution>; EEA, Air quality in Europe 2022, available at <https://www.eea.europa.eu/publications/air-quality-in-europe-2022>; EEA, Air pollution levels across Europe still not safe, especially for children, April 2023 <https://www.eea.europa.eu/en/newsroom/news/air-pollution-levels-across-europe>; and Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Human rights and the global water crisis: water pollution, water scarcity and water-related disasters, 19 January 2021, UN Doc. No. A/HRC/46/28. See also Office of the High Commissioner for Human Rights, The water crisis has a "major impact on human rights" expert say, 2021, available at <https://www.ohchr.org/en/stories/2021/03/water-crisis-has-major-impact-human-rights-expert-says>.

- le Protocole d'amendement de 1992 à la Convention européenne sur la protection des animaux dans les élevages (STE n° 145), qui élargit le champ d'application de la Convention à certains aspects des développements récents dans le domaine de l'élevage et de l'abattage des animaux à la ferme. 18 États membres ont ratifié ce protocole, le dernier en date étant les Pays-Bas en 2007. Il n'est pas encore entré en vigueur, car toutes les Parties à la convention ne l'ont pas encore ratifié.
 - la Convention européenne de 1979 sur la protection des animaux d'abattage (STE n° 102), qui a pour principal objectif de contribuer à l'humanisation et à l'harmonisation des méthodes d'abattage en Europe. 26 États membres ont ratifié cette convention, la dernière en date étant la Hongrie en 2021.
- [...]
- la Convention européenne de 1986 pour la protection des animaux vertébrés utilisés à des fins expérimentales ou à d'autres fins scientifiques (STE n° 123), qui vise à réduire, à la fois, le nombre d'expériences et le nombre d'animaux utilisés à de telles fins.
 - la Convention européenne de 1987 pour la protection des animaux de compagnie (STE n° 125) qui vise de façon générale le bien-être des animaux, en particulier, des animaux détenus par l'homme pour son agrément et en tant que compagnie. 26 États membres ont ratifié cette convention, le dernier en date étant les Pays-Bas en 2022.
- [...]
- le Protocole d'amendement de 1998 à la Convention européenne sur la protection des animaux vertébrés utilisés à des fins expérimentales ou à d'autres fins scientifiques (STE n° 170), qui introduit une procédure simplifiée pour l'actualisation des dispositions de la convention afin de prendre en compte l'évolution des connaissances et des pratiques scientifiques. 17 États membres l'ont ratifiée, le dernier en date étant la Lituanie en 2008 ainsi que l'UE.
- [...]
- la Convention européenne révisée de 2006 sur la protection des animaux en transport international (STE n° 193). La convention révisée tire les leçons depuis l'adoption de la Convention STE n° 193 et contient des dispositions destinées à remédier aux lacunes et faciliter la mise en application des principes de la convention. 13 États membres ont ratifié la convention révisée, dont le dernier en date étant Türkiye en 2019.

Commented [A60]: La question de la protection des animaux et du bien-être animal nous semble tomber hors du champ couvert par le projet de rapport.

Commented [A61]: La question de la protection des animaux et du bien-être animal nous semble tomber hors du champ couvert par le projet de rapport.

Commented [A62]: La question de la protection des animaux et du bien-être animal nous semble tomber hors du champ couvert par le projet de rapport.

Commented [A63]: La question de la protection des animaux et du bien-être animal nous semble tomber hors du champ couvert par le projet de rapport.

Commented [A64]: La question de la protection des animaux et du bien-être animal nous semble tomber hors du champ couvert par le projet de rapport.

Commented [A65]: Le terme important suggère qu'elle serait peut-être suffisante. Nous suggérons de ne pas préjuger ce point à ce stade.

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4. D'une manière générale, les instruments susmentionnés abordent directement la protection de l'environnement. Ils peuvent être divisés en trois groupes. Le premier groupe incluant les STE n° 065, 087, 102, 123 et 125 (y compris les protocoles et révisions ultérieurs) traite de la protection des animaux dans le cadre de l'élevage, de l'expérimentation scientifique et en tant qu'animaux de compagnie. Le second groupe incluant les STE n° 064, 104 et 176 (ainsi qu'un protocole ultérieur, STE n° 219), traite de la politique publique de protection et de préservation d'aspects de l'environnement naturel. Le troisième groupe incluant les STE n° 150 et 172 vise à établir une protection juridique de l'environnement par le biais de la responsabilité civile et pénale.

5. En ce qui concerne les droits humains et l'environnement, les instruments majeurs du Conseil de l'Europe sont la Convention européenne des droits de l'homme (la Convention) et la Charte sociale européenne (la Charte) qui garantissent une certaine protection importante des droits humains en matière d'environnement, comme le démontrent respectivement la jurisprudence de la Cour européenne des droits de l'homme (la Cour) et les conclusions et décisions du Comité européen des droits sociaux (CEDS). Ces instruments clés des droits humains ont été appliqués de manière à garantir la protection, le respect et la réalisation de nombreux droits à l'égard des dommages qui sont causés dans le contexte

~~environnementaux~~ impacts par des dommages environnementaux (communément appelé droits humains »). Dans le cas de la Convention, ~~il~~ des requérants ont invoqué le droit à la vie, l'interdiction des traitements inhumains et dégradants, le droit au respect de la vie privée et familiale et du domicile, le droit à la propriété et les droits dits participatifs (procéduraux) tels que la liberté d'expression (y compris l'accès à l'information), la liberté de réunion, le droit à un procès équitable (y compris l'accès à un tribunal) et le droit à un recours effectif. Dans le cas de la Charte, ~~ils comprennent~~ des organisations ont déjà invoqué dans le contexte environnemental les droits de travail équitables, à des conditions de travail sûres et saines, à la protection de la santé et au logement.

6. La manière dont la ~~Convention et la Charte reflètent~~ jurisprudence de la Cour et du CEDS prend en compte la relation entre les droits humains et l'environnement est examinée en détail dans le Manuel du CDDH sur les droits de l'homme et l'environnement (3^e édition, adoptée en 2021).

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14. Dans ce contexte institutionnel, et dans le contexte plus large du droit européen et international en général, le présent rapport examinera ~~notamment~~ la nécessité et la faisabilité d'instruments contraignants et/ou d'instruments supplémentaires non contraignants du Conseil de l'Europe, ainsi que l'éventuel contenu de tels instruments.

15. Les travaux sur le présent rapport ont commencé lors de la 5^e réunion du Groupe de rédaction du CDDH sur les droits humains et l'environnement (CDDH-ENV) en septembre 2022. Lors de cette réunion, le CDDH-ENV a tenu un échange de vues de deux jours avec des experts indépendants externes et des représentants de l'Assemblée parlementaire et du CEDS : ~~dont~~ Prof. Helen Keller, M. Sébastien Duyck, Prof. John H. Knox, Dr Lea Raible, Prof. Elisabeth Lambert, M. Simon Moutquin (Assemblée parlementaire) et Prof. Giuseppe Palmisano (CEDS). [...]

~~vi. Le présent rapport analysera l'éventuelle nécessité d'un ou de plusieurs autres instruments sous les angles suivants. Premièrement, il vise à identifier l'existence d'un problème qui nécessite une réponse. Deuxièmement, il explorera l'implication des droits humains dans ce problème. Troisièmement, le rapport évaluera l'efficacité des instruments existants pour traiter les aspects des droits humains relatifs à la question, et quatrièmement, le rapport examinera le processus de reconnaissance et de protection du droit à un environnement propre, sain et durable, sur la base du mandat du CDDH, afin de garder à l'esprit la proposition de l'Assemblée parlementaire de protéger ce droit par le biais de protocoles additionnels à la Convention européenne des droits de l'homme et à la Charte sociale européenne.~~

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II. Éventuelle nécessité d'un ou de plusieurs autres instruments instruments additionnels sur la protection des droits humains et l'environnement

~~Le présent rapport analysera l'éventuelle nécessité d'un ou de plusieurs instruments additionnels sur la protection des droits humains et de l'environnement comme suit. Premièrement, il décrira les défis environnementaux actuels qui invitent à s'interroger sur la nécessité éventuelle d'un ou plusieurs nouveaux instruments. Deuxièmement, il explorera le lien entre les droits humains et ces défis environnementaux. Troisièmement, le rapport évaluera l'efficacité des instruments existants pour traiter les aspects des droits humains relatifs à ces défis environnementaux. Enfin, le rapport examinera le niveau de reconnaissance et de protection du droit à un environnement propre, sain et durable, sur la base du mandat du CDDH et afin de garder à l'esprit la proposition~~

Commented [A66]: Suggestion de modification car il nous semble que c'est plutôt la jurisprudence qui prend en compte ce lien que directement la Convention ou la Charte.

Field Code Changed

Commented [A67]: Suggestion car cette liste nous semble exhaustive.

Commented [A68]:

Commented [A69]: Serait-il opportun de créer une sous-section correspondante ci-dessous ?

de l'Assemblée parlementaire de protéger ce droit par le biais de protocoles additionnels à la Convention européenne des droits de l'homme et à la Charte sociale européenne.

20. Aujourd'hui, l'humanité est confrontée à un défi sans précédent sous la forme de la dégradation de l'environnement et de la triple crise planétaire du changement climatique⁶⁴, de la ~~perte de la nature et de la biodiversité~~⁶⁵, et de la pollution⁶⁶. Les individus et les communautés du monde entier sont touchés et les conséquences sont d'autant plus graves pour ceux qui se trouvent déjà dans ~~des situations vulnérables et préoccupantes~~ et seront ressenties encore plus fortement par les jeunes générations et les générations futures.

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23. La reconnaissance des liens entre les droits humains et l'environnement s'est considérablement renforcée ces dernières années. Le nombre et l'étendue des réglementations internationales et nationales, des décisions juridiques et de la recherche universitaire sur le lien entre les droits humains et l'environnement augmentent rapidement. Ces liens ont également été reconnus par l'Assemblée parlementaire⁶⁷ et par le Comité des Ministres⁶⁸ du Conseil de l'Europe. Il en résulte une ~~reconnaissance grandissante meilleure reconnaissance~~ – aux niveaux national, régional⁶⁹ et international⁷⁰ – du droit à un environnement propre, sain et durable.

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⁶⁴ GIEC, 2022 : Résumé pour les décideurs [H.-O. Pörtner, D.C. Roberts, E.S. Poloczanska, K. Mintenbeck, M. Tignor, A. Alegria, M. Craig, S. Langsdorf, S. Lösckhe, V. Möller, A. Okem (eds.)]. In : Changement climatique 2022 : impacts, adaptation et vulnérabilité. Contribution du groupe de travail II au Sixième Rapport d'Évaluation du Panel intergouvernemental sur le changement climatique [H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegria, M. Craig, S. Langsdorf, S. Lösckhe, V. Möller, A. Okem, B. Rama (eds.)]. Article de l'Université de Cambridge [Rapport 2022 du GIEC] ; pour une définition du changement climatique, voir la Convention-cadre des Nations Unies sur le changement climatique (CCNUCC) (1992), UNTS vol. 1771, Art. 1(2)

⁶⁵ Rapport du rapporteur spécial sur les droits de l'homme et l'environnement, 2017, A/HRC/34/49, <https://undocs.org/A/HRC/34/49> ; et IPBES (2019) : Rapport d'évaluation mondiale sur la biodiversité et les services écosystémiques de la Plateforme intergouvernementale scientifique et politique sur la biodiversité et les services écosystémiques. E. S. Brondizio, J. Settele, S. Díaz, et H. T. Ngo (éditeurs). Secrétariat de l'IPBES, Bonn, Allemagne, 11.

⁶⁶ Programme des Nations Unies pour l'environnement, Plan de mise en œuvre « Vers une planète sans pollution », UNEP/EA.4/3 ; Landrigan, Philip J., et autres (2017), The Lancet Commission on Pollution and Health. Disponible à l'adresse [https://doi.org/10.1016/S0140-6736\(17\)32345-0](https://doi.org/10.1016/S0140-6736(17)32345-0).

⁶⁷ Recommandation de l'APCE 2211(2021), *Ancrer le droit à un environnement sain : la nécessité d'une action renforcée du Conseil de l'Europe* (septembre 2021).

⁶⁸ Recommandation CM/Rec(2022)20 du Comité des Ministres aux États membres sur les droits de l'Homme et la protection de l'environnement (septembre 2022)

⁶⁹ Voir par exemple la Charte africaine des droits de l'homme et des peuples, adoptée le 27 juin 1981 - entrée en vigueur le 21 octobre 1986, 1520 UNTS 217 à l'article 24 ; Protocole additionnel à la Convention américaine relative aux droits de l'homme traitant des droits économiques, sociaux et culturels (Protocole de San Salvador), adopté le 17 novembre 1988 - entré en vigueur le 16 novembre 1999, à l'article 11 ; Charte arabe des droits de l'homme, adoptée le 22 mai 2004 - entrée en vigueur le 15 mars 2008, à l'article 38 ; Déclaration des droits de l'homme de l'ANASE, adoptée le 18 novembre 2012, à l'article 28 (f) ; Accord régional sur l'accès à l'information, la participation du public et la justice en matière d'environnement en Amérique latine et dans les Caraïbes (Accord d'Escazú), adopté le 4 mars 2018 - entré en vigueur le 22 avril 2021, à l'article 1.

⁷⁰ Voir Assemblée générale des Nations Unies, *Le droit de l'homme à un environnement propre, sain et durable*, juillet 2022, Doc. A/RES/76/300 ; Conseil des droits de l'homme, *Le droit de l'homme à un environnement propre, sain et durable*, octobre 2021, UN Doc. no. A/HRC/RES/48/13 ; Conseil des droits de l'homme, *Le droit de l'homme à un environnement propre, sain et durable*, avril 2023, Doc. ONU A/HRC/RES/52/23.

Commented [A70]: Suggestion de déplacer ce paragraphe après le titre car ce paragraphe ne concerne que le contenu de la partie sur la nécessité d'un ou plusieurs nouveaux instruments.

Commented [A71]: Suggestion de reformulation car il nous semble pertinent d'indiquer plus précisément et directement ce que nous entendons traiter.

Commented [A72]: Sauf erreur, la terminologie habituelle relative à la triple crise planétaire est "changement climatique, perte de biodiversité et pollution".

Commented [A73]: Suggestion d'utiliser la formule plus habituelle de "situations vulnérables".

25. ~~La question du lien entre droits humains et environnement apparaît déjà dans plusieurs instruments internationaux et dans certains cadres régionaux et nationaux. Il existe un large cadre réglementaire relatif à la protection de l'environnement qui est déjà en place et qui produit des effets à la fois en vertu du droit national et du droit international.~~ La question reste néanmoins de savoir si le niveau de protection garanti par les instruments ~~internationaux~~ existants est suffisant pour relever les sérieux défis en matière de droits humains posés par la triple crise planétaire.

Commented [A74]: Suggestion de ne pas limiter la question aux instruments internationaux car nous mentionnons juste avant que le cadre national et régional peut aussi être pertinent.

A. Reconnaissance de l'interdépendance des droits humains et de la protection de l'environnement dans le droit international

26. Le Comité des Ministres, dans sa Recommandation CM/Rec(2022)20 aux États membres sur les droits de l'homme et la protection de l'environnement, a déjà reconnu que « des mesures visant à faire face à la triple crise planétaire du changement climatique, de la perte de biodiversité et de la pollution sont essentielles à une meilleure jouissance des droits de l'homme » et que « la vie et le bien-être sur notre planète dépendent de la capacité collective de l'humanité à garantir à la fois les droits de l'homme et un environnement propre, sain et durable pour les générations actuelles et futures » - en d'autres termes, la protection efficace de l'environnement dépend de la pleine jouissance des droits humains, et la pleine jouissance des droits humains dépend de la protection efficace de l'environnement. Il est néanmoins instructif d'examiner l'évolution de ~~cette prise de conscience~~ la reconnaissance du lien entre droits humains et protection de l'environnement au niveau international et d'étudier plus en détail la manière dont ce lien a été articulé.

Commented [A75]: Nous suggérons une reformulation car à notre sens il s'agit de plus qu'une simple prise de conscience.

i. Les droits humains et la protection ~~environnementale de l'environnement~~ dans les traités pertinents des Nations Unies

Commented [A76]: Suggestion pour homogénéiser.

28. Concernant le changement climatique, ~~la Convention-cadre des Nations Unies sur les changements climatiques (CCNUCC) de 1992 fait aussi partie des accords adoptés lors du « Sommet de la Terre » et établit un cadre juridique pour l'action climatique.~~ L'Accord de Paris, adopté par consensus lors de la COP 21 le 12 décembre 2015 ~~vise à mettre en œuvre les objectifs de la CCNUCC, ainsi que la Convention-cadre des Nations Unies sur les changements climatiques (CCNUCC) de 1992, établissent un cadre juridique pour l'action climatique~~⁷¹. Il est entré en vigueur le 4 novembre 2016 et compte 195 signataires.

Commented [A77]: Nous suggérons de présenter la CCNUCC avant l'Accord de Paris par souci de clarté.

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ii. Les droits humains et la protection de l'environnement dans les travaux des instances pertinentes des Nations Unies et des procédures spéciales

31. En raison des contraintes du présent rapport, il n'est pas possible de présenter une ~~vue~~ ~~liste d'ensemble~~ exhaustive de tous les instruments et procédures spéciales des Nations Unies. L'annexe II contient une compilation des travaux sur l'environnement, le changement climatique et les droits humains, préparée par le Haut-Commissariat des droits de l'homme des Nations Unies. Pour les besoins du présent rapport, nous soulignons les éléments suivants.

32. Le 8 octobre 2021, le Conseil des droits de l'homme des Nations Unies a adopté la résolution 48/13 sur « le droit de l'homme à un environnement propre, sain et durable »⁷². Le texte

⁷¹ Accord de Paris à la Convention-cadre des Nations Unies sur les changements climatiques, 12 décembre 2015, T.I.A.S. n° 16-1104.

⁷² Selon la présidence du groupe restreint (Costa Rica), le mot « sûr » a été supprimé du projet de texte de la Résolution 48/13 afin qu'il fasse référence à un droit à un environnement propre, sain et durable, ce qui reflète plus fidèlement les résultats des consultations et des dialogues, car l'adjectif « sûr » n'était pas suffisamment clair pour les parties concernées, voir la présentation du projet de résolution : <https://media.un.org/en/asset/k1g/k1g6cdjnxl>.

de la résolution 48/13 du CDH a été proposé, entre autres, par deux États membres du Conseil de l'Europe : la Slovénie et la Suisse. Il a été adopté par 43 voix pour et 4 abstentions. Tous les États membres du Conseil de l'Europe participant à ce vote, y compris l'Arménie, l'Autriche, la Bulgarie, la République tchèque, le Danemark, la France, l'Allemagne, l'Italie, les Pays-Bas, la Pologne, l'Ukraine et le Royaume-Uni. La Résolution du Conseil des droits de l'homme était accompagnée d'explications de vote, y compris de la part de membres du Conseil de l'Europe. Le même jour, le Conseil des droits de l'homme a également désigné, par la résolution 48/14, un rapporteur spécial sur la promotion et la protection des droits de l'homme dans le contexte des changements climatiques.

33. La Résolution 48/13 du Conseil des droits de l'homme reconnaît politiquement pour la première fois que « l'exercice du droit de bénéficier d'un environnement propre, sain et durable est un élément important de la jouissance des droits humains de l'homme », tout en encourageant les États à coopérer à la mise en œuvre de ce droit. Dans son préambule, la résolution 48/13 considère stipule que « les atteintes à l'environnement ont des effets négatifs, directs ou indirects sur l'exercice effectif des droits humains de tous les droits de l'homme » et souligne que « la dégradation de l'environnement, les changements climatiques et de développement non durable font partie des menaces les plus urgentes et les plus graves mettant en péril la capacité des générations actuelles et futures de jouir des droits de l'homme, y compris le droit à la vie ». La Résolution 48/13 note également que « le droit à un environnement propre, sain et durable est lié à d'autres droits et au droit international existant » et affirme que « la promotion du droit humain à un environnement propre, sain et durable nécessite passe par l'application la pleine mise en œuvre et entière des accords multilatéraux sur l'environnement en vertu des conformément aux principes du droit international de l'environnement ».

Commented [A78]: Suggestion de citer directement.

Commented [A79]: Suggestion de citer directement.

Commented [A80]: Suggestion de citer directement.

34. Sur la base du texte adopté par le Conseil des droits de l'homme, l'Assemblée générale des Nations Unies (AGNU) a adopté, le 28 juillet 2022, par un vote record de 161 États en faveur (y compris celles de tous les États membres du Conseil de l'Europe), zéro contre et huit abstentions, la Résolution 76/300 reconnaissant que « le droit à un environnement propre, sain et durable comme un droit humain fait partie des droits humains » (Résolution de l'AGNU)⁷³. Parmi les auteurs de la Résolution de l'AGNU se trouvaient 24 États membres du Conseil de l'Europe⁷⁴. La Résolution de l'AGNU était également accompagnée d'un certain nombre d'explications de vote, y compris de la part d'États membres du Conseil de l'Europe. Le présent rapport détaille ces votes au paragraphe 94 ci-dessous.

Commented [A81]: Suggestion de citer directement.

35. La résolution de l'AGNU applique un libellé similaire à la Résolution 48/13 du Conseil des droits de l'homme et reconnaît le droit à un environnement propre, sain et durable comme un droit humain. Suivant le libellé de la Résolution 48/13 du Conseil des droits de l'homme, elle reconnaît, dans son préambule, que « l'exercice des droits humains, notamment compris le droit de rechercher, de recevoir et de diffuser communiquer des informations, le droit de participer effectivement véritablement à la conduite des affaires publiques gouvernementales et publiques et le droit à et de disposer d'un recours utile, est essentiel indispensable à la protection d'un environnement propre, sain et durable ». Elle note que « le droit à un environnement propre, sain et durable est lié à d'autres droits et au droit international existant » et affirme que « la promotion du droit humain à un environnement propre, sain et durable exige la pleine mise en œuvre passe par l'application pleine et entière des accords multilatéraux relatifs à sur l'environnement, en vertu

Commented [A82]: Suggestion de citer directement.

⁷³ Résolution de l'Assemblée générale des Nations Unies, Le droit de l'homme à un environnement propre, sain et durable, 26 juillet 2022, A/RES/76/300.

⁷⁴ Andorre, Arménie, Bosnie-Herzégovine, Bulgarie, Croatie, Chypre, République tchèque, Finlande, France, Géorgie, Allemagne, Grèce, Lettonie, Luxembourg, Monaco, Monténégro, Pays-Bas, Portugal, Roumanie, Slovaquie, Slovénie, Espagne, Suède, Suisse et Ukraine.

~~des conformément aux principes du droit international de l'environnement ». Le texte intégral de résolution 76/300 de l'AG figure à l'annexe III du présent rapport.~~

Commented [A83]: Suggestion de citer directement.

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36. Le 4 avril 2023, le CDH a adopté par consensus, la Résolution 52/23 sur le droit à un environnement propre, sain et durable⁷⁵. La résolution invite, entre autres, les États « à adopter ~~et à [et à]~~ mettre en œuvre des lois ~~solides fortes garantissant qui garantissent, entre autres, les droits à la participation, à l'accès à l'information, à l'accès à et la justice, y compris à un recours utile, en matière d'environnement », à « faciliter la sensibilisation et la participation du public et la participation du public au processus décisionnel dans le domaine de la prise de décision concernant l'environnement » et à « prévoir des recours effectifs utiles en cas de violations des droits humains et d'abus liés à l'exercice des droits humains d'atteintes à ces droits, y compris lorsque l'exercice du droit à un environnement propre, sain et durable est compromis ». Par ailleurs, elle encourage les États à adopter « un cadre juridique efficace ainsi que des politiques intégrées, croisées et globales, aux niveaux national et local, notamment en vue de lutter contre les changements climatiques, l'appauvrissement de la biodiversité et la pollution, pour garantir l'exercice du droit à un environnement propre, sain et durable » ~~nationales et locales intégrées, convergentes et globales ainsi qu'un cadre juridique efficace pour la jouissance du droit humain à un environnement propre, sain et durable~~⁷⁶. Par ailleurs elle invite également les États membres, les organisations internationales, les entreprises et les parties prenantes pertinentes à adopter les politiques, à améliorer la coopération internationale, à renforcer le développement des compétences et à poursuivre le partage des bonnes pratiques afin d'intensifier les efforts visant à garantir un environnement propre, sain et durable pour tous.~~

Commented [A84]: Est-ce le document A/HRC/52/L.7 ?

Commented [A85]: Suggestion de citer directement.

Commented [A86]: Suggestion de citer directement.

37. Les instances judiciaires et ~~non~~quasi-judiciaires au sein du système des Nations Unies ~~ont~~sont également été appelées à interpréter les obligations internationales existantes dans le contexte du changement climatique.

38. Le 29 mars 2023, l'AGNU ~~de l'ONU~~ a adopté par consensus une résolution demandant officiellement un avis consultatif à la Cour internationale de justice (CIJ) sur les obligations des États en matière de changement climatique⁷⁷. En particulier, cette demande posait les questions suivantes : « (a) quelles sont les obligations des États en vertu du droit international en ce qui concerne la protection du système climatique et d'autres composantes de l'environnement contre les émissions anthropiques de gaz à effet de serre pour les États et pour les générations présentes et futures ; et (b) quelles sont les conséquences juridiques, au regard de ces obligations pour les États qui, par leurs actes ou omissions, ont causé des dommages importants

⁷⁵ Au moment de l'adoption par consensus de cette résolution, les membres suivants du Conseil de l'Europe étaient membres du Conseil des droits de l'homme et ont participé à l'adoption de cette résolution : Belgique, République tchèque, Finlande, France, Géorgie, Allemagne, Lituanie, Luxembourg, Monténégro, Roumanie, Ukraine et Royaume-Uni. La résolution a également été soutenue par d'autres membres du Conseil de l'Europe, y compris l'Albanie, l'Arménie, la Bosnie-Herzégovine, la Bulgarie, la Croatie, Chypre, l'Estonie, la Grèce, l'Italie, la Lettonie, la Macédoine du Nord, le Portugal, la République slovaque, la Slovénie, l'Espagne et la Suisse.

⁷⁶ Résolution du Conseil des droits de l'homme des Nations Unies, Le droit de l'homme à un environnement propre, sain et durable, 4 avril 2023, A/HRC/52/7.

⁷⁷ Résolution de l'Assemblée générale des Nations Unies A/RES/77/276, Demande d'avis consultatif de la Cour internationale de justice sur les obligations des États en matière de changement climatique, 29 mars 2023.

au système climatique et à d'autres éléments de l'environnement. En ce qui concerne les États, y compris, en particulier, les petits États insulaires en développement [...] et les peuples et individus des générations présentes et futures touchés par les effets néfastes du changement climatique ? » En se référant explicitement aux instruments internationaux relatifs aux droits humains, dont la Déclaration universelle des droits de l'homme, le Pacte international relatif aux droits civils et politiques (PIDCP) et le Pacte international relatif aux droits économiques, sociaux et culturels (PIDESC), cette demande pourrait permettre à la CIJ de se prononcer sur les obligations internationales des États en matière de droits humains concernant ledans le contexte du changement climatique.

Commented [A87]: Suggestion de citer directement.

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39. Dans le cadre de leur contrôle du respect par les États des principaux traités relatifs aux droits humains, tels que le PIDESC⁷⁸, le PIDCP⁷⁹ et la Convention relative aux droits de l'enfant, les organes conventionnels des Nations Unies chargés des traités relatifs aux droits humains créés en vertu d'instruments relatifs aux droits humains ont appliqué les droits de humains aux questions environnementales.

[...]

41. Le Comité des droits de l'homme des Nations Unies, qui supervise-surveille l'application du PIDCP, a publié en 2018 une Observation générale sur le droit à la vie, soulignant que l'obligation des États de protéger la vie implique également qu'ils doivent prendre des mesures adéquates pour atténuer les conditions sociétales susceptibles de menacer la vie, telles que la dégradation de l'environnement⁸⁰. En 2019, le Comité des droits de l'Homme des Nations Unies a estimé que le Paraguay avait violé ses obligations au titre de l'article 6 (sur le droit à la vie) et de l'article 17 (sur le droit à la vie privée et familiale) du PIDCP lorsqu'il n'avait pas réglementé de manière adéquate les pulvérisations à grande échelle de produits agrochimiques toxiques et n'avait pas enquêté sur le décès d'un travailleur agricole exposé à de tels produits chimiques⁸¹. La même année, cinq organes de traités conventionnels des Nations unies ont publié une déclaration commune sur le changement climatique appelant les États à mettre en œuvre des politiques visant à réduire les émissions de gaz à effet de serre afin de réaliser les objectifs de l'Accord de Paris⁸².

42. Les organes conventionnels de l'ONU des Nations unies sont de plus en plus sollicités pour statuer sur des affaires liées au changement climatique⁸³. Dans l'affaire *Sacchi et al v Argentine, Brésil, France, Germany et Türkiye*, le Comité des droits de l'enfant de l'ONU des Nations unies a été interrogé sur la question de savoir si les défendeurs avaient violé les droits des enfants en vertu de la Convention des Nations Unies relative aux droits de l'enfant en ne réduisant pas suffisamment les émissions de gaz à effet de serre et en n'utilisant pas les outils disponibles pour protéger les enfants des effets néfastes du changement climatique. La communication a été jugée irrecevable pour non-épuisement des voies de recours internes. Cependant, sur la juridiction, Bien que le Comité a# estimé que le critère approprié était celui retenu par la Cour interaméricaine des droits de l'homme dans son avis consultatif sur

⁷⁸ Nations Unies (Assemblée générale). « Pacte international relatif aux droits économiques, sociaux et culturels ». Recueil des Traités, vol. 999, déc. 1966.

⁷⁹ Nations Unies (Assemblée générale). (1966). Pacte international relatif aux droits civils et politiques. Recueil des Traités, 999, 171.

⁸⁰ Observation générale n° 36, § 26.

⁸¹ *Portillo Cáceres et autres c. Paraguay*, n° 2751/2016 (2019), § 7.5.

⁸² <https://www.ohchr.org/en/statements/2019/09/five-un-human-rights-treaty-bodies-issue-joint-statement-human-rights-and>

⁸³ Comité des droits de l'homme, *Teitiota c. Nouvelle-Zélande*, Doc. ONU CCRP/C/127/D/2728/2016 (2020) ; Comité des droits de l'enfant, *Sacchi et al c. Allemagne*, Doc. N.U. CRC/C/88/D/107/2019 (2021).

~~l'environnement et les droits de l'homme, selon lequel « lorsqu'un dommage transfrontière se produit, les enfants sont sous la juridiction de l'État sur le territoire duquel se trouve la source des émissions aux fins de l'article 5 (par. 1) du Protocole facultatif s'il y a un lien de causalité entre les actes ou omissions de l'État en question et les effets négatifs produits sur les droits d'enfants se trouvant en dehors de son territoire, lorsque l'État d'origine exerce un contrôle effectif sur la source des émissions en question ». Les requérants pouvaient relever de la juridiction de l'État d'origine des émissions dans la mesure où existait un lien de causalité entre les actes ou négligences de l'Etat et l'impact négatif sur les droits des enfants se trouvant hors de son territoire, la plainte a finalement été jugée irrecevable pour non épuisement des voies de recours internes⁸⁴.~~

Dans l'affaire *Teitiota c. Nouvelle-Zélande*, le Comité des droits de l'homme des Nations Unies a estimé, en septembre 2020, que les pays ne pouvaient pas expulser des demandeurs d'asile lorsque les conditions induites par le changement climatique risquent de violer le droit à la vie ; il n'a cependant pas constaté de violation dans les circonstances particulières de l'affaire. En septembre 2022, le Comité des droits de l'homme des Nations Unies a estimé que l'incapacité de l'Australie à protéger de manière adéquate les habitants autochtones des îles Torres, en prenant des mesures d'adaptation insuffisantes contre les effets néfastes du changement climatique constituait une violation des articles 17 (vie privée et familiale) et 27 (droits des minorités ethniques, religieuses ou linguistiques) du PIDCP⁸⁵.

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49. Aux fins du présent rapport, il est impératif de ~~souligner préciser l'état actuel de~~ la ~~niveau~~ de protection de l'environnement garantie par la Convention et la Charte telles qu'interprétées respectivement par la Cour et le CEDS.

[...]

52. Il convient de noter que la Cour développe son interprétation du texte de la Convention en réponse aux développements juridiques, sociaux, éthiques ou scientifiques, par l'application de la « doctrine de l'instrument vivant », selon laquelle « la Convention est un instrument vivant qui [...] doit être interprété à la lumière des conditions actuelles »⁸⁶. Cela permet à la Cour de répondre à de nouveaux défis. Par conséquent, ~~la jurisprudence de la Cour en matière d'environnement l'interprétation par la Cour des dispositions de la Convention dans le contexte environnemental pourrait être amenée à évoluer. n'est pas gravée dans le marbre. La Cour pourrait développer davantage sa jurisprudence en réponse à la triple crise planétaire afin de prendre en compte les préoccupations environnementales de manière plus large.~~

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iii. Droits humains et protection de l'environnement dans le droit de l'Union européenne

62. L'Union européenne (UE), par le biais de ~~sa législation son droit~~ sa ~~primaire et~~ secondaire dérivé, offre également un large éventail d'instruments normatifs pour la protection de l'environnement ; cependant, le système juridique de l'Union européenne ne reconnaît pas de droit autonome à un environnement propre, sain et durable.

63. ~~En termes de~~ S'agissant du ~~législation droit~~ législation ~~primaire~~, l'article 3, paragraphe 3, du traité sur l'Union européenne (TUE) et les articles 6, 11 et 191 à 193 du traité sur le fonctionnement de l'Union européenne (TFUE) établissent une série de principes et de critères qui doivent être respectés par les institutions lors de la définition et de la mise en œuvre de la politique

Commented [A88]: Nous préférierions dire d'abord que la communication a été jugée irrecevable, et citer plus directement le critère retenu par le Comité concernant la juridiction.

⁸⁴ Comité des droits de l'enfant des Nations Unies, CRC/88/D/104/2018.

⁸⁵ Comité des droits de l'homme, constatations adoptées par le Comité au titre du § 4 de l'article 5 du Protocole facultatif, concernant la communication n° 3624/2019, CCPR/C/135/D/3624/2019.

⁸⁶ *Tyrrer c. Royaume-Uni*, requête n° 5856/72, arrêt du 25 avril 1978, § 31.

environnementale. En outre, la Charte des droits fondamentaux de l'Union européenne stipule dispose, en son article 37, qu'« un niveau élevé de protection de l'environnement et l'amélioration de sa qualité doivent être intégrés dans les politiques de l'Union et assurés conformément au principe du développement durable »⁸⁷.

64. En termes de S'agissant du législation secondaire droit dérivé, les institutions de l'Union E ont adopté une série d'instruments et de procédures communautaires visant à garantir un niveau élevé de protection de l'environnement sous la forme de règlements et de directives.

65. En outre, la législation de l'UE en matière d'environnement est applicable aux États membres departies à l'accord sur l'Espace économique européen (EEE), comme le prévoient les Articles 73-75 et l'annexe XX de l'accord sur l'EEE⁸⁸. Dans le préambule de l'accord EEE cet accord, notamment, les parties contractantes affirment leur détermination à préserver, protéger et améliorer la qualité de l'environnement et à garantir une utilisation des ressources naturelles, qui soit prudente et-rationnelle sur la base desu principes du développement durable, et d'ainsi que le principe de l'action conservatoire et préventive. Elles affirment également leur détermination à garantir un niveau élevé de protection de la santé, de la sécurité et de l'environnement comme base pour l'élaboration de nouvelles règles.

66. L'Union européenne et ses États membres sont également Parties à la Convention d'Aarhus. L'UE met en œuvre les dispositions stipulations de la Convention d'Aarhus par le biais de diverses directives⁸⁹. Les institutions de l'UE garantissent la mise en œuvre de la Convention d'Aarhus dans leurs processus décisionnels par le biais du règlement n° 1367/2006 (Règlement d'Aarhus)⁹⁰. La Cour de justice de l'UE (CJUE) s'est également penchée sur l'accès à la justice au juge en matière d'environnement environnementale avant même la ratification de la Convention d'Aarhus par l'UE⁹¹. Depuis 2005, la CJUE a statué sur une cinquantaine d'affaires liées à l'accès à la justice au juge en matière d'environnement environnementale, couvrant divers aspects tels que la qualité pour agir des particuliers et des organisations non gouvernementales de protection de l'environnement⁹². La CJUE a notamment précisé que les procédures nationales devaient être interprétées de manière à permettre aux ONG d'avoir qualité pour agir dans les affaires environnementales et que les ONG pouvaient représenter les intérêts environnementaux sur la base de la législation nationale et du droit communautaire de l'environnement de l'UE ayant un

⁸⁷ Article 37 de la Charte des droits fondamentaux.

⁸⁸ Annexe XX de l'accord sur l'Espace économique européen. <https://www.efta.int/media/documents/legal-texts/eea/the-eea-agreement/Annexes%20to%20the%20Agreement/annex20.pdf>

⁸⁹ Directive 2003/4/EC du Parlement Européen et du Conseil du 28 janvier 2003 concernant l'accès du public à l'information en matière d'environnement et abrogeant la directive 90/313/CEE du Conseil, disponible à l'adresse suivante : EUR-Lex - 32003L0004 - FR (europa.eu); et Directive 2003/35/CE du Parlement européen et du Conseil du 26 mai 2003 prévoyant la participation du public lors de l'élaboration de certains plans et programmes relatifs à l'environnement, et modifiant, en ce qui concerne la participation du public et l'accès à la justice, les directives 85/337/CEE et 96/61/CE du Conseil - Déclaration de la Commission Council Directives du Conseil 85/337/EEC et 96/61/EC (OJ L 156, 25.6.2003, p. 17), disponible à l'adresse suivante : EUR-Lex - 32003L0035 - FR (europa.eu)

⁹⁰ Règlement (CE) n° 1367/2006 du Parlement européen et du Conseil du 6 septembre 2006 concernant l'application aux institutions et organes de la Communauté européenne des dispositions de la Convention d'Aarhus sur l'accès à l'information, la participation du public au processus décisionnel et l'accès à la justice en matière d'environnement (JO L 264 du 25.9.2006, p. 13), disponible à l'adresse suivante : L_2006264FR.01001301.xml (europa.eu).

⁹¹ C-431/92 Grosskrotzenburg (1995), C-72/95 Kraaijeveld (1996), C-435/97 WWF (1999) et C-201/02 Delena Wells (2004).

⁹² C-237/07 Janecek (2008), C-75/08 Mellor (2009), C-263/09 Djurgården (2010), C-240/09 LZ ou Slovak Brown Bear (2011), C-115/09 Trianel (2011), C-128/09 Boxus, C-182/10 Solvay (2012), C-72/12 Altrip (2014), C-404/13 ClientEarth (2014), et C-243/15 Slovak Brown Bear II (2016).

effet direct. – Ces arrêts vont dans le sens de l'objectif du Pacte vert pour l'Europe qui vise à renforcer l'accès à la justice pour le public⁹³.

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67. Par ailleurs, le médiateur de l'UE joue également un rôle important dans la protection de l'environnement et s'attache principalement à garantir la transparence, la responsabilité et la bonne gouvernance au sein des institutions et organes de l'UE⁹⁴. L'article 43 de la Charte des droits fondamentaux de l'UE garantit le droit de saisir le médiateur européen. Il est important de noter que les plaintes d'intérêt public sont également recevables devant le médiateur de l'UE.

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70. La Convention sur la protection de l'environnement par le droit pénal (STE n° 172) (la Convention de 1998) a été le premier instrument international juridiquement contraignant à rendre obligatoire l'incrimination des comportements préjudiciables à l'environnement. Le préambule et la section 2 de la Convention existante sur cette question indiquent clairement que son objectif sous-jacent est de protéger la vie et la santé humaines. La Convention de 1998 n'est cependant pas entrée en vigueur car le seuil requis de trois ratifications n'a jamais été atteint⁹⁵. Le 23 novembre 2022, le Comité des Ministres a adopté le mandat du Comité d'experts sur la protection de l'environnement par le droit pénal (PC-ENV) pour élaborer une nouvelle Convention qui annule et remplace la Convention de 1998⁹⁶. À la suite de l'adoption du mandat, le PC-ENV a tenu sa première réunion du 3 au 4 avril 2023⁹⁷.

D. Champ d'application matériel Niveau de reconnaissance du droit humain à un environnement propre, sain et durable à un environnement sain

71. Bien que le droit à un environnement propre, sain et durable ait été reconnu politiquement au niveau mondial dans la Résolution 76/300 de l'Assemblée générale des Nations Unies (voir ci-dessous), il n'est pas encore juridiquement protégé-garanti au niveau mondial ou européen. Cela signifie qu'il n'existe pas encore de compréhension commune au sein des États membres du Conseil de l'Europe au sujet de la « nature, du contenu et des implications » de ce droit (pour reprendre les termes de la Recommandation CM/Rec(2022)20).

72. La présente section donne ~~donc~~ un aperçu des codifications existantes, ~~des soutiens politiques et~~ de la reconnaissance jurisprudentielle et des soutiens politiques de différentes formes du droit à un environnement ~~propre, sain et durable~~ sain dans les différentes juridictions. L'expression « droit à un environnement sain » est utilisée comme un terme générique, « abrégé », qui intègre la grande diversité d'adjectifs qualificatifs utilisés dans les différents

⁹³ Communication de la Commission au Parlement européen, au Conseil européen, au Conseil, au Comité économique et social européen et au Comité des régions : Le Green Deal européen. Bruxelles 11.12.2019. COM/2019/640 final, p. 30, disponible à l'adresse suivante :

eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:52019DC0640&qid=1692732157750

⁹⁴ Voir https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/search-all-eu-institutions-and-bodies/europeanombudsman_en#:~:text=The%20European%20Ombudsman%20investigates%20complaints,EU%20Dbased%20associations%20or%20businesses

* Toute référence au Kosovo mentionnée dans ce texte, que ce soit le territoire, les institutions ou la population, doit se comprendre en pleine conformité avec la Résolution 1244 du Conseil de Sécurité des Nations-Unies et sans préjuger du statut du Kosovo.

⁹⁵ Seule l'Estonie a ratifié la Convention en 2002.

⁹⁶ Mandat du Comité d'experts sur la protection de l'environnement par le droit pénal (PC-ENV), https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a91ebb.

⁹⁷ PC-ENV(2023)02.

Commented [A89]: Il est un peu curieux de trouver ce paragraphe seul ici. Serait-il préférable d'intégrer ces informations au tableau ci-dessus ou de déplacer ce paragraphe dans une autre section ?

Commented [A90]: Il nous semble que plus que le champ d'application c'est le niveau de reconnaissance de ce droit qui est traité dans cette partie.

Nous suggérons aussi d'utiliser le terme générique "droit à un environnement sain", qui permet de couvrir l'ensemble des formes de ce droit, comme nous l'expliquons ci-dessous.

instruments⁹⁸. L'objectif de cette section est de clarifier le champ d'application matériel de ce droit tel qu'il figure actuellement dans divers instruments en vue de fournir une base pour l'examen de la section III du présent rapport.

i. Le droit à un environnement sain au niveau international

73. Le droit à un environnement sain est reconnu apparaît dans (i) des instruments régionaux relatifs aux droits humains ; (ii) certains accords multilatéraux sur l'environnement (AME) ; (iii) des résolutions d'organisations internationales et régionales et (iv) des décisions judiciaires (avis consultatifs et arrêts) et (v) autres documents juridiques non contraignants.

- a) Le droit à un environnement sain dans les instruments régionaux des droits humains

La Charte africaine des droits de l'homme et des peuples

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Commented [A91]: Nous hésitons sur l'utilisation de "reconnu" ici car certains des instruments cités reconnaissent une valeur contraignante à ce droit tandis que d'autres non. Le terme "reconnu" nous semble pouvoir créer une confusion à cet égard.

Commented [A92]: Suggestion d'ajouter quelques éléments sur la valeur contraignante de la Charte africaine des droits de l'Homme et des peuples.

⁹⁸ Voir Centre pour le développement du droit international de l'environnement, « Interprétation du sens de « sûr », « propre », « sain » et « durable » dans le droit de l'environnement, 21 mai 2020.

76. Il est également important de noter que le Protocole à la Charte africaine des droits de la femme en Afrique (Protocole de Maputo), adopté en 2003, garantit aux femmes le droit à un environnement sain⁹⁹ et durable-viable¹⁰⁰ et le droit à un développement durable¹⁰¹.

La Charte arabe des droits de l'homme

77. La Charte arabe des droits de l'homme révisée en 2004 (Charte arabe), entrée en vigueur en 2008 et ratifiée par 16 des 22 membres de la Ligue des États arabes (LEA)¹⁰², garantit le droit à un environnement sain¹⁰³. En outre, afin de mettre en œuvre le droit qu'elle reconnaît à tout membre de la société de jouir du meilleur état de santé physique et mentale qui puisse être atteint, la Charte elle engage les États à prendre des mesures pour lutter contre la pollution de l'environnement¹⁰⁴.

Le système interaméricain de protection des droits humains

78. La Convention américaine des droits de l'homme ne contient pas explicitement le droit à un environnement sain. Toutefois, ce droit a été expressément inclus dans l'article 11 du Protocole additionnel à la Convention américaine relative aux droits humains traitant des droits économiques, sociaux et culturels (Protocole de San Salvador) qui a été adopté en 1988 et est entré en vigueur en 1999. L'article 11 du Protocole de San Salvador prévoit que :

1. Toute personne a le droit de vivre dans un environnement sain-salubre et d'avoir accès aux services publics de base de bénéficier des équipements collectifs essentiels.

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84. L'inclusion du droit à un environnement sain dans-parmi les droits économiques, sociaux et culturels de l'article 26 a été confirmée dans le cadre d'une procédure contentieuse dans l'affaire *Lhaka Honhat*¹⁰⁵. L'affaire concernait plus de quatre-vingt-dix communautés indigènes qui cherchaient à faire reconnaître leurs droits de propriété foncière. La pétition a été lancée pour diverses raisons, notamment la construction de travaux publics, l'exploitation d'hydrocarbures et l'apparition d'activités illégales sur leur territoire traditionnel¹⁰⁶. La CIADH a constaté des violations du droit autonome à un environnement sain, ainsi que des droits à l'alimentation, à l'eau et à l'identité culturelle sur la base des faits de l'affaire¹⁰⁷. Outre d'autres recours, la Cour a explicitement ordonné à l'État de s'attaquer à l'exploitation forestière illégale, ce qui, bien qu'il s'agisse d'une mesure importante, a été entravé par le fait que la CIADH ait été exclue de la mise en œuvre de la supervision judiciaire. Par ailleurs, la CIADH a réaffirmé que le droit à un environnement sain qui « constitue un intérêt universel », est « un droit fondamental pour l'existence de l'humanité » et est « un droit autonome¹⁰⁸ ». La CIADH a réitéré ses conclusions de l'avis consultatif de 2017 et a clarifié le contenu du droit dans la mesure où elle a estimé que le droit comprend une obligation de prévenir les atteintes à l'environnement¹⁰⁹. S'appuyant sur le principe de prévention en droit international coutumier du devoir de prévention, la Cour a souligné que « les États sont tenus d'utiliser tous les moyens à leur disposition pour éviter que les activités relevant de leur juridiction ne causent des dommages importants à l'environnement ». La CIADH a énuméré les mesures suivantes parmi celles qui doivent être prises eu égard aux activités susceptibles de causer des dommages : (i) réglementation ; (ii) supervision et contrôle ; (iii) exigence et approbation d'études d'impact sur l'environnement ; (iv) établissement de plans d'urgence, et (v) atténuation des dommages causés à l'environnement¹¹⁰.

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Commented [A93]: Suggestion d'ajouter quelques éléments sur la valeur contraignante de la Charte arabe des droits de l'Homme.

Commented [A94]: Suggestion de préciser que la Charte traite de la question de la pollution de l'environnement dans le cadre du droit à la santé.

Commented [A95]: Traduction de la Commission interaméricaine des droits de l'Homme.

Commented [A96]: Ce point nous semble à préciser car l'argument ne nous semble pas très clair.

85. Certaines questions ne semblent pas encore avoir été complètement résolues dans la pratique de la CIADH, telles que (i) le contenu exact et les implications du droit à un environnement sain ; (ii) le juste équilibre du droit de ce droit avec d'autres droits consacrés par la Convention américaine ; (iii) les implications de l'approche de la CIADH selon laquelle ce droit est à la fois anthropocentrique (en tant que droit attaché aux êtres humains) et égocentrique (en tant que droit attaché à l'environnement et à ses éléments) ; ou (iv) la valeur ajoutée du droit à un environnement sain par rapport au droit à la vie et à l'intégrité personnelle.

86. La CIADH pourrait saisir l'occasion offerte par des affaires pendantes¹¹¹ et une récente demande d'avis consultatif du Chili et de la Colombie sur six aspects concernant les obligations des États en matière de droits humains dans le contexte du changement climatique pour préciser davantage les contours du droit à un environnement sain¹¹².

