THE RIGHT TO A CLEAN, HEALTHY AND SUSTAINABLE ENVIRONMENT IN PRACTICE

LE DROIT À UN ENVIRONNEMENT PROPRE, SAIN ET DURABLE DANS LA PRATIQUE

Proceedings of the High-level Conference organised by the Icelandic Presidency of the Committee of Ministers, with the support of the Council of Europe Secretariat

Actes de la Conférence de haut niveau organisée par la Présidence islandaise du Comité des Ministres, avec le soutien du Secrétariat du Conseil de l'Europe

PRESIDENCY OF ICELAND
Council of Europe 11/2022 – 05/2023
PRÉSIDENCE DE L'ISLANDE
Conseil de l'Europe 11/2022 – 05/2023

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

THE RIGHT TO A CLEAN, HEALTHY AND SUSTAINABLE ENVIRONMENT IN PRACTICE /

LE DROIT À UN ENVIRONNEMENT PROPRE, SAIN ET DURABLE DANS LA PRATIQUE

Proceedings of the Conference

Actes de la Conférence

Layout: SPDP, Council of Europe

Printed at the Council of Europe

Mise en page : SPDP, Conseil de l'Europe

Imprimé dans les ateliers du Conseil de l'Europe

Preface / Préface

Today, our societies face a triple planetary crisis: climate change, pollution and the loss of nature and biodiversity. These interconnected problems pose a threat to the very foundations of our lives. Damage to our air, water and land changes the way we live. This is expected to get worse, and it will echo down the generations and hit hardest those who have least.

The degradation of our environment also has grave implications for the enjoyment of human rights, undermining the shared values that the Council of Europe is dedicated to upholding.

Recognising and acting on this interdependence between human rights and the environment is therefore crucial. The Council of Europe has a rich history of activity in this field, including the recent Committee of Ministers Recommendation CM/Rec(2022)20 on human rights and the protection of the environment, which called on member States actively to consider recognising the right to a clean, healthy and sustainable environment at the national level.

At their Summit in May 2023, the Heads of State and Government committed to initiate the “Reykjavík process” of strengthening the work of the Council of Europe on the environment, with the aim of making it a visible priority for the Organisation.

Under the auspices of the Icelandic Presidency of the Committee of Ministers of the Council of Europe, a high-level conference on "The right to a clean, healthy and sustainable environment in practice" was held on 3 May 2023. This important event brought together prominent speakers from around the world to discuss what the international protection of such an autonomous right would look like, as well as its practical implementation in national legal systems around the world.

This text is a compilation of the contributions made at that conference and to the ongoing debate - including within the Council of Europe - on the recognition and protection of the right to a clean, healthy and sustainable environment. With the expertise and perspectives of eminent parliamentarians, judges, international officials and youth representatives who participated in the conference, it is a valuable resource for all stakeholders engaged in environmental protection and human rights.

Aujourd'hui nos sociétés sont confrontées à une triple crise planétaire : changement climatique, pollution et perte de la nature et de la biodiversité. Ces problèmes interconnectés menacent les fondements mêmes de nos vies. Les dommages causés à l'air, à l'eau et à la terre ont un impact sur nos modes de vie. Cette situation est amenée à s'aggraver, se répercutera sur les futures générations et frappera le plus durement les plus démunis d'entre nous.

La dégradation de notre environnement a également de graves répercussions sur la jouissance des droits humains en affaiblissant les valeurs communes que le Conseil de l'Europe s'est engagé à défendre.

Il est donc essentiel de reconnaître cette interdépendance entre les droits humains et l'environnement et d'agir en conséquence. Le Conseil de l'Europe a un riche passé d'activités dans ce domaine, notamment la récente Recommandation du Comité des Ministres CM/Rec(2022)20 sur les droits de l'homme et la protection de l'environnement, qui invite les États membres à envisager activement de reconnaître le droit à un environnement propre, sain et durable au niveau national.

Lors de leur Sommet en mai 2023, les Chefs d'État et de gouvernement se sont engagés à lancer le « processus de Reykjavík » visant à renforcer les travaux du Conseil de l'Europe en matière d'environnement, dans le but d'en faire une priorité manifeste pour l'Organisation.

Sous les auspices de la Présidence islandaise du Comité des Ministres du Conseil de l'Europe, une Conférence de haut niveau sur « Le droit à un environnement propre, sain et durable dans la pratique » s'est tenue le 3 mai 2023. Cet important événement a rassemblé d'éminents intervenants du monde entier pour examiner la forme que pourrait prendre une protection internationale d'un tel droit autonome et sa mise en œuvre pratique dans les systèmes juridiques nationaux du monde entier.

Ce texte est une compilation des contributions apportées à cette conférence et au débat actuel, notamment au sein du Conseil de l'Europe, sur la reconnaissance et la protection du droit à un environnement propre, sain et durable. Grâce à l'expertise et aux perspectives d'éminents parlementaires, juges, fonctionnaires internationaux et représentants de la jeunesse qui ont participé à la conférence, elle constituera une ressource précieuse pour toutes les parties prenantes engagées dans la protection de l'environnement et des droits humains.

Marija PEJČINOVIĆ BURIĆ
Secretary General of the Council of Europe
Secrétaire Générale du Conseil de l'Europe

Strasbourg, 14/06/2023

TABLE OF CONTENTS
TABLE DES MATIÈRES

PROGRAMME

9:30 – 10:00 **Welcome address**

- **Katrín JAKOBSDÓTTIR**, Prime Minister of Iceland *[Video message]*
- **Marija PEJČINOVIĆ BURIĆ**, Secretary General of the Council of Europe

10:15 – 10:45 **Keynote speech**

- **Robert SPANO**, former President of the European Court of Human Rights

10:45 – 12:00 **PANEL 1**

Why a right to a clean, healthy and sustainable environment?

With urgent global challenges posed by environmental degradation and the triple planetary crisis of climate change, pollution, and nature and biodiversity loss, the question of the need for an autonomous right to a clean, healthy and sustainable environment has never been timelier. The panel will address this question and its implications for present and future generations.

Moderator:
Krista OINONEN
(Finland)

Vice Chairperson of the Council of Europe Steering Committee for Human Rights (CDDH)

Panel Discussion with:

- **Rik DAEMS**, Chairperson of the Parliamentary Assembly of the Council of Europe Network of Contact Parliamentarians for a healthy environment
- **Shara DUNCAN-VILLALOBOS**, Ambassador, Deputy Permanent Representative of the Republic of Costa Rica to the United Nations Office and other international organisations in Geneva
- **Todd HOWLAND,** Chief of Development and Economic and Social Rights Branch, Office of the United Nations High Commissioner for Human Rights, Geneva
- **Pegah MOULANA**, Secretary General of Youth for Environment Europe

12:00 – 13:30 **LUNCH BREAK**

13:30 – 14:45 PANEL 2 *[Hybrid]*

The right to a clean, healthy and sustainable environment in practice – European perspectives

The panel will explore the practical implementation of the right to a clean, healthy and sustainable environment by examining the relevant jurisprudence and best practices from Belgium, Hungary, Norway, and Ukraine as well as the wider European context.

Moderator:
Spyros PAPADATOS
(Greece)

Chair of the Council of Europe Advisory Council on Youth

Panel Discussion with:

- **Luc LAVRYSEN**, President of the Constitutional Court of Belgium, Centre for Environmental & Energy Law, Ghent University, President of the European Union Forum of Judges for the Environment
- **Marcel SZABÓ**, Judge, Constitutional Court, Hungary
- **Ganna VRONSKA**, Judge, Supreme Court, Ukraine
- **Thom Arne HELLERSLIA**, Judge, Court of Appeal, Norway

14:45 – 15:00 COFFEE BREAK

15:00 – 16:15 PANEL 3 *[Hybrid]*

The right to a clean, healthy and sustainable environment in practice – Global perspectives

The panel will explore the practical implementation of the right to a clean, healthy and sustainable environment in jurisdictions outside of Europe, by examining the relevant jurisprudence and best practices from Argentina, Pakistan, and Australia, as well as the relevant jurisprudence of the Inter-American Court of Human Rights.

Moderator:
Nicola WENZEL
(Germany)

Rapporteur of the CDDH Drafting Group on Human Rights and Environment (CDDH-ENV)

Panel Discussion with:

- **Ricardo LORENZETTI**, Former President, Judge of the Supreme Court of Argentina
- **Ayesha A. MALIK**, Judge, Supreme Court, Pakistan
- **Nicola PAIN**, Judge, Land and Environmental Court, Australia
- **Marta CABRERA**, Senior Lawyer at the Inter-American Court of Human Rights

16:15 – 16:30 Closing remarks

Kristīne LĪCIS *(Latvia),* Chairperson of the CDDH and of the CDDH-ENV

PROGRAMME

9:30 – 10:00 **Allocutions de bienvenue**

- **Katrín JAKOBSDÓTTIR**, Première ministre de l'Islande *[Message vidéo]*
- **Marija PEJČINOVIĆ BURIĆ**, Secrétaire Générale du Conseil de l'Europe

10:15 – 10:45 **Discours liminaire**

- **Robert SPANO**, ancien Président de la Cour européenne des droits de l'homme

10:45 – 12:00 **SESSION 1**

Pourquoi un droit à un environnement propre, sain et durable ?

Face aux défis mondiaux urgents posés par la dégradation de l'environnement et la triple crise planétaire du changement climatique, de la pollution et de la perte de la nature et de la biodiversité, la question de savoir si un droit autonome à un environnement propre, sain et durable est nécessaire, n'a jamais autant été d'actualité. Le panel abordera ce point et ces implications pour les générations actuelles et futures.

Modératrice :
Krista OINONEN
(Finlande)

Vice-présidente du Comité directeur pour les droits de l'homme, Conseil de l'Europe (CDDH)

Discussions avec :

- **Rik DAEMS**, Président du Réseau de parlementaires de référence de l'Assemblée parlementaire du Conseil de l'Europe pour un environnement sain
- **Shara DUNCAN-VILLALOBOS,** Ambassadrice, Représentante Permanente adjointe de la République du Costa Rica auprès du Bureau des Nations Unies et d'autres organisations internationales à Genève
- **Todd HOWLAND,** Chef du Service du développement et des droits économiques et sociaux, Bureau des Nations Unies, Haut-Commissaire aux Droits de l'Homme, Genève
- **Pegah MOULANA,** Secrétaire Générale de « Youth for Environment Europe »

12:00 – 13:30 **PAUSE DÉJEUNER**

13:30 – 14:45 SESSION 2 *[Hybride]*

Le droit à un environnement propre, sain et durable dans la pratique – perspectives européennes

La session abordera la mise en œuvre pratique du droit à un environnement propre, sain et durable en examinant la jurisprudence pertinente et les meilleures pratiques de Belgique, Hongrie, Norvège et Ukraine ainsi que le contexte européen plus large.

Modérateur :
Spyros PAPADATOS
(Grèce)

Président du Conseil consultatif sur la jeunesse du Conseil de l'Europe

Discussions avec :

- **Luc LAVRYSEN**, Président de la Cour constitutionnelle de Belgique, Centre du droit de l'environnement et l'énergie, Université de Gand, Président du Forum de l'UE des juges pour l'environnement
- **Marcel SZABÓ**, Juge à la Cour constitutionnelle, Hongrie
- **Ganna VRONSKA,** Juge, Cour suprême, Ukraine
- **Thom Arne HELLERSLIA**, Juge, Cour d'appel, Norvège

14:45 – 15:00 PAUSE CAFÉ

15:00 – 16:15 SESSION 3 *[Hybride]*

Le droit à un environnement propre, sain et durable dans la pratique – perspectives mondiales

La session abordera la mise en œuvre pratique du droit à un environnement propre, sain et durable dans des juridictions en dehors d'Europe, en examinant la jurisprudence pertinente et des meilleures pratiques d'Argentine, du Pakistan et d'Australie, ainsi que la jurisprudence de la Cour interaméricaine des droits de l'homme.

Modératrice:
Nicola WENZEL
(Allemagne)

Rapporteure du Groupe de rédaction du CDDH sur les droits de l'homme et l'environnement (CDDH-ENV)

Discussions avec :

- **Ricardo LORENZETTI**, Ancien Président, Juge à la Cour suprême d'Argentine
- **Ayesha A. MALIK**, Juge, Cour suprême, Pakistan
- **Nicola PAIN**, Juge, Tribunal des affaires foncières et environnementales, Australie
- **Marta CABRERA,** Juriste principale à la Cour interaméricaine des droits de l'homme

16:15 – 16:30 Allocution de clôture

Kristīne LĪCIS *(Lettonie),* Présidente du CDDH et du CDDH-ENV

WELCOME ADDRESS

DISCOURS D'OUVERTURE

Katrín JAKOBSDÓTTIR
Prime Minister of Iceland
Première ministre de l'Islande

Dear all,

We are gathered here today to discuss one of the most urgent challenge of our times; posed by environmental degradation and the triple planetary crisis of climate change, pollution and biodiversity loss.

The challenge is the pressing need for an autonomous right to a clean, healthy, and sustainable environment. A challenge that has never been more timely.

Strengthening the environmental part of the Human Rights system is one of Iceland´s priorities of the Icelandic Presidency of the Council of Europe in addition to our commitment to fundamental values and multilateral cooperation, and to uphold the rights of women and girls and placing a special emphasis on children and youth.

The Reykjavík Summit in May will be an important opportunity to promote the right to a clean and healthy environment. That will be the fourth Council of Europe´s Head of States Summit in its 73 year history, held in challenging times for the Council and our continent.

My aim as the host of the Summit is to ensure that the Outcome Document of the Summit will send a strong message on future challenges, including addressing the urgency of strengthening the Council of Europe's tools to deal with the environmental crisis. To connect stronger to the Human Rights aspect of the climate crisis.

We have been doing so with an open-call work for many weeks during regular meetings in Strasbourg with all the representatives of the member States to have their input and say into the Outcome Document and I am hopeful that the result will be positive towards this demanding task. A task that is collective and not on the shoulder of one member State, but the responsibility of us all.

I am sure I do not need to tell this audience, that the urgent need for action against the environmental crisis is already visible and tangible here in Europe as elsewhere in the world. We have witnessed historical floods in Germany, devastating droughts in France and Spain, forest-fires in Greece and elsewhere in southern parts of Europe. And we have witnessed more extreme weather, warmer oceans and shrinking snow and ice covers. We feel this from the southern-most parts of Europe and the world to the most northern parts where those of us who live there, feel and observe these changes quite well.

The climate crisis is already starting to affect our ecosystems and our lives more and even earlier than some experts estimated. The impact is also on socio-economic sectors and human health. And therefore, on our human rights.

People are fleeing their homes because of droughts that destroy crops because of changes in average and extreme temperature and precipitation. And this is not happening somewhere far away from us. France was in state of alert only last February because of months with almost no rainfall causing significant worries about crop yields.

We must for this reason tackle the detrimental effects of this environmental and climate crisis on human rights across the world. Before it is too late.

We acknowledge that work is being done internationally in these matters; such as a very important preparation on an international legal framework on ecocide that me and my government are following closely.

The recognition by the United Nations General Assembly last year of the right to a clean, healthy and sustainable environment was also an immensely important step in this regard, marking the path for not only other human rights institutions and bodies to follow, but also for all the States that signed the resolution.

The Council of Europe must follow in those very important footsteps taken by UN if the Council is to withhold its role as one of the leading human rights institutions worldwide. In this regard, we of course recognise all the important work already done within the Council regarding Human rights and environmental issues, such as the creation and work of the Steering Committee on Human Right's Drafting Group on Human Rights and Environment and the good work that has been done there since April 2021.

I also want to mention that a number of the international legal standards developed by the Council of Europe – notably including the European Convention on Human Rights, the European Social Charter and the Bern Convention on the conservation of European wildlife and natural habitats – have successfully been invoked to help make progress on environmental issues.

And The European Court of Human Rights has so far ruled on some 300 environment-related cases, applying concepts such as the right to life, free speech and family life to a wide range of issues including pollution, man-made or natural disasters and access to environmental information.

And although there is no specific right to a healthy environment in the European Convention on Human Rights yet, the Convention is increasingly being used by individuals and campaign groups to help make progress on a wide range of environmental issues and judgements from the European court that have already helped to strengthen environmental protections in several countries. We will hear more on this from the former President of the European Court of the Human Rights later on today.

I also want to applaud that negotiations started in Strasbourg on the 3rd of April on a new Convention on the protection of the environment through criminal law, when the Council of Europe Committee of experts on the protection of the environment through Criminal Law held its first meeting.

And the Parliamentary Assembly of the Council of Europe recommended in October, that the right to a healthy environment would be established through an additional protocol to the European convention of human rights. And as we know, the Committee of Ministers is now working out how this can be formalised.

All this good work has to be accelerated.

Dear all,

The last 4 years have been challenging internationally. The Covid pandemic and Russia´s full-scale attack on Ukraine has – understandably - been the main focus on the human rights stage worldwide. It has therefore been harder to promote the dire challenges we are faced with in relation to the environmental crisis.

But we must remain engaged and focused, and above all, united to keep the environmental issues and the crisis in the spotlight and its effects on human lives and on the future generations.

The upcoming Reykjavík Summit as an important opportunity to work towards strengthening the Council of Europe and its member States to meet current and future challenges. The aim of the Icelandic Presidency is to do our utmost over the next few weeks, to ensure that the fourth Summit will be productive and clear messages will come out of it. Including regarding the human rights aspect of the climate crisis.

We have an exciting day ahead of us today, with great speakers addressing the implications of the right to a healthy and sustainable environment for present and future generations, how we can explore the practical implementation by examining the relevant jurisprudence and best practises from around the world. These topics here today are very important and I wish you all fruitful discussions. May we all join forces and interweave Human Rights in our response to the biggest challenge we are faced with.

Thank you.

Marija PEJČINOVIĆ BURIĆ
Secretary General of the Council of Europe
Secrétaire Générale du Conseil de l'Europe

Prime Minister,
Distinguished guests,
Ladies and gentlemen,

The relationship between human rights and the environment is now firmly established.

Whether we speak about the right to life, or the protection of health, or a range of other rights, experiencing these in practice requires an environment that allows them to flourish. But that environment – our common environment – is under severe pressure. And it is set to get worse.

Environmental degradation and the triple planetary crisis of climate change, pollution, and the loss of nature and biodiversity, these interconnected problems pose a threat to the very foundations of our way of life.

Damage to our air, water and land will change the way we live, echo down the generations, and hit hardest those who have least.

The human rights implications are already in play, and already in the courts.

In national courts, where the European Convention on Human Rights has been cited in judgments on environmental cases, in international tribunals, including the European Court of Human Rights, and before international monitoring bodies, including the European Committee on Social Rights.

In fact, the Court has ruled so far on around 300 environment-related cases, relating to a wide variety of Articles in the European Convention.

And it now faces a series of unprecedented claims concerning climate change and states' obligations to cut greenhouse gas emissions.

The Grand Chamber is examining three leading cases, one from Germany, one from Switzerland, and one from France, each with potentially far-reaching implications.

So, as the urgency of the challenge has built and understanding of its implications has grown, so too has the impetus for action from the Council of Europe.

All parts of our Organisation have engaged with this, including successive presidencies of our Committee of Ministers, not least the Icelandic Presidency, which has included the environment as one of its key priorities, pushed for progress, and arranged this conference as a substantive opportunity for moving forward.

Just last year, the Committee of Ministers made a recommendation to member States.

It called on them to actively consider recognising the right to a healthy environment at national level.

The question now is whether we can go further still.

Whether the right to a clean, healthy and sustainable environment should be fleshed out as an additional protocol to the European Convention on Human Rights or the European Social Charter, as our Parliamentary Assembly has proposed, or framed as a stand-alone convention.

Our member States have tasked the Steering Committee for Human Rights with considering that question, with a drafting group to produce the most appropriate text.

And that work is now underway.

Courts – national and international – are taking decisions on cases before them. Many more will come. The question for governments is to what extent they wish to frame the future Courts' decisions within a legally binding international standard or let the Courts operate within the existing one.

Twenty member States have told the Steering Committee that they already recognise some form of the right to a healthy environment in domestic legal systems.

The diverse range of panellists and experts here today know a great deal about the environment, about human rights, and about national and international law.

There is a great deal of knowledge in this room about what a new, cross-cutting protocol or treaty on the environment and human rights would look like on paper, and how governments could ensure that it is put into practice.

So, I hope that today will be an opportunity to share that knowledge, and to build an understanding of which obstacles are likely and how these can be overcome.

This will help the Steering Committee for Human Rights to draft the strongest possible proposal to address one of our societies' most urgent challenges.

*****

Il est important aussi de prendre conscience du fait que cet effort s'inscrit dans le cadre plus général de notre action pour un environnement durable, lequel est essentiel pour le plein exercice des droits humains.

Au fil des années, le Conseil de l'Europe a pris diverses initiatives dans ce sens.

Je citerai notre Convention de Berne relative à la conservation de la vie sauvage et du milieu naturel de l'Europe, seul traité paneuropéen en faveur de la préservation des espèces et de la biodiversité, dont le système de dossiers permet aux ONG et aux particuliers de déposer des plaintes.

Et notre Convention sur le paysage, premier traité international à couvrir tous les aspects de son domaine, qui garantit un développement durable, fondé sur un équilibre harmonieux entre les besoins sociaux, l'activité économique et l'environnement.

Nous élaborons aussi actuellement une nouvelle Convention sur la protection de l'environnement par le droit pénal.

Sur la base du contenu d'une version antérieure, que nous actualisons selon l'évolution de nos connaissances et du contexte.

Ce contexte est celui de l'essor récent du crime organisé et parfois transnational.

Cette criminalité environnementale vise souvent à réaliser des profits illégaux, sans se soucier des dommages engendrés pour la nature, ni de leur impact pour les citoyens et les générations futures.

Une nouvelle convention définira les crimes contre l'environnement et garantira l'existence de sanctions et d'une dissuasion, mais aussi des mesures tournées vers la prévention, tout d'abord la dissuasion de commettre de tels actes.

Une meilleure formation pour les forces de l'ordre, des initiatives éducatives et une sensibilisation aux questions environnementales.

Ces mesures et d'autres encore pourraient être mises en œuvre.

Et il devrait également être possible de récupérer les profits tirés de la criminalité au moyen d'amendes et d'autres sanctions, afin que les services publics recouvrent une partie au moins, du coût engendré par la dégradation de l'environnement.

Madame la Première Ministre, l'Islande, qui comme chacun sait exerce la présidence de notre Comité des Ministres, possède une longue et fière tradition en matière de protection de l'environnement et de promotion des droits humains.

Et allie désormais ces deux préoccupations.

Votre présence ici aujourd'hui est un signe fort et positif de l'importance que vous attachez à la poursuite de ces efforts au niveau multilatéral.

On ne peut que s'en réjouir.

La question des droits humains et de l'environnement dépasse les frontières, de même que les solutions qu'elle appelle.

Le Conseil de l'Europe possède une grande expérience dans ce domaine et nous évoluons avec notre temps.

L'ampleur du défi s'accroît en même temps que notre détermination à agir.

La faisabilité et le potentiel de nouveaux instruments sont examinés avec soin.

Leur qualité est d'une importance vitale.

Il n'y a pas une seconde à perdre.

Aussi, je remercie l'Islande d'avoir organisé cet événement ainsi que chacune et chacun d'entre vous qui êtes ici aujourd'hui.

Nous sommes ouverts à toutes vos idées.

Et nous comptons sur votre expérience pour nous indiquer la meilleure voie à suivre, tous ensemble et pour nous tous, dans l'intérêt de cet environnement que nous partageons et dont nous dépendrons toujours.

Robert SPANO
Former President of the European Court of Human Rights
Ancien Président de la Cour européenne des droits de l'Homme

It is my great pleasure and honour to deliver the keynote speech at today's Council of Europe conference organised by the Icelandic Presidency of the Committee of Ministers. The right to a clean, healthy and sustainable environment is extremely topical both at the level of the Council of Europe and, of course, globally.

My goal in this keynote presentation is to reflect on the recommendation of the Parliamentary Assembly of the Council of Europe, set forth in Resolution 2396 of 29 September 2021, and formally adopted in Recommendation 2211 of the same day, for the Committee of Ministers to "draw up an additional protocol to the European Convention on Human Rights … on the right to a safe, clean, healthy and sustainable environment". I will be guided in my analysis by the proposed text of an additional protocol appended to Recommendation 2211, although as I understand it the adjective 'safe' has now been omitted from further consideration. Moreover, I will examine the reaction by the Committee of Ministers as it finds its expression in the CM's Recommendation 2022(20) of 27 September 2022 on human rights and the protection of the environment.

It is clear that the catalyst for the PACE Recommendation of 2021 was what is sometimes termed the "triple planetary crisis", climate change, the speed and extent of environmental degradation and rapid loss of biodiversity. There is a wish now in the community of member States of the Council of Europe to discuss the creation of a more robust normative framework within the Convention system for the adjudication of environmental-related human rights claims which have as their origins the fight to induce politicians to take a more proactive role in protecting the environment and fighting climate change. Whilst it is clear that the right to a clean, healthy and sustainable environment is not limited to impacts of climate change, but reaches further towards an ecocentric approach to the protection of the environment, I will, in this speech, so as to contribute to this debate, focus on whether an additional protocol to the Convention is the right approach to take when it comes to environment-protective human rights claims, including in the field of climate change. Here, I have of course in mind that my old court, the European Court of Human Rights, is now having to deal with this issue in a series of climate change related cases within the parameters of existing Convention rights.