Déclaration des droits de l'homme de l'Association des Nations de l'Asie du Sud-Est (ASEAN)

87. La Déclaration des droits de l'homme de l'ASEAN, adoptée en 2012 par les États membres de l'Association des Nations de l'Asie du Sud-Est, contient le « droit à un environnement sûr, propre et durable » dans le cadre du droit à un niveau de vie adéquat, sans autre précision quant à sa portée ou à ses implications¹¹³. La déclaration est un instrument juridique non contraignant qui ne prévoit pas de mécanisme de suivi.

Commented [A97]: Suggestion de citer si nous n'utilisons pas l'expression générique de "droit à un environnement sain" telle que définie ci-dessus.

b) Le droit à un environnement sain dans les traités multilatéraux sur l'environnement (AME)

88. Deux traités reconnaissent le droit à un environnement sain de manière indirecte : la Convention d'Aarhus¹¹⁴ au niveau européen et, plus récemment, l'Accord d'Escazú¹¹⁵ au niveau latino-américain. Ces deux traités réglementent les droits d'accès à l'information environnementale, la participation du public au processus décisionnel en matière

Commented [A98]: Qu'entendons-nous ici ?

⁸⁹ Voir article 18 du Protocole de Maputo

¹⁰⁰ Voir article 18 du Protocole de Maputo

¹⁰¹ Voir article 19 du Protocole de Maputo

¹⁰² Voir <http://lasportal.org/ar/humanrights/Committee/Pages/MemberCountries.aspx>

¹⁰³ Article 38 : « Toute personne a droit, pour elle-même et sa famille, à un niveau de vie suffisant qui lui assure le bien-être et une vie décente, notamment l'alimentation, l'habillement, le logement, les services et le droit à un environnement sain. Les États parties prennent les mesures nécessaires, en fonction de leurs ressources, pour garantir ces droits. »

¹⁰⁴ Article 39 : « Les mesures prises par les États parties sont notamment les suivantes : [...] (f) Lutter contre la pollution de l'environnement et mettre en place des systèmes d'assainissement appropriés. »

¹⁰⁵ CIADH, Affaire des communautés autochtones de l'association *Lhaka Honhat c. Argentine*, arrêt du 6 février 2020.

¹⁰⁶ Ibid. §§ 2, 171, 186.

¹⁰⁷ Ibid. § 289.

¹⁰⁸ Ibid. § 203.

¹⁰⁹ Voir ci-dessus, §§ 207 et suivants.

¹¹⁰ Ibid.

¹¹¹ En particulier, l'affaire *Communauté de La Oroya c. Pérou*, pendante devant la Cour européenne des droits de l'homme, a été examinée par la Cour de justice des Communautés européennes.

¹¹² Voir la demande d'avis consultatif conjointe du Chili et de la Colombie, datée du 9 janvier 2023, http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2023/20230109_18528_petition-1.pdf (traduction non officielle).

¹¹³ Principe 28 : « Toute personne a droit à un niveau de vie suffisant pour elle-même et sa famille, y compris : (...) f. **Le droit à un environnement sûr, propre et durable** ».

¹¹⁴ Convention d'Aarhus de 1998 sur l'accès à l'information, la participation du public au processus décisionnel et l'accès à la justice en matière d'environnement, 2161 UNTS 447, 38 ILM 517 (1999).

¹¹⁵ 2018 Accord régional sur l'accès à l'information, la participation du public et la justice en matière d'environnement en Amérique latine et dans les Caraïbes voir cependant l'interprétation exprimée par le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord lors de la signature et confirmée lors de la ratification, selon laquelle l'article 1 est compris comme « exprimant une aspiration », plutôt qu'un droit.

d'environnement et l'accès à la justice en matière d'environnement, contribuant ainsi à la protection du « droit de toute personne des générations présentes et futures de vivre dans un environnement propre »¹¹⁶. Ils sont largement considérés comme codifiant les composantes procédurales du droit à un environnement sain¹¹⁷. Bien que la Convention d'Aarhus engage les États à veiller à ce que les défenseurs des droits humains sur l'environnement ne soient ni pénalisés, ni persécutés ou harcelés de quelque façon que ce soit, l'Accord d'Escazú va plus loin en incluant les droits spécifiques des défenseurs des droits humains en matière d'environnement¹¹⁸.

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89. En vertu de l'article 15 de la Convention d'Aarhus et de la décision I/7 prise lors de la première session de la Réunion des Parties en octobre 2002, le Comité ~~de conformité~~ d'examen du respect des dispositions peut être saisi par un ou plusieurs membres du public de communications alléguant le non-respect de la convention par un État partie.¹¹⁹ La communication peut concerner un cas spécifique de violation des droits d'accès à l'information, de participation du public ou d'accès à la justice d'une personne en raison du non-respect présumé de la convention par la partie concernée, ou porter sur un manquement général de la partie concernée à mettre en œuvre, ou à mettre en œuvre correctement, les dispositions de la convention. Les ONG peuvent soumettre des communications au Comité de conformité comme tout autre membre du public¹²⁰. Conformément au paragraphe 18 de l'Annexe à la décision I/7, les membres du public qui soumettent des communications ne doivent pas nécessairement être affectés par le manquement allégué - le système de la convention d'Aarhus semble donc autoriser l'*actio*

¹¹⁶ Article 1 de la Convention d'Aarhus : « **Afin de contribuer à la protection du droit de chacun, dans les générations présentes et futures, de vivre dans un environnement propre à assurer sa santé et son bien-être**, chaque partie garantit les droits d'accès à l'information, de participation du public au processus décisionnel et d'accès à la justice en matière d'environnement, conformément aux dispositions de la présente convention ».

Article 1 de l'accord d'Escazú : « L'objectif du présent accord est de garantir la mise en œuvre intégrale et effective en Amérique latine et dans les Caraïbes des droits d'accès à l'information sur l'environnement, de participation du public au processus décisionnel en matière d'environnement et d'accès à la justice en matière d'environnement, ainsi que la création et le renforcement des capacités et de la coopération, en **contribuant à la protection du droit de toute personne des générations présentes et futures de vivre dans un environnement sain** et de bénéficier d'un développement durable ».

¹¹⁷ Voir Peters, Environnement propre et sain, droit à la protection internationale, MPEPIL, janvier 2021, § 10.

¹¹⁸ Accord d'Escazú Article 9 - Défenseurs des droits de l'homme en matière d'environnement

1. Chaque partie garantit un environnement sûr et favorable aux personnes, groupes et organisations qui promeuvent et défendent les droits humains dans le domaine de l'environnement, afin qu'ils puissent agir sans menaces, restrictions ni insécurité.

2. Chaque partie prend des mesures adéquates et efficaces pour reconnaître, protéger et promouvoir tous les droits des défenseurs des droits humains en matière d'environnement, y compris leur droit à la vie, à l'intégrité personnelle, à la liberté d'opinion et d'expression, de réunion pacifique et d'association, et à la libre circulation, ainsi que leur capacité à exercer leurs droits d'accès, en tenant compte de ses obligations internationales dans le domaine des droits de l'homme, de ses principes constitutionnels et des concepts de base de son système juridique.

3. Chaque partie prend également des mesures appropriées, efficaces et opportunes pour prévenir, enquêter et punir les attaques, menaces ou intimidations dont les défenseurs des droits de l'homme en matière d'environnement peuvent faire l'objet dans l'exercice des droits énoncés dans le présent accord.

¹¹⁹ Article 15 de la Convention d'Aarhus, voir également les §§ 18 à 24 de l'annexe à la décision I/7 de la première session de la réunion des parties à la Convention d'Aarhus,

<https://unece.org/fileadmin/DAM/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf>.

¹²⁰https://unece.org/DAM/env/pp/Publications/Guide_to_the_Compliance_Committee_second_edition_2019_English/Guide_to_the_Aarhus_Convention_Compliance_Committee_2019.pdf.

*popularis*¹²¹. Un régime similaire est établi en vertu de l'article 18 de l'Accord d'Escazú¹²², qui établit le Comité d'appui à la mise en œuvre et au respect des dispositions en tant qu'organe subsidiaire de la Conférence des Parties à l'Accord d'Escazú. Ce Comité est de nature consultative et transparente, non accusatoire, non judiciaire et non punitif.

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c) Le droit à un environnement sain dans les résolutions des organisations internationales

90. Le début du débat sur le droit à un environnement sain dans le processus politique des ~~l'ONU Nations unies est généralement considéré comme~~ remontant ~~généralement~~ à la Déclaration de Stockholm sur l'environnement de 1972¹²³. Les déclarations et sommets ultérieurs des Nations Unies n'ont toutefois pas suivi et ce n'est qu'en 2021 qu'un droit humain à un environnement sain a été politiquement reconnu au niveau des Nations Unies¹²⁴ : le « droit à un environnement propre, sain et durable » a d'abord été inclus dans la Résolution 48/13 du Conseil des droits de l'homme d'octobre 2021¹²⁵, puis dans la Résolution 76/300 de l'Assemblée générale de juillet 2022¹²⁶.

Résolution 48/13 du Conseil des droits de l'homme des Nations Unies d'octobre 2021

91. La résolution ~~« reconnaît le droit à un environnement propre, sain et durable comme un droit de l'homme qui est »~~ « considère que l'exercice du droit de bénéficier d'un environnement propre, sain et durable est un élément important pour de la jouissance des droits de l'homme », note qu'il est « lié à d'autres droits et au droit international existant¹²⁷ » et affirme que la promotion de ce droit « nécessite la pleine mise en œuvre ~~passe par l'application pleine et entière~~ des accords multilatéraux sur l'environnement ~~en vertu~~ conformément aux ~~des~~ principes du droit international de l'environnement ».

Commented [A99]: Suggestion de citer directement.

92. La résolution en elle-même ~~ne confère pas de valeur contraignante au droit à un environnement propre, sain et durable et~~ n'apporte pas de réponse à toutes les questions qui pourraient découler de la reconnaissance ~~du droit de ce droit~~, telles que la nature de sa relation avec les autres droits humains. Il est donc d'autant plus important que **les cadres existants en matière de droits humains** se penchent davantage sur la question et clarifient la portée et les implications de ce droit.

¹²¹ Rapport de la première réunion des Parties, Décision I/7, ECE/MP.PP/2/Add.8, par. 18 « à l'expiration d'un délai de douze mois à compter de la date d'adoption de la présente décision ou de la date d'entrée en vigueur de la Convention à l'égard d'une Partie, la date la plus tardive étant retenue, des communications peuvent être présentées au Comité par un ou plusieurs membres du public au sujet du respect de la Convention par cette Partie, à moins que celle-ci n'ait notifié par écrit au dépositaire, avant la fin de la période applicable, qu'elle n'est pas en mesure d'accepter, pour une période ne dépassant pas quatre ans, l'examen de ces communications par le Comité »

¹²² Le Comité d'appui à la mise en œuvre et au respect des dispositions est un organe subsidiaire de la Conférence des parties à l'accord d'Escazú chargé de promouvoir la mise en œuvre de l'accord et d'aider les parties à cet égard. Il est de nature consultative et transparente, non accusatoire, non judiciaire et non punitif. Les règles relatives à la structure et aux fonctions du Comité ont été adoptées lors de la première réunion de la Conférence des Parties ; voir https://repositorio.cepal.org/bitstream/handle/11362/48347/3/S2200737_en.pdf.

¹²³ La Déclaration stipule que « l'homme a le droit fondamental à la liberté, à l'égalité et à des conditions de vie satisfaisantes, dans un environnement dont la qualité lui permette de vivre dans la dignité et le bien-être, ... ».

¹²⁴ Sur les développements qui ont conduit à l'adoption des Résolutions en 2021 et 2022, voir Peters, *Clean and Healthy Environment, Right to, International Protection, Max Planck Encyclopedia of Public International Law* (MPEPIL), janvier 2021.

¹²⁵ Doc. A/HRC/RES/48/13 du 18 octobre 2021 (Résolution du CDH).

¹²⁶ Doc. A/RES/76/300 du 1er août 2022 (Résolution de l'AG).

¹²⁷ Résolution CDH, 2.

Résolution 76/300 de l'Assemblée générale des Nations Unies de juillet 2022

93. Dans ses éléments essentiels¹²⁸, la résolution de l'AG – coparrainée par plus de 100 États et adoptée par 161 voix pour, aucune voix contre et 8 abstentions – ~~ne diffère que marginalement du~~ ~~reprend pour l'essentiel le~~ libellé de la Résolution du CDH. Cependant, il est important de noter que contrairement à cette dernière, elle ne précise pas que le droit humain à un environnement propre, sain et durable est important pour la jouissance de tous les droits humains, mais ~~qu'elle~~ énonce clairement, au paragraphe 1 de son dispositif, la reconnaissance du droit à un environnement propre, sain et durable en tant que droit humain, soulignant ainsi qu'il s'agit d'un droit à part entière.

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96. La Recommandation ~~présuppose l'existence du droit~~ ~~fait référence au droit à un~~ ~~environnement propre, sain et durable~~, mais ne le reconnaît pas explicitement, appelant plutôt les États membres à envisager activement de le faire au niveau national. En même temps, elle implique la nécessité de clarifier davantage le droit, en invitant les États à réfléchir à sa nature, son contenu et ses implications. À d'autres égards, la Recommandation CM/Rec(2022)20 utilise le même libellé que la Résolution 48/13 du CDH (plutôt que celui de la Résolution 76/300 de l'AG), puisqu'elle a été rédigée après l'adoption de la première, mais avant celle de la seconde.

d) Décisions adoptées dans le cadre d'accords internationaux sur l'environnement

97. Depuis la reconnaissance du droit à un environnement propre, sain et durable par l'AGNU ~~Assemblée générale des Nations Unies~~, plusieurs documents finaux adoptés par les ~~Etats~~ Parties aux accords internationaux sur l'environnement ont fait explicitement référence à ce droit.

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e) Principes-cadres du Rapporteur spécial des Nations Unies sur les droits de l'homme et l'environnement

94. En 2018, le Rapporteur spécial des Nations Unies sur les droits de l'homme et l'environnement, John H. Knox, a présenté les Principes-cadres ~~sur les relatifs aux~~ droits de l'homme et l'environnement (Principes-cadres) qui ~~« ont surtout vocation à mettre en évidence la manière dont les obligations relatives aux droits de l'homme existantes s'appliquent dans le domaine de l'environnement »~~ ~~reflètent « l'application des obligations existantes en matière de droits de l'homme dans le contexte environnemental »~~.¹²⁹ Les Principes-cadres énoncent les obligations fondamentales des États en matière de droits humains se rapportant

Commented [A100]: Suggestion pour éviter toute ambiguïté sur la préexistence ou non de ce droit au niveau international.

Commented [A101]: Nous préférons citer directement la version officielle en français.

¹²⁸ Résolution de l'AG, 1 - 3.

¹²⁹ Assemblée générale des Nations Unies « Rapport du Rapporteur spécial sur la question des obligations relatives aux moyens de bénéficier d'un environnement sûr, propre, sain et durable » (24 janvier 2018) Doc. NU A/HRC/37/59.

aux moyens de bénéficier d'un environnement sain. ~~Les Principes cadres ont pour but d'aider « à~~

95. Les deux premiers principes invitent les États à protéger les droits humains en garantissant un environnement sain et, en corollaire, qu'ils respectent les droits humains afin de garantir un environnement sain¹³¹. Ainsi, les Principes-cadres soulignent l'interdépendance des droits humains et de la protection de l'environnement.

96. Les principes-cadres établissent d'autres liens entre les droits humains relatifs à l'environnement et les éventuels éléments substantiels du droit à un ~~environnement propre, sain et durable~~sain, notamment : (i) de respecter et de protéger les droits à la liberté d'expression, d'association et de réunion pacifique concernant les questions environnementales ; (ii) de garantir l'éducation environnementale et la sensibilisation du public ; (iii) d'assurer l'accès du public à l'information environnementale ; (iv) d'exiger l'évaluation préalable ~~des incidences éventuelles sur l'environnement et les droits humains des projets et politiques proposés des effets que pourraient avoir sur l'environnement les projets et mesures envisagés~~ ; (v) de ~~garantir-permettre~~ et de ~~faciliter-favoriser~~ la participation du public au processus décisionnel relatif à l'environnement ; et (vi) d'assurer l'accès à des voies de recours ~~efficaces-utiles~~ en cas de violation des droits humains et des lois nationales relatives à l'environnement¹³² ; (vii) la non-discrimination en ce qui concerne ~~des conditions d'égalité des droits de l'homme qui supposent de bénéficier d'un environnement sain la jouissance d'un environnement sain~~¹³³ ; (viii) ~~l'établissement et l'application e-maintenance~~ de ~~mesures-normes~~ environnementales de fond ~~non discriminatoires et~~ non régressives par rapport à la réalisation progressive des droits économiques, sociaux et culturels¹³⁴ ; (ix) ~~le contrôle et~~ l'application effective ~~du respect des normes par les acteurs privés ainsi que par les autorités gouvernementales~~ ~~des normes environnementales aux acteurs publics et privés~~¹³⁵ ; (x) la coopération ~~interne entre Etats en vue d'établir des cadres juridiques internationaux efficaces, de les appliquer et de les faire respecter pour prévenir, limiter et réparer les dommages environnementaux transfrontières et mondiaux qui entravent la pleine jouissance des droits de l'homme au sujet de la protection de l'environnement~~¹³⁶ et (xi) la protection des droits de ceux qui sont particulièrement vulnérables aux dommages environnementaux ~~et de ceux qui mènent des activités dans les domaines des droits de l'Homme ou de l'environnement~~, y compris les défenseurs des droits humains en matière d'environnement et les populations autochtones¹³⁷. Par ailleurs, les Principes-cadres indiquent que les États devraient respecter et protéger les droits de l'Homme dans le cadre des mesures qu'ils prennent pour promouvoir le développement durable¹³⁸.

Commented [A103]: Suggestion d'utiliser ici l'expression générique de droit à un environnement sain car les Principes cadres utilisent encore une autre expression de ce droit ("sûr, propre, sain et durable")

Commented [A104]: Nous suggérons de reprendre directement les énoncés des différents principes cadres.

Commented [A105]: Suggestion d'ajout en référence au Principe-cadre n°4.

Commented [A106]: Sauf erreur, le Principe-cadre n°6 concerne l'éducation et la sensibilisation du public aux questions environnementales.

- f) Le droit à un environnement sain dans d'autres ~~documents-instruments~~ non contraignants

103. Dans son Observation générale n° 26 sur les droits de l'enfant et l'environnement, ~~en~~ ~~portant tout particulièrement avec un l'~~accent ~~particulier~~ sur le changement climatique (voir ci-dessus), le Comité pour les droits de l'enfant des Nations Unies observe qu'« un environnement propre, sain et durable est à la fois un droit humains en soi et nécessaire à la pleine jouissance d'un large éventail de droits de l'enfant »¹³⁹, ce qui fait écho à la formulation de la résolution 48/13 du Conseil des droits de l'homme des Nations Unies. Il prend également acte de « la reconnaissance de ce droit [...] dans les accords internationaux, la jurisprudence des tribunaux régionaux et nationaux, les constitutions nationales, les lois et les politiques d'une grande majorité d'États¹⁴⁰ ». Elle affirme ensuite que « les enfants ont le droit à un environnement propre, sain et durable », qui est « implicite » dans la CDE et « directement lié » à d'autres droits¹⁴¹ ; une formulation qui rappelle ~~la position le libellé~~ de la Résolution 48/13 ~~du CDH~~ et de la Résolution 76/300 de l'~~Assemblée générale des Nations Unies~~AGNU.

104. L'Observation générale n°26, après avoir mentionné au préalable les travaux du Rapporteur spécial des Nations Unies, énonce les éléments substantiels du droit à un environnement propre, sain et durable, notamment « un air pur, un climat sûr et stable, des écosystèmes et une biodiversité sains, de l'eau salubre et en quantité suffisante, une alimentation saine et durable et un environnement non toxique¹⁴² ». Sur cette base, le Comité considère que les États devraient immédiatement prendre certaines mesures spécifiques en vue de la réalisation de ce droit pour les enfants¹⁴³. L'Observation générale souligne également l'importance des éléments procéduraux de ce droit, notamment l'accès à l'information, la participation à la prise de décision et un accès à la justice adapté aux enfants et assorti de recours effectifs, et invite les États à intégrer le droit des enfants à un environnement propre, sain et durable dans leur législation nationale et à prendre des mesures adéquates pour le mettre en œuvre¹⁴⁴.

Commented [A107]: A quels paragraphes de l'OG n°26 est-il ici fait référence ?

Commented [A108]: L'OG n°26 commence par interpréter les articles de la Convention internationale des droits de l'enfant dans le contexte environnementale. Peut-être est-il nécessaire de le rappeler ?

105. Dans la section IV sur les mesures générales de mise en œuvre, le Comité considère que « les États doivent prendre des mesures délibérées, spécifiques et ciblées pour assurer la pleine et effective jouissance des droits de l'enfant liés à l'environnement, y compris leur droit à un environnement sain¹⁴⁵ ». On peut supposer que le Comité, ayant rappelé que « les enfants ont droit à un environnement propre, sain et durable », entend que d'autres mesures de mise en œuvre s'appliquent également au droit à un environnement sain. Ces mesures comprendraient des études d'impact sur les droits de l'enfant, l'obligation de protéger les enfants contre la violation de leurs droits par des tiers, y compris les entreprises, l'accès à la justice et la coopération internationale. L'Observation générale donne plus de détails sur ces mesures.

Commented [A109]: Nous ne sommes pas certains de bien comprendre ce que nous essayons de dire ici.

106. Les Observations générales sont des instruments juridiques non contraignants, dans la mesure où elles ne lient pas les États parties¹⁴⁶. Leur fonction est d'aider à la mise en œuvre du traité concerné, en clarifiant les obligations des parties pour certaines dispositions et en suggérant des approches pour la mise en œuvre des dispositions du traité. Elles peuvent être perçues comme des instruments juridiques normatifs qui visent à influencer le discours sur les droits humains et, par conséquent, le développement normatif. L'Observation générale n° 26 est donc importante pour l'identification du champ d'application matériel du droit à un environnement sain, l'interprétation des obligations de la Convention internationale des droits de l'enfant dans le contexte environnemental et la compréhension des éléments pouvant constituer le droit à un environnement propre, sain et durable.

d) Le droit à un environnement sain dans le droit national des États membres du Conseil de l'Europe

Commented [A110]: Le droit à un environnement sain au niveau national pourrait faire l'objet d'une partie séparée :

- i. Le droit à un environnement sain au niveau international
- ii. Le droit à un environnement sain au niveau national

¹⁴⁰ Synthèse détaillée, Knox, contribution d'expert, p. 27.

¹³¹ Ibid. §§ 4-6 (Principes-cadres 1-2).

¹³² Ibid. §§ 10-30 (Principes-cadres 5-10).

¹³³ Ibid. §§ 7-9 (Principe-cadre 3).

¹³⁴ Ibid. §§ 31-33 (Principe-cadre 11).

¹³⁵ Ibid. §§ 34-35 (Principe-cadre 12).

¹³⁶ Ibid. §§ 36-39 (Principe-cadre 13).

¹³⁷ Ibid. §§ 10-11, 40-53 (Principes-cadres 4, 14, 15).

¹³⁸ Ibid. §§ 54-55 (Principe-cadre 6).

¹³⁹ Comité pour les droits de l'enfant des Nations Unies, CRC/C/GC/26, § 8.

¹⁴⁰ Ibid. § 10.

¹⁴¹ Ibid. § 63.

¹⁴² Ibid. § 64.

¹⁴³ Ibid. § 65.

¹⁴⁴ Ibid. § 66.

¹⁴⁵ Ibid. § 71.

¹⁴⁶ Pour la nature et l'objet des Observations générales, voir *Official Records of the UN General Assembly, Thirty sixth Session, Supplement No. 40 (A/36/40), annex VII, introduction*.

107. La section suivante décrit l'état des législations nationales relatives au droit à un environnement sain sur la base des réponses à un questionnaire envoyé par le groupe d'experts aux États membres. Le questionnaire posait les questions suivantes : (i) est-ce que la constitution, la législation ou la jurisprudence protège-t-elle une forme explicite de droit humain à un environnement sain et, dans l'affirmative, en quels termes ; (ii) ce droit est-il justiciable, et dans l'affirmative, à quelles conditions ; (iii) quelle est la position, le cas échéant, des tribunaux nationaux au sujet de ce droit dans leur jurisprudence ?

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110. Le droit à un environnement sain est reconnu au niveau national comme un droit humain/droit fondamental dans une majorité d'États membres du Conseil de l'Europe. Ces États membres mentionnent le plus souvent la protection de l'environnement dans la section relative aux droits humains de leurs textes constitutionnels et le reconnaissent donc formellement comme un droit fondamental. La plupart des États membres définissent la portée du droit en incluant une référence au bien-être humain et/ou à la qualité de vie humaine dans les dispositions correspondantes. La formulation la plus courante pour illustrer ce lien entre la protection de l'environnement et l'individu est la garantie d'un « environnement sain » ou d'un environnement « favorable/conduisant à la santé ». D'autres États membres utilisent des attributs tels que « bienveillant » ou « habitable » en ce qui concerne l'environnement et « décent » ou « agréable » en ce qui concerne la qualité de vie. Les titulaires de droits sont toujours des êtres humains ; aucun État membre ne définit l'environnement ou la nature elle-même comme un sujet de droit ayant droit à une protection.

111. La plupart des dispositions relatives aux droits humains en matière d'environnement sont plutôt vagues quant au contenu du droit à un environnement sain, laissant le sujet à une concrétisation législative ou judiciaire. Certains États membres fournissent toutefois plus de détails sur les biens environnementaux protégés. Dans presque tous les États membres, les cours suprêmes et/ou constitutionnelles jouent un rôle important dans l'application et le développement du droit à un environnement sain. Le niveau d'ambition varie fortement en fonction des particularités nationales et du type d'affaires portées devant ces juridictions jusqu'à présent.

112. Tous les États membres qui ont répondu au questionnaire, considèrent que les obligations des États inhérentes au droit à un environnement sain ne se limitent pas à l'obligation négative de s'abstenir de toute action néfaste. L'obligation positive de protéger le droit contre l'ingérence d'autres acteurs est reconnue partout. En outre, certains États membres ont reconnu l'obligation positive de protéger l'environnement, c'est-à-dire d'assurer et de créer les conditions d'un environnement sain. Tous les États membres laissent une grande marge d'appréciation au législateur pour décider des moyens utilisés pour remplir leurs obligations.

113. Les réponses au questionnaire ne permettent pas de tirer des conclusions sur la mesure ~~où~~ dans laquelle le droit à un environnement sain est considéré comme pertinent pour les affaires concernant l'impact direct de la dégradation de l'environnement ou de la triple crise planétaire. Les tribunaux nationaux, dans au moins un État membre, semblent considérer que le droit à un environnement sain est engagé dans ces affaires concernant la triple crise planétaire, même si aucune conséquence spécifique sur les individus n'est établie¹⁴⁷.

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¹⁴⁷ Le « Supremo Tribunal de Justiça » portugais, par exemple, a établi que le droit constitutionnel à un « environnement sain » comprend également la conservation de la biodiversité.

114. La plupart des États membres prévoient des droits d'accès à l'information environnementale, de participation du public au processus décisionnel en matière d'environnement et d'accès à la justice en matière d'environnement à la suite de leur ratification de la Convention d'Aarhus.

115. Il convient de noter qu'un certain nombre d'États membres qui ne reconnaissent pas le droit humain à un environnement sain, ont codifié la protection de l'environnement en tant que principe ou objectif constitutionnel. Ces États décrivent le maintien d'un environnement sain comme un objectif de bien-être national qui, en vertu des dispositions constitutionnelles pertinentes, doit être promu et pris en considération dans les processus de prise de décision législatifs, administratifs et judiciaires. Certaines constitutions accordent même la primauté à la protection de l'environnement sur d'autres principes (constitutionnels)¹⁴⁸ ou donnent visiblement la priorité à la protection de l'environnement en tant que principe directeur dans leur cadre constitutionnel national. Comme c'est le cas pour le droit fondamental à un environnement sain, cette garantie objective de la protection de l'environnement est ouverte à l'interprétation judiciaire et, comme le montrent les réponses au questionnaire, elle est effectivement façonnée par la jurisprudence des tribunaux nationaux. Les États membres qui suivent ce modèle objectif de protection de l'environnement ont fait état d'évolutions jurisprudentielles substantielles. La combinaison des droits fondamentaux/humains traditionnels avec un principe constitutionnel de protection de l'environnement génère des résultats qui sont généralement associés au droit de l'homme à un environnement sain¹⁴⁹.

g) Conclusion

116. À l'heure actuelle, s'il ne fait aucun doute que le droit à un environnement sain est reconnu comme un droit **justiciable-opposable** dans plusieurs systèmes régionaux de protection des droits humains, sa nature, son contenu et ses implications dans le cadre du droit international en général ne sont pas encore clairement définis. L'importance prépondérante des tribunaux dans la définition des contours du nouveau droit est une caractéristique commune à toutes les juridictions examinées.

ii. Adaptation du droit à un environnement sain

117. Comme susmentionné, le droit à un environnement sain est reconnu comme un droit justiciable dans plusieurs systèmes régionaux de protection des droits humains (voir paragraphes 73-87).

118. Au niveau national, dans la plupart des États membres qui prévoient le droit à un environnement sain comme un droit humain dans leur législation nationale, ce droit est justiciable au même titre que les autres droits humains. Cela signifie notamment qu'il est possible d'introduire des recours en annulation contre des décisions administratives et - si le système judiciaire national le permet généralement - de procéder à un contrôle constitutionnel des actes législatifs. Certains États membres accordent un droit d'action aux organisations non gouvernementales et/ou aux organismes publics territoriaux locaux et régionaux¹⁵⁰, d'autres prévoient la possibilité d'un *actio popularis*.¹⁵¹ D'autres États membres qui reconnaissent le droit

Commented [A111]: Suggestion d'indiquer à quels droits nationaux il est fait référence afin de permettre au lecteur de pouvoir se reporter aux dispositions législatives ou constitutionnelles pertinentes.

Commented [A112]: S'agit-il de la conclusion de la section sur le droit national ou de la conclusion générale de la partie sur le droit à un environnement sain ?

Commented [A113]: S'il s'agit d'une conclusion générale sur la reconnaissance du droit à un environnement sain, nous suggérons de mentionner ici aussi le droit national.

¹⁴⁸ La Constitution croate, par exemple, dans son article 3, classe la protection de l'environnement parmi « les valeurs les plus élevées de l'ordre constitutionnel de la République » et déclare qu'il s'agit d'une « base pour l'interprétation de la Constitution ».

¹⁴⁹ La Cour constitutionnelle fédérale allemande, par exemple, a dérivé une doctrine dite d'égalité intergénérationnelle de l'objectif de protection de l'environnement énoncé à l'article 20a de la loi fondamentale allemande, qui peut être invoquée dans le cadre des garanties traditionnelles des droits fondamentaux.

¹⁵⁰ Estonie, Norvège, Pologne, République slovaque.

¹⁵¹ Lettonie et Portugal.

à un environnement sain dans leur législation nationale ne considèrent toutefois pas ce droit comme justiciable.

Commented [A114]: Nous ne comprenons pas bien l'articulation entre ces deux sections.

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E. Éventuels arguments en faveur d'un instrument ou d'instruments supplémentaires sur la protection des droits humains et l'environnement

108. La section suivante présente ~~les justifications possibles d différentes raisons qui pourraient justifier l'élaboration d'un instrument~~ supplémentaire sur les droits humains et l'environnement et analyse les hypothèses sous-jacentes.

i. Comblent les lacunes dans les obligations juridiques internationales des États membres

a) Lacunes dans le droit international en matière de droits humains

109. ~~Un argument se concentre sur les~~ Une raison de s'engager dans l'élaboration d'un instrument supplémentaire pourrait être de combler certaines lacunes du système actuel des droits humains, ~~et~~ en particulier du système de la Convention et de la Charte, ~~pour faire face aux défis posés par la triple crise planétaire elles-mêmes.~~

Commented [A115]: Il nous semble utile de rappeler par rapport à quoi certains acteurs identifient des lacunes du système actuel des droits humains.

La Convention européenne des droits de l'homme

110. La jurisprudence actuelle de la Cour et les exigences procédurales et matérielles qui doivent être respectées lors de la présentation d'affaires relatives aux droits humains devant la Cour, ~~peuvent constituer des obstacles complexes dans des~~ présentent certaines limites lorsqu'il s'agit pour la Cour de traiter d'affaires ~~liées~~ relatives à l'environnement. Très souvent, l'accent est mis ici aussi sur les litiges relatifs au changement climatique qui sont considérés comme étant de nature différente des affaires environnementales plus traditionnelles sur lesquelles la Cour européenne des droits de l'homme s'est prononcée jusqu'à présent : « Les requêtes relatives au changement climatique sont beaucoup plus complexes en termes de causes et d'effets, indéterminées en termes de préjudice individuel et peu claires quant aux mesures possibles à adopter¹⁵² ».

Commented [A116]: Dans cette partie, nous suggérons de commencer par rappeler que la Convention ne contient pas de droit à la protection de l'environnement ou à un environnement. Il nous semble que c'est la première limite posée par le système actuel de la Convention lorsqu'il s'agit de traiter de problèmes environnementaux.

111. Les points suivants sont perçus comme pouvant constituer des limites du système de la Convention pour aborder l'impact sur les droits humains de la triple crise planétaire :

- Conformément à l'article 1 de la Convention, ~~la juridiction d'un État, au sens de l'article, est avant tout territoriale. En conséquence, la victime d'une violation présumée de la Convention doit se trouver dans la juridiction territoriale d'un État membre~~ l'engagement des États contractants se borne à reconnaître aux personnes relevant de leur juridiction les droits et libertés énumérés dans la Convention et ses protocoles. Ainsi, un État contractant ne peut être tenu responsable des actes ou omissions à lui imputables qui sont à l'origine d'une allégation de violation de ces droits et libertés que vis-à-vis des personnes relevant de sa juridiction. Conformément au droit international public, la juridiction de l'État est avant tout territoriale. ~~C'est principalement le cas lorsque la victime se trouve sur le territoire de l'État~~¹⁵³. ~~La juridiction extraterritoriale peut s'appliquer exceptionnellement si la victime se trouve en dehors du territoire d'un État mais sous l'autorité et le contrôle de l'État~~ Les actes d'un État accomplis ou produisant des effets en dehors de son territoire ne peuvent fonder l'exercice de sa juridiction au sens de l'article 1^{er} de la Convention que dans des cas exceptionnels, en particulier lorsque l'État exerce

Commented [A117]: Cette note ne nous semble pas renvoyer au bon document.

Commented [A118]: Nous suggérons de déplacer ce point plus bas et de traiter d'abord des limites du système qui concernent l'ensemble des affaires environnementales.

Commented [A119]: Nous suggérons de rassembler les questions de recevabilité d'une part et celle de fond, d'autre part.

¹⁵² Ibid., 1, 3.

¹⁵³ *Ukraine c. Russie* (re Crimée) (déc.) [GC], 2020, § 345).

un contrôle effectif sur une zone située hors de son territoire national, et lorsque l'Etat, dans certaines circonstances et par l'intermédiaire de ses agents, exerce son contrôle et son autorité sur une personne¹⁵⁴. Les cas de dommages transfrontaliers et de changement climatique posent généralement des problèmes d'extraterritorialité, car ~~la~~ une pollution ou des émissions ~~provenant~~ d'un État ~~mais~~ peuvent avoir des répercussions ~~sur des individus dans un autre État en dehors du territoire national¹⁵⁵. Il n'y a ni contrôle territorial, ni juridiction, sous l'angle personnel d'une juridiction extraterritoriale ou d'autres bases de juridiction sur la base de la jurisprudence établie de la Cour~~ Dans ce cas, les critères établis de la jurisprudence de la Cour ne permettent pas de conclure à l'existence d'un titre de juridiction. La jurisprudence de la Cour sur la compétence a évolué¹⁵⁶, mais jusqu'à présent, contrairement à la Cour interaméricaine des droits de l'Homme et au Comité des droits de l'enfant ~~aux organes des Nations Unies chargés des traités relatifs aux droits de l'homme¹⁵⁷, la Cour n'a pas accepté de conception causale de la juridiction au titre de l'article 1. Des problèmes de recevabilité pour défaut d'établissement de la compétence sont donc déplorés~~ Certains acteurs regrettent qu'on ne puisse conclure à la juridiction de l'Etat d'origine de la pollution ou des

¹⁵⁴ Voir *M.N. et autres c. Belgique* [GC], n°3599/18, §§ 113-137.

¹⁵⁵ Synthèse détaillée, Raible, contribution d'expert, p. 34.

¹⁵⁶ *Carter c. Russie*, requête n° 20914/07, arrêt du 21 septembre 2021 ; *Géorgie c. Russie* (II) requête n° 38263/08, arrêt de Grande Chambre du 21 janvier 2021 ; *Ukraine et Pays-Bas c. Russie*, requêtes n° 8019/16, 43800/14 et 28525/20, arrêt de Grande Chambre du 30 novembre 2022.

¹⁵⁷ AO23/2017

émissions dans ce contexte¹⁵⁸. La jurisprudence de la Cour sur la compétence a évolué¹⁵⁹,

- L'article 34 de la CEDH exclut de la compétence de la Cour toute *actio popularis*, c'est-à-dire toute requête d'intérêt public qui n'aurait aucune incidence sur les droits individuels du requérant. Actuellement, un requérant doit se prétendre victime d'une violation d'un droit protégé par la Convention ou ses Protocoles qui le concerne personnellement.

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- En ce qui concerne la question des générations futures, dans le cadre normatif actuel, la Cour ne dispose que d'un pouvoir discrétionnaire d'accepter la qualité d'intervention d'une personne qui agit au nom d'une victime directe ou indirecte d'une violation alléguée¹⁶¹. En revanche, en dehors du système de la Convention, les intérêts des générations futures ont été protégés par des institutions telles que le médiateur hongrois pour les générations futures, qui est autorisé par la législation locale à engager des procédures judiciaires ou à y participer¹⁶². Cette protection serait nécessaire car les effets de la triple crise planétaire risquent de porter atteinte aux droits fondamentaux à l'avenir.

~~112. L'obligation d'épuiser les voies de recours internes, une expression du principe de subsidiarité, peut constituer un obstacle procédural important dans les affaires relatives au changement climatique¹⁶³. Le changement climatique mondial étant par nature causé par les actes ou les omissions d'une multitude d'États, certains requérants peuvent souhaiter introduire une requête à l'encontre de plusieurs États, comme c'est le cas dans l'affaire *Duarte Agostinho et autres c. Portugal et autres*. La nécessité d'épuiser les voies de recours internes dans chacun de ces États – une question qui est également examinée par la Cour dans les affaires dont elle est actuellement saisie – peut prendre du temps et être onéreuse.~~

Commented [A120]: Nous nous interrogeons sur l'opportunité de mentionner d'autres organes que la Cour dans cette liste. Il est peut-être plus clair que cette liste se contente d'indiquer les limites identifiées du système conventionnel sans ajouter des éléments comparatifs à ce stade.

- Le fait que, pour obtenir gain de cause, les requérants doivent démontrer que la dégradation de l'environnement affecte directement leurs droits au titre de la Convention peut également être considéré comme une limitation du système en vertu de la Convention lorsqu'il s'agit pour la Cour de juger d'affaires environnementales. L'affaire *Krytatos* illustre cette lacune : en 2003, la Cour a rejeté les griefs découlant de la destruction d'une zone humide adjacente à la propriété des requérants, au motif que « ni l'article 8 ni aucun des autres articles de la Convention ne sont spécifiquement conçus pour assurer une protection générale de l'environnement en tant que tel »¹⁶⁴. La Cour a déclaré que « même à supposer que l'environnement ait été gravement endommagé par le développement urbain de la zone, les requérants n'ont pas avancé d'arguments convaincants montrant que les dommages allégués aux oiseaux et autres espèces protégées vivant dans le marais étaient de nature à porter directement atteinte à leurs propres droits »¹⁶⁵. Il est soutenu que la reconnaissance contraignante du droit à un environnement sain établirait le lien entre les êtres humains et la protection naturelle que la décision *Kyrtatos* n'a pas trouvée¹⁶⁶ et permettrait, au moins en principe, d'introduire des réclamations pour des dommages environnementaux substantiels qui ont affecté les requérants.

Commented [A121]:
Ce point étant l'objet d'une requête actuellement pendante, nous préférons ne pas l'inclure.

Nous suggérons aussi de traiter dans un deuxième temps les points qui concernent plus particulièrement le changement climatique.

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- Une autre limite du système de la Convention pour traiter de la matière environnementale autre facteur de complication avancé par certains auteurs est l'impossibilité supposée d'établir un lien de cause à effet de causalité direct lorsqu'il s'agit des implications environnementales du changement climatique.¹⁶⁷ L'approche fondée sur les droits humains pour établir la responsabilité des dommages prétendument causés par le

Commented [A122]: Nous suggérons de déplacer ce point vers le haut et de rassembler les points relatifs aux questions de fond.

changement climatique a été critiquée en raison des les difficultés associées à l'établissement d'une chaîne de causalité entre l'acte ou l'omission d'un État, d'une part, et la violation d'un droit subie par une victime ou un groupe spécifique, d'autre part¹⁶⁸. Il a été souligné que l'établissement d'une causalité juridique est rendu particulièrement difficile par la nature diffuse des émissions de gaz à effet de serre, la nature indirecte de nombreux impacts du changement climatique sur l'humanité et, surtout, l'incertitude scientifique associée à l'établissement d'un lien définitif entre un événement météorologique singulier et le changement climatique¹⁶⁹. Pour que le droit humain à un environnement sain soit effectif dans les cas concernant les conséquences du changement climatique, il pourrait être nécessaire d'examiner comment la causalité, la prévisibilité et l'incertitude peuvent être traitées de manière efficace.

[...]

- Il est également avancé que le principe de précaution et d'autres principes du droit international de l'environnement ne jouent pas un rôle suffisamment important dans la jurisprudence de la Cour¹⁷⁰. Alors que la Cour a souligné l'importance du principe de précaution dans l'affaire *Tatar*¹⁷¹, dans des affaires plus récentes, la Cour n'a pas développé davantage son utilisation du principe de précaution.
- Étant donné que le système de la Convention ne reconnaît pas un droit à un environnement sain, seuls des « impératifs » environnementaux « indiscutables » peuvent, en principe, justifier une ingérence dans certains droits et libertés individuels (par exemple, le droit au respect de la vie privée ou le droit à la propriété). En vertu de la Convention et de ses Protocoles, une ingérence dans certains droits peut être justifiée le cas échéant, dans une société démocratique, « à la protection des droits et libertés d'autrui ». Pour apprécier si un juste équilibre a été ménagé entre les intérêts concurrents de l'individu et de la collectivité dans son ensemble, la Cour établit une distinction entre les « droits et libertés » qui sont garantis par la Convention ou ses Protocoles et ceux qui ne le sont pas. Selon un principe bien établi, lorsque les « droits et libertés » sont garantis par la Convention ou ses Protocoles, il faut admettre que la nécessité de les protéger peut conduire les États à restreindre d'autres droits ou libertés également énoncés dans la Convention, et les États contractants doivent disposer d'une large marge d'appréciation à cet égard. En revanche, lorsque des restrictions sont imposées à un droit ou à une liberté

Commented [A123]: Suggestion de rassembler et de traiter dans un second temps des questions propres au changement climatique.

Commented [A124]: Est-il utile de développer davantage ce point ?

¹⁵⁸ Synthèse détaillée, Raible, contribution d'expert, p. 35.

¹⁵⁹ *Carter c. Russie*, requête n° 20914/07, arrêt du 21 septembre 2021 ; *Géorgie c. Russie (II)* requête n° 38263/08, arrêt de Grande-Chambre du 21 janvier 2021 ; *Ukraine et Pays-Bas c. Russie*, requêtes n° 8019/16, 43800/14 et 28525/20, arrêt de Grande-Chambre du 30 novembre 2022.

¹⁶⁰ AO23/2017

¹⁶¹ Câmpeanu, § 103

¹⁶² Le bureau du médiateur pour les générations futures a été créé par le Parlement hongrois en 2007, voir <https://www.ajbh.hu/web/ajbh-en/the-role-of-the-ombudsman>.

¹⁶³ Keller/Pershing, *Climate Change in Court: Overcoming Procedural Hurdles in Transboundary Environmental Cases*, ECHRL 2022, 23, 34.

¹⁶⁴ *Kyrtatos c. Grèce*, requête n°. 41666/98, arrêt du 22 mai 2003, § 52

¹⁶⁵ Ibid. § 53.

¹⁶⁶ Knox. P. 27.

¹⁶⁷ Fanny Thornton, *The Absurdity of Relying on Human Rights Law to Go After Emitters*, *Debating Climate Law and Intergovernmental Panel on Climate Change*, 2022

¹⁶⁸ *Rendering International Human Rights Law Fit for Purpose on Climate Change Human Rights Law Review*, Volume 23, Issue 1, March 2023, *Climate Change and Human Rights: Amicable or Arrested Development?* (2010) 1 *Journal of Human Rights and the Environment*.

¹⁶⁹ Ibid.

¹⁷⁰ Résumé détaillé, Keller, contribution d'expert, p. 5.

¹⁷¹ *Tătar c. Roumanie*, requête n° 67021/01, arrêt du 27 janvier 2009, § 120.

garantis par la Convention afin de protéger des « droits et libertés » qui ne sont pas, en tant que tels, énoncés dans la Convention ou les Protocoles, seuls des impératifs indiscutables peuvent justifier une ingérence dans la jouissance d'un droit garanti par la Convention¹⁷².

Commented [A125]: Nous suggérons de rassembler ce point avec les autres questions de fond.

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- Il est également avancé que la Convention ne garantit pas une protection suffisante aux défenseurs des droits humains dans le domaine de l'environnement, qui constituent un groupe de défenseurs des droits humains particulièrement exposés dans le monde¹⁷³. Bien que les États membres du Conseil de l'Europe aient fourni des efforts importants pour protéger les défenseurs des droits humains dans le domaine de l'environnement ces dernières années, notamment dans le cadre de la Convention d'Aarhus¹⁷⁴, certains considèrent que ces efforts sont insuffisants. ~~La~~ **Un argument en faveur d'un nouvel instrument sur les droits humains et l'environnement serait de permettre reconnaissance du droit à un environnement sain dans un protocole additionnel à la Convention permettrait** aux défenseurs de l'environnement d'être considérés comme les défenseurs d'un droit qui est sur un pied d'égalité avec tous les autres droits légalement reconnus dans le système européen des droits humains, ce qui mettrait fin aux tentatives de délégitimer et d'isoler les défenseurs de l'environnement en suggérant qu'ils agissent contrairement à d'autres droits importants et intérêts collectifs.

Commented [A126]: Il nous semble que la question du type d'instrument et de ses effets potentiels est plutôt traitée dans la partie suivante.

[...]

La Charte sociale européenne

123. La Charte ne contient pas explicitement un droit à un environnement sain. Cependant, comme expliqué ci-dessus, le CESR a abordé la question de la protection de l'environnement et des droits sociaux, à la fois dans sa procédure de rapport périodique et dans des décisions portant sur des réclamations collectives contre des États Parties qui concernaient des, pour manquements présumés à l'obligation de donner effet à la Charte de manière appropriée.

Commented [A127]: Suggestion de mentionner également la question de la valeur des décisions rendues par le CEDS et du suivi de leur exécution.

125. La disposition la plus pertinente de la Charte pour la protection de l'environnement est l'article 11 (droit à la protection de la santé). En vertu de la Charte, le droit à la protection de la santé inclut le droit à un environnement sain. Dans le cadre de la procédure de rapport périodique, le CEDS a examiné la conformité de la législation et des pratiques des États Parties avec l'article

Commented [A128]: Suggestion d'insérer une référence à *Fondation Marangopoulos pour les droits de l'homme (FMDH) c. Grèce*, requête n° 30/2005, décision sur le bien-fondé du 6 décembre 2006, §§ 194-195, §202.

¹⁷² *Chassagnou et autres c. France*, requête n° 25088/94 28331/95 28443/95, arrêt de GC du 29 avril 1999, § 113.

¹⁷³ Rapporteur spécial sur la situation des défenseurs des droits de l'homme, 24 décembre 2020, Doc. des Nations Unies n° A/HRC/46/35, & 5.