The climate crisis is one of the most, if not the most pressing, concerns of our times. It is safe to say that I do not have the expertise nor the experience to opine on all of the myriad scientific, economic and policy-based questions that arise in relation to this issue. However, having been a Judge and President of the Strasbourg Court, I will offer my views on what should, if any, be the role of courts in this space, and in particular, the Strasbourg Court. Is it wise, and based on sound considerations of policy, to amend the Convention with a new protocol on

the right to a clean, healthy and sustainable environment and place the development of this right within the adjudicatory model of human rights enforcement provided for by the Convention and the European Court of Human Rights? That is the salient question that I wish to address here today.

I will divide my presentation as follows. First, I will briefly discuss the development of climate change as a human rights issue. This involves the development of the right to a clean, healthy and sustainable environment, the subject matter of today's conference. In this part, I will also briefly discuss the scope and content of the right to a safe, clean and healthy environment contains, both substantively and procedurally, as it is set forth in the PACE Recommendation. Second, I will explain why, in its current form, the European Convention on Human Rights is not well-suited to address human rights claims resulting from climate change. In conclusion, I will propose a way forward for the Council of Europe to ensure that it is well-equipped to face the most important challenge of our generation.

I.

I begin with a synopsis of the history of a rights-based approach to climate change culminating in the formation of the concept of the right to a safe, clean, healthy and sustainable environment. The European Convention on Human Rights was signed in 1950. The word *"environment"* is not mentioned in the Convention. That is because, until recently, human rights law and environmental law have largely developed along separate tracks. It is only relatively recently that climate change has been recognised as a rights-based issue.

Some say the earliest milestone of the convergence between the environment and human rights was the 1972 Stockholm Conference. During that conference, it was proclaimed that the environment is *"essential to [man's] well-being and to the enjoyment of basic human rights - even the right to life itself".* Some 30 years later, in 2012, John Knox was appointed the first UN Human Rights Council rapporteur on human rights and the environment. He made the case for what he referred to as the "*greening*" of human rights. Shortly after, in 2014, 27 UN special rapporteurs and independent experts issued a joint letter concluding that *"there can no longer be any doubt that climate change interferes with the enjoyment of human rights recognised and protected by international law".*

All of this culminated in two significant developments at international level.

First, as I mentioned at the outset, on 29 September 2021, the Council of Europe passed a Resolution recommending to *"build and consolidate a legal framework – domestically and at European level – to anchor the right to a safe, clean, healthy and sustainable environment, based on the UN guidance on this matter".* The resulting Recommendation was for the Committee of Ministers to *"draw up an additional protocol"* on the right to a safe, clean, healthy and sustainable environment. It included a draft protocol in annex, which I will discuss in a moment.

Second, on 26 July 2022, the UN General Assembly passed a Resolution recognising a human right to clean, healthy and sustainable environment. Subsequently, the Committee of Ministers of the Council of Europe adopted its Recommendation 2022(20) of 27 September 2022 on human rights and the protection of the environment. Interestingly, the PACE's invitation for the CM to draw up an additional protocol to the Convention was not taken up in the 2022 CM Recommendation. The CM rather focussed, using quite nuanced and soft language, on limiting itself to recommending to the Governments of the member States to "reflect on the nature, content and implications of the right [to a healthy environment]."

The right to a safe, clean and healthy environment, or variations of this right, is now recognised by a majority of UN member States, in fact over 150 of 193 States as of 2022 with Italy incorporating such a right into its Constitution in the beginning of last year. This includes over 30 Council of Europe member States. It has also been incorporated into regional human rights instruments such as the African Charter on Human and People's Rights (Article 24), and in the Additional Protocol to the Inter-American Convention on Human Rights (Article 11).

So what is the right to a clean, healthy and sustainable environment? It is not easy to give an exhaustive reply to this question as it may be relative to the textual formulation of the right one is examining. However, for present purposes, I will draw on the text as proposed in the COE Recommendation of 2021. There, the right has both substantive and procedural components. Substantively, it will impose on States an obligation to provide a safe climate, clean air, access to clean water and adequate sanitation, healthy and sustainably produced food, non-toxic environments in which to live, work, study and play, and healthy biodiversity and ecosystems. It also arguably imposes on States an obligation to mitigate climate change by regulating greenhouse gas emissions. Procedurally, it involves access to information, public participation in a decision-making process, and access to justice and effective remedies. The proposed right is further described as being *"of present and future generations."*

It is clear that the right to a safe, clean and healthy environment breaks from the anthropocentric and utilitarian approach to the environment. Currently, it can be said that the environment is protected insofar as it interferes with the intermediate enjoyment of other human rights, what I will term here the indirect protection thesis. The new proposed right is however not only anthropocentric, but also ecocentric, what can be termed the direct protection thesis. Indeed, the two elements would be considered inextricable under the proposed right. As is explained in the PACE Resolution of 29 September 2021, the proposal thus proceeds on the basis that the right is to be interpreted not only in its anthropocentric (subjective) dimension, recognising that nature undeniably has a utility for humans, but also in its ecocentric (objective) dimension, recognising the intrinsic value of nature and ecosystems.

As a matter of policy and my own sense of justice and morality, I have no doubts that it is justified for the international community to robustly debate the need for adopting a normatively binding right to a healthy environment. The times we live in require it, indeed make it imperative. However, when one views the textual

formulation and the scope of application of the right to a healthy environment, as laid down in PACE's Recommendation, the salient question that arises is this: To what extent is it sound policy to incorporate this right into the European Convention on Human Rights as an additional protocol thus triggering the disputes resolution mechanism under the European Court of Human Rights? Is it realistic that the right to a healthy environment can be properly developed by the Court considering that an additional protocol will not live in isolation within the Convention system, but will have to be adapted and developed in light of other fundamental interpretive principles of the Convention system, as well as to conform to procedural requirements for the sound administration of justice in an adversarial system of law.

Before attempting an answer to that question, allow me first to turn to my second part, namely an explication of the current state of the law under the Convention when it comes to environmental rights disputes and in particular claims made as regards human rights impacts resulting from the climate crisis.

II.

The Convention currently does not include a self-standing right to a safe, clean and healthy environment. It is moreover clear from existing case-law that the Convention cannot be interpreted to protect the right to a healthy environment in its ecocentric (objective) dimension wholly divorced from its utilitarian and anthropocentric (subjective) dimension. In other words, as things stand, the environment plays an ancillary role under the Convention and can only be brought into the adjudicative equation to the extent that environmental harms have direct impacts on the exercise of Convention rights. In short, it seems that within the framework of the Convention as it stands, there is limited scope for the Court to be meaningfully involved in protecting the right to a healthy environment as it is understood under the draft protocol. This is especially so if the Court is expected to impose positive mitigation obligations on member States. However, this does not mean that the Convention is agnostic to environmental harms and nuisance. On the contrary, there is ample case-law on such issues where the Court has made meaningful strides in interpreting the Convention guarantees to include protections against environmental hazards and pollution.

However, the question the Court is currently confronted with is whether the Convention can also be interpreted to protect against the dangers that climate change poses to classical first generation human rights, such as the right to life enshrined in Article 2 of the Convention, or the right to private and family life in Article 8? These are the challenges currently facing the European Court of Human Rights in three cases on its Grand Chamber docket, two of which are currently being deliberated after hearings on 29 March last and another which will be heard on 27 September this year.

In the pending climate change cases, the applicants essentially argue that that member States have violated their Convention rights by not implementing effective mitigation measures to address the climate crisis. In doing so, applicants and third party interveners have correctly argued that the Strasbourg Court has a tradition of looking to other sources of international law when

interpreting the Convention. On this basis they argue that the Court should interpret the Convention in light of principles of international environmental law, including the non-binding commitments of the Paris Agreement. Pursuant to the Paris Agreement, States resolved to hold the increase in the global average temperature to well below 2°C above pre-industrial levels. Indeed, some argue that there is now a consensus under international law that States have a legal obligation to limit emissions to not to exceed the 2% maximum temperature increase. The drafters of the Oslo Principles, which espouses this view, have described the legal basis for this obligation as being a *"network of intersecting sources"* which are *"local, national, regional and international"*. For example, reference is made to the Human Rights Committee, which is the monitoring body for the ICCPR, and which has found that climate change is a serious threat to the right to life. Furthermore, the Committee of Social, Cultural and Economic Rights has stated that States have an obligation to prevent foreseeable human rights harm caused by climate change. It further stated that not doing so would be a breach of the state's duty to promote human rights for all, on a non-discriminatory basis.

These arguments are of course enticing. In the face of perceived procrastination by national and international political processes in addressing climate change, some naturally crave judicial intervention. This is a challenge, especially as the Convention does not specifically provide for the right to a clean, safe and healthy environment. To mitigate that lacunae, the Court is invited to apply a broad and purposive interpretation to the existing rights enshrined in the Convention and to the norms that the Court has developed in applying these rights.

However, there are several issues that come with interpreting the Convention in a way that imposes positive substantive obligations on a member State. First, when it comes climate change, its nature and its cross-border effects, there are significant issues that need to be addressed at the admissibility stage, including challenges related to the traditional notions of victim status and extraterritorial jurisdiction, as I will come to in a moment. Second, at the merits stage, if the Court considers that it can proceed to the merits, there is the issue of the margin of appreciation that the Court traditionally affords to member States in areas of significant economic and social policy which is certainly implicated by any sweeping measures applied for the purpose of addressing a wide-ranging issue such as climate change.

To set the scene for my final part, in which I will attempt a reply to the question I posed at the outset, that is whether it is wise and based on sound considerations of policy, to amend the Convention with a new additional protocol on the right to a clean, healthy and sustainable environment, allow me now to explain further the nature and scope of the challenge facing the Court in cases of this kind.

First, the law has its limits, including a human rights treaty like the Convention. The Court has made clear that as an international treaty the Convention must be interpreted in the light of Article 31 § 1 of the Vienna Convention on the Law of Treaties. The starting point under this fundamental interpretive principle is the 'good faith' interpretation of the 'ordinary meaning' of the provision in question read in "its context" and "in the light of its object and purpose". The purposive or

teleological interpretation of the Convention is thus not limitless, it is constrained by the actual textual formulation of the treaty in question. There comes a point where law ends and politics begin. Attempts to expand the reach of the Convention, as it currently stands, to include the protection of human rights harms due to climate change therefore pose a great challenge, not only methodologically, but also as a matter of legitimacy of international law as a normative system of binding rules.

Second, any meaningful measure to address climate change requires the imposition of positive obligations on States. The legal claims in these cases are in principle not framed in terms of States' interfering with Convention rights, in other words their negative obligations. However, the Convention is mainly couched terms of this negative formulation as inhibiting the State from actively infringing rights, not in terms of positive obligations, which is a jurisprudential construct of the Court. Nevertheless, there is long-standing case-law to the effect that Convention rights sometimes require proactive engagement by States for the effective realisation of rights, hence their positive obligations.

However, and this is crucial, positive obligations have always been formulated in a manner that is sensitive to the articulation of the right which these obligations are meant to preserve and protect. Without taking a firm view, I think it is safe to say that it is questionable whether it is legally tenable to impose positive obligations on States when the scope and content of the right in question is expanded to cover harms or interests that are very far removed from the core of the right in question, such as the right to life and the right to private life and a home. It also would require the Court to give substance to positive obligations without a solid and legitimate normative basis to rely on. After all, that is why the international community is currently attempting to expand the reach of the human right to a healthy environment, both in its anthropocentric (subjective) dimension, but also to introduce a robust protection mechanism for its ecocentric (objective) dimension.

III.

On this basis, allow me now enter into the last segment of my speech: the way forward for the Council of Europe.

The PACE's draft protocol grants *"everyone"* the right to a safe, clean, healthy and sustainable environment. The draft protocol envisages that the right applies to both present and future generations. It also imposes on *"every generation*" a duty to "*prevent any irreparable and irreversible damage to life on Earth"* so as to ensure the right for future generations. In addition to this principle of intergenerational equity, the draft protocol recognises other principles of international environmental law such as prevention and precaution. Procedurally, the draft protocol grants *"everyone" "the right of access to justice in matters relating to the environment".* It also grants *"everyone whose rights as set forth in this Protocol are violated"* with an effective remedy.

It is tempting to consider that were this draft protocol to be adopted, it would fill in many of the gaps that exist currently under the Convention in terms of climate change-related actions, as well as to introduce an effective mechanism for protection against environmental degradation and loss of biodiversity. In other words, it would be assumed that a far more straightforward argument could be made for the Court to hold member States to account in environmental cases.

To be frank, I am not sure. I invite caution in this regard, as seems to have been the approach adopted by the Committee of Ministers in its 2022 Recommendation which did not follow up on the PACE's invitation to the CM to draw up an additional protocol. My arguments in this regard are both substantive and procedural. They are as follows:

Firstly, in point 3.1 of the PACE's 2021 Recommendation, it is stated that the "inclusion of this right in the Convention would establish the clear responsibility of member States to maintain a good state of the environment that is compatible with life in dignity and in good health and the full enjoyment of other fundamental rights; this would also support much more effective protection of a safe, clean, healthy and sustainable environment at national level, including for generations to come."

These are all lofty and inspiring goals and certainly merit extensive debate at the national and international stages and a moral and political obligation to adopt binding norms and standards. However, I question whether these goals justify the adoption of a new protocol to the European Convention on Human Rights which would open this new right to protracted disputes and adjudicatory resolution in national courts and ultimately within the Strasbourg Court. In other words, we should ask ourselves this: In the light of the need for further standard-setting and normatively binding and detailed rules in the climate change field and also to protect the environment in general, is it realistic that judges should be asked to take the lead by determining for 46 member States what constitutes a "good state for the environment that is compatible with life in dignity and in good health, " as this is worded in the Recommendation. The concepts underpinning the right in question under Article 5 of the draft protocol, referring as they do to a "safe, clean, healthy and sustainable environment" will moreover invite extremely difficult definitional, scientific and probative challenges when litigated in adversarial proceedings which will certainly require meaningful documentary and evidentiary processes for judges to be capable of reaching any sound conclusions.

Secondly, the adoption of the draft protocol would not, as it currently stands, alter the fact that all admissibility issues, such as jurisdiction under Article 1 and victim status under Article 34, will have to be dealt with in accordance with settled principles.

The question that arises is how the victim status requirement will be meaningfully developed within the context of the right to a clean, healthy and sustainable environment? Article 2 of the draft Protocol seems to introduce a minimum severity threshold which may have relevance here, although its possible interaction with the victim status requirement is not fully clear. Article 2 states

that *"Every generation has a duty to protect the environment and biodiversity and to prevent any irreparable and irreversible damage to life on Earth."* It has been argued that the threshold of what damage qualifies as irreparable and irreversible should be evaluated on the balance of probabilities, given the technical complexities of the subject matter, which would however require a significant reformulation of the case-law which traditionally sets a higher standard of proof for the establishment of facts.

Separately, the question of extraterritorial jurisdiction arises inevitably in the context of the right to a healthy environment. Article 1 of the Convention provides that member States shall secure Convention rights to *"everyone within their jurisdiction."* This means that a member States jurisdiction is only exceptionally recognised when the violations alleged occur outside its territory. Currently, the relevant test for extraterritorial jurisdiction is whether the State exerts *"effective control"* over the affected area outside of its territory. However, this has mainly been applied in the context of military conflict and extraterritorial occupation. Of course, environmental damage and climate change completely different. A member State does not need to have any sort of control over territories of third States to emit greenhouse gases into the environment, affecting a third state's air quality and climate.

It is not clear to me how the inherent cross-border and transversal nature of the right to a healthy environment can be reconciled meaningfully with the current formulation of Article 1 of the Convention and the Court's case-law. Again, any imposition of positive obligations in this field in one member States will, by its very nature, have to take account of pan-European policy issues as any effective solutions cannot be limited geographically to the respondent State in a given case.

So, to conclude, if not an additional protocol to the Convention, then what? I agree with those that say that the Council of Europe cannot be agnostic in this area. It should continue to take the lead. The PACE's Resolution and Recommendation of 2021 and the CM's Recommendation to member States of 2022 are steps in the right direction, but an additional protocol to the Convention is, I tend to think, not the right solution.

Before a right to a healthy environment is given normative status in a human rights treaty, granting 'everyone' direct access to an adjudicative remedy for violations of this right, robust standard-setting at national and international level ideally needs to take place for the effective realisation of that right. The CM's Recommendation of 2022, inviting member States to become more active in this area, is therefore a step in the right direction, but this does not exclude further proactive engagement at the level of the Council of Europe.

The upcoming Reykjavík Summit should be used as an opportunity for the organisation to commit to starting work on the Council of Europe Convention on the right to a clean, healthy and sustainable environment which would constitute a holistic and comprehensive set of standards. However, importantly, this would be a standard-setting and framework Convention, not a human rights treaty with individual access to an adjudicatory resolution mechanism. In short, in my view,

the right to a healthy environment will not be meaningfully imposed top-down by judges or human rights campaigners but can only realistically become a reality through robust, good-faith democratic, as well as multilateral engagement with all relevant stakeholders. Again, all politicians and stakeholders have a strong moral and political justification to act and act with all deliberate speed. There, the Council of Europe should remain a leader, paving the way forward.

Thank you very much.

SESSION 1

Why a right to a clean, healthy and sustainable environment?

Pourquoi un droit à un environnement propre, sain et durable ?

Rik DAEMS

Chairperson of the Parliamentary Assembly of the Council of Europe Network of Contact Parliamentarians for a healthy environment
Président du Réseau de parlementaires de référence de l'Assemblée parlementaire du Conseil de l'Europe pour un environnement sain

---

Ladies and gentlemen,

I warmly thank the Icelandic Presidency of the Committee of Ministers for initiating this conference. It is an important event to send a final message to the Heads of State and Government who will soon be meeting in Reykjavík.

Today, I would like to emphasise the significance of the political dimension of the recognition of the right to a clean, healthy and sustainable environment as a rebuttal to the legal analysis presented earlier by Robert Spano on whether it is wise to amend the European Convention on Human Rights ("ECHR") with a new Protocol on the right to a clean, healthy and sustainable environment and place the development of this right within the adjudicatory model of human rights enforcement provided for by the ECHR and the European Court of Human Rights?

In my previous role as President of the Parliamentary Assembly (PACE) of the Council of Europe, I had the opportunity to deliver a keynote speech at the COP26 Summit. At that time, I questioned the effectiveness of that approach to solving these issues. Meeting 26 times in 30 years without substantial progress indicates that there is a problem that needs to be addressed.

Recognising the need for practical action, I advocated for the introduction of a Protocol to the European Convention on Human Rights (ECHR) during my presidency of the Parliamentary Assembly of the Council of Europe. Although some doubted the feasibility of this proposal, I was convinced that tangible steps were necessary. As a wine farmer, I witness firsthand the impact of climate change on our environment.

In collaboration with the United Nations, a political strategy was devised. The Parliamentary Assembly of the Council of Europe aimed to pass a recommendation to the Committee of Ministers (CM) with a two-thirds majority, urging the formal recognition of the right to a clean, healthy, and sustainable environment as a basic human right. The idea was that this would fortify the UN General Assembly to recognise the right, following which the requisite impetus for the CM to take action would materialise.

In September 2021, Recommendation 2211 of the PACE on "Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe" was adopted unanimously that is to say that all parliamentarians designated to the Council of Europe, comprising 47 member States at the time voted in favour. This call to the CM was to introduce the right to a safe, clean, healthy, and sustainable environment into the Convention through a Protocol. By recognising the limitations of the European Court of Human Rights' capacity to adjudicate these matters, we believed it was essential for elected officials to play a role in deciding on such issues in a democratic society.

This recommendation was, however, not the sole factor that influenced subsequent developments. The United Nations followed suit, first in the Human Rights Council and then in the General Assembly.

All these developments lead me to pose a simple question for the Reykjavík Summit: can we envision a scenario where, following all of the developments recalled thus far, heads of state refuse to recognise this right when it has been collectively demanded? In my opinion, it is inconceivable.

There are no excuses left for failing to recognise the right to a clean, healthy, and sustainable environment as a basic human right. The means of achieving this recognition, as Robert Spano rightly mentioned, can be debated. The crucial point, however, is that it must be enshrined in the ECHR. By doing so, governments can be held responsible and accountable. Holding governments accountable is vital, as ministers often act only when compelled to do so.

The Reykjavík Summit presents an opportunity for political leaders to introduce this right into the Convention. It is a moment where we can demonstrate our commitment to future generations and the preservation of our planet. I remain open to both the option of a protocol and a standalone convention – even simultaneously –, as both avenues can serve as effective vehicles for achieving our goal.

The recognition of the right to a clean, healthy, and sustainable environment not only empowers individual citizens to seek legal recourse but also fosters accountability between countries. We have witnessed the positive outcomes of introducing obligations within the European Union, particularly when countries seeking membership were required to meet the Maastricht criteria. By making it an obligation, we establish a framework that encourages collective action and progress.

So, what does this mean in practice? It means that heads of States need to make up their minds. They must either come through and recognise the right to a clean, healthy, and sustainable environment as a basic human right, endorsing a legally binding instrument, or risk sending a precarious message to their respective populations. This issue represents one of the last critical areas where the political world can reach out to young people, assuring them that intergenerational collaboration is committed to tackling these challenges head-on.

Another idea that I would like to highlight is the potential establishment of the European Commission on Environmental Rights (ECER) following the model of the European Commission against Racism and Intolerance (ECRI). This commission would serve as a platform for connecting countries, sharing best practices, and reaching out to young people. It would also provide a forum for legal experts to collaborate on drafting and integrating the right to a clean, healthy, and sustainable environment into the ECHR.

It is time to do more than just talk about the need for action. The establishment of ECER would be a concrete step toward realising our shared vision. By bringing together political leaders, experts, and civil society, we can foster a comprehensive and inclusive approach to environmental human rights. This initiative would not only demonstrate our commitment but also empower individuals to actively participate in shaping a sustainable future.

In conclusion, the political and legal dimensions must work hand in hand to bring about the necessary changes. Let’s stop talking about these issues and finally do something about them.

Thank you.

Shara DUNCAN-VILLALOBOS

Ambassador, Deputy Permanent Representative of the Republic of Costa Rica to the United Nations Office and other international organisations in Geneva

Ambassadrice, Représentante Permanente adjointe de la République du Costa Rica auprès du Bureau des Nations Unies et d'autres organisations internationales à Genève

---

The right to a clean, healthy and sustainable environment: a few perspectives from its recognition in the Human Rights Council and the UNGA.

Thank you very much for inviting me today, it is an honour for me to be here taking part of this very interesting discussion. Up until October 2021, as you may know, the right to a healthy environment was not recognised at the global level, even though it was recognised by more than 80% of the UN membership, some 156 countries from all regions gave it some level of protection through their constitutions, national law or regional legally binding instruments.

This has meant that whenever Special Procedures, Treaty bodies or anyone for that matter at the global level wanted to develop it further they have always had to link it to other long-standing recognised rights, giving them a "green" turn, such is the case of the right to life or the right to the highest attainable standard of health. In other words, it always had to be presented as subjected to or linked to other rights and not as a right with a life of its own.

This has also meant that the level of recognition is dissimilar. The right is enforceable in some regions such as Latin America or Africa, but not in all European or Asian countries. Each State depending on the level of protection and recognition granted in its legal system, has developed a legal or jurisprudential protection scheme that responds to strictly national or regional criteria, including if it is of a collective or individual nature, the level of protection and measures for its promotion and its enforceability at the judicial level.

At the regional level, recognition has been given in the African Charter (1981); the Additional Protocol of San Salvador to the Inter American Convention on Human Rights (1988); the Aarhus Convention of the year 1998 and the Escazú Agreement in Latin America, of March 4, 2018. Also at the regional level, but in a less direct way, the Arab Charter of Human Rights (2004) talks about a right to a safe environment.

At the international level, this is a debate that has been on-going for a little over fifty years and started with the first Earth Summit, in Stockholm, in 1972 and the negotiation and subsequent adoption of the Stockholm Declaration. The second step of absolute relevance in this discussion at the international level is the Rio Declaration on Environment and Development (1992). Both have served as a framework of reference, despite being non-binding political declarations, but I

would like to highlight that both establish the essentiality for life and human rights of the human environment, although neither of them recognises the human right to a healthy environment, we know that serious attempts were made in both negotiations to introduce the right.

According to John Knox, the former Independent Expert on Human Rights and the Environment, the possible recognition started to receive particular attention in the early 1990s, including in the Commission of Human Rights, as well as other United Nations human rights bodies and mechanisms, but he explains that "instead of focusing on proclaiming a new right, the efforts were focused on examining the relationship of Human Rights with the environment" (Knox, J. 2012. p.7). The now extinct Commission made attempts to consider the issue and the Human Rights Council has been considering the impact of climate change in human rights since 2008 and made the link between HR and the environment in 2011 for the first time.