¹⁷⁴ Convention d'Aarhus sur l'accès à l'information, la participation du public au processus décisionnel et l'accès à la justice en matière d'environnement, adoptée le 25 juin 1998 - entrée en vigueur le 30 octobre 2001, 2161 UNTS 447, 38 ILM 517 (1999). Voir également la création, en octobre 2021, d'un mécanisme de réaction rapide pour les défenseurs de l'environnement et l'élection, en juin 2022, de Michel Forst en tant que premier rapporteur spécial sur les défenseurs de l'environnement dans le cadre de la Convention d'Aarhus. Voir Réunion des Parties à la Convention d'Aarhus, *Décision VII/9 sur un mécanisme de réaction rapide pour traiter les cas liés à l'article 3(8) de la Convention sur l'accès à l'information, la participation du public au processus décisionnel et l'accès à la justice en matière d'environnement*, octobre 2021, UN Doc. No. ECE/MP.PP/2021/2/Add.1 ; voir également l'article 3(8) de la Convention d'Aarhus, qui stipule que « Chaque Partie veille à ce que les personnes exerçant leurs droits conformément aux dispositions de la présente Convention ne soient pas pénalisées, persécutées ou harcelées de quelque manière que ce soit en raison de leur participation. Cette disposition n'affecte pas le pouvoir des tribunaux nationaux d'accorder des frais raisonnables dans le cadre de procédures judiciaires » ; voir également la Réunion des Parties à la Convention sur l'accès à l'information, la participation du public au processus décisionnel et l'accès à la justice en matière d'environnement, *Rapport de la troisième session extraordinaire de la Réunion des Parties, juin 2022, ECE/MP.PP/2022/2*. Voir également CEE-ONU, *Premier rapporteur spécial au monde sur les défenseurs de l'environnement élu en vertu de la Convention d'Aarhus*, 24 juillet 2022, disponible à l'adresse <https://unece.org/environment/press/worlds-first-special-rapporteur-environmental-defenders-elected-under-aarhus>.

11 concernant les risques environnementaux liés à la pollution de l'air, de l'eau, du sol et au bruit, à la gestion des déchets, aux rayonnements ionisants, à l'amiante, etc.¹⁷⁵. Toutefois, comme indiqué ci-dessus, il existe relativement peu de décisions sur des réclamations collectives ~~sur~~ concernant la portée et l'application de l'article 11 de la Charte ~~pour en matière de~~ protection de l'environnement. Jusqu'à présent, seules deux requêtes ont été déposées auprès du CESR concernant le droit à un environnement sain en vertu de l'article 11, toutes deux concernant la Grèce¹⁷⁶. Cette rareté de décisions en la matière peut être attribuée, entre autres, au nombre limité de ratifications du Protocole additionnel de 1995 à la Charte¹⁷⁷ qui prévoit le mécanisme de réclamations collectives ainsi qu'à une méconnaissance plus générale de la procédure de réclamations collectives.

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ii. Lacunes en ce qui concerne les responsabilités internationales des acteurs privés en matière d'impact environnemental de leurs activités

127. ~~Une autre raison de s'engager dans l'élaboration d'un instrument additionnel relatif à la protection des droits humains et à l'environnement pourrait être de combler certaines lacunes en matière de~~ Un autre argument relatif aux lacunes dans les normes juridiques internationales concerne les responsabilités internationales des acteurs privés ~~en ce qui concerne~~ quant à l'impact de leurs activités sur l'environnement¹⁷⁸. La plupart des pollutions environnementales, des émissions de gaz à effet de serre ~~et de~~ ainsi qu'une grande partie de la perte de biodiversité sont causées par des acteurs privés. Pour lutter efficacement contre la dégradation de l'environnement et la triple crise planétaire, l'implication des acteurs privés est donc primordiale. Les normes applicables aux États doivent être transcrites en obligations concrètes pour les entités privées. Cependant, les normes internationales de diligence raisonnable en matière d'environnement ne sont pas encore aussi profondément ancrées dans le droit international. Le document de référence pour la question des entreprises et des droits humains, à savoir, les Principes directeurs des Nations Unies relatifs aux Entreprises et aux Droits de l'Homme (UNGPs), postule une responsabilité des entreprises ~~en matière à protéger~~ de respecter les droits de l'homme et souligne le devoir des États de protéger les individus contre les violations des droits de l'homme commises sur leur territoire ou sous leur juridiction par des tiers, y compris ~~des~~ entreprises. Mais ce document n'inclut pas de mesures spécifiques et explicites concernant les questions environnementales. Celles-ci ne sont couvertes que dans la mesure où les questions environnementales relèvent des droits humains. Les Principes directeurs de l'OCDE à l'intention des entreprises multinationales ainsi que les Principes directeurs de l'OCDE relatifs au devoir de diligence et à la conduite responsable des entreprises sont en revanche plus larges et incluent des aspects environnementaux.

128. Certaines législations sur le devoir de diligence qui ont été ou sont en cours d'adoption dans les États membres et l'Union européenne vont au-delà ~~du Pacte mondial~~ des UNGPs et intègrent explicitement certains aspects environnementaux dans leurs obligations de diligence, sans établir de lien avec les droits humains. La feuille de route UNGP +10¹⁷⁹ conçoit l'UNGPs comme une boussole pour relever les défis mondiaux tels que la transition juste et le développement durable et se réfère, dans ce contexte, à la reconnaissance par le Conseil des

¹⁷⁵ CEDS, Conclusions 2021, 2017, 2013, 2009, 2005 et 2003 on Article 11§ 3

¹⁷⁶ *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, Requête n° 30/2005, décision sur le fond 6 décembre 2006 ; *International Federation of Human Rights Leagues (FIDH) v. Greece*, Requête n° 72/2011, décision sur le fond du 23 janvier 2013.

¹⁷⁷ À la date d'aujourd'hui, seulement 16 États ont ratifié le Protocole additionnel de 1995.

¹⁷⁸ Résumé détaillé, Lambert, contribution d'expert, p. 46.

¹⁷⁹ <https://www.ohchr.org/sites/default/files/2021-12/ungps10plusroadmap.pdf>

droits de l'homme du droit humain à un environnement propre, sain et durable. ~~Le droit humain à un environnement sain est donc considéré comme crucial pour l'intégration des préoccupations environnementales dans le régime des entreprises et des droits humains.~~

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- vi. ~~Améliorer la protection nationale du droit à un environnement propre, sain et durable~~

135. Un autre argument en faveur d'un nouvel instrument sur les droits humains et l'environnement pourrait être ~~de signaler aux États membres qu'ils doivent de rehausser l'ambition des États redoubler d'efforts~~ en matière de protection, de conservation et de restauration de l'environnement, ainsi que d'atténuation du changement climatique et d'adaptation à celui-ci¹⁸⁰. Selon l'étude du Rapporteur spécial des Nations Unies sur les droits de l'homme et l'environnement, l'introduction du droit à un environnement sain dans les constitutions nationales permet aux États de réduire leur empreinte écologique, de mieux se classer dans les indices globaux d'indicateurs environnementaux et de progresser plus rapidement dans la réduction des émissions nocives¹⁸¹. Un nouvel instrument sur les droits humains et l'environnement pourrait encourager les États qui n'ont pas encore ~~adopté le droit consacré le droit à un environnement sain au niveau national~~ à le faire et encourager les États ~~qui l'ont déjà adopté dont le droit national garantit déjà ce droit~~ à prendre de nouvelles mesures actives pour le mettre en œuvre¹⁸².

Commented [A129]: Suggestion de reprendre ici l'expression générique de "droit à un environnement sain" car ce droit existe sous différentes formes au niveau national.

Commented [A130]: Suggestion d'ajouter que cela permettrait aussi une homogénéisation du niveau d'ambition au sein du Conseil de l'Europe.

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III. La faisabilité d'un ou plusieurs instruments supplémentaires

138. La section suivante présente différents ~~instruments du Conseil de l'Europe types d'instruments~~ qui ont été proposés pour traiter des liens entre les droits humains et l'environnement ~~au niveau du Conseil de l'Europe~~. Les propositions présentées ici émanent d'organes du Conseil de l'Europe, d'experts entendus par le groupe de travail et de discussions au sein du groupe de travail. Pour chaque instrument, le rapport examine brièvement son contenu matériel possible. Il précise également quels motifs, parmi ceux identifiés dans la section II, seraient couverts par l'instrument en question, afin de permettre de réduire les options en fonction des motifs que les États membres considèrent comme particulièrement pertinents. Enfin, les arguments pour et contre chacun des instruments sont compilés tels qu'ils ont été avancés au cours des discussions. Cette compilation n'implique pas l'approbation d'un quelconque argument par les États membres. Elle vise à donner une vue d'ensemble de l'état des discussions et à fournir une base significative pour une décision politique sur la nécessité et la faisabilité d'un ou plusieurs nouveaux instruments sur les droits humains et l'environnement.

1. Protocole additionnel à la Convention européenne des droits de l'homme

139. Afin de tenir compte des liens entre les droits humains et l'environnement, un protocole additionnel à la Convention européenne des droits de l'homme codifiant le droit humain à un environnement propre, sain et durable ~~à été proposé~~.

Commented [A131]: Est-il utile de préciser les acteurs en faveur de cette option?

a) Contenu possible

¹⁸⁰ Pavlov et autres c. Russie, requête n° 31612/09, arrêt du 11 octobre 2022, opinion concordante du juge Serghides, § 21

¹⁸¹ David R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (2012), pp. 253-277

¹⁸² Knox, p.26

140. Alors que le dénominateur commun des propositions faites à cet égard est la codification du droit humain à un environnement propre, sain et durable, les propositions varient dans la mesure où elles considèrent la nécessité d'éléments supplémentaires relatifs aux conditions ~~d'admissibilité de recevabilité~~, aux titulaires de droits, etc. Les éléments supplémentaires proposés pour combler les lacunes du système actuel de la ~~CEDH-Convention~~ comprennent 1) des dispositions sur l'administration de la preuve afin d'alléger la charge de la preuve pesant sur les demandeurs¹⁸³, 2) la reconnaissance de la qualité ~~de victime pour les d'ONG~~¹⁸⁴, 3) une codification du principe de précaution¹⁸⁵, 4) une protection spécifique pour les défenseurs des droits de l'homme ~~dans le domaine de l'environnement~~¹⁸⁶, 5) une disposition modifiant l'article 1 de la CEDH afin d'étendre la portée ~~territoriale des obligations contenues dans le~~ protocole¹⁸⁷.

b) Arguments couverts

✓ Comblent les lacunes dans la protection internationale des droits humains

Un protocole additionnel contiendrait une codification juridiquement contraignante du droit à un environnement propre, sain et durable et fournirait aux individus un mécanisme de contrôle capable d'émettre des décisions contraignantes en ce qui concerne le droit à un environnement sain. ~~Il fournirait à la Cour une norme qui remédierait, au moins dans une certaine mesure, la reconnaissance dans un protocole additionnel du droit à un environnement sain remédierait, au moins dans une certaine mesure,~~ aux limites des droits existants de la Convention en matière d'environnement. La mesure dans laquelle les lacunes alléguées en matière de protection seraient comblées dépend du contenu du protocole additionnel. L'une des principales questions auxquelles il faudrait répondre en ce qui concerne les problèmes de recevabilité est de savoir si un protocole additionnel devrait s'écarter des normes existantes de la Convention en incluant des règles *lex specialis* concernant notamment la compétence, la condition de victime, la nécessité d'épuiser les voies de recours internes et les pouvoirs de réparation de la Cour. En ce qui concerne la portée matérielle de la protection, il conviendrait de déterminer dans quelle mesure le principe de précaution et d'autres principes du droit international de l'environnement, ainsi que la protection des défenseurs des droits de l'homme en matière d'environnement et des générations futures, joueraient un rôle dans la jurisprudence de la Cour. La Cour ~~européenne des droits de l'homme~~ pourrait en décider, à moins que les États membres n'incluent des dispositions à cet égard dans le protocole additionnel. Cette dernière approche s'écarterait toutefois de l'approche utilisée dans d'autres protocoles additionnels à la Convention, qui se limitent à énoncer les droits en termes génériques.

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✗ Comblent les lacunes concernant les responsabilités internationales des acteurs privés

Étant donné que la convention impose des obligations en matière de droits humains aux États, un protocole additionnel ne renforcerait pas directement la responsabilité des acteurs privés. Toutefois, par le biais d'obligations positives, les États pourraient être tenus pour responsables des omissions des acteurs privés relevant de leur juridiction, ce qui aurait un effet indirect, ce qui les obligerait à combler les lacunes en matière de responsabilité des acteurs privés.

Commented [A132]: Ce point nous paraît discutable.

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c) Arguments en faveur d'un protocole additionnel

+ Un protocole additionnel à la Convention permettrait aux individus d'accéder au mécanisme régional des droits humains le plus efficace pour faire respecter leur droit à un environnement sain. En fonction ~~de la formulation du contenu du protocole additionnel,~~

¹⁸³ Résumé détaillé, Keller, contribution d'expert, p. 4-6.

¹⁸⁴ Ibid. p. 6-77

¹⁸⁵ Ibid. p. 5

¹⁸⁶ Résumé détaillé, Duyck, contribution d'expert p. 14.

¹⁸⁷ Résumé détaillé, Raible, contribution d'expert p. 35-36.

les intérêts collectifs ~~peuvent pourraient~~ également être protégés en permettant aux ONG ~~de se porter partie civile d'introduire des requêtes~~, ce qui améliore l'accès à la justice en ce qui concerne les intérêts collectifs dans le domaine de l'environnement.

- + Une codification contraignante du droit à un environnement sain, associée à un mécanisme de surveillance capable de rendre des décisions contraignantes, contribuerait de manière décisive au développement du droit humain à un environnement sain et intégrerait l'ensemble déjà existant de la jurisprudence de la Cour en matière de droits humains dans le domaine de l'environnement.
- + Il pourrait aider la Cour à mettre en balance les intérêts des droits humains en matière d'environnement avec d'autres droits/intérêts.
- + Le pouvoir de la Cour d'ordonner des mesures correctives significatives en matière d'environnement pourrait être renforcé.

~~119. Un protocole additionnel répondrait à la quasi-totalité des raisons identifiées dans la section II.~~

~~120. Seule une intervention judiciaire peut sortir de l'impasse actuelle de l'inaction perçue des États face à la triple crise planétaire en obligeant les gouvernements à rendre des comptes.~~

- + Le système de la Convention, avec sa Cour faisant autorité et rendant des arrêts contraignants, pourrait remédier à certaines des lacunes perçues dans le système de la LIE, telles que i) l'absence d'un cadre normatif global dans le droit international de l'environnement, entraînant une fragmentation et une mise en œuvre entravée des régimes environnementaux sectoriels ; ii) une approche fragmentaire et réactive, manquant de cohérence et de synergie entre les cadres réglementaires, entraînant des déficits de coordination et l'incohérence des politiques ; (iii) l'articulation problématique entre les accords multilatéraux sur l'environnement et les instruments connexes en raison du manque de clarté des principes et de leur statut ; (iv) la fragmentation institutionnelle et les problèmes de coordination dans la gouvernance internationale de l'environnement et (v) les problèmes de mise en œuvre du droit international de l'environnement aux niveaux national et international, y compris l'insuffisance de la législation, des ressources et de la clarté des principes environnementaux¹⁸⁸.

Commented [A133]: Ces deux points nous semblent relever davantage d'une appréciation politique que juridique et nous nous interrogeons sur l'opportunité de les intégrer à cette partie du rapport.

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d) Arguments contre un protocole additionnel

- Pour permettre la mise en œuvre effective du droit à un environnement sain, des ajustements majeurs des principes fondamentaux du système de la Convention seraient nécessaires. Il a été avancé ~~que des dispositions spéciales seraient qu'une modification substantielle des conditions de recevabilité et de la jurisprudence de la Cour sur plusieurs aspects procéduraux serait~~ nécessaires, notamment en ce qui concerne ~~l'exigence de compétence la juridiction, l'exigence du statut la qualité~~ de victime, la nécessité d'épuiser les voies de recours internes et les pouvoirs de réparation de la Cour, ainsi que les normes et procédures en matière de preuve. S'écarter des principes établis de la Convention en ce qui concerne le droit à un environnement sain conduirait toutefois à une fragmentation des normes applicables qui pourrait être difficile à justifier.

¹⁸⁸ Ces lacunes ont été identifiées par le Secrétaire général des Nations unies, « Lacunes dans le droit international de l'environnement et les instruments liés à l'environnement : Vers un pacte mondial pour l'environnement » UN Doc. A/73/419 (30 novembre 2018).

- Le droit à un environnement sain diffère par nature des ~~autres~~ droits actuellement garantis par de la Convention et ses protocoles, qui protègent essentiellement les intérêts subjectifs des êtres humains individuels, dans la mesure où il reconnaît et protège également l'intérêt collectif à un environnement propre, sain et durable et/ou la valeur intrinsèque de l'environnement en tant que tel. Le système de la CEDH offre un système d'accès à la justice pour la poursuite de droits subjectifs. Il n'est pas bien adapté à l'application d'intérêts collectifs ou d'objectifs écocentriques. En même temps, on dit que le processus d' « écologisation des droits humains » a contribué à de nouvelles interprétations du contenu de la législation sur les droits humains en ce qui concerne la protection de l'environnement. En outre, la résolution 48/13 du Conseil des droits de l'homme et la résolution 76/300 de l'Assemblée générale notent spécifiquement que « le droit à un environnement propre, sain et durable est lié à d'autres droits et au droit international existant »¹⁸⁹. On peut donc affirmer que la reconnaissance du droit à un environnement sain dans un protocole à la Convention ne créerait pas de nouvelles obligations, mais permettrait plutôt de consolider l'acquis normatif existant au lieu de le fragmenter dans toute une série d'instruments¹⁹⁰. L'introduction du droit à un environnement sain fournirait donc à la Cour une base plus solide pour examiner les plaintes environnementales et renforcer sa jurisprudence existante en matière de droits humains dans le domaine de l'environnement¹⁹¹.

Commented [A134]: Cette partie semble mélanger des arguments contre un protocole additionnel avec des arguments en faveur d'un protocole additionnel. Il nous semble aussi que plusieurs arguments différents sont traités ensemble ici et nous suggérons de les séparer.

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[...]

➤ *une plus grande confiance dans les témoignages d'experts*

- Le contenu du droit à un environnement sain est incertain ; il est nécessaire d'établir des normes solides. Le fait de l'inclure dans un protocole à la Convention ne permet pas d'établir des standards précis concernant ses éléments constitutifs et donne à la Cour une marge de manœuvre pour l'interpréter à sa manière.

Solutions possibles :

- *les États membres pourraient définir eux-mêmes le droit à un environnement sain, tel qu'il est protégé par le système de la convention. Cette solution s'écarterait toutefois de l'approche adoptée dans tous les autres protocoles additionnels, qui se limitent à énoncer les droits couverts en termes génériques.*
- Des ressources financières supplémentaires pour la Cour ~~européenne des droits de l'homme~~ pourraient être nécessaires.

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b) Raisons couvertes

- ✓ Comblent les lacunes dans la protection internationale des droits humains

Un protocole additionnel contiendrait une codification juridiquement contraignante du droit à un environnement propre, sain et durable et prévoirait également un mécanisme de contrôle. Bien que les décisions du Comité européen des droits sociaux ne soient pas contraignantes pour les États

¹⁸⁹ Voir Résolution UN HRC 48/13 point 2 et Résolution UN GA 76/300 point 2

¹⁹⁰ Marcos Orellana, Quality Control of the Right to a Healthy Environment, in The Human Right to a Healthy Environment, pp. 169, 176

¹⁹¹ Résumé détaillé, Knox, p.27

membres, le système du CES, avec sa procédure de réclamations collectives, permettrait aux organisations non gouvernementales et aux partenaires sociaux de déposer des plaintes concernant le droit à un environnement sain, sans qu'il soit nécessaire de recourir à une disposition de *lex specialis* comme dans le système de la [CEDHConvention](#). Elle fournirait au Comité européen des droits sociaux une norme qui remédierait, au moins dans une certaine mesure, aux limites des droits existants de la Charte en matière d'environnement. La mesure dans laquelle les lacunes alléguées en matière de protection seraient comblées dépend du contenu du protocole additionnel. L'une des principales questions auxquelles il faudrait répondre en ce qui concerne les problèmes de recevabilité est de savoir si un protocole additionnel devrait étendre la portée territoriale de la Charte, qui est encore plus restreinte que celle de la [CEDHConvention](#). En ce qui concerne la portée matérielle de la protection, la mesure dans laquelle le principe de précaution et d'autres principes du droit international de l'environnement ainsi que la protection des défenseurs des droits humains dans le domaine de l'environnement joueraient un rôle dans la pratique du Comité dépend de la mesure dans laquelle les normes matérielles du droit international de l'environnement sont considérées comme étant incorporées dans le droit à un environnement sain. C'est le Comité européen des droits sociaux qui en déciderait, à moins que les États membres n'incluent des dispositions à cet égard dans le protocole additionnel.

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c) Arguments en faveur d'un protocole additionnel

- + Le système de la Charte sociale européenne est bien adapté pour intégrer un droit à un environnement sain. Il comprend deux mécanismes - la procédure de rapport et la procédure de réclamation collective - qui ont été choisis en raison de leur adéquation avec les obligations concernant les intérêts humains collectifs tels que la protection de l'environnement. Les plaintes peuvent être déposées sans que les voies de recours internes aient été épuisées et sans que l'organisation plaignante soit nécessairement victime de la violation alléguée.
- + Une codification contraignante du droit à un environnement sain, associée à un mécanisme de contrôle, contribuerait de manière décisive à la poursuite du développement du droit à un environnement sain. Les États membres auraient la possibilité d'influencer activement ce développement.
- + Le suivi non contraignant ~~pourrait être~~ plus approprié dans un domaine où des choix politiques ~~complexes et~~ difficiles doivent être faits.

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- En l'absence d'arrêts contraignants rendus par une entité faisant autorité telle que la Cour ~~européenne des droits de l'homme~~, l'impasse dans laquelle se trouve actuellement la perception de l'inaction des États face à la triple crise planétaire ne cessera pas.
- Les individus n'auraient pas la possibilité de saisir le Comité ~~social européen~~.

[...]

a) Contenu possible

143. Une convention autonome est un instrument particulièrement souple ; son contenu peut être adapté en fonction des besoins identifiés par les États membres. La ~~C~~convention pourrait codifier le droit humain à un environnement sain. En outre, elle pourrait fournir des normes matérielles détaillées sur l'interaction entre les droits humains et la protection de l'environnement. La convention pourrait également contenir des dispositions sur les responsabilités des acteurs privés. Il a également été suggéré qu'une convention autonome pourrait définir des normes environnementales de fond qui deviendraient un point de référence pour la jurisprudence de la Cour.

144. La flexibilité concerne également les mécanismes de contrôle possibles. Différentes options ont été examinées : un système d'établissement de rapports par les États, tel qu'il est prévu pour les traités des Nations Unies relatifs aux droits de l'homme, est concevable. Il pourrait (mais ce n'est pas obligatoire) être combiné à un système de plaintes individuelles et/ou collectives auprès d'un comité. Les conditions de recevabilité pourraient être adaptées aux spécificités du contenu de la convention et s'écarter des dispositions de la CEDH. Un processus d'examen par les pairs inspiré de l'EPU a également été proposé. Si la Convention met l'accent sur la responsabilité des acteurs privés, la création d'un mécanisme de résolution alternative des litiges impliquant des entités commerciales pourrait également être une option. Une autre possibilité serait de prévoir la possibilité de demander des avis consultatifs à la Cour ~~européenne des droits de l'homme~~, comme le prévoit la convention d'Oviedo.

Page 54

c) Arguments en faveur d'une convention

[...]

- + Une convention n'est pas soumise aux contraintes du système de la ~~CEDH-Convention~~ et offre une grande flexibilité. Elle offre une protection supplémentaire tout en laissant intact le système de la Convention.
- + Une convention pourrait être ouverte à la signature et à la ratification des États non-membres du Conseil de l'Europe. Ses normes pourraient ainsi avoir une influence au-delà de l'Europe.

d) Arguments contre une convention

- En l'absence d'arrêts contraignants rendus par une entité faisant autorité telle que la Cour européenne ~~des droits de l'homme~~, l'impasse dans laquelle se trouve actuellement la perception de l'inaction des États face à la triple crise planétaire ne cessera pas.

Page 56

c) Arguments en faveur d'un mécanisme de suivi autonome

- + Un suivi non contraignant ~~est-pourrait être~~ plus approprié dans un domaine où des choix politiques difficiles doivent être faits.

[...]

d) Arguments contre un mécanisme de suivi autonome

- Le suivi fondé sur le dialogue ne permettra pas de sortir de l'impasse actuelle ~~de concernant la perception de~~ l'inaction ~~perçue~~ des États face à la triple crise planétaire, car il n'a pas de pouvoir d'exécution, ce qui limite sa capacité à induire des changements significatifs dans le comportement des États et à traiter efficacement les questions relatives aux droits humains dans le domaine de l'environnement.

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[...]

✓ Affirmer le rôle du Conseil de l'Europe

L'inclusion de la protection de l'environnement dans le préambule de la CEDH refléterait une certaine prise de conscience de la gravité des questions en jeu, mais en soi, elle peut apparaître comme une réponse minimaliste et largement inefficace.

c) Arguments en faveur de l'inclusion de la protection de l'environnement dans le préambule de la CEDH

Commented [A135]: Si nous disons que l'objectif ne serait qu'en partie rempli, peut-être faut-il utiliser un autre symbole?

- + L'inclusion de la protection de l'environnement dans le préambule de la ~~Cour européenne des droits de l'homme~~ Convention confère une légitimité supplémentaire à la jurisprudence environnementale de la Cour ~~européenne des droits de l'homme~~ et favorise son développement dans les limites des normes procédurales et matérielles de la CEDH.

d) Arguments contre l'inclusion de la protection de l'environnement dans le préambule de la CEDH

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6. Instrument non contraignant reconnaissant le droit à un environnement propre, sain et durable au niveau du Conseil de l'Europe

[...]

a) Contenu possible

[...]

151. La recommandation existante CM/Rec(2022)20 sur les droits de l'homme et l'environnement ne reconnaît pas le droit humain à un environnement propre, sain et durable. Une nouvelle recommandation pourrait suivre la voie des résolutions ~~de l'ONU~~ des Nations unies et reconnaître ce droit. En outre, elle pourrait fournir des normes substantielles détaillées sur l'interaction entre les droits humains et la protection de l'environnement.

[...]

- ✗ Affirmer le rôle du Conseil de l'Europe dans le domaine des droits humains

La reconnaissance du droit à un environnement propre, sain et durable dans un instrument non contraignant du Conseil de l'Europe ne ferait que reprendre les termes des résolutions rendues aux Nations Unies ~~aligner le cadre des droits humains du Conseil de l'Europe sur les normes de l'ONU~~.

Page 59

c) Arguments en faveur d'un instrument non contraignant

- + La reconnaissance du droit à un environnement propre, sain et durable dans un instrument non contraignant du Conseil de l'Europe permettrait de reprendre au niveau du Conseil de l'Europe la reconnaissance politique de ce droit au niveau des Nations unies ~~mettrait l'ordre juridique du Conseil de l'Europe en conformité avec les normes internationales~~.

d) Arguments contre un instrument non contraignant

- La reconnaissance du droit à un environnement propre, sain et durable dans un instrument non contraignant du Conseil de l'Europe ne constituerait pas le pas décisif nécessaire pour relancer la lutte contre ~~les triples crises planétaires~~ la triple crise planétaire.

NETHERLANDS / PAYS-BAS

Page 2

Introduction

Page 4

Commented [A136]: Suggestion d'ajouter ici les effets juridiques limités de l'ajout d'une mention dans le préambule.

Commented [A137]: Perhaps a table of contents would be helpful.

4. Broadly speaking, the instruments above directly address environmental protection. They can be divided into three groups. The first group, ETS Nos. 065, 087, 102, 123 and 125 (plus subsequent protocols and revisions), addresses protection of animals in the context of farming and scientific experimentation, and as pets. The second group, ETS Nos. 064, 104 and 176 (plus a subsequent protocol, CETS No. 219), addresses public policy to protect and preserve aspects of the natural environment. The third group, ETS Nos. 150 and 172 sought to establish legal protection of the environment through civil and criminal liability.

5. As regards human rights and the environment, the Council of Europe's key instruments are the European Convention on Human Rights (the Convention) and European Social Charter (the Charter) which provide important protection with respect to human rights and 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 ensure protection, respect and fulfilment of numerous rights against harm that emerges in the environmental context (often referred to as the "greening of human rights"). In the case of the Convention, the applicants relied-rely on the right to life, the prohibition of inhuman and degrading treatment, the right to respect for private and family life and the home, right to property, and so-called participatory (procedural) rights such as freedom of expression (including access to information), freedom of assembly, right to a fair hearing (including access to a court) and the right to an effective remedy. 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.
[...]

7. The Council of Europe Convention on Access to Official Documents (Tromsø Convention) which guarantees a general right to access to official documents held by public authorities, including on environmental matters, is another noteworthy binding instrument. The Tromsø Convention is the only international legal instrument which guarantees a general right to access official documents held by public authorities. Its preamble refers in particular to the 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). The Tromsø Convention currently has 14 Parties: Albania, Armenia, Bosnia and Herzegovina, Estonia, Finland, Hungary, Iceland, Lithuania, Montenegro, Norway, the Republic of Moldova, Slovenia, Sweden and Ukraine.

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9. 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 held a high-level conference on "The Right to a Clean, Healthy and Sustainable Environment in Practice". The conference provided important input for the work of the CDDH by presenting the practical application of the right to a clean, healthy and sustainable environment in the domestic legal context both in Europe and globally.

Commented [A138]: NLD: Isn't this: "in environmental matters"? The instruments revolve around human rights protection, no matter the context. However, they do not *per se* protect environmental matters.

Commented [A139]: NLD: The current formulation suggests or presupposes a particular case. Please see redactional changes.

Commented [A140]: NLD: CDDH in general or CDDH-ENV?

10. The 9th edition of the World Forum for Democracy in November 2020 explored the question, “Can Democracy Save the Environment?” [...]

11. The Parliamentary Assembly has adopted a number of relevant resolutions and recommendations, in particular: Resolution 2286 (2019) on “Air pollution: a challenge for public health in Europe”, Resolution 2415 (2022) and Recommendation 2219 (2022) on “Inaction on climate change – A violation of children’s rights”, Resolution 2398 (2021) and Recommendation 2213 (2021) on “Addressing issues of criminal and civil liability in the context of climate change”, Resolution 2477 (2023) and Recommendation 2246 (2023) on the “Environmental impact of armed conflicts”, in addition to Resolution 2396 (2021), and Recommendation 2211 (2021) on “Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe”. Recommendation 2211 (2021), contains four proposals for strengthening the Council of Europe legal instruments, namely: (1) to draw up an additional protocols to the Convention, (2) to draw up an additional protocol and to the Charter, (3) to prepare a feasibility study for a “Five Ps” convention on environmental threats and technological hazards threatening human health, dignity and life and (4) to revise Recommendation CM/Rec(2016)3 on human rights and business with a view to strengthening corporate environmental responsibility for the adequate protection of the human right to a safe, clean, healthy and sustainable environment.¹⁹² It is important to note that PACE Recommendation 2211 (2021) includes a proposed text for an additional protocol to the Convention, concerning the right to a safe, clean, healthy and sustainable environment. The Assembly has also established a [Network of Contact Parliamentarians for a healthy environment](#),¹⁹³ which aims to anchor the right to a clean, healthy and sustainable environment in law, policy, practice and public awareness in Europe and beyond.

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13. At the Fourth Summit (“Reykjavik Summit”) held between 16-17 May 2023, the Heads of State and Government of the Council of Europe, in the [Reykjavik Declaration](#), underlined the urgency of taking co-ordinated action to protect the environment by countering the triple planetary crisis of pollution, climate change, and loss of biodiversity, and committed to strengthening the Council of Europe’s work on the human rights aspects of the environment. To this end, they initiated the “Reykjavik Process”, and encouraged the establishment of a new intergovernmental committee on environment and human rights (“Reykjavik Committee”) and called for rapid the conclusion of the CDDH’s feasibility study [as soon as possible](#). [...]

18. At its 7th meeting, the CDDH-ENV examined the replies to the questionnaire to member States on the protection at a national level of the right to a clean, healthy and sustainable environment and completed its first reading of a partial first draft of the report. The CDDH-ENV asked its Rapporteur, Nicola WENZEL (Germany), to present a revised version of the first part of the report and text for its chapter III for examination at its next meeting. On 3 May 2023, members of the CDDH-ENV participated in the [High-level conference on the right to a clean, healthy and sustainable environment in practice](#), organised by the Icelandic Presidency of the Committee of Ministers, with the support of the Council of Europe Secretariat.

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19. The present report will analyse the potential need for a further instrument or instruments from the following perspectives. First, it aims to identify if there is a problem that requires a response. Second, it will explore the involvement of human rights in this problem. Third, the report

Commented [A141]: NLD: If this is to be included, is it not necessary or helpful to very shortly include a description of the outcome, as is done with the conference referred to above?

Commented [A142]: NLD: please elaborate, perhaps in a footnote.

Commented [A143]: NLD: “As soon as possible”. As the NLD (I believe so) already stated before, the report needs to be concluded rapidly, but it has to be a thorough examination of the questions posed and issues raised. Therefore, we propose to stick to the wording of the Declaration.

Commented [A144]: NLD: referred to above?

Commented [A145]: NLD: the report at hand? Now it may seem as if there are different reports.

Commented [A146]: NLD: Involvement or application?

¹⁹² See doc. CM/Del/Dec(2021)1416/3.1, 3 November 2021.

¹⁹³ 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.

will evaluate the effectiveness of existing instruments in addressing the human rights aspects related to the issue. And fourth, the report will examine the process of recognition and protection of the right to a clean, healthy and sustainable environment, on the basis of the CDDH's mandate to bear in mind the Parliamentary Assembly's proposal to protect this right through additional protocols to the European Convention on Human Rights and the European Social Charter.

Commented [A147]: NLD: "in an environmental context"?

III. Potential need for a further instrument or instruments

20. Today humanity is facing an unprecedented challenge in the form of environmental degradation and the triple planetary crisis of climate change,¹⁹⁴ nature and biodiversity loss,¹⁹⁵ and pollution.¹⁹⁶ Individuals and communities around the world are affected and the consequences are most severe for those who are already in vulnerable and exposed situations. The effects and will be felt even more strongly by the younger and future generations.

21. The climate crisis, defined as the greatest threat to human rights by the former United Nations High Commissioner for Human Rights,¹⁹⁷ and requires a rights-based approach to mitigation and adaptation,⁷ according to the report published by the Intergovernmental Panel on Climate Change (IPCC).¹⁹⁸ This report which was politically endorsed by all States Parties to the

¹⁹⁴ IPCC, 2022: Summary for Policymakers [H.-O. Pörtner, D.C. Roberts, E.S. Poloczanska, K. Mintenbeck, M. Tignor, A. Alegria, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem (eds.)]. In: Climate Change 2022: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegria, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama (eds.)]. Cambridge University Press [IPCC 2022 Report]; for a definition of climate change see United Nations Framework Convention on Climate Change (UNFCCC) (1992), UNTS vol. 1771, Art. 1(2)

¹⁹⁵ 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. Diaz, and H. T. Ngo (editors). IPBES secretariat, Bonn, Germany, 11.

¹⁹⁶ 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).

¹⁹⁷ 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>

¹⁹⁸ 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].

Council of Europe.⁴⁹⁹ The alarming decline in biodiversity,²⁰⁰ coupled with air and water pollution's detrimental impact on human well-being,²⁰¹ further underscores the need for environmental protection to ensure the full enjoyment of human rights.

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23. 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. The linkages have also been recognised by the Parliamentary Assembly²⁰² and the Committee of Ministers²⁰³ of the Council of Europe. This has resulted in the increased recognition – at the national, regional²⁰⁴ and international²⁰⁵ levels – of (some form of) the right to a clean, healthy and sustainable environment.

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25. There is an extensive regulatory framework concerning the protection of the environment that is already in place and which produces effects both under national and international law. The question nevertheless remains whether the level of protection afforded by the already existing international instruments is sufficient to meet the critical human rights challenges posed by the triple planetary crisis.

[...]

i. Human rights and environmental protection in relevant UN treaties

27. The 1992 UN Convention on Biological Diversity²⁰⁶ is one of the four international agreements that were adopted at the "Earth Summit" in Rio de Janeiro.²⁰⁷ It entered into force on 29 December 1993 and has 196 signatories. The Convention on Biological Diversity recalls the importance of biological diversity for maintaining life sustaining systems of the biosphere and affirms that its conservation is a common concern of mankind.²⁰⁸

[...]

29. The Paris Agreement is the first global environmental treaty that makes direct reference to States' human rights obligations by stating in its preamble that "[p]arties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights".²⁰⁹

30. It should be noted that, whilst these important instruments recognise in different ways the inter-connection between environmental issues and various aspects of human rights, they do not establish specific standards or protection mechanisms in this respect.

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33. HRC Resolution 48/13 politically recognised for the first time the right to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights, while simultaneously encouraging States to cooperate on the implementation of this right. In its preamble, Resolution 48/13 stresses the negative direct and indirect implications, both direct and indirect, 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-". Resolution 48/13 also noted that the right to a clean, healthy and sustainable environment is related to other rights and existing international law and

Commented [A148]: NLD: please add source.

Commented [A149]: NLD: RHE has various formulations in various systems/jurisdictions.

Commented [A150]: NLD: suggestion to add at the end of the paragraph:

"However, it is not yet legally protected at either global or European level. This means that there is not yet any common understanding amongst Council of Europe member States of the "nature, content and implications" of the right (to use the language of Recommendation CM/Rec(2022)20)."

Commented [A151]: NLD: We note a stronger wording than the previous text. It previously states that many questions about the relationship remain unanswered at the international and European level and must be examined further. That uncertainty is now not mentioned.

Commented [A152]: NLD: international? See reference to "level of protection afforded by the already existing international instruments.."

Commented [A153]: NLD: What is meant by this? Legal effects? "Effects" sound a bit vague and can include or mean a variety of things.

Commented [A154]: NLD: this is now mostly referring to mere references of human rights in environmental treaties. However, there are numerous MEA that refer to procedural human rights, such as art. 6 UNFCCC, art. 14 CBD, the ESPOO Convention, Aarhus etc. Please clarify or justify the inclusion of only CBD and the Paris agreement.

Commented [A155]: NLD: These are relatively generic treaties. There are several other specific treaties missing (not all UN treaties) that regulate (virtually all aspects of) environmental protection, many with specific standards and protection mechanisms:

- UNECE Convention on Long-range Transboundary Air Pollution,
- Water Convention
- Protocol on Water and Health.
- Agreement Concerning the International Carriage of Dangerous Goods by Road (ADR)
- 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Protocol)
- Convention for the protection of the marine environment of the North-East Atlantic (Ospar)
- Protocol on Pollutant Release and Transfer Registers (PRTR)
- Protocol on strategic environmental assessment to the Convention on environmental impact assessment in a transboundary context (SEA)
- Convention on Environmental Impact Assessment in a Transboundary Context (Espoo)
- Convention on the conservation of European wildlife and natural habitats (Bern)

Commented [A156]: NLD: in this way, the title is a bit misleading. Namely, it is not explained how the CBD refers to human rights because it does not include a reference (besides highlighting the position, knowledge etc of IPs in relation to biodiversity).

Commented [A157]: NLD: please see comment on CBD.

Commented [A158]: NLD: passive or present tense? Below it is stated "Resolution 48/13 stresses".

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.

[...]

35. The [UNGA](#) Resolution uses similar wording to the HRC Resolution 48/13 and recognises the right to a clean, healthy and sustainable environment as a human right. Following the wording of HRC Resolution 48/13, in its preambular paragraphs 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 notes that the right to a clean, healthy and sustainable environment is related to other rights and existing international law; and affirms 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. The entire text of [UNGA](#) Resolution 76/300 can be found in Appendix III of this report.

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¹⁹⁹ 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].

²⁰⁰ 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

²⁰¹ World Health Organization, Household air pollution, 28 November 2022, available at <https://www.who.int/news-room/fact-sheets/detail/household-air-pollution-and-health>; European Environment Agency (EEA), Air quality in Europe 2021, available at <https://www.eea.europa.eu/publications/air-quality-in-europe-2021/health-impacts-of-air-pollution>; EEA, Air quality in Europe 2022, available at <https://www.eea.europa.eu/publications/air-quality-in-europe-2022>; EEA, Air pollution levels across Europe still not safe, especially for children, April 2023 <https://www.eea.europa.eu/en/newsroom/news/air-pollution-levels-across-europe>; and Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Human rights and the global water crisis: water pollution, water scarcity and water-related disasters, 19 January 2021, UN Doc. No. A/HRC/46/28. See also Office of the High Commissioner for Human Rights, The water crisis has a “major impact on human rights” expert say, 2021, available at <https://www.ohchr.org/en/stories/2021/03/water-crisis-has-major-impact-human-rights-expert-says>.

²⁰² PACE Recommendation 2211(2021), *Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe* (September 2021).

²⁰³ 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).

²⁰⁴ 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.

²⁰⁵ 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.

²⁰⁶ Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818 (entered into force Dec. 29, 1993).

²⁰⁷ The Agreements include the Rio Declaration, Convention on Climate Change, Convention on Biological Diversity and Statement of Principles on Forests.

²⁰⁸ Ibid. Article 1.

²⁰⁹ Ibid. Preamble.

36. On 4 April 2023, the HRC adopted by consensus ~~R~~resolution 52/23 on the right to a clean, healthy and sustainable environment.²¹⁰ The resolution, ~~among others,~~ calls upon States to, among others, adopt and implement strong laws ensuring rights to participation, access to information, and justice in environmental matters; to facilitate public awareness and participation in environmental decision-making and to provide for effective remedies for human rights violations and abuses relating to the enjoyment of the human right to a clean, healthy and sustainable environment. Moreover, it encourages States to adopt integrated, intersecting and holistic national and local policies and an effective legal framework for the enjoyment of the human right to a clean, healthy and sustainable environment.²¹¹ In addition, it also calls upon States, international organisations, 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.

37. Judicial and non-judicial bodies within the UN system are also being requested to interpret existing international obligations in the context of climate change.

38. On 29 March 2023, the UN GA adopted by consensus a resolution formally requesting an advisory opinion from the International Court of Justice (ICJ) on the obligations of States in respect of climate change.²¹² In particular, this request asked the following questions: (a) what are 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 greenhouse gases for States and for present and future generations; and (b) what are 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, with respect to States, including, in particular, small island developing States [...] and Peoples and individuals of the present and future generations affected by the adverse effects of climate change? By referring explicitly to international human rights instruments including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), this request may provide an opportunity for the ICJ to make pronouncements on States' international human rights obligations with respect to climate change.

Commented [A159]: NLD: This now comes a bit out of the blue. Maybe add: "Several examples will be provided below".

Commented [A160]: NLD: to interpret? Eventually the ICJ will not make new (international) law, but will interpret the law as it stands.

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41. The UN Human Rights Committee, which supervises the ICCPR, released a General Comment on the right to life in 2018, emphasising that States' obligation to protect life also entails that they should take adequate measures to alleviate societal conditions that may threaten life, such as environmental degradation.²¹³ In 2019, 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

²¹⁰ At the time of the adoption by consensus of this resolution, the following members of the Council of Europe were members to the Human Rights Council and participated in the adoption of this resolution: Belgium, Czech Republic, Finland, France, Georgia, Germany, Lithuania, Luxembourg, Montenegro, Romania, Ukraine and the United Kingdom. The resolution was also sponsored by other Council of Europe members including Albania, Armenia, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Estonia, Greece, Italy, Latvia, North Macedonia, Portugal, Slovakia, Slovenia, Spain and Switzerland.

²¹¹ UN HRC resolution, The human right to a clean, healthy and sustainable environment, 4 April 2023, A/HRC/52/7.

²¹² UN General Assembly resolution A/RES/77/276, Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change, 29 March 2023.

²¹³ General comment no. 36 para. 26.

such chemicals.²¹⁴ In the same year, 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.²¹⁵

42. UN treaty bodies are increasingly being asked to decide climate cases.²¹⁶ In the case of *Teitiota v. New Zealand*, the UN Human Rights Committee in September 2020 found that countries may not deport individuals seeking asylum who face climate change-induced conditions that violate the right to life; it did not, however, find a violation in the particular circumstances of the case. In *Sacchi et al. v Argentina, Brazil, France, Germany and Turkey*, the UN Committee on the Rights of the Child was asked whether the respondents 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 the adverse effects of climate change. 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.²¹⁷ In the case of *Teitiota v. New Zealand*, the UN Human Rights Committee in September 2020 found that countries may not deport individuals seeking asylum who face climate change-induced conditions that violate the right to life; it did not, however, find a violation in the particular circumstances of the case. In September 2022, the UN Human Rights Committee found that Australia's failure adequately to protect indigenous Torres Islanders by taking insufficient adaptation measures against adverse impacts of climate change amounted to a breach of Article 17 (right to respect for private, family and home life) and 27 (rights of ethnic, religious or linguistic minorities) of the ICCPR.²¹⁸

Commented [A161]: NLD: in the wake of the Cáceres communication? I believe not. Perhaps move this sentence to the next paragraph which revolves more around climate change.

Page 13

45. UN special procedures have also been developed to address human rights and environmental concerns. The HRC established the mandate for the Independent Expert on human rights and the environment in 2012²¹⁹ which was subsequently extended.²²⁰ 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. In 2018, the Special Rapporteur presented Framework Principles on Human Rights and the Environment, which summarise States' human rights obligations relating to the environment.²²¹

Commented [A162]: NLD: Later on in the document, under (e), this is more cautiously formulated:

[...]

47. The Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes was established in 1995.²²² The UN Commission on Human Rights created the mandate to investigate the human rights

Framework principles which reflect "the application of existing human rights obligations in environmental context".
Suggestion to follow this formulation.

²¹⁴ *Portillo Cáceres and others v. Paraguay*, No. 2751/2016 (2019), para. 7.5.

²¹⁵ <https://www.ohchr.org/en/statements/2019/09/five-un-human-rights-treaty-bodies-issue-joint-statement-human-rights-and>

²¹⁶ Human Rights Committee, *Teitiota v. New Zealand*, UN Doc. CCPR/C/127/D/2728/2016 (2020); UN Committee on the Rights of the Child, *Sacchi et al v Argentina et al.*, UN Doc. CRC/C/88/D/107/2019 (2021).

²¹⁷ UN Committee on the Rights of the Child, CRC/88/D/104/2018.

²¹⁸ 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.

²¹⁹ HRC resolution 19/10.

²²⁰ HRC resolution 48/14.

²²¹ 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.

²²² [Commission Resolution 1995/81](#).

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consequences of hazardous substances and toxic waste. This encompassed issues such as the illicit trafficking and release of dangerous products during conflicts, as well as shipbreaking, medical waste, and extractive industries. In 2011, the UN Human Rights Council recognized the danger of hazardous substances and waste to human rights. It expanded the mandate to cover the entire life-cycle of such products. The mandate was last renewed in 2020 through resolution [A/HRC/RES/45/17](#).²²³

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51. 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 of the Convention (right to respect for private and family life and home) associated caselaw concerns issues such as environmental risk and access to information; industrial pollution; noise pollution; mobile phone antennas; emission from diesel vehicles; soil and water contamination; urban development; 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 obligation to tolerate hunting on the land owned by those who object to hunting on ideological grounds, to States' positive obligations concerning the protection of property in case of natural disasters. Under Article 13 (the right to an effective remedy), ~~the Court~~ examined the issue of the right to an effective remedy pertaining to the substantive rights listed above. Thus, various environmental concerns can already be examined by the Court, framed in terms of Convention rights.

52. 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" according to which "the Convention is a living instrument which [...] must be interpreted in the light of present-day conditions".²²⁴ This allows the Court to respond to new challenges. As a result, the Court's caselaw, including concerning environmental matters, is not set in stone. The Court may further develop its jurisprudence in response to the triple planetary crisis to accommodate environmental concerns more broadly.

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53. The Court is also faced with novel claims in the form of climate change applications. At present, there are three climate change mitigation cases under examination by the Grand Chamber of the Court,²²⁵ with seven other cases adjourned until the Grand Chamber has ruled in these three cases.²²⁶ The Court has previously declared two applications inadmissible for lack of victim status.²²⁷

Commented [A163]: NLD: would be good to apply a consistent manner of referencing to resolutions and recommendations.

Commented [A164]: NLD: suggestion "when framed?"

Commented [A165]: NLD: perhaps explain, also in light of the foregoing, why these cases were declared inadmissible on the basis of victim status (especially since victim status will be dealt with as well in the Duarte case)?

²²³ HRC Resolution A/HRC/RES/45/17.

²²⁴ *Tyrer v. the United Kingdom*, application no. 5856/72, judgment of 25 April 1978, § 31.

²²⁵ *Verein Klimasenioren 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.

²²⁶ Press Release issued by the Registrar of the Court, ECHR 035 (2023), 3 February 2023.

²²⁷ *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.

54. Broadly speaking, these **three** 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' **alleged** failure to adhere to their positive obligations by their alleged non-compliance with their commitments under the 2015 Paris Agreement or the alleged inadequacy of their greenhouse gas emission reduction targets.²²⁸

Commented [A166]: NLD: why isn't the exhaustion of domestic remedies not included here? This is a big issue in the Duarte case, and should not be neglected in the report.

Commented [A167]: NLD: so as to make it in line with the second part of the sentence.

55. As to the Charter, while it does not explicitly contain a right to a healthy environment as such, 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.