In 2012, Costa Rica, the Maldives, Morocco, Slovenia and Switzerland presented a draft resolution to the Human Rights Council that created the figure of an "Independent Expert", and later, a Special Rapporteur who would study the issue of human rights obligations related to the enjoyment of a safe, clean, healthy and sustainable environment.

I want to refer to the last report presented to the General Assembly in 2018 by Special Rapporteur Knox, who recommended starting a process to carry out the recognition of the right at the international level, and proposed three possible ways to achieve it:

- a legally binding instrument that could be a new international treaty;
- an additional protocol to any of the already existing treaties or
- an approach that he described as "faster" through resolutions of UNGA the Council or both forums.

Since 2018 the Core Group together with the current Special Rapporteur, David Boyd, started discussing various scenarios that would make the recognition possible. At the end of 2019 we had an agreement on a roadmap and decided to begin an open informal consultation process and host some academic discussions.

In March 2020, the COVID-19 pandemic hit and put our activities on hold, however, we continued our work online and before the summer some 30 bilateral meetings with regional groups and delegations had been held. The pandemic put on the table the urgency of the recognition, a zoonotic disease stopped the world.

In 2020, the five members of the Core Group had decided to make a joint statement in the HRC committing to working towards recognition, and we decided to do the same by the end of the 46th session of the Council, in March 2021, but we opened the text and 70 countries joined from all regions of the world. Gaining critical mass support was politically relevant because it measured the temperature and gave us information about the possible outcome of

submitting the recognition to the Council. In that same session, 15 United Nations agencies also published a joint statement and for World Environment Day and at the request of Special Rapporteur David Boyd, 50 UN experts published a joint statement (2021) calling for assuming urgently "transformative" actions "to face the COVID-19 pandemic, " and "to protect the environment and human rights, and to face the factors that cause climatic disorders, toxic pollution, loss of biodiversity and zoonotic diseases".

The Core Group decided to present the resolution in September of 2021 during the 48th session of the HRC. We still couldn't have face-to-face negotiations at the Palais des Nations, but we needed to try to achieve the same result as if we were in the room.

The High Commissioner for Human Rights gave the starting signal with her oral report on the state of Human Rights in the world in which she made a very clear call for the recognition by linking the human rights situation around the world with the challenges arising from the environmental degradation that we are facing. (Bachelet, September 2021).

During the informal meetings, a few delegations made the call to wait, insisting that the Council was not the appropriate forum to discuss the recognition because it did not have universal membership, and that it was better to discuss the issue in the GA.

In any case, for us it was essential to continue, if we succeeded, this would be the first time that not only the human right to a healthy environment would be recognised, but also the first time that a human right was recognised within this important body in Geneva.

Due to time constraints, it is impossible for me to explain each of the discussions that took place, nevertheless I will try to summarise the most complex ones because I'm sure they can serve for any discussions at the global level in the future. It is important to be mindful that there is tension on this issue not only between those States that have no particular interest in codifying it, but also between developed and developing States that agree in the need for its codification.

The opposition to the recognition came basically from 4 but very powerful delegations, that argued that Human Rights can only be recognised in legally binding instruments, an argument that, of course, we do not share, especially since the basis of the Universal System is the Universal Declaration of Human Rights, which 75th anniversary is this year, the relevance of which is not questioned by anyone despite the fact that it is not a legally binding instrument.

Additionally, a large number of developing countries raised their voices to bring to the table other issues that have been part of the general discussion of climate change and international environmental issues, during the last 50 years, such as the tension with the right to development and some principles of the Rio declaration such as principle 2 on state sovereignty over natural resources; principle 5 on the eradication of poverty and principle 7 on common but

differentiated responsibilities (CBDR).And the incorporation of principle 21 of Stockholm, which also deals with state sovereignty over natural resources and the Rio +20 Declaration called "The future we want".

Grosso modo, Marc Limon (Limon, 2018), summarises the discussion very appropriately by stating that the tension has existed mainly for two reasons. On the one hand, developed States are accused of having achieved development through the overexploitation of natural resources and that they are putting at risk, the development and possibilities of eradicating poverty, of developing countries through protection standards. On the other hand, the discussion has to do with the argument that developing countries will not be able to achieve this development without international financial cooperation.

The latter becomes more relevant because developed countries are blamed for not having fulfilled their financial obligations and the development cooperation goals that would allow developing countries to achieve the desired development.

For the Core group, our greatest concern with respect to the CDBR principle was that for us it should have no place in a Human right's resolution. It was our common agreement that regardless of their level of development, States must comply with international obligations on Human Rights.

After several rounds of negotiations, we managed to come up with a text that accommodated some of the concerns voiced and both sides were equally dissatisfied with the text, which is usually a sign of having struck a good balance.

The recognition was achieved with 43 votes in favor, with 4 abstentions from China, India, Japan and Russia, no votes against and a spontaneous round of applause and tears, something very unusual in the Council, but that the relevance of the moment well deserved.

It is no secret to anyone that multilateral processes are slow. Those of us who dedicate ourselves to them would like to see much faster results. However, the diversity and multiplicity of actors at the international level makes this impossible.

What is certain is that, once we have taken a step forward, it is very unlikely that we will go back. In terms of human rights, we know that its progressiveness makes it even more difficult to go back and with that in mind we went to the United Nations General Assembly where the discussions were on the same arguments as in Geneva, to no one's surprise, with the great difference that the Core Group was able to build on the recognition from Geneva, and they knew what delegations had already put forward. And resolution 76/300 was approved by the GA on July 28, 2022 by 161 votes in favour, 8 abstentions and 0 votes against.

Why a right?

I am of the opinion that the recognition will catalyse better and higher standards at the international level, it will encourage those countries that have not recognised it at the national level to do so, as it has happened with the right to water and sanitation, in the near future it will not be strange to see changes at the constitutional, legislative and public policy levels in all regions of the world.

It will provide greater clarity for the people and States on its enforceability. Giving States the opportunity to carry out actions to comply with their obligations with the positive repercussion those actions will have on the quality of life of all people, especially those who are in vulnerable situations because of systemic exclusion that forces them to live in places with conditions of serious environmental degradation. In fact, I want to give you an example: in CR the right to a healthy environment recognised by our constitution since 1994 and there is numerous jurisprudence in this regard from the Constitutional Chamber of our Supreme Court, however, in October 2021, a Costa Rican decided to file a lawsuit in the constitutional court alleging that the use of a pesticide that killed bees affected everyone's right to a healthy environment. The Chamber agreed with him, but both the plaintiff and the court used resolution 48/13 in their arguments, and for us and for me personally, having had the enormous responsibility and honour of facilitating that negotiation, it is a source of great inspiration and a reminder that the work we do internationally has a direct impact on the lives of people on the ground.

The Universal Human Rights System, the UPR and the HRC mandate holders will begin to reflect, in their recommendations, actions to ensure that all people internationally have the same standards of protection. The work of the Special Procedures will sit on more solid ground and will reduce inconsistencies.

With only seven years left for the 2030 Agenda and its SDGs, the recognition gives a great boost to state efforts in environmental matters.

The pandemic brought to the forefront the need and urgency of the international community to act as a whole and face the triple planetary crisis in a joint, responsible and determined manner. I personally believe that we don't need to wait until we have an internationally binding legal instrument to start acting. We can start our efforts, and in fact have already started, with the recognitions we have.

Before closing, I want to pay homage to the fundamental role that civil society has played during these 50 years, their tireless work of decades towards this recognition. Also during 2019-2022, the Office of the Secretary General, the High Commissioner, United Nations agencies, special procedures and especially our champions, John Knox, David Boyd. The Core Group could have not achieved anything without the joint work of all these actors.

Thank you so much.

Todd HOWLAND

Chief of Development and Economic and Social Rights Branch, Office of the United Nations High Commissioner for Human Rights, Geneva

Chef du Service du développement et des droits économiques et sociaux, Bureau du Haut-Commissaire aux Droits de l'Homme des Nations Unies, Genève

---

Each year an estimated 9 million people die from pollution which accounts for approximately 1 in every 6 deaths. This is, in many ways, the tip of the iceberg in reflecting how pollution affects people's lives and rights, including their rights to health and a healthy environment.

In recent years, weather related disasters have resulted in the internal displacement of roughly 20 million people a year, again just one indicator among many of the dire consequences of climate inaction.

Pollution, climate change and changing patterns of land and resource use are also driving unprecedented biodiversity loss including extinction and ecosystem collapse – an existential threat to lives, livelihoods and health now and in the future.

This triple planetary crisis of pollution, climate change and biodiversity loss is a human rights crisis.

Tragically, it is one that could have been avoided if human rights law had been applied.

States have obligations to respect, protect and fulfil all human rights. Businesses, investors and even consumers need to be aware of their role to respect human rights.

Yet for decades they have failed to take adequate action to stop climate change, prevent pollution and protect nature.

The resulting human rights harms have been astronomical. We have documented them in every part of our world. Our project on climate change related human mobility in the Sahel not only demonstrates impact on health, livelihoods, and lives, but how without the resilience created by a strong level of respect for ESCR, some people are compelled to migrate in vulnerable situations.

Human rights are too often used post-facto after human rights tragedies, as opposed to useful policy guardrails to create a world free from want and fear.
This year marks the 75th anniversary of the Universal Declaration of Human Rights – itself a response the horrors of WWII and in the context of the great

depression and how the economy and economic policies were driving human misery.

The UDHR was the beginning of the international community's critical undertaking to create a universal framework for the recognition and implementation of human rights.

This is not a static exercise.

It is an ongoing one – elaborated on through the 9 core human rights treaties, multitudes of regional, national and local laws and policies, and a rich body of interpretive work by courts, academics and experts.

The purpose and effect of these efforts is not to create rights but rather to facilitate their implementation.

The right to a clean, healthy and sustainable environment has been recognised by the General Assembly and by the Human Rights Council. It clarifies how human rights already applied to the area of the environment, for example, via the right to health. It was implicit in the core human rights treaties and most importantly inherent and inalienable, a fundamental prerequisite for a life of human dignity interlinked and interdependent with all human rights.

Before its universal recognition, the right to a healthy environment was already recognised in multiple regional human rights instruments and the majority of countries.

Human rights, including the right to a healthy environment, are also increasingly prevalent in international environmental law.

The Paris Agreement calls for States to respect, promote and consider their respective human rights obligations when taking climate action and the Kunming-Montreal Global Biodiversity Framework calls on States to take a rights-based approach in its implementation.

The 27th Conference of the Parties to the UN Framework Convention on Climate Change and the 15th Conference of the Parties to the Convention on Biological Diversity explicitly integrated the right to a clean, healthy and sustainable environment in their outcomes.

In examining the large body of existing law as well as practice with respect to the right to a clean, healthy and sustainable environment in Europe and internationally, there can be no disputing its existence.

What remains to be explored is how best to implement it.

We are presently living the absence of effective implementation of the right to a clean, healthy and sustainable environment.

We cannot afford to continue.

The most recent report of the Intergovernmental Panel on Climate Change highlights how little time remains to prevent the climate crisis from becoming exponentially worse. Intergovernmental Panel on Biodiversity and Ecosystem Services came to a similar conclusion.

It emphasises that rights-based approaches will lead to more effective and sustainable climate action.

Human rights law requires action to prevent environmental harms and enhance accountability for them, which also leads to more effective environmental action. This is why the Secretary-General's Call to Action for Human Rights calls for the entire UN system to work together to advance the right to a healthy environment. In this respect, UN Human Rights, working together with UNDP and UNEP, recently issued a joint information note on the right to a healthy environment which describes commonly understood key elements of the right including: clean air; a safe and stable climate; access to safe water and adequate sanitation; healthy and sustainably produced food; non-toxic environments in which to live, work, study and play; healthy biodiversity and ecosystems; access to information; participation, and access to justice and effective remedies.

Notably, many of these elements are recognised as human rights in and of themselves, for example, the human right to access justice and effective remedies which is also a key element of the Aarhus Convention that so many Council of Europe States are party to.

Development by the Council of Europe of a new legal instrument on the right to a healthy environment could play an important role in clarifying the complex issues of diffuse and collective responsibility, causality and extraterritoriality posed by environmental harms including with respect to the role and responsibilities of businesses.

Just a word on this. Today it is relatively easy to document the human rights impacts of climate change and environmental degradation. It is possible scientifically to apportion responsibilities based on historic "contributions" to the factors causing climate change.

Human rights law celebrates when a torturer and the person that ordered the torture are brought to justice by a victim. Our system needs further development to breach the current barriers to accountability for environmental harms.

In climate change we have multiple perpetrators, in multiple jurisdictions, with differing levels of responsibility impacting the rights of multiple people, in multiple jurisdictions, with differing impacts. Human rights law can integrate developments in civil litigation that do assign various levels of responsibility and liability to different actors in various jurisdictions. Ensuring the right to access justice and effective remedy requires that the day will come when it does so lest the right itself be rendered meaningless.

Ultimately, the environmental crisis cannot be separated from a fundamentally flawed economic approach that perpetuates unsustainable production and consumption and prioritises short-terms profits as a matter of “fiduciary duty”. Current economic practices often reduce human rights to something optional in breach of human rights obligations rather than the essential part of rule of law that they are. Human rights need to be respected by government, businesses, investors and consumers.

A human rights economy would fundamentally realign economic policies, business models, investment decisions and consumer choices by simply treating human rights law as part of the rule of law that it is. It would help to end the unjust imposition by powerful actors of real human rights costs, including environmental harms, on the less powerful.

Enhanced efforts to implement the right to a clean, healthy and sustainable environment can facilitate this transformative change to our societies and economies.

In this respect, UN Human Rights welcomes the recommendation of the Parliamentary Assembly of the Council of Europe to pursue a legally binding instrument on the right to a healthy environment as well as enhanced corporate environmental responsibility and the ongoing consideration of these matters by the Committee of Ministers and its Human Rights Steering Committee.

Today’s Conference and the upcoming Summit of the Council of Europe offer additional opportunities to reflect on and highlight the importance of the right to a clean, healthy and sustainable environment and embrace human rights as rule of law and useful guardrails for policymaking.

UN Human Rights is pleased to have the opportunity to contribute to these discussions and looks forward to continuing to work with the Council of Europe to support any and all action that will enhance accountability for environmentally caused human rights violations and advance the realisation of the human right to a clean, healthy and sustainable environment for all.

Pegah MOULANA
Secretary General of Youth for Environment Europe
Secrétaire Générale de « Youth for Environment Europe »

Dear distinguished guests, colleagues, governmental representatives, thank you for joining us here today! I am incredibly honoured to be addressing you today and to be among such fantastic panellists this morning!

I must admit, it feels like a very difficult task to be speaking after such fantastic individuals and to be given the task of representing the voices of young people today on this important issue. It is no easy task, given the diversity of young people, multiplicity of their challenges, systematic vulnerabilities that they face on a daily basis, and I only have a couple of minutes to do them justice!

I would therefore, like you to go on a journey with me, to imagine ourselves in the life of a young person within today's society, a young person who is constantly realising that the more that they grow up, the four seasons that they have grown up with is becoming very different – with winter arriving earlier, its intensity being harsher, flowers blossoming before spring has arrived and summers getting drier, with the heat becoming intolerance, almost suffocating.

At the same turn, that same young person sees numbers and statistics that do not make too much sense, but are warning signs over the latest drought, flooding and fire trends across the world, in their city, town, and neighbourhood telling them that this is "not normal" and we must protect our planet before it is too late.

This leaves the young person confused, helpless, anxious, wondering whether they will continue living differently, in more anxiety as they get older. That young person wonders if it can do something to stop this from happening, to address this helpless feeling.

By a collection of those young people, a group of activists are formed, determined to make a difference. In turn, they organise themselves to form peaceful protests, to educate other young people about the situation, aim to voice their concerns and provide support to their decision makers, they shout and plea for their future, their children's future to be safeguarded. During this process, not only they learn the limitations of the system around them, but also what can be done to save it. They turn to you and address you.

They address you to say that despite the current mechanisms in place, they are struggling with the enjoyment of their fundamental civil, political, and social rights, because frankly, the drafters of the day, did not anticipate that their right to a healthy environment was a necessity. But it is today, it is for their tomorrow, and I am here to explain to you why!

First and foremost, young people and their rights are already being impacted by the latest environmental degradations by the:

- Increased temperature, causing droughts, sea level rise;
- Many adverse health effects including heat-related disorders, vector-borne diseases, foodborne and waterborne diseases, respiratory and allergic disorders, malnutrition, collective violence, and mental health problems;
- Right to assembly and protest are vastly marginalised;
- Those from vulnerable and marginalised groups continue to face consequences of environmental degradation in a tenth fold manner.

With this, it is essential to recognise that young people have the right to a healthy environment that supports their physical, mental, and social wellbeing.

For example:

- Young people have the right to breathe clean air and drink clean water, free from pollution and contaminants;
- Young people have the right to safe and nutritious food and products, free from harmful chemicals and toxins;
- Young people have the right to be protected from environmental hazards, such as pollution, hazardous waste, and climate change, that can harm their health and well-being;
- Young people have the right to equal access to environmental resources and protections, regardless of their race, ethnicity, or socioeconomic status.

What is evidently clear, that the current legal frameworks such as the European Convention on Human Rights do not go far enough in offering such protections to young people and generations to come.

Due to:

1. **Lack of explicit recognition of the right to a healthy environment**
   Limited consideration of environmental issues in human rights law: While some human rights instruments recognise the right to a healthy environment, this right is often not fully integrated into human rights law. There may be limited guidance on how to apply human rights law to environmental issues, or limited recognition of the specific environmental harms that young people may face.

2. **Insufficient enforcement mechanisms**
   At the present moment, there are insufficient enforcement mechanisms to ensure that this right is upheld. Young people may lack the resources, knowledge and ability to access justice.

3. **Inadequate participation of young people in environmental decision-making**
   While many international and regional human rights instruments recognise the right to participation in decision-making, young people may still face barriers to participation in environmental decision-making processes. They may lack access to information, resources, or platforms for participation, limiting their ability to influence environmental policies and practices.

4. **Limited recognition of the intergenerational nature of environmental harm:**
   Intergenerational equity is important because it acknowledges that natural resources such as clean air and water, healthy ecosystems, and diverse plant and animal species are not infinite and that we must preserve them for future generations.

While some human rights instruments recognise the intergenerational nature of human rights, there may be limited recognition of the intergenerational nature of environmental harms and the need to protect the rights of future generations. Perhaps it is time to wrap up my point and address to you and conclude by stating:

1. Despite the increased recognition in the national and constitutional level on the right to a healthy environment; a European framework is necessary, to not only govern but also act as a guidance tool for member States to better implement Human Right and Environmental frameworks.

   This recognition will act to support member States in preventing environmental and human right harm and in no way is designed to create a backlog of cases before the European Court on Human Rights.

   Prevention is always better than reaction; this is a message that I would like to leave you with today.

2. On behalf of young people, I request you to try your utmost in making the right to a healthy environment a reality that young people can rely on when growing up during such uncertain times. It is the moment for you to prove your leadership, and I for one, believe in you!

Thank you very much!

SESSION 2

The right to a clean, healthy and sustainable environment-European perspectives

Le droit à un environnement propre, sain et durable-perspectives européennes

Luc LAVRYSEN

President of the Constitutional Court of Belgium, Centre for Environmental & Energy Law, Ghent University, President of the European Union Forum of Judges for the Environment
Président de la Cour constitutionnelle de Belgique, Centre du droit de l'environnement et l'énergie, Université de Gand, Président du Forum de l'Union Européenne des juges pour l'environnement

---

In my presentation I will discuss:

1. The application of the constitutional provision on the right to a healthy environment in Belgian jurisprudence
2. The right to a healthy environment and the Aarhus Convention
3. The environmental jurisprudence of the ECtHR and its limits
4. The added value of the inclusion of a right to a clean, healthy and sustainable environment in the ECHR

1. The application of the constitutional provision on the right to a healthy environment in Belgian jurisprudence

The right to the protection of a healthy environment forms part of the economic, social and cultural rights which have been enshrined in the Belgian Constitution since 1994 and which can be found now in article 23 of the Constitution. It was made clear during the parliamentary discussions before the adoption of that provision that it is not meant to provide subjective rights, but other legal effects have not been excluded, e.g., the so-called standstill effect and the constitutional consistent interpretation.

The review of respect of that provision by the federal and regional legislators by the Belgian Constitutional Court is indeed chiefly carried out on the basis of the so called standstill *obligation* or non-regression principle, that has been derived from that constitutional provision and that itself, be it in other matters, stems from international law, more precisely art. 2 (1) of the International Covenant on Economic, Social and Cultural Rights.

By the standstill effect is meant that the level of protection as realised in the legal system at a given moment must not be reduced. The principle is interpreted in a flexible way by the Court. A non-significant regression is not prohibited. A significant regression does not automatically result in an infringement of Article 23 of the Constitution. That is only the case in the absence of reasons connected with the public interest. So, the Court will check if the reasons invoked by the legislator to lower the level of protection can be justified or not. A reason e.g., that is incompatible with international or European law does not qualify to justify a significant regression of domestic environmental law.[1]

[1] L. Lavrysen & J. Theunis, "The right to the protection of a healthy environment in the Belgian Constitution: retrospect and international perspective", in: Larmuseau, I., (ed.), *Constitutional*

The first time the Court annulled a legislative provision because of the violation of the right to the protection of a healthy environment was a case (judgment 137/2006) in which a regional town and country planning law had been relaxed in a way that was believed to be contrary to the EU Directive on Strategic Environmental Assessment and Article 7 of the Aarhus Convention. In its judgment 125/2016 the Court annulled a provision providing the transformation of environmental permits that were under the previous legislation limited in time into licenses for an indefinite period without the obligation to carry out an appropriate assessment according to the EU Habitats Directive, for violation of Article 23 of the Constitution in conjunction with the Habitats Directive. In its judgment 57/2016 the Court annulled some provisions of an amendment of a regional nature protection law for violation of Article 23 of the Constitution and Article 7 of the Aarhus Convention by not providing public participation for the establishment of some nature management plans. In that case however the standstill obligation was not at stake.

In total the Court has held in 9 environmental cases that the stand still obligation was violated, and the majority of those cases have been judged since 2019.

The jurisprudence of the Council of State and of the ordinary courts has endorsed largely the approach taken by the Constitutional Court.

Another legal meaning of the economic, social and cultural rights lies in a Constitution-compliant interpretation of laws, decrees and other rules. Where they are open to several interpretations, a court of law is obliged to follow the interpretation that is compatible with the Constitution. That means that, in case of doubt, an environmentally friendly interpretation is recommended in principle: *in dubio pro natura.* Also, in case of conflicting interest, the fact that the environment is protected by the Constitution, means that the protection of it is considered to be of great interest – in and of itself or independently of its utility to humans - and that in the balance with other, not constitutional protected interests, it must be given great weight. This means also that the environment is valued in itself, not only as far it is useful to humanity. This means at the same time not that the environment as such has rights. The rights of nature is another debate.

This can also be illustrated by the case law. The majority of the actions for annulment that are brought before the Court against federal or regional environmental legislation are instituted by enterprises or businesses associations, who believe that new environmental legislation constitutes an excessive infringement of their fundamental rights. Besides a far-reaching infringement of property rights, an infringement of the freedom of commerce and industry (or the freedom of enterprise) is invoked in particular.

rights to an ecologically balanced environment, (V.V.O.R.-Report; 2007/2), Gent, Vlaamse Vereniging voor Omgevingsrecht, 2007, 9-29; L. Lavrysen, "The Right to the Protection of a Healthy Environment," *UNEP World Congress on Justice, Governance and Law for Environmental Sustainability*, Brazil, 17-20 June 2012, Session 1.1, 33 p.

What emerges from the case law is that the Constitutional Court has no intention whatsoever of counteracting the development of environmental law. So far, the Court has always considered the restrictions on ownership resulting from the challenged environmental laws to be justified and not disproportionate to the objectives of the public interest pursued, even though when the (at times far-reaching) ownership restrictions did not give rise to compensation from the government. The fact that the right to protection of a healthy environment is recognised in the Constitution is of course of great importance when the Court has to balance it against rights that are not as such in the Constitution.

The Court also argues that the freedom of commerce and industry in Belgium is not unlimited, and that an effective environmental policy necessarily implies that activities, which cause environmental nuisances, are monitored and regulated. In the Court's view, there can only be an infringement of the aforementioned freedom if restrictions are imposed without there being any necessity for doing so, or if the restriction is completely disproportionate to the objective being pursued. Nearly all restrictions introduced by environmental legislation have so far been deemed compatible with the freedom of commerce and industry clause. Recent examples include the interdiction to use cars that do not meet emission standards that become stricter over time in low emission zones introduced by the regions (judgments 37/2019 and 43/2021) or the introduction of additional measures to reduce the pollution of water by nitrates due to the use of manure as a fertilizer (judgment 19/2021). The Court's approach is in line with the caselaw of the ECtHR (e.g. the *O'Sullivan Ltd v. Ireland* case).

The Constitutional Court can also take into consideration Article 7b of the Constitution. According that provision, the Federal State, the Communities and the Regions pursue in the exercise of their respective competences, the objectives of sustainable development in its social, economic and environmental aspects, taking into account the solidarity between the generations. Although that provision is not as such a constitutional provision against which the Court can check directly the conformity of legislative acts. So far, the Constitutional Court has referred in 19 judgments to Article 7b of the Constitution, sometimes *ex officio*. Most of the judgments have been delivered in environmental matters. In quite a few cases, the reference to Article 7b serves to contribute to the justification of the challenged rule and therefore to a rejection of the appeal or a finding of no violation (judgments 62/2016, 104/2017, 95/2018, 60/2021, 115/2021)[2].