56. 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.²²⁹

Commented [A168]: NLD: suggestion to include this paragraph in the foregoing paragraph.

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59. 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."²³⁰ The ECSR, similarly to the Court, is **therefore** able therefore to respond to new challenges by the application of this interpretative doctrine.

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62. 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.

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67. In addition, the EU Ombudsman also plays an important role in the protection of the environment **and is** primarily focused on ensuring transparency, accountability, and good

Commented [A169]: NLD: "by focussing on ... "?

²²⁸ Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.

²²⁹ *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, complaint no.30/2005, decision on the merits of 6 December 2006, §§ 194-195, §202.

²³⁰ *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.

governance within the institutions and bodies of the EU.²³¹ Article 43 of the Charter of Fundamental Rights of the EU guarantees the right to complain to the European Ombudsman. It is important to note that public interest complaints are also admissible before the EU Ombudsman.

[...]

69. The following table presents an overview of existing Council of Europe and some of the other international instruments that address human rights and/or the environment.

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F. Material Scope of the human right to a clean, healthy and sustainable environment

71. Although the right to a clean, healthy and sustainable environment has been recognised politically at a global level in UN General Assembly UNGA Resolution 76/300 (see further below), it is not yet legally protected at either global or European level. ~~This means that~~ Furthermore/Additionally, there is not yet any common understanding amongst Council of Europe member States of the possible “nature, content and implications” of the right (to use the language of Recommendation CM/Rec(2022)20).

Commented [A171]: NLD: UN? See difference with IACTHR, for example.

72. The present section therefore gives an overview of existing codifications of the right to a clean, healthy and sustainable environment, and the political endorsements and jurisprudential recognition of the right to a clean, healthy and sustainable environment in different jurisdictions. ~~This section~~ uses the term “right to a healthy environment” as a generic, “shorthand” term that incorporates the qualifying adjectives used in the different instruments.²³² The aim of this section is to clarify the material scope of this right as it is currently set out in various instruments so as to provide a basis for the considerations in Section III of this report.

Commented [A172]: NLD: The latter sentence does not flow logically from the former. No, the right is not recognised, but it is also not clear on whether it should be recognized on a regional (ECTHR/ECHR/ESCR) level. Please reformulate. See suggestion.

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76. It is important to note also that the Protocol to the African Charter on rights of women in Africa (Maputo Protocol) guarantees women a right to a healthy and sustainable environment²³³ as well as a right to sustainable development.²³⁴

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84. 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*.²³⁵ The case involved over ninety indigenous communities seeking recognition of their land ownership rights. The petition was prompted by various issues, including the construction of public works, exploitation of hydrocarbons, and the occurrence of illegal activities within their traditional territory.²³⁶ The IACTHR found violations of the autonomous right to a healthy

²³¹ See https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/search-all-eu-institutions-and-bodies/europeanombudsman_en#:~:text=The%20European%20Ombudsman%20investigates%20complaints,EU%20Dbased%20associations%20or%20businesses

*All references to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

²³² See Centre for International Environmental Law, ‘Interpreting the Meaning of “Safe”, “Clean”, “Healthy”, and “Sustainable”, in the Right to Environment, 21 May 2020.

²³³ Article 18 of the Maputo Protocol.

²³⁴ Article 19 of the Maputo Protocol.

²³⁵ IACTHR, Case of the Indigenous Communities of the Lhaka Honhat Association v. Argentina, judgment of 6 February 2020, par. 202.

²³⁶ *Ibid.*, paras 2, 171, 186.

environment, as well as the rights to food, water, and cultural identity based on the case's facts.²³⁷ Besides other remedies, the court explicitly ordered the State to address illegal logging, which, despite being an important step, was hindered by the IACtHR's exclusion of its implementation from judicial supervision. In addition, the IACtHR reaffirmed that the right to a healthy environment "constitutes a universal interest", is "a fundamental right for the existence of humanity", and is "an autonomous right".²³⁸ 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.²³⁹ Relying on the customary international law principle of the duty of prevention, the Court pointed out that "States are bound to use all the means at their disposal to avoid activities under its jurisdiction causing significant harm to the environment." The IACtHR listed the following as some of the measures that must be taken in relation to activities that could potentially cause harm: (i) regulation; (ii) supervision and monitoring; (iii) requirement and approval of environmental impact assessments; (iv) establishment of contingency plans, and (v) mitigation when environmental damage has occurred.²⁴⁰

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86. The IACtHR may use the opportunity offered by pending cases²⁴¹ and a recent request for an Advisory Opinion by Chile and Colombia on States' human rights obligations in the context of climate change to further elucidate the contours of the right to a healthy environment.²⁴²

Association of Southeast Asian Nations (ASEAN) Human Rights Declaration

87. 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, without further elaboration as to its scope or implications.²⁴³ The Declaration is a soft law instrument that does not provide for a monitoring mechanism.

- c) The right to a healthy environment in multilateral environmental agreements (MEAs)

88. — Two treaties recognise the right to a healthy environment in an indirect manner: the Aarhus Convention²⁴⁴ at the European level, and, more recently, the Escazú Agreement²⁴⁵ 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

Commented [A173]: NLD: Similarly to the previous report, the inclusion of a specific case does not feel logical. Furthermore, the section of the IACtHR is now not in balance with the other reports. Please reduce this to one or two sentences, which are to be included in the former paragraph.

Commented [A174]: NLD: such a statement is not made in relation to the ACHPR, even though that Court has to deal with similar issues (many of them relating to sustainability issues).

Commented [A175]: NLD: this is not addressed here. What is focused on is procedural rights - also because the Aarhus and Escazu Agreements do not refer to the right (besides in their preamble, which is not justiciable).

Commented [A176]: NLD: meaning what? In the preamble? Please specify/clarify.

²³⁷ Ibid. para. 289.

²³⁸ Ibid. para. 203.

²³⁹ See above, para. 207 et seq.

²⁴⁰ Ibid.

²⁴¹ In particular, *the Community of La Oroya v. Peru*, pending on decision by the IACtHR.

²⁴² See joint advisory opinion request of Chile and Colombia, dated 9 January 2023, http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2023/20230109_18528_petition-1.pdf (unofficial translation).

²⁴³ 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.**"

²⁴⁴ 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).

²⁴⁵ 2018 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean; see, however, the understanding expressed by the United Kingdom of Great Britain and Northern Ireland upon signature and confirmed upon ratification that Article 1 is understood "to express an aspiration", rather than a right.

generations to live in a clean environment”²⁴⁶ They are widely seen as codifying procedural components of the right to a clean environment.²⁴⁷ ~~While the Aarhus Convention obliges States to ensure that environmental human rights defenders shall not be penalised, persecuted or~~

²⁴⁶ 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.”

²⁴⁷ See Peters, Clean and Healthy Environment, Right to, International Protection, MPEPIL, January 2021, para. 10.

~~harassed in any way, the Escazú Agreement goes one step further by including specific rights of 88.~~

Page 31 (addition of a new para.)

~~90. Furthermore, while the Aarhus Convention obliges States to ensure that environmental human rights defenders shall not be penalised, persecuted or harassed in any way, the Escazú Agreement goes one step further by including specific rights of environmental human rights defenders.²⁴⁹~~

~~b)~~

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91. The resolution recognises the right to a clean, healthy and sustainable environment as a human right that is “important for the enjoyment of human rights”, ~~notes that and~~ is “related to other rights and existing international law”.²⁵⁰ ~~and the right furthermore~~ affirms that the promotion of the right requires the full implementation of the multilateral environmental agreements under the principles of international environmental law.

92. The resolution in itself does not provide the response to all the questions that might arise from the recognition of the right, such as the nature of its relationship with other human rights. This makes it all the more important that ~~existing human rights frameworks~~ give further consideration to the matter and provide further clarity on the scope and implications of the right.

United Nations General Assembly Resolution 76/300 of July 2022

93. In its essential elements,²⁵¹ the UNGA Resolution – co-sponsored by more than 100 States and adopted with 161 votes in favour to none against with eight abstentions – differs only marginally from the wording of the HRC Resolution. It is important to note, however, that 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, rather it clearly states in paragraph 1 of its operative part the recognition of the right to a clean, healthy and sustainable environment as a human right thereby underlining that it is a stand-alone right.

94. The UNGA Resolution was accompanied by a number of explanations of votes. 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”.²⁵² 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”.²⁵³

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97. The Recommendation assumes the existence of the right, but does not explicitly recognise it, instead calling on the member States actively to consider doing so at national level. At the same time, it implies a need for further clarification of the right, by inviting States to reflect on its nature, content and implications. In other respects, Recommendation CM/Rec(2022)20 uses the same

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language as HRC Resolution 48/13 (rather than UNGA Resolution 76/300), since it was drafted after the former had been adopted but before the latter had.

d) Decisions adopted in the context of international environmental agreements

98. Since the recognition of the right to a clean, healthy and sustainable environment by the UN General Assembly, several outcome documents adopted by ~~the~~ Parties to international environment agreements have referred explicitly to this right.

[...]

99. Similarly, the Parties to the Convention on Biological Diversity (CBD) acknowledged explicitly the right in the Kunming-Montreal Global Biodiversity Framework adopted at the 15th Conference of the Parties to the CBD and stressed that the newly adopted framework should “follow a human rights-based approach respecting, protecting, promoting and fulfilling human rights”.²⁵⁴

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100. In 2018, the UN Special Rapporteur on human rights and the environment, John H. Knox, presented the Framework Principles on Human Rights and the Environment (Framework Principles) which reflect “the application of existing human rights obligations in environmental context”.²⁵⁵ The Framework Principles also set out how States’ human rights obligations could

²⁴⁸ 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.

²⁴⁹ 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.

²⁵⁰ HRC Resolution, 2.

²⁵¹ GA Resolution, 1 – 3.

²⁵² <https://www.gov.uk/government/speeches/explanation-of-vote-on-resolution-on-the-right-to-a-clean-healthy-and-sustainable-environment>

²⁵³ See the explanation of Norway and Poland on the Right to a Clean, Healthy and Sustainable Environment Resolution, <https://press.un.org/en/2022/ga12437.doc.htm>.

²⁵⁴ Decision 1/COP.15: Kunming-Montreal Global biodiversity framework, CBD/COP/15/L.25, Annex, para. 14.

²⁵⁵ 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.

relate to the enjoyment of the human right to a healthy environment. They are intended to help explain what the content of such a right could include.²⁵⁶

101. The first two **Framework** principles call on 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.²⁵⁷ Thus, the Framework Principles highlight the interdependence of human rights and the protection of the environment.

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106. In Section IV on general measures of implementation, the Committee considers that “States must take deliberate, specific and targeted steps towards achieving the full and effective enjoyment of children’s rights related to the environment, including their right to a healthy environment”.²⁵⁸ One may assume that the Committee, having recalled that “children have the right to a clean, healthy and sustainable environment”, intends other implementation measures also to apply to the right to a healthy environment. These measures would include child rights impact assessments, the obligation to protect against the abuse of child rights by third parties, including business enterprises, access to justice, and international cooperation. The General Comment gives further details of such measures.

107. General Comments are soft law instruments, as they are not binding on States parties.²⁵⁹ Their function is to assist with the implementation of the relevant treaty, clarifying duties of the parties with respect to certain provisions and suggesting approaches to implementation of treaty provisions. They can be regarded as prescriptive legal instruments which seek to influence discourse on human rights and, by implication, normative development. General Comment No. 26 is thus important for the identification of the material scope of the right to a healthy environment.

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114. 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 to cases concerning the direct impact of the triple planetary crisis. National courts in at least one member State seem to consider the right to a healthy environment as being engaged in cases concerning the triple planetary crisis even if no specific consequences for individuals are derived.²⁶⁰

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115. 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

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²⁵⁶ Extended summary, Knox, Expert contribution, p. 27.

²⁵⁷ Ibid. paras 4-6 (Framework Principles 1-2).

²⁵⁸ Ibid. para 71.

²⁵⁹ For the nature and purpose of the general comments, see Official Records of the UN General Assembly, Thirty sixth Session, Supplement No. 40 (A/36/40), annex VII, introduction.

²⁶⁰ The Portuguese Supremo Tribunal de Justiça for example established that the constitutional right to a “healthy environment” also includes the conservation of biodiversity.

over other (constitutional) principles²⁶¹ 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 to the questionnaire, effectively shaped in the jurisprudence of the domestic courts. Member States that follow this objective model of environmental protection have reported on substantial **jurisprudential evolutions**. The combination of traditional fundamental/ human rights with a constitutional principle of environmental protection generates results that are usually associated with the human right to a healthy environment.²⁶²

[...]

118. At the national level, 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 permitted 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,²⁶³ others provide for the possibility of *actio popularis*.²⁶⁴ Other member States which recognize the right to a healthy environment in their national law, however, do not conceive of the right as being justiciable.

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D. Possible rationales for a further instrument or instruments

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

iii. Addressing gaps in member States' international legal obligations

e)b) Gaps in international human rights law

120. One line of argumentation focuses on gaps in the human rights system and in particular the **European system in relation to** ~~of~~ the Convention and the Charter.

The European Convention on Human Rights

121. The current jurisprudence of the Court and the procedural and material requirements that need to be met when litigating human rights cases before the Court may establish **complex obstacles** in environmental cases. 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: "[c]laims 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."²⁶⁵

122. The following **are perceived** as 'limitations' of the Convention system as a means to address the human rights impact of the triple planetary crisis:

²⁶¹ 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.“

²⁶² 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.

²⁶³ Estonia, Norway, Poland, Slovak Republic.

²⁶⁴ Latvia and Portugal.

²⁶⁵ *Ibid.*, 1, 3.

Commented [A186]: NLD: perhaps footnotes can be useful.

Commented [A187]: NLD: Perhaps some examples could be useful for this analysis?

Commented [A188]: NLD: What is the difference between giving an actionable right to NGOs and the possibility of *actio popularis*? Would be helpful if this is touched upon briefly, especially as some national legal orders do not have such a division/ a similar understanding due to other traditions.

Commented [A189]: NLD: a kind of introduction is missing here. What kind of rationales? Are these rationales derived from literature or jurisprudence? Please explain, as this will greatly enhance the reliability and quality / justifications of the analysis.

We would suggest to add a phrase along the lines of 'the following rationales have been identified in (for example) the literature and case law'. This would also add to the neutrality of the report, and would provide more clarity than "possible", which is rather ambiguous (what is 'possible' meant to express?)

Commented [A190]: NLD: or "complexities"? We are a bit afraid that 'complex obstacles', at least for some, may already assume an imbalanced framing.

Commented [A191]: NLD: Is this not the other way around?

"The procedural and material requirements that need to be met when litigating human rights cases before the Court, and the interpretation thereof by the Court, establish ...".

Commented [A192]: NLD: what is meant by this? That the complexities arise even more in climate change cases? Then this should be formulated in this manner. The formulation is now not correct/difficult to understand.

Commented [A193]: NLD: It seems as if this footnote is incorrect? Or is the footnote meant to refer to national submissions?

Commented [A194]: NLD: please explain by whom as the 'limitations' now seem randomly chosen. Such justification would benefit the analysis/report.

- According to Article 1 of the Convention a State's jurisdiction within the meaning of Article 1 is primarily territorial. Consequently, the victim of an alleged Convention violation needs to be within a member State's territorial jurisdiction. This occurs primarily where the victim is within the territory of the State.²⁶⁶ Exceptionally, extraterritorial jurisdiction may be established if the victim is outside of a State's territory, but under the State's agent authority and control (personal concept of jurisdiction) and effective control (spatial concept of jurisdiction). A key factor in this respect is control exercised by the State over individuals. However, ~~Cases of transboundary harm and climate change typically can pose~~ extraterritoriality ~~problems/issues~~ as the pollution can originate in one State but can impact individuals in another state.²⁶⁷ There is no territorial control and no jurisdiction under the personal heading of extraterritorial jurisdiction or other bases of jurisdiction on the basis of the established jurisprudence of the Court. Problems of admissibility on account of failure to establish jurisdiction are therefore deplored.²⁶⁸ There have been developments of the Court's jurisprudence on jurisdiction,²⁶⁹ but so far, unlike the UN Committee on the Rights of the Child and the IACtHR,²⁷⁰ the Court has not accepted control over the source of a harm as capable of establishing jurisdiction under Article 1 of the Convention.
- Article 34 of the ECHR notes the requirement of establishing 'victimhood', which means that At present, an applicant must claim to have been the victim of a violation of a right protected under the Convention or its Protocols. This, in essence, excludes from the Court's jurisdiction the possibility of any actio popularis, that is to say, any public-interest applications that would not have any bearing on the applicant's individual rights. At present, an applicant must claim to have been the victim of a violation of a right protected under the Convention or its Protocols.

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- 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.²⁷¹
- As to the issue of future generations, under the current normative framework, the Court only has the discretion to accept the standing of a person who acts on behalf of a direct or indirect victim of an alleged violation.²⁷² In contrast, outside of the Convention system, future generations' interests have been protected by institutions like the Hungarian Ombudsperson for Future Generations, who is permitted by local law to initiate or participate in legal procedures.²⁷³ It is argued that such protection would be needed as the effects of the triple planetary crisis risk the future impairments of fundamental rights.

²⁶⁶ *Ukraine v. Russia (re Crimea)* (dec.) [GC], 2020, § 345).

²⁶⁷ Extended summary, Raible, Expert contribution, p. 34.

²⁶⁸ Extended summary, Raible, Expert contribution, p. 35.

²⁶⁹ *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.

²⁷⁰ AO23/2017.

²⁷¹ 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.

²⁷² Câmpeanu, § 103

²⁷³ The office of Ombudsman for Future Generations was created by the Hungarian Parliament in 2007, see <https://www.ajbh.hu/web/ajbh-en/the-role-of-the-ombudsman>

Commented [A195]: NLD: The Court distinguishes four exceptional circumstances in which States exercise jurisdiction extraterritorially, these only covering two of them. The first two are derived from *Georgia v. Russia (II)* [GC], no. 38263/08, § 115, 21 January 2021.

The other two referring to (3) is the exercise of authority by diplomatic or consular officials in their official capacity, in respect of that State's nationals or their property, or where they exercise physical power and control over certain persons, and (4) specific circumstances of a procedural nature have been used to justify the application of the Convention in relation to events which occurred outside the respondent State's territory (both set out by the Court in *M.N. and Others v. Belgium*).

Shouldn't these be included as well? As jurisdiction is a key factor and important to outline here correctly, the NLD proposes to stick to the Court's own text/ line of jurisprudence.

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Commented [A196]: NLD: transboundary harm can either be the effect of environmental harm *and* climate change. Climate change is, in this case, not a different phenomenon, or is it? If not, please rephrase.

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Commented [A197]: NLD: see suggestions so as to broaden the scope (and not limit it to extraterritoriality).

Commented [A198]: NLD: personal model or concept for jurisdiction or is something else meant by this?

Commented [A199]: NLD: in the context of transboundary environmental harm, including harm originating from climate change?

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Commented [A200]: NLD: please use neutral language.

"Therefore, on the basis of the Court's current jurisprudence, such cases involving transboundary harm would be declared inadmissible as not falling within the jurisdiction of a particular state, unless the exceptional extraterritorial circumstances are applicable - which will most likely be not".

Commented [A201]: NLD: please explain it what sense, as this would merit the discussion/analysis.

Commented [A202]: NLD: a more functional approach of control/ cause and effect?

Commented [A203]: NLD proposal.

Commented [A204]: NLD: victim status?

Commented [A205]: NLD proposal.

Commented [A206]: NLD: Would it not be useful to briefly explain the exception, as this is relevant?

Commented [A207]: NLD: why include this, if this section focuses on the Convention only?

Commented [A208]: NLD: please take note of by whom. Would also be better to refrain from value judgments, especially if the source is not mentioned.

- The requirement to exhaust domestic remedies, an expression of the principle of subsidiarity, has been disputed by applicants in climate change cases related to human rights and the environment as a procedural obstacle.²⁷⁴ As global climate change by its very nature is caused by the acts or omissions of a multitude of States, applicants in cases such as *Duarte Agostinho and others v Portugal* and others argue that an application should 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 argued to be time-consuming and costly.
- The fact that in order to succeed, applicants need to show that environmental degradation directly affects their Convention rights can also be seen as a limitation under the Convention. ~~In the case of *Kyrtatos* the Court highlights this gap: in 2003, the Court rejected claims arising from the destruction of a wetland adjacent to the property of the applicants, on the ground that “neither Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such.”~~²⁷⁵ The Court stated, “even assuming that the environment has been severely damaged by the urban development of the area, 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.”²⁷⁶ ~~This shows that environmental harm has to be brought under existing human rights, and that a high threshold needs to be met.~~ It is argued that binding recognition of the right to a healthy environment would establish the linkage between human beings and natural protection that ~~was not found in the *Kyrtatos* decision failed to find~~²⁷⁷ and would make ~~it in principle possible, at least in principle,~~ for claims to be brought for substantial environmental harm that ~~affected-affects~~ the applicants.

Commented [A209]: NLD: please focus on the exhaustion of domestic remedies before the Court. This now seems more like an explanation of the limitation, whereas the system of the Court and ECHR should be central in this section. Moreover, the fact that litigating against numerous States simultaneously is an argument posed by applicants, whereas they can choose to litigate for particular systems under whose jurisdiction they fall.

Commented [A210]: NLD: Please first explain the ECHR system and then the interpretation by the Court that this is considered a gap. This is now not a neutral statement/explanation.

Commented [A211]: NLD proposal. Perhaps add, for example, that under Art. 8 of the Convention several factors apply or are applied in jurisprudence (such as vicinity etc). Perhaps the Court's registry can elaborate on this so as to frame it in line with the Court jurisprudence/ line of reasoning.

Commented [A212]: NLD proposal.

Commented [A213]: NLD proposal.

Commented [A214]: NLD proposal.

Commented [A215]: NLD: however, this is already the case if thresholds are met/ a matter falls within the scope of application. So please explain a bit more how this would work/ what is meant by this.

Commented [A216]: NLD: academics?

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Commented [A217]: NLD: in terms of jurisdiction?

Commented [A218]: NLD: liability or responsibility?

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- Another complicating factor argued by ~~some authors~~ is the assumed impossibility of establishing ~~cause and effect~~ when it comes to environmental implications of climate change.²⁷⁸ A human rights-based approach to establishing ~~liability~~ for harm purportedly caused by climate change has been criticized on account of the difficulties associated with establishing a chain of causation between the act or omission of a state on the one hand, and the infringement of a right suffered by a specific victim or group, on the other.²⁷⁹ It has been pointed out that the establishment of legal causation is made particularly challenging by the diffuse nature of greenhouse gas emissions, the indirect nature of many of climate change's impacts on humanity, and, crucially, the scientific uncertainty associated with definitively linking any meteorological event to climate change.²⁸⁰ ~~In order for a human right to a healthy environment to be efficient in cases concerning consequences of climate~~

²⁷⁴ Keller/Pershing, Climate Change in Court: Overcoming Procedural Hurdles in Transboundary Environmental Cases, ECHRL 2022, 23, 34.

²⁷⁵ *Kyrtatos v Greece*, application no. 41666/98, judgment of 22 May 2003, § 52.

²⁷⁶ *Ibid.* para. 53.

²⁷⁷ Extended Summary, Knox, expert contribution, p. 27.

²⁷⁸ Fanny Thornton, The Absurdity of Relying on Human Rights Law to Go After Emitters, Debating Climate Law and Intergovernmental Panel on Climate Change, 2022.

²⁷⁹ Rendering International Human Rights Law Fit for Purpose on Climate Change Human Rights Law Review, Volume 23, Issue 1, March 2023, Climate Change and Human Rights: Amicable or Arrested Development?' (2010) 1 Journal of Human Rights and the Environment.

²⁸⁰ *Ibid.*

change, it might be necessary to consider how causation, foreseeability and uncertainty can be effectively addressed.

- **Experts** also posit that the Court's limited power to order individual or general measures is **also** considered as an obstacle.²⁸¹ While the payment of just satisfaction is adequate to compensate for individual harm resulting from environmental damage, remedial measures of a general nature may be required to put an end to structural environmental problems. Although the Court does occasionally indicate general measures that should be taken in ~~execution-executing~~ of a judgment, in general the choice of measures required to ensure full implementation of a judgment falls to the respondent State, subject to the supervision of the Committee of Ministers under Article 46 of the Convention.
- It is also argued that the precautionary principle and other principles of international environmental law do not play a significant role in the Court's jurisprudence.²⁸² While the Court has emphasized the importance of the precautionary principle in *Tatar*,²⁸³ in newer cases the Court has not developed further its use of the precautionary principle.
- Given that the Convention system does not recognise a right to a healthy environment, only "indisputable" environmental "imperatives" can, in principle, justify interference with certain individual rights and freedoms (for example, right to respect for private life or right to property). Under the Convention and its Protocols, interference with certain rights may be justified if it is necessary in a democratic society "for the protection of the rights and freedoms of others". In assessing whether a fair balance has been struck between competing interests of the individual and of the community as a whole, the Court distinguishes between the "rights and freedoms" that are guaranteed by the Convention or its Protocols and those that are not. Pursuant to a well-established principle, where the "rights and freedoms" are guaranteed by the Convention or its Protocols, it must be accepted that the need to protect them may lead States to restrict other rights or freedoms likewise set forth in the Convention, and Contracting States **must** have a broad margin of appreciation in this respect. Instead, where restrictions are imposed on a right or freedom guaranteed by the Convention in order to protect "rights and freedoms" not, as such, enunciated in the Convention or protocols, only indisputable imperatives can justify interference with enjoyment of a Convention right.²⁸⁴

Commented [A219]: NLD: again focus on RHE. We were assuming that we would not include any proposals yet here, but merely explain the current state of the Court's jurisdiction/ current approaches to human rights and the environment, including climate change.

Commented [A220R219]: Furthermore, this is probably also necessary for other environmental issues, such as air pollution. It is sometimes difficult to establish the legal causation there to.

Commented [A221]: NLD: the argument posed in this paragraph merely related to the limitations with regard to general measures.

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Commented [A222]: NLD: perhaps add that just satisfaction is a possibility, but does not lead to restoration of the environment/nature and that often times the environmental harm cannot be reverted?

Commented [A223]: NLD: add reference to case law?

Commented [A224]: NLD: and what would be the obstacle in this?

Commented [A225]: NLD: again the focus on RHE, whereas on the basis of the intro one can assume the focus is on the current state of the jurisprudence of the Court.

Commented [A226]: NLD: please add conclusion.

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- It is further argued that the Convention does not provide sufficient protection to environmental human rights defenders, who are a particularly -high-risk group of human rights defenders.²⁸⁵ While 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,²⁸⁶ these efforts are ~~seen in the opinion~~by of some

²⁸¹ 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.

²⁸² Extended summary, Keller, Expert contribution, p. 5.

²⁸³ *Tătar v. Romania*, no. 67021/01, judgment of 27 January 2009, § 120.

²⁸⁴ *Chassagnou and others v. France*, app. nos. 25088/94 28331/95 28443/95, GC judgment of 29 April 1999, § 113

²⁸⁵ Special Rapporteur on the situation of human rights defenders, 24 December 2020, UN Doc. No. A/HRC/46/35, at para. 5.

²⁸⁶ 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

regarded as insufficient. It is considered that the recognition of the right to a healthy environment in an Additional Protocol to the Convention would ensure that environmental human rights defenders are considered as defenders of a right that stands on an equal footing 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.

123. In essence, many of these obstacles may be traced back to the nature of the Convention as a human rights treaty that is anthropocentric in nature centers around individual justice and is limited to civil and political rights. They illustrate the fact that, in its current form, the Convention system is not an adequate forum to litigate (transboundary) environmental issues of environmental justice more generally.

The European Social Charter

124. The Charter does not explicitly contain a right to a healthy environment. Nevertheless, as explained above, the ESCR has engaged with the issue of environmental protection and social rights, both within its periodical reporting procedure and in decisions on collective complaints against States Parties about alleged failures to give effect to the Charter adequately.

125. The most relevant provision of the Charter for the protection of the environment is Article 11 (right to protection of health). Under the Charter, the right to protection of health includes the right to a healthy environment. Within the periodical reporting procedure, the ECSR has examined compliance of States Parties' law and practice with Article 11 concerning environmental risks in relation to air, water, soil and noise pollution, waste management, ionising radiation, asbestos etc.²⁸⁷ As noted above, however, there are relatively few decisions on collective complaints 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.²⁸⁸

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New para

This paucity of decisions on the matter may be attributable, among other things, to the limited number of ratifications of the 1995 Additional Protocol to the Charter,²⁸⁹ which provides for the collective complaints mechanism, as well as a wider lack of awareness of the collective complaints procedure.

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>.

²⁸⁷ ECSR, Conclusions 2021, 2017, 2013, 2009, 2005 and 2003 on Article 11§ 3

²⁸⁸ *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.

²⁸⁹ To date only 16 States have ratified the Additional Protocol of 1995.

Commented [A227]: NLD: Please focus on the current state of protection under the ECHR system.

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Commented [A228]: NLD: individual justice can also relate to environmental matters. Please delete.

Commented [A229]: NLD: would this be the correct wording?

Commented [A230]: NLD: above, the difficulties are outlined in relation to the Convention. Why is this a different analysis? Would be helpful if despite the 'indirect recognition of a healthy environment' would be explained, and then elaborate on the difficulties so as to make it more in line with the analysis of the ECHR.

Commented [A231]: NLD: footnotes?

Commented [A232]: NLD: as interpreted by the ESCR, right? This should be added as the Charter does not include the RHE itself.

126. The protection offered by the Charter is furthermore limited by the restriction on its personal scope. According to the Appendix to the Charter,²⁹⁰ 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. However, the ECSR has considered, for example, that the restriction on the personal scope should not be read in such a way as to deprive foreigners coming within the category of irregularly present migrants of the protection of the most basic rights enshrined in the Charter or to impair their fundamental rights such as the right to life or to physical integrity or the right to human dignity.²⁹¹

Commented [A233]: NLD: jurisdictionally restricted? Please explain as this is brought up later in the document on the feasibility of the ESC.

Commented [A234]: NLD: in the end, the instrument still revolves around human rights. So why include environmental protection here?

iv. Gaps with respect to the international responsibilities of private actors for the environmental impact of their activities

127. Another argument relating to gaps in international legal standards concerns the international responsibilities of private actors for the environmental impact of their activities.²⁹² Most environmental pollution, greenhouse gas emissions and loss of biodiversity is caused by private actors. To effectively fight against combat environmental degradation and the triple planetary crisis, the involvement of private actors is key. ~~Standards applicable to States need to be translated into concrete obligations for private entities. International due diligence standards with respect to the environment, however, are not yet firmly anchored in international law.~~ The reference document for the issue of business and human rights, the United Nations Guiding Principles on Business and Human Rights (UNGPs), establishes corporate responsibility to respect human rights and highlights States' duty to protect individuals against human rights abuse within their territory by business enterprises. But this document lacks specific and explicit measures relating to environmental issues. These are only covered insofar as environmental issues are human rights issues. The OECD Guidelines for Multinational Enterprises as well as the OECD Due Diligence Guidances on Responsible Business Conduct, by contrast, are broader and include environmental aspects.

Commented [A235]: NLD: if such a statement is made, then please add footnote.

Commented [A236]: NLD: this is a value judgment. It would merit the discussion if it is first outlined what the standards are and that these are not enforceable under international law, and that this constitutes a limitation to the fight against environmental damage etc etc.

Commented [A237]: NLD: so, what would be the added value thereof for this discussion?

128. Some of the due diligence legislation that has been or is being adopted in member States and the European Union goes beyond the UNGP and explicitly incorporates certain environmental aspects into their due diligence obligations without establishing a link to human rights. The UNGP +10 Roadmap²⁹³ conceives the UNGP as a compass for meeting global challenges, such as just transition and sustainable development, and refers 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.

Commented [A238]: NLD: It is not properly explained why and how. See also comment above.

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129. The development of binding 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

²⁹⁰ Appendix to the European Social Charter (Revised), CETS 163, § 1.

²⁹¹ *International Federation of Human Rights Leagues v. France*, Complaint No. 14/2003, decision on the merits of 8 September 2004, §§ 30 and 31; *Defence for Children International v. the Netherlands*, Complaint No. 47/2008, decision on the merits of 20 October 2009, §19

²⁹² Extended summary, Lambert, Expert contribution, p. 46.

²⁹³ <https://www.ohchr.org/sites/default/files/2021-12/ungps10plusroadmap.pdf>

forum that could provide victims of corporate environmental human rights violations with access to a remedy such as a judicial remedy, 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 on human rights and the environment.²⁹⁴

Commented [A239]: NLD: useful to explain how?

iii. Shaping the content of the right to a healthy environment

130. Given the character of the right to a healthy environment as a developing right without a clear and uniform contour and content, a rationale for considering a new instrument could be seen found in the possibility for member States to shape the right proactively by defining its contours and content as well as its relationship with other human rights for the Council of Europe legal space. This would not only increase legal certainty in the Council of Europe, but it would also allow member States to contribute to the further development of the right in general international law.

Commented [A240]: NLD proposal.

Commented [A241]: NLD: in the CoE MS?

Commented [A242]: NLD: we wouldn't be sure whether this is a rationale, as this exercise should be focused on the CoE (system).

Commented [A243]: NLD: it would be useful to base some assertions on scientific research such as the IPCC. So, why would environmental friendly jurisprudence help? Also take into account the NL proposal on the limitations of IEL in relation to the protection of human rights.

Commented [A244]: NLD: please keep connecting this to human rights.

iv. Encouraging the development of an environment-friendly jurisprudence

131. Some argue that the lack of a clear normative framework for the Court or the ECSR to tackle environmental issues in relation to human rights is an obstacle to the development of an environment-friendly human rights jurisprudence, in particular with respect to the triple planetary crisis.²⁹⁵

132. This lack is also held responsible for the fact that the Court allegedly gives less importance to environmental protection in comparison with other public interests such as the economic well-being of the country.²⁹⁶ In a nutshell, this rationale for a new instrument centres on providing legitimacy for the development of the Court's jurisprudence and the decisions and conclusions of the ECSR on environmental protection.

Commented [A245]: NLD: please take into account that "economic well-being" is included in the ECHR and that the Court thus takes this into consideration in its reviews (on for example art. 8 ECHR).

v. Enhancing protection for environmental human rights defenders

133. In addition, a new instrument on human rights and the environment could enhance protection for environmental human rights defenders.

134. Environmental human rights defenders are a particularly high-risk group of human rights defenders in the world.²⁹⁷ They should be recognised as human rights defenders and, by extension, afforded the same level of protection.

Commented [A246]: NLD: above, it is not properly explained why they do not have the same protection as HRD. So, this conclusion now comes across unsubstantiated. We therefore struggle to understand how this could be a rationale for a new legal instrument and have great difficulty with it for several reasons:

1. It is not in any way a neutral and objective argument - as opposed to for example a gap in international law - and has a strong political overtone. Just by looking at current events and protests by environmental activists, this is a very sensitive topic among (member) states, with deep divides.
2. It is unclear in which sense 'protection' is to be understood, or what it entails.
3. Shouldn't the aim of (any) new instrument be to protect and promote human rights of citizens in general, thereby naturally including environmental human rights defenders?
4. There seems to be a leap of logic as it is difficult to see the correlation or causal link between a new instrument and a decline in the number of killings of environmental defenders, as footnote 190 seems to imply or allude to.

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

135. 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, conservation

²⁹⁴ Extended summary, Lambert, Expert contribution, p. 45.

²⁹⁵ Eicke, Climate Change and the Convention: Beyond Admissibility, ECHRL 2022, 8, 12.

²⁹⁶ 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.

²⁹⁷ Global Witness publishes an annual report on the number of killings of environmental defenders. The most recent report, entitled *Last line of Defence*, was published in September 2021 and is available at https://www.globalwitness.org/documents/20191/Last_line_of_defence_-_high_res_-_September_2021.pdf.

and restoration and mitigation of and adaption to climate change.²⁹⁸ According to the study of the UN Special Rapporteur on Human Rights and the environment, introduction of the right to a healthy environment in national constitutions results in States having smaller ecological footprints, ranking higher on comprehensive indices of environmental indicators and making faster progress in reducing harmful emissions.²⁹⁹ In a new instrument on human rights and the environment, ~~could States be encouraged~~ States that have not yet adopted the right to do so and encourage those States that have already adopted the right to take further active measures to implement it so as to comply with the call made in CM Rec 2022(20).³⁰⁰

136. In addition, in line with the recommendations under CM Rec 2022(20), a new instrument in which the right to a clean, healthy and sustainable environment is recognised, could clarify the understanding amongst Council of Europe member States of the scope and content of the right to a healthy environment and inspire corresponding national legislation. That legislation would define the ways in which States would meet the clearly defined international standard, in accordance with the principle of subsidiarity.³⁰¹

vii. Establishing the Council of Europe's role

137. The future relevance of the Council of Europe will be greatly enhanced by demonstrating its capacity to address the triple planetary crisis. Failure to explicitly address the environmental dimension of human rights risks giving the impression that the Council of Europe is absent on this critical issue. Leadership by the Council of Europe can be expected to reap benefits not only within Europe, but also beyond.

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III. The feasibility of a further instrument or instruments

138. The following section sets out different Council of Europe instruments that have been proposed to address the linkages between human rights and the environment. The proposals reflected here emanate from organs of the Council of Europe, experts heard by the working group and discussions within the working group. For each instrument, the report briefly examines its possible material content. It also sets out which of the rationales identified in Section II would be covered by the respective instrument in order to allow the narrowing down of options depending on the rationales member States consider particularly relevant. Finally, arguments for and against each of the instruments are compiled as they have been put forward in the expert discussions. The compilation does not imply an endorsement of any argument by member States. It aims to give an overview of the state of discussions and is intended to provide a meaningful basis for a political decision on the need and feasibility of a further instrument or instruments on human rights and the environment. The proposals are as follows:

1. An additional Protocol to the European Convention on Human Rights
2. Additional Protocol to the European Social Charter
3. Standalone Convention on Human Rights and the Environment

²⁹⁸ *Pavlov and others v. Russia*, application no. 31612/09, judgment of 11 October 2022, Concurring opinion of Judge Serghides, § 21.

²⁹⁹ David R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (2012), pp. 253-277.

³⁰⁰ Extended Summary, Knox, Expert contribution, p 26.

³⁰¹ CMRec 2022(20) para 1. „*Recommends that the governments of the member States 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*”

Commented [A247]: NLD: it would be important to separate a new instrument from the recognition of the RHE and frame the latter as an example of establishing or recognizing the link between human rights and the environment. Please see proposal.

Commented [A248]: NLD proposal.

Commented [A249]: NLD: Is this not a more political argument, rather than a legal argument? Should we not be focusing on a more technical analysis rather than a political one?

As with rationale V, we struggle to understand how this, in and of itself, can be a reason for a new legal instrument. We believe this rationale too lacks neutrality. On what premises are expectations that the *'future relevance of the CoE will be greatly enhanced'* and that its leadership *'can be expected to reap benefits not only within Europe, but also beyond'* being based, if any? It is moreover entirely unclear as to what 'benefits' could or should be expected.

Commented [A250]: NLD: in what sense?

Commented [A251]: NLD: Its difficult to compare the different options, because the scores / arguments change. There are also challenges such as causality and responsibilities of private actors that should but can not easily be resolved

Commented [A252]: NLD: it is therefore even more important to really justify on the basis of what the rationales 'were chosen'. This is now still unclear.

Commented [A253]: NLD proposal.

4. Self-standing monitoring mechanism
5. Inclusion of environmental protection in the preamble of the ECHR
6. Non-binding instrument recognising the right to a clean, healthy and sustainable environment at the level of the Council of Europe
- ⇨ 7. Combination of different instruments

1. Additional Protocol to the European Convention on Human Rights

138-139. To address the linkages between human rights and the environment, an Additional Protocol to the European Convention on Human Rights codifying the human right to a clean, healthy and sustainable environment has been proposed.

a) Possible content

139-140. Whereas the common denominator of proposals made in this respect is the codification of the human right to a clean, healthy and sustainable environment, proposals vary to the extent to which they consider the necessity of additional elements relating to admissibility requirements, right holders, etc. The additional elements proposed by experts to fill the gaps of the current ECHR system include 1) provisions on the administration of evidence to ease the burden of proof on applicants,³⁰² 2) the recognition of NGO standing,³⁰³ 3) a codification of the precautionary principle,³⁰⁴ 4) specific protection for human rights defenders,³⁰⁵ 5) a provision amending article 1 ECHR to extend the territorial reach of the Protocol.³⁰⁶

b) Covered rationales

✓ Addressing gaps in international human rights law

- An Additional Protocol would contain a legally binding codification of the link between human rights and the environment through, for example, the recognition of the right to a clean, healthy and sustainable environment and would provide individuals a possibility to invoke, for example, the right to a healthy environment with before a monitoring mechanism capable of issuing binding decisions with respect to the right to a healthy environment. It would provide the Court with a standard that would remedy at least to a certain extent the limits of existing Convention rights in environmental matters.
- The extent to which alleged protection gaps would be closed depends on the content of the Additional Protocol. One of the main questions that would need to be answered with respect to admissibility issues is whether an Additional Protocol should deviate from existing Convention standards by including *lex specialis* rules on *inter alia* jurisdiction, the victim requirement, the need to exhaust local remedies and the Court's remedial powers.
- With respect to the substantive scope of protection, the extent to which the precautionary principle and other principles of international environmental law as well as the protection of environmental human rights defenders and future generations would play a role in the Court's jurisprudence would need to be ascertained. This could be decided by the ECtHR unless member States include provisions in the Additional Protocol in that respect. The latter approach, however, would deviate from the approach used in other Additional Protocols to the Convention which limit themselves to stating rights in generic terms.

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Addressing gaps with respect to the international responsibilities of private actors

As the Convention imposes human rights obligations on States, an Additional Protocol would not contain obligations for private entities and therefore would not address the alleged gaps in the

Commented [A254]: NLD proposal to enhance the overview.

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Commented [A255]: NLD: would this not be a comment which needs to be made in the introduction to this overall part?

Commented [A256]: NLD: this has not been explained above in the section on the Convention. Would it not make more sense to include it there as well, so as to make the connection between the two parts?

Commented [A257]: NLD: it needs to be explained above in the 'gaps' section what benefits the recognition of NGO standing would have.

Commented [A258]: NLD: also here, what would the precautionary principle have in terms of benefits for human rights?

Commented [A259]: NLD: above it concerns 'environmental human rights defenders'. Why not here?

Commented [A260]: NLD proposal.

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Commented [A261]: NLD: the role to be played in the Court's jurisprudence is not a matter that is to be covered by an AP, right? This would entail guidelines, and it is the Court itself that needs to interpret the ECHR and APs - not through guidelines in APs. Please reformulate or explain what is meant by this.

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³⁰² Extended summary, Keller, Expert contribution, p. 4-6.

³⁰³ Ibid. p. 6-77.

³⁰⁴ Ibid. p. 5.

³⁰⁵ Extended summary, Duyck, Expert contribution p. 14.

³⁰⁶ Extended summary, Raible, Expert contribution p. 35-36.

responsibility of private actors even though, through positive obligations, as an indirect effect, States could be held responsible for the omissions of private actors within their jurisdiction, and would thus be thereby being forced to address gaps with respect to the responsibilities of private actors.

Commented [A262]: NLD: would be forced to address these on a national level?

✓ Shaping the content of the right to a healthy environment

~~An Additional Protocol to the ECHR would primarily allow the Court to contribute to developing a common understanding on the content of the right to a healthy environment through its jurisprudence. Member States, on the other hand, could actively shape the understanding of the right by defining its content in more detail in the Additional Protocol. An Additional Protocol to the ECHR would then primarily allow the Court to contribute to developing a common or more detailed understanding on the content of the right to a healthy environment through its jurisprudence.~~

Commented [A263]: NLD proposal.

✓ Encouraging the development of an environment-friendly jurisprudence

An Additional Protocol provides the strongest possible legitimacy for the progressive development of the Court's jurisprudence in environmental matters.

✓ Enhancing the protection for environmental human rights defenders

~~An Additional Protocol to the ECHR would primarily allow the Court to contribute to developing a common understanding on the content of the right to a healthy environment through its jurisprudence. An additional recognition of the right to a healthy environment could then clarify that the right to a healthy environment is on the same level as other human rights, thereby recognising environmental human rights defenders as human rights defenders and, by extension, affording them the same level of protection. In addition, the Additional Protocol could include specific provisions on environmental human rights defenders.~~

Commented [A264]: NLD proposal.

✓ Improving national protection of the right to a healthy environment

An Additional Protocol could work as a pull-factor in increasing the level of environmental protection in member States. A new instrument on human rights and the environment could furthermore encourage States that have not yet adopted the right to do so and encourage those States that have already adopted the right to take further active measures to implement it.

Commented [A265]: NLD: in conformity with CM Rec?

✓ Establishing the Council of Europe's role

An Additional Protocol would affirm the leading role of the Council of Europe in the area of human rights by being the first international organisation to meet the challenges posed by the triple planetary crisis with a binding human rights instrument.

Commented [A266]: NLD: see comment made above. We were under the assumption this is a technical or legal analysis rather than a political analysis.

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c) Arguments for an Additional Protocol

+ An Additional Protocol to the Convention allows individuals access to the most effective regional human rights mechanism to enforce their rights in relation to environmental issues, including a possible right to a healthy environment. Depending on the formulation, collective interests may could also be protected by allowing for NGOs standing under conditions to be agreed upon, thereby improving access to justice concerning collective interests in environmental matters.

Commented [A267]: NLD proposal.

Commented [A268]: NLD proposal.

+ A binding codification of the right to a healthy environment combined with a monitoring mechanism able to issue binding decisions will contribute decisively to the further development of the human right to a healthy environment and integrate the already existing body of environmental human rights jurisprudence.

Commented [A269]: NLD: why? And what jurisprudence? Proposal to delete.

+ An Additional Protocol could aid the Court in balancing environmental human rights interests with other rights/ interests.

+ The Court's power to order meaningful environmental remedies could be enhanced.

- + An Additional Protocol would address almost all of the rationales identified in Section II.
- + Only judicial intervention may break the current deadlock of perceived inaction of States concerning the triple planetary crisis by making governments accountable.
- + The Convention system, with its authoritative Court giving binding judgments, could remedy some of the perceived gaps in the international environmental law system, such as i) the lack of a comprehensive normative framework in international environmental law, resulting in fragmentation and hindered implementation of sectoral environmental regimes; (ii) piecemeal and reactive approach, lacking coherence and synergy among regulatory frameworks, leading to coordination deficits and policy incoherence; (iii) problematic articulation between multilateral environmental agreements and related instruments due to unclear principles and their status; (iv) institutional fragmentation and coordination challenges in international environmental governance and (v) challenges in implementing international environmental law at national and international levels, including inadequate legislation, resources, and clarity on environmental principles.³⁰⁷

Commented [A270]: NLD: this is new information that comes out of the blue in this section and does not make sense yet. Strongly discourage bringing this up here - as this would in our opinion only contribute to fragmenting the regimes.

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d) Arguments against an Additional Protocol

- To allow effective implementation of the right to a healthy environment, major adjustments to basic tenets of the Convention system would be needed. It has been argued that special provisions would be required *inter alia* on the jurisdiction requirement, the victim status requirement, the need to exhaust domestic remedies and the Court's remedial powers as well to evidentiary standards and processes. Deviating from established Convention principles with respect to the right to a healthy environment, however, would lead to a fragmentation of applicable standards that could be difficult to justify.
- The right to a healthy environment is different in nature from the other Convention rights that essentially protect subjective interests of individual human beings, insofar as it arguably also recognises and protects the collective interest in a clean, healthy and sustainable environment and/or the intrinsic value of the environment as such. The ECHR system provides a system of access to justice for the pursuit of subjective rights. It is not well suited for the enforcement of collective interests or ecocentric objectives. At the same time, it is said that the process of "greening human rights" has contributed to new interpretations of the content of human rights law with respect to environmental protection. Moreover, both HRC Resolution 48/13 and GA Resolution 76/300 specifically noted that "the right to a clean, healthy and sustainable environment is related to other rights and existing international law".³⁰⁸ It is thus argued that the recognition of the right to a healthy environment in a protocol to the Convention 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.³⁰⁹ Introduction of the right to a healthy environment would therefore provide a stronger basis for the Court to consider environmental claims and to strengthen its existing environmental human rights jurisprudence.³¹⁰

Commented [A271]: NLD: perhaps (as argued by, amongst others, Marko Milanovic) it would be difficult to justify why environmental matters would require the adoption and application of new standards as other issues, such as cyber, are also transboundary in nature.

Commented [A272]: NLD: this assumes that environmental rights do not encompass or cover subjective interests of individual human beings. Is that what is meant here?

Commented [A273]: NLD: this is a justification for the argument against as explained above. Please delete and move to the section where it belongs. This is actually hampering the assumption that this is a neutral analysis.

³⁰⁷ These gaps have been identified by the Un Secretary General, 'Gaps in International Environmental Law and Environment related Instruments: Towards a Global Pact for the Environment, UN Doc. A/73/419 (30 November 2018).

³⁰⁸ See UN HRC Resolution 48/13 point 2 and UN GA Resolution 76/300 point 2.

³⁰⁹ Marcos Orellana, "Quality Control of the Right to a Healthy Environment," in *The Human Right to a Healthy Environment*, pp. 169, 176.

³¹⁰ Extended Summary, Knox, p. 27

- Judges should not impose policy choices on States in environmental matters, such as the fight against the triple planetary crisis. Climate change issues in particular, as well as other environmental issues are multidimensional and involve issues of distributive justice. They therefore require a holistic approach: Who has to bear the economic costs of reduction measures? How to solve trade-offs between fighting climate change and other objectives such as environmental protection? How to provide for intergenerational equity? What is the level of environmental protection member States want to achieve? These issues require policy choices made and implemented in the democratic process that lie within the competence of States and not the Court.

Commented [A274]: NLD proposal.

Commented [A275]: NLD: this is a new argument.

Commented [A276]: NLD proposal.

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- Progressive Court judgments imposing policy choices on States based on the right to a healthy environment risk not being implemented. In the long run, this undermines the Court's authority and the effectiveness of the Convention and the proposed Additional Protocol.

Commented [A277]: NLD proposal.

- The Court has limited capacities which are already stretched thin. An Additional Protocol would further increase the number of pending applications.

Commented [A278]: NLD: see earlier comment on technical/legal analysis vs political considerations.

[...]

- The Court lacks the scientific expertise required to decide environmental cases. 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. For example, the Court has an established practice of adjudicating on cases related to issues of medical negligence where expert opinions play a key role.³¹¹

Commented [A279]: NLD: footnote? This is not discussed earlier on in the document.

[...]

- The content of the right to a healthy environment is uncertain; and it is argued there is a need for robust standard-setting. Including it in the Convention gives the Court leeway to interpret it in its own way.

Commented [A280]: NLD: in what kind of way? See comment above.

Commented [A281]: NLD proposal.

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a) Possible content

In an The Additional Protocol could codify the right to a healthy environment could be codified.

Commented [A282]: NLD proposal.

Commented [A283]: NLD: please also take into account the Dutch proposal for first identifying 'gaps' in whatever law. Before gaps can be identified, an outline needs to be made of the systems (in this case IEL vs IHRL).

Commented [A284]: NLD: the AP would provide this itself or would provide the possibility of invoking the complaints procedure? Please rephrase.

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Commented [A285]: NLD: it should be highlighted above that NGOs etc have the possibility of turning to the collective complaints mechanism, so this argument would make more sense.

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Commented [A286]: NLD: this limits are not extensively explained. The ESCR already stated that the right to health also encompasses the right to a healthy environment. So the question would then be, what would a right to a healthy environment than add? Perhaps in relation to other rights or whatsoever?

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Commented [A287]: NLD: this would then need to be explained in the section of the ESC, which is, in our view, not yet the case.

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b) Covered rationales

✓ Addressing gaps in international human rights law

- An Additional Protocol would contain a legally binding codification of the right to a clean, healthy and sustainable environment and would also provide a monitoring mechanism. Although decisions of the European Committee on Social Rights are non-binding on member States, the ESC system with its collective complaints procedure would provide a way for non-governmental organisations and social partners to lodge complaints with respect to the right to a healthy environment without the need for a *lex specialis* provision as in the ECHR system.
- It would provide the European Committee on Social Rights with a standard that would remedy at least to a certain extent the limits of existing Charter rights in environmental matters. The extent to which alleged protection gaps would be closed depends on the content of the Additional Protocol.
- One of the main questions that would need to be answered with respect to admissibility issues is whether an Additional Protocol should extend the territorial reach of the Charter which is even more restricted than that of the ECHR.
- With respect to the substantive scope of protection, the extent to which the precautionary principle and other principles of international environmental law as well as the protection of environmental human rights

³¹¹ Lopes de Sousa Fernandes v. Portugal (GC), application no. 56080/13, judgment of 19 December 2017 para 217.

defenders would play a role in the Committee's practice depends on how far the substantive standards of international environmental law are understood to be incorporated in the right to a healthy environment. This would be decided by the European Committee on Social Rights unless member States include provisions in the Additional Protocol in that respect.

Commented [A288]: NLD: this is not something that was brought up in the section of the ESCR.

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✗ Addressing gaps with respect to the international responsibilities of private actors

As the European Social Charter imposes human rights obligations on States, an Additional Protocol would not contain obligations for private entities and therefore would not address the alleged gaps in the responsibility of private actors even though indirectly, States could be held responsible for the omissions of private actors within their jurisdiction, thereby being forced to address gaps with respect to the responsibilities of private actors.

✓ Shaping the content of the right to a healthy environment

~~Depending on the content, an Additional Protocol to the ESC would primarily allow the Committee to contribute to developing a common understanding of the content of the right to a healthy environment through its jurisprudence. Member States, on the other hand, could actively shape the understanding of the right by defining its content in more detail in the Additional Protocol. Member States could actively shape the understanding of the right by defining its content in more detail in the Additional Protocol. An Additional Protocol to the ESC would then allow the Committee to contribute to developing a common or more detailed understanding on the content of the right to a healthy environment through its jurisprudence.~~

Commented [A289]: NLD proposal.

✓ Encouraging the development of an environment-friendly jurisprudence

An Additional Protocol provides the strongest possible legitimacy for the development of the Committee's practice in environmental matters. Its general impact on the discourse on human rights and the environment is mitigated due to the non-binding nature of recommendations by the Committee.

Commented [A290]: NLD: Where does this come from? What is meant by this?

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✓ Enhancing the protection for environmental human rights defenders

~~An Additional Protocol to the ESC would primarily allow the Committee to contribute to developing a common understanding on the content of the right to a healthy environment through its jurisprudence. An additional recognition of the right to a healthy environment could then clarify that the right is on the same level as other human rights, thereby recognising environmental human rights defenders as human rights defenders and, by extension, affording them the same level of protection. Recognition would clarify that the right to a healthy environment is on the same level as other human rights thereby, recognising environmental human rights defenders and human rights defenders and, by extension, affording them the same level of protection. In addition, the Additional Protocol could include specific provisions on environmental human rights defenders.~~

Commented [A291]: NLD proposal in conformity with proposal to ECHR section. See also earlier comment on the specific position of EHRD and the lack of outlining the rights under existing systems.

✓ Improving national protection of the right to a healthy environment

To a certain extent, an Additional Protocol could work as a pull-factor in increasing the level of environmental protection in member States. A new instrument on human rights and the environment could encourage States that have not yet adopted the right to do so and encourage those States that have already adopted the right to take further active measures to implement it.

Commented [A292]: NLD: in conformity with CM Rec?

✓ Establishing the Council of Europe's role

An Additional Protocol would affirm the leading role of the Council of Europe in the area of human rights by being the first international organisation to meet the challenges posed by the triple planetary crisis with a binding human rights instrument.

Commented [A293]: NLD: see comment made above. We were under the assumption this is a technical or legal analysis rather than a political analysis.

c) Arguments for an Additional Protocol

- + The European Social Charter system is well suited to address environmental human rights, such as the incorporation of a right to a healthy environment. It encompasses two mechanisms – the reporting procedure and the collective complaints procedure – which

are particularly suited for obligations concerning collective human interests such as protection of the environment. Complaints may be lodged without domestic remedies having been exhausted and without the complainant organisation necessarily being a victim of the alleged violation.

- + A binding codification of the right to a healthy environment combined with a monitoring mechanism will contribute **decisively** to the further development of the right to a healthy environment. Member States would have the possibility actively to influence the development.
- + Non-binding monitoring is more appropriate in an area where difficult policy choices need to be made.

d) Arguments against an Additional Protocol

- The impact of an Additional Protocol would be very limited as only a small number of States have ratified the collective complaints procedure.

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- Without binding judgments by an authoritative entity such as the ECtHR, current deadlock of perceived inaction of States concerning the triple planetary crisis will not cease.
- Individuals would not have the possibility to seize the European Social Committee.

[...]

a) Possible content

143. A standalone Convention **can be** a particularly flexible instrument; its content can be adapted according to the needs identified by member States. The Convention could codify the human right to a healthy environment. In addition, it could provide detailed substantive standards on the interaction between human rights and protection of the environment. The Convention could also contain provisions on the responsibilities of private actors. It has also been suggested that a self-standing Convention could set out substantive environmental standards that **could** become a point of reference for the Court's jurisprudence.

144. The flexibility also concerns possible monitoring mechanisms. Different options have been discussed: **For example**, a state reporting system as foreseen for UN human rights treaties is conceivable. This could (but doesn't have to) be combined with a system of individual and/or collective complaints to a committee. Admissibility requirements could be tailored to the specificities of the Convention's content and could deviate from ECHR **and ESC** provisions. A peer review process modeled on the **Universal Periodic Review** has also been proposed. If the Convention's focus is on the responsibility of private actors, the creation of a mechanism of alternative dispute resolution that involves business entities could also be an option. Another possibility would be to provide for the possibility to request Advisory Opinions from the ECtHR as foreseen in the Oviedo Convention.

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[...]

Encouraging the development of an environment-friendly jurisprudence

A binding Convention on Human Rights and the Environment would strengthen the discourse on human rights and the environment. Depending on the substantive content, such as the introduction of IEL principles, the interaction between **existing** IEL and IHRL could be further crystallised. Its

Commented [A294]: NLD: through the negotiation of an additional protocol?

Commented [A295]: NLD: possible solution would be to encourage States to ratify AP on the collective complaints procedure, right? In the end, this could also contribute to further development of a healthy environment, without the ratification of such an instrument.

Commented [A296]: NLD: This is a very strong, imbalanced statement. Furthermore, this point on non-binding judgments are already covered by the very first point on the small number of ratifications.

Commented [A297]: NLD: is this the correct wording?

Commented [A298]: NLD: but the instrument does not bind private actors, does it?

Commented [A299]: NLD: based on existing IEL standards? And are we talking about the possible application of existing environmental *principles* (e.g. precautionary principle) or *standards* (e.g. rules on air pollution)?

Commented [A300]: NLD: This already assumes that the Court would be the monitoring mechanism? Or the Court could take this into account in its jurisprudence? Please be more precise.

Commented [A301]: NLD: footnote?

Commented [A302]: NLD: an existing committee or new to be established committee?

Commented [A303]: NLD proposal.

Commented [A304]: NLD: would this exist separately from a possible mechanism for States?

Commented [A305]: NLD: Is it envisaged that the possibility for an Advisory Opinion would be combined with other monitoring or accountability mechanisms? If not, there would potentially be a lack of continued and adequate monitoring and enforcement. At least under art. 29 of the Oviedo Convention, only a Government of a Party and the Bioethics Committee can request an opinion. This means that individuals, the ones most likely to raise a complaint, may not submit a request. In addition, the question arises how effective the possibility of an AO would in fact be. So far the Court has only received one request under art. 29 of the Oviedo Convention and rejected it.

In turn, if two or more mechanisms are to be combined, this will likely raise difficulties in terms of delineation of respective mandates and potential encroachment into respective competences. The draft report does not identify or address these issues. For instance one important question is what happens when a case or complaint is brought under the standalone Convention, but also pertains to one or more rights enshrined in the ECHR. Often complainants allege violation of multiple fundamental rights.

Commented [A306]: NLD proposal.

implications for the ECtHR's jurisprudence in environmental matters would be more limited and could be modulated depending on States' wishes.

✓ **Enhancing the protection for environmental human rights defenders**

A Convention that recognizes the right to a healthy environment would clarify that the right to a healthy environment is on the same level as other human rights, thereby recognising environmental human rights defenders and human rights defenders and, by extension, affording them the same level of protection. In addition, the Convention could include specific provisions on environmental human rights defenders.

Commented [A307]: NLD: please see earlier comments made on EHRD. Also include existing HR als a possibility.

✓ **Improving national protection of the right to a healthy environment**

A Convention on Human Rights and the Environment could work as a pull-factor in increasing the level of environmental protection in member States. A new instrument on human rights and the environment could encourage States that have not yet adopted the right to do so and encourage those States that have already adopted the right to take further active measures to implement it.

Commented [A308]: NLD: in line with the Recommendation?

✓ **Establishing the Council of Europe's role**

A Convention on Human Rights and the Environment would affirm the leading role of the Council of Europe in the area of human rights by being the first international organisation to meet the challenges posed by the triple planetary crisis with a binding human rights instrument.

Commented [A309]: NLD: see comment made above. We were under the assumption this is a technical or legal analysis rather than a political analysis.

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c) Arguments for a Convention

+ A convention which includes a binding codification of the right to a healthy environment possibly combined with a monitoring mechanism will contribute decisively to the further development of the right to a healthy environment. member States would have the possibility to influence actively this development.

Commented [A310]: NLD proposal.

+ The political recognition of the human right to a healthy environment has triggered a need for robust normative standards that merge human rights and environmental standards and provide orientation for States in the fight against the triple planetary crisis.

Commented [A311]: NLD: through the negotiations of such an instrument?

+ A Convention is not subject to the constraints of the ECHR system and provides great flexibility. It provides additional protection while leaving the Convention system intact.

Commented [A312]: NLD: in order to make such statements, the standards first have to be explained and outlined. See also the comments made above.

+ A Convention could be opened for signature and ratification by Council of Europe-member States, as well as non-Council of Europe-member States. Thereby its standards could have influence beyond Europe.

Commented [A313]: NLD: in relation to IHRL?

Commented [A314]: NLD proposal to delete.

Commented [A315]: NLD: Whilst strictly speaking this is true, the two different instruments would at the same time not exist in a vacuum. The ECtHR will take account of this new Convention (e.g. on page 52 it is indicated that a standalone Convention that sets out substantive standards would become a point of reference for the Court's jurisprudence), and conversely there are pending decisions of the ECtHR on whether and to what extent a right to a healthy environment is included in art. 2 and 8 ECHR and that are to be taken account of by national courts.

The relationship between the ECHR and the Court's jurisprudence on one side, and a new Convention with or without a monitoring mechanism/body on the other, and the (legal) challenges this may pose, are not sufficiently addressed in the draft report.

d) Arguments against a Convention

- Without binding judgments by an authoritative entity such as the ECtHR, current deadlock of perceived inaction of States concerning the triple planetary crisis will not cease.

Commented [A316]: NLD proposal.

[...]

4. Self-standing monitoring mechanism

147. Another option that has been raised in the course of the working group's discussions is the creation of a self-standing monitoring mechanism within the Council of Europe that deals with issues of human rights and the environment. The idea of the establishment of a new intergovernmental committee on environment and human rights ("Reykjavik Committee") has also been encouraged by the Heads of State and Government of the Council of Europe in the Reykjavik Declaration.

Commented [A317]: NLD: please substantiate. For example, this could enhance uniformity in the approach to HR&ENV?

Commented [A318]: NLD: This is a very strong, imbalanced statement. Furthermore, this point on non-binding judgments are already covered by the very first point on the small number of ratifications.

Commented [A319]: NLD: does this mean that there are no standards that will or can be assessed?

Page 55

[...]

✗ Shaping the content of the right to a healthy environment

A self-standing monitoring mechanism would not allow member States to shape the content of the right to a clean, healthy and sustainable environment. Through policy recommendations for example, however, the mechanism itself could contribute to the development of the right to a certain degree.

Commented [A320]: NLD: what would that 'certain degree' be?

[...]

✓ Establishing the Council of Europe's role

A self-standing monitoring mechanism dedicated to human rights and the environment would demonstrate the Council of Europe's commitment to strengthen the environmental dimension of human rights.

Commented [A321]: NLD: see comment made above. We were under the assumption this is a technical or legal analysis rather than a political analysis.

Page 56**d) Arguments against a self-standing monitoring mechanism**

- Monitoring based on dialogue will not be able to break the current deadlock of perceived inaction of States concerning the triple planetary crisis since it lacks enforcement power, limiting its ability to induce significant changes in State behavior and address environmental human rights issues effectively.

Commented [A322]: NLD: This is a very strong, imbalanced statement. Furthermore, this point on non-binding judgments are already covered by the very first point on the small number of ratifications.

- The optional nature of monitoring diminishes the political and legal significance, potentially leading to selective engagement by States and a lack of accountability for violations.

Commented [A323]: NLD: Isn't it mostly that it diminishes legal significance, rather than (also) political significance?

[...]

- The new mechanism would be in addition to an already existing landscape of multiple international monitoring mechanisms based on State reporting or country visits. The risk is that reporting could be perceived by member States as another cumbersome routine, an exercise of ticking boxes but not as an incentive for change.

Commented [A324]: NLD: please delete. Monitoring mechanisms could in fact be an incentive for change, for example under the ICCPR.

- Funding of the new body and its activities by member States would be required.

- The creation of a new Commissioner for Human Rights and the Environment could encroach on the mandate of the Commissioner for Human Rights and lead to fragmentation.

Commented [A325]: NLD: and it will not be a possibility to include such work within the mandate of the commissioner for human rights?

Page 57

[...]

✓ Establishing the Council of Europe's role

The inclusion of environmental protection in the preamble of the ECHR would reflect a certain awareness of the gravity of the issues involved but by itself may appear to be a minimalist and largely ineffectual response.

Commented [A326]: NLD: see comment made above. We were under the assumption this is a technical or legal analysis rather than a political analysis.

Page 59**c) Arguments for a non-binding instrument**

+ The recognition of the right to a clean, healthy and sustainable environment in a non-binding Council of Europe instrument would bring the Council of Europe's order in line with international standards.

Commented [A327]: NLD: how so? Please elaborate.

d) Arguments against a non-binding instrument

- The recognition of the right to a clean, healthy and sustainable environment in a non-binding Council of Europe instrument would not be the decisive step that is needed to boost the fight against the triple planetary crises.
- The Council of Europe does not usually “recognise” human rights in non binding instruments. Either a human right is contained in a binding instrument or it is not.

NORWAY / NORVÈGE

Page 2 (para. 3 – second bullet point)

1968 European Convention for the Protection of Animals

Page 11

36. Judicial and non-judicial bodies within the UN system are also being requested to interpret existing international obligations in the context of climate change.
37. On 29 March 2023, the UN GA adopted by consensus

Page 18

69. The following table presents an overview of existing Council of Europe and some of the other international instruments that address human rights and/or the environment.

Page 38

D. Possible rationales for a further instrument or instruments

Page 47

- + Only judicial intervention may contribute to breaking the current deadlock of perceived inaction of States concerning the triple planetary crisis by making governments accountable.

Page 48

d) Arguments against an Additional Protocol

- Climate change issues in particular, as well as other environmental issues are multidimensional and involve issues of distributive justice. They therefore require a holistic approach: Who has to bear the economic costs of reduction measures? How to solve trade-offs between fighting climate change and other objectives such as environmental protection? How to provide for intergenerational equity? What is the level of environmental protection member States want to achieve? These issues require policy choices that are better made and implemented in the democratic process, and one should be careful to develop human rights obligations which would entail that the Court imposes policy choices on States. Judges should not impose policy choices on States in the fight against the triple planetary crisis. Climate change issues in particular, as well as other environmental issues are multidimensional and involve issues of distributive justice. They therefore require a

Commented [A328]: NLD: Once again, please formulate more neutrally. Furthermore 'decisive step' is very much exaggerated.

Commented [A329]: NLD proposal.

Commented [A330]: These and other similar conventions mentioned below seem to cover domesticated animals for production, scientific research or pet purposes. Judging from the description the aim seems to be protection of animals against unnecessary suffering. They do not seem to concern protection of the animals in the external environment, or protection of the environment from spread of diseases or invasive species in case the animals concerned escape from farms, laboratories or homes. We therefore question whether these conventions are relevant to mention as conventions regarding protection of the environment.

Commented [A331]: The request to the International Tribunal for the Law of the Sea for an Advisory Opinion submitted by the Commission of Small Island States on Climate change and international law could also be worth mentioning here. See [Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission \(SRFC\) \(iflos.org\)](#)

Commented [A332]: As this is described as an overview of CoE and other international instruments that address human rights and/or the environment, the following conventions should also be mentioned, as they «address environment» and the third part of the triple planetary crisis of climate change, loss of biodiversity and pollution, even if they do not address human rights as such:

- [Basel-, Rotterdam- and Stockholm Conventions](#), addressing transboundary movement of hazardous wastes, hazardous chemicals and persistent organic pollutants to protect human health and the environment
- [Vienna Convention and Montreal Protocol](#), addressing protection of the ozone layer from modification through human activities and protecting human health and the environment from the resulting adverse effects
- [Minamata Convention](#), addressing the protection of human health and the environment from the adverse effects of mercury

We are aware that we can not list all environmental conventions/agreements addressing different parts of the triple planetary crisis, but we should also list some of the global ones most central to the different elements of the triple planetary crisis mentioned in Part I. Mentioning also these contribute to illustrate the number of conventions and the different environmental challenges they cover, and the gaps, limitations and variations of the international environmental governance system and their mechanisms for monitoring and compliance.

Commented [A333]: Part II D Possible rationales for a further instrument or instruments
i Addressing gaps in Member States' international legal obligations

This part concerns gaps in international legal obligations in general and *litra a)* concerns addressing gaps in international human rights law. But there is no *litra b)* on addressing gaps in international environmental law. It should be considered to mention gaps in international environmental law.

Commented [A334]: In our view this statement is too categorical.

holistic approach: Who has to bear the economic costs of reduction measures? How to solve trade offs between fighting climate change and other objectives such as environmental protection? How to provide for intergenerational equity? What is the level of environmental protection member States want to achieve? These issues require policy choices made and implemented in the democratic process. It can also be questioned whether the application of the rights of an Additional Protocol will sufficiently take into account the broad, societal considerations which much be made in matters concerning environment and climate change.

- There is a risk that the legitimacy of the Court could be questioned if the Court decides on issues which are perceived to belong to the political sphere. Progressive Court judgments imposing policy choices on States based on the right to a healthy environment risk not being implemented. In the long run, this undermines the Court's authority.

Commented [A335]: We are aware that the order of the arguments is not intended to imply a hierarchy. However, in the view of Norway, these are fundamental questions which should be mentioned before the more practical obstacles. We also suggest certain adjustments and additions to these arguments.

- To allow effective implementation of the right to a healthy environment, major adjustments to basic tenets of the Convention system would be needed. It has been argued that special provisions would be required *inter alia* on the jurisdiction requirement, the victim status requirement, the need to exhaust domestic remedies and the Court's remedial powers as well to evidentiary standards and processes. Deviating from established Convention principles with respect to the right to a healthy environment, however, would lead to a fragmentation of applicable standards that could be difficult to justify. It is also a question whether States could be hesitant to ratify an Additional Protocol which, in order to take into account the cross-border consequences of climate gas emissions, broadens the extraterritorial application of the Protocol rights in a possibly unpredictable manner.
- The right to a healthy environment is different in nature from the other Convention rights that essentially protect subjective interests of individual human beings, insofar as it arguably also recognises and protects the collective interest in a clean, healthy and sustainable environment and/or the intrinsic value of the environment as such. The ECHR system provides a system of access to justice for the pursuit of subjective rights. It is not well suited for the enforcement of collective interests or ecocentric objectives. At the same time, it is said that the process of "greening human rights" has contributed to new interpretations of the content of human rights law with respect to environmental protection. Moreover, both HRC Resolution 48/13 and GA Resolution 76/300 specifically noted that "the right to a clean, healthy and sustainable environment is related to other rights and existing international law".³¹² It is thus argued that the recognition of the right to a healthy environment in a protocol to the Convention 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.³¹³ Introduction of the right to a healthy environment would therefore provide a stronger basis for the Court to consider environmental claims and to strengthen its existing environmental human rights jurisprudence.³¹⁴

³¹² See UN HRC Resolution 48/13 point 2 and UN GA Resolution 76/300 point 2.

³¹³ Marcos Orellana, "Quality Control of the Right to a Healthy Environment," in *The Human Right to a Healthy Environment*, pp. 169, 176.

³¹⁴ Extended Summary, Knox, p. 27

~~Judges should not impose policy choices on States in the fight against the triple planetary crisis. Climate change issues in particular, as well as other environmental issues are multidimensional and involve issues of distributive justice. They therefore require a holistic approach: Who has to bear the economic costs of reduction measures? How to solve trade-offs between fighting climate change and other objectives such as environmental protection? How to provide for intergenerational equity? What is the level of environmental protection member States want to achieve? These issues require policy choices made and implemented in the democratic process.~~

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Possible solutions:

- *Detailed definition of the nature, content and implications of the right by member States*

~~Progressive Court judgments imposing policy choices on States based on the right to a healthy environment risk not being implemented. In the long run, this undermines the Court's authority.~~

- The Court has limited capacities which are already stretched thin. An Additional Protocol would further increase the number of pending applications.

Possible solutions:

- *additional financial resources for the ECtHR*
- *standing for NGO's could limit the burden on the Court's environmental case-load*

- The Court lacks the scientific expertise required to decide environmental cases. 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. For example, the Court has an established practice of adjudicating on cases related to issues of medical negligence where expert opinions play a key role.³¹⁵

Page 51

d) Arguments against an Additional Protocol

- The impact of an Additional Protocol would be very limited as only a small number of States have ratified the collective complaints procedure.

Page 52

- Without binding judgments by an authoritative entity such as the ECtHR, **there is a risk that the** current deadlock of perceived inaction of States concerning the triple planetary crisis will not cease.

Page 53

b) Covered rationales

[...]

Commented [A336]: Determining causality in climate change cases might be more complex compared to cases concerning medical negligence.

Commented [A337]: We agree with the point, but an additional protocol to the ECHR would also require ratification by states. In order to ensure that the arguments concerning the different instruments are described in a balanced way, we believe that the need for ratification also should be mentioned when discussing an additional protocol to the ECHR.

Commented [A338]: We suggest to soften the wording slightly, so that the statement becomes less categorical.

³¹⁵ Lopes de Sousa Fernandes v. Portugal (GC), application no. 56080/13, judgment of 19 December 2017 para 217.

Enhancing the protection for environmental human rights defenders

A Convention that recognizes the right to a healthy environment would clarify that the right to a healthy environment is on the same level as other human rights, thereby recognising environmental human rights defenders and human rights defenders and, by extension, affording them the same level of protection. In addition, the Convention could include specific provisions on environmental human rights defenders.

Page 54

c) Arguments for a Convention

[...]

- + A Convention is not subject to the constraints of the ECHR system and provides great flexibility. It provides additional protection while leaving the Convention system intact.

[...]

d) Arguments against a Convention

- Without binding judgments by an authoritative entity such as the ECtHR, there is a risk that the current deadlock of perceived inaction of States concerning the triple planetary crisis will not cease.

Page 56

d) Arguments against a self-standing monitoring mechanism

- Monitoring based on dialogue may not be able to break the current deadlock of perceived inaction of States concerning the triple planetary crisis since it lacks enforcement power, limiting its ability to induce significant changes in State behavior and address environmental human rights issues effectively.

SWEDEN / SUÈDE

Page 7

19. The present report will analyse the potential need for a further instrument or instruments from the following perspectives. First, it aims to identify if there is a problem that requires a response. Second, it will explore the involvement of human rights in this problem. Third, the report will evaluate the effectiveness of existing instruments in addressing the human rights aspects related to the issue. And fourth, the report will examine the process of recognition and protection of the right to a clean, healthy and sustainable environment, on the basis of the CDDH's mandate to bear in mind the Parliamentary Assembly's proposal to protect this right through additional protocols to the European Convention on Human Rights and the European Social Charter.

II. Potential Is there a need for a further instrument or instruments?

Page 9

28. Concerning climate change, the Paris Agreement, adopted by consensus at COP 21 on 12 December 2015, at COP 21 of the ~~together with the 1992~~ United Nations Framework

Commented [A339]: If a monitoring mechanism under a standalone Convention will not have the possibility to issue binding decisions, as stated in the first point above, how can it afford environmental defenders the same level of protection as human rights defenders in general, who are able to enforce their rights through legally binding decisions from the ECHR?

Commented [A340]: Although a standalone convention is not subject to the constraints of the ECHR system, establishing a new convention might still give rise to similar challenges. For instance, a new convention would likely need a provision of jurisdiction of some form.

Commented [A341]: In line with para 14.

Commented [A342]: Include the aspect of feasibility in this para, in line with para 14.

Convention on Climate Change (UNFCCC), establishes a legal framework for climate action.³¹⁶ It entered into force on 4 November 2016 and has 195 signatories.

Page 10

33. HRC Resolution 48/13 ~~politically~~ recognised for the first time the right to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights, while simultaneously encouraging States to cooperate on the implementation of this right. In its preamble, Resolution 48/13 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.” Resolution 48/13 also 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.

Commented [A343]: In line with the text of HRC 48/13, and also as referred to in for example para 91 below.

Page 24 (deleted first row)

2022-UN General Assembly Resolution (A/76/L.75)	Non-binding	This UNGA resolution recognises the human right to a clean, healthy and sustainable environment.	-	-	-	-
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Page 30

88. Two treaties recognise the right to a healthy environment in an indirect manner: the Aarhus Convention³¹⁷ at the European level, and, more recently, the Escazú Agreement³¹⁸ 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”.³¹⁹ They are widely seen as codifying procedural components of the right to a clean environment.³²⁰ While the Aarhus Convention obliges States to ensure that environmental human rights defenders shall not be penalised, persecuted or

Commented [A344]: Please note art 4.1 of the Escazú Agreement in which the right to live in a healthy environment is directly regulated.

³¹⁶ Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.

³¹⁷ 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).

³¹⁸ 2018 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean; see, however, the understanding expressed by the United Kingdom of Great Britain and Northern Ireland upon signature and confirmed upon ratification that Article 1 is understood “to express an aspiration”, rather than a right.

³¹⁹ 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.”

³²⁰ See Peters, Clean and Healthy Environment, Right to, International Protection, MPEPIL, January 2021, para. 10.

harassed in any way, the Escazú Agreement goes one step further by including specific rights of environmental human rights defenders.³²¹

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99. Similarly, the Parties to the Convention on Biological Diversity (CBD) acknowledged explicitly the right in the Kunming-Montreal Global Biodiversity Framework adopted at the 15th Conference of the Parties to the CBD and stressed that the newly adopted framework should “follow a human rights-based approach respecting, protecting, promoting and fulfilling human rights” and that it “acknowledges the human right to a clean, healthy and sustainable environment”.³²²

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122. The following are perceived as limitations of the Convention system as a means to address the human rights impact of the triple planetary crisis:

- According to Article 1 of the Convention a State's jurisdiction within the meaning of Article 1 is primarily territorial. Consequently, the victim of an alleged Convention violation needs to be within a member State's territorial jurisdiction. This occurs primarily where the victim is within the territory of the State.³²³ Exceptionally, extraterritorial jurisdiction may be established if the victim is outside of a State's territory, but under the State's authority and control. Cases of transboundary harm and climate change typically pose extraterritoriality problems as the pollution originates in one State but impacts individuals in another state.³²⁴ There is no territorial control and no jurisdiction under the personal heading of extraterritorial jurisdiction or other bases of jurisdiction on the basis of the established jurisprudence of the Court. Problems of admissibility on account of failure to establish jurisdiction are therefore deplored.³²⁵ There have been developments of the Court's jurisprudence on jurisdiction,³²⁶ but so far, unlike the UN Committee on the Rights of the Child and the IACtHR³²⁷, the Court has not accepted control over the source of a harm as capable of establishing jurisdiction under Article 1.

Commented [A345]: Number missing.

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³²¹ 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.

³²² ~~Decision 1/COP.15-~~ Kunming-Montreal Global biodiversity framework, CBD/COP/15/4L-25, Annex, Section C-para. 7 (g)14.

³²³ *Ukraine v. Russia* (re Crimea) (dec.) [GC], 2020, § 345).

³²⁴ Extended summary, Raible, Expert contribution, p. 34.

³²⁵ Extended summary, Raible, Expert contribution, p. 35.

³²⁶ *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.

³²⁷ AO23/2017.

- It is further argued that the Convention does not provide sufficient protection to environmental human rights defenders, who are a particularly -high-risk group of human rights defenders.³²⁸ While 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,³²⁹ these efforts are seen by some as insufficient. It is considered that the recognition of the right to a healthy environment in an Additional Protocol to the Convention would ensure that environmental human rights defenders are considered as defenders of a right that stands on an equal footing 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.

123. 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, in its current form, the Convention system is not an adequate forum to litigate issues of environmental justice more generally.

Page 45

III. The feasibility of a further instrument or instruments

138. The following section sets out different Council of Europe instruments that have been proposed to address the linkages between human rights and the environment. The proposals reflected here emanate from organs of the Council of Europe, experts heard by the working group and discussions within the working group. For each instrument, the report briefly examines its possible material content. It also sets out which of the rationales identified in Section II would be covered by the respective instrument in order to allow the narrowing down of options depending on the rationales member States consider particularly relevant. Finally, arguments for and against each of the instruments are compiled as they have been put forward in the discussions. The compilation does not imply an endorsement of any argument by member States. It aims to give an overview of the state of discussions and is intended to provide a meaningful basis for a political decision on the need and feasibility of a further instrument or instruments on human rights and the environment.

Page 48

d) Arguments against an Additional Protocol

³²⁸ Special Rapporteur on the situation of human rights defenders, 24 December 2020, UN Doc. No. A/HRC/46/35, at para. 5.

³²⁹ 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>.

Commented [A346]: Reference in footnote to be included.

Commented [A347]: This is a statement that is not backed up by scientific reference.

Framstår som ett tyckande utan grund?

Commented [A348]: Insert an explanation to clarify what we mean by feasibility, for example: For the purposes of this report, the feasibility of a further instrument should be understood as the extent to which each proposed instrument can answer to the needs of the examined rationales.

- To allow effective implementation of the right to a healthy environment, major adjustments to basic tenets of the Convention system would be needed. It has been argued that special provisions would be required *inter alia* on the jurisdiction requirement, the victim status requirement, the need to exhaust domestic remedies and the Court's remedial powers as well to evidentiary standards and processes. Deviating from established Convention principles with respect to the right to a healthy environment, however, would lead to a fragmentation of applicable standards that could be difficult to justify.
- The right to a healthy environment is different in nature from the other Convention rights that essentially protect subjective interests of individual human beings, insofar as it arguably also recognises and protects the collective interest in a clean, healthy and sustainable environment and/or the intrinsic value of the environment as such. The ECHR system provides a system of access to justice for the pursuit of subjective rights. It is argued that the system is not well suited for the enforcement of collective interests or ecocentric objectives. At the same time, it is said that the process of "greening human rights" has contributed to new interpretations of the content of human rights law with respect to environmental protection. Moreover, both HRC Resolution 48/13 and GA Resolution 76/300 specifically noted that "the right to a clean, healthy and sustainable environment is related to other rights and existing international law".³³⁰ It is thus argued that the recognition of the right to a healthy environment in a protocol to the Convention 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.³³¹ Introduction of the right to a healthy environment would therefore provide a stronger basis for the Court to consider environmental claims and to strengthen its existing environmental human rights jurisprudence.³³²
- It is argued that judges should not impose policy choices on States in the fight against the triple planetary crisis. Climate change issues in particular, as well as other environmental issues are multidimensional and involve issues of distributive justice. They therefore require a holistic approach: Who has to bear the economic costs of reduction measures? How to solve trade-offs between fighting climate change and other objectives such as environmental protection? How to provide for intergenerational equity? What is the level of environmental protection member States want to achieve? These issues tend to require policy choices made and implemented in the democratic process.

Commented [A349]: The adjustments should be better described (or at least referred to) in order to provide the reader with an understanding of what the adjustments are as well as their possible consequences.

Commented [A350]: Reference included.

³³⁰ See UN HRC Resolution 48/13 point 2 and UN GA Resolution 76/300 point 2.

³³¹ Marcos Orellana, "Quality Control of the Right to a Healthy Environment," in *The Human Right to a Healthy Environment*, pp. 169, 176.

³³² Extended Summary, Knox, p. 27



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19. Le présent rapport analysera l'éventuelle nécessité d'un ou de plusieurs autres instruments sous les angles suivants. Premièrement, il vise à identifier l'existence d'un problème qui nécessite une réponse. Deuxièmement, il explorera l'implication des droits humains dans ce problème. Troisièmement, le rapport évaluera l'efficacité des instruments existants pour traiter les aspects des droits humains relatifs à la question, et quatrièmement, le rapport examinera le processus de reconnaissance et de protection du droit à un environnement propre, sain et durable, sur la base du mandat du CDDH, afin de garder à l'esprit la proposition de l'Assemblée parlementaire de protéger ce droit par le biais de protocoles additionnels à la Convention européenne des droits de l'homme et à la Charte sociale européenne.

Commented [A351]: Qu'en est-il de la faisabilité ? Pour être complet, ne faudrait-il pas aussi brièvement introduire le chapitre concernant la faisabilité ?

Page 9

25. Il existe un large cadre réglementaire relatif à la protection de l'environnement qui est déjà en place et qui produit des effets à la fois en vertu du droit national et du droit international. La question reste néanmoins de savoir si le niveau de protection garanti par les instruments internationaux existants est suffisant pour relever les sérieux défis en matière de droits humains posés par la triple crise planétaire.

Commented [A352]: Il serait utile d'indiquer entre parenthèses où ces quatre aspects sont abordés dans le texte qui suit.

B. Reconnaissance de l'interdépendance des droits humains et de la protection de l'environnement dans le droit international

26. Le Comité des Ministres, dans sa Recommandation CM/Rec(2022)20 aux États membres sur les droits de l'homme et la protection de l'environnement, a déjà reconnu que « des mesures visant à faire face à la triple crise planétaire du changement climatique, de la perte de biodiversité et de la pollution sont essentielles à une meilleure jouissance des droits de l'homme » et que « la vie et le bien-être sur notre planète dépendent de la capacité collective de l'humanité à garantir à la fois les droits de l'homme et un environnement propre, sain et durable pour les générations actuelles et futures » - en d'autres termes, la protection efficace de l'environnement dépend de la pleine jouissance des droits humains, et la pleine jouissance des droits humains dépend de la protection efficace de l'environnement. Il est néanmoins instructif d'examiner l'évolution de cette prise de conscience au niveau international et d'étudier plus en détail la manière dont ce lien a été articulé.

Commented [A353]: Qu'en est-il de la question de la mise en œuvre ? Est-ce que le problème est le résultat d'un niveau de protection insuffisant ou d'une mise en œuvre insuffisante ?

Commented [A354]: Peut-on dire ça ? Vérifier la formulation.

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En août 2023, le Comité des droits de l'enfant des Nations Unies a adopté l'Observation générale n° 26 sur les droits de l'enfant et l'environnement, en insistant particulièrement sur le changement climatique³³³. Le Comité souligne le principe d'équité intergénérationnelle et les intérêts des générations futures, en déclarant que « les États portent la responsabilité des menaces prévisibles liées à l'environnement qui résultent de leurs actes ou manquements actuels, dont les implications ne se manifesteront peut-être pas avant des années, voire des décennies »³³⁴. La section II de l'Observation générale décrit les liens entre l'environnement et les dispositions de la Convention relative aux droits de l'enfant (CDE). La section III est consacrée au droit à un environnement propre, sain et durable et sera examinée plus en détail dans la section C ci-

³³³ Comité des droits de l'enfant des Nations Unies, CRC/C/GC/26.

³³⁴ Ibid. § 11.

~~dessous.~~ La section IV est consacrée aux mesures générales de mise en œuvre et la section V traite du changement climatique.

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49. Aux fins du présent rapport, il est impératif de souligner l'état actuel de la protection de l'environnement garantie par la Convention et la Charte telles qu'interprétées respectivement par la Cour et le CEDS.

Commented [A355]: Il convient également de prendre en considération la marge de manœuvre de la Cour (cf. ch. 52 et 53) et du ECSR (cf. ch. 60 et 61).

Page 18

B. Aperçu des instruments existants du Conseil de l'Europe et d'autres instruments internationaux relatifs à l'environnement et/ou aux droits humains

Commented [A356]: Nous proposons de déplacer ce tableau vers l'annexe.

Page 19

Convention européenne des droits de l'homme (STE n° 5) de 1950	Contraignant	Les articles 2, 3, 6(1) , 8, 10, 11, 6(1) , 13 et l'art. 1 du Protocole 1 à la Convention ont été invoqués pour les questions environnementales.	Cour européenne des droits de l'homme	Requêtes individuelles introduites par toute personne, tout groupe de personnes, d'entreprise ou d'ONG qui affirme avoir subi une violation de leurs droits. Requête interétatique. En principe pas d'actio popularis.	Contraignant	46
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Commented [A357]: Cette formulation est problématique. La Cour elle-même a rappelé que « (...) le mécanisme de contrôle de la Convention ne saurait admettre l'*actio popularis* (...) » (cf. [Cordella et autres c. Italie](#), § 100). Nous proposons donc de revenir à la formulation précédente et d'expliquer la jurisprudence quant au standing des ONG.

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Résolution 48/13 du Conseil des droits de l'homme de 2021	Non contraignant	Première reconnaissance du droit à un environnement propre, sain et durable en tant que droit humain.	-	-		
Résolution de l'Assemblée générale des Nations Unies (A/76/L.75) de 2022	Non contraignant	Cette résolution de l'Assemblée générale des Nations Unies reconnaît le droit humain à un environnement propre, sain et durable.	-	-		
Résolution 76/300 de l'Assemblée Générale des NU de 2022	Non contraignant	Cette résolution de l'Assemblée générale des Nations Unies reconnaît le droit à un environnement propre, sain et durable				

Commented [A358]: Est-ce qu'il est nécessaire de mentionner A/76/L.75 si la Résolution 76/300 est mentionné ci-dessous ?

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F. ~~Éventuels arguments en faveur~~ Justifications possibles d'un instrument ou d'instruments supplémentaires

~~124.119.~~ La section suivante présente les justifications possibles d'un instrument supplémentaire sur les droits humains et l'environnement et analyse les hypothèses sous-jacentes.

Commented [A359]: La version anglaise fait la distinction entre « possible rationales » (chapitre II.D) et les « arguments for / against ». De plus, le chiffre 119 ci-après utilise la formulation « justifications possibles ». Par conséquent, il est proposé d'utiliser la formulation « justifications » ou « raisons » (chapitre III.1.b, 2.b, 3.b, 4.b, 5.b, 6.b).

- v. Comblent les lacunes dans les obligations juridiques internationales des États membres

Commented [A360]: Le chapitre concernant la faisabilité se réfère à plusieurs endroits à la sortie de « l'impasse actuelle de l'inaction perçue des États face à la triple crise planétaire » (p. 49, 54, 56 et 58). Ces références créent l'impression que la sortie de l'impasse actuelle est une des raisons pour un instrument supplémentaire. Cette impasse actuelle soulève en outre la question de savoir si l'impasse est le résultat d'une protection légale insuffisante ou d'un manque de mise en œuvre ?

e)c) Lacunes dans le droit international en matière de droits humains

Commented [A361]: Il n'y a plus un sous-titre b).

Page 41

- Il est également avancé que la Convention ne garantit pas une protection suffisante aux défenseurs des droits humains dans le domaine de l'environnement, qui constituent un groupe de défenseurs des droits humains particulièrement exposés dans le monde³³⁵. Bien que les États membres du Conseil de l'Europe aient fourni des efforts importants pour protéger les défenseurs des droits humains dans le domaine de l'environnement ces dernières années, notamment dans le cadre de la Convention d'Aarhus³³⁶, certains considèrent que ces efforts sont insuffisants. La reconnaissance du droit à un environnement sain dans un protocole additionnel à la Convention permettrait aux défenseurs de l'environnement d'être considérés comme les défenseurs d'un droit qui est sur un pied d'égalité avec tous les autres droits légalement reconnus dans le système européen des droits humains, ce qui mettrait fin aux tentatives de délégitimer et d'isoler les défenseurs de l'environnement en suggérant qu'ils agissent contrairement à d'autres droits importants et intérêts collectifs.

Commented [A362]: La chiffre 122 traite les limites du système de la Convention. Est-ce que cet argument ne serait-il pas mieux placé à un autre endroit (p.ex. dans le chapitre concernant la faisabilité sous les arguments en faveur d'un protocole additionnel à la Convention (III :1.c)) ?

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- vi. Lacunes en ce qui concerne les responsabilités internationales des acteurs privés en matière d'impact environnemental de leurs activités

127. Un autre argument relatif aux lacunes dans les normes juridiques internationales concerne les responsabilités internationales des acteurs privés en ce qui concerne l'impact de leurs activités sur l'environnement³³⁷. La plupart des pollutions environnementales, des émissions de gaz à effet de serre et de la perte de biodiversité sont causées par des acteurs privés. Pour lutter efficacement contre la dégradation de l'environnement et la triple crise planétaire, l'implication des acteurs privés est primordiale. Les normes applicables aux États doivent être transcrites en obligations concrètes pour les entités privées. Cependant, les normes internationales de diligence raisonnable en matière d'environnement ne sont pas encore aussi profondément ancrées dans le droit international.

³³⁵ Rapporteur spécial sur la situation des défenseurs des droits de l'homme, 24 décembre 2020, Doc. des Nations Unies n° A/HRC/46/35, & 5.

³³⁶ Convention d'Aarhus sur l'accès à l'information, la participation du public au processus décisionnel et l'accès à la justice en matière d'environnement, adoptée le 25 juin 1998 - entrée en vigueur le 30 octobre 2001, 2161 UNTS 447, 38 ILM 517 (1999). Voir également la création, en octobre 2021, d'un mécanisme de réaction rapide pour les défenseurs de l'environnement et l'élection, en juin 2022, de Michel Forst en tant que premier rapporteur spécial sur les défenseurs de l'environnement dans le cadre de la Convention d'Aarhus. Voir Réunion des Parties à la Convention d'Aarhus, *Décision VIII/9 sur un mécanisme de réaction rapide pour traiter les cas liés à l'article 3(8) de la Convention sur l'accès à l'information, la participation du public au processus décisionnel et l'accès à la justice en matière d'environnement*, octobre 2021, UN Doc. No. ECE/MP.PP/2021/2/Add.1 ; voir également l'article 3(8) de la Convention d'Aarhus, qui stipule que « Chaque Partie veille à ce que les personnes exerçant leurs droits conformément aux dispositions de la présente Convention ne soient pas pénalisées, persécutées ou harcelées de quelque manière que ce soit en raison de leur participation. Cette disposition n'affecte pas le pouvoir des tribunaux nationaux d'accorder des frais raisonnables dans le cadre de procédures judiciaires » ; voir également la Réunion des Parties à la Convention sur l'accès à l'information, la participation du public au processus décisionnel et l'accès à la justice en matière d'environnement, *Rapport de la troisième session extraordinaire de la Réunion des Parties, juin 2022, ECE/MP.PP/2022/2*. Voir également CEE-ONU, *Premier rapporteur spécial au monde sur les défenseurs de l'environnement élu en vertu de la Convention d'Aarhus*, 24 juillet 2022, disponible à l'adresse <https://unece.org/environment/press/worlds-first-special-rapporteur-environmental-defenders-elected-under-aarhus>.

³³⁷ Résumé détaillé, Lambert, contribution d'expert, p. 46.

128. The OECD Guidelines for Multinational Enterprises as well as the OECD Due Diligence Guidances on Responsible Business Conduct, by contrast, are broader and include environmental aspects.³³⁸ The updated Guidelines were released on 8 June within the context of the 2023 OECD Ministerial Council Meeting. They set out recommendations that enterprises conduct due diligence to assess and address adverse environmental impacts associated with their operations, products and services, including in relation to climate change and biodiversity. The chapter is aligned with the business responsibility to respect human rights established in the UN Guiding Principles on Business and Human Rights, including that enterprises should conduct due diligence to avoid causing, contributing to, or being directly linked to adverse human rights impacts. They emphasize that enterprises should pay special attention to any particular adverse impacts on individuals, for example human rights defenders, who may be at heightened risk due to marginalisation, vulnerability or other circumstances, individually or as members of certain groups or populations, including Indigenous Peoples. Adherent states to the OECD Guidelines³³⁹ are obliged to establish a National Contact Point to promote the implementation of the OECD Guidelines and serve as a non-judicial grievance mechanism in cases of alleged violations of the Guidelines.³⁴⁰ All 51 governments adhering to the OECD Guidelines have the legal obligation to set up an NCP. This network deals alleged violations of the OECD Guidelines by companies concerning the respect of human rights and environmental protection in their own operations or their supply chains.

127-129. Le document de référence pour la question des entreprises et des droits humains, à savoir, les Principes directeurs des Nations Unies relatifs aux Entreprises et aux Droits de l'Homme (UNGP), postule une responsabilité des entreprises en matière à protéger les droits de l'homme et souligne le devoir des États de protéger les individus contre les violations des droits de l'homme commises sur leur territoire par les entreprises. While the UNGP do not explicitly mention climate change, environmental issues are addressed insofar as they represent human rights issues. Mais ce document n'inclut pas de mesures spécifiques et explicites concernant les questions environnementales. Celles-ci ne sont couvertes que dans la mesure où les questions environnementales relèvent des droits humains. This was reiterated by the United Nations Working Group on business and human rights in a briefing note published in June 2023, stressing that, under the UNGP, States and companies also have obligations and responsibilities with respect to the impacts of climate change on human rights.³⁴¹ Les Principes directeurs de l'OCDE à l'intention des entreprises multinationales ainsi que les Principes directeurs de l'OCDE relatifs au devoir de diligence et à la conduite responsable des entreprises sont en revanche plus larges et incluent des aspects environnementaux.