[2] L. Lavrysen, Environmental cases before the Belgian Constitutional Court, Conference of the Heads of the Supreme Courts of the Council of the European Union member States, Workshop organised by the Constitutional Council "Courts faced with new public health, technological and environmental challenges," Paris, 21 February 2022, https://www.const-court.be/public/stet/f/stet-2022-001f.pdf *(accessed on 12 June 2023)*.

2. The Aarhus Convention and the right to live in a healthy environment

The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was adopted on 25th June 1998 at the Fourth Ministerial Conference in the 'Environment for Europe' process, in the framework of the United Nations Economic Commission for Europe (Geneva). The Convention, which entered into force on 30 October 2001, has now been ratified by 47 Parties, including the European Union and nearly all member States of the Council of Europe (except Andorra, Liechtenstein, Monaco, San Marino and Türkiye), and, very recently, by one Party outside the UNECE region, being Guinea-Bissau. The PRTR Protocol, which entered into force on 8 October 2009, has been ratified by 38 Parties, including the European Union and its member States. The GMO Amendment has been ratified by 32 Parties.

The preamble to the Aarhus Convention connects the concept that adequate protection of the environment is essential to the enjoyment of basic human rights with the concept that every person has the right to live in a healthy environment and the obligation to protect the environment. It then concludes that to assert this right and meet this obligation, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters. Although the Aarhus Convention itself does not recognise the right to a clean, healthy and sustainable environment, it recognises three procedural rights that in the eyes of the framers of that Convention contribute to the realisation of the right to live in a healthy environment. The three rights, or the so-called pillars of the Convention, being the regional transposition in binding regional international law of Rio Principle 10, have a tremendous impact on environmental law of the parties, including the EU and, as the third pillar is concerned, on the jurisprudence of the parties, including the CJEU. I have counted more than 200 judgments of that Court that refers to the Convention. Although the Council of Europe is not bound by the Convention, the ECtHR has referred in around 15 cases to that Convention. Also, the case-law of the Belgian Constitutional Court illustrates that, it referred in more than 20 cases to that Convention.

Although the Aarhus Convention has already had a huge impact on environmental law and jurisprudence in the parties to the Convention, there are still a lot of implementation gaps, as is illustrated by the Findings and Recommendations of its Compliance Committee, and the important number of complaints that are under investigation. Nearly 200 communications from the public and three submissions of the Parties have been submitted.

The Aarhus Convention is thus about procedural rights, not about a substantial right, and it will still be relevant as a tool of environmental law, in case the Council of Europe would introduce a substantive right.[3]

[3] L. Lavrysen, "The Aarhus Convention: Between Environmental Protection and Human Rights," in: X., *Liège, Strasbourg, Bruxelles: parcours des droits de l'homme. Liber amicorum Michel Melchior*, Limal, Anthémis, 2010, 647-671.

3. The environmental jurisprudence of the ECtHR and its limits

Although the ECHR, or its protocols, do not recognise for the moment the right to a clean, healthy and sustainable environment, the ECtHR has developed over time a vast environmental jurisprudence. This jurisprudence is mainly based on the Article 2 (right to life), 8 (right to respect for private and family life) and 1 of the First Protocol (protection of property). Furthermore, there are the Articles 6 (right to a fair trial), 10 (freedom of expression), 11 (freedom of meeting and association), 13 (right to an effective remedy) and 14 (prohibition of discrimination). Off course, this is a very important contribution to the protection of the environment of the European citizens, and this is reflected in a varying degree in national jurisprudence. As the substantive aspect is concerned, this approach has however inherent limitations. The environment will only be protected if at the same time some specific human rights, guaranteed by the ECHR, are at stake. Only when environmental pollution or degradation is of such a nature that the right to life or the right to the protection of private and family life is violated, the threshold from which the positive duty of the state to protect the environment, will play. The Court requires an impact on the quality of life (*Di Sarno*) or the wellbeing of the complainants (*Fadayeva*), without requiring, most of the time, an impact on their health. Therefore, the well-known environmental cases of the ECtHR, like *Lopez Ostra, Öneryildiz, Fadayeva, Taşkın, Cordella, Tătar* or *Pavlov*, are dealing most often with very serious cases of environmental pollution or of exposure to major risks. There must also be a direct and *immediate link between* the impugned situation and the applicant's life or health, home, private or family life. As is illustrated by the *Kyrtatos* case, a general deterioration of the environment is not sufficient. Even very serious damage to e.g., a natural protected area, without a direct negative impact on humans, fall outside the scope of the protection, although it contributes to the biodiversity crisis, which threatens at the end human survival on the planet. Additional gaps have been identified in the literature.[4]

4. The added value of the inclusion of a right to a clean, healthy and sustainable environment in the ECHR

The inclusion of a substantive right to a clean, healthy and sustainable environment in the ECHR, inspired by the wording used in UNGA resolution A/RES/76/300 of 26 July 2022 (*"Recognises the right to a clean, healthy and sustainable environment as a human right"*), the HRC resolution 48/13 of 8 October 2021 (*"Recognises the right to a safe, clean, healthy and sustainable environment as a human right that is important for the enjoyment of human right"*) or in the resolution 2396 (2021) of 29 September 2021 of the Parliamentary Assembly of the Council of Europe (*"the right to a safe, clean, healthy and sustainable environment"* or *"the right to a 'decent' or 'ecologically viable' environment"*) would go of course further than what exist now.

[4] N. Kobylarz, "Anchoring the right to a healthy environment in the European Convention on Human Rights: What concretised normative consequences can be anticipated for the Strasbourg Court in the field of admissibility criteria?," in G. Antonelli (ed.), *Environmental Law Before the Courts: A US-EU Narrative*, Springer, 2023, in press.

It is not a mere constitutional recognition of the fundamental value of the environment, a non-regression and interpretation principle, as is the case with the Belgian constitutional provision. It is a substantive right that is not limited to the procedural rights of the Aarhus Convention. Its scope will not be limited by the thresholds which are now present in the case law of the ECtHR, although a minimum severity requirement in terms of harm to the environment could be necessary. It will not require a direct impact on human life and health, to generate positive obligations to states and, depending on the formulation, non-state actors. It means that the state parties will have a positive obligation to close the gaps in environmental policy and law, and to ensure the enforcement of it, in view of tackling the threefold global environmental crisis we are facing: climate change, loss of biodiversity and environmental pollution (including pollution by plastics).

I believe that the inclusion of the right to a healthy environment in the regional human rights convention can help to reverse the negative environmental spiral that we are confronted with at the moment. I can refer to the chapter that David Boyd, the current UN Special Rapporteur on Human Rights and the Environment, wrote on article 1 of the proposed Global Pact for the Environment, which provides a right to an ecologically sound environment.[5] Looking at the pros and cons of such a right and looking at the experience of more than 100 states that have one or another constitutional right, the evidence is encouraging. Legal recognition of the right to a healthy environment usually spurs governments to review and strengthen environmental laws and policies, improve implementation and enforcement, provide greater opportunities for public participation, and address environmental injustices. The ultimate test of the right to a healthy environment is whether it contributes to healthier people and healthier ecosystems. On the basis of the available studies, he concludes that the evidence is strikingly positive.

As the justiciability of such a provision is concerned, one shall probably have to make a distinction between the domestic and European level. On the domestic level, the combination of the right to a clean, healthy and sustainable environment, with article 9(3) of the Aarhus Convention, provide (under certain conditions) for access to justice to members of the public, including NGOs, to challenge acts and omissions by private persons and public authorities which contravene provisions of the law relating to the environment. Article 9 (4) of the Convention requires effective remedies, as does Article 13 ECHR. In those circumstances, there should be ample opportunities to challenge violations of the right in the domestic courts. In case the national courts do not provide sufficient recourse, cases might be brought to the ECtHR. Off course, the question will arise than how the notion of "victim" in the sense of article 34 ECHR will work regarding such a right, if complainants are not directly affected themselves.

This are some of my reflections on the ongoing debate.
Thank you very much for your attention, and I am looking forward to our discussion.

[5] Y. Aguila & J. E. Viñuales, "*A Global Pact for the Environment -Legal Foundations,"* C-EENRG Report 2019-1, p. 30-36.

Marcel SZABÓ
Judge, Constitutional Court, Hungary
Juge, Cour constitutionnelle, Hongrie

I. Introduction – the right to a healthy environment in the Hungarian Fundamental Law

The Hungarian Fundamental Law, which entered into force in 2012, contains two provisions that protect the environment in the broad sense. Article P of the Fundamental Law provides for the protection, maintenance and preservation for future generations of the natural resources (arable land, forests, water resources, biodiversity, cultural assets) that are part of the common heritage of the nation, while Article XXI of the Fundamental Law establishes the right to a healthy environment as a fundamental human right. The wording of the right to a healthy environment in the Fundamental Law is essentially identical to the wording of the right to a healthy environment in the constitutions of many states around the world.[6] At the same time, the constitutional obligation to preserve natural resources in and for themselves provides Hungary with particularly strong constitutional protection, compared with other states, both for the conservation of these resources and for the interests of future generations.

For a long time in Hungary (from the change of regime until the entry into force of Act CLI of 2011 on the Constitutional Court), the Hungarian Constitutional Court almost exclusively conducted *ex-post* constitutional review procedures, i.e. it basically examined the constitutionality of legislation, not judicial decisions. The powers of the Constitutional Court thus provided a strong check on the legislator to enforce aspects of the right to a healthy environment, but at the same time there were no real legal consequences in the Hungarian legal system for ignoring environmental considerations in the application of the law.

The powers of the Constitutional Court changed fundamentally in two directions in 2012: *(i)* the institution of a "genuine" constitutional complaint was created, which is now recognised by the European Court of Human Rights as an effective remedy to be exhausted before recourse to the Strasbourg Court.[7] *(ii)* At the same time, the examination of the constitutionality of legislation has been significantly reduced compared to the previous *actio popularis* regime – nowadays, the Constitutional Court can only examine the constitutionality of legislation applied in a specific case, primarily on the motion of the judge in the case during the proceedings and, where appropriate, on the motion of the parties

[6] For an overview, see "*A Fundamental Right to the Environment: A Matter for Local and Regional Authorities Towards a Green Reading of the European Charter of Local Self-Government".* CG(2022)43-15 final, 26 October 2022, pp. 12-14.
[7] P. Paczolay: The ECtHR on Constitutional Complaint as Effective Remedy in the Hungarian Legal Order. *Hungarian Yearbook of International Law and European Law*, Vol. 8 (2020), pp. 157-168. From ECtHR decisions, see *Mendrei v. Hungary (dec.)*, No. 54927/15, 19 June 2018; *Szalontay v. Hungary (dec.)*, No. 71327/13, 12 March 2019.

to the proceedings after the proceedings have been concluded.[8] This necessarily also means that the Hungarian Constitutional Court nowadays does not essentially examine the conformity of a rule or a judicial decision with the Fundamental Law on the basis of abstract legal problems, but on the basis of concrete practical examples.

II. The role of the Hungarian Constitutional Court in constitutional complaint procedures

The task of the Hungarian Constitutional Court is very similar to that of the European Court of Human Rights: the Constitutional Court must never examine whether a judicial decision is correct, i.e. whether the court has decided the case "correctly", but whether the requirements of the Fundamental Law were recognised and properly enforced by the court in making the decision. According to the Constitutional Court, *"the establishment of the facts, the assessment of the evidence and the interpretation of the law are matters for the courts, which cannot be taken over by the Constitutional Court, which can only define the constitutional framework of the scope of interpretation".*[9] In simple terms, the Constitutional Court does not essentially assess the result reached by a court in an individual case, but how (by what procedure, by taking into account and weighing up the reasons) it reached that result. Contrary to the European Convention on Human Rights, the Hungarian Fundamental Law explicitly provides for the right to a healthy environment, and by allowing the Constitutional Court to annul judicial decisions that are contrary to the Fundamental Law, it can ultimately directly enforce the full implementation of the requirements of the Fundamental Law.

III. How often does the Constitutional Court deal with the right to a healthy environment?

Under Article XXI (1) of the Fundamental Law, Hungary recognises the right of "everyone" to a healthy environment. This wording does not mean, however, that anyone can invoke the violation of the right to a healthy environment before the Constitutional Court at any time, as the general requirements for the procedure before the Constitutional Court must be fulfilled also in the case of an invocation of the right to a healthy environment.

In the last 10 years (2013-2023), the Constitutional Court has issued a total of 64 decisions (decisions or orders) in which Article XXI of the Fundamental Law is explicitly mentioned. One third of these cases (22) ended with decisions, four of which were adopted on the basis of *ex-ante* constitutional review initiated by

[8] For the sake of completeness, it is worth mentioning that, exceptionally (for example, at the request of a quarter of the members of Parliament or the Commissioner for Fundamental Rights), the Constitutional Court can still conduct *ex-post* control of legislation, and individuals can challenge the conformity of a newly adopted law with the Fundamental Law within 180 days of the entry into force of the law if it directly and individually affects them and the legislation does not provide them with the right to appeal to the courts. See Article 26(2) of Act CLI of 2011 on the Constitutional Court.

[9] Decision No. 3289/2022. (VI. 10.) AB, Reasoning [23].

the President of the Republic before the promulgation of the bill,[10] seven of which were adopted on the basis of an *ex-post* constitutional review initiated by a quarter of the members of Parliament or the Commissioner for Fundamental Rights,[11] and two of which were adopted on the basis of a judicial initiative.[12] From the above figures, the following conclusions can be drawn: *(i)* The number of cases before the Constitutional Court in which the right to a healthy environment is invoked by petitioners is proportionally very low; *(ii)* However, a significant number of these cases (essentially one third of all cases) are decisions on the merits, *i.e.* the relatively low quantity is accompanied by a high quality. *(iii)* However, it can also be seen that only a very small number of judges in individual cases (only two cases in 10 years) question whether a piece of legislation actually gives effect to the right to a healthy environment. *(iv)* However, for the sake of accuracy, it should also be noted that in many cases environmental aspects are brought before the Constitutional Court through other rights: for example, the Hungarian Constitutional Court has already dealt with the right of access to drinking water on the basis of a judicial initiative – but formally not in the context of the right to a healthy environment, but in the context of the right to property.[13]

IV. How does the Constitutional Court apply environmental considerations in judicial proceedings?

As I have already mentioned, the Hungarian Constitutional Court has for a long time been able to examine the constitutionality of legislation. It was only in 2017 that the Constitutional Court formally made it clear that environmental considerations must be fully taken into account in judicial proceedings. Decision No. 3223/2017. (IX. 23.) AB was based on a neighbouring dispute concerning the possibility of extending a carport when a locally protected swamp cypress is located on the border of two properties. The case itself may seem less important in itself, but it is the first time that the Constitutional Court has ruled that the rules and principles of environmental law apply equally to the substantive, procedural and organisational rules for the protection of the environment and nature, since, taken together, they can only ensure that the protection of the environment is fully effective, and "the legislature acting in individual cases must also have

[10] Decision No. 16/2015. (VI. 5.) AB, Decision No. 13/2018. (IX. 4.) AB, Decision No. 5/2021. (II. 9.) AB, Decision No. 25/2021. (VIII. 11.) AB. Moreover, in the case of Decision No. 25/2021. (VIII. 11.) AB concerning the right to purchase apartments in listed buildings, it was not the President of the Republic who invoked Article XXI(1) of the Fundamental Law, but the Constitutional Court which used it as a basis for the interpretation of Article P(1).

[11] The initiative of the Commissioner for Fundamental Rights led to the adoption of Decision No. 44/2012. (XII. 20.) AB, Decision No. 3068/2013. (III. 14.) AB, Decision No. 3114/2016. (VI. 10.) AB, and Decision No. 14/2020. (VII. 6.) AB. On the initiative of a quarter of the members of Parliament, Decision No. 28/2017. (X. 25.) AB, Decision No. 4/2019. (III. 7.) AB, and Decision No. 16/2022. (VII. 14.) AB were adopted.

[12] Decision No. 17/2018. (X. 10.) AB and Decision No. 3071/2019. (IV. 10.) AB, of which, however, the petitioning judge actually only invoked a violation of Article XXI in the case of the former (concerning the noise pollution of the Hungaroring Formula 1 race track). The petition on which Decision No. 3071/2019. (X. 4.) AB was based alleged a violation of the right to property under Article XIII(1), and the Constitutional Court also referred to the rules on the right to a healthy environment in its assessment of this element of the petition.

[13] Decision No. 3196/2020. (VI. 21.) AB.

regard to the application of this principle, which derives from the Fundamental Law, when applying the law, and therefore the level of protection of the environment and nature guaranteed by the law cannot be reduced by an individual decision of the public authorities."[14] It follows from the Constitutional Court's decision that the courts must ensure the right to a healthy environment, partly by observing and enforcing the legislation in force and partly by taking due account of environmental and natural factors in the case of legislation which allows for multiple choices. In the case at hand, the Constitutional Court concluded that the contested judicial decision was not unconstitutional because "the court hearing the case also took expert evidence, obtained the opinions of experts in the field of wildlife protection and forensic architects, and heard the experts appointed, which led it to conclude that the planning documentation provided an appropriate solution for the tree for a long period of time, several decades."[15]

It follows from the decision that the Constitutional Court expects the courts in every single case to recognise the impact of the case on the right to a healthy environment and to take this into account in their decisions, and the reasoning of the judgment must clearly show the extent to which these environmental aspects have been taken into account by the court.

V. Integration of environmental considerations into legislation

The Constitutional Court, on the basis of a constitutional complaint, can only require that the right to a healthy environment be taken into account in relation to judicial decisions, as already mentioned above. However, in relation to legislation, the Constitutional Court can already, in a given case, enforce not only the right to a healthy environment under Article XXI of the Fundamental Law, but also the protection of natural and cultural resources, as main elements of the common heritage of the nation, under Article P of the Fundamental Law, on the basis of the so-called public trust doctrine. The essence of the public trust doctrine, in the approach of the Constitutional Court, is that present generations can only use natural resources in a limited way, taking into account the interests of future generations, given that the state can only use natural resources as a kind of trustee in trust for the benefit of future generations as beneficiaries. As the Constitutional Court has underlined, "the State shall manage the natural and cultural resources entrusted to it as a kind of trustee for future generations as beneficiaries and shall allow present generations to use and benefit from those resources only to the extent that this does not jeopardise the long-term survival of the natural and cultural resources as assets which must be protected for their own sake."[16] In this decision, the Hungarian Constitutional Court stated that the obligation to preserve natural and cultural resources for future generations not only derives from the Hungarian Fundamental Law, but can also be considered part of a newly established and consolidated universal customary law. This is of particular importance because, in the fight against global warming and climate change, it is now essential that all states work together towards the same goal,

[14] Decision No. 3223/2017. (IX. 25.) AB, Reasoning [29].
[15] Decision No. 3223/2017. (IX. 25.) AB, Reasoning [32].
[16] Decision No. 14/2020. (VII. 6.) AB, Reasoning [22].

which the Hungarian Constitutional Court has ruled is now not only a moral but also a legal obligation.

In Hungary, the examination of the constitutionality of legislation may be initiated by the President of the Republic (in the so-called *ex-ante* or preliminary review procedure, *i.e.* before the promulgation of an already adopted bill), a quarter of the members of Parliament, the Commissioner for Fundamental Rights (including on the motion of the Deputy Commissioner for the Protection of the Interests of Future Generations), or the judge in an individual case. A review of the practice of the Constitutional Court shows that both the President of the Republic and the members of Parliament invoke the violation of the right to a healthy environment and Article P of the Fundamental Law in the proceedings of the Constitutional Court in a proportionately high number of cases.

VI. Substantive requirements deriving from the right to a healthy environment based on the practice of the Hungarian Constitutional Court

1. Principle of non-derogation (non-retrogression)

The starting point for the Constitutional Court's concept of the right to a healthy environment is the principle of non-retrogression (or non-derogation), which can be traced back to Decision No. 28/1994. (V. 20.) AB. In this decision, the Hungarian Constitutional Court was among the first in the world to take a position on the question of the specific substantive obligations of the legislator arising from the enforcement of the right to a healthy environment. After the fall of communism, the Hungarian legislator took several steps to provide compensation for the damage caused to private individuals during the socialist era, one element of which was to allow private ownership of protected natural areas, which seriously threatened these protected natural areas, since the legislation did not restrict the management options of private owners at that time. In this decision, the Constitutional Court interpreted the content of the right to a healthy environment and established in principle that the right to a healthy environment also implies the obligation that "the State may not reduce the level of protection of nature provided by law, except where this is unavoidable for the enforcement of another fundamental right or constitutional value. The extent of the reduction in the level of protection must not be disproportionate to the objective pursued."[17] In practice, this meant that the Constitutional Court essentially laid down as a constitutional requirement that the legislator may not reduce the level of environmental protection already achieved.

Decision No. 28/1994. (V. 20.) AB (in its original wording) considered the principle of non-retrogression applicable to the field of nature protection. The Constitutional Court later extended this approach to all elements of nature and the environment, including the protection of the built environment. Without claiming to be exhaustive, the Hungarian Constitutional Court has already invoked the principle of non-retrogression in relation to, *inter alia*, Natura 2000

[17] Decision No. 28/1994. (V. 20.) AB, OJ 1994, 137, 140.

sites,[18] forests,[19] groundwater,[20] public land[21] and biodiversity,[22] the waterfront areas of Lake Balaton[23] or the protection of monuments.[24] The principle also applies to activities traditionally linked to the protection of the environment and nature, such as noise pollution.[25] In the light of the recent case law of the Constitutional Court, the prohibition of retrogression is not only a requirement for legislation but also for the application of the law.[26]

The prohibition of retrogression has been of paramount importance and continues to have an impact in the practice of the Hungarian Constitutional Court in relation to the right to a healthy environment. However, the principle necessarily has limitations: the principle of non-retrogression cannot be interpreted conceptually when determining the level of protection for the first time,[27] since in this case there is no reference point against which retrogression can be interpreted. Moreover, the prohibition of retrogression cannot be regarded as an absolute right, either in form or in substance: the scope of protection of the principle only prohibits retrogression necessary to protect the environment and nature (and not, in absolute terms, any retrogression from a level of protection already achieved), and even in this case, as in other fundamental rights, retrogression in the level of protection can be justified in accordance with the tests of necessity and proportionality. According to the approach of the Constitutional Court, the prohibition of retrogression is therefore not automatic but functional, and the Constitutional Court must assess whether *(i)* the matters raised in the petition fall within the scope of the right to a healthy environment; *(ii)* if so, whether any retrogression from the level of protection can be established; *(iii)* if so, whether the level of retrogression can be justified in the light of Article I(3) of the Fundamental Law.[28] There are, moreover, situations (such as the fight against climate change) where the mere preservation of the previous level of regulation is not sufficient, but requires active action by the State. This means that the principle of non-retrogression cannot in itself be a suitable solution to these situations.

2. The precautionary principle

The principle of precaution, as one of the most important principles of environmental law, was elevated to the level of fundamental law by the Constitutional Court in its Decision No. 13/2018 (IX. 4.) AB, in an *ex-ante* constitutional review procedure initiated by the President of the Republic. In the summer of 2018, the Parliament adopted an amendment to Act LVII of 1995 on

[18] Decision No. 28/2017. (X. 25.) AB.
[19] Decision No. 14/2020. (VII. 6.) AB.
[20] Decision No. 13/2018. (IX. 4.) AB.
[21] Decision No. 16/2015. (VI. 5.) AB.
[22] Decision No. 28/2017. (X. 25.) AB.
[23] Decision No. 16/2022. (VII. 14.) AB.
[24] Decision No. 3104/2017 (V. 8.) AB.
[25] Decision No. 17/2018. (X. 10.) AB.
[26] Decision No. 3223/2017. (IX. 25.) AB.
[27] Decision No. 17/2018. (X. 10.) AB, Reasoning [92].
[28] Decision No. 4/2019. (III. 7.), Reasoning [44]; most recently: Decision No. 25/2021. (VIII. 11.) AB, Reasoning [58].

Water Management, the aim of which was to establish a regulation that would have allowed anyone to construct wells up to 80 meters deep without an official permit and without the obligation to notify the authorities. The President of the Republic considered that the bill was contrary to the obligation to protect water resources forming part of the common heritage of the nation, in particular the prohibition of non-retrogression and the requirements arising from the precautionary principle. The legislator has not explained, either in the text of the bill or in the explanatory memorandum, why it is necessary to amend the legislation in force, nor has it provided any guarantees for the protection of the drinking water resource or the preservation of the environment. In this decision, the Constitutional Court closely linked the precautionary principle to the prohibition of retrogression. The approach of the decision is to distinguish between areas already regulated by law and those not yet regulated. In the area already covered by legal rules, the precautionary principle interacts with the prohibition of retrogression: the legislator, when adopting a regulation, must prove that the deterioration of the environment as a result of a given measure will certainly not occur, and the amended regulation does not create the theoretical possibility of harm. In the Constitutional Court's view, it follows from the precautionary principle that actual deterioration in the state of the environment is not necessary for the prohibition on retrogression to be infringed, but that the risk of deterioration is sufficient to justify infringement of the prohibition on retrogression.[29] In this sense, therefore, the precautionary principle serves to give effect to the principle of non-retrogression *(effet utile)* and extends its scope.

However, in areas not yet regulated by law (*i.e.* in the case of a field of law, when the first legislation is being drafted, where the principle of non-retrogression cannot be applied), the precautionary principle applies independently, and the legislator has a constitutional obligation to take it into account.[30] The Constitutional Court can also enforce the same obligation against the legislator in individual cases.

3. The polluter pays principle

According to Article XXI(2) of the Fundamental Law, "Whoever causes damage to the environment shall be obliged to restore it or to bear the costs of restoration, as provided by law." The Constitutional Court first recognised (by way of reference) in Order No. 3162/2019. (VII. 10.) AB that the polluter pays principle also has an independent constitutional content. In that order, the Constitutional Court concluded in a case concerning liability for soil pollution that a breach of the polluter pays principle could also render a judicial decision (or, in some cases, a legislative provision) unconstitutional.

The polluter pays principle is an "absolute content limitation" for the legislator, *i.e.* a legal provision that does not shift the costs of remedying pollution from the polluter to the polluter in the case of a (broadly defined) polluting activity cannot

[29] 13/2018 (IX. 4.) AB, Reasoning [65].
[30] 13/2018 (IX. 4.) AB, Reasoning [20].

be in line with the Fundamental Law.[31] The Constitutional Court can also hold the legislator accountable for the application of the polluter pays principle, and courts and authorities dealing with individual cases must always take this into account.[32] However, the applicability of the principle in individual cases before public authorities or courts necessarily poses a challenge to the petitioners: The Constitutional Court (in accordance with its consistent practice) is not a "court of fourth instance," *i.e.* the mere fact that a court in a given case has ruled incorrectly on the question of liability for environmental pollution in the broad sense and the question of liability for the damage caused is not sufficient to render the decision unconstitutional; the petitioner must also show that the contested decision is vitiated by a serious error of form or substance which renders it unconstitutional. For example, a judicial interpretation which excludes even the possibility of liability in principle in the case of a person who has caused damage, or which considers the polluter pays principle to be applicable only in the case of active polluting conduct (not in the case of omission), certainly reaches the level of unconstitutionality, since it already results in the substantive emptying of the right to a healthy environment under Article XXI of the Fundamental Law.[33]

VII. The right to a healthy environment as a climate protection tool? Concluding thoughts

As I have shown above, the Hungarian Constitutional Court has a strong influence on the enforcement of the right to a healthy environment, both in relation to legislation and the application of the law. However, one of the specificities of the fight against climate change is that traditional legal instruments alone are typically insufficient to prevent climate catastrophe. In the fight against climate change, the "prohibition of retrogression" (as elaborated by the Hungarian Constitutional Court) is no longer sufficient: what is needed is a “duty to move forward” at the regulatory level on the part of individual states.

The Hungarian Constitutional Court recently emphasised in its Decision No. 5/2022. (IV. 14.) AB that "the right to a healthy environment is both a fundamental right of the subject (to which everyone is subject) and an objective obligation of the state to protect institutions. The State must therefore take particular care in the drafting, observance and enforcement of the rules for the protection of the environment, which individuals may claim against the State under Article XXI of the Fundamental Law."[34] Moreover, the objective obligation of the State to protect institutions is complemented by provisions in the Fundamental Law itself which may be of particular importance in the fight against climate change and in safeguarding the living conditions of future generations.

[31] 3162/2019 (VII. 10.) AB, Explanation [18]. This interpretation is repeated in the parallel reasoning of Marcel Szabó, Judge of the Constitutional Court, to AB Decision 5/2021 (II. 9.), see paragraph [64] of the parallel reasoning. The President of the Republic did not allege a violation of the polluter pays principle in his motion underlying AB 5/2021 (9.2.21).
[32] AB 3162/2019 (10.VII.), Reasoning [18], which refers back to paragraph [29] of the Reasoning of AB 3223/2017 (25.IX.), to a similar approach of the prohibition of retrogression.
[33] 5/2022 (IV. 14.) AB, Reasons [77] and [89].
[34] Decision No. 5/2022. (IV. 14.) AB, Reasoning [88].

According to the National Avowal of the Fundamental Law, "we are responsible for our descendants, and therefore we will protect the living conditions of future generations by the careful use of our material, intellectual and natural resources." In this context, the National Avowal also states that the Fundamental Law is "an alliance between the Hungarians of the past, present and future." The National Avowal itself points out that the decisions taken by the present government have an impact on future generations, and therefore the decisions of the present government and legislature must also take into account the interests of future generations. All this also means that the quoted provision of the National Avowal lays down an interpretative framework for the Fundamental Law and thus for the Hungarian legal system as a whole, which generally requires that the interests of future generations be taken into account at the same time as the needs of the present are assessed, and with equal weight.

As Pope Benedict XVI put it in 2007, "Courageous choices that can re-create a strong alliance between man and Earth must be made before it is too late." I am convinced that the Hungarian Constitutional Court is provided by the Fundamental Law and the Constitutional Court's own practice with the substantive and procedural legal framework in view of which the "courageous" decisions can be taken which are essential to invoke the right to a healthy environment in the interests of Hungary, of present and future Hungarians, of the living environment and values of the Carpathian Basin, and thus the Fundamental Law itself provides the necessary (constitutional) legal framework for the fight against climate change.

The Constitutional Court is currently examining the *ex-post* constitutionality of the Hungarian Act on Climate Protection and its accordance with international treaties, in which the Constitutional Court can define the most important legal framework for the fight against climate change.[35]

[35] Constitutional Court case number: II/3536/2021.

Ganna VRONSKA
Judge, Supreme Court, Ukraine
Juge, Cour suprême, Ukraine

I. Ukraine

- Ukraine is a largest country in Eastern Europe.
- Its population is around 40 million and it is the eighth-most populous country in Europe (as of January 2022).
- In 2021 Ukraine celebrated it's 30th Anniversary of Independence.

II. The constitution of Ukraine

- Article 16. To ensure ecological safety and to maintain the ecological balance on the territory of Ukraine, to overcome the consequences of the Chornobyl catastrophe — a catastrophe of global scale, and to preserve the gene pool of the Ukrainian people, is the duty of the State.
- Article 50. Everyone has the right to an environment that is safe for life and health, and to compensation for damages inflicted through the violation of this right. Everyone is guaranteed the right of free access to information about the environmental situation, the quality of food and consumer goods, and also the right to disseminate such information. No one shall make such information secret.
- part 7 of Article 41. The use of property shall not cause harm to the rights, freedoms and dignity of citizens, the interests of society, aggravate the ecological situation and the natural qualities of land.
- Article 66. Everyone is obliged not to harm nature, cultural heritage and to compensate for any damage he or she inflicted.

III. The Supreme Court

The decision of the Civil Cassation Court within the Supreme Court, April 05, 2023, Case No. 369/7171/16-ц

"An individual has the right to a safe environment for life and health, the right to reliable information about the state of the environment, the quality of food products and household items, as well as the right to collect and disseminate such information.

The activities of individuals and legal entities that lead to the destruction, spoilage, or pollution of the environment are illegal. Everyone has the right to demand the cessation of such activities.

The activities of individuals and legal entities that cause harm to the environment may be terminated by a court decision."

The decision of the Administrative Cassation Court within the Supreme Court, April 05, 2023, Case No. К/9901/29048/20

"Local councils, state authorities in the field of environmental protection and use of natural resources are obliged to provide comprehensive assistance to citizens in carrying out environmental activities, taking into account their proposals for improving the state of the environment and rational use of natural resources, and involving citizens in the decision-making process on environmental protection and use of natural resources.

Violated rights of citizens in the field of environmental protection must be restored, and their protection is carried out through judicial proceedings in accordance with the legislation of Ukraine."

IV. War in Ukraine vs the environment

The military actions in Eastern Ukraine, which started in 2014 and have had a significant impact on the environmental situation after Russia's full-scale invasion in 2022

Water pollution

Air pollution

War waste

Radiation risks

Environmental refugees

What should be done?

1. Monitoring and assessing the environmental situation in zones of active military actions in order to identify main issues and priority areas for further action.
2. Conducting demining work, ensuring the safety of the population and restoring soil fertility.
3. Developing and implementing programs to reduce the impact of war on the environment, such as water resource purification, ecosystem restoration, tree planting, and other recovery measures.
4. Providing additional assistance to environmental refugees, developing strategies for their return to their home communities, and restoring their livelihoods.
5. Engaging international organisations such as the European Union, United Nations and others in promoting environmental recovery and providing necessary financial and technical assistance.
6. Drafting relevant legislation and policies aimed at environmental protection during and after the war, with an emphasis on sustainability, transparency, and accountability of a country-aggressor.
7. Organising educational programs and information campaigns to raise awareness among the population and local authorities about the environmental consequences of war and the need to prevent and mitigate them.
8. Establishing research programs that promote the study of the long-term consequences of war on the environment and the development of strategies for their recovery and prevention.

It is important

At the moment, it is important to focus on developing partnerships, collaboration, and coordination among all stakeholders to ensure the best possible conditions for environmental protection and the recovery of the whole region after the war.

War in Ukraine vs the environment

Post-war environmental recovery **?**

Thank you for your attention!
Stand with Ukraine!

Thom Arne HELLERSLIA
Judge, Court of Appeal, Norway
Juge, Cour d'appel, Norvège

Honorable colleagues, esteemed participants,

I am honored to be at this conference, which deals with the most important issue in our time. I extend my warmest gratitude to the Permanent Representation of Iceland, and to the Council of Europe for arranging it.

Norway stands in a split. On the one hand, Norway has the self-image of a humanitarian great power, of being "the good guy." On the other hand, Norway is one of the world`s biggest oil and gas producers. While contributing immensely to the Norwegian economy, this also means that Norway has contributed to the climate crisis, and in that way, we are one of "the bad guys."

From this dilemma, the following question arises: Is it possible to challenge the Norwegian petroleum production by domestic legal means? This was the primary question behind the Norwegian Climate Case, also called "the case of the century", decided by the Supreme Court in plenary in December 2020."[36]

In 2016, Nature and Youth Norway and Greenpeace Nordic filed a lawsuit against the state, with the Grandparents' Climate Campaign and Friends of the Earth Norway as interveners. The aim was to achieve a gradual shutdown of Norwegian petroleum production. To achieve this, the environmental groups contested the validity of the decision to grant ten specific production licenses. The claimants argued that the decision was a violation of Article 112 of the Constitution – the environmental provision, moreover, that the decision violated Articles 2 and 8 of the European Convention on Human Rights (ECHR), and that the decision was invalid due to procedural flaws.

The contested production licenses all applied to blocks in the Barents Sea – the sea north of Norway. In addition to the climate concerns, it was argued that the local environment was threatened. Both the ice edge and the polar front[37] has unique ecology, particularly vulnerable to oil spill. However, because of the low risk of oil spill, the licenses were not found to be invalid on such grounds. In the following, I will not elaborate on the local environmental issues, but limit myself to the threat to the climate.

The case implied several legal challenges, both regarding the understanding of the legal rules that the environmental impact was to be tested against, and the scope of the assessment of the environmental impact.

[36] HR-2020-2472-P; The judgment is available in English at "www.lovdata.no".
[37] Where cold waters from the Arctic Ocean meet warmer waters from the Atlantic Ocean.

The understanding of the environmental provision in the Constitution – Article 112 – had not previously been tried before the courts. One of the major questions, was whether the Article grants substantive rights to individuals that may be asserted in the courts, or on the contrary, is to be perceived primarily as a guideline for the authorities. Additionally, if the provision is to be perceived as granting rights, are the rights of a material or a procedural nature? These issues raised difficult questions under the principle of the separation of powers between the legislature and the judiciary, because the licensing round had received consent by a large majority in the Parliament.

The case also raised questions regarding the understanding of the European Convention on Human Rights Articles 2 and 8.[38]

Regarding the scope of the assessment of the environmental impact of the ten specific production licenses, several sub-questions arose:

1. Most of the oil and gas extracted in Norway is exported. Thus, only a minor part of the emissions from petroleum extracted in Norway stems from combustion in Norway – 5 % – whereas most of it – 95 % – stems from combustion abroad. Is the emission from the combustion abroad relevant, or is the combustion abroad up to the state in which the combustion finds place, to regulate? The argument of the Government was that the Paris Agreement builds upon the principle that each state only is responsible for its own national emissions.

2. In prolongation of the previous point, are only the effects of the climate change in Norway relevant, or also the effects in other countries, more vulnerable to climate change?

3. And what about the "drop in the ocean"-argument? Globally considered, Norwegian oil and gas plays a marginal role – about 1 % of the global CO_2-emissions. The petroleum that possibly would be extracted under the ten licenses would thus play an even more marginal role.

4. Further, the licenses will initially only give permission to search for carbon resources. The oil and gas must be discovered in a profitable size, extracted and then combusted to give considerable emissions. At the time at which the licenses were given, it remained uncertain whether any resources would be discovered. And if any resources were discovered, the oil companies had to apply for further approvals. How should this uncertainty be dealt with?

5. Moreover, what would be the net effect if Norway was to stop exploring and extracting oil and gas? The demand would, presumably, still be there, and other exporting countries could respond by producing more, or even by replacing gas with coal. These questions raise difficult issues concerning how to regulate the supply and demand of carbon energy resources in general.

[38] As well as the corresponding provisions in the Constitution.

I will now proceed to, in a very brief manner, the Supreme Court`s view on these questions.

The Supreme Court took as a starting point that "[t]here is broad national and international consensus that the climate is changing due to greenhouse gas emissions, and that these changes may have serious consequences for life on Earth."[39]

Regarding the understanding of Article 112 in the Constitution, the problem is that the Constitution entails both provisions that clearly express individual rights, like the freedom of expression, and provisions that are mere "manifestos", imposing duties on the authorities, but without corresponding individual rights. Opposed to other provisions in the human rights chapter of the Constitution, Article 112 is not modelled on any right stated by a binding international instrument, as there is no international convention on environmental rights.

The Supreme Court elaborated on the wording and the preparatory work of the provision. Regarding the wording, Article 112 speaks about a “right to an environment”.[40] However, the preparatory work was important: How strongly had the Parliament itself intended – like Odysseus – to tie itself to the mast? The preparatory works implied that the Parliament to some degree had intended to be bound by the provision, but was at the same time reluctant to renounce its political leeway. Accordingly, the Supreme Court did not understand the provision in the same way as core human rights, but merely as a safety valve. For the courts to set aside a decision by the Parliament, the Supreme Court provided that the Parliament must have "grossly neglected" its duty to protect the environment. Consequently, the threshold is very high. The Court of Appeal had mainly reached the same conclusion in result but had set the legal threshold significantly lower.

A main consideration behind the high threshold, was the principle of the separation of powers between the legislature and the judiciary. The Supreme Court stated that decisions on environmental issues often require a political balancing of interests, and that this balancing should be done by the Parliament, not by the courts.[41]

Regarding the scope of the environmental impact assessment, the Supreme Court stated that the Constitution does only protect the environment within the borders of Norway. However, the combustion abroad of Norwegian oil and gas

[39] Para. 49.
[40] Article 112 reads as follows:
“Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well.
In order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out.
The authorities of the state shall take measures for the implementation of these principles.”
[41] Para. 114.

has effect on the global climate, consequently, it causes harm in Norway as well. By this reasoning, the combustion abroad was relevant.

Regarding the "drop in the ocean"-argument, the Supreme Court stated that the effects of the specific ten licenses must be the starting point. On the other hand, like pollution of, for instance, a river, the emissions stemming from these licenses cannot be considered in isolation, but as a part of other emissions.

It was also relevant that at the time of the decision, it was uncertain whether one would discover oil or gas in such magnitude that production would be profitable, so that possible emissions could only be vaguely estimated.[42] At the time at which the Supreme Court handled the case, there had not been made any profitable discoveries of petroleum under the ten production licenses.

It was further relevant to compare these uncertain emissions with the different measures taken by the Parliament to reduce the overall greenhouse gas emissions, to reach the targets for cuts provided in the Climate Change Act. Regarding combustion abroad, it was, furthermore, relevant to attach weight to the fact that the Norwegian climate policy rests on the principle that each state is responsible for combustion on its own territory, in accordance with international agreements. Based on such a broad and general, and also somewhat diffuse assessment, the conclusion was that the ten licenses did not constitute a serious negligence under Article 112 of the Constitution, and, therefore, were not invalid under a material test.

However, Article 112 also provides procedural obligations. The Supreme Court stated that restraint is less required when it comes to assessing the procedure. The courts must control that the decision-making body has struck a fair balance of interests. The larger the effects a decision has, the stricter are the requirements for clarification of consequences. This may be seen as an echo of the development under the European Convention on Human Rights, concerning the shift of focus from a material to a procedural test.

The regulation of Norwegian petroleum activities may be roughly divided into three phases: (1) the opening of a field, (2) the exploration phase and (3) the production phase.[43] The environmental groups contended that the opening

[42] The estimates that were made, indicated that the emissions from the production phase would only form a minor part of the total emissions from the Norwegian petroleum production – less than 4%, and approximately 1% of the total Norwegian emissions, in the high scenario. Compared with global emissions, the contribution is of even less significance. If the emissions from the combustion abroad are included, the emissions will be more significant, but still form only a tiny part.

[43] Before each phase, reports and assessments are made in accordance with the rules applicable to the relevant phase. Any opening of a new area must be subject to an impact assessment, including the impact on the environment and the climate, before being presented to the Parliament. The subsequent permission – the production license, grants the licensee an exclusive right to perform the exploring phase, but does not grant a right to initiate development and production without further approvals. There is no requirement to carry out an environmental impact assessment before giving a production license. However, if profitable discoveries are made, the licensee must, among other things, apply for and obtain approval of a plan for

report of the Barents Sea was deficient, because the impact assessment did not address the emissions abroad created by exported oil and gas. In addition to Article 112 in the Constitution, both the Petroleum Act and the EU Council Directive on Strategic Environmental Assessment, the "SEA Directive", provide for an assessment of the total environmental impact.[44]

On the procedural issues, the Supreme Court was divided into two factions. The majority of eleven judges were of the opinion that the production phase was the time best suited to assess the global climate impact, not the opening phase, because at the opening stage, the size of the emissions is uncertain. The environmental groups had argued that a refusal at the production stage is unrealistic, because the oil company at this stage normally will have incurred large exploration costs, based on the assumption that these will be covered by the extraction.[45] For the majority, it was decisive that the oil company does not have a legal claim for approval of its production plan. If the situation at the extraction stage has become such that allowing the extraction would be incompatible with Article 112, the authorities would have a duty not to approve the project.

In any case, according to the majority, any errors at the opening phase had not influenced the decision. The Parliament had several times, by a broad political majority, rejected proposals to out-phase the Norwegian petroleum production due to the climate crisis. The political majority made reference to the role of the petroleum production for the Norwegian economy, and the fact that oil and gas production will also be possible in a low-emission society. In addition, the net effect of a shut-down was complicated and controversial. If gas is replaced by coal, cuts in the gas export would have a negative CO_2 effect. Further, if the gas competes with gas from other providers, the effect may be zero. Cuts in Norwegian oil production could be replaced by oil from other countries. And the total emissions would not necessarily be affected if Norwegian oil or gas was used within a sector subject to the EU emission trading system. The majority concluded that a more thorough assessment of the climate impact would not have led to another result, and that the decision was valid also under a procedural test.

The four dissenting judges were of the opinion that the omission to assess the climate impact of combustion abroad, at the opening stage, was a procedural error. They particularly relied on the SEA Directive, which provides that the assessment must be carried out as early as possible in the process.[46] The

development and operation (PDO), based on an impact assessment, before development and operation may be initiated.

[44] Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment. The SEA Directive has been incorporated into Norwegian law, including in the Petroleum Regulations.

[45] The state will also have incurred large financial costs at this stage, because of the profitable tax system for exploration costs.

[46] The dissenting opinion stated that the PDO phase is regulated by Council Directive 85/337/EEC – currently Directive 2011/92/EU on the assessment of effects of certain public and private projects on the environment, the “EIA Directive”. The global climate impact of the combustion of Norwegian petroleum is comprised by the term “environmental effects” in Article

minority agreed, on the other hand, that the opening decision would not have been different if the impact assessment had included the combustion abroad. However, because of the seriousness of the error, the decisions, according to the minority, were invalid under the procedural test.[47]

Concerning the understanding of the European Convention on Human Rights Articles 2 and 8, I will, unfortunately, have to be very brief.

The jurisprudence under Article 2 on the right to life states that the risk of loss of life must be "real and immediate". The jurisprudence under Article 8 states that to impose duties on the state to protect the environment, a direct and immediate link between the contested decision and the applicant's home, private life or family life must be established. According to the Supreme Court, the production licenses did not amount to a "real and immediate risk" and did not have a direct and immediate link to the applicant's home, private life or family life. It was uncertain whether the decision would actually lead to greenhouse gas emissions, and the possible impact on the climate would only be discernible in the more distant future.[48]

Thus, it was not possible to reach a result like the Urgenda Case by challenging specific licenses. The different result must also be seen in the light of the fact that the Netherlands are more vulnerable to climate change than Norway. Further, the conclusion has to be understood on the background of the general interpretive guideline that it is not the primary task of the Norwegian courts to evolve the Convention, but rather the European Court of Human Rights.

---

5 of the SEA Directive. However, it follows from the European Court of Justice's judgment 24. November 2011 in Case C-404/09 *The European Commission v. Kingdom of Spain* paragraph 80, on the application of the EIA Directive, that an isolated assessment of the environmental impacts is not appropriate. The assessment must also include an analysis of the cumulative effects on the environment. This is not likely to be different under the SEA Directive, which in its footnote to Annex I contains the same formulation on "cumulative" effects as the corresponding footnote in the EIA Directive interpreted by the European Court of Justice. It is at the early stage that "the various alternatives may be analysed and strategic choices may be made", see the European Court of Justice's judgment 7 June 2018 in Case C-671/16 *Inter-Environnement Bruxelles ASBL* paragraph 63. The assessment must reflect the level of detail in the plan. However, Article 5 (2) provides no basis for postponing the consideration of important aspects of the environmental effects, as the estimates become more certain and detailed at a later stage. That would, in the eyes of the minority, be incompatible with the SEA Directive's objective.

[47] The minority argued that it follows from Article 11 of the SEA Directive that an environmental assessment under that directive cannot replace an assessment under the EIA Directive, and that it is reasonable to assume that this also applies the other way around. To move the environmental assessment from the opening stage to the PDO stage would also conflict with the SEA Directive's objective of integrating environmental considerations in the drafting and adoption of plans, according to Article 1.

[48] The environmental groups also argued that the European Court of Human Rights may identify the content of the rights on the basis of international agreements constituting "common ground" between the member States, see the Grand Chamber judgment 12 November 2008 *Demir and Baykara v. Turkey* paragraphs 85–86. The Supreme Court`s response was that such a principle may hardly be applied to environmental issues, as the ECHR does not have a separate environment provision. In any case, it had not been demonstrated that the production licenses constituted a breach of international obligations.

To sum up, the Supreme Court accepted a broad scope of the assessment of climate impact, including the relevance of emissions from the combustion abroad. However, the Supreme Court set the threshold for a violation of Article 112 very high, especially in situations in which the Parliament has given its consent. A key point for the environmental groups was that there is no need to discover more carbon resources – there has already been discovered more carbon resources in the world than what can be produced within the temperature goals in the Paris Agreement. Another key point for the environmental groups was that Norway must take a proportionally larger share of the climate cuts than other countries, because of its petroleum production and economic capacity. However, the judgment implies that one cannot challenge the petroleum or climate policy as a whole by contesting individual decisions.

From an environmental perspective, the most useful outcome is the requirements of broad climate impact assessments at the production stage, and that there is a duty to reject the approvals required at this stage if they are not compatible with Article 112 of the Constitution. This aspect has been closely followed up towards the Parliament by, amongst others, the Norwegian Institute of Human Rights.

In my opinion, the case illustrates the challenges of combatting a global problem with domestic legal means.

The judgment has been brought before the European Court of Human Rights. The case has been referred to the Court and is prioritised as a possible "impact case" but is not among the first three climate cases before the Grand Chamber, which undergo oral hearings these days.

Finally, I will briefly mention one other case that highlights the difficult dilemmas in this area. The Fosen Case, decided by the Supreme Court in 2021, concerned the validity of the license for the biggest windfarm project in Europe, located at the Fosen peninsula.[49] The windfarms are located within the area of a reindeer grazing district. The Supreme Court unanimously found that the windfarms interfered with the Sami people's right to enjoy their own culture, under article 27 of the International Covenant on Civil and Political Rights. Consequently, the license was invalid. When assessing the validity under article 27, there is no room for a margin of appreciation or a proportionality assessment. However, the Supreme Court stated that it may be necessary to strike a balance if Article 27 conflicts with other basic rights, such as the right to a healthy environment. The case is still unsolved, as the Government has not yet found a solution that do not violate the reindeer herders' rights.

Thank you for your attention.