[...]

131. Le développement de normes de diligence environnementale contraignantes pour les entreprises – qu'elles soient conçues comme une diligence environnementale ou comme une diligence en matière de droits humains prenant en compte les questions environnementales par le biais du droit humain à un environnement sain n'en est qu'à ses débuts. Beaucoup de travail reste à faire, notamment en ce qui concerne l'accès aux voies de recours pour les violations des droits humains en matière d'environnement causées par des acteurs privés. Il n'existe pas encore de forum international qui permettrait aux victimes de violations des droits humains en matière d'environnement commises par des entreprises d'accéder à un recours tel qu'un recours

³³⁸ <https://mneguidelines.oecd.org/mneguidelines/>

³³⁹ Governments of the 38 OECD members and other states (Argentina, Brazil, Bulgaria, Costa Rica, Croatia, Egypt, Jordan, Kazakhstan, Morocco, Peru, Romania, Tunisia and Ukraine)

³⁴⁰ <https://mneguidelines.oecd.org/ncps/>

³⁴¹ [Information Note on Climate Change and the UNGPs, Working Group on Business and Human Rights, 2023](#)

Commented [A363]: As already raised in the context of the previous consultation round of the CDDH-ENV Draft, we would like to recall the importance of ensuring coherence between the CDDH-ENV text and discussions and already existing instruments which tackle the topic of BHR and the environment like the UNGPs and the OECD guidelines and guidances. While we appreciate that the current version has introduced a reference to the OECD, we believe that the current draft version still does not adequately reflect the latest development and existing instruments. Switzerland is particularly committed to working within the OECD to address the linkages between issues such as human rights, the environment and labour conditions. The OECD has done pioneering work with the recently revised OECD Guidelines for multinational enterprises for Responsible Business Conduct. The present work of the Council of Europe should therefore be closely coordinated with the OECD RBC Center in order to assure alignment and policy coherence. Integrating such information would be key to ensure and strengthen coherence with already existing initiatives. We would appreciate if the current draft could better reflect these aspects.

In light of what has been set out about the OECD instruments, it is absolutely crucial to add more information respectively a separate paragraph with regard to the OECD Guidelines for Multinational Enterprises OECD Due Diligence Guidances on Responsible Business Conduct as well as sectoral guidances on due diligence (incl. a reference on these instruments).

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juridictionnel, ~~une procédure de médiation~~ ou une autre forme de règlement extrajudiciaire des litiges. Il a été avancé que cette lacune pourrait être comblée par un nouvel instrument du Conseil de l'Europe³⁴².

Commented [A364]: There is already the OECD Network of NCPs where Adherents of the OECD Guidelines provide mediation to parties with regard to the respect of human rights and environmental protection (see above).

Commented [A365]: Rather than developing new instruments, we would suggest strengthen synergies with already existing instruments such as the UNGPs and the OECD Guidelines for Multinational Enterprises as well as the OECD Due Diligence Guidances on Responsible Business Conduct as well as sectoral guidances on due diligence.

³⁴² Résumé détaillé, Lambert, contribution d'expert, p. 45

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- vi. Améliorer la protection nationale du droit à un environnement propre, sain et durable

137. Un autre argument en faveur d'un nouvel instrument sur les droits humains et l'environnement pourrait être de signaler aux États membres qu'ils doivent redoubler d'efforts en matière de protection, de conservation et de restauration de l'environnement, ainsi que d'atténuation du changement climatique et d'adaptation à celui-ci³⁴³. Selon l'étude du Rapporteur spécial des Nations Unies sur les droits de l'homme et l'environnement, l'introduction du droit à un environnement sain dans les constitutions nationales permet aux États de réduire leur empreinte écologique, de mieux se classer dans les indices globaux d'indicateurs environnementaux et de progresser plus rapidement dans la réduction des émissions nocives³⁴⁴. Un nouvel instrument sur les droits humains et l'environnement pourrait encourager les États qui n'ont pas encore adopté le droit à le faire et encourager les États qui l'ont déjà adopté à prendre de nouvelles mesures actives pour le mettre en œuvre³⁴⁵.

Commented [A366]: David R. Boyd a été nommé Rapporteur spécial sur les droits de l'homme et l'environnement pour la première fois en 2018. L'étude citée dans la note de bas de page date de 2012 ce qui implique qu'il n'a pas fait cette étude en sa fonction de Rapporteur spécial.

Page 45**a) Contenu possible**

119. Alors que le dénominateur commun des propositions faites à cet égard est la codification du droit humain à un environnement propre, sain et durable, les propositions varient dans la mesure où elles considèrent la nécessité d'éléments supplémentaires relatifs aux conditions d'admissibilité, aux titulaires de droits, etc. Les éléments supplémentaires proposés pour combler les lacunes du système actuel de la CEDH comprennent 1) des dispositions sur l'administration de la preuve afin d'alléger la charge de la preuve pesant sur les demandeurs³⁴⁶, 2) la reconnaissance de la qualité d'ONG³⁴⁷, 3) une codification du principe de précaution³⁴⁸, 4) une protection spécifique pour les défenseurs des droits de l'homme³⁴⁹, 5) une disposition modifiant l'article 1 de la CEDH afin d'étendre la portée territoriale du protocole³⁵⁰.

Commented [A367]: Il est mentionné ci-dessous (p. 48 et 51) que les états membres pourraient définir le contenu du droit de manière plus détaillée dans le protocole additionnel. La définition du droit pourrait aussi être mentionné sous ce titre. Il serait peut-être utile d'adresser aussi la possible nature du droit (cf. p. 50 ci-dessous) sous ce titre.

b) Arguments-Raisons couvertes**Page 47****c) Arguments en faveur d'un protocole additionnel (last para.)**

+ Le système de la Convention, avec sa Cour faisant autorité et rendant des arrêts contraignants, pourrait remédier à certaines des lacunes perçues dans le système de la LIE, telles que i) l'absence d'un cadre normatif global dans le droit international de l'environnement, entraînant une fragmentation et une mise en œuvre entravée des régimes environnementaux sectoriels ; ii) une approche fragmentaire et réactive, manquant de cohérence et de synergie entre les cadres réglementaires, entraînant des

³⁴³ *Pavlov et autres c. Russie*, requête n° 31612/09, arrêt du 11 octobre 2022, opinion concordante du juge Serghides, § 21

³⁴⁴ David R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment (2012)*, pp. 253-277

³⁴⁵ Knox, p.26

³⁴⁶ Résumé détaillé, Keller, contribution d'expert, p. 4-6.

³⁴⁷ Ibid. p. 6-77

³⁴⁸ Ibid. p. 5

³⁴⁹ Résumé détaillé, Duyck, contribution d'expert p. 14.

³⁵⁰ Résumé détaillé, Raible, contribution d'expert p. 35-36.

déficits de coordination et l'incohérence des politiques ; (iii) l'articulation problématique entre les accords multilatéraux sur l'environnement et les instruments connexes en raison du manque de clarté des principes et de leur statut ; (iv) la fragmentation institutionnelle et les problèmes de coordination dans la gouvernance internationale de l'environnement et (v) les problèmes de mise en œuvre du droit international de l'environnement aux niveaux national et international, y compris l'insuffisance de la législation, des ressources et de la clarté des principes environnementaux³⁵¹.

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d) Arguments contre un protocole additionnel

- Pour permettre la mise en œuvre effective du droit à un environnement sain, des ajustements majeurs des principes fondamentaux du système de la Convention seraient nécessaires. Il a été avancé que des dispositions spéciales seraient nécessaires, notamment en ce qui concerne l'exigence de compétence, l'exigence du statut de victime, la nécessité d'épuiser les voies de recours internes et les pouvoirs de réparation de la Cour, ainsi que les normes et procédures en matière de preuve. S'écarter des principes établis de la convention en ce qui concerne le droit à un environnement sain conduirait toutefois à une fragmentation des normes applicables qui pourrait être difficile à justifier.
- Le droit à un environnement sain diffère par nature des autres droits de la Convention qui protègent essentiellement les intérêts subjectifs des êtres humains individuels, dans la mesure où il reconnaît et protège également l'intérêt collectif à un environnement propre, sain et durable et/ou la valeur intrinsèque de l'environnement en tant que tel. Le système de la CEDH offre un système d'accès à la justice pour la poursuite de droits subjectifs. Il n'est pas bien adapté à l'application d'intérêts collectifs ou d'objectifs écocentriques. En même temps, on dit que le processus d'« écologisation des droits humains » a contribué à de nouvelles interprétations du contenu de la législation sur les droits humains en ce qui concerne la protection de l'environnement. En outre, la résolution 48/13 du Conseil des droits de l'homme et la résolution 76/300 de l'Assemblée générale notent spécifiquement que « le droit à un environnement propre, sain et durable est lié à d'autres droits et au droit international existant »³⁵². On peut donc affirmer que la reconnaissance du droit à un environnement sain dans un protocole à la Convention ne créerait pas de nouvelles obligations, mais permettrait plutôt de consolider l'acquis normatif existant au lieu de le fragmenter dans toute une série d'instruments³⁵³. —L'introduction du droit à un environnement sain fournirait donc à la Cour une base plus solide pour examiner les plaintes environnementales et renforcer sa jurisprudence existante en matière de droits humains dans le domaine de l'environnement³⁵⁴.

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Solutions possibles :

- *Définition détaillée de la nature, du contenu et des implications du droit par les États membres*

³⁵¹ Ces lacunes ont été identifiées par le Secrétaire général des Nations unies, « Lacunes dans le droit international de l'environnement et les instruments liés à l'environnement : Vers un pacte mondial pour l'environnement » UN Doc. A/73/419 (30 novembre 2018).

³⁵² Voir Résolution UN HRC 48/13 point 2 et Résolution UN GA 76/300 point 2

³⁵³ Marcos Orellana, Quality Control of the Right to a Healthy Environment, in The Human Right to a Healthy Environment, pp. 169, 176

³⁵⁴ Résumé détaillé, Knox, p.27

Commented [A368]: Ne serait-il pas judicieux de remédier à ces lacunes perçues dans le système de la LIE dans le droit d'environnement ? De plus, il est difficile de voir comment exactement un protocole additionnel peut remédier aux chiffres i-v.

Commented [A369]: Une fragmentation des normes difficilement justifiable rend le système plus vulnérable. De plus, cette fragmentation soulève la question de savoir dans quelle mesure un protocole additionnel remédie effectivement à la fragmentation (cf. argument en faveur d'un protocole additionnel, p. 49).

Commented [A370]: Est-ce que ce texte ne serait-il pas mieux placé sous le titre arguments en faveur d'un protocole additionnel ?

Commented [A371]: Pourquoi n'y a-t-il des propositions de solutions que pour certains aspects ? La proposition de solutions pour quelques aspects semble aléatoire.

Commented [A372]: Cette approche ne s'écarterait non seulement de l'approche utilisée dans d'autres protocoles additionnels, mais il peut aussi résulter en une définition très étroite du droit.

[...]

Solutions possibles :

➤ les États membres pourraient définir eux-mêmes le droit à un environnement sain, tel qu'il est protégé par le système de la convention. Cette solution s'écarterait toutefois de l'approche adoptée dans tous les autres protocoles additionnels, qui se limitent à énoncer les droits couverts en termes génériques.

Commented [A373]: Cette approche ne s'écarte non seulement de l'approche utilisée dans d'autres protocoles additionnels, mais il peut aussi résulter en une définition très étroite du droit.

- Des ressources financières supplémentaires pour la Cour européenne des droits de l'homme pourraient être nécessaires.

- Le mécanisme de réparation prévue par la Convention est limité (en principe satisfaction équitable selon art. 41 de la Convention ; exceptionnellement indication des mesures générales selon art. 46 de la Convention).

- Le mécanisme de surveillance par la Cour n'intervient généralement que lorsqu'une violation a déjà eu lieu.

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2. Protocole additionnel à la Charte sociale européenne

143. Un protocole additionnel à la Charte sociale européenne a également été proposé.

a) Contenu possible

Le protocole additionnel pourrait codifier le droit à un environnement sain.

Commented [A374]: Nous proposons d'exposer plus en détail le contenu possible d'un protocole additionnel à la Charte sociale européenne.

b) Raisons couvertes

✓ Comblent les lacunes dans la protection internationale des droits humains

Un protocole additionnel contiendrait une codification juridiquement contraignante du droit à un environnement propre, sain et durable et prévoirait également un mécanisme de contrôle. Bien que les décisions du Comité européen des droits sociaux ne soient pas contraignantes pour les États membres, le système de la CSE, avec sa procédure de réclamations collectives, permettrait aux organisations non gouvernementales et aux partenaires sociaux de déposer des plaintes concernant le droit à un environnement sain, sans qu'il soit nécessaire de recourir à une disposition de *lex specialis* comme dans le système de la CEDH. Elle fournirait au Comité européen des droits sociaux une norme qui remédierait, au moins dans une certaine mesure, aux limites des droits existants de la Charte en matière d'environnement. La mesure dans laquelle les lacunes alléguées en matière de protection seraient comblées dépend du contenu du protocole additionnel. L'une des principales questions auxquelles il faudrait répondre en ce qui concerne les problèmes de recevabilité est de savoir si un protocole additionnel devrait étendre la portée territoriale de la Charte, qui est encore plus restreinte que celle de la CEDH. En ce qui concerne la portée matérielle de la protection, la mesure dans laquelle le principe de précaution et d'autres principes du droit international de l'environnement ainsi que la protection des défenseurs des droits humains dans le domaine de l'environnement joueraient un rôle dans la pratique du Comité dépend de la mesure dans laquelle les normes matérielles du droit international de l'environnement sont considérées comme étant incorporées dans le droit à un environnement sain. C'est le Comité européen des droits sociaux qui en déciderait, à moins que les États membres n'incluent des dispositions à cet égard dans le protocole additionnel.

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d) Arguments contre un protocole additionnel

- L'impact d'un protocole additionnel serait très limité car seul un petit nombre d'États a ratifié la procédure de réclamations collectives.

Commented [A375]: Qu'en est-il de la procédure de rapport ?

Page 53**b) Raisons couvertes**

- ✓ Comblent les lacunes dans la protection internationale des droits humains

Une convention sur les droits humains et l'environnement pourrait contenir une codification juridiquement contraignante du droit à un environnement propre, sain et durable. Elle pourrait également prévoir un mécanisme de surveillance (avec ou sans accès pour les individus et les organisations non gouvernementales), sans toutefois, selon toute vraisemblance, la possibilité d'émettre des décisions contraignantes.

Commented [A376]: Sur quoi se fonde cette assumption ? Il n'est pas pour cette étude de faire des assumptions mais de présenter les possibilités et fournir une base pour une décision politique (cf. ch. 138 ci-dessus).

Page 54**c) Arguments en faveur d'une convention**

- + Une convention pourrait répondre à la totalité des raisons identifiées dans la section II. Elle bénéficie de la plus grande marge de manoeuvre.

- + Une codification contraignante du droit à un environnement sain, éventuellement associée à un mécanisme de surveillance, contribuera de manière décisive à la poursuite du développement du droit à un environnement sain. Les États membres auraient la possibilité d'influencer activement ce développement.

- + La reconnaissance politique du droit humain à un environnement sain a fait naître le besoin de normes solides qui fusionnent les droits humains et les normes environnementales et qui orientent les États dans la lutte contre la triple crise planétaire.

- + Une convention n'est pas soumise aux contraintes du système de la CEDH et de la CSE et offre une grande flexibilité. Elle offre une protection supplémentaire tout en laissant intact le système de la Convention et de la CSE.

- + Une convention pourrait être ouverte à la signature et à la ratification des États non-membres du Conseil de l'Europe. Ses normes pourraient ainsi avoir une influence au-delà de l'Europe.

Commented [A377]: Dans ce contexte, on pourrait également faire référence à la nature du droit à un environnement sain. Il est allégué dans le texte ci-dessus que cette nature se distingue des droits garantis par la CEDH et la CSE. Une nouvelle convention pourrait répondre à la nature du droit à un environnement sains sans contraintes.

d) Arguments contre une convention

- En l'absence d'arrêts contraignants rendus par une entité faisant autorité telle que la Cour européenne des droits de l'homme, l'impasse dans laquelle se trouve actuellement la perception de l'inaction des États face à la triple crise planétaire ne cessera pas.

Commented [A378]: La convention pourrait prévoir un mécanisme qui prend des décisions contraignantes.

Page 55**b) Raisons couvertes**

- ✗ Comblent les lacunes dans la protection internationale des droits humains

Un mécanisme de surveillance autonome n'améliorerait pas les possibilités pour les individus de faire valoir leurs droits à la protection de l'environnement.

Commented [A379]: Est-ce que cette raison ne va pas au-delà de la possibilité pour l'individues de faire valoir leurs droits ? Un mécanisme qui rend des décisions contraignantes est un aspect de cette raison.

Page 56**c) Arguments en faveur d'un mécanisme de suivi autonome**

- + Un suivi non contraignant est plus approprié dans un domaine où des choix politiques difficiles doivent être faits.

- + Le droit humain à un environnement sain se développe actuellement. Un mécanisme de surveillance autonome qui agit par le dialogue et les recommandations est le mieux adapté à l'état actuel du droit international.
- + Un mécanisme de suivi autonome dont le travail est basé sur le dialogue est bien adapté pour fournir des conseils et un soutien aux États membres sur des questions transversales telles que les droits humains et l'environnement.
- + Un commissaire aux droits humains et à l'environnement pourrait intervenir en tant que tierce partie dans des affaires environnementales devant la Cour européenne des droits de l'homme.
- + Possibilité d'atteindre la société dans son ensemble (cf. p. 59 ci-dessus)

MEXICO / MEXIQUE

Pages 30-31

88. Two treaties recognise the right to a healthy environment in an indirect manner: the Aarhus Convention³⁵⁵ at the European level, and, more recently, the Escazú Agreement³⁵⁶ 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”.³⁵⁷ They are widely seen as codifying procedural components of the right to a clean environment.³⁵⁸ While the Aarhus Convention obliges States to ensure that environmental human rights defenders shall not be penalised, persecuted or harassed in any way, the Escazú Agreement goes one step further by including specific rights of

³⁵⁵ 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).

³⁵⁶ 2018 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean; see, however, the understanding expressed by the United Kingdom of Great Britain and Northern Ireland upon signature and confirmed upon ratification that Article 1 is understood “to express an aspiration”, rather than a right.

³⁵⁷ 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.”

³⁵⁸ See Peters, Clean and Healthy Environment, Right to, International Protection, MPEPIL, January 2021, para. 10.

environmental human rights defenders,³⁵⁹ in order to strengthen democracy, access rights and sustainable development.³⁶⁰

89. 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.³⁶¹ 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.³⁶² According to para. 18 of the Annex to decision I/7, the 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*.³⁶³ A similar regime is established under Article 18 of the Escazú Agreement,³⁶⁴ which establishes the Committee to Support Implementation and Compliance as a subsidiary body of the Conference of the Parties to the Escazú Agreement. This Committee is of a consultative and transparent nature, non-adversarial, non-judicial and non-punitive, and shall review compliance of the provisions of the Agreement and formulate recommendations, ensuring the significant participation of the public and paying particular attention to the national capacities and circumstances of the Parties.³⁶⁵

³⁵⁹ 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.

³⁶⁰ Escazú Agreement, preambular text and Decision I/6 of the first meeting of the Conference of the Parties to the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean.

³⁶¹ 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>.

³⁶² 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.

³⁶³ Report of the first meeting of the Parties, Decision I/7, ECE/MP.PP/2/Add.8, para 18 “the expiry of twelve months from either the date of adoption of this decision or from the date of the entry into force of the Convention with respect to a Party, whichever is the later, communications may be brought before the Committee by one or more members of the public concerning that Party's compliance with the Convention, unless that Party has notified the Depositary in writing by the end of the applicable period that it is unable to accept, for a period of not more than four years, the consideration of such communications by the Committee.”

³⁶⁴ The Committee to Support Implementation and Compliance is a subsidiary body of the Conference of the Parties to the Escazú Agreement to promote the implementation of the Agreement and support Parties in that regard. It is of a consultative and transparent nature, non-adversarial, non-judicial and non-punitive. The rules relating to the structure and functions of the Committee were adopted at the first meeting of the Conference of the Parties; see further https://repositorio.cepal.org/bitstream/handle/11362/48347/3/S2200737_en.pdf.

³⁶⁵ Escazú Agreement, Article 18, and Decision I/3 of the first meeting of the Conference of the Parties to the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean.

PARLIAMENTARY ASSEMBLY / ASSEMBLÉE PARLEMENTAIRE

Simon Moutquin fut rapporteur sur « Ancrer le droit à un environnement sain: la nécessité d'une action renforcée du Conseil de l'Europe ». Il est le représentant de la commission des questions sociales, de la santé et du développement durable et du réseau de parlementaires de référence pour le droit à un environnement sain dans les travaux du CDDH-ENV.

Le Réseau de parlementaires pour le droit à un environnement sain a été créé il y a presque deux ans afin de porter la reconnaissance du droit à un environnement sûr, propre, sain et durable à l'intérieur et à l'extérieur du Conseil de l'Europe.

Le Rapporteur de l'APCE insiste sur la nécessité de prendre en compte la triple-crise environnementale dans la protection des droits humains assurée par le Conseil de l'Europe. Au-delà des déclarations, il considère que l'Organisation doit adopter rapidement des mesures résolues en matière des droits environnementaux, afin de pouvoir contribuer réellement au redressement de la situation face à l'urgence à laquelle nous sommes confrontée.

L'APCE rappelle que les propositions qu'elle a formulées ont vocation à être mises en œuvre simultanément, en particulier l'adoption d'un protocole à la CEDH et la préparation d'une nouvelle convention. Elle insiste sur les quatre objectifs figurant dans la résolution : sûr, propre, sain et durable. Ces adjectifs ont chacun une utilité, y compris « sûr » qui ne figure pas dans le rapport.

L'APCE encourage, d'une façon générale, l'utilisation d'une langue épïcène en français en utilisant par exemple l'expression « droits humains » à chaque fois que cela est possible en français.

Paragraphe 2

Remplacer « passif » par « historique » qui ne rend pas hommage aux actions passées et à l'actif du Conseil de l'Europe en matière de droits environnementaux.

Paragraphe 12

L'Assemblée prône le droit à un environnement sûr, propre, sain et durable. L'adhésion aux quatre adjectifs a été renouvelée à l'occasion de :

Résolution 2493 (2023) et Recommandation 2251 (2023) sur « Stratégies politiques permettant de prévenir les catastrophes naturelles, de s'y préparer et d'y faire face »

Il convient de noter que les quatre propositions de l'APCE sont simultanées. Ainsi, elle est partisane à la fois des protocoles à la CEDH et à la Charte sociale européenne et à un nouvel instrument de type ECRI.

Paragraphe 116

L'APCE insiste sur la nécessité de renforcer les capacités et connaissance de l'environnement au sein des greffes afin de mieux appréhender la triple-crise.

Paragraphe 121

La création d'un crime environnemental a pour fonction de combler certaines lacunes observées.

Paragraphe 122

« ...La victime se trouve SUR le territoire... »

Paragraphe 123

Certes, mais la multiplication des affaires devant les tribunaux nationaux et probablement à terme devant la Cour européenne des droits de l'homme ne laissera pas d'autres choix que de relever le défi lancé par non seulement des enfants, des jeunes mais aussi des personnes âgées (affaire suisse).

Paragraphe 140

En ce qui concerne les avantages en faveur d'un protocole, il convient d'insister sur les effets d'un tel droit sur le cadre politique et législatif. A l'Assemblée, nous poursuivons l'idée que la politique est décidée avant tout dans les parlements plutôt que dans les tribunaux.

Paragraphe 146

...(ECRI) qui associe à la fois des **aspects juridiques et politiques** en s'appuyant sur un **réseau d'experts nationaux** susceptible de mobiliser des spécialistes du droit, du climat, de la santé, de l'environnement, de la biodiversité, des catastrophes naturelles, des ingénieurs et des économistes désignés par les États membres. Par ailleurs, l'administration du comité pourrait être confiée à d'une représentante spéciale de la Secrétaire générale sur l'environnement et les droits humains. Ce choix d'organisation donnerait de la **visibilité** au Comité de Reykjavik et afficherait une certaine **flexibilité**. Ce choix offrirait au nouvel outil du Conseil de l'Europe la possibilité de **coordonner** les efforts de l'ensemble des entités du Conseil de l'Europe.

Paragraphe 147

Ses tâches pourraient, dans un premier temps, s'organiser autour de trois piliers. Le Comité serait susceptible de collecter pays par pays des **exemples de bonne pratique**, de les promouvoir ; de faire des **recommandations concrètes** aux États ; et enfin d'assurer une **coopération renforcée avec la société civile et la jeunesse** en matière de droits environnementaux.

De l'audition de Mme Corinne Le Quéré par le réseau le 18 septembre 2023, le rapporteur retient qu'il existe un réseau international des conseils pour le climat (ICCN) lancé lors de la COP26 à Glasgow. Il note qu'il n'a pas de capacité d'évaluation.

Les bonnes pratiques devraient mettre en exergue la concrétisation d'un environnement sûr, propre, sain et durable dans les États membres du Conseil de l'Europe et la confirmation de la trajectoire de baisse des émissions de gaz à effet de serre, la bonne mise en œuvre des politiques et mesures pour réduire les émissions de gaz à effet de serre et développer les puits de carbone. Elles sont identifiées, par pays, à l'occasion de **tables rondes** associant les autorités et la société civile nationales et dédiées à la reconnaissance d'un environnement sûr, propre, sain et durable. En plus de recueillir des exemples de bonne pratique susceptibles d'inspirer l'ensemble des États membres, les tables rondes donnent l'occasion aux gouvernements d'assurer la promotion de leurs activités en matière de droit à un environnement sûr, propre, sain et durable.

La validation de ces bonnes pratiques pourrait être liée à la remise d'un prix Reykjavik du Conseil de l'Europe.

Les recommandations générales devraient être organisée de façon thématique et contenir les grandes lignes de l'ensemble des mesures à mettre en place par les autorités nationales afin de réaliser le droit à l'environnement sûr, propre, sain et durable à l'échelle continentale

Le Comité de Reykjavik devrait assurer la mise en réseau des bonnes volontés partageant la même envie de concrétiser l'application et la défense des droits environnementaux. Ce réseau pourrait d'une part prendre la forme d'une réunion annuelle avec la société civile et les conseils consultatifs nationaux sur le climat conseils et d'autre part la mise en œuvre d'un programme dédié à l'attention de la jeunesse (enfants et jeunes adultes).



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2. Additional Protocol to the European Social Charter

141. To address the linkages between human rights and the environment, a An Additional Protocol to the European Social Charter codifying the human right to a clean, healthy and sustainable environment has also been proposed.

[...]

f)d) Covered rationales

[...]

x Addressing gaps with respect to the international responsibilities of private actors

As the European Social Charter imposes human rights obligations on States, an Additional Protocol would not contain obligations for private entities and therefore would not address the alleged gaps in the responsibility of private actors even though indirectly, through positive obligations, States could be held responsible for the omissions or actions of private actors within their jurisdiction, thereby being forced to address gaps with respect to the responsibilities of private actors.

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✓ Improving national protection of the right to a healthy environment

~~To a certain extent, A~~ An Additional Protocol could work as a pull-factor in increasing the level of environmental protection in member States. A new instrument on human rights and the environment could encourage States that have not yet adopted the right to do so and encourage those States that have already adopted the right to take further active measures to implement it.

[...]

c) Arguments for an Additional Protocol

- + The European Social Charter system is well suited to incorporate a right to a healthy environment. It encompasses two mechanisms – the reporting procedure and the collective complaints procedure – which are particularly suited for obligations concerning collective human interests such as protection of the environment. Complaints may be lodged without domestic remedies having been exhausted and without the complainant organisation necessarily being a victim of the alleged violation.
- + A binding codification of the right to a healthy environment combined with a monitoring mechanism will contribute decisively to the further development of the human right to a healthy environment. Member States would have the possibility actively to influence the development.
- + Non-binding monitoring combining a reporting procedure and a complaints procedure is more appropriate in an area where difficult policy choices need to be made.
- + Charter provisions are framed in terms of both positive and negative obligations. This is suitable/appropriate for a binding instrument like an Additional Protocol codifying the human right to a clean, healthy and sustainable environment which requires both types of obligations.

d) Arguments against an Additional Protocol

- The impact of an Additional Protocol ~~might~~would be ~~very~~ limited as only a minority small number of States (16) have ratified the collective complaints procedure (on the other hand, all 42 States Parties to the Charter are subject to the reporting procedure).

Possible solutions:

- States could be given the option to accept the collective complaints procedure only in relation to the Additional Protocol on the right to a clean, healthy and sustainable environment; in case of States that have not yet accepted the collective complaints procedure, they will be subject to monitoring by the ECSR within the framework of the reporting procedure in relation to the rights enshrined in the Additional Protocol.

The protection offered by the Charter is furthermore limited by the restriction on its personal scope.

Possible solutions:

- States may unilaterally decide to extend the personal scope of the Charter.³⁶⁶
- States Parties may decide to amend the Charter by removing the restriction on the personal scope set out in the Appendix and extend the reach of rights either for the Charter as a whole or solely for an Additional Protocol on the right to a clean, healthy and sustainable environment.
- The ECSR has considered that the restriction on the personal scope should not be read in such a way as to deprive foreigners coming within the category of irregularly present migrants of the protection of the most basic rights enshrined in the Charter or to impair their fundamental rights such as the right to life or to physical integrity or the right to human dignity.³⁶⁷ Thus, it ~~may~~ can be envisaged that in certain situations the ECSR ~~will~~ may extend the personal scope of the right to a healthy environment should it be added to the ESC via an Additional Protocol.

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- Without binding judgments by an authoritative entity such as the ECtHR, the current deadlock of perceived inaction of States concerning the triple planetary crisis will not be resolved~~ease~~.
- Individuals do not~~would not~~ have the possibility to seize the ECSR~~European Social Committee~~.
- ~~It may be~~ argued that the right to a healthy environment should not be identified only as an 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,~~

³⁶⁶ See the Appendix to the European Social Charter, paragraph 1 second sentence: "This interpretation would not prejudice the extension of similar facilities to other persons by any of the Parties."

³⁶⁷ International Federation of Human Rights Leagues v. France, Complaint No. 14/2003, decision on the merits of 8 September 2004, §§ 30 and 31; Defence for Children International v. the Netherlands, Complaint No. 47/2008, decision on the merits of 20 October 2009, §19

| ~~healthy and sustainable environment could not be covered by the Charter alone.~~³⁶⁸

REGISTRY OF THE COURT / GREFFE DE LA COUR

The Registry of the Court would propose that the last paragraph 52 of the Draft Report be amended to read as follows:

“... It should be noted that the Court develops its interpretation of the text of the Convention **and its Protocols** in response to legal, social, ethical or scientific developments, by application of the “living instrument doctrine” according to which “the Convention is a living instrument which [...] must be interpreted in the light of present-day conditions”.^[1] This allows the Court to respond to new challenges **if their subject-matter falls within the ECHR normative framework. In this sense,** the Court’s caselaw concerning **some** environmental matters is not set in stone. **[last sentence deleted]**

The rationale behind this suggestion is that the development of the Court’s jurisprudence stays within the normative limits of the legal framework in place.

One of the triple planetary crises to which the Report refers is that of biodiversity loss.

Biodiversity is not covered by the current legal framework and the Court has many times explicitly stated that the general protection of the environment (or wild habitats) is not enshrined in the ECHR and is not within the Court’s jurisdiction (see, for example, *Kyrtatos v. Greece*).

It is thus inaccurate to predict that the Court “may further develop its jurisprudence” to “accommodate” the concerns of the biodiversity crisis.

Regarding the remaining two crises (climate change and pollution), the conclusion is more nuanced. The rulings in the climate cases, currently pending, will determine the extent to which the current legal framework is or is not fit to address the issue of climate change.

ENNHRI

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c) Arguments for an Additional Protocol

[...]

+ It could aid the Court in balancing environmental human rights interests with other rights/ interests. This could be greatly beneficial to Court when assessing the adequacy of interferences in rights that pursue climate or environmental aims, that are likely to increase when the green shift is implemented.

[...]

+ Only judicial intervention may break the current deadlock of perceived inaction of States concerning the triple planetary crisis by making governments accountable. When the absence of effective measures from State parties as to environmental or climate protection leads to the violation of fundamental rights, it is fully in accordance with the Court’s mandate and competence to hear the complaints and remedy the breach of human rights safeguards.

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d) Arguments against an Additional Protocol

- To allow effective implementation of the right to a healthy environment, major adjustments to basic tenets of the Convention system would be needed. It has been argued that special provisions would be required *inter alia* on the jurisdiction requirement, the victim status requirement, the need to exhaust domestic remedies and the Court’s remedial powers as

Commented [A381]: Some arguments are artificial and not related to the right to a healthy environment particularly. .

^[1] *Tyrer v. the United Kingdom*, application no. 5856/72, judgment of 25 April 1978, § 31.

well to evidentiary standards and processes. Deviating from established Convention principles with respect to the right to a healthy environment, however, would lead to a fragmentation of applicable standards that could be difficult to justify.

Possible solutions:

- Explicitly state in the mandate for the development of an additional protocol that the protocol should not deviate from the need to exhaust domestic remedies, and as far as possible ensure consistency with established Convention principles, adapted to the particularities of environmental law.

- The right to a healthy environment is different in nature from the other Convention rights that essentially protect subjective interests of individual human beings, insofar as it arguably also recognises and protects the collective interest in a clean, healthy and sustainable environment and/or the intrinsic value of the environment as such. The ECHR system provides a system of access to justice for the pursuit of subjective rights. It is not well suited for the enforcement of collective interests or ecocentric objectives. At the same time, it is said that the process of “greening human rights” has contributed to new interpretations of the content of human rights law with respect to environmental protection. Moreover, both HRC Resolution 48/13 and GA Resolution 76/300 specifically noted that “the right to a clean, healthy and sustainable environment is related to other rights and existing international law”.³⁷² It is thus argued that the recognition of the right to a healthy environment in a protocol to the Convention 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.³⁷³ Introduction of the right to a healthy environment would therefore provide a stronger basis for the Court to consider environmental claims and to strengthen its existing environmental human rights jurisprudence.³⁷⁴

Commented [A382]: Why this question is included when in the same paragraph, it states that this has evolved; so this is not an argument against, I would say.

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Possible solutions:

- Detailed definition of the nature, content and implications of the right by member States
- Focus on whether an effective framework to regulate environmental issues are in place, for example based on criteria such as (i) regulation; (ii) supervision and monitoring of whether regulations are implemented; (iii) procedural guarantees such as environmental impact assessments and access to information, not the particular choice of means to address an environmental situation

- Progressive Court judgments imposing policy choices on States based on the right to a healthy environment risk not being implemented. In the long run, this undermines the Court’s authority.

Possible solutions:

- Prior judicial practice in other regional human rights protection systems and on the domestic level in relation to a standalone right to a healthy environment

Commented [A383]: This is not a particular issue for the right to a healthy environment, but all human rights and court judgements in general. As it currently stands, it might give another impression. Suggest to remove this in this context, or take in as a possible solution that the Court and the CoE system could use its established systems (procedures to ensure the follow-up of judgements) and established interpretative principles (European consensus and margin of appreciation) to address this issue.

Commented [A384]: This point concerns the functioning of the Court in general and not in connection with the right to a healthy environment

³⁷² See UN HRC Resolution 48/13 point 2 and UN GA Resolution 76/300 point 2.

³⁷³ Marcos Orellana, “Quality Control of the Right to a Healthy Environment,” in *The Human Right to a Healthy Environment*, pp. 169, 176.

³⁷⁴ Extended Summary, Knox, p. 27

suggests that courts can operationalize such a right in their judicial decisions without imposing policy choices on States.

- The Court has limited capacities which are already stretched thin. An Additional Protocol would further increase the number of pending applications.

Possible solutions:

- *additional financial resources for the ECtHR*
- *standing for NGO's could limit the burden on the Court's environmental case-load*

- The Court lacks the scientific expertise required to decide environmental cases. 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. For example, the Court has an established practice of adjudicating on cases related to issues of medical negligence where expert opinions play a key role.³⁷⁵

Possible solutions:

- stronger reliance on expert testimony, closer engagement with the scientific evidence and data available in the case file, already provided for under Annex to the Rules of Court (concerning investigations)

111.

- The content of the right to a healthy environment is uncertain; there is a need for robust standard-setting. Including it in the Convention gives the Court leeway to interpret it in its own way.

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b) Covered rationales

[...]

- ✓ Encouraging the development of an environment-friendly jurisprudence

The recognition of the right to a clean, healthy and sustainable environment in a non-binding Council of Europe instrument could influence the development of the Court's jurisprudence to a limited extent. Such an instrument would not be binding on the Court and therefore it is unlikely that it would have an appreciable impact on the Court's jurisprudence.

APPENDIX II

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4. National human rights institutions and climate change

The Global Alliance of National Human Rights Institutions (GANHRI) Annual Conference in December 2020 issued an [outcome statement on climate change and human rights](#), highlighting that "climate change and its impacts are one of the greatest challenges of the day, directly and indirectly impacting on the full enjoyment of human rights, including social, economic and cultural rights as well as civil and political rights, the right to development and the right to a healthy environment". The statement also notes that a "human rights-based approach leads to more

Commented [A385]: True but above all it remains a problem which concerns all human rights. The perception of the climate crisis from a strictly scientific angle must not obscure its dimension linked to human rights

Commented [A386]: Again, this is a general issue for human rights, which are openly and generally formulated because they are meant to last over time and in different societies. Might not his be dealt with based on the same interpretative principles the Court already uses?

Commented [A387]: As was noted by many experts who met the members, this is an argument that could be raised in the 1990s but certainly not now. Especially since the Human Rights Council and the UN General Assembly have recognized the right to a healthy environment, not to mention the reports of the Special Rapporteurs which clearly define this right and its contours. And the fact that several States in the world, including in Europe, have recognized the right to a healthy environment.

³⁷⁵ Lopes de Sousa Fernandes v. Portugal (GC), application no. 56080/13, judgment of 19 December 2017 para 217.

sustainable and effective climate action and climate policies” and calls on States to “ratify and implement international and regional human rights treaties, taking into account the recommendations and guidance from the UN Human Rights Council, UN Special Procedures and UN Treaty Bodies.” In this statement, NHRIs committed to contributing to climate action efforts in line with human rights obligations and principles of non-discrimination and participation, by reporting to and advising government bodies as well as other stakeholders on a human rights-based approach to climate mitigation and adaptation measures.

Under the [Secretary-General's Call to Action for Human Rights](#), OHCHR serves as one of the co-leading agencies on the action area of [rights of future generations](#), especially climate justice. OHCHR together with UNEP, UNDP and GANHRI is working to support National Human Rights Institutions (NHRIs) with respect to climate change. As the GANHRI Annual Conference outcome statement on climate change emphasized, NHRIs can play a key role in supporting more effective rights-based climate action, and monitoring and reporting on the human rights impacts of climate change including in support of the global stocktake and other UNFCCC processes. The National Human Rights Committee of Qatar, the Office of the UN High Commissioner for Human Rights, the UN Development Program, the League of Arab States, and GANHRI recently co-organised a conference on climate change and human rights.

The most recent resolution of the Human Rights Council on NHRIs, adopted in October 2022, has specifically recognised and welcomed the critical role of NHRIs and their networks in promoting and safeguarding human rights in the context of climate change.

In a statement adopted at the General Meeting of the Global Alliance of National Human Rights Institutions (GANHRI) in December 2020, NHRIs around the world committed to engage – collectively through GANHRI and their regional networks - in national, regional and international processes to promote human rights and enhance climate action. In 2021, the European Network of National Human Rights Institutions (ENNHRI) – bringing together over 40 National Human Rights Institutions across Europe - has established its Working Group on Climate Crisis and Human Rights to further support exchange and cooperation among NHRIs and to actively engage in processes and debates on climate change and human rights. This Working Group consists of representatives of 14 NHRIs from Belgium, Croatia, Denmark, Finland, France, Georgia, Germany, Hungary, Northern Ireland, Norway, Romania, Scotland and Slovakia.

ENNHRI's Working Group on Climate Crisis and Human Rights fed into ENNHRI's Paper 'Climate Change and Human Rights in the European Context' published in 2021. The Paper provides a global and European-level analysis of the nexus between climate change and human rights. Detailed country-specific information from twelve ENNHRI member institutions further illustrates the national climate policies and practices in selected European countries by reference to human rights standards. This includes an overview of national targets and progress on the reduction of greenhouse gas emissions in relation to the 2015 Paris Agreement to stabilise the rise in global average temperature to between 1.5°C and 2°C above pre-industrial levels. The Paper also assesses how the harm caused by greenhouse gas emissions may engage a State's responsibility under several articles of the ECHR.

The European Network of National Human Rights Institutions (ENNHRI) so far submitted third-party interventions in four climate cases before the European Court of Human Rights (*Duarte Agostinho and Others v. Portugal and Others*, *Verein KlimaSeniorinnen Schweiz and others v. Switzerland*, *Carême v. France*, and *Greenpeace Nordic and others v. Norway*). These

Commented [A388]: Source: Page 2 of the GANHRI statement; it is worth highlighting the commitment made by NHRIs through this statement.

submissions underline States' responsibility to combat climate change effectively in order to protect the right to life and the right to private and family life under the European Convention on Human Rights (ECHR) Articles 2 and 8. Moreover, in two of the above cases (*Duarte Agostinho and Others v. Portugal and Others, Verein KlimaSeniorinnen Schweiz and others v. Switzerland*) ENNHRI delivered oral interventions in the hearings before the Grand Chamber of the European Court of Human Rights.

ENNHRI has been represented by its members at meetings of the CDDH Drafting Group on Human Rights and Environment (CDDH-ENV) in the role of the observer, actively contributing to the development of the Recommendation CM/Rec(2022)20 to member States on human rights and the protection of the environment as well as to this CDDH report on the need for and feasibility of a further instrument or instruments on human rights and the environment. During CDDH-ENV meetings ENNHRI underlined the need for a binding instrument on human rights and the right to a healthy environment.

Commented [A389]: ENNHRI kindly requests that information on ENNHRI's work on climate and human rights, as proposed in track changes mode, to be included in the appendix II of this report, as proposed.

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4. Broadly speaking, the instruments above directly address environmental protection. They can be divided into three groups. The first group, ETS. Nos. 065, 087, 102, 123 and 125 (plus subsequent protocols and revisions), addresses the protection of animals in the context of farming and scientific experimentation and as pets. The second group, ETS Nos. 064, 104 and 176 (plus a subsequent protocol, CETS No. 219), addresses public policy to protect and preserve aspects of the natural environment. The third group, ETS Nos. 150 and 172 sought to establish legal protection of the environment through civil and criminal liability.
 5. As regards human rights and the environment, the Council of Europe's key instruments are the European Convention on Human Rights (the Convention) and European Social Charter (the Charter) which provide important protection for with respect to human rights and 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 ensure protection, respect and fulfilment of numerous rights against harm that emerges in the environmental context (often referred to as the "greening of human rights"). In the case of the Convention, ~~the~~ applicants have relied on the right to life, the prohibition of inhuman and degrading treatment, the right to respect for private and family life and the home, right to property, and so-called participatory (procedural) rights such as freedom of expression (including access to information), freedom of assembly, right to a fair hearing (including access to a court) and the right to an effective remedy. 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.
- [...]
7. The Council of Europe Convention on Access to Official Documents (Tromsø Convention) which guarantees a general right to access official documents held by public authorities, including on environmental matters, is another noteworthy binding instrument. The

Tromsø Convention is the only international legal instrument ~~that which~~ guarantees a general right to access official documents held by public authorities. Its preamble refers in particular to the 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). The Tromsø Convention currently has 14 Parties: Albania, Armenia, Bosnia and Herzegovina, Estonia, Finland, Hungary, Iceland, Lithuania, Montenegro, Norway, the Republic of Moldova, Slovenia, Sweden and Ukraine.

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10. The Council of Europe organised the 9th edition of the World Forum for Democracy in November 2021~~0~~ around explored the question, “Can Democracy Save the Environment?”. After much discussion and debate, recommendations were made to the Council of Europe to introduce the right to a clean, healthy and safe environment among the list of human rights protected by the Council of Europe, along with the inclusion of crimes against such right in the criminal codes of the member-states.

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13. At the Fourth Summit (“Reykjavík Summit”) held between 16-17 May 2023, the Heads of State and Government of the Council of Europe, in the Reykjavík Declaration, underlined the urgency of taking co-ordinated action to protect the environment by countering the triple planetary crisis of pollution, climate change, and loss of biodiversity, and committed to strengthening the Council of Europe’s work on the human rights aspects of the environment based on recognition of the right to a clean, healthy and sustainable environment as a human right, in line with United Nations General Assembly Resolution 76/300 “The human right to a clean, healthy and sustainable environment”. To this end, they initiated the “Reykjavik Process”, and encouraged the establishment of a new intergovernmental committee on environment and human rights (“Reykjavík Committee”) and called for rapid conclusion of the CDDH’s feasibility study.
14. 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 on human rights and the environment, as well as the possible content of any such instrument(s).
15. 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).
16. At the same meeting, the CDDH-ENV adopted a questionnaire to be shared with member States on the recognition and protection of the right to a healthy environment in national law.³⁷⁶ The following 27 member States replied to this questionnaire: 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.

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We continue to await a summary of these expert views. Given how aligned they were on the need, it would be helpful to be able to provide or at least reference such a summary.

³⁷⁶ See Appendix I.

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17. At its 6th meeting, the CDDH-ENV adopted a draft outline for the report on the need for and feasibility of a further instrument or instruments in the field of human rights and the environment.

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While it may be useful orientation at this point, it seems unnecessary to include paragraphs 17 and 18 in the final draft.

Page 7**II. Potential need for a further instrument or instruments**

20. Today humanity is facing an unprecedented challenge in the form of environmental degradation and the triple planetary crisis of climate change,³⁷⁷ nature and biodiversity loss,³⁷⁸ and pollution.³⁷⁹ The human rights of individuals and communities around the world are affected and the human rights 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.
21. The climate crisis has been defined as the greatest threat to human rights by the former United Nations High Commissioner for Human Rights.³⁸⁰ This “suicide by proxy” as labelled by António Guterres” during the COP15 in 2022 requires a rights-based approach to mitigation and adaptation, according to the report published by the Intergovernmental Panel on Climate Change (IPCC) which was politically endorsed by all States Parties to the Council of Europe.³⁸¹ The alarming decline in biodiversity,³⁸² coupled with air and water pollution's detrimental impact on human well-being,³⁸³ further underscores the need for environmental protection to ensure the full enjoyment of human rights.

³⁷⁷ 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. Lösschke, 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. Lösschke, 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)

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³⁷⁸ 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.

³⁷⁹ 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).

³⁸⁰ 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>

³⁸¹ 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].

³⁸² 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

³⁸³ World Health Organization, Household air pollution, 28 November 2022, available at <https://www.who.int/news-room/fact-sheets/detail/household-air-pollution-and-health>; European Environment Agency (EEA), Air quality in Europe 2021, available at <https://www.eea.europa.eu/publications/air-quality-in-europe-2021/health-impacts-of-air-pollution>;

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22. These are common concerns requiring urgent action, including as a matter of inter-generational equity and solidarity.³⁸⁴
23. 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 ~~recognising~~ the connection between human rights and the environment are quickly expanding. ~~These linkages have~~ also been recognised by the Parliamentary Assembly³⁸⁵ and the Committee of Ministers³⁸⁶ of the Council of Europe. ~~The right to a clean, healthy and sustainable environment has resulted in the increased recognition is already explicitly recognised – at the national, regional³⁸⁷ and international³⁸⁸ levels, including in resolutions adopted by the UN General Assembly (2022) and the UN Human Rights Council (2021) – of the right to a clean, healthy and sustainable environment.~~
- [...]
25. There is an extensive regulatory framework concerning the protection of the environment that is already in place and producing effects both under national and international law. The question nevertheless remains whether the level of protection ~~and enforcement~~ afforded by the already ~~existing~~ international instruments, ~~and in particular, those of the Council of Europe~~ is sufficient to meet the critical ~~and growing~~ human rights challenges posed by the triple planetary crisis.