[49] HR-2021-1975-S, available in English at www.lovdata.no.

SESSION 3

The right to a clean, healthy and sustainable environment - Global perspectives

Le droit à un environnement propre, sain et durable - perspectives mondiales

Ricardo LORENZETTI
Former President, Judge of the Supreme Court of Argentina
Ancien Président, Juge à la Cour suprême d'Argentine

Comparative law shows different approaches in the field of the right to a clean, healthy, and sustainable environment.

I. Different approaches to protecting nature

There is a growing consensus that nature and its components need protection. From the point of view of philosophy, ethics, biology, and economics, there are a large number of instruments that emerge when we focus our attention on the environmental paradigm.

There is also a similar landscape in law, and four possible scenarios arise:

1. The courts have no role to play in the protection of nature because it is a public policy matter.
2. People have an individual right to a healthy environment. A great number of countries all over the world have this type of individual rights, which in turn indirectly protects nature.
3. Nature or its components are legal subjects and may bring an action by representative entities.
4. Nature or its components, without being recognised as legal subjects, are protected as common legal goods;

The idea that nature has a right or that it's a common good presents a strong difference from the individual right approach. It is not a question of a subjective right, but rather how the legal standing protects a collective good. Consequently, a court ruling focuses on the protection of the good and not on the satisfaction of the individual.

But there are also differences between the approach based on the rights of nature and the protection of nature as a common good.

To a large degree, the idea of "nature as a subject" is a substantial breaking point from legal tradition because there are no rights not held by people. This is not a minor issue, because, for many legal systems, this is a difficult change to accept, with highly complex consequences in a wide range of areas.

The result is not substantially different, since both basically protect nature directly, and not indirectly like when we are talking about nature being protected from an individual rights perspective.

Which are the differences?

II. Nature as a subject: examples

The Constitution of Ecuador has been pioneering in this regard, declaring:

> "Nature shall be the subject of those rights that the Constitution recognises for it" (art. 10).
>
> "Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions, and evolutionary processes. All persons, communities, peoples, and nations can call upon public authorities to enforce the rights of nature. To enforce and interpret these rights, the principles set forth in the Constitution shall be observed, as appropriate. The State shall give incentives to natural persons, legal entities, and communities to protect nature and promote respect for all the elements comprising an ecosystem" (art. 71).
>
> "Nature has the right to be restored. This restoration shall be apart from the obligation of the State and natural persons or legal entities to compensate individuals and communities that depend on affected natural systems. In those cases of severe or permanent environmental impact, including those caused by the exploitation of non-renewable natural resources, the State shall establish the most effective mechanisms to achieve the restoration and shall adopt adequate measures to eliminate or mitigate harmful environmental consequences" (art. 72).

The Constitution of Bolivia (2009) states:

> "Everyone has the right to a healthy, protected, and balanced environment. The exercise of this right must be granted to individuals and collectives of present and future generations, as well as to other living beings so that they may develop in a normal and permanent way" (art. 33).

It was based on this recognition that the "Law of the Rights of Mother Earth" (Ley de Derechos de la Madre Tierra, law 071, 21/12/2010) was passed. It declares:

> "This Act is intended to recognise the rights of Mother Earth, and the obligations and duties of the Multinational State and society to ensure respect for these rights" (art. 1). The law recognises as principles (art. 2) harmony, the status of collective good, the guarantee of the regeneration of Mother Earth, and no commercialism (art. 2). "Mother Earth is defined as 'a dynamic living system comprising an indivisible community of all living systems and living organisms, interrelated, interdependent and complementary, which share a common destiny. Mother Earth is considered sacred, from the worldviews of nations and peasant indigenous peoples'. For the purpose of protecting and enforcing its rights, Mother Earth assumes the status of a collective subject of public interest. Mother Earth and all its components, including human communities, are entitled to all the inherent rights recognised in this Act. The exercise of the rights of Mother Earth will take into account the specificities and particularities of its various components. The rights under this Act shall not limit the existence of other rights of Mother Earth" (art. 5).

When we look at the Court rulings, there are various judgments.
In India, the Uttarakhand High Court bestowed rights on the Ganges River.[50]

The Civil Cassation Chamber of the Supreme Court of Justice of Colombia[51] conferred rights on animals as "sentient beings". In order to grant rights to non-humans, it took an ecocentric-anthropogenic view, within the framework of a "national and international ecological public order", declaring them "subjects of rights" as a result. "Animals are non-human sentient subjects of rights", and as such "they enjoy certain prerogatives on account of their being protected fauna, and of the biodiversity and natural balance among species. This is especially the case for wild animals." It clarified that "the point is not to grant them rights in every respect analogous to those that human beings enjoy, and therefore think that bulls, parrots, dogs or trees, etc. will have their own courts, but rather those which correspond to, or are fitting to or suit their species." "It all amounts to recognising and assigning rights and legal identity so that we might put an end, in an epistemological, ethical, political, cultural and juridical way, to the irrational destruction of our planet and of nature that shamefully and tragically afflicts the present generation." In conclusion, the Supreme Court of Justice of Colombia decided that animals, as "sentient beings and part of an ecological public order", have rights and are exempted from duties, and that the State must guarantee and protect their rights, as members of an ecosystem in which every species performs a vital role.

In short, it is a way of providing protection, but perhaps it is unnecessary to redesign the entire legal system in order to achieve this, since, ultimately, the legal effects are similar to those achieved by other means.

III. Nature or its components, without being recognised as legal subjects, are protected as common legal goods and anybody with legal standing may file a complaint

This is the position adopted by the Civil and Commercial Code of Argentina.

On 1 August 2015, Argentina's new Civil and Commercial Code came into force. As regards the definition of rights, the Code is innovative with respect to comparative law and the history of codification itself.

The new Argentine Civil and Commercial Code is characterised by, among other things, being a code of individual and collective rights.

Firstly, in the Preliminary Title, article 14 stipulates that both individual and collective rights are recognised and that the law provides no protection for the abusive use of individual rights when this affects the environment or collective rights in general.

[50] Writ Petition (PIL) No. 126 of 2014, available at: https://www.ecolex.org/details/court-decision/mohd-salim-v-state-of-uttarakhand-others-260ca401-424d-40f6- 8586-e20e1b746ba/; http://lobis.nic.in/ddir/uhc/RS/orders/22-03-2017/RS20032017W-PPIL1262014.pdf *(accessed on 12 June 2023).*

[51] Available at https://corte-suprema-justicia.vlex.com.co/vid/692862597 *(accessed on 12 June 2023).*

The precedent for this article is the Supreme Court "Halabi" judgement, with slightly different wording, since it was decided to retain that used in the Constitution, which refers to collective rights.

Then, in Book One, Title III, Chapter 1, article 240, it states that the exercise of individual rights over goods "must be compatible with collective rights [...] and must not affect the development or sustainability of flora and fauna ecosystems, biodiversity, water, cultural values, and landscape, among others, in accordance with the criteria envisaged in special legislation."

In Book Three, in both Title III and Title V, there are specific provisions related to the protection of collective rights.

Also in Book Three, in Title V, Chapter 1, there are regulations relating to civil liability, several of which are aimed at the protection of collective rights. Thus, the obligation of damage prevention and preventive action, although not exclusively referring to cases related to collective rights, certainly has a significant impact in this area, especially as regards environmental protection.
In addition, the concept of legal damage adopted by the new Code expressly includes effects on collective rights and, as a consequence, collective damage.

IV. The Theoretical approach

So-called "collective goods" have gained regulatory significance on both a constitutional and special legislation level with these important figures:

- Indivisibility of benefits: the good cannot be divided among those who use it.
- Sustainable common use: the good may be used by all citizens.
- Non-exclusion of beneficiaries: all individuals have usage rights and thus cannot be excluded.
- Precedence of preventive protection: to protect these goods, prevention, and precaution must take priority over reparation.
- Policentric perspective in the legal process: the characterisation of the environment as a "collective good, that belongs to the community, of common use and indivisible" (Supreme Court Decision No. 340:1695, "La Pampa, Provincia de c/ Mendoza, Provincia de" and No. 329:2316) changes substantially the problem's approach, which not only has to respond to the parties claims. The classification of the case demands a "consideration of interests that exceed the bilateral conflict to have a polycentric perspective since the rights affected are several. For that reason, the solution shall not be limited to solving the past, but, and essentially, to promote a solution focused on future sustainability, which demands a decision that foresees the consequences derived from it."

V. Implementation in the field of public goods litigation

Very often, environmental law is directed at awareness but not at behaviour. These types of regulations expose the conflict, yet they do not resolve it. It opens the door to the important role of the judiciary.

We need to understand that our work is not finished when the Courts hand down a judgement.

There are a lot of challenges, such as but not limited to:

1. Courts must test the effects that the decision produces.

2. Complex remedies: Courts can order the implementation to the administration, such as ordering to clean a river; or exhorting Congress to fulfill a gap in the legal system to protect the environment.

3. Of course, we need to respect the discretion of the executive power. But implementation is not someone else´s problem. This is the position adopted by the Argentinian Supreme Court.

We need to incorporate a very different view on the matter according to the needs of our time because we are facing a big challenge of paramount consequences, that being environmental collapse.

Ayesha A. MALIK
Judge, Supreme Court, Pakistan
Juge, Cour suprême, Pakistan

Good afternoon from Islamabad,

Madam Secretary General,
Distinguished Guests,
Ladies and Gentlemen,

I am honoured and delighted to be here before this esteemed forum today, to share Pakistan's judicial experience in enforcing the right to a clean, healthy, and sustainable environment. While our world is facing numerous environmental challenges that threaten the planet's sustainability, it has been the judges of the High Courts and Supreme Court of Pakistan that have played a significant role in declaring the right to a clean, healthy, and sustainable environment as a fundamental right. However, at the same time, we recognise that protecting the environment in the first instance is the responsibility of the State and not of judges. Due to the lack of initiative on the part of the respective governments, the courts took it on to themselves to push environmental concerns and now climate change into the forefront. Today it is our collective responsibility to come together and work towards preserving our environment for the future generations.

Background: Environment and Climate Change

- By way of background, Pakistan suffers from major environmental challenges such as carbon emissions, air pollution, water pollution, and deforestation. In the latest Environmental Performance Index (EPI) Pakistan ranks 176th out of 180 countries which shows that a lot needs to be done by the State in developing a clean and healthy environment and mitigating climate change.
- Pakistan is responsible for less than 1% of the global planet-warming gases but its geography makes it extremely vulnerable to climate change and is one of the most vulnerable countries as per the Global Climate Risk Index 2021. ["Global Climate Risk Index | German Watch", January 20, 2021]
- Pakistan is especially vulnerable to the effects of climate change with rising temperatures and heavy monsoon rains which impacts Pakistan's agrarian economy, which contributes 23% of the GDP and 43% of the labour force. Additionally, rising temperatures, pollution and smog, glacial melts and droughts are some of the bigger challenges faced today.
- The more serious challenge is the fasting-growing population of 234 million which in turn lead to the issues related to the conservation and depletion of natural resources, especially water shortage.

Legal Framework

- The Constitution of Pakistan does not explicitly provide for a fundamental right to a clean and sustainable environment and while there is a statutory framework under the Pakistan Environmental Protection Act, 1997 (federal law) and similar Provincial laws, the statutory regime does not declare any environmental right.
- In this regard, it has been the Supreme Court and the High Courts in their Constitutional jurisdiction that have expanded upon the right to life and the right to dignity guaranteed under the Constitution (Articles 9 and 14 of the Constitution) and declared the right to a clean and healthy environment, the right to clean water and clean air and the right to a climate capable of sustaining human life as a fundamental right to life and dignity. Ideally this is not the role of the Court as it requires legislative and policy initiatives, however, given the slow pace at which the State was responding to the environment, the courts have played an active role in recognising the need to protect the environment.

Judicial Activism

- This role of the judiciary is often referred to as judicial activism and is perhaps the most significant feature in the environmental landscape of Pakistan which has positively responded to the growing public interest in environment and climate change litigation.
- The role of the Supreme Court and High Courts of Pakistan has been noteworthy in bringing environmental rights, environmental justice, and now climate justice, to the forefront as the Courts have adopted a human rights approach looking to declare rights directly related to the environment and now to climate change. As a constitutional court, the focus of the High Courts and Supreme Court has been on creating inertia, so that the relevant stakeholders do what is required to be done.
- Judicial activism is associated with Public Interest Litigation (PIL), where public spirited individuals approach the court to voice their grievance and the courts then respond to the grievance provided that the matter is of public importance and relates to the enforcement of a fundamental right. The spirit behind PIL was to not let the rigidness of law prevent relief for those vulnerable, on issues which are neglected and not given timely intervention by the executive. The proceedings are inquisitorial in an effort to discover the problems and bottlenecks in the system and carve out a solution. The Superior Courts have taken a liberal view in respect of *locus standi* of the petitioner by relaxing the rules on standing and allowing any person aggrieved to approach the Court to voice their complaint. This has enabled the Courts through judicial review to scrutinise issues related to the environment and more particularly review decisions taken by the government with respect to development projects, with an emphasis on procedures and processes so as to determine the role of the regulator and the impact on the environment. It is also an effective way of generating awareness and participation from the public while at the same time placing duties and obligations on the relevant government agencies.

Declaring Rights

- One of the initial steps taken by the courts was to recognise and declare environmental rights. In a landmark case *(Shehla Zia vs. WAPDA, P 1994 SC 693)* where the residents challenged the constructions of a high voltage grid station, in a residential area on the ground that it has serious health effects, the Supreme Court of Pakistan declared the right to a clean and healthy environment in the Fundamental Right to life and the Fundamental Right to dignity. The issue for the Court was the serious impact on the health of the residents, pollution and environment degradation caused by the construction of the grid station. The Court introduced the *precautionary principle*, with specific reference to its inclusion in the Rio Declaration on Environment and Development, into Pakistani jurisprudence. The Supreme Court held that if there are threats of serious damage, effective measure should be taken to control it and it should not be postponed on the ground that scientific research is not conclusive. The impact of this case is profound as it laid down the foundation for testing projects threatening the environment.
- Moving on from the Shehla Zia case, in another case, *(Karachi Building Control Authority v. Saleem Akhtar Rajput, 1993 SCMR 1451)*, the Court considered the construction of multi-storeyed buildings and the impact it has on the environment, especially on the availability of clean air and light as well as the pressure it creates on civic amenities. Importantly, the court concluded that if there is conflict between a personal right and the environment, the personal right must yield in favour of environment.
- The right to life includes the right to have clean water was declared in a mining case *(Khewra Mines case, 1994 SCMR 2061)* where the Petitioners sought enforcement of the right of the residents to have clean and unpolluted water against the coal mining activities in an upstream area. Despite the fact that this right has been declared as early as 1994 the right to water as well as clean water is one of Pakistan's biggest challenges today. This right was further expanded upon when the Court examined the construction of an industrial plant and the impact it would have on subsoil water. The Court invoked the public trust doctrine and required the State to protect the subsoil water.
- The Supreme Court also exercises *suo motu* jurisdiction where on its own motion it initiates proceedings on matters causing infringement to a fundamental right which is of public importance. So it has taken *suo motu* notice of environmental threats which have been prompted again by the lack of initiative, the lack of legislation and policy and of enforcement. In a case pertaining to environmental pollution in Balochistan (PLD 1994 SC 102), the Supreme Court of Pakistan took *suo motu* notice from a newspaper item against dumping of industrial and nuclear waste in the Balochistan coastal area. The Supreme Court stopped this dumping and ordered that the area could not be used for dumping industrial or nuclear waste.
- The Supreme Court also took *suo motu* action in the New Murree Project *(2010 SMR 361)* which would destroy 5,000 acres of forest. The Court did not allow this project to continue as it would disturb the ecology of the area and the Court relied upon the principle of intergenerational equity as well as

sustainable development in order to protect the environment. In another case, the Court adopted the precautionary principle and observed that it was a tool for ensuring sustainable development and that the Court should focus on enforcement mechanism and regulatory duties to prevent further harm and degradation of the environment *(2017 CLD 772)*.

- Along the same lines again through *suo motu* notice the Supreme Court stopped a housing project along the Margalla Hills as it would have had a direct and adverse bearing on the eco-system of the Margalla Hills. The Court once again recognised that the eco-system needs to be preserved and protected in order to maintain a clean and healthy environment *(Suo Motu Case No. 13/2005).* Again while protecting the forest and the eco-system, the Supreme Court took notice of the government's lax response to the cutting of trees in Balochistan for constructing a road. The orders of the court included directions to create awareness and to impose penalties on the person cutting trees as well as the officers, who neglected their duties.

- While protecting green belts, the Court applied the principle of Public Trust Doctrine *(2011 SCMR 1743 and 2015 SCMR 1520)* and held that the green belt around both sides of the main canal running through Lahore was a public trust resource and hence could not be converted into private or other use. It allowed the widening of the road on the minimum area required and held that this was indeed for a public purpose and was in conformance with the doctrine of Public Trust. By this case, courts have recognised that there can be multiple stresses on the environment and there is sometimes a dynamic tension involved, which may mean that it may not be possible to redress one without to a certain extent leaving others unaddressed. The aim is not necessarily a perfect environment but a balanced one and the above referred judgment shows that in such cases, the judicial approach has been appropriately nuanced.

- The list is long and jurisprudence is rich as the Courts have taken notice on a variety of issues from motor vehicle emissions and traffic congestion *(1996 SCMR 543)*, to industrial dumping, land conversion and protecting natural beauty, cultural heritage, green areas and parks all in the interest of protecting the environment. In a more recent case, *(PLD 2020 Lahore 229)*, the Court took notice of the wastage of food and expressed its opinion stating that the right to food was a necessity of life and thus an extension of the right to life, which also included protection against the wastage of excess food. The Court directed the Government to start awareness campaigns to sensitise the people in this regard to prevent wastage of food.

Declaring Procedural Rights

- From declaring environmental rights in the fundamental right to life and dignity, the courts shifted gears and started to focus on procedural rights, the role of the regulator and on processes. These are cases filed against the government requiring them to do their duty as prescribed under the law.

- The Supreme Court in *(IMAX Cinema Case, 2006 SCMR 1202)* declared that the conversion of a public park into a shopping mall and setting up of an IMAX cinema without observing the codal formalities as prescribed under the law,

in particular the non-filling of the initial environment examination, was grossly illegal and was an offence under the law.

- A project which would have converted a stretch of 7 Km of road into a signal-free high-speed expressway, a full bench of Lahore High Court declared the same as illegal and stopped the authority from starting any such new development project. The court recognised the principle of environmental justice, and stated that the same was vested in the right to life and was an amalgam of the constitutional principles of democracy, equality, social, economic and political justice. It stated that the corpus of international laws has the purpose of protecting life and nature and this included international environmental principles of sustainable development, precautionary principle, inter-generational equity, intra-generational equity and the public trust doctrine. The court while explaining the scope and meaning of the *Environmental Impact Assessment* (EIA) observed that it is nature's first man-made check post, nothing adverse to the environment is allowed to pass through. It is through the tool of EIA that the authority gets to regulate and protect the environment and as a result the life, health, dignity and well-being of the people who inhabit the environment *(PLD 2015 Lahore 522).*
- The courts have focused on the role of the Environment Protection Agency and its powers to seal a plant by virtue of an Environmental Protection Order to ensure clean air and prevent noise pollution *(2017 CLD 772)*.
- In a more recent case, the issue before the Court was the expansion of a cement plant and environmental approvals. The Supreme Court held that Environmental Department to be proactive and devise sector specific plans and emphasised that while it is important to ensure that development projects are carried out in an environmentally responsible manner, it is also important to ensure that the regulatory process does not unduly delay the implementation of the project. To strike this balance, it is essential that the regulatory process is designed to be efficient and effective, while still ensuring that all relevant environmental considerations are taken into account *(C.P. No.677-L of 2018)*.
- These cases highlights the extent to which the Court has gone to ensure procedure and proprietary in protecting the environment and how the notion of access to justice has been expanded by really giving a voice to the environment.

Climate Change

- In recent times, the Court again shifted its attention from environmental rights to climate change rights.
- The same fundamental rights to life and dignity have again been invoked with reference to climate change injuries where the Court now needed to take a more cross-sectoral look at the manner in which the injuries claimed be compensated and environmental rights be protected.
- The relief now is in the form of adaptive measures, creating awareness and policy-making.

- Since Pakistan faces multiple climate change challenges, thus, in climate change cases, Judges have had to create and craft relief in Constitutional jurisdiction in order to get a more effective response from the government.

Issue:

- In this first ever climate change related case the Asghar Laghari Case *(2018 CLD 424)* filed in the Lahore High Court, a farmer challenged the inaction, delay and lack of seriousness of the national and provincial governments to implement Pakistan's national climate change policy 2012 and its framework (2014-2030) as it offended the fundamental right to life under the Constitution of Pakistan as their livelihood based on agriculture was adversely affected due to the existential threat posed by climate change. The Court imposed positive obligation on the government requiring it to consider and address climate change.

What did the Court declare?

- Climate change is a defining challenge of our time and has led to dramatic alterations in our planet's climate system. For Pakistan, these climatic variations have primarily results in heavy floods and droughts, raising serious concerns regarding water and food security. On a legal and constitutional plane this is clarion call for the protection of fundamental rights of the citizens of Pakistan, in particular, the vulnerable and weak segments of the society who are unable to approach this Court.
- From Environmental Justice, which was largely localised and limited to our own ecosystems and biodiversity, we have moved to Climate Justice.
- Climate Justice links human rights and development to achieve a human-centered approach, safeguarding the rights of the most vulnerable people and sharing the burdens and benefits of climate change and its impacts equitably and fairly. Climate Justice is informed by science, responds to science and acknowledges the need for equitable stewardship of the world's resource.
- Climate justice, therefore, moves beyond the construct of environmental justice. It has to embrace multiple new dimensions like health security, food security, energy security, water security, human displacement, human trafficking and disaster management within its fold.
- Climate justice covers agriculture, health, food, building approvals, industrial licenses, technology, infrastructural work, human resource, human and climate trafficking, disaster preparedness, health, etc.

What did the Court do?

- The Court found that the delay and lethargy of the State in implementing the Framework offends the fundamental rights of the citizens and ordered the creation of a cross-sectoral Climate Change Commission to monitor implementation of the Climate Change Policy and submit a regular progress report and ultimately, make recommendations on the way forward.
- After dissolving the Commission, the Court constituted a Standing Committee creating an ongoing link between the Court and the executive. As a result of the Standing Committee and the Commission, subsequently, the Climate Change Act 2017 was enacted and the Climate Change Ministry was established. This was followed by a National Climate Change Policy 2021 so as to mandate government action.
- Ministry of Climate Change was subsequently established on 4th August 2017.
- As the Court now looks at issues with its climate change lens in a case, where the petitioners challenged a notification whereby the establishment of a cement manufacturing plant was not allowed, the Court held that post-climate change, democracies have to be redesigned and restructured to become more climate resilient and the fundamental principle of rule of law has to recognise the urgent need to combat climate change. The Supreme Court noted that formerly environmental issues brought to the court were local geographical issues, be it air pollution, urban planning, water scarcity, deforestation or noise pollution, but now climate change has a bearing on these issues. The Supreme Court dismissed the petition holding that this notification was a climate resilient measure and in step with the Constitution *(2021 SCMR 834).*
- The Court also recognised that climate-resilient development in cities of all sizes is crucial for improving the well-being of people and increasing the life opportunities of future generations. Any change in the Master Plan to an urban scheme without taking account of the climate factor would be detrimental. Effect of climate change on cities, affects its residents and their core fundamental rights to life, dignity and property guaranteed under Articles 9, 14, 18 and 23 of the Constitution of the Islamic Republic of Pakistan, 1973 *(2022 SCMR 1411).*
- In a matter relating to deforestation, the Supreme Court held that denuding land of forests and trees has catastrophic effects including avalanches, flash floods, silting up of rivers, lakes and dams, the accumulation of carbon dioxide (a greenhouse gas) and climate change *(Shah Zaman Khan v. Govt. of KPK, CAs. 329 to 346 of 2022)*
- In a recent case where a decision of the Sindh High Court *(CP No. D-1064 of 2022 (Flood Case)* was challenged before the Supreme Court, the issue before the Court was the involvement of the citizens in flood management. The Court allowed the Citizens Committee to be formed to encourage public-private partnerships as well as directed for women to be included on this Committee. Additionally, the Court emphasised that the State functionaries should take urgent action to formulate such policies and create such

mechanisms to prevent further exacerbation of the losses and damage already suffered due to the floods and for sustainable rehabilitation. The Supreme Court directed that the Sindh High Court continue monitoring the progress of the citizen committee and flood relief work through periodic reports.

Judicial Solutions

This now brings me to the various tools and mechanism used by the courts to achieve the objective of protecting the environment. Some of these judicial innovations are as follows:

Commissions and Standing Committees

- Pakistan's judiciary has adopted a unique and innovative approach in dealing with environmental rights and climate justice. One such approach is the appointment of commissions to investigate issues and make recommendations. These commissions comprise of cross-sectoral experts and relevant stakeholders who are put together to review the issue and find solutions. From clean air issues to health hazards by asphalt plants to waste management plans and air quality, commissions have been appointed to inquire and recommend policies and adaptation measures. The Commissions work as a fact-finding body which builds consensus and finds solutions and at times has even recommended legislation. The Asghar Leghari Case is one example and the Shehla Zia case is another example.

Implementation Bench

- Instead of concluding and deciding cases, at times, courts start implementing and monitoring their decisions and help review the work of the government to ensure an effective response, which in turn has helped to ensure that the required measures are adopted.

Continuing Mandamus

- Another tool used is one of continuing mandamus which is a relief given by a Court of law through a series of ongoing orders over a long period of time, directing an authority to do its duty or fulfill an obligation in general public interest, as and when a need arises over the duration a case lies with the Court, with the Court choosing not to dispose the case off in finality.
- Every year, Pakistan loses almost 27,000 hectares of natural forest area. Based on this, Pakistan is in a state of "Green Emergency". The Supreme Court in an effort to protect the forest of Sindh where in public interest it was stated that work towards deforestation was underway which needs to be stopped. Where the petitioners challenged deforestation in the Province of Sindh, the Supreme Court has been working on protecting the forest of Sindh by regularly reviewing the decisions and steps taken by the government and also looking at the inactions and the delays caused in an effort to expedite the processes involved in protecting the forest and ensuring that further deforestation does not take place *(CP No. 52 of 2018 Deforestation Case).*

Covid-*19 in prisons*

- The Supreme Court recently also took notice of the outbreak of Covid-19 in prisons and called for reports on measures taken to tackle the pandemic. It also called for immediate legislation to deal with the pandemic and relevant measures for quarantine at entry points of Pakistan. Again, such action was initiated to enable effective management by the State, in an area which was neglected and a cause of concern.

Public Participation/Stakeholder Participation

- The Court has also resorted to encouraging and forcing public participation or stakeholder participation. The Court allowed the Citizens Committee to be formed to encourage public-private partnerships. The Court is now monitoring compliance of its orders, seeking periodic reports from authorities on the progress in implementing them. The Supreme Court also upheld the order of the Sindh High Court and further directed for women to be included on this Committee. The Superior Court have begun to include gender perspectives in our jurisprudence relating to environment protection and climate change; climate change affects women more deeply than men. Of the 33 million people that are affected by these recent unprecedented floods, 8 million are women. Thus, it was emphasised that our response could not be gender-blind. In view of this, the relevant authorities were directed to include women in the disaster management committee at all levels to ensure integration of the gender perspective *(CP No. D-1064 of 2022 (Flood Case).*
- In a recent case challenging the encroachment of green belts in the Province of Sindh, the Courts not only required that the footpath be cleared from encroachment but also placed an obligation on the Petitioner by pronouncing that it is also the civic duty of citizens to maintain the environment. The Court directed that the greenbelt and footpaths, boundary walls should be neatly developed and maintained at a reasonable civic standard. So, in effect where the Court recognised that the Petitioner's claim of encroachment over footpaths was correct, the court also concluded that where a right is being claimed a corresponding responsibility is also there. This encourages public participation and creates awareness.
- In a case of shortage of water in a particular vicinity, members of the community filed a petition as they were deprived of clean drinking water and in response, the government stated that they were working on it under a project which would take at least 05 years. While hearing the petition, I was conscious of the fact that there is a right to clean water already declared as a fundamental right which meant that 05 years was too long a period for anyone to wait for clean drinking water. With the help of the petitioners, the concept of a public-private partnership was introduced where members of the community would contribute part of the money with the government to set up tube wells and carry out water boring as an interim measure until they would be provided water under the government project *(WP No. 25550 of 2014).*

Push to make Laws

- The Supreme Court has gone to great lengths to bring the subject of environment and climate change to the forefront, compelling the Government to devise policies and law and take the issue of environment and climate change seriously.
- Lahore High Court closely reviewed a matter concerning the continued exercise of culling dogs in certain areas and required policy on the issue, which was ultimately made and approved by the executive *(ICA No. 277 of 2017).*
- The Court took notice of the smoke from brick kilns being a serious contributor to smog and directed the Government of Punjab to initiate appropriate administrative and legislative measures to regulate brick manufacturing in general and the use and conservation of soil in particular *(PLD 2020 Lahore 137).*
- The Supreme Court recently required planning authorities to consider and support adaptation, climate resiliency and sustainability that is to consider adverse environmental consequences in residential neighborhoods *(PLD 2019 SC 218).*
- With respect to garbage disposal, the Court directed the department to devise interim measures for garbage disposal in order to ensure that the environment of the vicinity remains clean. In this case, garbage was being disposed of on agricultural land and the Government's response was that the garbage disposal project for the vicinity will take some time, hence, for the interim while they did not have any policy or solution *(WP No. 21857 of 2018)*.
- The Supreme Court held that while mining is an essential part of the economy, it must be conducted in a responsible and sustainable manner to minimise its impact on the environment. By implementing best practices and adhering to strict guidelines and developing a climate proof mining policy, it can be ensured that mining continues to provide for the economy while also protecting the health of our planet and its inhabitants *(C.P. No. 55 of 2020).*

Conclusion: Intervention by Court is not enough

- The intervention by the Courts is by no means the only way forward and is not a permanent solution to resolving issues related to the environment or climate change. It is an expensive and time consuming exercise which has over the years developed a dynamic role of the Court, however, in the long run this is not sustainable.
- The active role of the Courts has created awareness and brought environmental justice and climate change within a judicial narrative and has prompted measures by the government.
- The High Court and Supreme Court while exercising judicial review have developed basic tools to declare environment rights as fundamental rights and has also declared procedural rights to ensure that the issues of the environment are heard and responded to.

- Developing the public-private partnership, forming commissions, encouraging law making and policy making and working through an implementation bench to ensure that things are done.
- The Constitutional Courts of Pakistan have also used the human rights approach to protect environmental rights as well as to take notice of climate change injuries and have required the government to take responsibility by compelling climate action.
- At the same time, the Courts have also placed responsibility on the citizens so as to encourage public participation and create awareness (climate marches, schools are focusing on this subject with conservation, etc.)
- The impact on public awareness has been tremendous as this conversation has been brought to the forefront, and in some cases real time effort has been made such as establishment of the ministry, tribunals, enactment of legislations, policies, etc. However, the impact remains limited as the tribunals, ministry have not been very effective and the change in court driven.
- In this respect moving forward one can only hope that the environment and climate change become a priority for the government and that active measures are taken to prevent further harm keeping in view the various aspects and impacts that it has on humanity. However, until then the Courts will strive to do their part in holding the government accountable for meeting legislative, policy and enforcement commitments to effectuate a response.
- While the right to life includes the right to clean water, there are many challenges such as the monitoring for effective water infrastructure include stands of water supply and storage facilities, implementation of standards for water quality, water treatment and purification methodology, ecological sanitation observing water waste and excreta management, maintenance of pipelines to eliminate water losses and to prevent contamination, illegal connections, strategies and preparedness for crisis, equitable supply and distribution standards between urban and rural populations in terms of the water quality, quantity and services, etc.

Thank you for your time.

Nicola PAIN
Judge, Land and Environmental Court, Australia
Juge, Tribunal des affaires foncières et environnementales, Australie

---

Speaking points summary:

What are environmental rights?
Complexity of diverse jurisdictions and legal systems
Challenges for courts considering environmental rights include:

- cases increasingly have a climate change focus,
- consideration of procedural impediments to enable suits by civil society,
- adopting innovative reasoning such as identifying multiple sources for environmental principles and addressing international and cross-jurisdictional policies/authorities in domestic litigation,
- demonstrating a willingness to craft innovative remedies where practically and legally feasible,
- environmental constitutionalism in the Asia-Pacific region,
- focus on ASEAN countries within Asia,
- caselaw from the Asia-Pacific region,
- protection of environmental human rights defenders in Asia-Pacific region,
- expanding opportunities for litigation, example of Australia.

What are environmental rights?

1. Discussion of environmental rights whether within or separate to a human rights framework encompasses substantive rights, such as clear air, safe climate, healthy ecosystems and biodiversity, safe and sufficient water, healthy and sustainable food and support for indigenous communities. The recent United Nations General Assembly adoption on 28 July 2022 of the right to a clean, healthy and sustainable environment is likely to influence how the right will be described.[52]

2. The focus of much recent domestic litigation seeking to enforce an environmental right, whether through a human right to life, or as a constitutional right to a clean, safe and sustainable environment, has been addressing climate change impacts. According to the Sabin Center for Climate Change global climate change litigation database based at Colombia University there have been 32 suits against governments

*Substantial thanks to Joanna Endacott Tipstaff Land and Environment Court of New South Wales and Juliette Reskov Associate Land and Environment Court of New South Wales who greatly assisted in the preparation of this paper.

[52] *The human right to a clean, healthy and sustainable environment*, GA Res A/RES/76/300, UN GAOR, 76th sess, Agenda item 74(b), UN Doc A/76/L/75 (26 July 2022, adopted 28 July 2022) <https://digitallibrary.un.org/record/3982508?ln=en>.

(excluding the United States of America) relying on the "right to a healthy environment."[53] Suits were filed in domestic courts in the following regions:

a. two suits in Africa;
b. six suits in Asia;
c. sixteen suits in Central and South America;
d. five suits in Europe.

3. Means of achieving these substantive environmental rights in some contexts include undertaking adequate environment impact assessment and strategic environmental assessment.

4. Important procedural rights include ensuring access to justice such as the ability to take action in courts and tribunals, access to environmental information, right to public participation in decision-making, promoting free, prior and informed consent for indigenous and local communities, considering the circumstances of vulnerable groups such as women and children and indigenous communities, and supporting rights for environmental human rights defenders. These procedural rights are well defined in the 1998 Aarhus Convention,[54] and the Escazu Agreement,[55] which entered into force in 2021 in Latin America and the Caribbean.

5. Courts and therefore judges have important roles in achieving the implementation of these substantive and procedural rights. For example, a key procedural right in relation to access to justice is access to courts to obtain remedies for breaches of rights. The ability of citizens/civil society to access courts will depend on numerous factors, including rules of court and legislation in relation to standing to sue.

Complexity of diverse jurisdictions and legal systems

6. Domestic courts in many jurisdictions are considering environmental rights. My consideration of the practical implementation of the right to a clean, healthy and sustainable environment will focus on the Asia-Pacific region and the role of domestic courts. Superior courts in the South Asian jurisdictions of India, Pakistan, Nepal and Bangladesh have lead the way in cases recognising and giving effect to environmental and related rights, and courts in these jurisdictions have imposed innovative remedies. Within the wider Asian region, I will focus on East and Southeast Asia and Oceania given my esteemed fellow panellist from South Asia Justice Malik from the Supreme Court of Pakistan who has far greater familiarity with that region.

[53] "Climate change litigation databases", *Sabin Center for Climate Change Law* (web page, accessed 26 April 2023) <http://climatecasechart.com/non-us-case-category/right-to-a-healthy-environment/>. Three suits were commenced in an international jurisdiction.
[54] *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, United Nations Economic Commission for Europe, opened for signature 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001).
[55] *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean*, opened for signature 27 September 2018, 3397 UNTS (entered into force 22 April 2021).

The important caselaw in Latin America will also no doubt be referred to by my esteemed fellow panellist Judge Lorenzetti of the Supreme Court of Argentina.

Asia-Pacific region diversity

7. The Asia-Pacific region includes a great variety of nations with diverse cultures, religions, economies, histories, and, not least, legal systems.

8. In the Pacific region the Pacific Community (SPC) was founded in 1947 with 22 nations in addition to founders Australia, France, New Zealand, the United Kingdom and the USA.[56] The Secretariat of the Pacific Regional Environment Programme (SPREP) is a partner agency of SPC. The Pacific Forum (a regional organisation facilitating dialogue between its 18 members) recently released its 51st Leaders Communique which reaffirmed the urgency of action on climate change to limit global warming to 1.5 degrees celsius.[57]

ASEAN and human/environmental rights

9. The Association of Southeast Asian Nations (ASEAN) countries has 10 member States in Southeast Asia.[58] The ASEAN Intergovernmental Commission on Human Rights (AICHR) was established 2009. The ASEAN Human Rights Declaration was made in 2012.[59] Article 28F identifies the right to a clean, safe and healthy environment. The Commission has been working on a possible human rights framework agreement for the ASEAN region since 2014. It also has a working group developing the ASEAN framework on environmental rights.

Environmental constitutionalism in the Asia-Pacific

10. The large number of national constitutions which include an environmental right or environmental focused human right has expanded substantially since the 1970s.[60] In several jurisdictions such rights are enforceable and have been used by civil society before diverse courts. In more than 100

[56] The 22 nations are American Samoa, Cook Islands, Federated States of Micronesia, Fiji, French Polynesia, Guam, Kiribati, Marshall Islands, Nauru, New Caledonia, Niue, Northern Mariana Islands, Palau, Papua New Guinea, Pitcairn Islands, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu, Vanuatu and Wallis and Futuna. "members", *Pacific Community* (webpage, accessed 26 April 2023) <https://www.spc.int/our-members/>.

[57] Pita Ligaiula, "51st Pacific Islands Forum Leaders Communique 2022", *PINA* (webpage, 18 July 2022) <https://pina.com.fj/2022/07/18/51st-pacific-islands-forum-leaders-communique-2022/&gt>.

[58] The 10 member States are Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam. 'ASEAN member States', *Association of Southeast Asian Nations* (webpage, accessed 26 April 2023) <https://asean.org/member-states/>.

[59] "ASEAN Human Rights Declaration", *Association of Southeast Asian Nations* (19 November 2012) <https://asean.org/asean-human-rights-declaration/>.

[60] United Nations Environment Programme, *Environmental Rule of Law* (First Global Report, January 2019) 156, 159 <https://www.unep.org/resources/assessment/environmental-rule-law-first-global-report>.

States the right to a healthy environment has gained constitutional recognition and protection.[61] A large number of countries in the Asia-Pacific region include an environmental right in their constitution and that has enabled several cases to be brought in reliance on those rights.

Caselaw in Asia-Pacific region

Philippines

11. The Philippines legal system is predominantly a mix of civil law and common law systems, as well as indigenous customary law and a distinct Muslim legal system for the Muslim minority.[62] The Philippines Constitution states that "the state shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature."[63]

12. *Oposa v Factoran* (1993) is a well-known case in the region.[64] A group of children challenged timber licence agreements on the basis that deforestation was causing environmental damage to themselves as well as future generations. Their right to do so was recognised by the Supreme Court of the Philippines in its landmark judgment on a motion to dismiss, which upheld the standing of the children. The Supreme Court found that their complaint demonstrated prima facie the violation of the right to a balanced and healthy ecology. The case was remanded back to the trial court for further determination.[65]

13. In *Metropolitan Manila Bay Development Authority v Concerned Residents of Manila Bay* (2008),[66] the Supreme Court of the Philippines again affirmed the constitutional right to a healthy environment in granting relief to the plaintiff who sued several government agencies seeking orders requiring the clean-up, rehabilitation and protection of Manila Bay. The Bay was heavily polluted. A writ of continuing mandamus was issued requiring clean up to be carried out and provision of progress reports to the court.

---

[61] John H. Knox, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN GAOR, 73rd sess, Agenda Item 74(b), UN Doc A/73/188 (19 July 2018).

[62] "Philippines", *Council of ASEAN Chief Justices* (webpage, accessed 26 April 2023) <https://cacj-ajp.org/philippines/>.

[63] *Constitution of the Republic of the Philippines* 1987 Art II s 16. <https://www.officialgazette.gov.ph/constitutions/1987-constitution/>.

[64] *Oposa v. Factoran* (1993) G.R. No. 101083, 224 S.C.R.A 792 (Supreme Court of Philippines) <http://hrlibrary.umn.edu/research/Philippines/Oposa%20v%20Factoran,%20GR%20No.%20101083,%20July%2030,%201993,%20on%20the%20State's%20Responsibility%20To%20Protect%20the%20Right%20To%20Live%20in%20a%20Healthy%20Environment.pdf>.

[65] Ma Soccoro Z Manguiat, Vincente Paolo B Yu III, "Maximising the value of Oposa v Factoran" (2003) 15(3) *Georgetown International Environmental Law Review* 487, 488.

[66] *Metropolitan Manila Development Authority v. Concerned Residents of Manila Bay* (2008) G.R. 171947-48 (Supreme Court of Philippines) <https://leap.unep.org/sites/default/files/court-case/COU-158533.pdf>.

Indonesia

14. Indonesia's legal system is a mix of civil law, customary law and sharia law.[67] The Indonesian Constitution provides that every person shall have the right to enjoy a good and healthy environment.[68]

15. In *Indonesian Youths and Ors v Indonesia,*[69] the plaintiffs filed a complaint against the Indonesian government on 14 July 2022 in the Indonesian National Human Rights Commission concerning climate change impacts on youth and affected groups facing life-threatening hazards, reduced physical and mental well-being, increased health risks, food and water insecurity and disruption. Rights include the right to life, the right to a good and healthy environment inter alia. The violation of human rights guaranteed in the Indonesian Constitution is occurring by the Indonesian Government not taking the necessary mitigation and adaptation measures to prevent temperature rises above 1.5 degrees celsius.

16. In the Jakarta air pollution case decided in 2019, the District Court found that the President of Indonesia had failed to tackle air pollution in Jakarta and ordered monitoring stations and other measures to improve the city's air quality in a citizen lawsuit brought by 32 plaintiffs.[70] The court held the defendants, which also included the Minister of Environment and Forestry, Minister of Home Affairs, Minister of Health and the Governor of Jakarta, in this case violated human rights by failing to take the necessary actions to fulfill the right to a good and healthy environment.[71] This decision was upheld by the Jakarta High Court in 2022 after the Central Government appealed the decision, affirming that a right to clean air is a human right protected by the Indonesian Constitution.

Thailand

17. Thailand is fundamentally a civil law system. Under the Constitution of Thailand, the Thai people have the right to manage, maintain and utilise, and the duty to support the conservation and protection of natural resources, the environment and biodiversity in a balanced and sustainable manner.[72] The State shall, subject to the participation and benefit of the local community, "conserve, protect, maintain and use or arrange for utilisation of natural resources, environment and biodiversity in a balanced and sustainable manner…"[73] Nor will the State permit an undertaking that may severely affect natural resources and environment quality without an

[67] "Indonesia", *Council of ASEAN Chief Justices* (webpage, accessed 26 April 2023) <https://cacj-ajp.org/indonesia/>.
[68] *Undang-Undang Dasar* [Constitution of the Republic of Indonesia] 1945 Art 28H(1).
[69] Sabin Center for Climate Change Law, "Indonesian Youth and Ors v Indonesia", *Climate Change Litigation Databases* (webpage, accessed 26 April 2023) <http://climatecasechart.com/non-us-case/indonesian-youths-and-others-v-indonesia/>.
[70] Decision No. 374/Pdt.G/LH/2019/PN Jkt.Pst (Central Jakarta District Court of Indonesia).
[71] Detania Sukarja and Barran Hamzah Nasution, "Revisiting Legal and Ethical Challenges in Fulfilling Human Right to Clean Air in Indonesia" (2022) 13(5) *Jurnal HAM* 557, 574-575.
[72] *Constitution of the Kingdom of Thailand 2017* ss 43.2, s 50.8 <https://www.constituteproject.org/constitution/Thailand_2017.pdf?lang=en>.
[73] Ibid s 57.

impact assessment on the community and public hearing of relevant stakeholders.[74]

18. Fifty villagers, residents of Omkoi, filed a lawsuit in the Chiang Mai Administrative Court concerning the impacts of a coal mine on their environment and livelihoods seeking revocation of mining concessions issued by a government agency because of the breach of various national laws and in light of international obligations.[75] The court was asked to revoke the mining concessions because of impacts on the Karen way of life, health effects from mine emissions, loss of natural resources and environmental harm and loss of agricultural land. One issue raised by the plaintiffs was the lack of ability provided to them to participate in the environment impact assessment process considering the mine approval.

19. A temporary injunction suspending mining was issued pending a final hearing.[76] The judgment reaffirmed the right to live in a good environment and recognised the right to meaningful participation in the community. The court referred to the United Nations Human Rights Council resolution of 8 October 2021 and the United Nations General Assembly resolution of 28 July 2022 recognising a clean, healthy and sustainable environment as a human right in the judgment.

South Korea

20. South Korea is located in East Asia. It is not a member State of the ASEAN. South Korea is a civil law legal system.[77]

21. South Korea's Constitution includes a right to a healthy and pleasant environment, as well as a duty of citizens to endeavour to protect the environment.[78]

22. The interesting case of *Do-Hyun Kim et al v South Korea* has been underway since 2020. The plaintiffs are youth climate activists who are asserting in the Constitutional Court of South Korea that the climate change law of South Korea (and a Presidential decree made under it setting the emissions reduction target) violates their constitutional rights including the right to life, right to live in a clean and healthy environment, the obligation to

[74] Ibid s 58.
[75] Sabin Center for Climate Change Law, "Residents of Omkoi v. Expert Committee on EIA Consideration and the Office of Natural Resources and Environmental Policy and Planning", *Climate Change Litigation Databases* (webpage, accessed 26 April 2023) <http://climatecasechart.com/non-us-case/fifty-representatives-of-the-residents-of-omkoi-v-expert-committee-on-eia-consideration-in-the-mining-and-extracting-industry-and-the-office-of-natural-resources-and-environmental-policy-and-planning/>.
[76] Ibid.
[77] Subin Cho, "A brief introduction to the Korean Judicial System and Court Hierarchy" (ALC Briefing Paper 13, 2021) Melbourne Law School, The University of Melbourne, 4 <https://law.unimelb.edu.au/__data/assets/pdf_file/0011/3899198/ALC-Briefing-Paper-13_Cho.pdf>.
[78] *Constitution of the Republic of Korea* Art 35(1) <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/67127/98324/F2042155478/KOR67127%20English.pdf>.

prevent natural disasters and the obligation to protect health and safety.[79] The target of a 24% cut in emissions from 2017 by 2030 is argued to be too weak to keep global warming to under 2 degrees celsius.

23. A further novel case was commenced in the District Court of Seoul.[80] The claim relied on the constitutional right to a healthy and pleasant environment. In March 2022, a Korean national and three Tiwi Islanders filed a suit seeking an injunction against the Korea Trade Insurance Corporation and Korea Export Import Bank. Those organisations plan to provide credit for a Santos development seeking to exploit the Barossa Gas reserve near the Tiwi Islands off the coast of the Northern Territory in Australia. The plaintiffs, traditional owners of the Tiwi Islands, allege inter alia that this project will cause environmental harm including by emissions of CO2 and that the development is incompatible with the Paris Agreement. The Court dismissed the case in May 2022.[81]

Papua New Guinea

24. Papua New Guinea's legal system is a mix of common law and customary law.[82] A national goal of the Constitution of Papua New Guinea is that its natural resources and environment be conserved and used for the collective benefit of all Papua New Guineans and be replenished for the benefit of future generations.[83] All governmental bodies have a duty to apply and give effect to the national goals.[84]

25. In *Morua v China Harbour Engineering Co (PNG) Ltd,*[85] the National Court of Justice[86] recognised the standing of a group of landowners protesting about the activities of a company which caused substantial pollution and

[79] "Constitutional Complaint", Complaint in *Do-Hyun Kim et al v. South Korea*, 13 March 2023 <http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20200313_NA_complaint-2.pdf>; Sabin Center for Climate Change Law, 'Do-Hyun Kim et al. v. South Korea', *Climate Change Litigation Databases* (webpage, accessed 26 April 2023) <http://climatecasechart.com/non-us-case/kim-yujin-et-al-v-south-korea/>

[80] Sabin Centre for Climate Change Law, "*Kang et al. v. KSURE and KEXIM*", *Climate Change Litigation Databases* (webpage, accessed 26 April 2023) <http://climatecasechart.com/non-us-case/kand-v-ksureandkexim/>.

[81] Jane Bardon, "Traditional owners vow to keep fighting Barossa gas field despite losing South Korean court battle", *Australian Broadcasting Commission News* (webpage, 25 May 2022) <https://www.abc.net.au/news/2022-05-25/nt-santos-barossa-gas-tiwi-larrakia-lose-southkorea-court-figh/101097372>.

[82] "Papua New Guinea Law", *The University of Melbourne* (webpage, accessed 26 April 2023) <https://unimelb.libguides.com/c.php?g=926005&p=6688727>.

[83] *Constitution of the Independent State of Papua New Guinea* preamble <https://www.parliament.gov.pg/images/misc/PNG-CONSTITUTION.pdf>.

[84] Ibid Art 25.

[85] *Morua v. China Harbour Co (PNG) Ltd* [2020] PGNC 16; N8188 (7 February 2020).

[86] The National Court of Justice is a superior court of record, has original jurisdiction as a trial court, and appellate jurisdiction to hear appeals from the District Courts. The Supreme Court of Justice (the highest court in Papua New Guinea) hears appeals from the National Court. "Legal System of Papua New Guinea", *The University of Melbourne* (webpage, accessed 26 April 2023) <https://unimelb.libguides.com/c.php?g=926005&p=6688730>.

harm to their lands in the course of building a bridge.[87] In granting standing to sue to the landowners the judge looked at a range of sources including recognition of the right to a healthy environment internationally and in other jurisdictions in considering a section in the Papua New Guinea Constitution which allows action to be taken to enforce human rights in the Constitution. The court issued an interim injunction in part to ensure protection of the plaintiffs' constitutional rights.