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

26. The Committee of Ministers, in Recommendation CM/Rec(2022)20 to member States on human rights and the protection of the environment, has already recognised that “measures to address the triple planetary crisis of climate change, loss of biodiversity and pollution are essential to the better enjoyment of human rights” and that “life and well-

EEA, Air quality in Europe 2022, available at <https://www.eea.europa.eu/publications/air-quality-in-europe-2022>; EEA, Air pollution levels across Europe still not safe, especially for children, April 2023 <https://www.eea.europa.eu/en/newsroom/news/air-pollution-levels-across-europe>; and Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Human rights and the global water crisis: water pollution, water scarcity and water-related disasters, 19 January 2021, UN Doc. No. A/HRC/46/28. See also Office of the High Commissioner for Human Rights, The water crisis has a “major impact on human rights” expert say, 2021, available at <https://www.ohchr.org/en/stories/2021/03/water-crisis-has-major-impact-human-rights-expert-says>.

³⁸⁴ CM/Rec(2022)20.

³⁸⁵ PACE Recommendation 2211(2021), *Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe* (September 2021).

³⁸⁶ 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).

³⁸⁷ 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.

³⁸⁸ 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.

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This sentence should be redrafted as now it gives the impression that increased recognition is a result of PA's and CoM's actions....

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Add a footnote mentioning that the R2HE is recognized in domestic law by more than 80 percent (156 out of 193) of States Members of the United Nations. See, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, HRC, 30 December 2019, A/HRC/43/53.

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This question should be reframed. The question is, rather, whether there is a need for and whether it is feasible for a further instrument from the COE. Of course, this need may be informed by insufficient protection from other instruments internationally, but it may also be based on other rationales, such as the need for integrated, intersecting and holistic work by the COE. Even if there were strong and enforceable UN standards, there would still be a need for the CoE to reflect these, for consistency and for the CoE system to keep pace with other IL.

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The CoE should prioritise and assess its own areas of competency and mandates (as an independent IO established to uphold human rights, democracy, and the rule of law in Europe), rather than assessing the adequacy and the potential of protection offered by other international instruments. The question at hand is whether the CoE's current legal instruments can provide sufficient protection for human rights in the context of the triple planetary crisis, thereby aligning with the advancements achieved in the recognition and safeguarding of the R2HE by other international organizations and instruments.

being on our planet are contingent on humanity's collective capacity to guarantee both human rights and a clean, healthy and sustainable environment for present and future generations". – in other words, the Recommendation acknowledges that effective protection of the environment depends on full enjoyment of human rights, and full enjoyment of human rights depends on effective protection of the environment. It is nevertheless instructive to review the evolution of this awareness at the international level, and to examine in more detail the way in which this connection has been articulated.

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30. It should be noted that, whilst these important instruments recognise in different ways the inter-connection between environmental issues and various aspects of human rights, they do not establish specific standards or protection mechanisms in this respect.

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33. HRC Resolution 48/13 politically recognised for the first time at the global level the right to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of other human rights, while simultaneously encouraging States to cooperate on the implementation of this right. In its preamble, Resolution 48/13 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." Resolution 48/13 also 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.

34. Based on the text adopted by the HRC, the UN General Assembly, on 28 July 2022, with a recorded vote of 161 States (including those of all Council of Europe member States) in favour, zero against and eight abstentions, adopted resolution 76/300 recognising the right to a clean, healthy and sustainable environment as a human right (GA Resolution).³⁸⁹ Among the co-sponsors of the GA Resolution were 24 Council of Europe member States.³⁹⁰ The GA Resolution was also accompanied by a number of explanations of votes, including of Council of Europe member States. The present report goes into more detail on these votes in paragraph 94 below.

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37. Judicial and non-judicial bodies within the UN system are also interpreting or being requested to interpret and apply existing international human rights obligations to environmental damage, including in the context of climate change.

³⁸⁹ UN General Assembly resolution, The human right to a clean, healthy and sustainable environment, 26 July 2022, A/RES/76/300.

³⁹⁰ 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, Sweden, Switzerland and Ukraine.

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Perhaps in this section there should be references to the recent Sharm el-Sheikh Implementation Plan and the Kunming-Montreal Global Biodiversity Framework. Adopted by consensus at Climate COP 27 and Biodiversity COP 15 respectively, both include explicit references to the right to a clean, healthy and sustainable environment.

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This is a contentious statement. For example, by requiring reliance on the best available science, the applicability of specific standards may be quite clear, even though not detailed in the text. Likewise, there are many other MEAs not mentioned here (desertification, ozone, etc), which can be used to inform States' human rights obligations, as per UN Human Rights Committee General Comment 36 on the right to life at para 62. As worded, this section is misleading.

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The resolution may not be legally binding but it is a UN resolution, not just a political statement. A resolution is a resolution: the descriptor seems pejorative.

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Or else, cut "for the first time"

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Inaccurate. In fact, 38 Council of Europe member States were co-sponsors. Albania, Austria, Belgium, Denmark, Estonia, Hungary, Iceland, Ireland, Italy, Liechtenstein, Lithuania, Republic of Moldova, San Marino and Sweden should be added to footnote 30. See A/76/PV.97

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While it may be helpful orientation at this point, this seems unnecessary to include in the final draft.

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They are not only being requested to interpret these obligations: they are doing so of their own accord, e.g. the recent CRC GC

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The narrowing of focus to climate change is problematic and out of place here.

38. On 29 March 2023, the UN GA adopted by consensus a resolution formally requesting an advisory opinion from the International Court of Justice (ICJ) on the obligations of States in respect of climate change.³⁹¹ In particular, this request asked the following questions: (a) what are 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 greenhouse gases for States and for present and future generations?; and (b) what are 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, with respect to States, including, in particular, small island developing States [...] and Peoples and individuals of the present and future generations affected by the adverse effects of climate change? By referring explicitly to international human rights instruments including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), this request ~~may provide~~ an opportunity for the ICJ to ~~interpret/make pronouncements on~~ States' international human rights obligations with respect to climate change.

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40. 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."³⁹²
41. The UN Human Rights Committee, which supervises the ICCPR, released a General Comment on the right to life in 2018, emphasising that States' obligation to protect life also entails that they should take adequate measures to alleviate societal conditions that may threaten life, such as environmental degradation.³⁹³ In 2019, 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.³⁹⁴ In the same year, 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.³⁹⁵
42. UN treaty bodies are increasingly being asked to decide climate and other environmental cases.³⁹⁶ In *Sacchi et al. v Argentina, Brazil, France, Germany and Turkey*, the UN Committee on the Rights of the Child was asked whether the respondents had violated children's rights under the UN Convention on the Rights of the Child by making insufficient

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The CESCR General Comment No. 26 (2022) on land states in para . 1 that "The sustainable use of land is essential to ensure the right to a clean, healthy and sustainable environment and to promote the right to development, among other rights."

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There should also be a para on "General recommendation No. 39 (2022) on the Rights of Indigenous Women and Girls" of the Committee on the Elimination of Discrimination Against Women, which includes multiple references to the right to a clean, healthy and sustainable environment.

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ICCPR General Comment No. 36 (2018) on the right to life emphasized that "environmental degradation, climate change, and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life", Human Rights Committee, General Comment No. 36 (2018) on article 6 of the ICCPR, on the right to life, 30 October 2018.

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Not only specifically climate. See, e.g., pesticide cases, e.g., *Portillo Cecers* (HRC)

³⁹¹ UN General Assembly resolution A/RES/77/276, Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change, 29 March 2023.

³⁹² General Comment No. 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4 (2000), para. 15.

³⁹³ General comment no. 36 para. 26.

³⁹⁴ *Portillo Cáceres and others v. Paraguay*, No. 2751/2016 (2019), para. 7.5.

³⁹⁵ <https://www.ohchr.org/en/statements/2019/09/five-un-human-rights-treaty-bodies-issue-joint-statement-human-rights-and>

³⁹⁶ Human Rights Committee, *Teitiota v. New Zealand*, UN Doc. CCPR/C/127/D/2728/2016 (2020); UN Committee on the Rights of the Child, *Sacchi et al v Argentina et al.*, UN Doc. CRC/C/88/D/107/2019 (2021).

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cuts to greenhouse gas emissions and failing to use available tools to protect children from the adverse effects of climate change. 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.³⁹⁷ In the case of *Teitiota v. New Zealand*, the UN Human Rights Committee in September 2020 found that countries may not deport individuals seeking asylum who face climate change-induced conditions that violate the right to life; it did not, however, find a violation in the particular circumstances of the case. In September 2022, the UN Human Rights Committee found that Australia's failure ~~adequately~~ adequately protect Indigenous Peoples in the Torres Islanders ~~by taking insufficient adaptation measures~~ against the adverse impacts of climate change amounted to a breach of Article 17 (right to respect for private, family and home life) and 27 (rights of ethnic, religious or linguistic minorities) of the ICCPR.³⁹⁸

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45. UN special procedures have also been ~~created~~ developed to ~~consider~~ specifically address human rights and environmental concerns. The HRC established the mandate for the Independent Expert on human rights and the environment in 2012³⁹⁹ which was subsequently extended.⁴⁰⁰ 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. In 2018, the Special Rapporteur presented Framework Principles on Human Rights and the Environment, which summarise States' human rights obligations relating to the environment.⁴⁰¹
46. The Special Rapporteur on the promotion and protection of human rights in the context of climate change was established by the UN Human Rights Council at its 48th session in October 2021. This Special Rapporteur, among other things, studies the impact of climate change on human rights, provides recommendations to address it, promotes human rights integration in climate policies, and raises awareness.
47. The Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes was established in 1995. The UN Commission on Human Rights created the mandate to investigate the human rights consequences of hazardous substances and toxic waste. This encompassed issues such as the illicit trafficking and release of dangerous products during conflicts, as well as shipbreaking, medical waste, and extractive industries. In 2011, the UN Human Rights Council recognized the danger of hazardous substances and waste to human rights. It expanded the mandate to cover the entire life-cycle of such products. The mandate was last renewed in 2020 through resolution A/HRC/RES/45/17.⁴⁰²

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Mention of the Special Rapporteur on Environmental Defenders should similarly be included below in the section concerning Aarhus.

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³⁹⁷ UN Committee on the Rights of the Child, CRC/88/D/104/2018.

³⁹⁸ 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.

³⁹⁹ HRC resolution 19/10.

⁴⁰⁰ HRC resolution 48/14.

⁴⁰¹ 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.

⁴⁰² HRC Resolution A/HRC/RES/45/17.

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48. As can be seen from the list above, UN organs and special procedures are engaged on a wide scale with the examination of the interaction between human rights and the protection of the environment with a special focus on environmental degradation and the triple planetary crisis⁴⁰³. It should be noted, however, that, these mechanisms do not adopt binding decisions, and as a result their effectiveness as human rights protection mechanisms, including in respect of their interpretation and application of human rights in the environmental context, is somewhat limited.
- iii. Human rights and environmental protection in Council of Europe instruments
49. 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.
50. While the Convention does not contain an explicit right to a clean, healthy and sustainable environment, the Court has so far ruled in over 300 environment-related cases invoking issues under Articles 2, 3, 6(1), 8, 10, 11, 13 and Article 1 of Protocol No.1 to the Convention.⁴⁰⁴
51. 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) associated caselaw concerns issues such as environmental risk and access to information; industrial pollution; noise pollution; mobile phone antennas; emission from diesel vehicles; soil and water contamination; urban development; 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 obligation to tolerate hunting on the land owned by those who object to hunting on ideological grounds 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 concerns can already be examined by the Court, framed in terms of Convention rights.
52. 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" according to which "the Convention is a living instrument which [...] must be interpreted in the light of present-day conditions".⁴⁰⁵ This allows the Court to respond to new challenges. As a result, the Court's caselaw concerning environmental

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The same (not binding) could be said about the UN treaty bodies. Its not very clear here whether the comment that decisions are not binding refers only to the special procedures or also to the TBs. It would be better to specifically mention TBS - of course their decisions are authoritative interpretations of binding IL obligations so therefore carry some legal weight, but they are not directly binding in the same way as an ECtHR judgment

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It is very odd that none of the six reports of the Special Rapporteur, based on state practice and jurisprudence from across the world that detail the substantive elements of the right to a clean, healthy and sustainable environment are mentioned here.

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Is this concept meant to be used interchangeably with protection of the human right to a clean, healthy, and sustainable environment? This seems rather confusing.

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What are we meant to understand as the significance of this number (closer to 400) in relation to the absence of explicit protection of the human right to a clean, healthy, and sustainable environment? Perhaps it would be useful to make the implication clearer.

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It would be more fitting to refer here to the numerous cases where the Court has found that the right to property may be lawfully restricted for environmental protection. See e.g. *Fredin v. Sweden*; *Pine Valley Developments Ltd and Others v. Ireland* etc

⁴⁰³ Appendix II of the present report contains a comprehensive compilation of work on environment, climate change and human rights as prepared by the United Nations Human Rights Office.

⁴⁰⁴ 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).

⁴⁰⁵ *Tyrer v. the United Kingdom*, application no. 5856/72, judgment of 25 April 1978, § 31.

matters is not set in stone. The Court may further develop its jurisprudence in response to the triple planetary crisis to accommodate environmental concerns more broadly.

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54. 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 to effectively protect the applicant's human rights guaranteed by the Convention resulting from by their alleged non-compliance with their commitments under the 2015 Paris Agreement or the alleged inadequacy of their greenhouse gas emission reduction targets.⁴⁰⁶

[...]

57. 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,⁴⁰⁷ and to protect the population against, for example, nuclear hazards⁴⁰⁸ as well as against health risks related to asbestos.⁴⁰⁹ 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.⁴¹⁰ 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 11.⁴¹¹ The ECSR has also emphasised that States have positive obligations in order to combat air pollution.⁴¹² States are required to take measures to remove the causes of ill-health from environmental ~~threats~~ threats such as pollution, within a reasonable time, by showing measurable progress and making best possible use of the resources at their disposal.⁴¹³

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iii. Human rights and environmental protection in the European Union

62. 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 and justiciable fundamental right to a clean, healthy and sustainable environment within the legal system of the European Union.

[...]

64. 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.

⁴⁰⁶ Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.

⁴⁰⁷ Ibid. §§ 203, 209, 210 and 215.

⁴⁰⁸ Conclusions XV-2 (2001), France; Conclusions XV-2 (2001), Denmark.

⁴⁰⁹ Conclusions XVII-2 (2005), Latvia.

⁴¹⁰ Conclusions 2013, Georgia.

⁴¹¹ Conclusions XVII-2 (2005), Portugal.

⁴¹² *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, Complaint No.30/2005, decision on the merits of 6 December 2006, §203; and the CDDH Manual on Human Rights and the Environment (3rd Edition, adopted in 2021), p. 118.

⁴¹³ Ibid., §204.

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However, it must also be acknowledged, on the other hand, that many respondent states (e.g., in *Klimaseniorinnen and Agostinho*) argue that protection of the right to a clean, healthy, and sustainable environment is limited by it being only indirect. As the Court itself has declared: "There is no explicit right in the Convention to a clean and quiet environment" See *Hatton and others v. the UK*, § 96, 2003, also *Kyrtatos c. Greece*, § 52.

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The differences between these cases are significant. Some (like *Klimaseniorinnen, Mullner*) are focussed on actual impacts on the applicants, and rely both on substantive and procedural rights, including that of access to justice/remedy. Others (like *Duarte Agostinho*) concern (amongst others) projected and extraterritorial impacts. It would be more useful to engage with the nuances in approach between these cases, with a view to better understanding the questions that are being asked of the Court. These are denotative of the scale of the problem confronting COE members and of the limits of the ECHR in addressing these problems. It's unclear that anything helpful is provided by the broad strokes used here.

Commented [A416]:

What about Article 6?

Commented [A417]:

This requires redrafting: the failure to adhere to their positive obligations results from the ineffective protection of applicants' human rights

Commented [A418]:

The body of EU environmental law is made up of a range of regulatory instruments. They may cover: (i) specific aspects of environmental protection (e.g. Air Quality and Water Framework Directive), (ii) activities that may have an adverse impact on the environment (Industrial Emissions Directive or Plant Protection Products Regulation), (iii) the protection of specific areas or species (the Habitats Directives, or, (iv) horizontal rules, such as the Environmental Impact Assessment Directive or the Aarhus Regulation. However, the conditions for the enforcement of these instruments are not uniform (they may vary from one framework to the other). Accordingly, they present procedural and substantive challenges for individuals whose position is impaired by the actions or omissions of EU and national authorities or economic operators.

Commented [A419]:

It's unclear why a partial account of the numerous EU law instruments providing sectorial protection of the environment should be included: the EU is not the COE. What bearing does it have on the findings of this study?

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[...]

66. The European Union and its member States are also parties to the Aarhus Convention. The EU is implementing the provisions of the Aarhus Convention through various EU secondary legislations, directives.⁴¹⁴ The EU's institutions ensure the implementation of the Aarhus Convention in their decision-making processes through Regulation No 1367/2006 (Aarhus Regulation).⁴¹⁵ The Court of Justice of the EU (CJEU) has also addressed access to justice in environmental matters even before the EU's ratification of the Aarhus Convention.⁴¹⁶ Since 2005, the CJEU has ruled on approximately 50 cases related to access to justice in environmental matters, covering various aspects such as standing for individuals and environmental non-governmental organizations (ENGOs).⁴¹⁷ The CJEU has clarified, among others, that national procedures should be interpreted to enable NGO standing in environmental cases and that NGOs can represent the environmental interest based on both national legislation and EU environmental law with direct effect. These judgments align with the European Green Deal's goal of strengthening access to justice for the public.⁴¹⁸

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B. Overview of existing Council of Europe and other international instruments that address the environment and/or human rights

Pages 19 – 25

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This is a disputable claim. The Aarhus Convention Compliance Committee has found that the EU falls short of its obligations under the Aarhus Convention. Even after the reform of the Aarhus Regulation in 2021, NGOs are still fighting for broader access to justice on environmental matters before EU courts. Meanwhile, a number of studies have testified to the ongoing barriers to access to justice in environmental matters at the Member State level. See the excellent summary here: <https://www.clientearth.org/projects/access-to-justice-for-a-greener-europe/updates/access-to-justice-to-enforce-the-european-green-deal/>

Instrument	Legal Status	Material Scope	Monitoring Mechanism	Complaints procedure (Individual or Collective)	Commented [A421]: What are the criteria behind the selection of the international law instruments that are included in the table?	monitoring member States mechanism's decisions
Council of Europe						

⁴¹⁴ Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, available at : <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003L0004&qid=1615481237607>; and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ L 156, 25.6.2003, p. 17), available at: <https://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=celex%3A32003L0035>.

⁴¹⁵ Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ L 264, 25.9.2006, p. 13), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32006R1367>.

⁴¹⁶ C-431/92 Grosskrotzenburg (1995), C-72/95 Kraaijeveld (1996), C-435/97 WWF (1999) and C-201/02 Delena Wells (2004).

⁴¹⁷ C-237/07 Janecek (2008), C-75/08 Mellor (2009), C-263/09 Djurgården (2010), C-240/09 LZ or Slovak Brown Bear (2011), C-115/09 Trianel (2011), C-128/09 Boxus, C-182/10 Solvay (2012), C-72/12 Altrip (2014), C-404/13 ClientEarth (2014), and C-243/15 Slovak Brown Bear II (2016).

⁴¹⁸ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: The European Green Deal. Brussels 11.12.2019. COM/2019/640 final, p. 30, available at: <https://eur-lex.europa.eu/legalcontent/EN/TXT/?qid=1596443911913&uri=CELEX:52019DC0640#document2>

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. In principle no <i>actio popularis</i> .	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 (in two procedures: the periodical reporting procedure and the collective complaints procedure)	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>
1979 Convention on the Conservation of European Wildlife and Natural Habitats (the Bern Convention, ETS No. 104),	Binding	Aims to ensure conservation of wild flora and fauna and their habitats, with special attention to endangered and vulnerable species	Standing Committee; arbitral tribunal	Individual and collective complaints through the case file system; reporting system;	Non-binding	45
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)

Commented [A422]:

The ECHR is the only instrument assisted by an international adjudicatory body: it seems rather obvious that it differs in nature from the compliance mechanisms established under the other instruments. By lining the instruments up in this way, the table suggest its goal is comparative, but there can be no serious comparison between a treaty like the ECHR with a mere COP decision, like the Glasgow Pact.

1998 Convention on the Protection of the Environment through Criminal Law (ETS No. 172)	Binding	The Convention aims to protect the environment by 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 Justice in Environmental Matters (Aarhus Convention) (2161 UNTS 447)	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 individuals to make communications.	Non-binding	41
1966 International Covenant on Civil and Political Rights (999 UNTS)	Binding	The ICCPR does not explicitly recognise 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 recognise 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

1989 Convention on the Rights of the Child (1577 UNTS)	Binding	The CRC establishes safeguards for children's rights concerning the environment, encompassing the child's right to highest attainable standard of health, including the right to nutritious food and safe drinking water, to issues of environmental pollution, as well as ensuring the child's right to information on environmental health issues and incorporates environmental education as an educational objective. In General comment No. 36, the Committee on the Rights of the Child stated that children have the right to a clean, healthy and sustainable environment which is implicit in the Convention on the Rights of the Child	Committee on the Rights of the Child	Individual complaint procedure	Non-binding	46
1992 Convention on Biological Diversity (1760 UNTS)	Binding	The CBD recognises the close and traditional dependence of many indigenous and local communities on biological resources, as well as the vital role of women and the need for their full participation at all levels of policy-making and implementation for biological diversity conservation and that the conservation and sustainable use of biological diversity is of critical importance for meeting the food, health, and other needs of the growing world population.				
1992 United Nations Framework Convention on Climate Change and 2015 Paris Agreement (3256 UNTS)	Binding	The Paris Agreement – a legal instrument adopted under the UNFCCC – 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, including the establishment of a Consultative Committee of Experts to be chaired by the Secretary-General of the United Nations.	No complaints mechanism	-	27
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.	-	-	-	-

2019 Human Rights Council Resolution 40/11	Non-binding	Recognising the contribution of environmental human rights defenders to the enjoyment of human rights, environmental protection and sustainable development;				
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	-	-	-	-
2022 Human Rights Council Resolution 50/9	Non-binding	On realising 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 recognises the human right to a clean, healthy and sustainable environment.	-	-	-	-
2022 UN General Assembly Resolution (76/300)	Non-binding	This UNGA resolution recognises the human right to a clean, healthy and sustainable environment.	-	-	-	-
2023 Human Rights Council Resolution 52/35	Non-binding	On the 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.	-	-	-	-
United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295)	Non-binding	The Declaration provides, among others, that Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.	-	-	-	-
2021 Glasgow Climate Pact	Non-binding	The Glasgow Climate Pact urges Parties to swiftly begin implementing the Glasgow work programme on Action for Climate Empowerment, respecting, promoting and considering their respective obligations on human rights, as well as gender equality and empowerment of women	-	-	-	-

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

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C. Material Scope of the human right to a clean, healthy and sustainable environment

71. Although the right to a clean, healthy and sustainable environment has been recognised ~~politically~~ at global level in UN General Assembly Resolution 76/300 (see further below), it is not yet legally protected at either global or European level. This means that there is not yet any common understanding amongst Council of Europe member States of the “nature, content and implications” of the right (to use the language of Recommendation CM/Rec(2022)20).

72. The present section therefore gives an overview of existing ~~codifications, political endorsements and jurisprudential~~ recognition of the right to a clean, healthy and sustainable environment in different jurisdictions. It uses the term “right to a healthy environment” as a generic, “shorthand” term that incorporates the qualifying adjectives used in the different instruments.⁴¹⁹ The aim of this section is to clarify the material scope of this right as it is currently set out in various instruments so as to provide a basis for the considerations in Section III of this report.

i. The right to a healthy environment at international level

73. The right to a healthy environment is recognised in (i) regional human rights instruments, (ii) certain multilateral environmental agreements (MEAs); (iii) resolutions of international and regional organisations; (iv) judicial pronouncements (advisory opinions and judgments); and (v) ~~other~~ soft law documents.

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75. 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.⁴²⁰ The African Commission ~~has~~ held that article 24 of the African Charter requires 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.”⁴²¹ To comply with the spirit of Article 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

⁴¹⁹ See Centre for International Environmental Law, ‘Interpreting the Meaning of “Safe”, “Clean”, “Healthy”, and “Sustainable”, in the Right to Environment, 21 May 2020.

⁴²⁰ Communication 155/96, ACHPR/COMM/A044/1 of 27 May 2002, para. 49.

⁴²¹ See above, para. 52.

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.⁴²²

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79. As the title indicates, the Protocol of San Salvador conceives of the right to live in a healthy environment as an economic, social and cultural right that is to be realized progressively and is dependent on available resources.⁴²³ [The American Declaration on the Rights of Indigenous Peoples also expressly recognizes the right to a healthy environment.](#)⁴²⁴ The progressive realisation of the rights contained in the Protocol of San Salvador is monitored through a State reporting system.⁴²⁵ Individual applications are only possible with respect to two specific rights, which do not include the right to live in a healthy environment.⁴²⁶

80. 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 to everyone, without any discrimination, a healthy environment in which to live; (2) the duty to guarantee to 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.⁴²⁷ It also established that the exercise of the right to live in a healthy environment must be governed by the criteria of availability, accessibility, sustainability, acceptability and adaptability,⁴²⁸ as is the case of other economic, social and cultural rights.

81. In its Advisory Opinion OC-23/17 of 2017 (2017 Advisory Opinion) the Inter-American Court of Human Rights (IACtHR) held that the American Convention, despite its silence on the issue, includes a right to a healthy environment.⁴²⁹ The IACtHR stated that the right to a healthy environment is protected as an economic, social and cultural right under Article 26 of the American Convention,⁴³⁰ thereby rendering the right justiciable. The IACtHR expressly recognized that the human right to a healthy environment, as thus protected, "has both an individual and

⁴²² See above, para. 53.

⁴²³ 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.

⁴²⁴ [Organization of American States, American Declaration on the Rights of Indigenous Peoples, adopted on 15 June 2016, article XIX, OEA/Ser.P AG/RES.2888 \(XLVI-O/16\)](#)

⁴²⁵ See *ibid.* Article 19.

⁴²⁶ *Ibid.*, Article 19 (6).

⁴²⁷ "Progress Indicators: Second Group of Rights," November 5, 2013, OEA/Ser.L/XXV.2.1, GT/PSS/doc.9/13, para. 26.

⁴²⁸ See above, para. 29.

⁴²⁹ IACtHR, Advisory Opinion OC-23/17 of 15 November 2017 requested by the Republic of Colombia – The Environment and Human Rights.

⁴³⁰ **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.

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The jurisprudence has evolved. The right to a healthy environment was recognised initially at the Inter-American System as an ESC right. However in the OC23, mentioned below, the Court expressly mentions that the right to a healthy environment is an autonomous right. Also, relevant, "The Court reiterates the interdependence and indivisibility of the civil and political rights, and the economic, social and cultural rights, because they should be understood integrally and comprehensively as human rights, with no order of precedence, that are enforceable in all cases before the competent authorities." para. 57. It is best to edit this paragraph, taking out the distinction of the right as ESC right, as it is not relevant for the Court anymore and is confusing.

Commented [A427]:

This is valuable, but it is in the right place?

Commented [A428]:

suggest moving this phrase to the paragraph below, referring to the Working Group of the Protocol

Commented [A429]:

Does not seem relevant here, as its describing the status of the right regionally. In any case, while this was true when the Protocol was ratified, recent decisions say otherwise, in particular OC23. Also, this phrase is inconsistent with par. 80 below, were it says that it is justiciable.

Commented [A430]:

Delete this paragraph as it refers to what the Working Group on the San Salvador Protocol defines as State duties. Replace them with what the Court, the entity with jurisdiction, defines as States obligations.

collective connotation”.⁴³¹ It also stressed that the right is autonomous, distinct from the environmental content of other rights such as the right to life and the right to personal integrity,⁴³² in that it

[...]

82. The Court also considered that the full enjoyment of human rights depends on a suitable environment and that there are some rights more susceptible to be impacted by environmental degradation, such as the right to life, personal integrity, health or property, or other rights whose exercise supports better environmental policy making, such as freedom of expression and association, information and right to an effective remedy.⁴³³ In addition, the Court recognised that some groups that are already in a vulnerable situation will experience environmental degradation with greater force. “States are legally obliged to confront these vulnerabilities based on the principle of equality and non-discrimination”⁴³⁴. ~~Consequently, the IACtHR held that, based on~~

⁴³¹ IACtHR, AO 23-2017, para. 59.

⁴³² IACtHR, AO 23-2017, para. 63.

⁴³³ See above, para 64.

⁴³⁴ Ibid. para. 67.

~~standards of international human rights law,⁴³⁵ “States are legally obliged to confront these vulnerabilities based on the principle of equality and non-discrimination”.⁴³⁶~~

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84. The ~~consideration inclusion~~ of ~~the~~ right to a healthy environment ~~as an autonomous right and as an in the~~ economic, social and cultural rights of Article 26 was confirmed in the context of contentious proceedings in the case of *Lhaka Honhat*.⁴³⁷ The case involved over ninety ~~indigenous~~ indigenous communities seeking recognition of their land ownership rights. The petition was prompted by various issues, including the construction of public works, exploitation of hydrocarbons, and the occurrence of illegal activities within their traditional territory.⁴³⁸ The IACtHR found violations of the autonomous right to a healthy environment, as well as the rights to food, water, and cultural identity based on the case's facts.⁴³⁹ Besides other remedies, the court explicitly ordered the State to address illegal logging, which, despite being an important step, was hindered by the IACtHR's exclusion of its implementation from judicial supervision. In addition, the IACtHR reaffirmed that the right to a healthy environment “constitutes a universal interest”, is “a fundamental right for the existence of humanity”, and is “an autonomous right”.⁴⁴⁰ 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.⁴⁴¹ Relying on the customary international law principle of the duty of prevention, the Court pointed out that “States are bound to use all the means at their disposal to avoid activities under its jurisdiction causing significant harm to the environment.” The IACtHR listed the following as some of the measures that must be taken in relation to activities that could potentially cause harm: (i) regulation; (ii) supervision and monitoring; (iii) requirement and approval of environmental impact assessments; (iv) establishment of contingency plans, and (v) mitigation when environmental damage has occurred.⁴⁴²

Commented [A431]:

The Court reaffirmed in this decision that the RHE is autonomous and an ESCRight part of art 26, thus if the distinction is needed, the edits should be made. Don't think the difference is relevant anymore, to this particular document.

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85. Certain issues do not yet seem to have been fully resolved in the IACtHR's practice, such as (i) the exact content and implications of the right; (ii) the balancing of the right against other rights enshrined under the American Convention; (iii) the implications of the IACtHR's approach that the right is both anthropocentric (as a right attaching to human beings) and ecocentric (as a right attaching to the environment and its elements); or (iv) the added value of the right when compared to the right to life and personal integrity.

86. The IACtHR may use the opportunity offered by pending cases⁴⁴³ and a recent request for an Advisory Opinion by Chile and Colombia on States' human rights obligations in the context of climate change to further elucidate the contours of the right to a healthy environment.⁴⁴⁴

[...]

88. Two treaties recognise the right to a healthy environment ~~in an indirect manner~~: the Aarhus Convention⁴⁴⁵ at the European level, and, more recently, the Escazú Agreement⁴⁴⁶ 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”.⁴⁴⁷ They are widely seen as codifying procedural components of the right to a clean environment.⁴⁴⁸ While the Aarhus Convention obliges States to ensure that environmental human rights defenders shall not be penalised, persecuted or harassed in any way, the Escazú Agreement goes one step further by including specific rights of environmental human rights defenders.⁴⁴⁹

Commented [A432]:

Not sure what's the purpose of these paragraphs. On the exact content, the IACtHR has said that: the right is autonomous, has an individual and collective component, and has refer to several situations and States obligations, including to respect, prevent and fulfill the right in connection with rights to life and integrity, and defined obligations of States to prevent severe environmental damages, the obligation to regulate, control and monitor activities that might impact the environment, request environmental and impact assessments by independent and objective parties, among others. Suggest to delete these.

Commented [A433]:

This is a grossly inaccurate depiction of the Escazu Agreement. Article 4.1 states unambiguously that “1. Each Party shall guarantee the right of every person to live in a healthy environment and any other universally-recognized human right related to the present Agreement.” How is that indirect??

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Even Aarhus art 1. says '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.'

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92. The resolution in itself does not provide the response to all the questions that might arise from the recognition of the right, such as the nature of its relationship with other human rights. This makes it all the more important that existing human rights frameworks give further consideration to the matter and provide further clarity on the scope and implications of the right.

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How could it? Did the Universal Declaration of Human Rights "provide the response to all the questions that might arise from the recognition of the right"?

United Nations General Assembly Resolution 76/300 of July 2022

93. In its essential elements⁴⁵⁰, the GA Resolution – co-sponsored by more than 100 States and adopted with 161 votes in favour to none against with eight abstentions – differs only

⁴³⁵ Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, January 15, 2009, UN Doc. A/HRC/10/61, para. 42, and Human Rights Council, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, February 1, 2016, UN Doc. A/HRC/31/52, para. 81.

⁴³⁶ ~~Ibid. para. 67.~~

⁴³⁷ IACtHR, Case of the Indigenous Communities of the Lhaka Honhat Association v. Argentina, judgment of 6 February 2020, par. 202.

⁴³⁸ Ibid. paras 2, 171, 186.

⁴³⁹ Ibid. para. 289.

⁴⁴⁰ Ibid. para. 203.

⁴⁴¹ See above, para. 207 et seq.

⁴⁴² Ibid. para. 208.

⁴⁴³ In particular, *the Community of La Oroya v. Peru*, pending on decision by the IACtHR.

⁴⁴⁴ See joint advisory opinion request of Chile and Colombia, dated 9 January 2023, http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2023/20230109_18528_petition-1.pdf (unofficial translation).

⁴⁴⁵ 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).

⁴⁴⁶ 2018 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean; see, however, the understanding expressed by the United Kingdom of Great Britain and Northern Ireland upon signature and confirmed upon ratification that Article 1 is understood "to express an aspiration", rather than a right.

⁴⁴⁷ 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."

⁴⁴⁸ See Peters, Clean and Healthy Environment, Right to, International Protection, MPEPIL, January 2021, para. 10.

⁴⁴⁹ 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.

⁴⁵⁰ GA Resolution, 1 – 3.

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marginally from the wording of the HRC Resolution. It is important to note, however, that 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, rather it clearly states in paragraph 1 of its operative part the recognition of the right to a clean, healthy and sustainable environment as a human right thereby underlining that it is a stand-alone right.

94. The GA Resolution was accompanied by a number of explanations of votes. 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”.⁴⁵¹ 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”.⁴⁵²

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104. The General Comment, having earlier referred to the work of the UN Special Rapporteur, then sets out substantive elements of the right, including “clean air, a safe and stable climate, healthy ecosystems and biodiversity, safe and sufficient water, healthy and sustainable food and non-toxic environments”.⁴⁵³ On this basis, the Committee considers that States should immediately take certain specific actions towards the realisation of this right for children.⁴⁵⁴ The General Comment also underlines the importance of procedural elements of the right, including access to information, participation in decision making and child-friendly access to justice with effective remedies, and calls on States to incorporate children’s right to a clean, healthy and sustainable environment into their national legislation and take adequate measures to implement it.⁴⁵⁵

[...]

107. 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 asked: (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; and (iii) what, if anything, have the domestic courts said about this right in their caselaw?

Page 36

108. To the first question, 20 member States 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

⁴⁵¹ <https://www.gov.uk/government/speeches/explanation-of-vote-on-resolution-on-the-right-to-a-clean-healthy-and-sustainable-environment>

⁴⁵² See the explanation of Norway and Poland on the Right to a Clean, Healthy and Sustainable Environment Resolution, <https://press.un.org/en/2022/ga12437.doc.htm>.

⁴⁵³ Ibid. para 64.

⁴⁵⁴ Ibid. para 65.

⁴⁵⁵ Ibid. para 66.

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This is the second time these two resolutions are compared and contrasted in this short report: it seems it would be enough to do so once well.

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It's not clear why quoting these 3 interventions is relevant or needed. Perhaps if it's felt that such explanations should be included, it would also make sense to balance with statements by supporters of the right explaining why they support it.

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To the contrary, many states and UN entities have mentioned that based on international, regional and national recognition of the right, including in decisions and Constitutions, there is an international agreement on basic elements, including its recognition as a stand-alone right.

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It is unclear how this State reconciles its various criticisms, however, since it seems internally inconsistent to say both that there is no consensus on the legal basis for the right and that it is derived from existing economic and social rights.

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Providing exclusively negative comments gives the impression that the report is biased.

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The adoption of these elements by the CRC is an indication of the value of the six missing thematic reports by the UN SR on the substantive content of the right to a clean, healthy and sustainable environment!

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Why does the study limit itself to this resource when there are so many other more authoritative resources?

member States (Armenia, Austria, Belgium, Denmark, Estonia, Germany, Malta, the Netherlands, Sweden, Switzerland and the UK) answering in the negative. To the third question, 19 member States have answered in the positive by providing examples with 8 (Andorra, Armenia, Denmark, Estonia, Malta, the Netherlands, Sweden and the UK) answering in the negative.

[...]

412-110. The right to a healthy environment is recognised at national level as a human/fundamental right in the clear majority of multiple 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 human 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.

413-111. In common with most constitutional rights guarantees, mMost 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, as is generally the case with respect to human rights.

[...]

113.

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 to cases concerning the direct impact of the triple planetary crisis. National courts in at least one member State seem to consider the right to a healthy environment as being engaged in cases concerning the triple planetary crisis even if no specific consequences for individuals are derived.⁴⁵⁶

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115. 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 their 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) principles⁴⁵⁷ 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 to the questionnaire, effectively shaped in the jurisprudence of the domestic courts. Member States that follow this objective

⁴⁵⁶ The Portuguese Supremo Tribunal de Justiça for example established that the constitutional right to a "healthy environment" also includes the conservation of biodiversity.

⁴⁵⁷ 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.“

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This paragraph appears to reveal a negative bias within the document by failing to identify the States that answered the three questions in the positive and only identifying the minority that answered in the negative.

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"as a human right", why change the language?

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It is unclear why this is stated, since it is true of virtually all human rights.

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There is no real reason why they should: they are constitutional rights guarantees designed for the long term and their durability would be undermined if they were framed solely around current problems. It is for legislation and the courts to elaborate on them further. This is exactly why it is necessary for the COE to do this.

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It is unclear what this statement is based on. The response from Portugal simply provides that "The jurisprudence of the Supremo Tribunal de Justiça has dealt with 109 cases between 1995 and 2020 concerning a wide range of environmental harms, with many referring to the right to a healthy environment. Recently, the Constitutional Court established that the right to a healthy environment includes the conservation of biodiversity." Portugal is also not the only state whose responses reference biodiversity, and climate and pollution are referred to extensively.

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It does not follow automatically that inclusion of the conservation of biodiversity in the right means that the case involved no specific consequences for individuals.

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What about the judgments issued by domestic courts in which they refer to the human rights-based protection of the environment guaranteed by the ECHR and the ECtHR? Example of Urgenda case. It seems coherent to mention them as the HRB protection of the environment performed by the ECtHR has been explored in this document.

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This wording makes it sound like there are many that haven't, but there aren't many.

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Before moving here, it would be helpful to note that 15 Members of the CoE out of 46 have recognised the R2HE in their Constitutions.

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It would be clearer to simply provide the list of States recognizing the R2HE in their constitutions and legislation, as a justiciable human right and an objective

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Besides acknowledging a human right to a healthy environment, constitutions often include provisions on sustainable development, the interests of future

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A new paragraph is needed to avoid creating confusion, as this is not about States failing to recognise the right.

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How is this effectiveness being assessed?

model of environmental protection have reported on substantial jurisprudential evolutions. The combination of traditional fundamental/ human rights with a constitutional principle of environmental protection generates results that are usually associated with the human right to a healthy environment.⁴⁵⁸

h) Conclusion

116. At this point in time, while there is no doubt that the right to a healthy environment is recognised as a justiciable right in several regional human rights systems, its nature, content and implications ~~under international law generally~~, are not yet clearly defined ~~by the Council of Europe~~. The preeminent importance of courts in shaping the contours of the ~~new~~-right is a cross-cutting feature in all jurisdictions examined.

[...]

118. At the national level, 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 permitted 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 bodies⁴⁵⁹, others provide for the possibility of *actio popularis*⁴⁶⁰. ~~Other member States which recognize the right to a healthy environment in their national law, however, do not conceive of the right as being justiciable.~~

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D. Possible rationales for a further instrument or instruments

119. 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 the Council of Europe frameworks – member States' international legal obligations~~

a) Gaps in ~~European international~~ human rights law

120. One line of argumentation focuses on gaps in the human rights system and in particular the system ~~and procedural requirements~~ of the Convention and the Charter.

The European Convention on Human Rights

121. ~~The current jurisprudence of the Court and the procedural and material requirements that need to be met when litigating human rights cases before the Court may establish complex obstacles in environmental cases. 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: "[c]laims 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."~~⁴⁶¹

⁴⁵⁸ 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.

⁴⁵⁹ Estonia, Norway, Poland, Slovak Republic.

⁴⁶⁰ Latvia and Portugal.

⁴⁶¹ Ibid., 1, 3.

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What does this mean? The nature of human rights is that they are universal and inalienable; indivisible; interdependent and interrelated. What is the question exactly?

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What is the exception here?

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Please identify which States are being referred to.

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The section fails to address the gaps and instead seems to be organised around the concerns raised below about an additional protocol.

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European

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The start here should be on the absence of the explicit recognition of the autonomous right in the Convention

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These are not the primary nor central arguments/rationales for recognition of the right within the European Convention on Human Rights. They are important but peripheral issues of Convention general principles and procedure. It is not expected that adding a new Convention right or even a new instrument would solve them. For example, no one would expect a new right or instrument not to require the exhaustion of domestic remedies. These issues are misplaced here.

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As showed by the 300 cases dealt by the court, these complex obstacles can overcome by the Court.

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What is this based on? Also, it is an odd/narrow focus from which to start this section, which is not about climate change in particular

Commented [A465]:

Footnote reference is unclear

122. The following are perceived as limitations of the Convention system as a means to address the human rights impact of the triple planetary crisis:

- According to Article 1 of the Convention a State's jurisdiction within the meaning of this Article is primarily territorial. Consequently, the victim of an alleged Convention violation needs to be within a member State's territorial jurisdiction. This occurs primarily where the victim is within the territory of the State.⁴⁶² Exceptionally, extraterritorial jurisdiction may be established if the victim is outside of a State's territory, but under the State's authority and control over either territory or individuals. Such jurisdiction has been established for example, in cases of military occupation outside the national territory, or extra-territorial operations by state officials, or where a state intercepts a vessel on the high seas. It can also apply in some circumstances where a state's actions on its own territory produce effects elsewhere.
- While on the one hand States in the ongoing climate cases argue that there are problems of extraterritoriality, climate litigants argue that the alleged violation of the Convention by the State(s) is not the production of extra-territorial GHG emissions; rather it is the failure to adopt the necessary legislative framework within the country. Thus, no extra-territorial conduct is at issue; the impugned conduct is within the borders of the State(s), even if the effects may be felt in whole or in part abroad. This is in line also with evolving norms of international law and the practice of the Contracting States, such as the 2015 Oslo Principles on Global Climate Change Obligations which hold that as part of the "Obligation of States, every state is required to reduce the GHG emissions within its jurisdiction or control to the permissible quantum within the shortest time feasible" (Art. II.B.13,) and that "States must regulate GHG emissions in their jurisdictions or under their control to meet their obligations set forth in these Principles" (Art. II.B.24,).⁴⁶³ Cases of transboundary harm and climate change typically pose particular issues for extraterritorial jurisdictionity problems as the pollution originates in one State but impacts individuals in

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The focus should be broader on the human right to a clean, healthy, and sustainable environment. This shift to the specific context of the triple planetary crisis and even more narrowly climate change does not address the topic fully.

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The prior text underplays the extent of extraterritorial jurisdiction. The revised test better reflects how the extraterritoriality jurisprudence has developed.

Cases to footnote:
Loizidou v Turkey
Al-Saadoon and Mufdhi v UK
Al-Skeini v UK
Hirsi Jamaa v Italy
Soering v UK

As well as the general information note of the court :
https://ks.echr.coe.int/documents/d/echr-ks/guide_art_1_eng

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Rather than starting with extraterritorial considerations, it would make more sense to first consider what states can do within their jurisdiction.

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can cut these words (not specific to climate change) since cases of transboundary harm by definition extend beyond territory lines.... Climate change is not the only type of environmental harm that is transboundary and yet the court has managed to decide over 300 environmentally related cases

Commented [A470]:

There's no case example proving that there are indeed extraterritoriality problems... because there have been no decided climate cases at the ECtHR. However, this was a key argument of the Respondent States in Agostinho and the Court, while not deciding on the matter, did refuse to dismiss the claim based on problems of extraterritoriality. Indeed, as argued by the Klimaseniorinnen, "the impugned conduct is within the borders of the Respondent, even if the effects may be felt in whole or in part abroad", citing *Nada v. Switzerland*, no. 10593/08, §§117-123 and *TILMANN ALTWICKER*, *Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts*, *European Journal of International Law* Volume 29 (2), Jul. 2018, p. 592

⁴⁶² *Ukraine v. Russia* (re Crimea) (dec.) [GC], 2020, § 345).

⁴⁶³ *Nada v. Switzerland*, no. 10593/08, §§117-123; *TILMANN ALTWICKER*, *Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts*, *European Journal of International Law* Volume 29 (2), Jul. 2018, p. 592 and *Expert Group on Global Climate Obligations*, *Oslo Principles on Global Climate Change Obligations*, *The Hague* 2015

another state.⁴⁶⁴ There is no territorial control and no jurisdiction under the personal unlike the UN Committee on the Rights of the Child and the IACtHR⁴⁶⁷, the Court has not accepted control over the source of a harm as capable of establishing jurisdiction under Article 1.

- Article 34 of the ECHR excludes from the Court's jurisdiction any *actio popularis*, that is to say, any public-interest applications that would not have any bearing on the applicant's individual rights. At present, an applicant must claim to have been the victim of a violation of a right protected under the Convention or its Protocols.

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- As to the issue of future generations, under the current normative framework, the Court only has the discretion to accept the standing of a person who acts on behalf of a direct or indirect victim of an alleged violation.⁴⁶⁸ In contrast, outside of the Convention system, future generations' interests have been protected by institutions like the Hungarian Ombudsperson for Future Generations, who is permitted by local law to initiate or participate in legal procedures.⁴⁶⁹ It is argued that such protection would be needed as the effects of the triple planetary crisis risk the future impairments of fundamental rights.
- The requirement to exhaust domestic remedies, an expression of the principle of subsidiarity, has been disputed by applicants in climate change cases related to human rights and the environment as a procedural obstacle.⁴⁷⁰ As global climate change by its very nature is caused by the acts or omissions of a multitude of States, applicants in cases such as *Duarte Agostinho and others v Portugal and others* argue that an application should 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 argued to be time-consuming and costly.
- The fact that in order to succeed, applicants need to show that environmental degradation directly affects their Convention rights can also be seen as a limitation under the Convention. The case of *Kyrtatos* highlights this gap: in 2003, the Court rejected claims arising from the destruction of a wetland adjacent to the property of the applicants, on the ground that "neither Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such."⁴⁷¹ The Court stated, "even assuming that the environment has been severely damaged by the urban development of the area, 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."⁴⁷² It is argued that binding recognition of the right to a healthy environment would establish the linkage between human beings and natural protection that the *Kyrtatos* decision failed to find⁴⁷³ and would make possible, at least in principle, for claims to be brought for substantial environmental harm that affected the applicants.

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- Another complicating factor argued by some authors is the assumed impossibility of establishing cause and effect when it comes to environmental implications of climate change.⁴⁷⁴ A human rights-based approach to establishing liability for harm purportedly caused by climate change has been criticized on account of the difficulties associated with

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What about potential and indirect victims? They should appear in the analysis of the article 34

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However, the Court has adopted a flexible approach to the issue of who holds civil rights in a series of cases brought by environmental protection associations.

The Convention does not envisage the bringing of an *actio popularis* for the protection of general interest in cases that do not affect applicants personally. However, the associations qualify for protection under Article 6 § 1 of the Convention:

- if they seek recognition of specific rights and interests of their members (Gorraiz Lizarraga and Others v. Spain)
- of particular rights to which they have a claim as legal persons, such as the right to take part in decisions regarding the environment (see Collectif national d'information et d'opposition à l'usine Melox – Collectif Stop Melox and Mox v. France (dec.), 2006),

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What about potential victims?

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by whom?

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Applicants are only obliged to exhaust domestic remedies which are available in theory and in practice at the relevant time.

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This requirement, presented as a limitation, is a general one, not specific to the R2HE. The provided example

Commented [A481]:

The requirement to exhaust domestic remedies is a procedural obstacle in every case. . .

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The analysis should start broader about a healthy environment, instead of leap to this subset of issues.

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If anything, the existence of the aforementioned 300+ cases shows the Court's ability to fill the gap despite this

Commented [A486]:

However, in the same case in the same para. "It might have been otherwise if, for instance, the environmental

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There is a reference to just one author

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The ECtHR itself, in *E. and Others v. UK201 and O'Keefe v Ireland*,²⁰² it explicitly rejected the "but for" test in the

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National Courts of Contracting States themselves have refuted the causation "problem". For instance, the Germ

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This section demonstrates regrettable cherry-picking of the academic literature to support an apparent negative bias.

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This contradicts directly the caselaw of the member States of the Council of Europe, interpreting the ECHR. National

establishing a chain of causation between the act or omission of a state on the one hand, and the infringement of a right suffered by a specific victim or group, on the other.⁴⁷⁵ It has been pointed out that the establishment of legal causation is made particularly challenging by the diffuse nature of greenhouse gas emissions, the indirect nature of many of climate change's impacts on humanity, and, crucially, the scientific uncertainty associated with definitively linking any meteorological event to climate change.⁴⁷⁶ In order for a human right to a healthy environment to be efficient in cases concerning consequences of climate change, it might be necessary to consider how causation, foreseeability and uncertainty can be effectively addressed.

- Experts also posit that the Court's limited power to order individual or general measures is also considered as an obstacle.⁴⁷⁷ While the payment of just satisfaction is adequate to compensate for individual harm resulting from environmental damage, remedial measures of a general nature may be required to put an end to structural environmental problems. Although the Court does occasionally indicate general measures that should be taken in execution of a ~~judgement~~ judgment, in general the choice of measures required to ensure full implementation of a ~~judgement~~ judgment falls to the respondent State, subject to the supervision of the Committee of Ministers under Article 46 of the Convention.
- It is also argued that the precautionary principle and other principles of international environmental law do not play a significant role in the Court's jurisprudence.⁴⁷⁸ While the Court has emphasized the importance of the precautionary principle in *Tatar*⁴⁷⁹, in newer cases the Court has not developed further its use of the precautionary principle.

⁴⁶⁴ Extended summary, Raible, Expert contribution, p. 34.

⁴⁶⁵ Extended summary, Raible, Expert contribution, p. 35.

⁴⁶⁶ *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.

⁴⁶⁷ AO23/2017.

⁴⁶⁸ Câmpeanu, § 103

⁴⁶⁹ The office of Ombudsman for Future Generations was created by the Hungarian Parliament in 2007, see <https://www.ajbh.hu/web/ajbh-en/the-role-of-the-ombudsman>

⁴⁷⁰ Keller/Pershing, Climate Change in Court: Overcoming Procedural Hurdles in Transboundary Environmental Cases, ECHRL 2022, 23, 34.

⁴⁷¹ *Kyrtatos v Greece*, application no. 41666/98, judgment of 22 May 2003, § 52.

⁴⁷² *Ibid.* para. 53.

⁴⁷³ Extended Summary, Knox, expert contribution, p. 27.

⁴⁷⁴ Fanny Thornton, The Absurdity of Relying on Human Rights Law to Go After Emitters, Debating Climate Law and Intergovernmental Panel on Climate Change, 2022.

⁴⁷⁵ Rendering International Human Rights Law Fit for Purpose on Climate Change Human Rights Law Review, Volume 23, Issue 1, March 2023, Climate Change and Human Rights: Amicable or Arrested Development?' (2010) 1 Journal of Human Rights and the Environment.

⁴⁷⁶ *Ibid.*

⁴⁷⁷ 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.

⁴⁷⁸ Extended summary, Keller, Expert contribution, p. 5.

⁴⁷⁹ *Tătar v. Romania*, no. 67021/01, judgment of 27 January 2009, § 120.

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What is efficient? It is not appropriate for this report to start from some specific case in mind and work its way backwards, to try to achieve a pre-desired result in that case. The starting point should be the right and whether and if so how the absence of its recognition leaves a gap. Insofar as this is a free-standing right, it seems beyond obvious that its absence must leave a gap. One can point to the 2023 LSE Report on Climate Litigation and the UNEP and Sabin Center Report totalling the number of cases and impact, and simply in Europe the victories in the Netherlands, Germany, France and Belgium, which all refer to the ECHR.

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The Court's limited powers of enforcement exist in all cases, not just environmental. If this is an argument against it dealing with environmental rights, then it's also an argument against it dealing with torture cases. Indeed, what is stated here about environmental cases specifically can be said about any judgment of the Court. The statement seems to attack the whole of the enforcement machinery of the ECHR. And relative to other international mechanisms, they are strong. Indeed, there is also a lot to be said FOR the Court in this regard. At a minimum, this perspective must be balanced by all the 'good' things the Court offers that can be consolidated by recognition of the right.

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This does not mean that the Court doesn't still apply implicitly in its case law. See, e.g., *Lemke v. Turkey*, no. 17381/02, § 41, and *Genç and Demirgan v. Turkey*, no. 34327/06 and 45165/06, § 30.

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In any event, climate change and its adverse effects are no longer a matter of uncertainty but of acknowledged risks, which have materialized. In line with the position in *Tătar v. Romania*, §121, given that some harms have already materialised, States' positive obligation to prevent irreversible and serious harm to the global climate applies even more so now and in the future.

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- Given that the Convention system does not recognise a right to a healthy environment, only “indisputable” environmental “imperatives” can, in principle, justify interference with certain individual rights and freedoms (for example, right to respect for private life or right to property). Under the Convention and its Protocols, interference with certain rights may be justified if it is necessary in a democratic society “for the protection of the rights and freedoms of others”. In assessing whether a fair balance has been struck between competing interests of the individual and of the community as a whole, the Court distinguishes between the “rights and freedoms” that are guaranteed by the Convention or its Protocols and those that are not. Pursuant to a well-established principle, where the “rights and freedoms” are guaranteed by the Convention or its Protocols, it must be accepted that the need to protect them may lead States to restrict other rights or freedoms likewise set forth in the Convention, and Contracting States must have a broad margin of appreciation in this respect. Instead, where restrictions are imposed on a right or freedom guaranteed by the Convention in order to protect “rights and freedoms” not, as such, enunciated in the Convention or protocols, only indisputable imperatives can justify interference with enjoyment of a Convention right.⁴⁸⁰

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This point here could be clearer. Although this based on an old case, if the objective is to address the substance of the right, this argues in favor of recognising a specific Convention right in order to give environmental rights greater weight in proportionality assessments.

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The importance of this old case, concerning hunting, in informing the caselaw of the ECtHR may be a bit overplayed.

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- It is further argued that the Convention does not provide sufficient protection to environmental human rights defenders, who are a particularly -high-risk group of human rights defenders.⁴⁸¹ While 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,⁴⁸² these efforts are seen by some, including the European Parliament⁴⁸³, as insufficient. It is considered that the recognition of the right to a healthy environment in an Additional Protocol to the Convention would ensure that environmental human rights defenders are considered as defenders of a right that stands on an equal footing 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.

123. 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

⁴⁸⁰ *Chassagnou and others v. France*, app. nos. 25088/94 28331/95 28443/95, GC judgment of 29 April 1999, § 113

⁴⁸¹ Special Rapporteur on the situation of human rights defenders, 24 December 2020, UN Doc. No. A/HRC/46/35, at para. 5.

⁴⁸² 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>.

⁴⁸³ See https://www.europarl.europa.eu/doceo/document/TA-9-2021-0245_EN.html

rights. They illustrate the fact that, in its current form, the Convention system is not an adequate forum to litigate issues of environmental justice more generally.

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ii. Gaps with respect to the international responsibilities of private actors for the environmental impact of their activities

126. Another argument relating to gaps in international legal standards concerns the international responsibilities of private actors for the environmental impact of their activities.⁴⁸⁴ Most environmental pollution, greenhouse gas 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. Standards applicable to States need to be translated into concrete obligations for private entities. International due diligence standards with respect to the environment, however, are not yet firmly anchored in international law. The reference document for the issue of business and human rights, the United Nations Guiding Principles on Business and Human Rights (UNGP), establishes corporate responsibility to respect human rights and highlights States' duty to protect individuals against human rights abuse within their territory by business enterprises. But this document lacks specific and explicit measures relating to environmental issues. These are only covered insofar as environmental issues are human rights issues. The OECD Guidelines for Multinational Enterprises as well as the OECD Due Diligence Guidances on Responsible Business Conduct, by contrast, are broader and include environmental aspects.

127. Some of the due diligence legislation that has been or is being adopted in member States and the European Union goes beyond the UNGP and explicitly incorporates certain environmental aspects into their due diligence obligations without establishing a link to human rights. The UNGP +10 Roadmap⁴⁸⁵ conceives the UNGP as a compass for meeting global challenges, such as just transition and sustainable development, and refers 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.

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130. Given the character of the right to a healthy environment as a developing right, a rationale for a new instrument could be seen in the possibility for member States to shape the right proactively by defining its contours and content as well as its relationship with other human rights for the Council of Europe legal space. This would not only increase legal certainty in the Council of Europe, but it would also allow member States to contribute to the further development of the right in general international law.

iv. Encouraging the development of an environment-friendly jurisprudence

131. ~~Some argue that~~ The lack of a clear normative framework for the Court or the ECSR to tackle environmental issues is an obstacle to the development of jurisprudence concerning the

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This conclusion is also structurally out of place here.

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This debatable conclusion gives the impression that the report is negatively biased and seems to contradict the earlier assertion that the Convention has grappled with and often delivered environmental justice in more than 300 cases. A more appropriate conclusion to reach here would be that the ECHR system could benefit from reform in order to better cater for HRS needs of the 21st century.

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The gaps that this section of the report should be assessing are those in the COE system, not other systems.

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Notably, this is known to be true, despite concerns about attribution evidence raised earlier. Rather than refer to private actors it is best to refer to businesses, since many State-owned business are responsible as well.

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which is the scope of this report . . .

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that doesn't mean that there isn't one, does it?

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This should be the starting point of this section - if indeed there is an appetite to include it. The starting point should be that in a 21st century HRS system, there is a need to better tackle the matter of business responsibilities. The R2HE is just one of many tools that could be used in this connection.

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Instead: "Given the importance/significance of the right as the defining HR of our time, a rationale could be...."

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"A developing right" that is recognized in law by 160 nations, including Council of Europe member state constitutions from the 1970 (Slovenia, Portugal, Spain). More accurate to recognize that all rights are in a constant process of development. That's why the UN Human Rights Committee issued a new General Comment on the right to life in 2019 (GC No. 36) following earlier GCs on the right to life (GC 14, GC 6).

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There are multiple separate arguments packed in here, i.e., setting the bar internationally is a separate point from providing legal certainty in Europe. Other rationales include ensuring a level playing field throughout Europe, assuaging fears of "judicial activism" by the legislature taking up the issue, etc. ...

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maybe this should say: of a human rights-friendly jurisprudence? (i.e., concerning the human right to a clean, healthy, and sustainable environment)

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This is a function of the ECHR's self-restraint.

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Add "further development" as the Court already performed some development

⁴⁸⁴ Extended summary, Lambert, Expert contribution, p. 46.

⁴⁸⁵ <https://www.ohchr.org/sites/default/files/2021-12/ungps10plusroadmap.pdf>

human right to a clean, healthy, and sustainable environment ~~an environment-friendly human~~

132. This lack is also held responsible for the fact that the Court allegedly gives less importance to environmental protection in comparison with other public interests such as the economic well-being of the country.⁴⁸⁷ In a nutshell, this rationale for a new instrument centres on providing legitimacy for the development of the Court's jurisprudence and the decisions and conclusions of the ECSR on environmental protection.

v. Enhancing protection for environmental human rights defenders

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135. 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, conservation and restoration and mitigation of and ~~adaptation~~ ~~adaption~~ to climate change.⁴⁸⁸ According to the study of the UN Special Rapporteur on Human Rights and the environment, introduction of the right to a healthy environment in national constitutions results in States having smaller ecological footprints, ranking higher on comprehensive indices of environmental indicators and making faster progress in reducing harmful emissions.⁴⁸⁹ A new instrument on human rights and the environment could encourage States that have not yet adopted the right to do so and encourage those States that have already adopted the right to take further active measures to implement it.⁴⁹⁰

136. In addition, in line with the recommendations under CM Rec 2022(20), a new instrument could clarify the understanding amongst Council of Europe member States of the scope and content of the right to a healthy environment and inspire corresponding national legislation. That legislation would define the ways in which States would meet the clearly defined international standard, in accordance with the principle of subsidiarity.⁴⁹¹

vii. Establishing the Council of Europe's role

137. The future relevance of the Council of Europe will be greatly enhanced by demonstrating its capacity to address the triple planetary crisis.⁴⁹² Failure to explicitly address the ~~adverse impacts on environmental dimension of~~ human rights ~~resulting from environmental degradation and the triple planetary crisis~~ risks giving the impression that the Council of Europe is absent on this critical issue. Leadership by the Council of Europe can be expected to reap benefits not only within Europe, but also beyond.

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⁴⁸⁶ Eicke, Climate Change and the Convention: Beyond Admissibility, ECHRL 2022, 8, 12.

⁴⁸⁷ 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.

⁴⁸⁸ *Pavlov and others v. Russia*, application no. 31612/09, ~~judgement~~ ~~judgment~~ of 11 October 2022, Concurring opinion of Judge Serghides, § 21.

⁴⁸⁹ David R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment (2012)*, pp. 253-277.

⁴⁹⁰ Extended Summary, Knox, Expert contribution, p 26.

⁴⁹¹ CMRec 2022(20) para 1. „Recommends that the governments of the member States 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”

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This term "environmentally-friendly" is confusing.

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This isn't an allegation, it's how competing interests are balanced according to the Court.

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See, e.g., caselaw: GC, *Hatton v. the UK*, 2003. Notably, in this example, the balancing was performed between the right to respect for private and family life and the legitimate aim of the economic well-being of the country.

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The Court's legitimacy is conveyed in Art. 32 of the ECHR. Still, it's not even just a question of perceived legitimacy. It's a question of the existence and coherence of the caselaw.

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Recognition is also of particular importance in terms of the positive effects it has on vulnerable populations, including women and girls, persons subject to poverty, Indigenous Peoples, elderly persons, persons with disabilities, and minorities. This may be listed as an additional rationale.

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Here's another argument: Responding to the threat of the triple planetary crisis.

See, e.g., UN Special Rapporteur David Boyd: "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." See

e.g., <https://www.cambridge.org/core/books/human-right-to-a-healthy-environment/catalyst-for-change/46EB145CB4BEB4B596B25E4718DD3A6B>

There are case studies that make clear the extent to which the right to a healthy environment contributes to improved implementation and enforcement of climate laws, protects against gaps in climate laws, and creates opportunities for better access to justice for climate litigants. See e.g., ...

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Provide the exact number of States, members of CoE, that have not yet adopted the right

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It is important also to make clear that there are significant differences (i.e., inconsistencies) across European member states in terms of national enforcement mechanisms.

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Harmonising national protection of the right to a clean, healthy, and sustainable environment is an additional rationale. ...

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Considering the ongoing deterioration of the environment and the triple planetary crisis, it is important to keep up with those challenges. It's important to recall the CoE's aim, Art. 1 of its Statute: The aim of the Council of ...

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140. Whereas the common denominator of proposals made in this respect is the codification of the human right to a clean, healthy and sustainable environment, proposals vary to the extent to which they consider the necessity of additional elements relating to admissibility requirements, right holders, etc. The additional elements proposed to fill the gaps of the current ECHR system include 1) provisions on the administration of evidence to ease the burden of proof on applicants,⁴⁹² 2) the recognition of NGO standing⁴⁹³, 3) a codification of the precautionary principle⁴⁹⁴, 4) specific protection for human rights defenders⁴⁹⁵, 5) a provision amending article 1 ECHR to extend the territorial reach of the Protocol.⁴⁹⁶

b) Covered rationales

✓ Addressing gaps in international human rights law

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x Addressing gaps with respect to the international responsibilities of private actors

As the Convention imposes human rights obligations on States, an Additional Protocol would not contain obligations for private entities and therefore would not directly address the alleged gaps in the responsibility of private actors. However, as with other Convention rights, even though, through positive obligations, as an indirect effect, States could be held responsible for the acts or omissions of private actors within their jurisdiction thereby being forced to address gaps with respect to the responsibilities of private actors.

✓ Shaping the content of the right to a healthy environment

An Additional Protocol to the ECHR would primarily allow the Court to contribute to developing a common understanding on the content of the right to a healthy environment through its jurisprudence. Member States, on the other hand, could actively shape the understanding of the right by defining its content in more detail in the Additional Protocol.

✓ Encouraging the development of an environment-friendly jurisprudence

An Additional Protocol provides the strongest possible legitimacy for the progressive development of the Court's jurisprudence in environmental matters.

[...]

Improving national protection of the right to a healthy environment

An Additional Protocol could work as a pull-factor in increasing the level of environmental protection in member States. A new instrument on human rights and the environment could encourage States that have not yet adopted the right to do so and encourage those States that have already adopted the right to take further active measures to implement it.

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c) Arguments for an Additional Protocol

⁴⁹² Extended summary, Keller, Expert contribution, p. 4-6.

⁴⁹³ Ibid. p. 6-77.

⁴⁹⁴ Ibid. p. 5.

⁴⁹⁵ Extended summary, Duyck, Expert contribution p. 14.

⁴⁹⁶ Extended summary, Raible, Expert contribution p. 35-36.

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Notably, as former judge Keller, writes: ' the Court's often deferential, inconsistent and unreasoned remedial practice is in urgent need of overhaul.' <https://academic.oup.com/hrlr/article/22/1/ngab030/6497578>

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The right to a healthy environment imposes an obligation on States to regulate the activities of private actors so that the right is not violated or abused.

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Yes, it would, via the states' responsibility, same as every other HR. . .

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It's preferable to reverse the sentence structure as the horizontal effect of the ECHR is an "acquis"

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as well as in the practice of implementation of the R2HE, thus building a level-playing field on this across the COE

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Suggest to revise this terminology, as noted above.

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It is not the legitimacy but the legal basis and legal security

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Rather, an Additional Protocol provides the most direct and comprehensive means for the Court's jurisprudence on the RTHE. It would corroborate and expand the Court's jurisprudence in this area.

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To add another rationale: Improved enjoyment of all human rights guaranteed by the ECHR

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A number of arguments for an Additional Protocol are missing entirely.

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It would make most sense to combine this section with the previous one.

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Why are there arguments recognised here that are not included in the rationales?

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- + An Additional Protocol to the Convention allows individuals access to the most effective regional human rights mechanism to enforce their right to a healthy environment. Depending on the formulation, collective interests may also be protected by allowing for NGO standing, thereby improving access to justice concerning collective interests in environmental matters.
- + A binding codification of the right to a healthy environment combined with a monitoring mechanism able to issue binding decisions will contribute decisively to the further development of the human right to a healthy environment and integrate the already existing body of environmental human rights jurisprudence.
- + It would require aid the Court to in-balanceing the human right to a clean, healthy, and sustainable environmental human rights interests with other rights/ interests.
- + The Court's power to order meaningful environmental remedies could be enhanced.
- + An Additional Protocol would address almost all of the rationales identified in Section II.
- + Only judicial intervention may break the current deadlock of perceived inaction of States concerning the triple planetary crisis by making governments accountable.
- + The Convention system, with its authoritative Court giving binding judgments, could remedy some of the perceived gaps in the international environmental law system such as i) the lack of a comprehensive normative framework in international environmental law, resulting in fragmentation and hindered implementation of sectoral environmental regimes; (ii) piecemeal and reactive approach, lacking coherence and synergy among regulatory frameworks, leading to coordination deficits and policy incoherence; (iii) problematic articulation between multilateral environmental agreements and related instruments due to unclear principles and their status; (iv) institutional fragmentation and coordination challenges in international environmental governance and (v) challenges in implementing international environmental law at national and international levels, including inadequate legislation, resources, and clarity on environmental principles.⁴⁹⁷

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d) Arguments against an Additional Protocol

- To allow effective implementation of the right to a healthy environment, major adjustments to basic tenets of the Convention system would be needed. It has been argued that special provisions would be required *inter alia* on the jurisdiction requirement, the victim status requirement, the need to exhaust domestic remedies and the Court's remedial powers as well as evidentiary standards and processes. Deviating from established Convention principles with respect to the right to a healthy environment, however, would lead to a fragmentation of applicable standards that could be difficult to justify.
- The right to a healthy environment is different in nature from the other Convention rights that essentially protect subjective interests of individual human beings, insofar as it arguably also recognises and protects the collective interest in a clean, healthy and sustainable environment and/or the intrinsic value of the environment as such. The ECHR system provides a system of access to justice for the pursuit of subjective rights. It is not well suited for the enforcement of collective interests or ecocentric objectives. At the same

⁴⁹⁷ These gaps have been identified by the Un Secretary General, 'Gaps in International Environmental Law and Environment related Instruments: Towards a Global Pact for the Environment, UN Doc. A/73/419 (30 November 2018).

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More can and should be said here about the profound importance for the protection of all human rights (including this one, as all others) that they are backed by a strong, legally binding, accountability mechanism.

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and to the enhanced protection of all human rights

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Would require balancing, where it currently does not.

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Attention to the wording. Once the right is enshrined in an Additional Protocol, it's not anymore an interest, placed in the context of the proportionality test under the second paragraphs of articles 8 to 11 ECHR, and A1 P1

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the real prospect of

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Consider rephrasing

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Even on paper, the current ambition of Council of Europe Member States is not compatible with limiting warming to 1.5°C.

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Instead: The prevailing inaction of Member States in addressing the ongoing environmental degradation and the triple planetary crisis can be mitigated through judicial intervention. This intervention would establish governmental accountability for upholding their obligation to protect human rights as safeguarded by the ECHR. The ECtHR's past judgments on more than 300 cases involving environmental dimensions demonstrate the effectiveness of the ECHR system in handling such matters. Furthermore, the ongoing environmental degradation and triple planetary crisis exacerbate the infringement of all human rights and are undeniably poised to increase the volume of applications reaching the ECtHR. Therefore, it is not the adoption of the R2HE in a new Additional Protocol that w...

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legal security for the applicants

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ideal, maybe; required, no

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which the RTHE is

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time, it is said that the process of “greening human rights” has contributed to new interpretations of the content of human rights law with respect to environmental protection. Moreover, both HRC Resolution 48/13 and GA Resolution 76/300 specifically noted that “the right to a clean, healthy and sustainable environment is related to other rights and existing international law”.⁴⁹⁸ It is thus argued that the recognition of the right to a healthy environment in a protocol to the Convention 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.⁴⁹⁹ Introduction of the right to a healthy environment would therefore provide a stronger basis for the Court to consider environmental claims and to strengthen its existing environmental human rights jurisprudence.⁵⁰⁰

- Judges should not impose policy choices on States in the fight against the triple planetary crisis. Climate change issues in particular, as well as other environmental issues are multidimensional and involve issues of distributive justice. They therefore require a holistic approach: Who has to bear the economic costs of reduction measures? How to solve trade-offs between fighting climate change and other objectives such as environmental protection? How to provide for intergenerational equity? What is the level of environmental protection member States want to achieve? These issues require policy choices made and implemented in the democratic process.

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Possible solutions:

- Detailed definition of the nature, content and implications of the right by member States

- Progressive Court judgments imposing policy choices on States based on the right to a healthy environment risk not being implemented. In the long run, this undermines the Court’s authority.
- The Court has limited capacities which are already stretched thin. An Additional Protocol would further increase the number of pending applications.

Possible solutions:

- additional financial resources for the ECtHR
- standing for NGO’s could limit the burden on the Court’s environmental case-load

- The Court lacks the scientific expertise required to decide environmental cases. 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. For example, the Court has an established practice of adjudicating on cases related to issues of medical negligence where expert opinions play a key role.⁵⁰¹

⁴⁹⁸ See UN HRC Resolution 48/13 point 2 and UN GA Resolution 76/300 point 2.

⁴⁹⁹ Marcos Orellana, “Quality Control of the Right to a Healthy Environment,” in *The Human Right to a Healthy Environment*, pp. 169, 176.

⁵⁰⁰ Extended Summary, Knox, p. 27

⁵⁰¹ Lopes de Sousa Fernandes v. Portugal (GC), application no. 56080/13, judgment of 19 December 2017 para 217.

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by whom? reference missing

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Why is there a binary opposition between the two? It could do both, consolidating the *acquis* and developing it further as needed for an appropriate HR response to the triple planetary crisis.

Commented [A559]:
more direct and more coherent

Commented [A560]:
human rights

Commented [A561]:
How is this being presented as an argument against an Additional Protocol?

Commented [A562]:
What is the argumentation behind this assumption? Judges decide on the violation or not of a right guaranteed by the Convention. Judges may order the implementation of general measures (legislative or administrative) to ensure the protection of the applicant’s rights at stake

Commented [A563R562]:
The Court will not decide for States what to prioritise in their policies, but when it finds that the State’s policies led to the infringement of the right to non-discrimination in an individual case, it will intervene.

Commented [A564]:
The new factsheet sets out several examples of measures adopted and reported by States, in the context of the execution of the European Court’s judgments, in order to safeguard and protect one’s living environment: <https://rm.coe.int/thematic-factsheet-environment-eng/1680a00c09>

Commented [A565]:
This statement is too categorical. Sometimes there can be an obvious policy outcome from a judgment. That can’t mean that the judgment can’t be issued.

Commented [A566]:
No need for court to dictate this. See Urgenda, Neubauer, etc.

Commented [A567]:
Strawman argument. Actions to address climate crisis generally also are good for air pollution and biodiversity. ...

Commented [A568]: ...

Commented [A569]: ...

Commented [A570]: ...

Commented [A571]:
Another straw man argument. Who is suggesting that the ...

Commented [A572]: ...

Commented [A573]: ...

Commented [A574]: ...

Commented [A575]: ...

Commented [A576]: ...

Commented [A577]:
The Court is dealing with these cases anyway.

Commented [A578]: ...

Commented [A579]: ...

Possible solutions:

- stronger reliance on expert testimony

- The content of the right to a healthy environment is uncertain; there is a need for robust standard-setting. Including it in the Convention gives the Court leeway to interpret it in its own way.

Possible solutions:

- member States could themselves define the right to a healthy environment, as protected under the Convention system. This solution, however, would deviate from the approach adopted in all other Additional Protocols which are limited to setting out the rights covered in generic terms.

- Additional financial resources for the Court may be required.

Page 50

2. Additional Protocol to the European Social Charter

[...]

b) Covered rationales

- ✓ Addressing gaps in international human rights law

[...]

- x Addressing gaps with respect to the international responsibilities of private actors

As the European Social Charter imposes human rights obligations on States, an Additional Protocol would not contain obligations for private entities and therefore would not address the alleged gaps in the responsibility of private actors even though indirectly, States could be held responsible for the omissions of private actors within their jurisdiction, thereby being forced to address gaps with respect to the responsibilities of private actors.

[...]

- ✓ Encouraging the development of an environment-friendly jurisprudence

An Additional Protocol provides the strongest possible legitimacy for the development of the Committee's practice in environmental matters. Its general impact on the discourse on human rights and the environment is mitigated due to the non-binding nature of recommendations by the Committee.

Page 51

d) Arguments against an Additional Protocol

- The impact of an Additional Protocol would be very limited as only a small number of States have ratified the collective complaints procedure.

PAGE 52 (second bullet point)

- Individuals would not have the possibility to seize the European Social Committee.

[...]

144. The flexibility also concerns possible monitoring mechanisms. Different options have been discussed: a state reporting system as foreseen for UN human rights treaties is conceivable. This

Commented [A580]:
It is no more uncertain than any other human right. Consider, e.g., the right to respect for private and family life (Art 8)

This claim must also be examined next to the work of the Special Rapporteurs, which clarifies the scope of State obligations in this context.

Commented [A581]:
How is this prospect supported by the actual practice of the Court, which is very well-aware of its role and limitations?

Commented [A582]:
This claim requires comparative analysis. Increases may be anticipated anyway because of the rise in human rights violations stemming from the triple-planetary crisis. If anything, failing to recognise the right may be expected to exacerbate the problem as a result of a corresponding lack of protections provided at national levels. A possible solution would then be to recognise the right to mitigate the extent of this need.

Commented [A583]:
it's unclear why this amounts to a green check . . .

Commented [A584R583]:
this check list approach seems to suggest an equal weight among the checks which is not substantiated

Commented [A585]:
European

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Commented [A586]:
Same point as with ECHR above. It does address private actors just through the framework of state responsibility

Commented [A587]:
If only ESC alone, then could be expected to send the opposite signal. This applies to all of the remaining points on this list.

Commented [A588]:
A further significant weakness not mentioned here is that under Part III Article A of the Revised Charter, states do not have to declare that they are bound by every right in the Charter, only by a specified number of rights from each part.

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Commented [A589]:
this is a very important argument against this proposal!

Commented [A590]:
word choice?

Commented [A591R590]:
access? bring a complaint to?

could (but doesn't have to) be combined with a system of individual and/or collective complaints to a committee. Admissibility requirements could be tailored to the specificities of the Convention's content and could deviate from ECHR provisions. A peer review process ~~modelled~~ modeled on the UPR has also been proposed. If the Convention's focus is on the responsibility of private actors, the creation of a mechanism of alternative dispute resolution that involves business entities could also be an option. Another possibility would be to provide for the possibility to request Advisory Opinions from the ECtHR as foreseen in the Oviedo Convention.

Page 53

b) Covered rationales

✓ Addressing gaps in the international protection of human rights

A Convention on Human Rights and the Environment could contain a legally binding codification of the right to a clean, healthy and sustainable environment. It could also provide for a monitoring mechanism (with or without access for individuals and non-governmental organisations), although in all likelihood without the possibility to issue binding decisions.

[...]

✓ Encouraging the development of an environment-friendly jurisprudence

A binding Convention on Human Rights and the Environment would strengthen the discourse on human rights and the environment. Depending on the substantive content, such as the introduction of IEL principles, the interaction between IEL and IHRL could be further crystallised. Its implications for the ECtHR's jurisprudence in environmental matters would be more limited and could be modulated depending on States' wishes.

✓ Enhancing the protection for environmental human rights defenders

A Convention that recognizes the right to a healthy environment would clarify that the right to a healthy environment is on the same level as other human rights, thereby recognising environmental human rights defenders and human rights defenders and, by extension, affording them the same level of protection. In addition, the Convention could include specific provisions on environmental human rights defenders.

Page 54

c) Arguments for a Convention

- + A binding codification of the right to a healthy environment possibly combined with a monitoring mechanism will contribute decisively to the further development of the right to a healthy environment. member States would have the possibility to influence actively this development.
- + The political recognition of the human right to a healthy environment has triggered a need for robust normative standards that merge human rights and environmental standards and provide orientation for States in the fight against the triple planetary crisis.
- + A Convention is not subject to the constraints of the ECHR system and provides great flexibility. It provides additional protection while leaving the Convention system intact.
- + A Convention could be opened for signature and ratification by non-Council of Europe-member States. Thereby its standards could have influence beyond Europe.

d) Arguments against a Convention

- Without binding judgments by an authoritative entity such as the ECtHR, current deadlock of perceived inaction of States concerning the triple planetary crisis will not cease.

Commented [A592]:
mainly European

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Commented [A593]:

The Court can still rely on this new Convention for interpreting the provisions of the ECHR, potentially revising its initial stance on recognizing the R2HE in its case law. This scenario will once again bring up the recurring question of adopting the Additional Protocol to the ECHR. Notably, the ECtHR routinely relies on the Aarhus Convention to interpret rights under the ECHR.

Commented [A594]:

how when excluded from ECHR?

Commented [A595]:

It would take years to develop a dedicated complaint mechanism! Can the triple environmental crisis wait for it??

There is no accent in this document on the urgency of action to tackle the triple planetary crisis

The key arguments against that are missing here are the practical ones of how much time it will take, (the risk that as with other specific conventions, few states will ratify and it will never come into force), and also the cost inefficiency of creating a whole new system.

Commented [A596]:

What does "intact" mean? By definition, this means complete, but it is incomplete currently, since it is missing the RTHE.

Indeed, the ECHR system has dynamically evolved over time through the adoption of additional protocols...

Commented [A597]:

except for the fact that other regional HRS systems already recognise the R2HE...

Commented [A598]:

What about the length of time required as an argument against a Convention? What about the danger of limited ratifications? What about the utter failure of the proposed Global Pact for the Environment as a major reason for concern about prospects for success?

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- In case a monitoring mechanism is included, funding of the body and its activities by member States would be required.
- The new Convention would be in addition to an already existing landscape of multiple international instruments without the authoritative force of an established mechanism such as the Court. The risk is that the new Convention could be perceived by member States as another cumbersome routine. Formal ratification of treaties do not always generate changes in member States' domestic human rights practices.

Commented [A599]:

in case an accountability mechanism is not included, it will be ineffectual

Commented [A600]:

There is also the risk of contradiction/duplication/complication with the Court's ongoing casehandling which will continue to concern environmentally-related human rights matters, building on 300+ cases already within its established jdx

Commented [A601]:

Also, it doesn't resolve the problems facing the ECtHR system, which will receive applications on this no matter what...

Commented [A602]:

European

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[...]

b) Covered rationales

- x Addressing gaps in the international protection of human rights

A self-standing monitoring mechanism would not improve the possibilities for individuals to make claims for environmental protection.

[...]

- x Encouraging the development of an environment-friendly jurisprudence

A self-standing monitoring mechanism would strengthen the discourse on human rights and the environment, but its impact on the jurisprudence of the Court and the practice of the Committee on Social Rights would be limited

Commented [A603]:

This is an assumption. The Court can still rely on this new Convention/Monitoring mechanism for interpreting the provisions of the ECHR, potentially revising its initial stance on recognizing the R2HE in its case law. This scenario will once again bring up the recurring question of adopting the Additional Protocol to the ECHR.

Commented [A604]:

Any human right is always developing, but is this really an accurate representation especially in an international context?

Page 56**c) Arguments for a self-standing monitoring mechanism**

[...]

- + The human right to a healthy environment is currently developing. A self-standing monitoring mechanism that acts through dialogue and recommendations is best adapted to the current state of international law.

[...]

- + A Commissioner for Human Rights and the Environment could intervene as third party in environmental cases before the ECtHR.

Commented [A605]:

Ok but what to do with the lack of an appropriate legal basis for the ECtHR as the cases will continue to be submitted in front of the Court? How to fill this gap? We are facing the same problem. In the absence of an instrument, the Court might adapt its case law by providing a dynamic and evolutive interpretation of the Convention.

Commented [A606R605]:

This would be a good idea only in combination with other proposals, not as a stand-alone.

Commented [A607]:

Certainly not on its own, at a timescale that is needed

Commented [A608]:

This same wording should be used above for new convention.

Commented [A609]:

Fragmentation should also be added as an argument against a separate convention.

d) Arguments against a self-standing monitoring mechanism

- Monitoring based on dialogue will not be able to break the current deadlock of perceived inaction of States concerning the triple planetary crisis since it lacks enforcement power, limiting its ability to induce significant changes in State behavior and address environmental human rights issues effectively.
- The optional nature of monitoring diminishes the political and legal significance, potentially leading to selective engagement by States and a lack of accountability for violations.

[...]

- The creation of a new Commissioner for Human Rights and the Environment could encroach on the mandate of the Commissioner for Human Rights and lead to fragmentation.

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[...]

- ✓ Encouraging the development of an environment-friendly jurisprudence

The inclusion of environmental protection in the preamble of the ECHR would provide opportunity for the Court to further strengthen its reliance on principles of international environmental law and would allow for the development of the Court's jurisprudence in environmental matters without implying the need for a fundamental change of the ECtHR's jurisprudence.

[...]

✓ Establishing the Council of Europe's role

The inclusion of environmental protection in the preamble of the ECHR would reflect a certain awareness of the gravity of the issues involved but by itself may appear to be a minimalist and largely ineffectual response.

Commented [A610]:

This seems to suggest that an Additional Protocol would imply as much, but it does not and need not imply this.

Commented [A611]:

Similar assessment of the effectualness of the each alternative listed above "by itself" should also be added.

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- An Additional Protocol amending the existing preamble would be required that would have to be ratified by all member States to enter into force.

[...]

b) Covered rationales

- x Addressing gaps in the international protection of human rights

[...]

- ✓ Shaping the content of the right to a healthy environment

The recognition of the right to a clean, healthy and sustainable environment in a non-binding Council of Europe instrument would allow member States to actively shape the understanding of the right by defining its content in more detail. Due to the non-binding nature of the instrument, the legal impact would be limited, however, unless the Court were to rely on the non-binding instrument as a basis for developing its caselaw on existing rights in a way that would encompass aspects of the right to a healthy environment.

- ✓ Encouraging the development of an environment-friendly jurisprudence

The recognition of the right to a clean, healthy and sustainable environment in a non-binding Council of Europe instrument could influence the development of the Court's jurisprudence to a limited extent.

- ✓ Enhancing the protection for environmental human rights defenders

A non-binding instrument including specific provisions could enhance the level of protection afforded to environmental human rights defenders, however, because of the non-binding nature, the impact would remain limited.

Commented [A612]:

This is a strong argument against! Quite pragmatically, is it worth the hassle? It would take years for something that would have no legal force and change little.

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Commented [A614]:

This wording is problematic because the right to a clean, healthy, and sustainable environment is an existing right: it's just not being directly protected by the COE.

Commented [A615]:

The Court already performed this job

Commented [A616]:

or send a clear signal regarding the lack of willingness

Commented [A617]:

How? To the contrary, this should say "would not significantly increase"

Page 59

- x Establishing the Council of Europe's role in the area of human rights

The recognition of the right to a clean, healthy and sustainable environment in a non-binding Council of Europe instrument would only align the Council of Europe's human rights framework with UN standards.

c) Arguments for a non-binding instrument

- + The recognition of the right to a clean, healthy and sustainable environment in a non-binding Council of Europe instrument would bring the Council of Europe's order in line with international standards.

Commented [A618]:

It would not align with UN standards insofar as they call for implementing and protecting human rights.

Commented [A619]:

if the standard is no more than mere recognition of the existence of human rights.

d) Arguments against a non-binding instrument

[...]

- The implications of recognising a human right are unclear. The Recommendation could be perceived as a purely symbolic instrument.

Commented [A620]:

They are soft law.

Commented [A621]:

Worse: Given the existence of the UN recognition, this is little more than a cop-out that distracts from efforts with practical impact.

7. Combination of different instruments

152. Finally, different combinations of instruments have been discussed.

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APPENDIX II

Compilation of work of the UN on Environment, Climate Change and Human Rights

[...]

- Report on the relationship between climate change and human rights (2009) [A/HRC/10/61](#)

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1. Work by the special procedures mechanisms of the Human Rights Council relevant to rights-based climate action

Special Rapporteur on human rights and the environment:

- Women, girls and the right to a clean, healthy and sustainable environment - Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (2023), [A/HRC/52/33](#)
- The right to a clean, healthy and sustainable environment: non-toxic environment (2022), [A/HRC/49/53](#)
- Human rights and the global water crisis: water pollution, water scarcity and water-related disasters (2021), [A/HRC/46/28](#)
- [A healthy biosphere and the right to a healthy environment \(2020\), A/75/161](#)
- Right to a healthy environment: good practices (2019), [A/HRC/43/53](#)
- Safe climate (2019), [A/74/161](#)
- Clean air and the right to a healthy and sustainable environment (2019), [A/HRC/40/55](#)
- [Recommendation that the General Assembly should recognize the human right to a safe, clean, healthy and sustainable environment \(2018\), A/73/188](#)
- [Relationship between children's rights and environmental protection \(2018\), A/HRC/37/58](#)
- [Human rights obligations relating to the conservation and sustainable use of biological diversity \(2017\), A/HRC/34/49](#)
- Climate change (2016), [A/HRC/31/52](#)

Commented [A622]:

Is it the intention to go through these check-lists in the final document, or is this just a means for the drafting group to develop its own understanding?

Commented [A623]:

It is assumed that this is a placeholder and that more is meant to come here? Given how non-comprehensive this section is currently.

Commented [A624]:

Cut "climate change" here. (It is included in environment, which is the relevant scope.)

Commented [A625]:

It is worth also making reference to the recent report of the HRC Advisory Committee on impact of new technologies intended for climate protection on HR <https://undocs.org/en/A/HRC/54/47>

Commented [A626]:

Why the narrow focus on climate action? The topic is the human right to a healthy environment. Accordingly, reports related to this right should be included.

Commented [A627]:

Missing: Human Rights Depend on a Healthy Biosphere, 2020, [A/74/161](#) and healthy and sustainable food, 2021, [A/76/169](#)

- [Good practices of Governments, international organizations, civil society organizations, corporations and others in the use of human rights obligations relating to the environment \(2015\), A/HRC/28/61](#)

Also missing reports of the Special Rapporteur on toxics and human rights, which often relate to the right to a healthy environment.

Commented [A628]:
Please note!

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[Special Rapporteur on the right to health:](#)

- [Compilation of climate change-related statements and observations](#) by the Special Rapporteur
- [Elements for advancing mental health \(2020\), A/HRC/44/4](#)
- [Education of healthcare workers \(2019\), A/74/174](#)
- [Agriculture, healthy environment and health \(2018\), E/C.12/ARG/CO/4](#)
- [SDGs and the right to health \(2016\), A/71/304](#)

Commented [A629]:
The link opens a site to housing related issues instead of health-ones.

[Special Rapporteur on the right to adequate housing:](#)

- [Towards a just transition: the climate crisis and the right to adequate housing \(2022\), A/HRC/52/28](#)
- [The right to adequate housing: "Taking stock - moving forward" \(2021\), A/HRC/47/43](#)
- [The right to housing of Indigenous Peoples \(2019\), A/74/183](#)
- [Conservation and the threat of expulsion of Indigenous People \(2014\), A/HRC/25/53](#)
- [Climate Change and the Right to Housing \(2009\), A/64/255](#)

[Special Rapporteur on the right to food:](#)

- [Legal and policy framework on the right to food \(2020\), A/HRC/43/44](#)
- [SDGs as a potentially transformative tool to advance the realization of the right to food, as well as other economic, social and cultural rights \(2019\), A/74/164](#)
- [Rights of agricultural workers and the paradoxical challenge they face in realizing their right to food \(2019\), A/HRC/40/56](#)
- [Direct and indirect impacts of natural disasters and the right to food and people's livelihoods \(2018\), A/HRC/37/61](#)
- [Right to food in conflict situations \(2017\), A/72/188](#)
- [Excessive use of pesticides \(2017\), A/HRC/34/48](#)
- [The importance of a rights-based approach to "adequate food" \(2016\), A/71/282](#)
- [The structural, cultural, legal, economic and ecological barriers that women face in their fulfilment of the right to food \(2016\), A/HRC/31/51](#)
- [Impact of climate change on the right to food \(2015\), A/70/287](#)

Special Rapporteur on the human rights to safe drinking water and sanitation:

- [Special Thematic Report Part 3](#): A rights-based approach to adaptation, mitigation, finance, and cooperation (2022)
- [Special Thematic Report Part 2](#): The impacts of climate change on the human rights to water and sanitation of groups and population in situations of vulnerability (2022)
- [Special Thematic Report Part 1](#): Outlining the impacts of climate change on water and sanitation around the world (2022)
- [Human rights and the global water crisis: water pollution, water scarcity and water-related disasters \(2021\), A/HRC/46/28](#)
- Climate Change and the Human Rights to Water and Sanitation: [Position paper](#) (2010)

Special Rapporteur on the environmentally sound management and disposal of hazardous substances and waste:

- [Toxic wastes \(2022\), A/HRC/51/35](#)
- [Right of environmentally sound management and disposal of hazardous substances and waste \(2020\), A/HRC/45/12/Add.2](#)
- [Impact of toxics and pollution on children's rights \(2016\), A/HRC/33/41](#)
- [Attainable standards of mental and physical health, as well as ensurance of full decontamination \(2009\), A/HRC/12/26](#)

Special Rapporteur on the right to development:

- [The human right to a clean, healthy and sustainable environment: a catalyst for accelerated action to achieve the Sustainable Development goals \(2022\), A/77/284](#)
- Climate action at the national level (2021), [A/HRC/48/56](#)
- Climate action and the right to development- international level (2021), [A/76/154](#)

Working Group of Experts on People of African Descent:

- Environmental justice, the climate crisis, and people of African descent (2021), [A/HRC/48/78](#)

Special Rapporteur on contemporary forms of racism:

- Ecological crisis, climate justice and racial justice (2022), [A/77/549](#)

Special Rapporteur on the rights of indigenous peoples:

- [Indigenous people's rights to food, health and a healthy environment \(2019\), A/HRC/42/37](#)
- Impacts of climate change and climate finance on indigenous peoples' rights (2017), [A/HRC/36/46](#)

Special Rapporteur in the field of cultural rights:

- Premise that the universality of human rights, including cultural rights, has no meaning today without a liveable environment in which they can be enjoyed (2021), A/HRC/43/50
- Climate change, culture, and cultural rights (2020), [A/75/298](#)

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3. Universal Periodic Review – Recommendations on Climate Change

The Universal Periodic Review (UPR) is a State-driven process, under the auspices of the Human Rights Council, which provides the opportunity for each State to declare, during a peer-led review process of the human rights situation in their country, what actions they have taken to fulfil their human rights obligations. As one of the main features of the Council, the UPR is designed to ensure equal treatment for every country when their human rights situations are assessed. The ultimate aim of this mechanism is to improve the human rights situation in all countries. Currently, no other universal mechanism of this kind exists.

The UPR, which ultimately results in concrete recommendations to the State under review, is increasingly addressing the links between climate change and human rights. Between 2008 and 2018, States made 114 recommendations explicitly addressing climate change. Nauru, Kiribati, the United States of America, Samoa, and Tuvalu received the largest number of climate change-related recommendations during the first and second UPR cycles. The Maldives, the Philippines, Haiti, Sierra Leone, and Bangladesh were the States that made the most climate-related recommendations during these two cycles.

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By 2023, following a significant uptick in climate change related recommendations, more than 400 such recommendations have been made. Examples include:
[...]

Sudan's recommendation to Palau (2021): [A/HRC/48/12](#) (UPR 2021) "89.7 Continue efforts to mitigate the negative impacts of climate change on livelihoods and human rights".

4. National human rights institutions and climate change

[...]

Under the [Secretary-General's Call to Action for Human Rights](#), OHCHR serves as one of the co-leading agencies on the action area of [rights of future generations](#), especially climate justice. OHCHR together with UNEP, UNDP and GANHRI is working to support National Human Rights Institutions (NHRIs) with respect to climate change. As the GANHRI Annual Conference outcome statement on climate change emphasized, NHRIs can play a key role in supporting more effective rights-based climate action, and monitoring and reporting on the human rights impacts of climate change including in support of the global stocktake and other UNFCCC processes. The National Human Rights Committee of Qatar, the Office of the UN High Commissioner for Human Rights, the UN Development Program, the League of Arab States, and GANHRI recently co-organised a conference on climate change and human rights.

Commented [A630]:

While climate change related recommendations are interesting, it would be more appropriate given the topic of this study to identify recommendations related to the human right to a healthy environment.

Commented [A631]:

This number should reflect the recommendations on the R2HE. For example in this UPR cycle (last year) Costa Rica recommended to Poland to "Incorporate in the Constitution the recognition of the human right to a clean, healthy and sustainable environment" (Costa Rica; 114.24). This recommendation was rejected by Poland as "The Constitution of the Republic of Poland refers to the protection of the environment so there is no reason for making any changes in this regard in this Act". However, this is not a justiciable right!

Commented [A632]:

The Philippines recommendation to Czechia (2023): A/HRC/53/4 (UPR 2023) "Implement appropriate measures to ensure that businesses conduct human rights due diligence to promote and protect the right to a clean and healthy environment and are held accountable for operations that adversely impact people's full enjoyment of that right".

The Maldives recommendation to the United Kingdom of Great Britain and Northern Ireland (2022): A/HRC/52/10 (UPR 2022) "Continue to strengthen the legal and institutional systems on environmental protection, in particular with respect to the right to a healthy environment".

Spain's recommendation to Brazil (2022): A/HRC/52/14 (UPR 2022) "Improve the mechanisms to protect the life and territories of the Indigenous Peoples, guaranteeing their rights to water".

Brazil's recommendation to Finland (2022): A/HRC/52/9 (UPR 2022) "Ratify ILO Convention No. 169, on Indigenous Peoples' rights, and redouble efforts to ensure the realization of all of the human rights of the Indigenous Sami people, particularly to a healthy environment and to receive education, social care and health services in their own language".

Samoa's recommendation to India (2022): A/HRC/52/11 (UPR 2022) Adopt concrete measures implementing the

Commented [A633]:

Slovenia's recommendation to Guyana (2020): A/HRC/44/61 (UPR 2020) "Take all steps to respect and protect the constitutional rights to a healthy environment and intergenerational equity".

Indonesia's recommendation to El Salvador (2020): A/HRC/43/5 (UPR 2020) "Continue to improve public facilities including access to clean water and a healthy environment for a decent livelihood, as well as to

Commented [A634]:

Same point. Great that NHRIs are doing so much excellent work on climate change but that is not the topic of this paper. As it turns out, NHRIs have done and are doing outstanding work directly on the right to a healthy environment. That should be the focus.

Commented [A635]:

SG's Call to Action included specific recommendations related to the right to a healthy environment. For purposes of this paper, this seems more relevant and important than what is written here

ⁱ Présidente du Haut Conseil pour le climat (France)