Role of environmental human rights defenders in the Asia-Pacific Region

26. UNEP has commissioned a report into the challenges and threats posed to human environmental rights defenders in the Asia-Pacific which has just been launched on 27 April 2023.[88]

27. The Environmental Human Rights Defenders Working Paper identifies the many challenges and threats faced by people defending environmental human rights in the Asia-Pacific region and makes recommendations for how these can be addressed through implementing the rule of law. One area of concern is the use of courts to commence litigation which is designed to harass environmental human rights defenders.

Expanding opportunities for litigation: Human rights / Environmental rights in Australia

28. Australia is a common law legal system albeit with extensive statutory schemes in the area of environmental protection. The Australian Constitution 1901 does not contain any human rights provisions. While lacking comprehensive national human rights legislation, human rights acts or charters exist in three jurisdictions, the Australian Capital Territory and the States of Victoria and Queensland. None have an express environmental right. The rights protected by legislation have been called on in the environmental and indigenous cultural protection context.

29. In *Waratah Coal v Youth Verdict and the Bimblebox Alliance*, First Nations-led organisation Youth Verdict and the Bimblebox Alliance challenged two coal mining applications on human rights grounds under the *Human Rights Act 2019* (Qld). The right to life, cultural rights of First Nations people, rights of children, right to property, right to privacy and home and right to enjoy

[87] Art 57 of the Papua New Guinea Constitution enables the enforcement of express rights in the National Court of Justice. A right to a healthy environment is not an express right. However, in *Morua v. China Harbour Engineering Co* (PNG) Ltd the Court found that a right to a healthy environment underpins the right to life (express right enshrined in Art 35) and recognised the standing of the landowners.

[88] United Nations Environment Programme, *Environmental Rule of Law and Human Rights in Asia Pacific: Supporting the Protection of Environmental Human Right Defenders* (Working Paper, February 2023); "Environmental Rule of Law and Human Rights in Asia Pacific Working Paper Launch", *United Nations Environment Programme* (webpage, 27 April 2023) <https://www.unep.org/events/webinar/environmental-rule-law-and-human-rights-asia-pacific-working-paper-launch>.

human rights equally were all relied on.[89] The Land Court of Queensland recommended that a mining lease and environmental authority for the proposed mine be refused because of human rights impacts inter alia. That decision is presently under appeal.

Observations about cases

30. My opening remarks about the important role of courts in considering substantive and procedural matters in giving effect to environment human rights is demonstrated in a number of the cases referred to above.

31. Issues such as climate change require domestic courts to consider environmental issues which arise within and beyond the jurisdiction of those courts. That has lead courts to refer to international and regional sources of policy and law, particularly in relation to climate change with the substantial work of the Intergovernmental Panel on Climate Change featuring in many judgments at the domestic level. This observation applies in relation to numerous cases considering environmental rights in the climate change context.

32. The relatively recent adoption by the United Nations General Assembly on 28 July 2022 of a clean, healthy and sustainable environment as a human right is likely to be influential in the future including in domestic litigation. As I mentioned earlier in Thai case *Residents of Omkoi v Expert committee on EIA Consideration and the Office of Natural Resources and Environmental Policy and Planning* the Administrative Court referred to the United Nations General Assembly resolution in their consideration, as did the reasoning in the Papua New Guinea case of *Morua v China Harbour Engineering Co (PNG) Ltd*.

Conclusion

33. Environmental rights litigation is expanding in many regions of the globe and is likely to continue to do so in the Asia Pacific region, particularly given the challenges of climate change and the desire of civil society to respond. Domestic courts in diverse legal systems therefore play a crucial role in the recognition and implementation of such rights which will increasingly include the right to a clean, healthy and sustainable environment. Courts in the global south have been particularly willing to engage in that recognition according to a recent study published in the Oxford Yearbook of International Environmental Law.[90]

---

[89] *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* (No 6) [2022] QLC 21; Environmental Defenders Office, *A Healthy Environment is a Human Right: Report on the Status of the Human Right to a Healthy Environment in Australia* (July 2022) 19.

[90] Pau de Vilchez and Annalisa Savaresi, 'The Right to a Healthy Environment and Climate Litigation: a Game Changer?' (2021) 32(1) *Yearbook of International Environmental Law* 3, 7.

Marta CABRERA
Senior Lawyer at the Inter-American Court of Human Rights
Juriste principale à la Cour interaméricaine des droits de l'homme

I. Introduction

First of all, I would like to thank the Council of Europe and the Icelandic Presidency of the Committee of Ministers for this kind invitation to participate in this high-level conference. It is truly a great honor to be part of this panel. I am convinced that today's discussion will further enrich the judicial dialogue towards the right to a clean, healthy and sustainable environment.

I will dedicate my presentation to the latest developments of the case-law of the Inter-American Court of Human Rights on this matter.

I will start by addressing the sources of international law which have allowed the Inter-American Court to be undoubtedly at the forefront of the promotion and protection of a healthy environment at an international level. Then I will focus on the landmark Advisory Opinion 23/17 on Environment and Human Rights which set relevant standards on States' obligations in this matter. Lastly, I will draw your attention to the latest request for an Advisory Opinion lodged by Colombia and Chile on climate emergency.

II. Sources of international law at the Inter-American System of protection of human rights

I would start by pointing out that the Inter-American Court has stressed on several occasions that there is an interdependence and indivisibility of the civil and political rights, and the economic, social and cultural rights, and, as such, they should be understood integrally and comprehensively as human rights, with no order of precedence.[91]

Why is this important? Unlike the European Convention of Human Rights, the American Convention on Human Rights recognises in Article 26 the protection of economic, social and cultural rights[92] and the Court has also understood that

[91] Case of *Lagos del Campo v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 31, 2017. Series C No. 340, para. 141, and *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*. Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23, para. 57.

[92] This Article states the following: "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 realisation of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organisation of American States as amended by the Protocol of Buenos Aires."

the right to a healthy environment is included among the economic, social and cultural rights protected by Article 26 of the Convention.[93] Article 26 must also be read in conjunction with the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights (hereinafter "Protocol of San Salvador"), which entered into force in 1999. Specifically, Article 11 of the Protocol of San Salvador states that "Everyone shall have the right to live in a healthy environment and to have access to basic public services" and that "The States Parties shall promote the protection, preservation, and improvement of the environment."

Additionally, when interpreting the content of the right to a healthy environment, the Court has used as auxiliary sources the Vienna Convention on the Law of Treaties, which contains the general and customary rules for the interpretation of international treaties, the case law of the European Court of Human Rights (ECHR)[94], International Court of Justice (ICJ),[95] African Court and African Commission on Human and Peoples' Rights,[96] United Nations treaty mechanisms[97] and special procedures[98] as well as other United Nations instruments such Resolutions issued by the General Assembly,[99] the Human Rights Council[100] or the Stockholm Declaration on the Human Environment and the Rio Declaration on Environment and Development.

---

[93] AO-23/17, *op. cit.*, para. 57.

[94] See, for instance, ECHR, *Case of Tătar v. Romania*, No. 67021/01. Judgment of January 27, 2009, para. 107, *Case of Hatton and Others v. The United Kingdom* [GS], No. 36022/97. Judgment of July 8, 2003, paras. 121 to 123, 126 and 129, and *Case of López Ostra v. Spain*, No. 16798/90. Judgment of December 9, 1994, para. 58.

[95] See, for instance, ICJ, *Legality of the threat or use of nuclear weapons*. Advisory Opinion of July 8, 1996, para. 29, and ICJ, *Case concerning the Gabčikovo-Nagymaros Project (Hungary v. Slovakia)*. Judgment of September 25, 1997, para. 112.

[96] See, for instance, African Commission on Human and Peoples' Rights, *Case of the Social and Economic Rights Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*. Communication 155/96. Decision of October 27, 2001, paras. 52 and 53.

[97] As regards the interpretation on extraterritorial jurisdiction, see, for instance, Human Rights Committee, Communication No. 56/1979, *Lilian Celiberti de Casariego v. Uruguay*, CCPR/C/13/D/56/1979, 29 July 1981, para. 10.3, and Human Rights Committee, Communication No. 106/1981, *Mabel Pereira Montero v. Urugu*ay, CCPR/C/18/D/106/1981, March 31, 1983.

[98] See, for instance, 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; Human Rights Council, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries and indigenous peoples, UN Doc. A/HRC/24/41, July 1, 2013

[99] See, for instance, United Nations General Assembly, Resolution 70/1 entitled "*Transforming our world: the 2030 Agenda for Sustainable Development,"* September 25, 2015, UN Doc. A/RES/70/1.

[100] See, for instance, Human Rights Council, Resolution 35, entitled "Human rights and climate change," adopted on June 19, 2017, UN Doc. A/HRC/35/L.32; Human Rights Council, Resolution 7/14, "The right to food," adopted on March 27, 2008, A/HRC/7/L.6; Human Rights Council, Resolution 10/12, entitled "The right to food," adopted on March 26, 2009, A/HRC/RES/10/12, and Human Rights Council, Resolution 13/4, entitled "The right to food", adopted on March 24, 2010, A/HRC/RES/13/4. Human Rights Council, Analytical study of the relationship between human rights and the environment, Report of the United Nations High Commissioner for Human Rights, adopted on December 16, 2001, UN Doc. A/HRC/19/34.

III. Case-law development

The first cases where the Court referred to the relationship between a healthy environment and the protection of human rights were the cases concerning the territorial rights of indigenous and tribal peoples, where the Court considered that peoples' right to collective ownership was linked to the protection of, and access to, the resources to be found in their territories, because those natural resources were necessary for the very survival, development and continuity of their way of life.[101]

Also, the Court has address in a tangential manner the right to a healthy environment when dealing with cases regarding access to information and the right to freedom of expression (for example, the case of *Claude Reyes Vs. Chile,*[102] where the Court analysed the right of all individuals to request access to state-held information concerning a proposed foreign investment project for forestry exploitation from the Foreign Investment Committee) of the Chilean Government) or the case of *Kawas Fernandes et Vs. Honduras,*[103] concerning States' positive obligations to respect and protect the life of environmental human rights defenders.

However, the landmark decision on this topic was issued in 2017: the Advisory Opinion OC-23 on Environment and Human Rights.

As you know, as opposed to what happens at the European System of protection of Human Rights, at the Inter-American System, member States of the Organisation of American States (among other institutions of the OAS) may request the IACtHR to issue an opinion regarding the interpretation of the Convention or of other treaties concerning the protection of human rights in the American States.[104]

In the present case, the Advisory Opinion was requested by the State of Colombia. After analysing and adapting the questions posed by the State, the Court addressed the following questions:

- Based on the provisions of the Pact of San José, should it be considered that a person, even if he or she is not in the territory of a State Party, may

[101] See, e.g., Case of the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of August 31, 2001. Series C No. 79, Case of the *Moiwana Community v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of June 15, 2005. Series C No. 124, Case of the *Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, Case of the *Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, and Case of the *Saramaka People. v. Suriname. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of November 28, 2007 Series C No. 172.

[102] Case of *Claude Reyes et al. v. Chile*. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151.

[103] Case of *Kawas Fernández v. Honduras*. Merits, Reparations and Costs. Judgment of April 3, 2009. Series C No. 196.

[104] American Convention on Human Rights, Article 64.

be subject to the jurisdiction of that State in the context of compliance with obligations relating to the environment?

- What are the obligations of the States Parties to the Convention in relation to environmental protection in order to respect and to ensure the rights to life and to personal integrity [in the case of damage that occurs within their territory and also in the case of damage that goes beyond their borders]?

As a preliminary matter, the Court noted that there was extensive recognition of the interdependent relationship between protection of the environment, sustainable development, and human rights in international law.

Secondly, the Court noted that the human right to a healthy environment should be understood as a right that has both collective and also individual connotations. In its *collective dimension*, the right to a healthy environment constitutes a universal value that is owed to both present and future generations. That said, the right to a healthy environment also has an *individual dimension* insofar as its violation may have a direct and an indirect impact on the individual owing to its connectivity to other rights, such as the rights to health, personal integrity, and life.

More importantly, this was the first time that the Court declared that the right to a healthy environment is an autonomous right, which, unlike other rights, protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals[105]. The Court changed its approach from an *anthropocentric* perspective to an *ecocentric* perspective and that following a tendency, not only expressed in national court judgments,[106] but also in Constitutions.[107]

[105]AO-23/17, *op. cit*., para. 62.

[106] See, for example, Constitutional Court of Colombia, Judgment T-622-16 of November 10, 2016, paras. 9.27 to 9.31; Constitutional Court of Ecuador, Judgment No. 218-15-SEP-CC of July 9, 2015, pp. 9 and 10, and High Court of Uttarakhand at Naintal of India, Decision of March 30, 2017. Petition (PIL) No. 140 of 2015, pp. 61 to 63.

[107] The preamble to the Constitution of the State of Bolivia stipulates that: "In ancient times, mountains arose, rivers were displaced, and lakes were formed. Our Amazon, our Chaco, our highlands and our lowlands and valleys were covered in greenery and flowers. We populated the sacred earth with a variety of faces, and since then we have understood the plurality that exist in all things and our diversity as human beings and cultures." Article 33 of the Constitution establishes that: "People have a right to a healthy, protected and balanced environment. The exercise of this right should allow individuals and collectivities of present and future generations, and also other living beings, to develop normally and permanently." In addition, article 71 of the Constitution of the Republic of Ecuador establishes that: "Nature or Pacha Mama, in which life is reproduced and realised, has the right to comprehensive respect for its existence, and the continuity and regeneration of its vital cycles, structure, functions and evolutionary processes. Every person, community, people or nationality may require public authorities to respect the rights of nature. The relevant principles established in the Constitution shall be observed to apply and interpret these rights. The State shall encourage natural and legal persons, and collectivities, to protect nature and shall promote respect for all the elements that form an ecosystem."

That having said, the Court moved towards addressing the first question. Indeed, another important contribution of this Advisory Opinion is the legal interpretation of the word “jurisdiction” within the context of States’ obligations towards the protection of a healthy environment. In fact, many environmental problems involve transboundary damage or harm. As the Court stated, "one country’s pollution can become another country’s human and environmental rights problem, particularly where the polluting media, like air and water, are capable of easily crossing boundaries".[108] Thus, the Court stated that this concept must be interpreted "in good faith and considering the context, object and purpose of the American Convention”, meaning that it could not “be limited to the concept of national territory”.[109]

The Court broadened the interpretation of jurisdiction and concluded that a person is under the jurisdiction of the State of origin (*i.e.,* where the harm or damage was caused) if there was a "causal link between the action that occurred within its territory and the negative impact on the human rights of persons outside its territory" and that the exercise of jurisdiction would arise "when the State of origin exercises effective control over the activities that caused the damage and the consequent human rights violation".[110] This standard has been recently applied by the UN Committee on the Rights of the Child in its decision adopted in 2021 in the cases of *Sacchi et al v Argentina, Brazil, France, Germany and Turkey*, where the Committee followed the reasoning of the Inter-American Court and found that countries have extraterritorial responsibilities related to carbon pollution.[111]

Additionally, as regards State obligations in the face of potential environmental damage, the Court developed standards concerning: (i) the obligation of prevention; (ii) the precautionary principle; (iii) the obligation of cooperation, and (iv) the procedural obligations relating to environmental protection.

What did the Court basically say?

1. First, the Court concluded that States must take measures to prevent significant harm or damage to the environment, within or outside their territory.[112]
2. Secondly, it stated that States must act in keeping with the precautionary principle in order to protect the rights to life and to personal integrity in the case of potential serious or irreversible damage to the environment, even in the absence of scientific certainty.[113]

[108] AO-23/17, *op. cit*., para. 57.
[109] AO-23/17, *op. cit*., para. 74.
[110] AO-23/17, *op. cit*., para. 104.
[111] UN Committee on the Rights of the Child, Communication nos. 104/2019, 105/2011, 106/2019, 107/2019, 108/2019, *Chiara Sacchi et al. v. Argentina, Brazil, France, Germany and Turkey*, Decisions of 8 October 2021.
[112] AO-23/17, *op. cit*., para. 140.
[113] AO-23/17, *op. cit*., para. 180.

3. Thirdly, States have the obligation to cooperate, in good faith, to protect against environmental damage.[114]
4. Lastly, States have the obligation to ensure the right of access to information, to ensure the right to public participation of the persons subject to their jurisdiction, as well as to ensure access to justice in relation to the State obligations with regard to protection of the environment.[115]

These standards were later applied in the Court's first contentious case where it ruled on the rights to a healthy environment based on Article 26 of the Convention: the 2020 *case of Lhaka Honhat vs. Argentina,*[116] concerning the violation of the right to property over the ancestral territory of an indigenous community.

The Court found that, because of the State's non-compliance with its obligations concerning the protection of indigenous community ancestral land, there were threats to the environment that may have an impact on the right to adequate food, water and cultural identity of indigenous people.[117] Indeed, the Court found that the right to food, the right to water and also the right to take part in cultural life, were particularly vulnerable to environmental impact and therefore the policies that should be adopted included environmental policies.[118]

Lastly, I would like to dedicate the last minutes of this presentation to the new Advisory Opinion that was lodged this year by Colombia and Chile on "climate emergency and human rights". According to these States, the purpose of the Advisory Opinion is to clarify the scope of State obligations, in their individual and collective dimension, in order to respond to the climate emergency within the framework of international human rights law, paying special attention to the differentiated impacts of this emergency on individuals from diverse regions and population groups.

The central topics that the Court may address are (i) measures of mitigation, adaptation and reparation with a human rights perspective and under an intersectional focus, (ii) what are State obligations as regards children's rights (and, in particular the rights of future generations), (iii) procedural rights such as access to information, judicial protection and participation, (iv) protection of environmental human rights defenders, (v) how should inter-State cooperation obligations be interpreted, and (v) the impacts of the climate emergency on human mobility (migration and forced displacement).

In accordance with Article 73(3) of the Rules of Procedure of the Inter-American Court, all interested parties are invited to present their written opinion on the issues covered by the request. The President of the Court has established August 18th, 2023, as the deadline to submit written observations. I am

[114] AO-23/17, *op. cit*., para. 242.
[115] AO-23/17, *op. cit*., para. 242.
[116] *Case of the Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina. Merits, Reparations and Costs.* Judgment of February 6, 2020. Series C No. 400.
[117] *Ibid.*, para. 245.
[118] *Idem*.

convinced that this Advisory Opinion will be a landmark decision that will take a leading place in the judicial dialogue between regional and international tribunals specially in these times where the ECHR, the ICJ or the International Tribunal for the Law of the Sea have cases in the pipeline addressing this important topic.

I can see that my time is just about up to finish, so I'd like to say thank you for your attention today. I will be very interested to hear from you with your thoughts or questions.

CLOSING REMARKS

ALLOCUTION DE CLÔTURE

Kristīne LĪCIS

Chairperson of the Council of Europe Steering Committee for Human Rights (CDDH) and of the Council of Europe Drafting Group on Human Rights and Environment (CDDH-ENV)

Présidente du Comité directeur du Conseil de l'Europe pour les droits de l'homme (CDDH) et du Groupe de rédaction du Conseil de l'Europe sur les droits humains et l'environnement (CDDH-ENV)

First of all, I would like to express my gratitude to the Chairmanship of Iceland for organising this remarkable event. This day has been incredibly interesting and informative, and I would like to extend my appreciation to all the speakers for their valuable contributions and their willingness to participate.

Summarising the most important points from this conference is a daunting task, as practically everything that has been said was important. However, I will attempt to highlight some conclusions and identify the central issue that emerged from the conference.

The conference centered around two fundamental questions: why should we recognise the right to a clean, healthy, and sustainable environment, and how should this recognition be achieved?

Exploring the "Why" and the "How"

Throughout the conference, the pressing question of "why" was consistently addressed. In the opening remarks, the Prime Minister of Iceland emphasised the severity of the environmental challenges we face, such as dramatic floods, forest fires, and extreme weather events. As she pointed out, the onset of the triple planetary crisis and environmental degradation has been affecting us even earlier than anticipated by scientists, necessitating urgent action. Thus, these crises affects us all, and the rights of every individual are consequently affected. The Secretary General of the Council of Europe underscored the undeniable link between the environment and human rights, highlighting that the enjoyment of human rights is already affected by environmental factors. The Secretary General reaffirmed the significance of recognising the human right to a clean, healthy, and sustainable environment.

In the context of the "why" we have heard powerful messages for action. The conference speakers delivered compelling speeches emphasising the need for immediate action. On the first panel, Todd Howland highlighted that weather disasters displace 20 million people annually, and pollution is responsible for one in six global deaths. Pegah Moulana eloquently described the negative impacts already experienced by young people as a result of environmental degaradation. On the second panel, Judge Ganna Vronska provided a poignant account of the environmental consequences resulting from Russia's war of aggression, emphasising that these consequences affect us all.

Additionally, Rick Daems passionately expressed the high expectations of civil society and the public regarding the Council of Europe member States' responsibility to act in the face of the triple planetary crisis. He pointed out that the recognition of the right to a clean, healthy, and sustainable environment is not a matter of "whether," but rather a matter of "how."

In light of the discussions, two key considerations emerged for States to bear in mind: (i) the engagement with the private sector; and (ii) the creation of equal standards of protection.

First, as argued by Todd Howland, given the nature and causes of the environmental crisis, it is imperative for States to engage the private sector. Recognising the right to a clean, healthy, and sustainable environment would enable States to clarify issues related to environmental harms and the responsibilities of businesses. In his view, developing a new legal instrument within the Council of Europe could facilitate this process.

Second, Ambassador Shara Duncan-Villalobos, drawing on her experience in the UN, provided a comprehensive summary of the impact that the recognition of the right to a clean, healthy, and sustainable environment should have. She emphasised that such recognition should lead to changes at constitutional, legislative, and public policy levels. It should aim to reduce inconsistencies and ensure equal standards of protection across various domains. In other words, the recognition of this right should have a horizontal effect, transcending particular stages of decision-making or dispute settlement and applying to all relevant subject areas.

Parallel to the question of "why," the conference speakers also delved into the question of "how" to address the right to a clean, healthy, and sustainable environment.

Insights were shared on judicial approaches from various jurisdictions, both within and beyond the Council of Europe. These discussions allowed us to reflect on issues not often present in the European legal order by exploring, for example, the rights of nature. Particularly noteworthy was the contribution from the Inter-American Court of Human Rights, often referenced in the context of recognising this right. These discussions serve as an important reminder that the Council of Europe does not operate in isolation and is inevitably affected by developments in other regions.

The evident common theme emerging from the presentations is the increasing prevalence of environmental litigation, a trend projected to persist in the future. It is clear that the surge in environmental litigation reflects the pressing need for robust legal mechanisms to address environmental challenges. National courts, international courts, and regional human rights courts are actively dealing with various elements of the right to a clean, healthy and sustainable environment. This ongoing reality underscores the imperative for States to recognise the importance of upholding this right and ensure that legal frameworks are equipped to effectively respond to environmental issues.

Considering the discussions surrounding the "why" and "how" of recognising the right to a clean, healthy, and sustainable environment, the emerging central question is the following: what is the balance between political decision-making and legal aspects in the context of this recognition? As articulated by the Secretary General of the Council of Europe and former President of the European Court of Human Rights, Robert Spano, the member States of the Council of Europe must decide whether the content and impact of this right are to be established and defined by the legislator and the executive, as well as their equivalents at the international level, or should this task be left with the judiciary? The answer to this question depends on States' policy objectives, bearing in mind all the reasons given today about the need to address the right to clean, healthy, and sustainable environment.

Thank you.

With the urgent global challenges posed by environmental degradation and the triple planetary crisis of climate change, pollution, and nature and biodiversity loss, the question of the need for an autonomous right to a clean, healthy, and sustainable environment has never been more timely.

This publication contains the proceedings of 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, on 3 May 2023.

Face aux défis mondiaux urgents posés par la dégradation environnementale et la triple crise planétaire du changement climatique, de la pollution et de la perte de la nature et de la biodiversité, la question de savoir si un droit autonome à un environnement propre, sain et durable n'a jamais autant été d'actualité.

Cette publication contient les actes de la Conférence de haut niveau sur « Le droit à un environnement propre, sain et durable dans la pratique », organisée par la Présidence islandaise du Comité des Ministres, avec le soutien du Secrétariat du Conseil de l'Europe, le 3 mai 2023.

PREMS 056023

BIL

www.coe.int

The Council of Europe is the continent's leading human rights organisation. It comprises 46 member states, including all members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.

Le Conseil de l'Europe est la principale organisation de défense des droits de l'homme du continent. Il comprend 46 États membres, dont l'ensemble des membres de l'Union européenne. Tous les États membres du Conseil de l'Europe ont signé la Convention européenne des droits de l'homme, un traité visant à protéger les droits de l'homme, la démocratie et l'État de droit. La Cour européenne des droits de l'homme contrôle la mise en œuvre de la Convention dans les États membres.

PRESIDENCY OF ICELAND
Council of Europe 11/2022 – 05/2023
PRÉSIDENCE DE L'ISLANDE
Conseil de l'Europe 11/2022 – 05/2023

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE