

Giorgia Pane

**JUSTICIABILITY
OF THE COLLECTIVE RIGHT
TO A HEALTHY ENVIRONMENT**

**BETWEEN THE PROTECTION
OF THE ENVIRONMENT
AND INTERNATIONAL HUMAN RIGHTS LAW**

LA RICERCA DEL DIRITTO NELLA COMUNITÀ INTERNAZIONALE
Collana diretta da Maurizio Arcari, Enrico Milano e Attila Tanzi

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TABLE OF CONTENTS

INTRODUCTION

1. Context and relevance of the work	1
2. Epistemological and theoretical premises	3
2.1. Anthropocentric and ecocentric approaches in philosophical and legal research	3
2.2. Intergenerational justiciability and environment	5
2.3. The climate crisis and other environmental concerns: mutually dependent	6
3. Working definitions	7
3.1. Environment	8
3.2. The importance of adjectives: safe, clean, healthy and sustainable	9
4. Research questions	10
5. Structure of the work and methodology	11

PART I

THE RIGHT TO A HEALTHY ENVIRONMENT AS A COLLECTIVE RIGHT

CHAPTER I:

THEORETICAL CONFIGURATION OF THE COLLECTIVE PROTECTION OF THE ENVIRONMENT

1. Environment and human rights in an intergenerational framework	17
1.1. Right to nature and rights of Nature	21
2. Human rights-based approaches to the protection of the environment	27
2.1. “Greening” existing human rights	28
2.2. Reframing the individual component in environmental human rights: the need for an autonomous right to a healthy environment	33
2.3. The generalist-specialist theory: the right to a healthy environment as an “umbrella right”	39
3. Building a collective approach	43
3.1. Collective rights	43
3.2. Third-generation rights, solidarity rights	47
3.3. Global common goods: towards a reconceptualization of the right to a healthy environment as a collective right	50

CHAPTER II:
MAIN LEGAL INSTRUMENTS FOR THE COLLECTIVE PROTECTION OF THE
ENVIRONMENT

1. The first (soft) steps	55
1.1. From Stockholm to Rio: the path towards the collective protection of the environment	57
2. Relevant principles of IEL and their interplay with human rights obligations	60
2.1. The use of EIA and other due diligence assessments: maximise synergies between fundamental rights and climate actions	63
2.2. Precaution and plausible risk: the shift in the burden of proof as an asset for collective justiciability	66
3. Explicit direct recognition in human rights' regional mechanisms	70
3.1. The Inter-American system: the dual nature of the right to a healthy environment in the Advisory Opinion of 2017	70
3.2. The African Charter on Human and Peoples' Rights	74
3.3. The Arab Charter on Human Rights	76
3.4. The ASEAN Human Rights Declaration and the Declaration on the Right to a Safe, Clean, Healthy and Sustainable Environment	77
4. Other explicit references to collective environmental protection	78
4.1. Responses to the climate crisis as inherently collective	78
5. Recent developments and proposed definitions: the two resolutions of the Human Rights Council and the resolution of the General Assembly of the United Nations	81

CHAPTER III:
THE SCOPE OF THE RIGHT: THE DOUBLE DIMENSION OF THE RIGHT TO A
HEALTHY ENVIRONMENT

1. Substantive scope of the right: safe, clean, healthy and sustainable	90
1.1. The "Good Practices" of 2019	90
1.2. The core elements of the right to a healthy environment in the Stockholm Declaration	94
1.2.1. "Protection": to not be subject to anthropogenic planetary destruction	94
1.2.2. The undefined content of "improvement"	95
2. Duty-bearers and right-holders	96
2.1. States' human rights obligations in relation to the environment: the principle of due diligence	97
2.1.1. The UN climate regime as a true source of binding obligations?	104

2.1.2. The (lack of?) consensus on human rights obligations related to climate change: the Advisory Opinions	110
2.1.2.1 The 2025 Advisory Opinion of the Inter-American Court on the Climate Emergency and Human Rights	113
2.1.2.2 The ICJ Advisory Opinion on Climate Change (2025): Human rights obligations and beyond	118
2.1.3. The impact of collectiveness on jurisdiction and extraterritoriality	126
2.2. Right-holders: which collective entity?	130
2.2.1. Peoples	131
2.2.2. From vulnerability to intersectionality	134
2.2.3. Humanity: present and future generations	139
2.3. Procedural rights	143

PART II

COLLECTIVE JUSTICIABILITY AND HUMAN RIGHTS OBLIGATIONS: WHICH FORUM (IF ANY)?

CHAPTER IV:

ELEMENTS OF COLLECTIVE JUSTICIABILITY

1. A collective access to justice?	153
1.1. “Un pour tous, tous pour un”: invoking a right pertaining to all of humanity	155
1.2. The issue with representation for future generations	159
2. Effective remedies to environmental degradation	164
2.1. Ecological damage as collective and personal	168
2.2. Effectiveness of remedies to environmental degradation	171
3. Limits of judicial authority: the principle of subsidiarity and the justiciability of the right to a healthy environment	177
4. Concluding reflections on possibilities of justiciability	181

CHAPTER V:

INTERNATIONAL STANDARDS IN PRACTICE: DIFFERENT LEVELS OF COLLECTIVE JUSTICIABILITY

1. Regional human rights mechanisms: (too) high expectations?	183
1.1. Healthy environment and Indigenous Peoples: the case-law of the Inter-American Court of Human Rights	184

1.1.1. Effective justiciability of the collective right to a healthy environment in the Inter-American system	191
1.2. The collective approach within the African human rights system	194
1.3. The “derivative” approach of the European Court of Human Rights	200
1.3.1. A “sub-right” of an environmental character under Article 8 ECHR? Effectiveness as both a principle and a norm	202
1.3.2. Environmental claims vs. climate litigation: recent case-law between wins and foretold delusions	211
1.3.3. On the effective possibility of invoking a collective right to a healthy environment under the ECHR: current and future perspectives	222
2. UN treaty bodies as a “fortuitous” venue for climate litigation	225
2.1. Human Rights Committee: from Teitiota to Torres Strait Islanders and the way forward	226
2.2. The rights of children as future generations in fieri: the work of the Committee on the Rights of the Child	232
3. Partial conclusions and partial justiciability	238

CHAPTER VI:

NATIONAL CLIMATE LITIGATION FOR THE COLLECTIVE REALISATION OF THE RIGHT TO A HEALTHY ENVIRONMENT: A FLAWED BUT INTERESTING PERSPECTIVE

1. The legal bases for national justiciability of the collective right to a healthy environment	242
2. “Strategic” climate litigation	245
3. An overview of the cases outside Europe	249
3.1. Constitutional justiciable environmental rights in Latin America	249
3.2. Public Interest Litigation in Asia	254
3.3. The case-law in the United States: a doomed path for collective ecology?	257
4. The principles elaborated by the European jurisprudence	262
4.1. The rights of future generations between collectiveness and separation of powers	267
4.2. Perspectives of reception at the international level: KlimaSeniorinnen and beyond	271

TABLE OF CONTENTS

XI

<i>Conclusions</i>	275
<i>Bibliography</i>	281
<i>Documents</i>	317
<i>Table of cases</i>	324

INTRODUCTION

1. *Context and relevance of the work*

«Rien n'est plus fort qu'une idée dont l'heure est venue». With these words, famously attributed to Victor Hugo, former Special Rapporteur John H. Knox urged the General Assembly of the United Nations to recognise that the interdependency of human rights and environment is an idea *whose time has come*.¹

He based this affirmation on the acknowledgement of the existence and growth of movements around the globe built by people – whether local communities or legal representatives of concerned citizens – fighting for the preservation of the environment in the interest of the entire *human community*. Indeed, when faced with the so-called “triple planetary crisis”,² it is no longer possible to refute the implication that our decisions regarding the environment travel around time and space affecting present and future generations all around the globe.

This calls for a reflection on the collective implications of the relationship between human rights and environmental concerns. Acknowledging the *lacunae* in the current normative framework, namely the lack of a universal binding recognition of the right to a healthy environment, this inquiry aims at exploring juridical possibilities for the existence of an autonomous right to a healthy environment which is inherently collective. Strictly linked to this is the acknowledgment that in order to offer plausible solutions it is necessary to inquire about the effective justiciability – that is, the concrete realisation – of the right, and the possibility to invoke it before human rights courts and tribunals.

The relevance of the work can be found in both theoretical and practical considerations. Increasing pollution, loss of biodiversity and the effects of climate change are undoubtedly devastating. It is no longer a

¹ J.H. KNOX, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Framework Principles*, UN Doc. A/HRC/37/59 (2018), para. 20.

² This is the term used inside the United Nations system to refer to the three main intersecting crises at the global level: loss of biodiversity, climate crisis and pollution. See the website of the UN Framework Convention on Climate Change at www.unfccc.int.

question of whether we should change, or even when. The answer is now. Change is needed now, and change comes through the development of effective solutions, which must take into account the collective dimension.

This brings forward issues of intergenerational and intra-generational equity. These two refer respectively to the equity owed to members of different generations (specifically, future ones) and to different members within the same generation.

The need to respond to these claims reflects the need to find a forum that is suitable for providing answers and possibly compensation. Therefore, the question of the “ability to judge” is of a fundamental nature, as it concerns access to justice.

Furthermore, the interplay between human rights and commitments deriving from international environmental law calls for the need to tackle the question of justiciability also in broader, more philosophical terms. As all human rights, also the right to a healthy environment sits at the crossroads between law and politics. Environmental concerns are particularly sensitive to this interaction and considerations of a practical matter cannot be completely ignored.

In recent years, politicians have shown themselves to be either incapable or maliciously ignorant before demands for change. This does not mean that the legal system has done the same. The progress in the form of litigation has provided – and continues to provide – definition of existing standards as well as advancement, offering room for further analysis on the issue.

This analysis builds upon the work of international law scholars who have approached the issue of environmental protection from a human rights point of view. Abandoning the idea of simply “greening” existing human rights, this research will follow an autonomous configuration of the right to a healthy environment.³ In the same way, the research will be conducted adopting an intergenerational approach, in direct continuity with the majoritarian doctrine and the most recent case-law.

The work aims at offering a comprehensive reconstruction of the normative and jurisprudential international framework on the right to a

³ The work of the two former Special Rapporteurs on human rights and environment (John H. Knox and David R. Boyd) must be mentioned. See more in detail *infra* Chapter I.

healthy environment, by focusing on its collective aspect. Indeed, even though the idea has been hinted at in most of recent debate, a broad analysis of its legal consequences in the dynamic of international law is still lacking.

Moving from this approach, the book offers a reflection on the impact of collectiveness on perspectives of justiciability for the right to a healthy environment, by considering international human rights law standards and testing its fora.

2. *Epistemological and theoretical premises*

The present research is conducted following an analysis of the scholarship on the matter, confronting it with the relevant case-law. The study is situated in the doctrinal debate around the existence of the right to a healthy environment, moving from the consideration of its collective and intergenerational nature.

It is built around a theoretical framework, which is then put to the test of the practice of courts and tribunals. Those theoretical premises benefit from the scientific contribution of the doctrine of public international law and international human rights law, but they do not exclude considerations of a philosophical nature. Among these, particular relevance is assumed by those studies that have explored the relationship existing between humans and nature (Section 2.1), intergenerational equity and environmental concerns (Section 2.2) and the correlation between environmental degradation and the climate crisis (Section 2.3).

2.1. *Anthropocentric and ecocentric approaches in philosophical and legal research*

When exploring the relationship between humans and nature, two main approaches come to mind: anthropocentrism and ecocentrism. The traditionally Western European approach is mainly an anthropocentric one.⁴ This approach moves from the premise that nature is “other” from

⁴ P. BURDON, *The Earth Community and Ecological Jurisprudence*, in *Oñati Socio-Legal Series*, 2013, p. 815 ff.

humans, an *object* to be valued up to the point where it is useful to humans. The paradigm of sustainable development – omnipresent in environmental international and national documents of the last 30 years⁵ – balances ecological needs with economic ones, considering the environment as a “note” in the scheme of economical evolution.⁶ This approach is generally focused on humans and does not consider other forms of life as equally important.

On the opposite side of the spectrum stands “ecocentrism”,⁷ which contemplates the dynamic human-nature as an ecosystem. Humans are in this sense *a part of* nature and hold the same value as other forms of life relevant for the biosphere. This approach cannot be disentangled from its birthing place, which can be found in the cosmogonies of some Indigenous Peoples – especially in Latin America.⁸

Critics to these distinctions have mainly focused on its supposed irrelevance or unavoidability.⁹ Nevertheless, while epistemological anthropocentrism is indeed unavoidable (we cannot stop *thinking as humans*), normative anthropocentrism doesn’t need to be. While it might seem counterintuitive, putting humans at the centre of law is not indispensable. In the past years, several scholars have suggested

⁵ See, for reference, the Kyoto Protocol (adopted in 1997, entered into force in 2005). For the definition of sustainable development, see the Brundtland Report, *Our Common Future*, adopted by the World Commission on Environment and Development, transmitted to the General Assembly as an annex document A/42/427 – Development and International Cooperation: Environment, 1987. See also *infra* Chapter III.

⁶ P. CURRY, *Ecological Ethics: An Introduction*, Cambridge, 2011.

⁷ K. BOSSELMAN, *Shifting the Legal Paradigm: Earth-centred Law and Governance*, in P. MAGALHÃES, W. STEFFEN, K. BOSSELMANN, A. ARAGO (eds), *The Safe Operating Space Treaty: A New Approach to Managing Our Use of the Earth System*, Cambridge, 2016, p. 64 ff.; V. DE LUCIA, *Beyond Anthropocentrism and Ecocentrism: A Biopolitical Reading of Environmental Law*, in *Journal of Human Rights and the Environment*, 2017, p. 181 ff.; A. GREAR, *The Vulnerable Living Order: Human Rights and the Environment in a Critical and Philosophical Perspective*, in *Journal of Human Rights and the Environment*, 2011, p. 23 ff..

⁸ See also *infra* Chapter I. On ecocentric and anthropocentric approaches in human rights see also S. DE VIDO, *A Quest for an Eco-centric Approach to International Law: the COVID-19 Pandemic as Game Changer*, in *Jus Cogens*, 2021, p. 105 ff.; F. CERULLI, *Antropocentrismo vs ecocentrismo nella giurisprudenza della Corte interamericana dei diritti umani*, in *Diritti umani e diritto internazionale*, 2023, p. 259 ff..

⁹ B.G. NORTON, *Environmental ethics and weak anthropocentrism*, in *Environmental Ethics*, 1984, p. 131 ff.; A. WESTON, *Beyond intrinsic value: Pragmatism in environmental ethics*, in *Environmental Ethics*, 1985, p. 321 ff.; W. GREY, *Anthropocentrism and deep ecology*, in *Australasian Journal of Philosophy*, 1993, p. 463 ff.

alternative ways to foster the interaction between the legal system and a truly sustainable way to preserve the environment.¹⁰

This book positions itself at the crossroads between these two approaches. Acknowledging that the point of view of an international human rights law scholar cannot disregard the human component, the present analysis contends that framing the right to a healthy environment in its collective dimension can bridge the gap existing between the two approaches. These should not be seen as incompatible alternatives, rather as elements which can coexist. Indeed, any true ecocentric approach takes into account the role of humans in the ecosystem.

The collective aspect relates to the nature of the *interests* underlying the right to a healthy environment as well as the subjects who can benefit from it. By focusing on this aspect, the research considers that the right to a healthy environment cannot be anything but collective, since the environment is a common good to be preserved for present and future generations.¹¹

2.2. *Intergenerational justiciability and environment*

The intergenerational approach is a consequence of the collective one. Indeed, if one moves from the premise that the right to a healthy environment protects a common good, or common interest, one cannot refrain from wondering “common to whom”?

The answer, as will be discussed below, can be found in the instruments protecting the environment since the beginning of the 1970s

¹⁰ S. BAGNI, *The Enforcement of New Environmental Rights Through Courts: Problems and Possible Solutions*, in D. AMIRANTE, S. BAGNI (eds), *Environmental Constitutionalism in the Anthropocene: Values, Principles and Actions*, London, 2022, p. 221 ff.; K. BOSSELMAN, *Shifting the Legal Paradigm: Earth-centred Law and Governance*, cit.; R. BROOKS, R. JONES, *Law and Ecology: The Rise of the Ecosystem Regime (Ecology and Law in Modern Society)*, London, 2002; S. EMMENEGGER, A. TSCHENTSCHER, *Taking Nature's Rights Seriously: The Long Way to Biocentrism in Environmental Law*, in *Georgetown International Environmental Law Journal*, 1994, p. 545 ff.; L.J. KOTZÉ, R.E. KIM, *Earth System Law: The Juridical Dimensions of Earth System Governance*, in *Earth System Governance Journal*, 2019, p. 1 ff.; D. SHELTON, *Human Rights, Environmental Rights and the Rights to Environment*, in *Stanford Journal of International Law*, 2001, p. 103 ff.

¹¹ See, generally, S. BUCK, *The Global Commons: An Introduction*, Washington DC, 1998. More in detail, see *infra* Chapter I.

and well into the most recent history.¹² Environmental concerns intrinsically pertain to the *whole* of humankind. The most authoritative doctrine in this sense can certainly be found in the essay of Edith Brown Weiss, where “fairness to future generations” is invoked in strict relationship with ecological demands.¹³

This work commits to moving from traditional temporality towards the reception of interactions between generations as a *continuum*. Indeed, a growing awareness can be observed of the way environmental protection spreads through different generations, both in scholarship and normative actions.¹⁴ This awareness should be reflected in the way the right to a healthy environment is framed, but it cannot overlook the aspects of justiciability. Questions of justiciability of “future rights” will be considered in this analysis on the premise that no right is effective if it is not justiciable.

2.3. *The climate crisis and other environmental concerns: mutually dependent*

The climate crisis may be considered as one of the many types of environmental “issue” or “concern”. Together with loss of biodiversity and pollution, it forms what the UNFCCC calls the “triple planetary crisis”. The term “crisis” in itself evokes a time of “judgment” (from Greek *krino*, which means “to judge”, “to evaluate”). The present time surely calls for evaluation and reflection on contemporary ways of living, on the legal and philosophical framework that supports modern societies.

For this reason, the term “climate crisis” best represents the spirit of this analysis rather than “climate change”, or “emergency”. It may be argued that neither of these captures the epochal transition that must be faced. Change is part of the natural order, and the concept of emergency evokes that of a temporal problem, something that will go away if we wait long enough.

¹² To name the two: the Stockholm Declaration of 1972 and the most recent UN General Assembly Resolution on the recognition of the right to a healthy environment (2022). See also *infra* Chapter II.

¹³ E.B. WEISS, *In Fairness To Future Generations and Sustainable Development*, in *American University International Law Review*, 1992, p. 19 ff.

¹⁴ See more diffusely *infra* Chapter I.

This is not the case with the climate crisis. Our way of living as humans on planet Earth has proved to be unsustainable both for us and for other living organisms in the ecosystem.¹⁵ The anthropogenic origin of the climate crisis is now mostly undisputed in international fora thanks to the work of the Intergovernmental Panel on Climate Change.¹⁶

The approach adopted in this work moves from the idea that the climate crisis and other gross environmental violations are mutually dependent. It is argued that the same social system which has given source to one of the planetary crises has also contributed to the other two (loss of biodiversity and pollution). This means that environmental degradation caused by negligence in delivering local projects is no different than the one caused by sea-level rising attributable to the climate crisis.

In other words, the two aspects should not be considered as divisible when analysing the right to a healthy environment. It is true that the climate crisis entails a specific type of damage and requires a peculiar type of cooperation, but the position adopted here is that this only serves to better show the collective nature of the right to a healthy environment and the dimension of the latter as a global common good.¹⁷

For this reason, consideration will be given to cases addressing a broad range of environmental concerns – including their cultural, health and safety dimensions – as well as to climate-related cases. The latter offer a possibility to enhance the need for collective justiciability and show with stark clarity the way in which principles of international environmental law interact with international human rights law.¹⁸

3. *Working definitions*

At this point, it is essential to take into account how these theoretical premises relate to the basic concepts here evoked: the concept of

¹⁵ M. YANG, L. CHEN, J. WANG ET AL, *Circular economy strategies for combating climate change and other environmental issues*, in *Environmental Chemistry Letters*, 2023, p. 55 ff.

¹⁶ See the Special Report of the Intergovernmental Panel on Climate Change (IPCC): IPCC, Special Report, *Global Warming of 1.5°C*, 2018; also, IPCC, Special Report, *Global Warming of 1.5°C, Summary for Policymakers*, 2018.

¹⁷ See more diffusely *infra* Chapter I.

¹⁸ See *infra* Chapter II.

“environment” and its adjectives. The polysemy of this terms is positioned with cause in regard to the nuanced interpretations of certain key concepts, as their meanings and implications shift depending on the context in which they are applied. In particular, the notions of anthropocentric and ecocentric approaches, intergenerational equity, and the climate crisis carry diverse connotations, shaped by differing disciplinary perspectives and ethical frameworks. The problematisation of these terms – whether considering the human-centric or nature-centric focus of environmental responsibility, the fairness of obligations across generations, or the multifaceted impacts of climate change – highlights the complexity of defining such issues with precision. This reflection on the multiplicity of meanings informs the formulation of the research question explored in the following paragraph.

3.1. *Environment*

The word “environment” finds its etymological origin in the French term “*environner*”, which means “to surround”. In this sense, “environment” evokes the concept of “what surrounds”.

The term contains multiple meanings and is often accompanied by a specification: «natural, social, cultural, urban, or digital environment» and yet «in nearly any case, the word ‘environment’ is employed as a synonym for space, territory, place, or ecosystem».¹⁹ For the purpose of this work, reference will be made to the “natural environment”.

The Council of Europe Convention of Lugano defines the (natural) “environment” as including:

«natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; property which forms part of the cultural heritage; and the characteristic aspects of the landscape.»²⁰

The interplay of the climate crisis with other environmental concerns is only an example of how the different components of the natural

¹⁹ F. BUONGIORNO, X. CHIARAMONTE, *Environment*, in N. WALLENHORST, C. WULF (eds), *Handbook of the Anthropocene*, Berlin, 2023, p. 49.

²⁰ Council of Europe Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, 1993, Art. 2(10).

environment interact with one another and coexist to determine the functioning and the well-being of the entire ecosystem.²¹ The Aarhus Convention, dealing with environmental information, adopts a similar definition of the term considering it as composed of information regarding: «air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements».²²

Traditionally, and coherently with its etymological meaning, “ecology” has been linked to the concept of “house” (from Greek *oikos*). While this idea is fascinating because it conveys the idea of nature as a place in which different species can coexist, it has also been adopted with the idea of protection *in function* of preserving the *use* it has for humans.²³ To overcome this dualistic approach, the idea of environment as “home” can be interpreted in terms of “milieu”, as a «relational space in between the organism and its complex environment».²⁴ In other words, this space exists *because* of its components and in strict interdependence with them.

In this sense, the term “environment” is understood as encompassing not only its individual components (such as water, air and vegetation), but also the distinctive manner in which these elements interact with one another. Coherently, the health dimension of the natural environment does not exist without its cultural one, and the two concur to form the relationship between human and non-human.

3.2. *The importance of adjectives: safe, clean, healthy and sustainable*

The terminology used to refer to the right in this book consolidates into the four adjectives here mentioned: safe, clean, healthy and sustainable. The term which will be generally adopted is “right to a

²¹ See F.S. CHAPIN, P.A. MATSON, P.M. VITOUSEK, *Principles of Terrestrial Ecosystem Ecology*, 2nd ed., New York, 2011.

²² UN Convention on access to information, public participation in decision-making and access to justice in environmental matters, 1998, (“Aarhus Convention”), Art. 3(a).

²³ F. BUONGIORNO, X. CHIARAMONTE, *Environment*, cit., p. 50 and the doctrine cited therein. See also G. BATESON, *Steps to an ecology of mind: Collected essays in anthropology, psychiatry, evolution, and epistemology*, Chicago, 1972.

²⁴ M. ALTAMIRANO, *Time, technology, and environment. An essay on the philosophy of nature*, Edinburgh, 2016, p. 129.

healthy environment” because it is the most commonly used in international law scholarship, but other formulations are not excluded. Indeed, the four adjectives are considered to be in some way interdependent from one another.

The reference to health is easily understood since the link between human rights and environmental protection finds its roots in the acknowledgement of the adverse impact on human health deriving from environmental degradation. A “clean” environment is also linked to the planetary issue of pollution.

Sustainability is an additional element, both old and new. Recently added in the last formulations of the right, it is however but an explication of the parameter of sustainable development which can be found in the first international documents on environmental protection.²⁵

Finally, “safety” is a more open term. It clearly relates to the “health” dimension, to the idea that humans must be protected from the negative impacts that environmental degradation can have on all other human rights, in line with the idea of interdependency of human rights.

Nevertheless, as stated, a healthy environment must be safe for more than just humans, and, as the recent crises humanity has been facing demonstrate, no environment is safe if it does not account for sustainability in the sense of balancing with other living organisms in the ecosystem. In this sense, the content of the right to a healthy environment also shapes the relationship with other parts of the biosphere, by promoting a harmonic way of life which benefits both humans and nature, in line with the premises on anthropocentric and ecocentric approaches.

4. *Research questions*

The research questions underlying this inquiry revolve around the concept of justiciability of the collective and intergenerational right to a healthy environment.

The first part of this enquiry can be framed in the following terms: Can it be affirmed, based on the current normative framework –

²⁵ See *infra* Chapter II.

composed of both hard and soft law – that an autonomous collective right to a healthy environment exists?

This issue mainly concerns the nature of the interests contained in the right to a healthy environment, including its substantive and subjective scopes: what is included in the right to a healthy environment? Who can invoke it? Individuals? Groups? Present and future generations?

The second part of the question relates to the issue of justiciability, that is the “how” of the realisation of the right. This means, preliminarily, framing the confines of the concept of “justiciability” in the broad sense of existence of remedies and access to justice. Then, the research moves to the jurisprudential analysis for the final question: what is the best forum (if any) for the effective justiciability of the collective right to a healthy environment?

5. Structure of the work and methodology

After this Introduction, the research will be divided into two parts: one focused on building the collective dimension of the right to a healthy environment, and the second centred around the issue of effective justiciability.

The methodology adopted is analytic, and, following the structural division, it can be broken down into two main approaches: normative analysis and jurisprudential analysis, both of which are essential for examining the right to a healthy environment and its justiciability.

The first approach involves evaluating the legal frameworks and principles that define the right to a healthy environment. It covers both instruments of soft law (UN declarations, Reports of UN Special Rapporteurs, UN resolutions) and hard law (treaties, regional human rights conventions and national constitutions) that relate to human rights-based environmental protection. The normative analysis examines whether international and national legal systems explicitly recognise a collective right to a healthy environment. The research investigates how collective rights, especially in relation to intergenerational equity, are grounded in various legal instruments and how they address environmental degradation. It also defines the scope of procedural rights tied to the right to a healthy environment, such as access to justice,

ensuring that individuals and communities can seek legal remedies when these rights are violated.

The second approach dives into both international and national case-law, focusing on the justiciability of environmental rights. It explores how different adjudicatory and monitoring bodies (the regional human rights protection mechanisms, the UN Human Rights Committee and the Committee on the Rights of the Child) address environmental claims, particularly in relation to human rights law. This part also highlights how courts interpret legal standards around environmental protection and what remedies are available, especially in cases involving climate change and vulnerable categories. At the national level, climate litigation provides further examples of how courts integrate international human rights law into their decisions, even though these processes are still evolving.

The relevance of these two methodologies lies in their complementarity. Normative analysis provides the legal foundation and the conceptual framework for understanding the collective nature of the right, while jurisprudential analysis shows how it is practically enforced and interpreted by courts. Together, they offer a comprehensive view of the legal recognition and justiciability of the right to a healthy environment, both at the national and international levels.

Finally, the use of elements from philosophy of law likely informs the theoretical grounding of these analyses, ensuring that the collective and intergenerational aspects are thoroughly explored.

On this methodological background, the structure follows with the afore-mentioned division.

The first part will tackle the question and the grounding of the collective approach, strictly linked to intergenerational equity, as a virtuous example compared to other views adopted for the protection of the environment [Chapter I]. Once established, it will be necessary to go through the main legal instruments – of both soft and hard law – relevant for the protection of the environment, searching for explicit recognition of a right to a healthy environment of a collective nature, seen and understood as a necessity to face serious environmental degradation [Chapter II].

In light of the above, the scope of the right will be outlined. The right to a healthy environment will be seen, in this perspective, as a collective right which imposes the preservation and the improvement of the

environment, and which carries along a bundle of procedural rights fundamental to its full realisation. Among those, access to justice is an accessory and indispensable feature which must be analysed in detail [Chapter III].

Along these lines, the second part will explore in depth the question of justiciability, both from an international and a national point of view. The reflection on access to justice will constitute the necessary premise to analyse the elements composing justiciability, with special attention to possible remedies and their effectiveness [Chapter IV].

Justiciability will then take the form of international human rights law claims, as discussed and decided in the Inter-American Court of Human Rights, the African Commission of Human Rights, and the European Court of Human Rights, the only one among those listed that does not explicitly recognise the right to a healthy environment, and yet also the one with the most prolific and detailed jurisprudence on the matter of interpretative standards. This chapter will also be devoted to cases brought before specific UN treaty bodies that have dealt with the question of the right to a healthy environment with a keen eye on discriminatory and vulnerability factors and in relation to climate change [Chapter V].

Finally, national climate litigation will provide examples of fora extremely susceptible to international human rights law inputs, which have been – and continue to be – a positive example of integration with international standards of environmental protection, and that represent venues in which international environmental law and international human rights law can be applied in collective claims, though not without flaws [Chapter VI].

Conclusively, the research will face the results of the studies and evaluate whether there is a right to a healthy environment of a collective nature, which elements of it are *ius conditum* and which ones are *ius condendum*, to confirm that the collective approach is the right way forward in order to offer a timely and effective protection to the environment.

PART I
THE RIGHT TO A HEALTHY ENVIRONMENT AS A
COLLECTIVE RIGHT

CHAPTER I:
THEORETICAL CONFIGURATION OF THE COLLECTIVE PROTECTION OF
THE ENVIRONMENT

The first Section of this Chapter will be dedicated to the analysis of the link existing between environmental concerns and human rights, as the necessary basis for the present research. Then, in Section 2, the nature of this relation will be explored with an eye to different existing models of interaction with the purpose of identifying in an autonomous right to a healthy environment the preferred model. The main aim of this Chapter will be developed in Section 3, where the collectiveness of the right to a healthy environment will be configured in reason of the global and community-related characteristics of the interests involved.

1. *Environment and human rights in an intergenerational framework*

The relationship between environment and human rights has been the object of doctrinal study since last century. Scholars have since long inserted the environment among the themes related to human rights' protection in their works.²⁶ The impact environmental degradation has on the enjoyment of several human rights has been made particularly apparent by the rapid evolution of the climate emergency and all that it entails (loss of diversity, sea-level rise, an unprecedented wave of migration, among other devastating effects).²⁷

²⁶ *Inter alia*, P. ALSTON, H. STEINER, R. GOODMAN, *International Human Rights in Context: Law, Politics, Morals*, 3rd ed., Oxford, 2008; O. DE SCHUTTER, *International Human Rights Law: Cases, Materials, Commentary*, Cambridge, 2010; L. LOUCAIDES, *Environmental Protection through the Jurisprudence of the ECHR*, in *British Yearbook of International Law*, 2004, p. 249 ff.; R. DESGAGNÉ, *Integrating Environmental Values into the European Convention on Human Rights*, in *The American Journal of International Law*, 1995, p. 263 ff.; C. TOMUSCHAT, *Human Rights: Between Idealism and Realism*, Oxford, 2014; R. PISILLO MAZZESCHI, *Diritto internazionale dei diritti umani: Teoria e prassi*, Torino, 2020.

²⁷ On the recognition of the relationship between climate change and human rights' violations, see the two Reports by J.H. Knox, former Special Rapporteur on the Environment and Human Rights at the United Nations Human Rights Council (UNHRC): *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Climate*

Notwithstanding this, environmental concerns have largely been tackled inside the framework of international environmental law. The latter constitutes a *sui generis* branch of public international law,²⁸ which started to be developed in the 1970s and which can be defined as «the corpus of international law norms pertaining to environmental matters which guides all actors in international environmental governance».²⁹ The reference to “environmental governance” immediately conduces to the realisation that the actors involved are first and foremost States. Indeed, international environmental law (or IEL) is mainly composed of multilateral treaties dealing with specific environmental issues.³⁰ However, the inter-State nature of IEL has rendered it largely incapable of facing the human dimension of environmental questions: it does not offer recourse for individual victims, and it is, ultimately, *not enough*.³¹

Former Special Rapporteur John H. Knox underlined this aspect by taking into account the fact that international environmental law has a

Change Report, UN Doc. A/HRC/31/52, 2016; *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Framework Principles*, cit.

²⁸ “Branch” is here used for the purpose of describing «a wide range of treaties, soft-law instruments, bodies of *droit dérivé* and decisions of adjudicatory and quasi-adjudicatory bodies that address, with varying degrees of specificity, aspects of the “environment” as a composite legal object» (J.E. VIÑUALES, *The Influence of Environmental Protection on the Fabric of International Law*, in P. DE SENA, R. PISILLO MAZZESCHI (eds.), *Global Justice, Human Rights and the Modernization of International Law*, Cham, 2018, p. 260). On the absence of “branches” in international law see, more diffusively, J.E. VIÑUALES, *Cartographies imaginaires: observations sur la portée juridique du concept de “régime spécial en droit international”*, in *Journal du droit international*, 2013, p. 405 ff.

²⁹ U. BEYERLIN, J. GROTE STOUTENBURG, *Environment, protection of*, in *Max Planck Encyclopedia of Public International Law*.

³⁰ Among the others, reference can be made to the UN Convention on Biological Diversity of 1992, the 1998 Convention on access to information, public participation in decision-making and access to justice in environmental matters (so-called “Aarhus Convention”), and the UN Framework Convention on Climate Change (UNFCCC) entered into force in 1994. As of 2005, the UNEP *Register of International Treaties and Other Agreements in the Field of the Environment* contained reference to more than two hundred environmental treaties, and the number has kept on rising in the last twenty years (see UN Doc. UNEP/Env.Law/2005/3, 2005).

³¹ C. DOMMEN, *Claiming Environmental Rights: Some Possibilities Offered by the United Nations Human Rights Mechanisms*, in *Georgetown International Environmental Law Review*, 1998, p. 1 ff.; N. POPOVIC, *In Pursuit of Environmental Human Rights*, in *Columbia Human Rights Law Review*, 1996, p. 487 ff.

fundamentally “transnational vocation”. On the other hand, international human rights law (or IHRL) (mainly) consists of internal obligations. In this sense, anchoring environment and human rights functions as a way to fill the gaps in IEL.³²

The connection with international human rights law has two added functions: giving environmental issues a transversal legitimacy – based on a plurality of rights – and relying on the interpretation given by the regional courts on human rights in order to clarify the scope of States’ obligations,³³ therefore improving State performance also on the national level.³⁴

The rights-based approach has been said to hinder the possibility of compromise, typical of political issues.³⁵ However, it also gives environmental rights the same weight as other rights, allowing for balancing.³⁶

Environmental degradation has undoubtedly a severe impact on the enjoyment of a plethora of human rights. More than that, its effects are not limited to present generations, but stretch long into the future, impeding or threatening the realisation of human rights even for future generations.

In her ground-breaking essay, Edith Brown Weiss formulated the fundamental equation that true sustainability implies that future generations have rights too, by putting the accent on the prism of “intergenerational equity”.³⁷ She affirmed that «[t]he theory of intergenerational equity states that all generations have an equal place in

³² J.H. KNOX, *Constructing the Human Right to a Healthy Environment*, in *Annual Review of Law and Social Science*, 2020, p. 79 ff.

³³ On this dual function, see P. PUSTORINO, *Cambiamento climatico e diritti umani: sviluppi nella giurisprudenza nazionale*, in *Ordine internazionale e diritti umani*, 2021, p. 600: «[...] il richiamo della disciplina normativa sui diritti umani – sia essa specificamente dedicata alla protezione ambientale o ricavata per via ermeneutica dal diritto alla vita, alla salute, etc. – sembra in grado di svolgere una funzione correttiva di specificazione del contenuto degli obblighi statali a livello internazionale e interno in materia ambientale [...]».

³⁴ J.H. KNOX, *Constructing the Human Right to a Healthy Environment*, cit., p. 90. See also, S. GARDBAUM, *Human rights as international constitutional rights*, in *European Journal of International Law*, 2008, p. 749 ff.

³⁵ M. IGNATIEFF, *Human Rights as Politics and Idolatry*, Princeton, 2003.

³⁶ L.H. LEIB, *Human Rights and the Environment: Philosophical, Theoretical and Legal Perspectives*, Leiden, 2010.

³⁷ E.B. WEISS, *In Fairness To Future Generations and Sustainable Development*, cit.

relation to the natural system, and that there is no basis for preferring past, present or future generations in relation to the system».³⁸ It is not only a moral imperative, but a theory that has «deep roots in international law»,³⁹ which stem from the Preamble of the Universal Declaration of Human Rights and its reference to “all members of the human family”.⁴⁰

Professor Weiss frames three normative principles for intergenerational equity and sustainability. First, «each generation must conserve options» for the next one,⁴¹ by ensuring the protection of biodiversity and natural resources. Second, each generation must preserve the “quality” of the planet, so that the next enjoys it in a way that is not inferior to the one enjoyed by the precedent. Third, each generation must conserve “access to the legacy” of the previous, by protecting *accessibility* of natural resources.

This configuration is not without its complications.⁴² One of those is that future generations cannot have rights because they are indetermined in number and quality.⁴³ In not being determined, they are incapable of being centres of imputation of rights. However, as Weiss precises, future generations’ rights are not to be seen as individual rights, rather as “group rights”.⁴⁴ Moreover, they do not exist in themselves, in a sort of *vacuum* alienated from contemporary contexts. They are put in relation to “intragenerational equity”, for at least three reasons.

The first, highlighted by Weiss, is of a practical nature: no single subgroup of humans (whether a State, the Global North or local communities) can offer the full realisation of a healthy environment for future generations. Cooperation and solidarity are necessary for the efficacy of the solutions.

³⁸ *Idem*, p. 20.

³⁹ *Ibidem*.

⁴⁰ Preamble of the Universal Declaration of Human Rights.

⁴¹ E.B. WEISS, *In Fairness To Future Generations and Sustainable Development*, cit., p. 20.

⁴² See, *inter alia*, S. HUMPHREYS, *Against Future Generations*, in *European Journal of International Law*, 2022, p. 1061 ff.; and as a response: M. WEWERINKE-SINGH, A. GARG, S. AGARWALLA, *In Defence of Future Generations: A Reply to Stephen Humphreys*, in *European Journal of International Law*, 2023, p. 651 ff.

⁴³ Professor Weiss refers to Parfit’s paradox, according to which «for any perfectly equal population with very high positive welfare, there is a population with very low positive welfare which is better, other things being equal» (D. PARFIT, *Reasons and Persons*, Oxford, 1984).

⁴⁴ See *infra* Section 3.

Secondly, and from a logical point of view, there is no way to precisely predict which category of future generations will inherit resources and which one will not. At present, with the current rate of global environmental degradation, and the looming threat of a “triple planetary crisis”, *all future generations* will suffer the inaction of the present.

Thirdly, and consequentially, intragenerational equity takes into account the intersectional nature of environmental degradation, in this way offering coverage for the protection of all rights impacted by it, both directly and indirectly. Intragenerational equity is in this sense part of the obligations that present generation owes to future ones.

A construction of the collective right to a healthy environment passes through the recognition of the relevance of these principles and any further analysis will be conducted taking them into account.

1.1. *Right to nature and rights of Nature*

Before proceeding to the analysis of human rights-based approaches to environmental issues, a point needs to be made on the existence of a category of rights *directly* pertaining to the environment. Indeed, a distinction may be drawn between the “right to nature”, in its various determinations, which will be the object of the reflection contained in the next Chapters, and the “rights of nature”, identified in some systems as a category of rights whose holder is Nature itself. Ever since 1972, when the paper “Should Trees Have Standing?” by Christopher D. Stone appeared on the *Southern California Law Review*,⁴⁵ scholarship in favour and against the recognition of Nature’s rights has been copious.

Critics of the extension of legal personhood focus on a variety of arguments, ranging from their alleged non-transformative impact⁴⁶ to lack of enforcement,⁴⁷ passing through their essence of “manifesto rights”.⁴⁸ Many of these critics are common to the ones opposed to the

⁴⁵ C.D. STONE, *Should Trees Have Standing? – Toward Legal Rights for Natural Objects*, in *Southern California Law Review*, 1972, p. 450 ff.

⁴⁶ M. GUIM, M.A. LIVERMORE, *Where Nature’s Rights Go Wrong*, in *Virginia Law Review*, 2021, p. 1347 ff.

⁴⁷ J. BÉTAILLE, *Rights of Nature: Why it Might Not Save the Entire World*, in *Journal for European Environmental & Planning Law*, 2019, p. 35 ff.

⁴⁸ P. BAARD, *Are Rights of Nature Manifesto Rights (And is That a Problem)?*, in *Res Publica*, 2023, p. 425 ff.

recognition of an autonomous right to a healthy environment. Stating that difficulties arise with their “vague and incoherent” content, the absence of limiting principles and guiding rules for human representatives, scholars are concerned with their viability.⁴⁹

Philosopher Jacques Derrida defined rights of Nature as «naive positions that one can sympathize with but that are untenable».⁵⁰ The ingenuity of the attempts is called in to question their feasibility, and rights of Nature are deemed nothing more as a fantastic cultural experiment. By lacking human consciousness, Nature is intrinsically deprived of personhood.

However, as Fischer-Lescano pointed out, the “equivalence doctrine”, which stems from the premise that humanity and legal personhood are interdependent, is no longer adamant, and «being human or having a human substrate is a sufficient, but not a necessary condition for legal personhood».⁵¹ Indeed, the locution “legal person” describes so much more than physical individuals, by encompassing also juridical persons such as societies, associations and organs of States, and become what Fischer-Lescano defines “character masks”.⁵² The term “person” itself derives from the Latin word *persona*, which translates to “mask”.⁵³

In *Pure Theory of Law*, Hans Kelsen talks about the “dissolution” of the concept of “person” and of the “legal subject” by affirming that the “person” is but a group of obligations and rights: a “complex of

⁴⁹ N. SACHS, *A Wrong Turn with the Rights of Nature Movement*, in *The Georgetown Environmental Law Review (GELR)*, 2023, p. 39 ff.

⁵⁰ J. DERRIDA, E. ROUDINESCO, *For What Tomorrow...: A Dialogue*, Jeff Fort (tr.), Stanford, 2004, p. 64.

⁵¹ A. FISCHER-LESCANO, *Nature as a Legal Person: Proxy Constellations in Law*, in *Law & Literature*, 2020, p. 242.

⁵² *Ibidem*. Moreover, on “character mask,” see also R. WEIHE, *Die Paradoxie der Maske: Geschichte einer Form*, Munich, 2004, p. 310; on the person as a “construct” see generally R. DAMM, *Personenrecht – Klassik und Moderne der Rechtsperson*, in *Archiv der civilistischen Praxis*, 2002, p. 841 ff.; F. DE MARINI AVONZO, *Diritto romano e diritto privato. Letture da F.K. von Savigny*, Torino, 1995, p. 195: «[I]a capacità giuridica fu da noi dimostrata come coincidente col concetto dell’uomo singolo (§ 60). Noi la consideriamo ora come estesa a subietti artificiali, creati per semplice finzione. Tale subietto vien chiamato da noi *persona giuridica*, cioè persona che è ammessa solamente per uno scopo giuridico. In essa noi troviamo un nuovo soggetto di rapporti di diritto oltre l’uomo singolo».

⁵³ From the combination of the words *per* and *sonare*, meaning literally “to sound through” and referring to how the sound of the voice of the actor passed through the mask.

norms”.⁵⁴ The same point is made by Gustav Radbruch and Georg Jellinek who connect the existence of the legal person itself to acts of the legal order and of the State.⁵⁵

Among contemporary scholars, the foundations of human rights themselves have long been put into question, their philosophical bases and adaptability challenged.⁵⁶ Some argue that their justiciability is not even necessary for their existence, by reflecting on alternatives models like social and political awareness as well as moral impact.⁵⁷

On the point, it can be concluded that the feasibility of the recognition of Nature’s rights lies firstly in an act of political will, in a way that is not different to any other declaration of rights. The content of that declaration is then redefined with rules specific to the non-human, with their scopes and principles.⁵⁸ In the *Los Cedros* case, part of the reasoning of the Constitutional Court of Ecuador is given to the punctual analysis of the scope of Nature’s rights and the principles behind their application – like the *in dubio pro natura* principle, which states that interpretative doubts around a provision must be interpreted in favour of Nature.⁵⁹

It could be argued that the main problem for the environment are the same subjects that invoke its enjoyment. Weiss’s theoretical construction of an ecological intergenerational equity lies indeed on two interacting relationships: the first one, examined above, connects humans with humans, in a temporal continuum; the second relates to the one between humans and nature. And only humans «among all other living creatures, have the capacity to significantly shape our relationship with this system». ⁶⁰ The anthropogenic characteristics of the climate crisis have

⁵⁴ H. Kelsen, *Lineamenti di dottrina pura del diritto*, Torino, 2000, p. 87.

⁵⁵ G. RADBRUCH, *Rechtsphilosophie. Studienausgabe*, Heidelberg, 1999, pp. 124-125; G. JELLINEK, *System der subjektiven öffentlichen Rechte [2nd ed. 1905]*, Tübingen, 2011, p. 82.

⁵⁶ See C. GEARTY, *Can Human Rights Survive?*, Cambridge, 2006.

⁵⁷ A. SEN, *Human Rights and Development*, in B. A. ANDREASSEN, S. P. MARKS (eds.), *Development as a Human Right: Legal, Political, and Economic Dimensions*, London, 2006.

⁵⁸ A. FISCHER-LESCANO, *Nature as a Legal Person: Proxy Constellations in Law*, cit., p. 244 ff.

⁵⁹ Constitutional Court of Ecuador, Case No. 1149-19-JP/20, Judgment of 10 November 2021, para. 23 ff.

⁶⁰ E.B. WEISS, *In Fairness To Future Generations and Sustainable Development*, cit., p. 20.

been recognised by experts⁶¹ as well as international treaties. The Paris Agreement itself recognises the need to reduce anthropogenic emissions in order to alleviate the pressure on the planet.⁶²

In her work, Leib reconstructs the underpinnings of the environmental crisis chronologically by anchoring it to religious origins and the way they shaped the relation between humans and nature.⁶³ The question whether the interaction between the two has been conducted in an imbalanced way is to be responded affirmatively. It seems, at one point, that no possible positive outcome can derive from their combination. Recalling Hardin,⁶⁴ numerical growth of humankind leads to the inevitable depletion of nature's resources, which in turn brings forth the impossibility to enjoy common goods and the only possible choice seems at one point to stop humans from reproducing. In Leib's reconstruction, the history of humankind is marred by an incapability of fostering a positive relationship with the environment.

While it can be argued that this is indeed the history of a part of the human population, this is not the case for *every* part of it. Many Indigenous Peoples around the world still make a case for an interpretation of the relationship with nature which recognises that humans are but a part of it, together with all other living organisms. Claims, under the so-called "Earth Jurisprudence" wave,⁶⁵ have been brought before courts invoking the implementation of rights of Nature, recognising the fundamental relationship that binds humans to ecological balance.⁶⁶ These cases are usually lodged by Indigenous Peoples or local

⁶¹ See the Special Report of the Intergovernmental Panel on Climate Change (IPCC), which indicates that the reduction target of 1.5°C clearly reduces the likelihood of reaching so-called "tipping points" (IPCC, Special Report, *Global Warming of 1.5°C*, 2018; also, IPCC, Special Report, *Global Warming of 1.5°C, Summary for Policymakers*, 2018). More recently, see IPCC, Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, *Climate Change 2021: The Physical Science Basis, Summary for Policymakers*, 2021.

⁶² Paris Agreement, Art. 2, letter a), and Art. 4.

⁶³ L.H. LEIB, *Human Rights and the Environment: Philosophical, Theoretical and Legal Perspectives*, cit., p. 11 ff.

⁶⁴ G. HARDIN, *The Tragedy of the Commons*, in *Science*, 1968, p. 1243 ff.

⁶⁵ C. CULLINAN, *Wild Law: A Manifesto for Earth Justice*, 2nd ed., London, 2011.

⁶⁶ On the point, K. SANDERS, 'Beyond Human Ownership'? *Property, Power and Legal Personality for Nature in Aotearoa New Zealand*, in *Journal of Environmental Law* 2018, p. 207 ff.; E.L. O'DONNELL, *At the Intersection of the Sacred and the Legal: Rights for Nature in Uttarakhand, India*, in *Journal of Environmental Law*, 2018, p. 135 ff.; A.

communities who act as “guardians” of Nature itself, in the form of rivers,⁶⁷ forests⁶⁸ or mountains.⁶⁹

This “ecocentric” approach to environmental questions stems from a cultural and religious background, a *cosmogony* based on the vital role that Nature has as holder of all life forms.⁷⁰ It is usually perceived as in opposition with the “anthropocentric” approach, typical of legal systems in Western societies.⁷¹ In this context, moral values are restricted to human beings as the only holders of rational thought⁷² and ecological claims are considered *in reference to* their human impact.⁷³ Critics of

FISCHER-LESCANO, *Nature as a Legal Person: Proxy Constellations in Law*, cit.; E. DALY, *Environmentalism Constitutionalism in Defense of Nature*, in *Wake Forest Law Review*, 2018, p. 667 ff.

⁶⁷ The New Zealand Whanganui tribunal accorded legal personhood to the river Whanganui, following this the New Zealand Government signed a deed with the Whanganui Iwi people establishing a new legal framework for the Whanganui River, as well as recognising claims of cultural and financial redress to the Whanganui Iwi. For reference, see M. KRAMM, *When a River Becomes a Person*, in *Journal of Human Development and Capabilities* 2020, p. 307 ff.; K. SANDERS, ‘Beyond Human Ownership?’ *Property, Power and Legal Personality for Nature in Aotearoa New Zealand*, cit.

Recognition of rights to rivers has been particularly widespread. Cases can be seen also in India, where the High Court of Uttarakhand affirmed the legal personhood of rivers Ganges and Yamuna and established a fiduciary proxy structure (see E.L. O’DONNELL, *At the Intersection of the Sacred and the Legal: Rights for Nature in Uttarakhand, India*, cit.); and in Colombia, where the Constitutional Court recognised the river Atrato as a legal person (Constitutional Court of Colombia, Case no. T-622/2016, judgment of 10 November 2016, from now “*Atrato river case*”).

⁶⁸ See, for example, the *Los Cedros* case in Ecuador (Constitutional Court of Ecuador, Case No. 1149-19-JP/20, Judgment of 10 November 2021, from now “*Los Cedros case*”).

⁶⁹ See the case of the Taranaki Mountain in New Zealand, recognised as a legal person by the Government through the Record of Understanding (for reference, see A. GEDDIS, J. RURU, *Places as Persons: Creating a New Framework for Māori-Crown Relations*, in J. VARUHAS (ed.), *The Frontiers of Public Law*, Oxford, 2019).

⁷⁰ On “strict” ecocentric approaches see also N. NAFFINE, *Who are Law’s Persons? From Cheshire Cats to Responsible Subjects*, in *Modern Law Review*, 2003, p. 346 ff.

⁷¹ L.J. KOTZÉ, *Human Rights and the Environment in the Anthropocene*, in *Anthropocene Review*, 2014, p. 252 ff.

⁷² S.J. ARMSTRONG, R.G. BOTZLER (eds.), *Environmental Ethics: Divergence and Convergence*, 3rd ed., New York, 2003.

⁷³ On “weak” and “strong” anthropocentrism, see, *inter alia*, E. LAMBERT, *The Environment and Human Rights: Introductory Report to the High-Level Conference Environmental Protection and Human Rights*, Strasbourg, 2020; N. KOBYLARZ, *Balancing its Way out of Strong Anthropocentrism: Integration of ‘Ecological Minimum Standards’ in the European Court of Human Rights ‘Fair Balance’ Review*, in *Journal of Human Rights and the Environment*, 2022, p. 16 ff.

anthropocentrism affirm that it is based on the false premise of human superiority over nature, and that it has – and continues to – lead to ecological disasters.⁷⁴ The problem with anthropocentrism does not stop there, as anthropocentric legal models «fundamentally informed not only the way modern law constructs, categorizes and orders nature, but also the manner in which law protects nature».⁷⁵

The question is not without relevance. In Leib's words, «[t]he distinction between anthropocentrism and ecocentrism is, in many respects, a distinction between instrumental and intrinsic values. The instrumental value of something ends with its use, so it follows that its value depends on its connection to other entities or to functions it can accomplish in a specific system. However, the intrinsic value of a certain entity is the essence of any value system because it revolves around the worth of an entity independent of any other factor».⁷⁶

Ecocentrism, on the other hand, reflects on paradigms of ecological balance, by putting humans *inside* Nature, together with other organisms of the ecosystems.⁷⁷

This framework, far from being a merely culturally relevant phenomenon, has had an impact on several States' legislations. In Latin America, the Constitutions of Ecuador and Bolivia recognise Nature's rights both in their Preambles and in the operative part of their texts, by making an explicit reference to Pacha Mama – roughly understood as Mother Nature.⁷⁸ Articles 10 and 71-74 of the Constitution of Ecuador

⁷⁴ K. BOSSELMANN, *When Two Worlds Collide: Society and Ecology*, Auckland, 1995.

⁷⁵ V. DE LUCIA, *Competing Narratives and Complex Genealogies: The Ecosystem Approach in International Environmental Law*, in *Journal of Environmental Law*, 2015, p. 95.

⁷⁶ L.H. LEIB, *Human Rights and the Environment: Philosophical, Theoretical and Legal Perspectives*, cit., pp. 27-28. See also, P. BURDON, *The Earth Community and Ecological Jurisprudence*, cit.

⁷⁷ On the theoretical currents internal to ecocentrism see: E. GAMLUND, *Who Has Moral Status in the Environment? A Spinozistic Answer*, in *The Trumpeter*, 2007, p. 3 ff.; S. ROWE, *From Shallow to Deep Ecological Philosophy*, in *The Trumpeter*, 1996, p. 26 ff.; A. WESTON, *Multicentrism: A Manifesto*, in *Environmental Ethics*, 2004, p. 24 ff.

⁷⁸ See the Preambles of the Constitution of Ecuador and the Constitution of Bolivia. Ecuador uses the term "Good Living" known in Kichwa (Quechua) as *Sumak Kawsay*; Bolivia uses the term "Living Well" whose official translation from the Aymara is *Suma Qamaña*. They both refer to a philosophy that grounds the relationship between humans and nature in concepts of care and respect (see, *inter alia*, E. PIVA, A. BONET DE VIOLA,

explicitly recognise legal personhood to Nature. Article 10 affirms that Nature is a *legal subject*, holder of the rights that the Constitution recognises it.⁷⁹

These constitutions are of particular relevance for the present analysis due to the “intercultural” approach that they adopt. By affirming the plural characteristics of the State, they find a meeting point between ecocentric and anthropocentric approaches. The right to a healthy environment, in this sense, can have a positive impact on the shift from a strictly anthropocentric to a more ecocentric view of human rights.⁸⁰

Rights of Nature and the right to a healthy environment have more in common than the critics they receive. Rights of Nature are based on the recognition of the intrinsically collective essence of the environmental question, they take into account community-based interests and are framed inside a collective approach to land and territory. In this sense, the right to a healthy environment acts as a point of encounter. It is still centred around humans; it still moves inside the framework of essentially – albeit “weaker” – anthropocentric human rights. However, by adopting a collective approach, the human right to a healthy environment allows to bring forward those ecocentric instances of balance and complementarity.

2. *Human rights-based approaches to the protection of the environment*

Recognising the right to a healthy environment is but one of the ways in which the discipline of international human rights law can interact with ecology. The point of departure of most of international human rights law texts is “greening” existing human rights. However, this does not take into account the premises of ecological balance explored in the previous paragraph. Searching for an autonomous right to a healthy environment gives strength to the protection of the environment and clarifies legal standards as well as States’ obligations.

Aportes del Buen Vivir para repensar el derecho humano a un nivel de vida adecuado, in *Revista de Difusión Acadèmica*, 2021, p. 69 ff.).

⁷⁹ Constitution of Ecuador, Art. 10(2): «La naturaleza será sujeto de aquellos derechos que le reconozca la Constitución».

⁸⁰ J.H. KNOX, *Constructing the Human Right to a Healthy Environment*, cit., p. 92.

2.1. “Greening” existing human rights

One of the first attempts to frame the interaction between environmental protection and human rights is the so-called phenomenon of “greening” human rights, that is the interpretative turn in adjudication which infers the value of the environment by connecting it to other, well-established, human rights.⁸¹

The rights invoked are usually the ones directly or indirectly impacted by environmental degradation. As for the former category, the connection is made to the right to life, health, private and family life. Regarding the latter, other social and cultural rights assume relevance: right to housing, adequate standard of living and rights of Indigenous Peoples.

Indeed, most human rights treaties do not mention explicitly neither the right to a healthy environment nor environment in itself. The main reason behind these *lacunae* lies of course in the circumstance that most of these treaties were adopted in times where environmental issues were not yet framed in terms of human rights violations.⁸²

Ever since UN General Assembly Resolution on the “Historical responsibility of States for the preservation of nature for present and future generations”,⁸³ the relationship between nature preservation and human life has been made apparent. It was confirmed also by the International Court of Justice in the famous *Gabcikovo-Nagymaros* case.⁸⁴ In a separate opinion, Judge Weeramantry stated that «[t]he protection of the environment is [...] a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life»,⁸⁵ and that «damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments».⁸⁶

⁸¹ P. BIRNIE, A.E. BOYLE, *International Law and the Environment*, 2nd ed., New York, 2002.

⁸² B.H. WESTON, D. BOLLIER, *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons*, Cambridge, 2013, p. 285.

⁸³ UNGA Resolution on the “Historical responsibility of States for the preservation of nature for present and future generations”, UN Doc. A/35/48, 30 October 1980.

⁸⁴ ICJ, *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment of 25 September 1997.

⁸⁵ *Idem*, *Separate Opinion of Vice-President Weeramantry*, p. 88-89.

⁸⁶ *Ibidem*.

On the level of human rights protection mechanisms, the connection between environment and human rights is recognised both at the global and regional level.

Firstly, in the framework of the United Nations, Special Rapporteurs appointed to the monitoring of a multitude of human rights have mentioned environmental issues in their reports since 1995.⁸⁷ The questions have been tackled from the point of view of pollution,⁸⁸ extractive activities in indigenous territories,⁸⁹ environmental human rights defenders,⁹⁰ pesticides,⁹¹ climate change.⁹² In this regard, the Committee on Economic, Social and Cultural Rights (CESCR)⁹³ has also been prominent with its periodic reporting system.⁹⁴ Of course, the mechanism in place is but one of review, not a tribunal.

In the form of adjudication, at the universal level is of relevance the work of the Human Rights Committee, who oversees the application of the International Covenant on Civil and Political Rights and works as a quasi-judicial body which emanates non-binding “views”. In 2019, the Committee held for the first time that the right to life had been violated by the inaction of the State in relation to environmental harm.⁹⁵

The same point has been made at the regional level with more frequency.⁹⁶

⁸⁷ J.H. KNOX, *Constructing the Human Right to a Healthy Environment*, cit., p. 85.

⁸⁸ B. TUNCAK, *Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes*, UN Doc. A/HRC/33/41, 2016.

⁸⁹ J. ANAYA, *Report of the Special Rapporteur on the rights of indigenous peoples: extractive industries operating within or near indigenous territories*, UN Doc. A/HRC/18/35, 2011.

⁹⁰ M. FORST, *Report of the Special Rapporteur on the situation of human rights defenders*, UN Doc. A/71/281, 2016.

⁹¹ H. ELVER, *Report of the Special Rapporteur on the right to food*, UN Doc. A/HRC/34/48, 2017.

⁹² P. ALSTON, *Report of the Special Rapporteur on extreme poverty and human rights*, UN Doc. A/HRC/41/39, 2019.

⁹³ The Committee was established by the UN Economic and Social Council (ECOSOC) in 1985, to perform the monitoring functions of Part IV of the ICESCR (ECOSOC Resolution 1985/17 of May 28, 1985).

⁹⁴ B.H. WESTON, D. BOLLIER, *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons*, Cambridge, 2013, p. 290.

⁹⁵ Human Rights Committee, *Portillo Cáceres v. Paraguay*, Communication No. 2751/2016, UN Doc. CCPR/C/126/D/2751/2016, Views of 20 September 2019.

⁹⁶ On a more detailed reconstruction of the cases, see also *infra* Part II.

The first case in the European system is *Lopez Ostra v. Spain*, decided by the European Court of Human Rights in 1994.⁹⁷ In declaring a violation of Article 8 (right to private and family life) of the European Convention on Human Rights (ECHR), the Court affirmed that «severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, *without, however, seriously endangering their health*».⁹⁸ Therefore, the Court implicitly recognised that environmental pollution can have an impact on multiple human rights – at least two – one not excluding the other.

In 2001, the African Commission ruled in favour of the applicants in relation to a violation of, *inter alia*, Articles 4 (right to life), 16 (right to health) and 24 (right to a clean environment) of the African Charter on Human and Peoples' Rights, arguing that failure of the State to control contamination of water, soil and air had infringed on the human rights of the Ogoni people.⁹⁹ It found that Nigeria had to put in place «reasonable [...] measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources».¹⁰⁰

Moving to the Inter-American system, the issue has been argued both in the form of adjudication¹⁰¹ and with an Advisory Opinion on “Environment and Human Rights”, which, among other points – one of which related to the recognition of an autonomous right to a healthy environment – affirmed the responsibility of States to prevent environmental pollution in order to protect the right to life.¹⁰² The Inter-American Court of Human Rights also highlighted the importance of the

⁹⁷ ECtHR, *Lopez Ostra v. Spain*, application No. 16798/90, Judgment of 9 December 1994.

⁹⁸ *Idem*, para. 51 (emphasis added).

⁹⁹ ACHPR, *Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria*, Communication 155/96, Decision of 27 October 2001.

¹⁰⁰ *Idem*, para. 52.

¹⁰¹ *Inter alia*, IACtHR, *Saramaka People v. Suriname*, Judgment of 28 November 2007.

¹⁰² IACtHR, *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, issued on 15 November 2017.

so-called “participation rights”,¹⁰³ by stating that the rights to information, public participation, and access to justice are fundamental for the realisation of the rights to life and personal integrity in the environmental context.¹⁰⁴

Participation rights are at the centre of a sub-theory among the ones that connect environment and human rights, which has been called “environmental democracy” theory.¹⁰⁵ This doctrine is based on the “proceduralisation” of environmental rights. By reconducting them to procedural rights, they act as a *trait d’union* between democratic governance and environmental sustainability.¹⁰⁶

The environmental democracy theory has the merit of involving non-State actors in decision-making processes and stressing the accent on the link between the realisation of democracy and the preservation of the environment.¹⁰⁷ It subtracts environmental protection from the realm of government-made decisions and puts a preventive and proactive role on civil society.

It does not, however, postulate a *better* solution than the one offered by the recognition of substantive rights, as some would argue.¹⁰⁸ Substantive rights provide for stronger grounds and have greater impact on the realisation of interpretative legal standards to be applied in different contexts.

¹⁰³ On which, see *infra* Chapter III.

¹⁰⁴ M.L. BANDA, *Inter-American Court of Human Rights’ Advisory Opinion on the Environment and Human Rights*, in *ASIL Insights*, 2018.

¹⁰⁵ M. MASON, *Environmental Democracy: A Contextual Approach*, London, 1999; C. PITEA, *Diritto internazionale e democrazia ambientale*, Napoli, 2013.

¹⁰⁶ L.H. LEIB, *Human Rights and the Environment: Philosophical, Theoretical and Legal Perspectives*, cit., p. 81.

¹⁰⁷ J. CAMERON, R. MACKENZIE, *Access to Environmental Justice and Procedural Rights in International Institutions*, in A.E. BOYLE, M.R. ANDERSON (eds.), *Human Rights Approaches to Environmental Protection*, Oxford, 1996, p. 109 ff.; S. DOUGLAS-SCOTT, *Environmental Rights in the European Union-Participatory Democracy or Democratic Deficit*, in A.E. BOYLE, M.R. ANDERSON (eds.), *Human Rights Approaches to Environmental Protection*, cit., p. 113.

¹⁰⁸ S. DOUGLAS-SCOTT, *Environmental Rights in the European Union-Participatory Democracy or Democratic Deficit*, cit., p. 112; R. MACRORY, *Environmental Citizenship and the Law: Repairing the European Road*, in *Journal of Environmental Law*, 1996, pp. 232-233; G. HANDL, *Human Rights and Protection of the Environment*, in A. EIDE, C. KRAUSE, A. ROSAS (eds.), *Economic, Social, and Cultural Rights*, Dordrecht/Boston/London, 2001, p. 303 ff.

The phenomenon of “greening” human rights, or “expansion theory” as it is also been defined,¹⁰⁹ responds in a better way to the instance, its major merit being the *resonation*.¹¹⁰

International cases – both at the universal and regional level – offer interpretative development on sound bases by anchoring environmental rights to other human rights. They clarify obligations and contextualise the components of the rights. The national impacts of this “echo effect” depend of course on a multitude of factors, and analysing them lies not in the purpose of this Chapter.¹¹¹

Nevertheless, a positive critique of the phenomenon can be sustained, overall. The value of greening human rights can be seen in the consequences on both doctrine and case law, which have proliferated in the last decades and continue to do so at a rapid rate.

At the same time, more recent scholarship has pointed out that the very success of the “greening” strategy reveals its structural limits.¹¹² By anchoring environmental protection to pre-existing rights, the interpretative expansion remains indirect and often contingent upon demonstrating serious impacts on individually framed interests such as life, health or private and family life. This approach risks leaving insufficient space for addressing diffuse, cumulative and transboundary harms, as well as the collective and intergenerational dimensions of environmental degradation. It also tends to preserve an individualistic architecture which may not be fully equipped to respond to systemic ecological threats. In this sense, while “greening” has undeniably contributed to the progressive development of environmental human rights, it does not entirely resolve the theoretical and practical questions surrounding the autonomous status and content of the right to a healthy environment. Conclusively, it can be said that the “expansion theory” has lit the match for sparking the discourse around the recognition of an autonomous human right to a healthy environment.

¹⁰⁹ L.H. LEIB, *Human Rights and the Environment: Philosophical, Theoretical and Legal Perspectives*, cit., p. 71.

¹¹⁰ J.H. KNOX, *Constructing the Human Right to a Healthy Environment*, cit., p. 85.

¹¹¹ See *infra* Part II, Chapters V and VI.

¹¹² A. CHALABI, *A New Theoretical Model of the Right to Environment and its Practical Advantages*, in *Human Rights Law Review*, 2023, p. 1 ff.

2.2. *Reframing the individual component in environmental human rights: the need for an autonomous right to a healthy environment*

The first question that comes to mind when thinking about the recognition of a new right is whether its adoption is necessary. Therefore, the first point to be addressed in this paragraph is: why do we need an autonomous right to a healthy environment? Put differently, what is missing from the existing framework?

Some of the *lacunae* of the current system of environmental protection have already been mentioned: namely, the ineffectiveness of international environmental law and the need to foster a human rights-based approach.¹¹³ They will not be repeated here.

What is of interest relates to the necessity for an *autonomous* right, independent from other, already recognised, human rights.

The first observation that can be made is also one of the strengths of expanding human rights to include the environmental component. The right to life, to private and family life, to health, to an adequate standard of living, and the others, all have a solid basis of interpretative standards for courts to adjudicate them. While this means that in its first steps environmental protection could be anchored to strong claims, at this point of its evolution this anchor is starting to drag. The rights mentioned have limits that can only be stretched so far before causing a rupture.

The second observation relates to legitimisation. Grounding environmental protection in an autonomous right gives a valid response to scepticism and offers courts legitimisation to discuss and develop its elements.

Thirdly, recognising an autonomous right to a healthy environment helps fill the gaps as well as avoid inconsistencies and contradictions. It responds to the need for harmonisation and provides regulation for State and non-State actors by clarifying obligations and entitlements.

Lastly, and from a more practical point of view, the human right to a healthy environment is the best equipped to tackle environmental degradation and the devastating impacts it has on human rights.¹¹⁴ Where

¹¹³ See *supra* Section 1.

¹¹⁴ A study of David R. Boyd, former Special Rapporteur on human rights and environment, concluded that States which include the right to a healthy environment in their constitutions «have smaller ecological footprints, rank higher on comprehensive indices of environmental indicators, are more likely to ratify international environmental

it has been recognised, internationally and nationally, claimants have been able to obtain bold declarations which can inform the behaviour of States and interpretation of future claims.¹¹⁵ Cases like the *Los Cedros* mentioned above, or statements like the ones contained in the Advisory Opinion on environment and human rights of the Inter-American Court of Human Rights precisely serve this purpose.

An autonomous right protecting environmental interests would also have the double impact of grounding the claims of people and empowering them to bring forward the value of the environment in itself.

Among the positive effects that it could have, former Special Rapporteur John H. Knox described two points of impact: on environmental protection and on human rights.¹¹⁶ As for the first, Knox identified four: a) highlighting the importance of the environment to human rights, b) fill the gaps in IEL – as already mentioned, c) strengthening the legal basis for the enforcement on an international level,¹¹⁷ d) improving environmental performance on a State level.¹¹⁸

On this last point, while this discourse relates more generally to recognition and does not look specifically at treaties, it is worth mentioning that part of the doctrine has provided analysis on how ratification of treaties recognising human rights does not always bring with itself an improvement in State compliance.¹¹⁹ On the contrary, in some instances ratification leads to lower compliance rates, but these results can derive from a series of reasons.¹²⁰

agreements and have made faster progress in reducing emissions of sulphur dioxide, nitrogen oxides and greenhouse gases than nations without such provisions» (UNGA, Resolution on “Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment”, UN Doc. A/73/188, 18 July 2018, para. 44; quoting D.R. BOYD, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment*, Vancouver, 2012).

¹¹⁵ On the point, see more diffusively *infra* Part II.

¹¹⁶ J.H. KNOX, *Constructing the Human Right to a Healthy Environment*, cit., p. 89 ff.

¹¹⁷ *Idem*, p. 90. Here specific reference is made to the system of the Universal Periodic Review (UPR), through which the Human Rights Council monitors the conditions of human rights in States.

¹¹⁸ For an assessment of environmental constitutionalism, see *infra* Chapter VI.

¹¹⁹ O.A. HATHAWAY, *Do human rights treaties make a difference*, in *The Yale Law Journal*, 2002, p. 1932 ff.; H. SMITH-CANNOY, *Insincere Commitments: Human Rights Treaties, Abusive States, and Citizen Activism*, Washington, 2012.

¹²⁰ O.A. HATHAWAY, *Do human rights treaties make a difference*, cit., p. 1962 ff.

In her article, Oona A. Haraway contemplates that maybe it is not true that States comply less, but only that the monitoring mechanisms in place allow for a clearer knowledge of the situation in a determined Country. States could ratify with the purpose of “preparing an excuse” to deny future claims of violations.

Following the realist approach of Morgenthau and Henkin, it could be argued that States ratify merely for political reasons, or even that they get more creative once they learn the contours of the law.¹²¹ In this sense, compliance wouldn't derive from ratification but from effectiveness of the compliance mechanism put in place. As Montini put it, citing Bodansky, compliance is not in itself an indicator of the effectiveness of a treaty, as it could also mean that the international regime «is unambitious and does not require States to do much, if anything, to change their behaviour».¹²²

On the other hand, compliance does not exist free from other conditions, and a correlation can be drawn between compliance with international law and *interaction* with international law.¹²³ According to the constructivist school scholarship, the more States interact with one another, the more they will comply. Compliance benefits also from the interaction between international and domestic systems.¹²⁴

Moreover, recognition could come also in the form of a resolution, as it has happened with Resolution of 2022 of the United Nations General

¹²¹ H.J. MORGENTHAU, *Politics among nations: the struggle for power and peace*, New York, 1948; H.J. MORGENTHAU, *Positivism, Functionalism, and International Law*, in *American Journal of International Law*, 1940, p. 260 ff.; L. HENKIN, *How nations behave: law and foreign policy*, New York, 1979; L. HENKIN, *International law: Politics, Values and Functions General Course on Public International Law*, in *Collected Courses of the Hague Academy of International Law*, Vol. 216, Leiden, 1989.

¹²² See M. MONTINI, *Revising International Environmental Law through the Paradigm of Ecological Sustainability*, in F. LENZERINI, A. VRDOLJAK (eds.), *International Law for Common Goods. Normative Perspectives on Human Rights, Culture and Nature*, Oxford and Portland, 2014, p. 274, and the bibliography there mentioned.

¹²³ M. FINNEMORE, K. SIKKINK, *International Norm Dynamics and Political Change*, in *International Organization*, 1998, p. 887 ff.; A. CHAYES, A.H. CHAYES, *The New Sovereignty: Compliance with International Regulatory Agreements*, Cambridge, 1995; R. GOODMAN, D. JINKS, *How to Influence States: Socialization and International Human Rights Law*, in *Duke Law Journal*, 2004, p. 621 ff.

¹²⁴ More extensively on this point, see *infra* Chapter VI.

Assembly,¹²⁵ and Resolution 48/13 of the Human Rights Council in 2021,¹²⁶ in this way foregoing a binding nature but exercising impact on the formation of customary law.¹²⁷

In summary, whether in the form of a binding or non-binding instrument, recognition of the right to a healthy environment can have positive impacts on behaviour of States in the field of environmental protection.

The human right to a healthy environment would not be beneficial only in the sphere of environmental protection, but it could have positive effects also on the regime of international human rights law. Knox specifically mentions the contribution to the debate around colonialism and the contribution of the Global South to the development of legal standards for the right to a healthy environment,¹²⁸ in opposition to the unwillingness of States belonging to the Global North.¹²⁹ Another point, correlated to the previous, is the possible extraterritoriality of human rights application,¹³⁰ a point which has been receiving growing attention also in recent cases of climate litigation,¹³¹ and which has been actively obstructed mainly by Countries in the Global North.¹³²

Other openings in IHRL discourse are mentioned in the present Chapter and pertain to the treatment of future generations and the discussion around anthropocentrism and ecocentrism.

Having clarified why an autonomous right to a healthy environment is necessary and how it could positively impact both the sector of

¹²⁵ UNGA Resolution on “The Human Right to a Healthy, Clean and Sustainable Environment”, adopted unanimously, UN Doc. A/76/300, 28 July 2022.

¹²⁶ UN Human Rights Council Resolution on “The human right to a clean, healthy and sustainable environment”, UN Doc. A/HRC/RES/48/13, 8 October 2021.

¹²⁷ J.H. KNOX, *Constructing the Human Right to a Healthy Environment*, cit., p. 86.

¹²⁸ See C. GONZALEZ, *Environmental justice, human rights, and the Global South*, in *Santa Clara Journal of International Law*, 2015, p. 151 ff.

¹²⁹ J.H. KNOX, *Constructing the Human Right to a Healthy Environment*, cit., pp. 91-92.

¹³⁰ More comprehensively, see P. DE SENA, *La nozione di giurisdizione statale nei trattati sui diritti dell'uomo*, Torino, 2002. Also, *infra* Chapter III, Section 2.

¹³¹ For example, it is a point in the case of *Duarte Agostinho and others v. Portugal and others* before the European Court of Human Rights. More extensively, see *infra* Chapters III and V.

¹³² M. CRAVEN, *The violence of dispossession: extra-territoriality and economic, social, and cultural rights*, in M.A. BADERIN, R. MCCORQUODALE (eds.), *Economic, Social and Cultural Rights in Action*, Oxford, 2007, p. 71 ff.

environmental and human rights protection, the discourse moves to its juridical feasibility.

In other words, what characteristics should the right to a healthy environment possess in order to be recognised as such? And does it have the capability to pass the test?

The General Assembly of the United Nations has previously stated that in order for a claim to be recognised as a human right, certain criteria must be met. Resolution 41/120 affirms that prospective human rights have to be: consistent with other human rights, fundamental, precise, implementable and enjoy international support.¹³³

In Orellana's words, «[c]onsistency does not mean or imply the lack of tensions between the right to a healthy environment and other protected rights», for conflicts among rights may very well commonly happen but they would be solved using existing interpretative tools.¹³⁴ Instead, consistency is met with the synergy existing between the right to a healthy environment and other human rights, among which there is the inherent value of human dignity, which also speaks to the fundamental character of the right at hand.¹³⁵

The last three characteristics are also the object of most of the critiques made to the right to a healthy environment.

First of all, part of the doctrine argues that its content is too vague and indetermined to give rise to an autonomous human right.¹³⁶

¹³³ UNGA Resolution on "Setting international standards in the field of human rights", UN Doc. A/RES/41/120, 4 December 1986.

See also Maurice Cranston's test for a genuine right (M. CRANSTON, *What Are Human Rights?*, New York, 1973), as successfully applied to the right to a healthy environment in T. HAYWARD, *Constitutional Environmental Rights*, New York, 2005.

¹³⁴ M. ORELLANA, *Quality Control of the Right to a Healthy Environment*, in J.H. KNOX, R. PEJAN (eds.), *The Human Right to a Healthy Environment*, Cambridge, 2018, p. 173.

¹³⁵ *Idem*, p. 174. On the concept of "human dignity" in IHRL see, generally, C. TOMUSCHAT, *Human Rights: Between Idealism and Realism*, cit., p. 85 ff.

¹³⁶ V. ROSSI, *Il riconoscimento del diritto universale a un ambiente sano: questioni aperte e percorsi evolutive*, in G. CATALDI (ed.), *I diritti umani a settant'anni dalla Dichiarazione universale delle Nazioni Unite*, vol. I, Napoli, 2019, pp. 178-179; H. HANNUM, *Rescuing Human Rights: A Radically Moderate Approach*, Cambridge, 2019; J.B. RUHL, *The metrics of constitutional amendments: and why proposed environmental quality amendments don't measure up*, in *Notre Dame Law Review*, 1999, p. 245 ff. For a recent reconstruction of this objection, and an attempt to overcome it through a more structured theoretical model, see A. CHALABI, *A New Theoretical Model of the Right to Environment and its Practical Advantages*, cit.

However, as it has been authoritatively contended,¹³⁷ it can be noted that the criterion of “preciseness” is not always rigorously respected in international human rights law. The right to a healthy environment does not appear to be vaguer than, for example, the right to health, to an adequate standard of living, or the right not to be subjected to inhuman and degrading treatment.¹³⁸

Scholars have proposed narrower and broader definitions, by stating that it includes only protection of human health from environmental hazard,¹³⁹ or that it encompasses present and future generations’ disruption of their quality of life.¹⁴⁰ It has also been said that «such uncertainty is a sign of the richness and flexibility of the concept and its ability to cover a wide range of complex issues».¹⁴¹ Either way, it does not seem that at this point the content of the right is *so vague* that it cannot permit implementation.

The second objection that will be tackled relates to the affirmation that there are no perspectives of fruitful and effective implementation.¹⁴² Wolfe has defined it an “empty promise” due to the lack of compliance.¹⁴³ While the issue of justiciability will be the object of in-depth analysis in

¹³⁷ J.H. KNOX, *Constructing the Human Right to a Healthy Environment*, cit., p. 87; R. PISILO MAZZESCHI, *Diritto internazionale dei diritti umani: Teoria e Prassi*, Torino, 2020, pp. 396-397.

¹³⁸ C. RODRÍGUEZ-GARAVITO, *A human right to a healthy environment? Moral, legal, and empirical considerations*, in J.H. KNOX, R. PEJAN (eds.), *The Human Right to a Healthy Environment*, Cambridge, 2018, p. 155 ff.

¹³⁹ J.W. NICKEL, *The Human Right to a Safe Environment: Philosophical Perspectives on Its Scope and Justification*, in *Yale Journal of International Law*, 1993, p. 282 ff.; J. LEE, *The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law*, in *Columbia Journal of Environmental Law*, 2000, p. 283 ff.

¹⁴⁰ E. EACOTT, *A Clean and Healthy Environment: The Barriers & Limitations of This Emerging Human Right*, in *Dalhousie Journal of Legal Studies*, 2001, p. 74 ff.

¹⁴¹ L.H. LEIB, *Human Rights and the Environment: Philosophical, Theoretical and Legal Perspectives*, cit., p. 93.

¹⁴² See also A. CHALABI, *A New Theoretical Model of the Right to Environment and its Practical Advantages*, cit., highlighting that a clearer theoretical model may assist legislators, judges, policy-makers and human rights bodies in identifying the content of the right, the criteria for breach, and the practical implications of its recognition.

¹⁴³ K.A. WOLFE, *Greening the International Human Rights Sphere? An Examination of Environmental Rights and the Draft Declaration of Principles on Human Rights and the Environment*, in *Journal of Environmental Law and Practice*, 2003, p. 45 ff.

the next Chapters,¹⁴⁴ the point can be preliminarily refuted by considering three aspects.

Firstly, two out of the three regional mechanisms for the protection of human rights explicitly recognise the existence of an autonomous right to a healthy environment and have been enriching their jurisprudence on the matter year by year. These are the Inter-American and the African system.

Secondly, the tribunals which do not explicitly recognise it have been adapting their instruments on a jurisprudential basis in order to offer some form of environmental protection. The European Court of Human Rights has an extensive jurisprudence on “derived” human rights.

Third, most States have *already* recognised it in some form. According to the United Nations Environment Programme (UNEP), «[a]pproximately 150 of the world’s 193 UN members have constitutions from about 90 nations that expressly or implicitly recognize some kind of fundamental right to a quality environment».¹⁴⁵ It is also worth remembering that the UN General Assembly Resolution on the matter, quoted above, was adopted almost unanimously.¹⁴⁶

Finally, some argue that the absence of global international recognition is proof that no positive affirmation around the international support of the right can be made. However, besides being an argument that justifies itself – international recognition is prevented by the fact that no international recognition exists – it is also falsified by the amount of support that the UN resolutions received and the enormous quantity and quality of inputs that derive from domestic courts and civil society.

2.3. *The generalist-specialist theory: the right to a healthy environment as an “umbrella right”*

Having argued for its independence from other rights, the reflection now moves to the nature of the right to a healthy environment, and its relationship to those rights. In order to move to its collective

¹⁴⁴ See also, *infra* Chapter II and Part II.

¹⁴⁵ UNEP, *Global Judicial Handbook on Environmental Constitutionalism*, 3rd ed., 2019, p. 19.

¹⁴⁶ With 161 votes in favour and 8 abstentions (Belarus, Cambodia, China, Ethiopia, Iran, Kyrgyzstan, Russia, Syria).

configuration, which will be the object of next paragraph, it is first necessary to widen its confines. A way to do it is through the so-called “umbrella rights” theory, or generalist-specialist theory.

In a two-level conceptualisation, Leib proposes a configuration of the right to healthy environment as a “general” or “umbrella” right, composed of strains of other “sub-rights”.¹⁴⁷ In what has been called by Weston and Bollier a «shift that consolidates the fragmentation of human rights and environmental themes»,¹⁴⁸ the umbrella right to environment would offer a “synthetic” or “integrated” approach to environmental questions, calling forward concepts of joint responsibility.

The call to fragmentation is mentioned also by Orellana. In his work he sees as a consequence to this “normative acquis” that «[t]he normative content of human rights in respect of the environment would [...] no longer be dispersed or fragmented across a range of rights, but would come together under a single normative frame».¹⁴⁹ The latter would work as a “cluster-right”, containing other rights.¹⁵⁰ In this sense, its normative content would comprise «identifiable and practicable rights and obligations that, when under a single frame, would further help in implementation and progressive development».¹⁵¹

To see how and which parts of this theory are of help, it is first appropriate to delve deeper into the concept of umbrella rights.¹⁵²

These are, in Leib’s “reconfiguration”, rights assigned to broad and complex concepts like democracy, development and environment. While posing issues of justiciability, related to the amplexness of their content, these right have as a principal focus the purpose of putting humans at the centre of State and non-State actions.

¹⁴⁷ L.H. LEIB, *Human Rights and the Environment: Philosophical, Theoretical and Legal Perspectives*, cit., p. 123 ff.

¹⁴⁸ B.H. WESTON, D. BOLLIER, *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons*, cit., p. 86.

¹⁴⁹ M. ORELLANA, *Quality Control of the Right to a Healthy Environment*, cit., p. 176.

¹⁵⁰ J.J. THOMSON, *The realm of rights*, Cambridge, 1990, p. 55. A different line of scholarship has recently argued that the right to environment should not be understood merely as an “umbrella” right or as the sum of already recognised rights, but rather as a composite right with its own autonomous structure and added value. See A. CHALABI, *A New Theoretical Model of the Right to Environment and its Practical Advantages*, cit.

¹⁵¹ M. ORELLANA, *Quality Control of the Right to a Healthy Environment*, cit., p. 176.

¹⁵² See also, See J.R. MAY, E. DALY, *Global Environmental Constitutionalism*, Cambridge, 2015, p. 64.

The theory draws from the concept of sustainable development in its original configuration of «development that meets the needs of the present without compromising the ability of future generations to meet their own needs».¹⁵³ This definition, contained in the so-called “Brundtland Report”, applies a scheme of equilibrium among generations and *inside* generations, by tackling the issue of disparity of resources between Global North and Global South. The concept is used in the umbrella rights theory as a way to combine ecological and economic interests in a balanced way.

Sustainable development is, in Leib’s work, a “marriage of convenience” between development and environment, as it represents the existing interactions between two generalist rights – or umbrella rights.

Alongside development and environment, she also identifies the right to democracy as a generalist right. The three of them together form a triangle of interactions between political and economic self-determination.¹⁵⁴ Their “synthetic” capability would serve as a bridge over the justiciability gap, in order to foster an extra-judicial, and mostly political, “joint responsibility” of State and non-State actors.

The sources of these umbrella rights would be the International Covenant on Civil and Political Rights for the right to democracy, the International Covenant on Economic, Social and Cultural Rights for the right to development, and finally a new Covenant on Environmental Rights for the right to environment.¹⁵⁵

The latter would then contain in itself a non-exhaustive list of sub-rights – or specialist rights – of which six are mentioned by Leib: nature, natural resources, water, food, Indigenous Peoples’ rights and the right to a healthy environment, read as the right to be free from pollution. In other words, the umbrella right to environment would embrace all those environmental rights mentioned above. Its contingency on a set of fundamental and basic rights, together with its ability to encompass the relations among them is one of the strengths of the generalist-specialist theory.

¹⁵³ Brundtland Report.

¹⁵⁴ L.H. LEIB, *Human Rights and the Environment: Philosophical, Theoretical and Legal Perspectives*, cit., p. 123.

¹⁵⁵ *Idem*, p. 136.

Indeed, by binding umbrella rights together with their sub-rights, this reconfiguration does not cut clear boundaries among them. In being an instrument thought and developed mainly for extra-judicial use, it allows for possible integrations of a set of specialist rights with other generalist rights outside their own “umbrella”. Put differently, it permits an intersectional approach to environmental issues.

Using an example taken from Leib’s work:

«[...] victims of environmental pollution caused by an extractive industry operating in a developing country will have to invoke their rights to health, life or privacy to seek injunctive relief or compensation, while environmental advocates will probably seek to protect the whole ecosystem for the sake of present and future generations, and company workers will be much more concerned about the effects of environmental litigation on their rights to work. This environmental issue may also involve a governance problem in which public authorities provide legal and logistical protection to the company’s harmful activities on the grounds that the economic profits generated by the extractive industry are necessary to achieve the state’s economic goals».¹⁵⁶

As already said, environmental dilemmas touch upon a multitude of rights and interests. The generalist-specialist theory finds a way to combine them without losing pieces of each one in the process.

However, as mentioned above, it also brings forward serious issues of justiciability. Although it delves on concepts of joint responsibility, and claims to put humans at the centre, the theory is built around States’ actions. States would, in fact, act both as right-holders and duty-bearers for umbrella rights, in a self-fulfilling circle of interests which seems to be one of the limits of this theory. Who would be able to question States’ actions if people are not the right-holders of the right at issue?

The contours of rights are too blended and, while being a useful tool for policymakers and other stakeholders, umbrella rights are not in themselves justiciable. However, their components are. Sub-rights, however partial, are in themselves fully actionable and can be put together by the judicial apparatus when informing decision on a case. It

¹⁵⁶ *Idem*, p. 155.

is not clear how this brings the analysis further than what is already available.

All in all, the generalist-specialist theory is a valid reconfiguration of environmental issues from a theoretical point of view, and, in the purpose of this analysis, it reinforces the collective approach.

Collectiveness is at the centre of the interaction between sets of rights. It is both the basis and the answer for intergenerational and intra-generational equity. It allows an intersectional approach and brings forward concepts of communality of interests. This point will be tackled in the next paragraph.

3. *Building a collective approach*

Human rights have always been perceived from an individualistic point of view, which comes from the Western imprint on IHRL and its mainly anthropocentric characteristics. However, in recent times, the impact of doctrine from so-called “developing” countries has shown a tendency to soften this accent on the “I” and has offered alternatives constructions based on the “we”. This is of particular relevance for rights which tackles community-related interests, such as the right to a healthy environment.

Therefore, the discourse now moves to the third step of the present theoretical configuration, which consists in building a collective right to a healthy environment which could be effectively justiciable. While justiciability will be tackled in Part II of this work, this Section will be dedicated to a reconstruction of collective rights through solidarity and toward global common goods.

3.1. *Collective rights*

Finding a definition of collective rights is not an easy task.¹⁵⁷ First and foremost, collective rights can be said to pertain to “collective entities”, but that does not offer much to work with. It does not explain which

¹⁵⁷ See also T.H. MALLOY, *National Minority Rights in Europe*, Oxford, 2009, p. 83 ff.

collective entities and what kind of relationship exists between the right and the right-holders, nor who are the duty-bearers.

Collective rights have primarily been identified through their right-holders. Griffin describes them as rights which are recognised to a group in itself and are not «reducible to the individual rights of their members».¹⁵⁸ In other words, they are «rights that groups have as groups».¹⁵⁹

In this sense, collective rights are group rights, and they are distinct from the rights of the single individual that compose the group, like the right to self-determination.

Sudre distinguishes *droits collectifs* from *droits des collectivités*, by affirming that only the latter includes rights of collective entities, while the name “droits collectifs” refers to «droits individuels don’t l’exercice est collectif».¹⁶⁰ In this sense, *droits collectifs* would be the ones that belong to a single person but cannot be exercised *in any other form but in group*, such as the freedom to form a trade union. *Droits des collectivités*, on the other hand, would be roughly comparable to “group rights” as identified above: they would serve as safeguards for the realisation of the «intégrité de la collectivité».¹⁶¹ Belonging to this category would be the right of the group to not be subjected to genocide or apartheid.

Another distinction that can be made is the one between “group rights” and “group-differentiated rights”. With this term, Kymlicka describes a right that is accorded to a particular group but not to the larger society within which the group exists.¹⁶² Therefore, these rights would belong *uniquely* to the members of that particular group, *in comparison* to the larger community. Such would be the rights of minorities and Indigenous Peoples. In this sense, group rights could even come in conflict with group-differentiated rights.¹⁶³

¹⁵⁸ J. GRIFFIN, *Group Rights*, in L.H. MEYER, S.L. PAULSON, T.W. POGGE (eds), *Rights, Culture and the Law: Themes from the Legal and Political Philosophy of Joseph Raz*, Oxford, 2003, p. 161.

¹⁵⁹ *Ibidem*.

¹⁶⁰ F. SUDRE, *Droit européen et international des droits de l’homme*, Paris, 2019, p. 91.

¹⁶¹ *Ibidem*.

¹⁶² W. KYMLICKA, *Multicultural Citizenship*, Oxford, 1995.

¹⁶³ P. JONES, *Cultures, Group Rights and Group-Differentiated Rights*, in M. DIMOVA-COOKSON, P. STIRK (eds.), *Multiculturalism and Moral Conflict*, London, 2010, p. 38 ff.

Rights of minorities represent maybe a good example to build the bases of the present configuration. First recognised by Article 27 of the International Covenant on Civil and Political Rights (ICCPR), rights of minorities are there defined as the rights of members of «ethnic, religious or linguistic minorities», to «enjoy their own culture, to profess and practise their own religion, or to use their own language», «in community with the other members of their group». Apart from the specific elements of the right – namely, the objective criterion of the characteristics of the group, together with the subjective feeling of belonging to that specific group –¹⁶⁴ minority rights are identified as *individual rights* in a *collective context*, as is confirmed by the jurisprudence of the Human Rights Committee. In its views on the case of the *Lubicon Lake Band*, the Committee clearly stated that the rights enshrined in Article 27 ICCPR, by being *individual rights*, could be the object of a communication before itself.¹⁶⁵

Therefore, it seems that in this case the “group” is not the exclusive right-holder, rather it qualifies the *contours* of the applicability of the right, using an “individualistic approach” to the question of minorities.¹⁶⁶ On the point, Kälín and Künzli adopt a different interpretation, by affirming that the phrase «in community with the other members of their group» would serve as a way to avoid excluding collective rights *in toto*.¹⁶⁷ However, as noted by Pisillo Mazzeschi, and mentioned above in Sudre, this seems to add to the collectiveness of the *context* in which minority rights are applicable, rather than the nature of their right-holders.¹⁶⁸ This seems to be confirmed also by General Comment No. 23 of the Human

¹⁶⁴ On which see F. SUDRE, *Droit européen et international des droits de l'homme*, cit., p. 94.

¹⁶⁵ Human Rights Committee, *Chief Bernard Ominayak and Lubicon Lake Band v. Canada*, Communication No. 167/1984, Views of 26 March 1990, p. 69 (CCPR/C/38/D/167/1984).

¹⁶⁶ A. MEIJKNECHT, *Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law*, Antwerpen-Groningen-Oxford, 2001, p. 171.

¹⁶⁷ W. KÄLIN, J. KÜNZLI, *The Law of International Human Rights Protection*, Oxford-New York, 2009, p. 375.

¹⁶⁸ R. PISILLO MAZZESCHI, *Diritto internazionale dei diritti umani: Teoria e prassi*, cit., p. 379, at note 300.

Rights Committee.¹⁶⁹ The same consequence can be drawn on “peoples’ rights”.¹⁷⁰

Partially different is the reconstruction of Indigenous Peoples’ rights.¹⁷¹ Limiting ourselves to what is of relevance for the present reconstruction, it is worth noting that the UN Declaration on the Rights of Indigenous Peoples recognises that while members of Indigenous Peoples enjoy individual rights as members of minorities,¹⁷² they also enjoy some rights *collectively*: cultural rights, as well as property rights on their ancestral lands.¹⁷³ Moreover, Article 1 states that «Indigenous Peoples have the right to the full enjoyment, as a *collective* or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights 4 and international human rights law» (emphasis added).

These rights, while not binding, have been reprised and confirmed also by the case law of the Inter-American Court of Human Rights,¹⁷⁴ as well as by national constitutions in Latin America.¹⁷⁵ Here the collective rights are mainly linked to the *cultural* roots of Indigenous Peoples, and to their special preservation. This point is relevant because it allows to shift the perspective of this analysis.

Indeed, possible definitions of collective rights have been examined, all but examining their right-holders and forgetting about the content of the rights in themselves. It appears, that for the configuration of collective rights one should turn around the definition offered by Sudre. Not

¹⁶⁹ Human Rights Committee, *CCPR General Comment No. 23: Article 27 (Rights of Minorities)*, (CCPR/C/21/Rev.1/Add.5), 8 April 1994.

¹⁷⁰ Human Rights Committee: *E and P v. Colombia*, Communication No. 318/1988, Views of 25 July 1990 (CCPR/C/39/D/318/1988); *A and B v. Italy*, Communication No. 413/1990, Views of 2 November 1990 (CCPR/C/40/D/413/1990).

¹⁷¹ On which see, more generally, J. ANAYA, *Indigenous Peoples in International Law*, Oxford, 2004.

¹⁷² On the assimilation of Indigenous Peoples to minorities see also, R. PISILLO MAZZESCHI, *Diritto internazionale dei diritti umani: Teoria e prassi*, cit., p. 382.

¹⁷³ Arts. 7.2 and 40, as well as the Preamble, explicitly mention “collective rights” (UN Declaration on the Rights of Indigenous Peoples, U.N. Doc. A/RES/61/295, 2007).

¹⁷⁴ See, *inter alia*, IACtHR, *Caso de la Comunidad Mayagna (Sumo) Awas Tingni v. Nicaragua, Fondo, Reparaciones y Costas*, Judgment of 31 August 2001. Here the Court recognised the “collective property framework” of Indigenous Peoples’ relationship with their ancestral lands.

¹⁷⁵ See, for example, the already mentioned Constitutions of Ecuador and Bolivia.

“individual rights of collective exercise”, rather “collective rights of possible individual exercise”.

Collectiveness can be seen as a “collection of individuals” and collective rights are not perceived as mutually exclusive in reference to the rights of the individuals that compose the group. In other words, «vindicating group rights need not entail showing that the right-holding group has either interests or a standing that is not reducible to those of its members».¹⁷⁶

In this sense, the accent is put not on the holder – which is of relevance nevertheless –¹⁷⁷ but on the nature of the *interests* upheld by the right itself.

Accordingly, the analysis turns to a configuration of rights grounded in their substantive content.

3.2. *Third-generation rights, solidarity rights*

The traditional classification between sets of rights related to their content is the one based on different “generations” of human rights, from Karel Vasak’s article for *The Unesco Courier*.¹⁷⁸ According to this categorisation, the first two generations of rights would comprise respectively civil and political rights and social, economic and cultural rights, as mirrored by the two international covenants (ICCPR and ICESCR). Third-generation rights would entail «the right to development, the right to a healthy and ecologically balanced environment, the right to peace, and the right to ownership of the common heritage of mankind».¹⁷⁹ By being representation of “community life”, or, as Tomuschat called them, “global aims”,¹⁸⁰ the third-generation rights need the «combined efforts of everyone:

¹⁷⁶ P. JONES, *Group Rights*, in *The Stanford Encyclopaedia of Philosophy (Fall 2022 Edition)*, 2022.

¹⁷⁷ See *infra* Chapter III.

¹⁷⁸ K. VASAK, *Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights*, in *The UNESCO Courier* 30, November 1977, p. 29.

¹⁷⁹ *Ibidem*.

¹⁸⁰ C. TOMUSCHAT, *Human Rights: Between Idealism and Realism*, cit., p. 136.

individuals, states and other bodies, as well as public and private institutions».¹⁸¹

It is in Vasak's own words that these rights are linked to the general principle of solidarity. Reprising the motto of the French Revolution (*liberté, égalité, fraternité*), Vasak connects each of these generations to a concept, defining third-generations rights as "solidarity rights".¹⁸² As Wellman noted, this has the purpose of filling a gap in IHRL, a "deficiency" that he perceived in its essentially individualistic – even "egoistic" – premises.¹⁸³ It is the *communal effort* put into solidarity rights that realises, according to Wellman, the «unity or accordance of feeling, action, especially among individuals with common interest, sympathies or aspirations».¹⁸⁴

Solidarity rights have since been criticised under multiple points of view.

As "generation-rights", they suffer from the same limits as the other two generations, in that they are encapsulated in a static differentiation which goes to the detriment of all. Tomuschat warned against the use of the term "generations" by stating that the idea of generations evokes the concept of "obsolescence". By coming one after the other, and being confined in their "temporal scope", first generations will be perceived as being overcome by the second and the third, therefore forgetting the need for "mutual support" and "coexistence" that they share.¹⁸⁵

On the same point, Sudre goes so far as stating that, by implying the idea of "progression" and "anachronism" the generation taxonomy is a "discours mystificateur" and that solidarity rights are "pseudo-droits", pseudo-rights.¹⁸⁶ He states that these types of rights are impossible to identify, as their right-holders and duty-bearers are indefinite, and that they have the ultimate effect of exonerating States from responsibility.

¹⁸¹ K. VASAK, *Human Rights: A Thirty-Year Struggle*, cit., p. 29.

¹⁸² *Ibidem*. On the principle of solidarity, see, generally, R. WOLFRUM, C. KOJIMA (eds.), *Solidarity: A Structural Principle of International Law*, Berlin-Heidelberg-London, 2010.

¹⁸³ C. WELLMAN, *Solidarity, the Individual and Human Rights*, in *Human Rights Quarterly*, 2000, p. 642.

¹⁸⁴ L. BROWN, *The New Shorter Oxford English Dictionary on Historical Principles*, 1993.

¹⁸⁵ C. TOMUSCHAT, *Human Rights: Between Idealism and Realism*, cit., p. 137.

¹⁸⁶ F. SUDRE, *Droit européen et international des droits de l'homme*, cit., p. 101.

However, Sudre himself excludes the right to a healthy environment from this critique, by stating that it has a specific content, opposable to the public authority, and it entails procedural rights.¹⁸⁷ Its peculiar status would be invocable by peoples, States or other private or public entities.¹⁸⁸

Indeed, solidarity is not exclusive to third-generation rights, as Marks put it: «a minimum of solidarity, in the sense of a sharing of purpose and an agreeing on modes of action among various elements of society, is essential to the realization of the rights of the first and second generations as well».¹⁸⁹

Following this reasoning, the right to a healthy environment would become the meeting point between generations of rights, by having characteristics which pertain to all of them. It would have a “mixed nature”, as Judge Kéba Mbaye put it, in the sense that it would participate «des exigences de l’individu et des peuples» and it would belong «autant au domaine des droits civils et politiques que des droits économiques sociaux et culturels».¹⁹⁰ This reconstruction would also be in line with the configuration of the right offered by the Inter-American Court of Human Rights in its Advisory Opinion of 2017, mentioned above.¹⁹¹

Therefore, the collective configuration of the right to a healthy environment does not imply an abandonment of the individual content which lies in it.¹⁹² On the contrary, this reconfiguration allows for encompassing both, the relationship between the two dimensions being

¹⁸⁷ *Idem*, p. 106-107.

¹⁸⁸ *Ibidem*.

¹⁸⁹ S. MARKS, *Emerging Human Rights: A New Generation for the 1980s*, in *Rutgers Law Review*, 1981, 441.

¹⁹⁰ K. MBAYE, *Les droits de l’homme en Afrique*, Paris, 1992, p. 38.

¹⁹¹ On which see, more in detail, *infra* Chapter II.

¹⁹² Recent scholarship on the right to environment has also moved towards multi-level conceptualisations that seek to go beyond a purely individualistic understanding. See A. CHALABI, *A New Theoretical Model of the Right to Environment and its Practical Advantages*, cit., proposing to understand the right to environment as operating at individual, collective and global levels. While based on a different theoretical framework from the one adopted here, Chalabi’s proposal is significant in showing that recent scholarship increasingly treats the right to environment as irreducible to the individual level alone.

one of *complementarity*.¹⁹³ This does not mean that conflicts are impossible; rather that if they arise, they can be resolved through ordinary interpretative criteria.¹⁹⁴

This is consistent with the premises upon which the present analysis is grounded, specifically the framework of intergenerational equity.

Indeed, as mentioned above, intergenerational equity, together with intra-generational equity, entails the need to embrace community-related interests and rights, by recognising the intrinsic link that connects humankind to nature.

3.3. *Global common goods: towards a reconceptualization of the right to a healthy environment as a collective right*

Keeping in mind the conclusions reached until this point – namely the autonomous nature of the right to a healthy environment and the theoretical framework behind its collectiveness – it is now possible to move to the final part of this reconstruction, by circling back to the beginning.

Building on the relationship between environment and human rights, as well as the one between humans and nature, the collective approach represents a logical consequence of the need to abandon a strictly individualistic, merely anthropocentric, approach to environmental issues.

To draw this last point, it is imperative to focus on the *communal content* of environment, that is, configuring the environment as the object of some sort of communal interest. This, in turn, necessitates an examination of three distinct categories: collective goods, public goods and common goods.¹⁹⁵

¹⁹³ See also, A. BUCHANAN, *Liberalism and Group Rights*, in J.L. COLEMAN, A. BUCHANAN (eds.), *In Harm's Way: Essays in Honor of Joel Feinberg*, Cambridge, 1994, p. 1 ff.; K. DE FEYTER, G. PAVLAKOS (eds.), *The Tension Between Group Rights and Human Rights: A Multidisciplinary Approach*, Oxford, 2008; C.L. HOLDER, J.J. CORNTASSEL, *Indigenous Peoples and Multicultural Citizenship: Bridging Collective and Individual Rights*, in *Human Rights Quarterly*, 2002, p. 126 ff.; P. JONES, *Human Rights and Collective Self-Determination*, in A. ETINSON (ed.), *Human Rights: Moral or Political?*, Oxford, 2018, p. 441 ff.

¹⁹⁴ P. JONES, *Group Rights*, cit.

¹⁹⁵ D. RÉAUME, *Individuals, Groups, and Rights to Public Goods*, in *University of Toronto Law Review*, 1988, p. 1 ff.; J. WALDRON, *Liberal Rights*, Cambridge, 1993. For a

Marmor adopts a definition of collective goods that links their existence to some sort of communal production. Collective goods are such because they are *produced* only by a collective entity, the “community”.¹⁹⁶

He includes in this list the “protection of the environment”, but not environment in itself, by arguing that these categories exist only where they’re needed. For example, considering clean air, the existence of the collective good of clean air would exist, in Marmor’s idea, only where there is indeed a problem of pollution. Therefore, «[i]f there is no pollution, such as in distant rural communities, perhaps, there is no need to produce clean air, and clean air becomes a good people can enjoy without any communal aspect whatsoever».¹⁹⁷

However, this approach disempowers people and does not hold States responsible for the “preservation” of the environment also for future generations. This is exactly what has happened in the last century. Perceiving environmental issues as a “problem for tomorrow” leads to environmental degradation and infringement of future generations’ rights.

The second category is the one of “public goods”, characterised by Raz by their non-excludability and non-rivalry.¹⁹⁸ Public goods are enjoyable by everyone without anyone’s detriment. On the point, Réaume argues that there is no such thing as perfect non-excludability, as the more people make *use* of a good, the more they deteriorate it.¹⁹⁹ And some goods that are deliverable only as public goods can reasonably be considered objects of individual rights. These characteristics of the mixed nature of public goods seem to apply better to the environment as constructed so far. However, this category is strictly related to its “public” nature, in the sense that there is a strong connection between the “good” and the State, as a political entity. It does not «convey a sense of

thematic characterization of types of commons, see B.H. WESTON, D. BOLLIER, *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons*, cit., p. 155-178.

¹⁹⁶ A. MARMOR, *Do We Have A Right To Common Goods?*, in *Canadian Journal of Law and Jurisprudence*, 2001, p. 214.

¹⁹⁷ *Ibidem*.

¹⁹⁸ J. RAZ, *The Morality of Freedom*, Oxford, 1986.

¹⁹⁹ D. RÉAUME, *Individuals, Groups, and Rights to Public Goods*, cit.

commonality among a group of individuals, but rather a political binding constituted collectively within a particular society (usually a country)».²⁰⁰

On the other hand, common goods are defined by Waldron as those which cannot be enjoyed *but* communally.²⁰¹ This means that it takes a community to create and sustain them, and they are characterized by “communal consumption”.²⁰² However, scholarship on the matter of common goods has provided different characterisations for them. Some argue that they are indeed non-excludable but rivalrous, as in their access cannot be prevented but use from one can impede future use of another.²⁰³

Italian doctrine has delved deep into the concept of common goods.²⁰⁴ Ever since the Draft Law proposed by the Rodotà Commission in 2007, scholarship has proposed a construction of common goods which is of particular relevance for the present work. The Rodotà Commission identified common goods as those utilities functional to the exercise of fundamental rights and the full development of the individual, and it stated that their protection had to be guaranteed by law also to the benefit of future generations.²⁰⁵

The Draft was not adopted; however, the definition has been honed by the scholarship. Insisting on the point of “intergenerationality”, Mattei mentions that common goods give rise to “intergenerational

²⁰⁰ E. SABZALIEVA, J.A. QUINTEIRO, *Public goods, common goods and global common goods: A brief explanation*, in UNESCO IESALC, April 2022.

²⁰¹ J. WALDRON, *Liberal Rights*, cit.

²⁰² A. MARMOR, *Do We Have A Right To Common Goods?*, cit.

²⁰³ E. SABZALIEVA, J.A. QUINTEIRO, *Public goods, common goods and global common goods: A brief explanation*, cit.

²⁰⁴ See, *inter alia*, U. MATTEI, *Beni comuni. Un manifesto*, Roma-Bari, 2011; M.R. MARELLA, *Oltre il pubblico e il privato. Per un diritto dei beni comuni*, Verona, 2012; L. NIVARRA, *Quattro usi di beni comuni per una buona discussione*, in *Rivista critica del diritto privato*, 2016, p. 43 ff. For a critical view of the topic, see also, E. VITALE, *Contro i beni comuni. Una critica illuminista*, Roma-Bari, 2013.

²⁰⁵ Art. 1 co. 2 lett. C) of the Draft Law: «cose che esprimono utilità funzionali all'esercizio dei diritti fondamentali nonché al libero sviluppo della persona. I beni comuni devono essere tutelati e salvaguardati dall'ordinamento giuridico anche a beneficio delle generazioni future».

duties”.²⁰⁶ This stress on intergenerational responsibility is what gives the theory of common goods the elements that are needed.

Identifying collective rights through collective goods, invoking rights pertaining to all of humanity, leads indeed to another step along the ladder of communal interests: the right to a healthy environment does not belong exclusively to the national of a State. In being a human right, it is universal. And its call for universality can be effectively answered by the concept of *global common goods* (GCGs).²⁰⁷

Like common goods, GCGs are intrinsically communal in nature, as in they are non-excludable, they can be enjoyed by the entire community, and they are rivalrous, so their abuse can lead to their degradation.²⁰⁸ However, in addition to these features, GCGs have a *global* aspiration. It seems reasonable that the interests surrounding environmental protection and preservation should be linked to the *entire* global community. As Bauwens and Ramos clearly put it: «in the case of planetary life-support systems, the value of this as a commons [*sic*] is fundamentally implicit» and in relation to the climate crisis, «the climate as commons represents the awakening of the individual to the fact that they/we share an atmosphere with seven billion others (and countless species) as a commons of concern».²⁰⁹

Identifying the environmental interests as global common goods allows to pool resources and share responsibilities. For the purpose of this analysis, it also leads to the comprehension of humanity-shared interests and answers to the need for universality, reinforcing the qualification of an autonomous right to a healthy environment. It is the response to «an emerging awareness of our shared commons and an emergent subjectivity that responds to this awareness through *commoning* as a relationally charged form of action».²¹⁰

²⁰⁶ U. MATTEI, *Future Generations Now! A Commons-based Analysis*, in S. BAILEY, G. FARRELL, U. MATTEI (eds.), *Protecting Future Generations through Commons*, Strasbourg, 2014, p. 11.

²⁰⁷ See, generally, S. BUCK, *The Global Commons: An Introduction*, cit.

²⁰⁸ Although some believe them to be non-rivalrous. See E. SABZALIEVA, J.A. QUINTEIRO, *Public goods, common goods and global common goods: A brief explanation*, cit.

²⁰⁹ M. BAUWENS, J. RAMOS, *Awakening to an Ecology of the Commons*, in A. GREAR, D. BOLLIER (eds.), *The Great Awakening. New Modes of Life amidst Capitalist Ruins*, Santa Barbara, 2020, pp. 129-130.

²¹⁰ *Ibidem* (emphasis added).

Recognising the intrinsic nature of the relationship between humans and environment, and therefore bypassing the anthropocentric-ecocentric binarism, calls for the adoption of an approach which embraces the global communal interest to environmental preservation and protection. Collectiveness is achieved, in this way, through the recognition of the right-holders involved – humanity, present and future generations – and the underlying interests – global preservation of the environment. By configuring a right which is both collective and individual in its aspiration, such a framework implies that *anyone* can invoke it in the name of the community.

Conclusively, applying the “ecology of the commons” to the present human rights-based reconfiguration leads to the identification of a healthy environment as the *ultimate global common good*, which not only can but *needs* to be invoked in the form of a collective human right.

CHAPTER II:
MAIN LEGAL INSTRUMENTS FOR THE COLLECTIVE PROTECTION OF
THE ENVIRONMENT

Moving from the premises set forward in Chapter I, Chapter II will be dedicated to the analysis of the existing legal framework related to the collective protection of the environment, in order to define the margins of the right to a healthy environment and clarify its normative bases.

The main instruments of soft law that support this reconstruction will be considered in the first Section. In Section 2 the interplay between international human rights law and the relevant principles of international environmental law will be laid out. Section 3 will then be devoted to explicit direct recognition of the collective right to a healthy environment in human rights' mechanisms – specifically the American Convention on Human Rights, the African Charter on Human and Peoples' Rights and the Arab Charter on Human Rights. Section 4 will explore other explicit references to collective environmental protection, with a specific attention to responses to the climate crisis. Finally, Section 5 will reflect on recent developments and proposed definitions, also taking into account the two resolutions of the Human Rights Council and the UN General Assembly.

1. *The first (soft) steps*

The value of soft law in international law has been extensively and thoroughly analysed by the most relevant doctrine.²¹¹ Dupuy's definition crystallizes it into something that is “not yet law” or “not only law”, in this way recognising its alterity in respect to other sources of international

²¹¹ Most notably, P. WEIL, *Towards Relative Normativity in International Law?*, in *American Journal of International Law*, 1983, p. 413 ff.; C.M. CHINKIN, *The challenge of soft law: development and change in international law*, in *International & Comparative Law Quarterly*, 1989, p. 850 ff.; J. KLABBERS, *The Redundancy of Soft Law*, in *Nordic Journal of International Law*, 1996, p. 167 ff.; D. SHELTON (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, Oxford, 2000; F. FRANCONI *International “Soft law”: A Contemporary Assessment*, in V. LOWE, M. FITZMAURICE (eds), *Fifty Years of the International Court of Justice, Essays in Honour of Sir Robert Jennings*, Cambridge, 1996, p. 167 ff.

law – namely, those included in Article 38 of the Statute of the ICJ – but not quite rejecting its normative force.²¹²

Despite original scepticism around its absence of binding force as a sign of absence of normativity,²¹³ a claim for its role in international law-making has been made by more recent doctrine.²¹⁴ This is particularly relevant in the field of environmental protection and, more specifically, international environmental law, where most of the legal instruments do in fact belong to this category. It has been argued that this area is characterised by a «blurring of the distinction between hard and soft law».²¹⁵ Indeed, environmental protection is characterised by the presence of soft law instruments which contain provisions so specific that they are then reprised by other binding instruments, as well as obligations so vague that they hardly provide any true binding force.²¹⁶

In some way, the same can be said for the role of soft law in the development of human rights. The fundamental instrument on human rights' protection, the Universal Declaration of Human Rights (UDHR), is indeed a non-binding resolution of the General Assembly of the United Nations.²¹⁷ After the UDHR, as it so often happens with soft law instruments, a number of legally binding norms have reprised its content – first and foremost, the regional treaties on human rights' protection. In the words of Simma,

«[...] soft-law instruments or processes do not play merely a preliminary role, but are here to stay and assume functions that go well beyond that of preparing and maybe testing the text of later human right treaties. I

²¹² P. DUPUY, *Soft law and the International Law of the Environment*, in *Michigan Journal of International Law*, 1991, p. 420. Indeed, he preliminary refers to this term as a “paradoxical one”.

²¹³ See, for example, P. WEIL, *Towards Relative Normativity in International Law?*, cit., and J. KLABBERS, *The Redundancy of Soft Law*, cit.

²¹⁴ A. BOYLE, *Soft law in international law-making*, in M.D. EVANS (ed), *International law*, 4th ed., Oxford, 2014, p. 118 ff.

²¹⁵ E. ORLANDO, *Principles, Standards and Voluntary Commitments in International Environmental Law*, in E.J. TECHERA, J. LINDLEY, K.N. SCOTT, A. TELESSETSKY, (eds), *Routledge Handbook of International Environmental Law*, New York, 2021, p. 15.

²¹⁶ P. DUPUY, *Soft law and the International Law of the Environment*, cit., p. 429; C. VOIGT, *The power of the Paris Agreement in international climate litigation*, in *Review of European, Comparative & International Environmental Law*, 2023, p. 237 ff. On the controversial nature of the Paris Agreement see also *infra* Section 2.

²¹⁷ UNGA Resolution on “International Bill of Human Rights”, UN Doc. A/Res/217(III), 10 December 1948.

would go as far as saying that it is probably the more important part of international human rights that is manifesting itself within the soft-law processes and mechanisms of standard setting, or maybe I should say that part where the political action is». ²¹⁸

Shelton describes this phenomenon by exploring the ways in which a non-binding normative instrument can impact the formation and interpretation of international law. ²¹⁹ From the codification of pre-existing customary law to the stimulation of State practice and correction of lacunae, a non-binding norm can end up being the «substitute for legal obligation when ongoing relations make formal treaties too costly and time consuming or otherwise unnecessary or politically unacceptable». ²²⁰

1.1. *From Stockholm to Rio: the path towards the collective protection of the environment*

The 1972 UN Conference on the Human Environment in Stockholm was convened under the impulse of the government of Sweden and the UN General Assembly, with the aim to «provide a framework for comprehensive consideration within the United Nations of the problems of the human environment in order to focus the attention of Governments and public opinion on the importance and urgency of this question and also to identify those aspects of it that can only or best be solved through international co-operation and agreement». ²²¹

The product of that Conference was the Stockholm Declaration, composed by 26 principles and an Action Plan of 109 recommendations. ²²² This document can be considered as the first action recognising the global dimension of the environmental question, framing

²¹⁸ B. SIMMA, *Remarks: A Hard Look at Soft Law*, in *American Society of International Law Proceedings*, 1988, p. 379.

²¹⁹ D. SHELTON, *Advanced Introduction to International Human Rights Law*, 2nd ed., Cheltenham, 2020, pp. 84-85.

²²⁰ *Idem*, at p. 85.

²²¹ UNGA Resolution on “Problems of the Human Environment”, UN Doc. A/RES/2398(XXIII), 3 December 1968.

²²² Stockholm Declaration, A/CONF.48/14/Rev.1 and Corr.1, 1972.

the issue for all future discussions. The use of a soft law instrument helped serving this specific purpose.²²³

For the purpose of this reflection, Principle 1 is of the utmost importance, stating that: «Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a *solemn responsibility to protect and improve the environment for present and future generations*» (emphasis added).

This “solemn responsibility” towards future generations reflects the implant of the present analysis, enshrining the collective approach through the reference to intergenerational equity.²²⁴ This approach – confirmed also by the recent resolution of the UNGA on the right to a healthy environment²²⁵ – has been part of subsequent multilateral environmental agreements (MEAs) and declarations related to the human rights’ dimension of the protection of the environment and is closely connected to the concept of sustainable development.²²⁶

In 1992, twenty years after the Stockholm Declaration, a second global conference on the environment took place in Rio de Janeiro: the United Nations Conference on Environment and Development (UNCED, also known as “Earth Summit”). The 27 principles stemming from this conference were proclaimed in the Rio Declaration on Environment and Development (“Rio Declaration”).²²⁷ Together with Agenda 21,²²⁸ they put forward the idea of sustainable development.

²²³ L.E. RODRIGUEZ-RIVERA, *The human right to environment in the 21st century: case for its recognition and comments on the systemic barriers it encounters*, in *American University International Law Review*, 2018, p. 157. See also, E.B. WEISS, *Introduction*, in *International Compliance with Nonbinding Accords*, Washington DC, 1997.

²²⁴ On the link between these two concepts, see *supra* Chapter I.

²²⁵ See *infra* Section 5.

²²⁶ See e.g.: UN Rio Declaration on Environment and Development (1992); UN Johannesburg Declaration on Sustainable Development (2002); UN “The Future We Want” (2012); UN “Transforming our world: the 2030 Agenda for Sustainable Development” (A/RES/70/1, 25 September 2015). See also, e.g. UN Framework Convention on Climate Change (UNFCCC), UN Convention on Biological Diversity (CBD), UN Convention to Combat Desertification (CCD).

²²⁷ Rio Declaration on Environment and Development, A/CONF.151/26/Rev.1, vol. I and Corr.1.

²²⁸ *Idem*, Annex II.

The first mention of the principle of sustainable development dates a couple of years back, in the 1987 Brundtland Report,²²⁹ which stressed the link between the critical and global environmental problems on the one hand and the extreme poverty of the Global South and the unsustainable production and consumption patterns of the Global North on the other. After being recognised in Principle 1 of the Rio Declaration, sustainable development is then recalled in twelve of the twenty-seven principles,²³⁰ yet remaining in its content quite vague.²³¹

In spite of this vagueness, it is quite clear that term “sustainable development” was used to identify a strategy to integrate development and sustainability through an explicit call to the satisfaction of the needs of the present generation and future generations.²³² Its aim was therefore to address the gap in powers and resources between the two global spheres, taking into consideration the needs of the developing countries.²³³

The diachronic dimension of both intergenerational equity and sustainable development,²³⁴ which can be reconducted to these two fundamental soft law instruments, plays a fundamental role in the construction of the collective right to a healthy environment. While no explicit reference to the right in question is made in these instruments,

²²⁹ Brundtland Report.

²³⁰ Rio Declaration, Principles 3-9, 12, 20-22, 24, and 27.

²³¹ The concept itself has remained mostly nebulous, and it has also been used to justify the adoption of measures whose sustainability can be questioned. Of course, the vagueness of its content was also one of the reasons for its approval, and, as highlighted by Bruno Simma, «that needs not necessarily be considered a disadvantage» (B. SIMMA, *Foreword*, in N. SCHRIJVER, F. WEISS (eds), *International Law and Sustainable Development*, Leiden, 2004). On the issue see also V. BARRAL, *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*, in *European Journal of International Law*, 2012, p. 377 ff.; M. FITZMAURICE, S. MALJEAN-DUBOIS, S. NEGRI (eds.), *Environmental Protection and Sustainable Development from Rio to Rio+20*, Leiden, 2014.

²³² Brundtland Report, Chapter 2, para. 1: «Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs».

²³³ See N. SCHRIJVER, F. WEISS (eds), *International Law and Sustainable Development: Principles and Practice*, cit. Also, Y. ONUMA, *A Transcivilizational Perspective on International Law*, Leiden, 2010.

²³⁴ J. BRUNNÉE, *The Stockholm Declaration and the Structure and Processes of International Environmental Law*, in A. CHIRCOP, T. MCDORMAN (eds), *The Future of Ocean Regime-Building: Essays in Tribute to Douglas M. Johnston*, Leiden, 2009, p. 39 ff.

the recognition of the connection between human rights and environmental concerns can nevertheless be underlined. It can also be argued that this connection has had a collective imprint since the start, with the framing of the environmental issue as a global one, effectively paving the way for future recognition.

2. *Relevant principles of IEL and their interplay with human rights obligations*

Before moving to the explicit recognition of the right to a healthy environment in human rights' mechanisms, it seems necessary to further explore the way in which some principles of international environmental law interact with the human rights' dimension of environmental protection. Specifically, this paragraph will move from the guidance offered by the so-called "Strasbourg Principles on International Environmental Human Rights Law" (from now on, "Strasbourg Principles"),²³⁵ in order to deal with the principle of precaution and the obligations of due diligence, both elements of great relevance in their interplay with human rights obligations.

In the field of human rights-based environmental protection, it is not enough to consider States' human rights obligations. The components of the right to a healthy environment, its scope and content which will be examined in Chapter III, make it necessary to take into account some elements of international environmental law language, which impact the protection of the environment itself.

The Strasbourg Principles are a tool developed by a group of human rights and environmental law experts designed especially for practitioners and consisting of «a uniform restatement of general principles that have emerged in international human rights law in the context of the environment».²³⁶

²³⁵ *The Strasbourg Principles of International Environmental Human Rights Law*, in *Journal of Human Rights and the Environment*, Special Issue, September 2022, p. 195 ff.

²³⁶ *Idem*, p. 195. Among the endorsers there are professors, judges, UN special rapporteurs and other experts in the field: David R. Boyd, Michel Forst, Françoise Tulkens, Paulo Pinto de Albuquerque, Christina Voigt, Ricardo Lorenzetti, Ayesha Malik, Eva Brems, Marta Torre-Schaub, Monica Fera-Tinta, Jorge Calderón Gamboa.

Paragraph 15 of the Strasbourg Principles states that «[i]n the context of environmental harm, the fundamental principles of international environmental law, including, but not limited to, the principles of prevention and precaution, constitute a framework of interpretation for international human rights law».²³⁷

The principle of prevention is a cornerstone of international environmental law. It is codified in Principle 21 of the Stockholm Declaration as «the responsibility [of States] to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction», and then reprised with identical words in Principle 2 of the Rio Declaration. In its original formulation it is, therefore, «a due diligence requirement to prevent transboundary pollution».²³⁸

The prohibition of transboundary harm can be considered to have a customary status in international law. Since 1996, the International Court of Justice has stated that: «[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now *part of the corpus of international law relating to the environment*».²³⁹

Again, the ICJ, in affirming the obligation for the State to carry out an environmental impact assessment in order to avoid damage to other States or territories, has also traced its foundations to the principle of prevention, affirming its customary origin,²⁴⁰ linked to the more general duty to exercise due diligence «not to allow knowingly its territory to be

²³⁷ *Idem*, p. 197.

²³⁸ N. DE SADELEER, *Environmental Principles: From Political Slogans to Legal Rules*, 2nd ed., Oxford, 2002, p. 63.

²³⁹ ICJ, *Legality of the threat or use of nuclear weapons*, Advisory Opinion of 8 July 1996, par. 29, emphasis added.

²⁴⁰ ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, par. 101. See also, *ex multis*, ICJ: *Whaling in the Antarctic (Australia v. Japan)*, Judgment of 31 March 2014; *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment of 16 December 2015.

On the prohibition of transboundary environmental harm and the protection of the environment as a “common concern” see also L. PINESCHI, *I principi del diritto internazionale dell'ambiente: dal divieto di inquinamento transfrontaliero alla tutela dell'ambiente come common concern*, in R. FERRARA, M.A. SANDULLI (eds), *Trattato di diritto dell'ambiente*, Milano, 2014, p. 93 ff.

used for acts contrary to the rights of other States». ²⁴¹ The prevention principle operates in this sense as an *intrinsic* limit to the principle of permanent sovereignty of States and peoples over natural resources. ²⁴²

Strictly linked is the principle of precaution, defined in Principle 15 of the Rio Declaration in this way: «[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental damage». ²⁴³ This is in some way confirmed also in the Strasbourg Principles in paragraph 18, where it is stated that «[i]n the event of scientific uncertainty, even in the absence of official documentary support, a sufficiently close link may be established through a combination of indirect evidence or by a presumption drawn from serious, specific and consistent facts and/or based on statistical correlation». ²⁴⁴

Read in conjunction, the two principles operate in two different circumstances. The principle of prevention, in fact, operates in the field of scientific “certainty”, while that of precaution in that of “uncertainty”. In other words, where the prevention principle acts to avoid risks where the cause-and-effect relationships are already known, the precaution

²⁴¹ ICJ, *Corfu Channel (United Kingdom v. Albania)*, Judgment of 9 April 1949, in *I.C.J. Reports 1949*, p. 22.

²⁴² F.X. PERREZ, *The relationship between ‘permanent sovereignty’ and the obligation not to cause transboundary environmental damage*, in *Environmental Law*, 1996, p. 1187 ff. On the principle of permanent sovereignty see also K. KOHDAY, *The Emerging South and the Evolution of Sovereignty over Natural Resources*, in M.C. BASSIOUNI, J. GOMULA (eds), *The Global Community Yearbook of International Law and Jurisprudence. Global Trends: Law, Policy & Justice Essays in Honour of Professor Giuliana Ziccardi Capaldo*, Oxford, 2013, p. 41 ff. In a critical sense C. ARMSTRONG, *Against ‘permanent sovereignty’ over natural resources*, in *Politics, Philosophy & Economics*, 2015, p. 129 ff.

²⁴³ The principle is sometimes referred to as an “approach”. See the *Seabed Mining Opinion* of the International Tribunal for the Law of the Sea: ITLOS, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, in *ITLOS Reports 2011*, p. 10, para. 135: «the precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. In the view of the Chamber, this has initiated a trend towards making this approach part of customary international law».

²⁴⁴ *The Strasbourg Principles of International Environmental Human Rights Law*, cit., p. 198.

comes into play when the probability of an event cannot be irrefutably demonstrated.²⁴⁵

Defined as they are, prevention and precaution can play a defining role in the justiciability of the collective right to a healthy environment: the first, in relation to impact assessments; the second, considered as an asset in the shift of the burden of proof.

2.1. *The use of EIA and other due diligence assessments: maximise synergies between fundamental rights and climate actions*

Due diligence is a fundamental parameter in the assessment of both human rights and environmental violations, even though there is no consensus on the boundaries of the concept in the two areas.²⁴⁶ As some authors have contended, «[d]ue diligence [...] is no free-standing obligation but a modality attached to a duty of care for someone or something else (including the duty to prevent and mitigate harm)».²⁴⁷

In the field of environmental law, as mentioned above, due diligence takes the form of an obligation of conduct in inter-State relations.²⁴⁸ «As the precautionary principle is a due diligence obligation, the state needs to act diligently and with foresight when it comes to activities in their jurisdiction that may cause significant harm to the environment or the risk thereof».²⁴⁹ The obligation is therefore fulfilled if the State provides

²⁴⁵ N. DE SADELEER, *Environmental Principles*, cit., pp. 74-75.

²⁴⁶ International Law Association Study Group on Due Diligence in International Law, Second Report, 12 July 2016; A. PETERS, H. KRIEGER, L. KREUZER, *Due diligence in the international legal order: dissecting the leitmotif of current accountability debates*, in A. PETERS, H. KRIEGER, L. KREUZER, *Due diligence in the international legal order*, Oxford, 2020, p. 1 ff. See also, M. LONGOBARDO, *The Relevance of the Concept of Due Diligence for International Humanitarian Law*, in *Wisconsin International Law Journal*, 2019, p. 44 ff; R. BARNIDGE, *The Due Diligence Principle Under International Law*, in *International Community Law Review*, 2006, p. 81 ff.

²⁴⁷ A. PETERS, H. KRIEGER, L. KREUZER, *Due diligence in the international legal order*, cit., p. 2.

²⁴⁸ See the jurisprudence of ICJ mentioned *supra* at notes 239-241. See also: ITLOS, *Seabed Mining Opinion*, cit., para. 110.

²⁴⁹ M. MALAIHOLLO, *Due Diligence in International Environmental Law and International Human Rights Law: A Comparative Legal Study of the Nationally Determined Contributions under the Paris Agreement and Positive Obligations under the European Convention on Human Rights*, in *Netherlands International Law Review*, 2021, p. 128.

its “best efforts” to reach the aim established, even if that aim is not in fact reached. This could mean, for example, complying with the requirement to evaluate the risk of a project or an activity through an environmental impact assessment (EIA).

EIA finds its *raison d'être* in the need to predict the ecological consequences of a plan before undertaking a specific activity. After considering the cost/benefit ratio, when possible with the contribution of the public, it is decided whether to proceed with the project or opt for an alternative that has a lower environmental impact.

Several environmental protection treaties require States to ensure that an assessment is carried out before authorizing activities that may have a significant environmental impact.²⁵⁰ Some treaties specifically provide or regulate impact assessments for projects that may have environmental consequences in other States, or outside national jurisdiction (transboundary environmental effect).²⁵¹

While a comparative analysis is outside the scope of this inquiry,²⁵² it is nonetheless useful to look at how due diligence assessments are developed in relation to human rights obligations. These types of evaluation can indeed be seen as an instrument for States to claim that «process [can substitute] for standards by ensuring thoughtful and well-informed exercises of discretion».²⁵³

In international human rights law, where States' obligations are tendentially referred to individuals, this is not always the case. For example, the European Convention of Human Rights refers to the term “positive obligations” rather than “due diligence”, and the juxtaposition of the two is not always possible.²⁵⁴ In the case of environmental

²⁵⁰ For example, the UN Convention on Biological Diversity of 1992 at Art. 14, titled “Impact Assessments and Minimizing Adverse Impacts”: «Each Contracting Party, as far as possible and as appropriate, shall: (a) Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures».

²⁵¹ Convention on Environmental Impact Assessment in a Transboundary Context of 1991 (the so-called Espoo Convention).

²⁵² On this point and for a comparative analysis, see M. MALAIHOLLO, *Due Diligence in International Environmental Law and International Human Rights Law*, cit., p. 136 ff.

²⁵³ M. HERZ, *Parallel Universes: NEPA Lessons for the New Property*, in *Columbia Law Review*, 1993, p. 1669.

²⁵⁴ V. STOYANOVA, *Due diligence versus positive obligations: critical reflections on the Council of Europe Convention on Violence against Women*, in J. NIEMI, L. PERONI, V.

pollution, however, it can be argued that the European Court of Human Rights has used due diligence to clarify the parameters of positive obligations under Article 8 of the Convention.²⁵⁵ More clearly and more recently, the Court has used an even more explicit language in respect to climate cases.²⁵⁶

The analysis on whether a State has complied with positive obligations is not one of a “merely” procedural nature in the sense of a shield to avoid substantive commitment. Examples can be found also at the global level, where General Comment 31 of the Human Rights Committee mentions the duty of States to investigate violations through independent and impartial bodies.²⁵⁷ Nowak speaks in this regard of the existence of a *de facto* right together with the *de jure* right.²⁵⁸ In other words, the effectiveness of the substantive protection of the right goes through the procedural control of its implementation.

Far from constituting a merely procedural requirement, environmental impact assessments and other due diligence assessments sit at the crossroads between IEL and IHRL. For a long time, the issue with EIA (domestic or transboundary) has been one of compliance with a *procedure*, and scholars have often shied away from an analysis on the merits of such compliance.²⁵⁹ However, in an effort to maximise synergies, these kinds of evaluation can instead provide a tool to enhance effectiveness. Moreover, applying a precautionary approach to

STOYANOVA (eds), *International law and violence against women: Europe and the Istanbul Convention*, London, 2020.

²⁵⁵ ECtHR: *Hatton and Others v. United Kingdom*, application no. 36022/97, Judgment of 8 July 2003; *Fadeyeva v. Russia*, application no. 55723/00, Judgment of 9 June 2005; *Jugheli and Others v. Georgia*, application no. 38342/05, Judgment of 13 July 2017.

²⁵⁶ ECtHR, *Verein KlimaSeniorinnen Schweiz and others v. Switzerland*, application no. 53600/20, Judgment of 9 April 2024, para. 538 ff. On the jurisprudence of the European Court of Human Rights in the context of environmental degradation see *infra* Chapter V.

²⁵⁷ Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13, 26 May 2004.

²⁵⁸ M. NOWAK, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 2nd ed., Kehl, 2005, p. 569. See also, D. SHELTON, A. GOULD, *Positive and Negative Obligations*, in D. SHELTON (ed.), *The Oxford Handbook of International Human Rights Law*, Oxford, 2013, p. 562 ff.

²⁵⁹ C.M. KERSTEN, *Rethinking Transboundary Environmental Impact Assessment*, in *Yale Journal of International Law*, 2009, p. 173 ff.

environmental cases based on human rights can concretely impact their outcome.

2.2. *Precaution and plausible risk: the shift in the burden of proof as an asset for collective justiciability*

One of the most controversial elements of the precaution principle (or approach) is the burden of proof.²⁶⁰ Exploring the added value of a precautionary recollection of environmental assessments with an eye to positive obligations standards shows specifically how useful the interplay between IEL and IHRL can be in the reconstruction of a collective justiciability of the right to a healthy environment.

The rules at the base of the burden of proof in international law generally abide by two principles: fairness among the parties, and presumption of compliance of States.²⁶¹ They both ensure that the party burdened with proving the facts is the one that makes the allegation.²⁶² This generally works both for inter-State adjudications and individual applications before human rights' courts.²⁶³ The latter, however, usually

²⁶⁰ See also A.E. BOYLE, C. REDGWELL, P.W. BIRNIE, *Birnie, Boyle & Redgwell's International Law and the Environment*, 4th ed., Oxford, 2021.

²⁶¹ C.E. FOSTER, *Science and the precautionary principle in international courts and tribunals: expert evidence, burden of proof and finality*, New York, 2011, p. 189 ff. On the fairness-based argumentation regarding the burden of proof in decision-making processes, see also M. AMBRUS, *The Precautionary Principle and a Fair Allocation of the Burden of Proof in International Environmental Law*, in *Review of European Community & International Environmental Law*, 2012, p. 259 ff.

²⁶² ICJ, *Pulp Mills*, cit., para. 162: «the Court considers that, in accordance with the well-established principle of *onus probandi incumbit actori*, it is the duty of the party which asserts certain facts to establish the existence of such facts». See also: D. SANDIFER, *Evidence Before International Tribunals*, 2nd ed., Charlottesville, 1975, p. 127; M. KAZAZI, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals*, London, 1996, p. 369.

²⁶³ While this is true for the Inter-American Court and the European Court, the African Commission constitutes an exception, following the rule according to which «[i]f the government provides no evidence to contradict an allegation of human rights violation made against it, the Commission will take it as proven, or at least probable or plausible» (ACHPR: *Haregewoin Gebre-Sellaise and IHRDA (on behalf of former Dergue officials) v. Ethiopia*, Communication 301/05, Decision of 7 November 2011, para. 178 ff. See also: *Amnesty International and Others v. Sudan*, Communications 48/90, 50/91, 52/91 and 89/93, Decision of 15 November 1999, para. 52; *Marcel Wets'okonda Koso and others v. Democratic Republic of Congo*, Communication 281/03, Decision of 24

adopt a more “flexible” approach, which tends to assess the evidence rules applicable in relation to the specifics of the case.²⁶⁴

Considering the possibility to reverse the burden of proof following the precautionary principle, Foster takes into great account the guarantees of fairness and presumption of compliance, by facing the issue of “certainty”.²⁶⁵ In her arguments, she focuses on the necessity to «to ensure the sound administration of justice» and with the aim of ensuring «procedural fairness and the proper protection for human health and the environment».²⁶⁶

Her construction follows this structure:

«By virtue of the precautionary principle, a decision might be made that a party was out of compliance with international legal obligations relating to protection of human health or the environment if that party could not establish that it was in compliance with the applicable obligations. Alternatively, a decision might be made that a party could rely on environmental exceptions to protect its population or ecology where a challenging party was unable to prove that these exceptions did not apply.»²⁶⁷

It is worth recalling the content of both precaution and burden of proof: the first intervening to avoid that scientific uncertainty regarding the cause-effect link could bring nefarious environmental consequences; the second stating that it is on the actor to prove the facts alleged. The burden of proof would be reversed in the sense that proof would not be needed in the field of “scientific uncertainty” when that uncertainty has brought the State to refuse to bring forward a project with the *plausible risk* of environmental degradation. Applying the precautionary principle

November 2008. para. 90; *Gabriel Shumba v. Zimbabwe*, Communication 288/04, Decision of 30 June 2017, paras.132-140).

For a detailed account of the burden of proof in international human rights law see J. KOKOTT, *The Burden of Proof in Comparative and International Human Rights Law*, Leiden, 1998. More recently, see also C. ROBERTS, *Reversing the burden of proof before human rights bodies*, in *The International Journal of Human Rights*, 2021, p. 1682 ff.

²⁶⁴ See IACtHR, *Velásquez Rodríguez v. Honduras*, Judgment of 29 July 1988; ECtHR, *El-Masri v. The Former Yugoslav Republic of Macedonia*, application no. 39630/09, Judgment of 13 December 2012.

²⁶⁵ C.E. FOSTER, *Science and the precautionary principle in international courts and tribunals*, cit., p. 240.

²⁶⁶ *Idem*, p. 241.

²⁶⁷ *Ibidem*.

to the reversal of the burden of proof means using “scientific uncertainty” as an effective tool to protect the environment, *without* costing the State a heavier decision-making process.

An example can help understanding the practical effect of this reversal:

«The circumstances of the *Gabčíkovo-Nagymaros* case may be considered. It will be recalled that Hungary bore the burden of establishing the defence of ecological necessity that was asserted in justification of the Hungarian suspension of works at Nagymaros. This required Hungary to prove that the environmental peril engendered by the Gabčíkovo-Nagymaros project was ‘grave and imminent’. The Court found that the asserted dangers to water quality in the Gabčíkovo sector were uncertain, and was prepared to reject the Hungarian defence on the basis that an uncertain peril could not have been an imminent peril. Hungary thus lost the dispute for failure to prove the defence of ecological necessity, despite Hungary’s reminder that ‘the court has itself the vocation to act in a precautionary mode, confronted with a degree of scientific uncertainty’». ²⁶⁸

The example made by Foster is useful also when the focus shifts from inter-State disputes to individual – and especially collective – applications to human rights’ mechanisms, every time the applicants need to prove the risk or potential harm to human rights deriving from conscious or negligent environmental degradation. The need to consider this potential reversal stems from the peculiarity of the international human rights law regime, which almost always comprises an intrinsic inequality of arms between the victims (individuals) and the alleged perpetrator (the State). ²⁶⁹ In the context of climate cases, this is even clearer due to the difficulties in proving the causal link and where science is not always readable and translatable in legal terms. ²⁷⁰

²⁶⁸ *Idem*, p. 261.

²⁶⁹ C. ROBERTS, *Reversing the burden of proof before human rights bodies*, cit., p. 1686, where different reasons for reversing the burden of proof in human rights cases are explored. On the costs of the burden of proof in a case of severe environmental degradation see N.A. ODONG, *Burden of Proof: Real Burden in Environmental Litigation for the Niger-Delta of Nigeria*, in *Journal of Environmental Law and Litigation*, 2020, p. 193 ff.

²⁷⁰ On climate litigation see *infra* Chapter VI.

Here the Strasbourg Principles come into play once again. In the reconstruction offered by the authors of the Principles, the burden of proof follows a peculiar rule.²⁷¹ The “*prima facie* evidence” is still on the plaintiffs, and it regards either “the harm” or “the real risk of harm”, in line with traditional human rights’ rules of procedure. However, in the following paragraph, a reversal of the burden is introduced: where the alleged violation has happened in the context of «an activity or omission that lies within the responsibility or oversight of a public authority, including activities carried out by private actors», or when «pollution or nuisance exceeds the limits which are binding on a State concerned or where the alleged dangerous activity or omission has been found to breach its permit conditions or the statutory regulations applicable in the country in question».²⁷²

The first part of this last paragraph clearly reminds of the parameters put in place for environmental impact assessment, which have been explored above and which reproduce a due diligence mechanism in line with a precautionary approach. On this point, it is useful to remember that the precautionary standards adopted by the Principles consider that, for proving harm, «[i]t is enough to establish a *sufficiently close link* between the applicant’s individual human rights and the risks of serious harm to the environment and/or of the dangerous effects of an activity or omission».²⁷³

Such a formulation of the burden of proof could be considered as somewhat of a “half reversal”, in which the *prima facie* burden still lays in the hand of the plaintiffs, and the reversal happens only in the field of activities under the “supervision” of the State – ensuring the responsibility of the State for positive obligations, once again in line with IHRL. On the other hand, it provides a practical application of the principle of precaution, by guaranteeing that “scientific uncertainty” cannot be used by States as some sort of procedural shield against the commitment to environmental preservation.

This paragraph offered a brief analysis of the way in which principles of IEL relate to IHRL in the field of environmental degradation impacting human rights. These interactions must be borne in mind in the

²⁷¹ *The Strasbourg Principles*, cit., p. 198.

²⁷² *Ibidem*.

²⁷³ *Ibidem*.

overview of the recognition of the right to a healthy environment, particularly in light of its progressive movement towards explicit recognition within human rights mechanisms.

3. *Explicit direct recognition in human rights' regional mechanisms*

Having clarified the legal origins of the collective and intergenerational configuration of the right to a healthy environment, and having observed that the relationship between instruments – and principles – of international environmental law and direct human rights protection is more nuanced than might initially appear, the present paragraph addresses the three regional systems that recognise the right to a healthy environment. A great absentee from the list will be the European Convention of Human Rights, the only regional instrument which does not explicitly recognise the right to a healthy environment. However, as a form of disclaimer, it must be noted that European jurisprudence in the field of environmental degradation is copious and detailed, and it will form object of analysis in Chapter V, where the practice of international standards will be put to the test.

In this paragraph, therefore, only three systems will be considered: the Inter-American system, the African Charter on Humans and Peoples' Rights, and the Arab Charter on Human Rights.

3.1. *The Inter-American system: the dual nature of the right to a healthy environment in the Advisory Opinion of 2017*

The American Convention on Human Rights (or “Pact of San José”) was adopted in 1969 under the auspices of the Organization of American States.²⁷⁴ The Convention is a treaty; therefore, it is binding under the Vienna Convention on the Law of the Treaties (Article 26). The Convention – similarly to other treaties on the protection of human rights – contains a list of civil and political rights, but it also includes a number of so-called “economic and social rights”,²⁷⁵ like Article 26, which is titled

²⁷⁴ The OAS was created in 1948 with the Charter of Bogotá. Only 23 of 35 members of OAS have signed the American Convention, the most notable absentee being the United States of America.

²⁷⁵ On this distinction, see *supra* Chapter I.

“Progressive Development”.²⁷⁶ Other rights are then included in the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (“Protocol of San Salvador”).²⁷⁷ Among them there is Article 11: “Right to a healthy environment”.

Article 11 states that «[e]veryone shall have the right to live in a healthy environment and to have access to basic public services» and that «States Parties shall promote the protection, preservation, and improvement of the environment.».

Overseeing the application of the American Convention are two complementary mechanisms: the Inter-American Commission on Human Rights – a quasi-judicial body established in 1959 – and the Inter-American Court of Human Rights, established in 1969. Both the Commission and the Court have – among others – a contentious competence. The Commission is tasked with receiving complaints and adopting reports with recommendations, while the Court is the only organ that can deliver binding judgments. Individuals are allowed to go before the Commission, but *not* before the Court. Only States and the Commission can refer cases to the Court.²⁷⁸

In principle, the Court has jurisdiction to oversee the application of the American Convention on Human Rights and the Protocol of San Salvador. Nevertheless, Article 19(6) of the Protocol itself states that only Articles 8 (trade union rights) and 13 (right to education) «may give rise to [...] application of the system of individual petitions». It can be inferred, then, that the right to a healthy environment included in Article 11 is not in itself justiciable before the Commission or the Court.²⁷⁹

²⁷⁶ American Convention on Human Rights, Art. 26: «The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to *achieving progressively*, by legislation or other appropriate means, *the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards* set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires» (emphasis added).

²⁷⁷ Only 16 States parties to the Convention have ratified the Protocol so far.

²⁷⁸ V. GOMEZ, *The Inter-American Commission and Court of Human Rights*, in G. OBERLEITNER (ed), *International Human Rights Institutions, Tribunals, and Courts*, Singapore, 2018, p. 461 ff.

²⁷⁹ J.L. CAVALLARO, E. SCHAFFER, *Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas*, in *Hastings Law Journal*, 2005, p. 217 ff.

At the same time, Article 26 of the Pact of San José clearly recognises the right to economic social and cultural rights, and, as it forms part of the Convention, it may be considered justiciable. The case law of the Inter-American Court supports this reconstruction,²⁸⁰ despite doctrinal controversy on the matter.²⁸¹ On the point, it has been argued that the Protocol on San Salvador should function as an interpretative tool for the application of the American Convention on Human Rights.²⁸²

It is of particular relevance, on the matter, the elaboration of the right to a healthy environment in the interpretation of the Inter-American Court.

On 15 November 2017, the Court issued the *Advisory Opinion on Environment and Human Rights*, regarding States' obligations in the matter of environmental protection, relating to the right to life (Article 4) and the right to humane treatment (Article 5).²⁸³

In the Advisory Opinion the Court has affirmed the existence of an independent right to a healthy environment in the form of a «fundamental right for the existence of humankind»,²⁸⁴ which is “autonomous” and «unlike other rights, protects the components of the environment [...]»,²⁸⁵ in this way differing «from the environmental

²⁸⁰ IACtHR, *Acevedo Buendía et al. (“Discharged and Retired Employees of the Office of the Comptroller”) v. Peru*, Judgment of 1 July 2009.

²⁸¹ L. BURGORGUE-LARSEN, *Economic and Social Rights*, in L. BURGORGUE-LARSEN, A. ÚBEDA DE TORRES (eds.), *The Inter-American Court of Human Rights: Case Law and Commentary*, New York, 2011, p. 613 ff; V. KRSTICEVIC, *La tutela de los derechos sociales en el Sistema Interamericano*, in A. ELY YAMIN (ed.), *Los derechos económicos, sociales y culturales en América Latina*, Mexico City, 2006, p. 171 ff.

²⁸² O.R. RUIZ-CHIRIBOGA, *The American Convention and the Protocol of San Salvador: Two Intertwined Treaties*, in *Netherlands Quarterly of Human Rights*, 2013, p. 159 ff.

²⁸³ IACtHR, *Environment and Human Rights*, cit. It is worth noting that the Court also affirms States' duty to prevent transboundary environmental damage, stemming from the Stockholm Declaration (Principle 21), the Rio Declaration (Principle 2). The Court also mentions in this regards the UN Convention on the Law of the Sea, which affirms that (Art. 194.2): «States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention». On the point of States' obligations in relation to the human rights' dimension of the protection of the environment, see also *infra* Chapter III.

²⁸⁴ *Idem*, para. 59.

²⁸⁵ *Idem*, para. 62.

content that arises from the protection of other rights [...]».²⁸⁶ On the relationship between Article 26 of the Convention and Article 11 of the Protocol of San Salvador, the Court affirms: «[i]t should also be considered that this right is included among the economic, social and cultural rights protected by Article 26 of the American Convention, because this norm protects the rights derived from the economic, social, educational, scientific and cultural provisions of the OAS Charter».²⁸⁷

This approach moves past the mere act of “greening” existing human rights and directly and explicitly recognises an autonomous right to a healthy environment, which is defined in a way that ensures the possibility of environmental protection even in the absence of harm to individuals.

«This means that the environment is protected not only because of the benefits it provides to humanity or the effects that its degradation may have on other human rights, such as health, life or personal integrity, but because of its importance to the other living organisms with which we share the planet, that also merit protection in their own right».²⁸⁸

Finally, the Court dedicates its analysis to the nature of the right under examination, refusing to choose one single approach between the individual and the collective but rather opting for a “dual nature” of the right to a healthy environment. The Court stresses that it is in the nature of the interests at stake to be both relevant for individual wellbeing, as values which are fundamental for the existence of humankind, as well as the community.

«The human right to a healthy environment has been understood as a right that has both individual and also collective 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. Environmental degradation may

²⁸⁶ *Idem*, para. 63.

²⁸⁷ *Idem*, para. 57.

²⁸⁸ *Idem*, para. 62.

cause irreparable harm to human beings; thus, a healthy environment is a *fundamental right for the existence of humankind*».²⁸⁹

The reference to intergenerational equity corroborates the construction elaborated so far, in confirming that no right can effectively protect the environment if it does not recognise its universal and communal nature. Moreover, no community can refuse to take into account the interests of both present and future generations.

3.2. *The African Charter on Human and Peoples' Rights*

Like the Inter-American system, also the African system is constituted of both a Commission and a Court, and also in this case the only mechanism allowed to adopt binding decisions is the African Court on Human and Peoples' Rights.²⁹⁰ The African Commission was established by Article 30 of the African Charter on Human and Peoples' Rights, which was adopted in 1981 in the context of the Organization of African Unity (OAU). The Court came almost twenty years after, through the adoption of a separate additional protocol in 1998 (which entered into force in 2004 and didn't start to operate until 2007).

Through its recommendations, the African Commission has the mandate to promote and protect human rights,²⁹¹ and is therefore able to receive complaints from victims. The Commission considers its recommendations to be binding, and almost all the African Union States agree with this legal status.²⁹² The structure of the African system is complicated by the fact that – unlike the Inter-American system – direct access to the Court from individuals and NGOs is possible alongside direct access to the Commission.²⁹³

²⁸⁹ *Idem*, para. 59 (emphasis added).

²⁹⁰ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of An African Court on Human and Peoples' Rights, Art. 30.

²⁹¹ African Charter on Human and Peoples' Rights, Art. 45.

²⁹² On the point see M. SENEYONJO, *Responding to Human Rights Violations in Africa: Assessing the Role of the African Commission and Court on Human and Peoples' Rights (1987–2018)*, in *International Human Rights Law Review*, 2018, p. 1 ff.

²⁹³ Only if the State concerned has signed an optional declaration recognising this possibility for individuals and NGOs with observer status before the African Commission (Protocol on the Establishment of An African Court, Arts. 5(3) and 34 (6)). In total, only

The African Charter has a peculiar form.²⁹⁴ First, it contains both rights and duties of individuals (Article 27-29). Secondly, it lists civil and political rights together with economic social and cultural ones – even though the *Nairobi Reporting Guidelines on ECOSOC* distinguish them in terms of interpretative criteria and nature of States’ obligations.²⁹⁵ Third, it is directed both at individuals and “peoples”.

It is in this last part that Article 24 is located, providing that «[a]ll peoples shall have the right to a general satisfactory environment favourable to their development». The African Charter is in fact the *first treaty* to recognise the right to a healthy environment.²⁹⁶

According to Article 24, the right to a healthy environment is recognised to “peoples”.²⁹⁷ It is, therefore, an exquisitely collective right. However, it should be noted that some authors contend that it «is relatively uncontested in that it is a right to which individuals, communities and the public at large can be beneficiaries of».²⁹⁸ Without explicitly affirming it, it seems that also the African Charter adopts a configuration of the right that is invokable both by individuals and communities, confirming the approach adopted in this work which considers the collective nature of the *interest* of environmental protection, rather than the exquisitely collective nature of its right-holders.

twelve States have offered this declaration, but four of them have withdrawn it (Rwanda, Tanzania, Côte d’Ivoire, and Benin).

On the complicated structure of the African system see also M. HANSUNGULE, *African courts and the African Commission on Human and Peoples’ Rights*, in A. BÖSL, J. DIESCHO (eds), *Human Rights in Africa: Legal Perspectives on Their Protection and Promotion*, Windhoek, 2009, p. 233 ff.

²⁹⁴ For a more detailed analysis of the Charter see M. EVANS, R. MURRAY (eds), *The African Charter on Human and Peoples’ Rights: The System in Practice 1986–2006*, 2nd ed., Cambridge, 2008.

²⁹⁵ ACHPR, *Principles and Guidelines on the implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights*, 2019, available on the website of the African Union (<http://archives.au.int/handle/123456789/2063>).

²⁹⁶ L. CHENWI, *The right to a satisfactory, healthy, and sustainable environment in the African regional human rights system*, in J.H. KNOX, R. PEJAN (eds.), *The Human Right to a Healthy Environment*, cit., p. 62.

²⁹⁷ On the concept and the jurisprudence see *infra* Chapter V.

²⁹⁸ M. VAN DER LINDE, L. LOUW, *Considering the Interpretation and Implementation of Article 24 of the African Charter on Human and Peoples’ Rights in Light of the SERAC Communication*, in *African Human Rights Law Journal*, 2003, p. 174.

It has been argued critically that the content of the right in the Charter is quite vague and that the reference to a “general satisfactory environment” is not as stringent as the phrasing “healthy and sustainable”, which is used in other African instruments.²⁹⁹ However, it could be noted that the stringent relation between a “general satisfactory environment” and the concept of “development” is in some way akin to the connection between “health” and “sustainability”, with all the issues of coordination that the two entail.³⁰⁰

3.3. *The Arab Charter on Human Rights*

The Arab Charter on Human Rights was adopted by the League of Arab States in 2004 and entered into force in 2008.³⁰¹ The Statute for a Court was adopted in 2014, but no action was taken in this regard.³⁰²

The Charter consists of a Preamble and 52 articles without chapters or divisions, and – like the African Charter – it contains both civil and political as well as economic social and cultural rights. Only the Arabic text is the official text.³⁰³

Article 38 of the Charter recognises the right to an adequate standard of living, ensuring well-being and a decent life, including adequate food, clothing, housing, services and *a right to a safe environment*. Like the African Charter, also Article 38 of the Arab Charter is included in a group

²⁹⁹ For example, the African Women’s Protocol (“Maputo Protocol”). See L. CHENWI, *The right to a satisfactory, healthy, and sustainable environment in the African regional human rights system*, cit., p. 69.

³⁰⁰ *Idem*, p. 66. See also, M. VAN DER LINDE, *African responses to environmental protection*, in *The Comparative and International Law Journal of Southern Africa*, 2002, p. 99 ff; E.P. AMECHI, *Enhancing Environmental Protection and Socio-Economic Development in Africa: A Fresh Look at the Right to a General Satisfactory Environment under the African Charter on Human and Peoples’ Rights*, in *Law, Environment and Development Journal*, 2009, p. 58 ff.

³⁰¹ 18 out of 22 States of the League of Arab States have ratified the Charter. The ones who haven’t adopted it are: Tunisia, Djibouti, Somalia and Morocco.

³⁰² See K. MAGLIVERAS, G. NALDI, *The Arab Court of Human Rights. A Study in Impotence*, in *Revue québécoise de droit international*, 2016, p. 147 ff.; A. ALMUTAWA, *The Failure of the Arab Court of Human Rights and the Conflicting Logics of Legitimacy, Sovereignty, Orientalism and Cultural Relativism*, in *Netherlands International Law Review*, 2021, p. 479 ff.

³⁰³ For a commentary on the Arab Charter see W. ALLAM, *The Arab Charter on Human Rights: Main Features*, in *Arab Law Quarterly*, 2014, p. 40 ff.

of collective rights (together with the right to self-determination and the right to development).

While the collocation of the right to a healthy environment among collective rights is coherent with this reconstruction, it should be noted that the absence of any monitoring mechanism able to receive complaints from victim makes the right to a healthy environment non justiciable in the context of the Arab Charter.

3.4. *The ASEAN Human Rights Declaration and the Declaration on the Right to a Safe, Clean, Healthy and Sustainable Environment*

Similar considerations can be made for the ASEAN (Association of South-East Asian Nations) Human Rights Declaration of 2012, which includes the right to a healthy environment in Article 28(f): «Every person has the right to an adequate standard of living for himself or herself and his or her family including: [...] f. The right to a safe, clean and sustainable environment». The Declaration has been object of severe criticism for its inconsistencies with other IHRL norms.³⁰⁴

Nevertheless, a significant development occurred in 2025 with the adoption of the ASEAN Declaration on the Right to a Safe, Clean, Healthy and Sustainable Environment, endorsed at the 47th ASEAN Summit.³⁰⁵ Unlike the 2012 Human Rights Declaration, which mentioned the right only as a component of the right to an adequate standard of living, the 2025 Declaration explicitly advances the right as an autonomous human right and frames it within the broader context of the “triple planetary crisis” of climate change, biodiversity loss and pollution.

The Declaration expressly links the right to environmental law, multilateral environmental agreements and principles of progressive realisation, and recognises the disproportionate impact of environmental degradation on vulnerable groups, including women, children, persons

³⁰⁴ See International Commission of Jurists, *The ASEAN Human Rights Declaration: Questions and Answers*, 2013.

³⁰⁵ More specifically, the Declaration was endorsed by Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Republic of the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand, and the Socialist Republic of Viet Nam.

with disabilities and indigenous and local communities. It also emphasises access to information, public participation and access to justice, and encourages the adoption of environmental impact assessments and due diligence measures, including with respect to non-State actors and business enterprises.

Although the Declaration remains a non-binding political instrument and does not establish an individual complaints mechanism, it marks a clear normative evolution within the ASEAN framework. It strengthens the regional recognition of the right to a healthy environment and signals a gradual shift from a purely programmatic reference to a more structured articulation of State commitments.

4. Other explicit references to collective environmental protection

The systems explored in last paragraph have some similarities – namely, the collective approach – as well as differences – presence and structure of monitoring mechanisms. However, they all refer to existing binding instruments of a regional nature with the aim of protecting human rights, and they all recognise the existence of an autonomous right to a healthy environment. With a view to complement the information in this Chapter, this paragraph will be devoted to the analysis of some instruments – both explicitly and implicitly referring to human rights – which have included a formulation of the protection of the environment which can be considered collective. The aim of this paragraph is to complete the overview of the existing instruments which corroborate the configuration of a collective right to a healthy environment before moving to the last paragraph and exploring the most recent developments at the universal level. In order to do so, it is imperative to recognise the steps that have led to those developments. Therefore, the instruments which will be mentioned are related to global legal responses to the climate crisis.

4.1. Responses to the climate crisis as inherently collective

There are a number of instruments related to the protection of the environment from the perspective of human rights. The most dated ones tend to adopt an approach more closely linked to the phenomenon of

“greening” human rights.³⁰⁶ One of the fields in which this approach is clearer is linked to the issue of the climate crisis, one of the three planetary crises denounced by UNEP.

In 1989, 24 representatives of States signed the Declaration of The Hague, recognising the collective impact of the «warming of the atmosphere and [...] the deterioration of the ozone layer»,³⁰⁷ and calling for the development of a framework convention on climate change, as well as advocating for an institution which would have the main responsibility for combating further global warming – UNEP.

The Declaration was then recalled in the same year by the UNGA Resolution on the protection of global climate for present and future generations.³⁰⁸ Since then, the climate crisis has progressively become a banner for the necessity of a collective protection of the environment. Within the framework of the UNFCCC, the Kyoto Protocol and the Paris Agreement further articulate the collective dimension of climate change, both expressly acknowledging its shared and transboundary impact.

The Kyoto Protocol was adopted in 1997 and entered into force in 2005, its main feature being the application of the principle of common but differentiated responsibilities (CBDR) to the reduction of greenhouse gas (GHG) emissions.³⁰⁹ The content of CBDR can be drawn from Principle 7 of the Rio Declaration, which states that «developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command». ³¹⁰ Critics of the Kyoto Protocol

³⁰⁶ On the point see *supra* Chapter I.

³⁰⁷ *Declaration of The Hague*, in *Environmental Policy and Law*, 1989, p. 78.

³⁰⁸ UNGA Resolution on “Protection of global climate for present and future generations of mankind”, UN Doc. A/RES/44/207, 22 December 1989.

³⁰⁹ Kyoto Protocol to the United Nations Framework Convention on Climate Change, Art. 3(1): «The Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B and in accordance with the provisions of this Article, with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012».

³¹⁰ On the principle of CBDR see also P. CULLET, *Common but Differentiated Responsibilities*, in M. FITZMAURICE, D.M. ONG, P. MERKOURIS (eds), *Research Handbook on International Environmental Law*, Cheltenham, 2010, p. 161 ff.; J. LEE, *Rooting the*

have considered it nothing more than empty words, a “fundamentally flawed” instrument incapable of providing real change.³¹¹ Other authors, moving with more moderation, show empirical evidence of some level of effectiveness in the reduction of GHG emissions.³¹²

The same can be said for the Paris Agreement, which was adopted in 2015 and entered into force in 2016, whose Preamble takes into account that «climate change is a common concern of humankind», and as such it needs to be faced applying equity and the principle of common but differentiated responsibility.

Be as it may regarding enforceability and effectiveness, what is interesting in this section is that approaching climate change through common responsibility reflects once more the understanding of the collective nature of environmental protection. Therefore, from a theoretical point of view, both the Kyoto Protocol and the Paris Agreement are instruments which endorse the communal configuration of the right to a healthy environment.³¹³

It is not a case, then, that the most recent developments on the right to a healthy environment stem from the need to offer responses to the climate crisis. The “common concern of humankind” recognised by the Paris Agreement has been recently tackled from a human rights perspective both at the regional and national level, and the configuration of the claims has followed a decisively collective approach.³¹⁴ In answer to this growing phenomenon, both the Human Rights Council and the

Concept of Common but Differentiated Responsibilities in Established Principles of International Environmental Law, in *Vermont Journal of Environmental Law*, 2015, p. 28 ff.; K. DINGWERTH, *Multi-layered differentiation in the climate regime: the gradual path from Rio to Paris*, in *Environmental Politics*, 2023, p. 240 ff.

³¹¹ A.M. ROSEN, *The Wrong Solution at the Right Time: The Failure of the Kyoto Protocol on Climate Change*, in *Politics and Policy*, 2015, p. 30 ff.; C. ALMER, R. WINKLER, *Analyzing the effectiveness of international environmental policies: The case of the Kyoto Protocol*, in *Journal of Environmental Economics and Management*, 2017, p. 125 ff.

³¹² N. GRUNEWALD, I. MARTINEZ-ZARZOSO, *Did the Kyoto Protocol fail? An evaluation of the effect of the Kyoto Protocol on CO2 emissions*, in *Environment and Development Economics*, 2016, p. 1 ff.; Y. KIM, K. TANAKA, S. MATSUOKA, *Environmental and economic effectiveness of the Kyoto Protocol*, in *PLoS ONE*, 2020, p. 1 ff.; N. MAAMOUN, *The Kyoto protocol: Empirical evidence of a hidden success*, in *Journal of Environmental Economics and Management*, 2019, p. 227 ff.

³¹³ For an analysis of the nature of the obligations in the Kyoto Protocol and the Paris Agreement, see *infra* Chapter III.

³¹⁴ On this point see *infra* Chapters V and VI.

General Assembly of the United Nations have offered a contribution in the form of non-binding resolutions. It is to these resolutions that attention now turns.

5. *Recent developments and proposed definitions: the two resolutions of the Human Rights Council and the resolution of the General Assembly of the United Nations*

On 8 October 2021, the Human Rights Council emanated a resolution recognising the existence of the human right to a “healthy, clean and sustainable environment” (Res 48/13).³¹⁵ Despite the other regional recognitions mentioned above, this is the first instrument – albeit non-binding in nature – which explicitly affirms the existence of an autonomous right to a healthy environment. The resolution was approved with a vote of 43-0, with four abstentions (China, India, Japan and Russian Federation).

Res 48/13 «[n]otes that the right to a clean, healthy and sustainable environment is related to other rights and existing international law», in this way following the classical doctrine of interdependency of human rights, and «[a]ffirms that the promotion of the human right to a clean, healthy and sustainable environment requires the full implementation of the multilateral environmental agreements under the principles of international environmental law». The human right to a healthy environment cannot be interpreted only in the light of human rights law, but it needs to take into account the principles deriving from IEL, which, as already discussed, are intrinsically inter-State in nature.³¹⁶

On the same day, the Human Rights Council adopted also Res 48/14, establishing a Special Rapporteur on human rights and climate change,³¹⁷ further endorsing the idea that the climate crisis is a human rights crisis, and as such would benefit from the tools available to human rights. One of those tools is, of course, the recognition of the right to a healthy

³¹⁵ UN Human Rights Council Resolution on “The human right to a clean, healthy and sustainable environment”, cit.

³¹⁶ See *supra* Section 2.

³¹⁷ UN Human Rights Council Resolution on “Mandate of the Special Rapporteur on the promotion and protection of human rights in the context of climate change”, UN Doc. A/HRC/RES/48/14, 8 October 2021.

environment. What is interesting to note is that the resolution explicitly mentions the need for the Special Rapporteur on human rights and climate change to «closely coordinate with the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment». This role was established in 2012,³¹⁸ and assigned to John H. Knox for two mandates of three years. Then, in 2018, David R. Boyd was appointed for three years.³¹⁹ All this time the name of the Special Rapporteur on the topic remained related to “the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment”. It was only in 2024 that the title was changed to Special Rapporteur on the human right to a clean, healthy and sustainable environment.³²⁰ In this case, the mandate is not only to study human rights obligations relating to the enjoyment of a safe, clean and sustainable environment; but more explicitly the obligations related to the “human right to a clean, healthy and sustainable environment”.

The Human Rights Council takes this, apparently insignificant, semantic decision by quoting its resolution of 2021 on the recognition of the right to a healthy environment, as well as the UNGA resolution of 2022.

The General Assembly of the United Nations adopted Res 76/300 on 28 July 2022, with a formulation that largely recalls that of the Human Rights Council.³²¹ The right to a healthy environment is recognised as autonomous, but interdependent with other existing rights and international law. Multilateral environmental agreements are also recalled together with relevant principles of IEL. The resolution was adopted unanimously.³²²

³¹⁸ UN Human Rights Council Resolution on “Human rights and environment”, UN Doc. A/HRC/RES/19/10, 22 March 2012.

³¹⁹ UN Human Rights Council Resolution on “Human rights and environment”, UN Doc. A/HRC/RES/37/8, 22 March 2018.

³²⁰ UN Human Rights Council Resolution on “Mandate of Special Rapporteur on the human right to a clean, healthy and sustainable environment”, UN Doc. A/HRC/RES/55/2, 3 April 2024.

³²¹ UNGA Resolution on “The Human Right to a Healthy, Clean and Sustainable Environment”, cit.

³²² The draft was supported by over 100 States, with the exception of the sceptical approach manifested especially by the Russian Federation – which was among the

Finally, in 2023, the Human Rights Council returned on the point by approving – by consensus – a resolution with a detailed list of what is expected of States in relation to the right to a healthy environment and, more generally, the protection of the environment related to human rights.³²³

It further reinstated that the right to a healthy environment is a human right and calls upon States to respect it and protect it together with other environmentally related rights (life, health, food, water, housing and cultural rights). It encourages them to provide laws implementing the right to a healthy environment, guaranteeing access to justice and effective remedies.³²⁴ An ample part of the resolution is also dedicated to the theme of public awareness, education and participation of civil society in decisions involving the environment.

Once more, these are all non-binding instruments, as such not immediately enforceable. However, as repeatedly clarified in this Chapter, soft law instruments can go a long way in the field of environmental protection.

First, it needs to be noted how these resolutions influenced each other. The work of the Human Rights Council had an impact on the unanimous adoption of General Assembly Resolution 76/300. And the latter, in turn, informed the clarification contained in Human Rights Council Resolution of 2023, as well as on the specification of the title of the Special Rapporteur working on the right to a healthy environment. Finally, it is worth noting that it is in the light of these developments that, in 2023, the General Assembly approved a resolution – again, by consensus – requesting an Advisory Opinion to the International Court of Justice on States' obligations to address climate change.³²⁵

abstained also in the Human Rights Council Resolution – and Iran (UN Doc. A/76/PV.97).

³²³ UN Human Rights Council Resolution on “The human right to a clean, healthy and sustainable Environment”, UN Doc. A/HRC/52/L.7, 4 April 2023.

³²⁴ On the point, see *infra* Chapter IV.

³²⁵ UNGA Resolution on “Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change”, UN Doc. A/RES/77/276, 29 March 2023. Among the statements made by some States on this occasion, it is worth noting that at least six States (Costa Rica, Seychelles, Chile, Samoa, Austria and El Salvador) explicitly recall their commitment to the recognition and development of the right to a healthy environment, while Canada offers a more prudent

Secondly, without repeating what has already been said, soft law instruments play a role in the development of practice of States, as well as influencing the work of courts, tribunals and other committees.³²⁶ Recognition, in this sense, does not amount to the creation of a new right *ex nihilo*; rather, it crystallises a normative trajectory already visible in State practice, jurisprudence and doctrine.³²⁷ The repeated reference to the interdependence between the right to a healthy environment and multilateral environmental agreements further reinforces the legitimacy of systemic integration between international human rights law and international environmental law.³²⁸ By situating the right within this broader legal architecture, the resolutions strengthen interpretative coherence and provide authoritative guidance to courts and treaty bodies. This consolidating trajectory is further confirmed by the adoption, in 2025, of General Comment No. 27 of the Committee on Economic, Social and Cultural Rights.³²⁹ Unlike the aforementioned resolutions, the General Comment operates within the framework of a binding treaty, offering authoritative interpretation of the International Covenant on Economic, Social and Cultural Rights. The Committee explicitly recognises the right to a clean, healthy and sustainable environment as indispensable for the enjoyment of Covenant rights and treats it as inherent to the structure of the Covenant itself. In doing so, the Committee integrates the right within the established tripartite framework of obligations to respect, protect and fulfil, clarifies its intergenerational dimension, and links it directly to duties of mitigation, adaptation and environmental due diligence.³³⁰ The significance of this development lies in the shift from political recognition to treaty-based

position on the content of the right (UN Doc. A/77/PV.64). On the point see *infra* Chapter III.

³²⁶ See *supra* Section 1.

³²⁷ See *infra* Part II.

³²⁸ Vienna Convention on the Law of the Treaties, Art. 31(3)(c). The General Comment also endorses systemic integration between international human rights law and international environmental law, referring expressly to principles such as precaution, common but differentiated responsibilities, and intergenerational equity. On systemic integration between human rights law and environmental law see also *infra* Chapter III, Section 2.1.

³²⁹ CESCR, *General Comment No. 27: Economic, social and cultural rights and the environmental dimension of sustainable development*, UN Doc. E/C.12/GC/27, 6 November 2025.

³³⁰ See, more specifically, *infra* Chapter III, Section 2.1.

interpretative consolidation. While still not amounting to the adoption of a universal binding instrument, General Comment No. 27 strengthens the normative density of the right to a healthy environment and reinforces its operational content within the existing human rights framework. It thus illustrates how soft law recognition and treaty interpretation can operate in tandem, progressively solidifying the legal contours of the right.

Third, resolutions of organs of the United Nations hold a heavy political weight, especially when they are adopted by consensus or unanimously. In this case, the work of the Human Rights Council and the General Assembly has also inspired the International Centre for Comparative Environmental Law (ICCEL), an international NGO which holds Special Consultative Status with the United Nations Economic and Social Council and Observer Status with the United Nations Environment Assembly.

Drawing from the resolutions mentioned above, the ICCEL has developed a Draft International Covenant on Environmental Rights (from now “ICER” or “Draft”) with the aim to “complement” and “update” the International Covenants on Civil and Political Rights and on Economic, Social, and Cultural Rights.³³¹ Clearly, the Draft is not a political instrument and has no binding force. But it shows how doctrine, jurisprudence and politics are actually going hand in hand as it regards the human rights-based protection of the environment. This is not the only instrument produced by experts that deals with the issue of environment and human rights. The Strasbourg Principles have already been addressed above,³³² and reference may likewise be made to the work of the World Commission on Environmental Law.³³³

The ICCEL Draft explicitly states that it will be the aim of the Centre to «seek State sponsors to promote adoption of the International Covenant on Environmental Rights in the Human Rights Council and by the General Assembly and to support its ratification by Member States».

³³¹ International Centre for Comparative Environmental Law, *Draft International Covenant on Environmental Rights*, 2024.

³³² *The Strasbourg Principles of International Environmental Human Rights Law*, cit.

³³³ International Council of Environmental Law (ICEL), IUCN Commission on Environmental Law (CEL), *Draft International Covenant on Environment and Development: implementing sustainability*, 5th ed, IUCN, 2015.

Similarly to its “older brothers”, the ICER contains a Preamble, a set of rights and an implementation committee (Committee on Environmental Rights). The list includes first the right to a healthy environment and then a number of environment-related human rights.

The right to a healthy environment is here defined in a peculiar way. Indeed, Article 1(1) affirms that «*Every person and all peoples have the right to live in a clean, healthy and sustainable environment*» (emphasis added). The reference to collectiveness does not end here. It is mentioned also in relation to «collective health, safety, security, livelihood and wellbeing for present and future generations, in harmony with nature». ³³⁴ In the right to a healthy environment is then included the recognition of a “symbiotic relationship” between humans and nature, and the duty of humans to protect and improve the environment. In this sense, rights of nature and the right to a healthy environment can be understood as mutually dependent. ³³⁵

A final point is worth noting. One of the main critics to the existence of an autonomous right to a healthy environment is the vagueness of its content. The point has already been addressed from a theoretical perspective. ³³⁶ The practical issue of its scope will be the topic of next Chapter, but some preliminary considerations can be drawn also from the review conducted so far.

While the first instruments referred to the right to environment as a right to a “satisfactory” environment, ³³⁷ it can be noted how quickly words like “safe” and “healthy” have taken over. The formulation of the right as included by the resolutions of the General Assembly and the Human Rights Council is indeed “safe”, “clean”, “healthy” and “sustainable”. Moreover, there is a tendency to underline the dimension of the right as “double” or “symbiotic”. ³³⁸ And a growing reference is made to the other parts or “components” of the environment, betraying the evolution towards an “ecosystem approach” to environmental

³³⁴ Draft International Covenant on Environmental Rights, Art. 1(2). In the note here mention is made to the Stockholm Declaration, Principle 1; Rio Declaration, Principle 1; Aarhus Convention, Art. 1; African Charter on Human and People’s Rights, Art. 24; Escazú Agreement, Art. 1; United Nations General Assembly Resolution 76/300; Human Rights Council Resolution 48/13.

³³⁵ On rights of nature see also *supra* Chapter I.

³³⁶ See *supra* Chapter I, Section 2.2.

³³⁷ African Charter on Human and Peoples’ Rights.

³³⁸ See the wording in the Inter-American system, *supra* Section 3.1.

protection which embraces both anthropocentric and ecocentric views of the relationship with nature.³³⁹

In conclusion, most of the international instruments which explicitly recognise the right to a healthy environment are still soft law. However, regional mechanisms – with the exception of the European Convention of Human Rights – do provide the affirmation of the right. Moreover, the instruments mentioned are largely global in nature. It should also be briefly noted that many of these instruments draw upon the fact that the explicit recognition of the right is enshrined in more than half of the world's national constitutions.³⁴⁰

The status of the right to a healthy environment in international law cannot be considered unequivocal at the moment. Indeed, despite unanimous recognition at the General Assembly, the statements of some of the States regarding the binding nature or possible customary status of the right to a healthy environment are dubious at best.³⁴¹ But, as practice will show, these considerations are largely influenced by the jurisprudence at the regional and national level.³⁴²

While a universal binding instrument recognising the right to a healthy environment is still lacking, it cannot be maintained that the right does not exist merely because no such instrument has been approved. The tendency identified in this Chapter is towards growth and expansion both of the catalogue of rights and the content of the right to a healthy environment itself. In this sense, a large role is played by the need to find effective responses to the triple planetary crisis, especially climate change.

Against this background, Chapter III turns to an examination of the scope and constituent elements of the collective right to a healthy environment, which must reflect this holistic approach.

³³⁹ See V. DE LUCIA, *Competing Narratives and Complex Genealogies: The Ecosystem Approach in International Environmental Law*, cit.

³⁴⁰ UNEP, *Global Judicial Handbook on Environmental Constitutionalism*, cit. See also *infra* Chapter VI.

³⁴¹ Doubts around the status of such a right in international law arose also among its supporters: namely, the United Kingdom, Canada, Japan, New Zealand, Norway, the United States, India, Israel, Egypt, Poland, China. Finally, Nicaragua manifested the need for intergovernmental negotiations to adopt a universal agreement to clarify the content of the right (UN Doc. A/76/PV.97).

³⁴² See *infra* Chapters V and VI.

CHAPTER III:
THE SCOPE OF THE RIGHT: THE DOUBLE DIMENSION OF THE RIGHT TO
A HEALTHY ENVIRONMENT

The present Chapter is devoted to an attempt of clarifying the “vague” content of the right to a healthy environment. This analysis is undertaken with due regard to the evolving nature of the right, which continues to develop as a legal and normative phenomenon. While this does not mean that it is new – the tenor of the instruments on which it is based proves as much – it most certainly means that it is evolving. Its elements are not unanimously shared by all doctrine and jurisprudence.³⁴³ However, some common characteristics can be underlined, making use of the work of former Special Rapporteur David R. Boyd, who, in 2019, submitted a report to the Human Rights Council containing good practices relating to the right to a healthy environment (from now on “Good Practices”).³⁴⁴

A second disclaimer is needed before delving into the substantive scope (Section 1), defining right-holders and duty-bearers (Section 2) and finally portraying the procedural elements of the right to a healthy environment (Section 3). The hypothesis supported in this work is that the right to a healthy environment embraces a collective dimension even when it is framed as an individual right.

It is worth remembering the considerations made in Chapter I. Since the collective aspect of the right derives from the interests it protects — namely, the environment as a global common good — it is not necessary for the right to be framed as a “group right” or as a right of peoples (such as that enshrined in the African Charter).³⁴⁵ The idea of the right to a healthy environment as a collective right comprehends its dimension as being closer to the one elaborated by the Inter-American Court of Human Rights in its Advisory Opinion of 2017: that is a dual

³⁴³ On the jurisprudence see *infra* Part II.

³⁴⁴ D.R. BOYD, *Report of the Special Rapporteur on Issue of Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Right to a Healthy Environment—Good Practices*, UN Doc A/HRC/43/53, 2019.

³⁴⁵ See *supra* Chapter II, Section 3.2.

manifestation of the right.³⁴⁶ Intrinsically collective in nature, the right to a healthy environment has, however, both an individual and communal dimension.

Once again, this is coherent with the configuration of global common goods, which, as it has been discussed above, are non-excludable – enjoyable by the entire community, which is entitled to them – and rivalrous – as in degradable through abuse.

With these coordinates in view, the reconstruction of the scope of the right to a healthy environment may be undertaken, with the aim of providing (at least partial) answers to the question concerning States' obligations.

1. *Substantive scope of the right: safe, clean, healthy and sustainable*

The substantive elements of the right to a healthy environment have already been hinted at in the previous Chapter. This Section is an effort of classification – where classification is possible – of the substantive content of the right.³⁴⁷

The aim of this paragraph is to recapitulate the characteristics of the right to a healthy environment, keeping in mind its connection to other human rights, in order to provide a smooth transition towards the thorny question of States' obligations.

1.1. *The “Good Practices” of 2019*

In December 2019, following a call for inputs to States and international organizations, the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment presented a report to the Human Rights Council. The report contained a recollection of good practices related to the implementation of the right to a healthy environment, accompanied by a list of States' legal recognition of said right through national constitution, international treaty and/or national legislation

³⁴⁶ See *supra* Chapter II, Section 3.1.

³⁴⁷ B.J. PRESTON, *The right to a clean, healthy and sustainable environment: how to make it operational and effective*, in *Journal of Energy & Natural Resources Law*, 2023, p. 1 ff.

(Annex II). The results of this compilation are that, as of 2019: 110 Countries had implicit or explicit recognition of the right to a healthy environment in their constitution, 126 signed international treaties recognising the right,³⁴⁸ and 101 had adopted national legislation implementing it. In total, 156 States out of 193 Members of the United Nations recognise the right to a healthy environment in some form.

The report focuses first on procedural rights (access to environmental information, public participation in environmental decision-making and access to justice), to which Section 3 is dedicated, and then on the substantive elements of the right. These are of relevance for this paragraph.

The Good Practices show at least six “sub-rights” in the right to a healthy environment: clean air, safe climate, healthy and *sustainably produced* food, water and sanitation, non-toxic living environment, healthy ecosystems and biodiversity.

Some of these elements regard the sustenance of humans (food, water and sanitation). These are sometimes referred to as autonomous rights: food,³⁴⁹ water,³⁵⁰ and health.³⁵¹ It is interesting to notice how the access to healthy food is framed in a “sustainable production” chain, in

³⁴⁸ In international treaties, the Special Rapporteur included the African Charter, the San Salvador Protocol, the Aarhus Convention, the Arab Charter and the Escazu Agreement.

³⁴⁹ International Covenant on Economic, Social and Cultural Rights, Art. 11 on the right to an adequate standard of living. See CESCR, *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, UN Doc. E/C.12/1999/5, 12 May 1999. See also, K. TOMAŠEVSKI, P. ALSTON (eds), *The Right to Food*, Leiden, 2021; M. BLAKENEY, *Food Loss and Food Waste: Causes and Solutions*, Cheltenham, 2019; M. GESTRI (eds), *Cibo e diritto: dalla Dichiarazione Universale alla Carta di Milano*, Modena, 2015.

³⁵⁰ UNGA Resolution on “The human right to water and sanitation”, UN Doc. A/RES/64/292, 3 August 2010; CESCR, *General Comment No. 15: The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/2002/11, 20 January 2003. See also, I. WINKLER, *The Human Right to Water: Significance, Legal Status and Implications for Water Allocation*, London, 2014; F.M. PALOMBINO, *Il diritto all'acqua. Una prospettiva internazionalistica*, Milano, 2017; D. MISIEDJAN, *Towards a Sustainable Human Right to Water*, Cambridge, 2019; E. MORGERA ET AL., *The Right to Water for Food and Agriculture*, Roma, 2020.

³⁵¹ CESCR, *General Comment No. 14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/2000/4, 11 August 2000. See also, L. PINESCHI (ed), *La tutela della salute nel diritto internazionale ed europeo tra interessi globali e interessi particolari*, Napoli, 2017.

this way including all the aspects of food sustainability.³⁵² Relating to health, the CESCR has affirmed that States must take «steps on a non-discriminatory basis to prevent threats to health from unsafe and toxic water conditions» and that they «should ensure that natural water resources are protected from contamination by harmful substances and pathogenic microbes».³⁵³

Other elements regard specific aspects such as non-toxicity of the general living environment and availability of clean air.³⁵⁴ In a previous report of the same year,³⁵⁵ the Special Rapporteur had underlined the adverse impacts of poor air quality,³⁵⁶ which include ambient and household air pollution caused by burning fossil fuels, industrial processes, poor waste management and transportation, provoking also specific damage to the health of vulnerable categories (children, the elderly, minorities, Indigenous Peoples and members of traditional

³⁵² See E. MAITRE-EKERN, C. DALHAMMAR, *Towards a hierarchy of consumption behaviour in the circular economy*, in *Maastricht Journal of European and Comparative Law*, 2019, p. 394 ff. Apart from ethical considerations on the conditions of animals (on which see J. ANOMALY, *What's Wrong With Factory Farming?*, in *Public Health Ethics*, 2015, p. 246 ff.; and N.M. WILLIAMS, *Affected Ignorance And Animal Suffering: Why Our Failure To Debate Factory Farming Puts Us At Moral Risk*, in *Journal of Agricultural & Environmental Ethics*, 2008, p. 371 ff.), intensive farming – whether of livestock or agriculture – pollutes lands, rivers and seas, contaminating nature with pesticides and chemicals, and increasing the risk of “spillover”. See M. STEL, J. EGGERS, S. NAGELMANN, *Accuracy of Risk Perception of Zoonoses Due to Intensive Animal Farming and People's Willingness to Change Their Animal Product Consumption*, in *Sustainability*, 2022, p. 589 ff.

³⁵³ CESCR, *General Comment No. 14*, cit., para. 8. More than 2 billion people lack access to safely managed drinking water and over 4 billion people lack access to safely managed sanitation (D. R. BOYD, *Human rights and the global water crisis: water pollution, water scarcity and water-related disasters*, UN Doc HRC/46/28, 19 January 2021).

³⁵⁴ Several international instruments deal with the issue of toxic substances. For example: the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, the Stockholm Convention on Persistent Organic Pollutants and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade.

³⁵⁵ D.R. BOYD, *Report of the Special Rapporteur on Issue of Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UN Doc A/HRC/40/55, 2019.

³⁵⁶ According to the World Health Organization (WHO), air pollution is the main cause of death among environmental damages, with 7 million deaths per year (WHO, *Global Air Quality Guidelines*, 2021).

communities, people living in poverty, people with pre-existing health conditions such as respiratory conditions or heart disease).

Finally, overarching elements may be identified, such as a safe climate and healthy ecosystems and biodiversity. These two aspects are directly connected to what the UNEP has described as the “triple planetary crisis” (climate crisis, loss of biodiversity and pollution). The relationship between the right to a healthy environment and the need for a safe climate has already been examined above, the latter functioning as a cross-cutting condition that underpins many of the elements previously identified (food, water, clean air, biodiversity).

The dual dimension of the right to a healthy environment is also made clear by the mention of healthy ecosystems and biodiversity. The need to abandon an exquisitely anthropocentric approach is met by the recognition of an “ecosystemic” approach, which considers human as *part of* nature. At this point, there is no need to affirm that the loss of biodiversity damages humans, since humans are *part of* that biodiversity. Balance with other parts of the ecosystems is entrenched in the collective nature of the right to a healthy environment and an ecocentric approach is needed to understand these interactions.

The Good Practices assist in delineating the more concrete dimensions of the right to a healthy environment, but they do not constitute an exhaustive list. Other elements can come into play when talking about enjoying a collective right to a healthy, clean and sustainable environment. All of these concur to defining the content of the right, which proves to be not at all vague, but actually very easy to specify.³⁵⁷ The real question under the analysis in this Chapter, however, relates to the obligations of States. Are the elements portrayed enough to clarify the content of those obligations?

³⁵⁷ In a report to the General Assembly, the former Special Rapporteur presented extensive evidence to this. The General Assembly proceeded to adopt a resolution which stated that: «the human right to a healthy environment is not an empty vessel waiting to be filled; on the contrary, its content has already been exhaustively discussed, debated, defined and clarified over the past 45 years» (UNGA, Resolution on “Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment”, cit., para. 38).

1.2. *The core elements of the right to a healthy environment in the Stockholm Declaration*

The report of 2019 is a useful tool because it considers comprehensively the standards adopted at the national and international level, but it is not the only instrument. With a view to contributing to the framing of States' obligations, and before examining what is already established – and, more importantly, what remains *absent* – reference may usefully be made to the general terms of the Stockholm Declaration. It is in Principle 1 that the core elements of the right to a healthy environment can still be discerned, and it is to that formulation that attention now turns.

Principle 1 mentions the «*solemn responsibility to protect and improve the environment for present and future generations*». While this responsibility is bestowed upon humans (“man” in the text), it is no doubt that the targets of these words are to be intended as societies, States since they are the primary recipients of human rights obligations. Moving from the specific to the general, and from rights to responsibilities, these coordinates are of help in the effort to guide the interpretation of States' obligations related to the right to a healthy environment.

1.2.1. *“Protection”: to not be subject to anthropogenic planetary destruction*

Defining protection from a substantive point of view requires a clarification of a *destructive element*. In other words, the question that must be answered is the following: protection from *what*?

It is a relatively easy question to answer, since the point of environmental degradation has been considered since the beginning of this inquiry. All attempts at damaging the environment in a significant way could potentially be considered “environmental degradation”, and in this way trigger the need for protection.

Again, from a substantive point of view, this means that the realisation of a right to a healthy environment could be threatened by war, the climate crisis, natural disasters, pandemics, pollution and so on and so forth. More generally, it could be said that the content of

“protection” is related to all those episodes of environmental degradation which are in some way *controllable* by the State. In other words, to be protected for the right to a healthy environment means to not be subject to (more or less vast) anthropogenic planetary destruction.

1.2.2. *The undefined content of “improvement”*

The Stockholm Declaration refers also to the responsibility to “improve” the environment for present and future generations.³⁵⁸ This term could be trickier to define.

Who decides the margins of improvement? And the direction towards which we must go? Do we defer these choices to politics? Civil society? Experts?

The concept of “destruction” entails the existence of an “original situation”, a status quo of sorts which gets negatively modified (a forest eradicated, a river drained, a mine depleted). Moving from a determinate situation, it is easier – in theory – to *recognise* destruction. Of course, in practice the lines are usually more blurred, and factors of human evaluation come into play. A project to build a wind farm could be considered an action to “improve” the environment – wind energy is considered a renewable source, a definitive improvement from fossil fuels – but what if that wind farm is built on land obtained after deforestation? The harm caused by deforestation to that portion of land would be irreversible. And what about the case in which the wind farm is built on land illegally expropriated from Indigenous Peoples?³⁵⁹

³⁵⁸ I will return on the point of right-holders in the next paragraph.

³⁵⁹ Attention is drawn to the *Unión Hidalgo v. EDF* case, currently pending in France, which involves the construction of a wind farm in Mexico without prior meaningful consultation with the local communities. For further discussion, see J.S. CONTRERAS, N. ALTAMIRANO, STOP EDF MEXIQUE, *Colonialisme vert et transition énergétique au Mexique: la face cachée de l’extractivisme et du renouvelable industriel*, in *Mouvements*, 2022, p. 130 ff.; C. BAILEY, C. LAVITE, *Litigating Climate Justice in Renewable Energy Projects: Reflections from Unión Hidalgo v EDF*, in *Business and Human Rights Journal*, 2025, p. 260 ff. A similar tension between renewable energy objectives and the protection of Indigenous rights emerged in the *Fosen* case before the Norwegian Supreme Court (*Statnett SF et al. v. Sør-Fosen sjtte et al.*, judgment of 11 October 2021), where licences granted for wind farms were found to violate Art. 27 ICCPR due to their severe impact on Sámi reindeer herding. Both cases illustrate that the pursuit of environmental “improvement” through decarbonisation cannot be detached from procedural

Thus far, the answer to these questions has been to interpret “improvement” as such only insofar as it is consistent with the respect of other human rights (in this example, the right to free, prior and informed consent of Indigenous Peoples) and situated within the paradigm of sustainable development, however critically that paradigm may be assessed. The very meaning of “sustainability” could be subject to relativistic considerations.

For an action to be considered “improvement” of the environment, concrete evaluations need to be made on a case-by-case basis. While this is not the place for an analysis of the sort, it should be noted that no definition of “improvement” cannot be exempt from critical evaluation of its impact on all aspects of life (human and non-human alike).³⁶⁰

2. *Duty-bearers and right-holders*

The brief commentary on what may be described as the *expectation* of protection and improvement of the environment facilitates the transition from an examination of substantive content to an analysis of States’ obligations. The present paragraph focuses primarily on the obligations arising under international human rights law, in light of the

guarantees, cultural survival and collective land rights. The transition to renewable energy, if implemented without meaningful participation and respect for affected communities, risks reproducing patterns of dispossession under the banner of sustainability.

³⁶⁰ An example of this tension can be found in the so-called REDD+ projects (Reducing Emissions from Deforestation and Forest Degradation) which aim to protect forests through a system of financial incentives. In other words, the CO₂ retention service performed by forests would be *paid*, but it must be proven. This is not irrelevant since REDD+ projects are financed through the system of “carbon credits”, which consists in the exchange of emissions and allows “big polluters” to “reset” the impact of their emissions by buying the “right to pollute” from others who pollute less (who are the owners of the REDD+ project). These measures have often been critically referred to as forms of “climate colonialism”. See M.M. BAYRAK, L.M. MARAFA, *Ten Years of REDD+: A Critical Review of the Impact of REDD+ on Forest-Dependent Communities*, in *Sustainability*, 2016, p. 620 ff.; J. DEHM, *Carbon colonialism or climate justice? Interrogating the international climate regime from a TWAIL perspective*, in *The Windsor Yearbook of Access to Justice*, 2016, p. 129 ff.; F. NEYROZ, “Colonialismo climatico”: una lettura dell’attuale stato del climate law, in *BioLaw Journal - Rivista Di BioDiritto*, 2023, p. 103 ff.; G.K. BHAMBRA, P. NEWELL, *More than a metaphor: ‘climate colonialism’ in perspective*, in *Global Social Challenges Journal*, 2022, p. 179 ff.

perspective adopted, namely the realisation of the human right to a healthy environment. However, keeping in mind the interaction between branches of international law, it should be considered how in this specific field principles and obligations of international environmental law come into play as well. Human rights obligations are read *in light of* those principles, in the same way as international environmental law *takes into account* human rights.

In order to comprehend the true dimension of the collective right to a healthy environment, it is imperative to analyse the subjects which are involved in its effective realisation. These subjects will then form part of the completed elements when moving to examining the justiciability of the right to a healthy environment. While the primary holders of obligations in IHRL are clearly States, the same straight-forward answer cannot be given in regard to beneficiaries of the right in question.

To the aim of finding some answers, this Section will first lay out States' human rights obligations, by considering also their interplay with obligations deriving from international environmental law, before moving to the definition of right-holders, where the collective dimension gets complicated by the diachronic or intertemporal element of the right to a healthy environment.³⁶¹

2.1. *States' human rights obligations in relation to the environment: the principle of due diligence*

By clarifying the substantive scope of the right to a healthy environment, the foundations are laid for defining the obligations incumbent upon States in relation to that right. And in doing so, the question may legitimately be raised as to whether the right is to be characterised as civil and political in nature, or rather as economic, social and cultural.

These two sets of rights are historically divided into the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Both their contents are shaped on the Universal Declaration of Human Rights, which lists the rights

³⁶¹ J.H. KNOX, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Framework Principles*, cit.

without explicitly differentiating between one category or the other, affirming the interdependency among all human rights.³⁶²

Neither the American Convention nor the African Charter adopt the differentiation. However, the European Convention includes only civil and political rights, delegating the role of warden of ESC rights to the European Social Charter.

Usually, civil and political rights request from States obligations of “respecting” and “ensuring”, while ESC rights call for obligations to “take steps to ensure” and speak of “progressive realisation”.³⁶³ However, the CESCR has also developed the “tripartite typology”, stating that the rights contained in the ICESCR must be *respected*, *protected* and *fulfilled*.³⁶⁴ In respect to ESC rights, and specifically in relation to the right to a healthy environment, the IACtHR identified five core obligations: «(a) *guaranteeing* everyone, without any discrimination, a healthy environment in which to live; (b) guaranteeing everyone, without any discrimination, basic public services; (c) promoting environmental *protection*; (d) promoting environmental *conservation*, and (e) promoting *improvement* of the environment». ³⁶⁵

The typology of the CESCR has since been extended to all human rights,³⁶⁶ and basically adopted by former Special Rapporteur John H.

³⁶² In 2006, the UN General Assembly adopted a resolution establishing the Human Rights Council. In its preamble it reaffirmed «that all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing, and that all human rights must be treated in a fair and equal manner, on the same footing and with the same emphasis» (UNGA Resolution on “Human Rights Council”, UN Doc A/Res/60/251, 3 April 2006, preamble). See also P. CULLET, *Definition of an environmental right in a human right context*, in *Netherlands Quarterly of Human Rights*, 1995, p. 28: «The vanishing categorization of human rights leads us to reject any hierarchy in theory insofar as all the rights we include as human rights are fundamental rights, of which none can be held to be intrinsically superior given their pervasive interdependence. The globalization of challenges tends indeed to show clearly that all biological as well as economic processes are interrelated and must be dealt within a single framework».

³⁶³ C. TOMUSCHAT, *Human Rights: Between Idealism and Realism*, cit., p. 141.

³⁶⁴ CESCR: *General Comment No. 12*, cit.; *General Comment No. 15*, cit.; *General Comment No. 19: The right to social security (art. 9)*, UN Doc. E/C.12/GC/19, 4 February 2008.

³⁶⁵ IACtHR, *Environment and Human Rights*, cit., para. 60 (emphasis added).

³⁶⁶ See A. MCBETH, J. NOLAN, S. RICE, *The International Law of Human Rights*, 2nd ed., Oxford, 2017, p. 139 ff. See also H. SHUE, *Basic Rights*, Princeton, 1980, p. 53, for a three-step recollection of the duties corresponding to a right. Shue does not differentiate among categories of rights but identifies three obligations: “non deprivation”,

Knox in the Framework Principles of 2018.³⁶⁷ Furthermore, it has been recently reaffirmed and significantly developed in General Comment No. 27 (2025) of the CESCR.³⁶⁸ Here, the obligation to *respect* requires States to refrain from conduct that directly or indirectly contributes to environmental degradation, including pollution, biodiversity loss and climate change. The obligation to *protect* entails regulating private actors and adopting effective environmental and human rights due diligence frameworks proportionate to environmental risks. The obligation to *fulfil* demands the adoption of legislative, administrative, financial and judicial measures aimed at preserving, restoring and sustainably managing ecosystems, as well as progressively strengthening mitigation and adaptation policies.³⁶⁹

In light of this approach and having regard to the substantive content of the right to a healthy environment, it is necessary to consider whether such a distinction is required for the purposes of the present analysis.

In some way, it could be argued that the right to a healthy environment acts as some sort of hybrid, which could be included in one category or the other. After all, an examination of the early jurisprudence on “green” rights reveals that the environmental dimension has generally been linked to the right to life and to the right to respect for private and family life, both of which have historically been included among civil and political rights. Its other dimensions – health, food, adequate standard of living – are on the other hand connected to the list of economic, social and cultural rights. No definitive conclusion may be drawn in either direction. Accordingly, rigid or simplified classifications should be

“protection”, and “aid” which roughly correspond to “respect”, “protect” and “fulfil”. See also, Office of the United Nations High Commissioner for Human Rights, *Fact Sheet No. 33: Frequently Asked Questions on Economic, Social and Cultural Rights*, United Nations, 1 December 2008, p. 11.

³⁶⁷ J.H. KNOX, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Framework Principles*, cit., Principle 2: «States should respect, protect and fulfil human rights in order to ensure a safe, clean, healthy and sustainable environment».

³⁶⁸ CESCR, *General Comment No. 27*, cit.

³⁶⁹ Notably, the Committee links these obligations to intergenerational equity, the precautionary principle and common but differentiated responsibilities, and clarifies that the failure to take appropriate action to protect the climate system may constitute a breach of the Covenant. In doing so, the General Comment confirms that the right to a healthy environment is not merely aspirational, but operational within the existing structure of human rights obligations.

avoided, and attention should instead be directed to the relevant instruments in their concrete application to the right to a healthy environment.³⁷⁰

The first step in trying to understand the obligations of States *vis-à-vis* the right to a healthy environment is to comprehend human rights obligations of States. In this circumstance, divisions of rights in categories are not helpful, mainly because the right to a healthy environment has clearly proven to escape traditional categorisation. Accordingly, any construction grounded in the theory of successive “generations” of rights, or in a strict dichotomy between civil and political rights and economic, social and cultural rights, is to be set aside.

Having excluded the classification of rights into distinct categories as a proxy for differentiated obligations, the full spectrum of human rights obligations may be considered in order to assess whether, and in what manner, they are applicable to the right to a healthy environment. Of course, each right imposes on States a various number of obligations, which are often very diverse in nature.³⁷¹ On this point the approach adopted by Pisillo Mazzeschi may usefully be relied upon, in so far as it proposes an assessment limited to those which he calls «categorie utili e aventi valore concettuale-sistematico».³⁷² In this group he includes: negative/positive obligations, performance/due diligence obligations, and obligations which demand immediate/progressive realisation.

Deferring to other, more complete, works the burden of clarifying each and every one of these obligations, the purpose here is to consider them in relation to the content of the right to a healthy environment.

First, States have the negative obligation to abstain from committing acts which could cause harm to the right to a healthy environment. This falls also in line with a general obligation to *respect* human rights, in the language of the CESCR. In practice, and with regard to the components of the right as defined by the Special Rapporteur in the report of 2019, this means abstaining from actively polluting air, damaging the climate, violating the right to food, contaminating water or threatening sanitation,

³⁷⁰ For a critique of the division among obligations to respect, protect and fulfil, see R. PISILLO MAZZESCHI, *Diritto internazionale dei diritti umani: Teoria e prassi*, cit., p. 105 ff.

³⁷¹ *Idem*, p. 92.

³⁷² *Idem*, p. 108.

using toxic pesticides on the environment, and destroying ecosystems and biodiversity.

However, this is not enough. States must also guarantee the respect of the components of the right to a healthy environment through positive actions, that is through active behaviours. This translates into the obligation of the State to do what is in its power to guarantee the realisation of the right through monitoring of the behaviour of third parties (which could translate in an obligation to *protect*) and taking steps to adopt measures apt to facilitate the enjoyment of the right to a healthy environment (what the CESCR calls an obligation to *fulfil*). It will be shown that this last obligation is particularly relevant in relation to the procedural content of the right to a healthy environment, and therefore of specific importance in the area of justiciability.³⁷³

To summarise, the State has an obligation to refrain from actively impeding the realisation of the right to a healthy environment (*negative obligation*) and another obligation to guarantee its full enjoyment, through whatever means necessary (*positive obligation*).

This leads to the second group: performance/due diligence obligations. While the first group is related to the concept of reaching a result, and efforts are not considered as relevant, the second category is strictly linked to the idea of “best efforts”. Negative obligations are usually performance obligations, since no effort is required on the State to avoid killing a person or torturing them. Due diligence obligations are particularly relevant in the field of positive obligations, and, for the purpose of this analysis, of the utmost importance.

Due diligence is usually considered in circumstances where the State is responsible for the behaviour of private actors, and that behaviour is not directly attributable to the State itself.³⁷⁴ This does not require, of course, complete control over any action conducted by private actors. What is necessary, in order to meet the requirements of due diligence obligations, is the deployment of the *best efforts* to reach the result.

In 2004, the Human Rights Committee clarified that, while the ICCPR does not have a direct horizontal effect – it cannot be applied

³⁷³ See *infra* Section 3 and Part II.

³⁷⁴ If the behaviour of the private actors is attributable, then there is a direct responsibility of the State for the action itself. See T. KOIVUROVA, K. SINGH, *Due diligence*, in *Max Planck Encyclopedia of Public International Law*.

directly in disputes between to private parties – the Covenant imposes a general obligation of due diligence on States, who are required to prevent violations of the rights enshrined in the Covenant even when those violations are perpetrated by private actors. This means, in other words, that States should «take appropriate measures or [...] exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities».³⁷⁵ The Human Rights Committee specifically connects these positive obligations of due diligence to the need to provide effective remedies.³⁷⁶ This is confirmed by case law of both the IACtHR and the ECtHR.³⁷⁷

“Appropriate measures” can be legislative, financial, judicial or administrative. They relate to the true and complete realisation of the right to a healthy environment and can be linked to the last of the group of obligations examined: the ones which demand immediate/progressive realisation.

Despite being at the two opposite ends of the spectrum, these two obligations are not in complete antithesis. Immediate realisation explains itself, demanding an action from the State which is not prolonged over time. However, progressive realisation does not mean that the State is obligated for an undetermined future, it does not leave it free to decide when to comply with its obligation. Quite oppositely, progressive

³⁷⁵ Human Rights Committee, *General Comment No. 31*, cit., para. 8. This is also applied by the CESCR in relation to the behaviour of business activities, in line with the UN Guiding Principles on Business and Human Rights (UN Human Rights Council Resolution on “Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework”, UN Doc. A/HRC/17/31, 21 March 2011). See CESCR, *General Comment No. 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, issued by the Committee on Economic, Social and Cultural Rights*, UN Doc. E/C.12/GC/24, 10 August 2017. On the issue of due diligence regarding business activities see also J. BONNITCHA, R. MCCORQUODALE, *The Concept of ‘Due Diligence’ in the UN Guiding Principles on Business and Human Rights*, in *European Journal of International Law*, 2017, p. 899 ff.; J.G. RUGGIE, J.F. SHERMAN III, *The Concept of ‘Due Diligence’ in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale*, in *European Journal of International Law*, 2017, p. 921 ff.

³⁷⁶ Human Rights Committee, *General Comment No. 31*, cit., para. 8.

³⁷⁷ IACtHR, *Velásquez Rodríguez v. Honduras*, cit.; ECtHR: *Ergi v. Turkey*, application no. 23818/94, Judgment of 28 July 1998; *Timurtas v. Turkey*, application no. 23531/94, Judgment of 13 June 2000; *Bevacqua and S v. Bulgaria*, application no. 71127/01, Judgment of 12 June 2008.

realisation of an obligation entails the need for the State to «move as expeditiously and effectively as possible» towards the realisation of the right.³⁷⁸ According to Pisillo Mazzeschi this can be considered as a *general complex obligation composed of other specific obligations of different nature*.³⁷⁹

When these considerations are applied to the right to a healthy environment, it becomes apparent that its full realisation requires the consideration of both negative and positive obligations, as well as obligations of due diligence and progressive realisation. These elements may now be tested once more by reference to the substantive content of the right as defined in the 2019 report.

States must exercise due diligence in preventing private actors – business activities included – from violating the right to a healthy environment (through pollution, GHG emissions, contamination of water, destruction of ecosystems and biodiversity etc.).³⁸⁰ They should also endeavour in the adoption of all the necessary measures (legislative, financial, administrative, judicial) for the progressive realisation of the substantive components of the right to a healthy environment: clean air, safe climate, food, water and sanitation, non-toxic environments, safe ecosystems and biodiversity. On this point, the IACtHR clarified that «the exercise of the right to a healthy environment must be governed by the criteria of *availability, accessibility, sustainability, acceptability and adaptability*».³⁸¹ These roughly translate into the four “minimum core obligations” identified by Special Rapporteur Leo Heller in relation to the right to water: availability, accessibility, affordability and safety.³⁸² Therefore, in relation to all the substantive components of the right to a healthy environment the following must be guaranteed: sufficient

³⁷⁸ CESCR, *General Comment No. 3: The nature of States Parties obligations (art. 2, para. 1 of the Covenant)*, UN Doc. E/1991/23, 14 December 1990, para. 9.

³⁷⁹ R. PISILLO MAZZESCHI, *Diritto internazionale dei diritti umani: Teoria e prassi*, cit., p. 113.

³⁸⁰ This requirement finds further support in *General Comment No. 27* (cit.), where the CESCR expressly calls upon States to establish legal frameworks imposing human rights and environmental due diligence obligations on business enterprises throughout their operations and value chains, particularly where environmental harm may impair Covenant rights.

³⁸¹ IACtHR, *Environment and Human Rights*, cit., para. 60 (emphasis added).

³⁸² L. HELLER, *Report of the Special Rapporteur on the human rights to safe drinking water and sanitation*, UN Doc A/HRC/45/10, 8 July 2020.

availability, physical access, economic and ecologic sustainability, sensitisation towards multiple form of discrimination which can arise (acceptability, which can be linked also to *intersectionality*), and accommodation to the local context (adaptability).³⁸³

On this basis, the right to a healthy environment may be characterised as a “hybrid” right: comprised of a mix of positive/negative duties, as well as performance/due diligence obligations and immediate/progressive realisation obligations.

These last considerations make it all the more clear why human rights obligations in the field of environmental protection must be necessarily linked to obligations deriving from international environmental law. This is especially true when considering one of the largest components of the right to a healthy environment: the guarantee of a safe climate.

2.1.1. *The UN climate regime as a true source of binding obligations?*

The Preamble of the Paris Agreement affirms clearly that «climate change is a common concern of humankind». Chapter II has already mentioned the principle of common but differentiated responsibilities (CBDR). These two consolidated acknowledgements – common concern and common responsibility – lead to the problematic question of *communal obligations*.

Apart from a duty of cooperation and a general idea of solidarity,³⁸⁴ IHRL usually deals with the *individual* obligations of the State in relation to its citizens. It is not – generally – equipped to face collective obligations. However, the pervasive and all-encompassing nature of the climate crisis and its impact on human rights compels a reconsideration of this paradigm and examination of other instruments to *fill the gaps*. For this purpose, the analysis will first address the obligations arising under the UNFCCC; it will then examine the relationship between those obligations and IHRL in light of the recent requests for advisory opinions; and finally, it will consider the implications of recognising

³⁸³ CESCR: *General Comment No. 13: The right to education (article 13 of the Covenant)*, UN Doc. E/C.12/1999/10, 8 December 1999; *General Comment No. 14*, cit.; *General Comment No. 19*, cit.

³⁸⁴ R. WOLFRUM, C. KOJIMA (eds.), *Solidarity: A Structural Principle of International Law*, cit.

collective responsibility, with particular attention to the issue of jurisdiction in IHRL.

With regard to the first point, it is necessary, as a preliminary matter, to state the obvious: the UNFCCC is a treaty as defined by the Vienna Convention on the Law of Treaties (VCLT), and such is also the Paris Agreement. This means, according to Article 26 VCLT, that it is «binding upon the parties to it and must be performed by them in good faith» (principle of *pacta sunt servanda*). However, its binding nature has been the object of fervent and continued criticism due to the way in which its obligations are framed.

In Article 2, the Paris Agreement sets a long-term temperature goal: to keep the rise in mean global temperature to well below 2°C (3.6°F) above pre-industrial levels, and preferably limit the increase to 1.5°C (2.7°F), recognising that this would substantially reduce the effects of climate change.³⁸⁵

If the global temperature rise exceeds 2°C this would result in flooding due to rising sea levels, heat stress due to more intense and prolonged heat waves, increased respiratory diseases associated with deterioration of air quality due to periods of drought (severe forest fires), increased spread of infectious diseases, severe flooding due to torrential rains, and interruptions of food production and drinking water supply.³⁸⁶ Ecosystems, flora and fauna would be seriously damaged, and biodiversity would be lost. An inadequate climate policy would, in the second half of the century, result in hundreds of thousands of victims in Western Europe alone. The risk of reaching such a point of no return worsens exponentially with an increase in temperature between 1°C and

³⁸⁵ See also M. BURGER, J. WENTZ, R. HORTON, *The Law and Science of Climate Change Attribution*, in *Columbia Journal of Environmental Law*, 2020, p. 147: «Evidence linking human influence on climate to the harmful impacts of climate change plays an important role in lawsuits seeking to compel action on climate change as well as the legal defense of programs and regulations aimed at reducing greenhouse gas emissions or advancing adaptation objectives».

³⁸⁶ See IPCC Special Reports: *Global Warming of 1.5°C*, 2018; *Global Warming of 1.5°C, Summary for Policymakers*, 2018. More recently, see IPCC, Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, *Climate Change 2021: The Physical Science Basis, Summary for Policymakers*, 2021.

2°C.³⁸⁷ Therefore, emissions should be reduced as soon as possible and reach net-zero by the middle of the 21st century. To stay below 1.5°C of global warming, emissions need to be cut by roughly 50% by 2030.³⁸⁸ This is an aggregate of each country's nationally determined contributions (NDCs).³⁸⁹

The Paris Agreement has been seen as the “world's greatest diplomatic success”.³⁹⁰ While this proposition may be regarded as accurate, due consideration must be given to the technical nature of the obligations contained therein, and to the *extent* to which they possess genuinely binding force.³⁹¹

In a detailed analysis of its dispositions, Rajamani identifies three categories of obligations: hard, soft and “non-obligations”.³⁹² The latter, far from «intended either to undermine the importance of these provisions or to dismiss the efforts of Parties»,³⁹³ by admission of the author herself, are all those provisions which «apply in a blanket fashion to Parties, and do not prescribe, whether in mandatory, recommendatory or even cajoling terms, a particular course of action for Parties. They do, however, provide context, construct a narrative and generate mutual reassurances about the nature of the problem being addressed, particular ways of addressing them, and availability of support for doing so».³⁹⁴ According to Rajamani, even these “non-obligations”, a category in which she includes a large part of the adaptation measures, perform a “critical function”, because they «capture shared understandings,

³⁸⁷ IPCC Special Reports: *Global Warming of 1.5°C*, 2018; *Global Warming of 1.5°C, Summary for Policymakers*, 2018.

³⁸⁸ *Idem*.

³⁸⁹ See S. JOLLY, A. TRIVEDI, *Principle of CBDR-RC: Its Interpretation and Implementation Through NDCs in the Context of Sustainable Development*, in *Washington Journal of Environmental Law and Policy*, 2021, p. 309 ff.

³⁹⁰ F. HARVEY, *Paris Climate Change Agreement: The World's Greatest Diplomatic Success*, in *The Guardian*, 14 December 2015.

³⁹¹ See also D. KLEIN, M.P. CARAZO, M. DOELLE, J. BULMER, A. HIGHAM (eds), *The Paris Agreement on Climate Change: Analysis and Commentary*, Oxford, 2017; G. VAN CALSTER, L. REINS (eds), *The Paris Agreement on Climate Change: A Commentary*, Cheltenham, 2021.

³⁹² L. RAJAMANI, *The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations*, in *Journal of Environmental Law*, 2016, p. 337 ff.

³⁹³ *Idem*, p. 339, note 7.

³⁹⁴ *Idem*, p. 356.

endorse common conceptual underpinnings and tenets, and signal solidarity in addressing the problem».³⁹⁵

Hard obligations can be found in the area of “mitigation measures”.³⁹⁶ They are directed at “each Party”, «framed in mandatory terms (‘shall’), with clear and precise normative content, and no qualifying or discretionary elements». ³⁹⁷ However, “soft” obligations are also present in the field of mitigation, frequently expressed through terms such as “should” or “are encouraged to”.³⁹⁸

Therefore, stronger normative language may be identified within the mitigation dimension – namely, measures aimed at combating climate change (for example, the reduction of GHG emissions) – whereas the field of adaptation – understood as the development of a more ecologically resilient society – is generally characterised by more flexible formulations (and no specific examples are provided in the Paris Agreement).

Is this enough to state that the Paris Agreement is *not* binding? The view advanced here is that the answer is no, for a number of reasons.

First, the concept of binding force is in itself problematic where these types of agreements are involved. In this sense, some authors talk about the “regulatory” function of the Paris Agreement.³⁹⁹ They affirm its

³⁹⁵ *Ibidem*.

³⁹⁶ *Idem*, p. 352. In her analysis, Rajamani underlines how in the negotiation phase developing countries sought stronger wording for obligations regarding adaptation and means of implementation (finance, technology, capacity building) alongside mitigation and transparency, while developed countries preferred to focus on the latter.

On the nature of mitigation obligations in IEL see also B. MAYER, *Climate Change Mitigation as an Obligation under Customary International Law*, in *Yale Journal of International Law*, 2023, p. 105 ff. The author draws the existence of a customary norm linked to the general due diligence and prevention principles, affirming that this is sustained by both practice and *opinio juris*.

³⁹⁷ D. BODANSKY, J. BRUNNÉE, L. RAJAMANI, *International Climate Change Law*, cit., p. 213.

³⁹⁸ For example, art. 4(4): «Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances» (L. RAJAMANI, *The 2015 Paris Agreement*, cit., p. 354).

³⁹⁹ J. PICKERING, J.S. MCGEE, S.I. KARLSSON-VINKHUYZEN, J. WENTA, *Global Climate Governance Between Hard and Soft Law: Can the Paris Agreement’s ‘Crème*

impact on global governance by underlining how hard and soft law alike can perform such a task. This is in line with the previous reflection on the value of soft law.⁴⁰⁰ In the field of environmental protection, precisely due to the fact that normative effect and governance follow a peculiar interplay, «international norms that may otherwise be considered hard law owing to their formal legal status or legal form (such as promises made in treaties or norms based on custom) can still be viewed as soft law, or of having soft legal character, if they are imprecise or lack mechanisms for delegating the resolution of disputes or questions of interpretation» and in the same way softer obligations can still have a strong impact on the regulatory framework.⁴⁰¹

Secondly, the Paris Agreement is surely an unusual treaty, combining different kinds of obligations and mixing various tenors of language. However, it is a treaty, nonetheless. This means that, like every other treaty, it is subject to the Vienna Convention on the Law of Treaties, as already said. It is worth recalling, then, that the VCLT codifies also criteria for interpreting the language of treaties. Article 31(1) VCLT states: «A treaty shall be interpreted *in good faith* in accordance with the *ordinary meaning* to be given to the terms of the treaty *in their context* and *in the light of its object and purpose*».⁴⁰² Following the article, the interpretation of a treaty should *start* with the literary meaning, but not

Brûlée' Approach Enhance Ecological Reflexivity?, in *Journal of Environmental Law*, 2019, p. 1 ff.

⁴⁰⁰ See *supra* Chapter II.

⁴⁰¹ J. PICKERING, J.S. MCGEE, S.I. KARLSSON-VINKHUYZEN, J. WENTA, *Global Climate Governance*, cit., p. 5. See also, A. BOYLE, C. CHINKIN, *The Making of International Law*, Oxford, 2007; K. ABBOTT, D. SNIDAL, *Hard and Soft Law in International Governance*, in *International Organization*, 2000, p. 421 ff.

⁴⁰² This rule is now part of customary international law. See ICJ: *Territorial Dispute Case (Libyan Arab Jamabiriya/Chad)*, Judgment of 3 February 1994; *Oil Platforms Case (Iran v United States of America)*, Judgment of 6 November 2003. On the point see also R. GARDINER, *Treaty Interpretation*, 2nd ed., Oxford, 2016; J. SOREL, V. BORÉ-EVENO, *Article 31*, in O. CORTEN, P. KLEIN (eds), *The Vienna Conventions on the Law of Treaties: A Commentary, Vol I*, Oxford, 2011; J. D'ASPROMONT, *The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order*, in O.K. FAUCHALD, A. NOLLKAEMPER (eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law*, Oxford, 2012, p. 141 ff. See also G. PANE, *Casi climatici ed extraterritorialità: quali prospettive d'integrazione fra diritto internazionale dell'ambiente e diritto internazionale dei diritti umani?*, in *Quaderni SIDIBlog* 2024, 2025, p. 145 ff.

end there.⁴⁰³ The literary interpretation is accompanied by systematic interpretation (“in their context”) and teleological interpretation (“in the light of its object and purpose”).⁴⁰⁴

According to Ammann, teleological (or purposive) interpretation can offer clarity for judges and leaves room for evolutionary interpretation of a treaty.⁴⁰⁵ It is of course also risky, because the object and purpose of a treaty are not always clear.⁴⁰⁶ However, it is true that the Paris Agreement contains several clauses which state the “aim” of its dispositions. While these are not in themselves “hard” obligations, in the language of Rajamani, they indeed perform at least two functions: clarifying the objective of other obligations (hard, soft and non-obligations), as well as crystallising the direction of the “good faith effort” which is expected of the Parties.⁴⁰⁷ Moreover, the “purpose” of the agreement is clearly stated in Article 2 (the long-term temperature goal) as declared by Article 3.⁴⁰⁸

To conclude, framing the issue of *value* of the Paris Agreement in terms of either exclusively diplomatic impact or strong binding nature is probably not all that relevant. The Paris Agreement has determined an historic moment in the fight against climate change because it has established, in a codified text, the relationship existing between the violation of human rights and the climate crisis, and in doing so it has undoubtedly affirmed that efforts have to be made towards the

⁴⁰³ ICJ, *Competence of Assembly regarding admission to the United Nations*, Advisory Opinion of 3 March 1950.

⁴⁰⁴ To these a fourth should be added: historical interpretation ex Art. 32 VCLT: «Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion». On the interplay between these four methods see also O. AMMANN, *Domestic Courts and the Interpretation of International Law: Methods and Reasoning Based on the Swiss Example*, Leiden, 2020, p. 221 ff.

⁴⁰⁵ O. AMMANN, *Domestic Courts and the Interpretation of International Law: Methods and Reasoning Based on the Swiss Example*, cit., p. 211. See also Y. LE BOUTHILLIER, *Article 32*, in in O. CORTEN, P. KLEIN (eds), *The Vienna Conventions on the Law of Treaties*, cit., p. 850 ff.

⁴⁰⁶ J. KLABBERS, *Some Problems Regarding the Object and Purpose of Treaties*, in *Finnish Yearbook of International Law*, 1997, p. 138 ff; D.S. JONAS, T.N. SAUNDERS, *The Object and Purpose of a Treaty: Three Interpretive Methods*, in *Vanderbilt Journal of Transnational Law*, 2010, p. 565 ff.

⁴⁰⁷ L. RAJAMANI, *The 2015 Paris Agreement*, cit., p. 354.

⁴⁰⁸ Paris Agreement, Art. 3: «[...] all Parties are to undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 with the view to achieving the *purpose of this Agreement* as set out in Article 2» (emphasis added).

elimination of that violation. In this sense, it is of immense importance for the present work. Indeed, as will be seen, the Paris Agreement functions as an interpretative instrument of human rights obligations relating to the climate crisis and, willingly or less, it has provided a strong anchor for claim of realisation of one of the core components of the collective right to a healthy environment.

2.1.2. *The (lack of?) consensus on human rights obligations related to climate change: the Advisory Opinions*

Despite the fact that the relationship between human rights and the climate crisis has been apparent – officially – at least for a decade, there is still no uniform answer to what human rights obligations must be deployed to face such violations. Courts – both national and international – have taken it upon themselves to clarify some of these obligations, and Part II will be dedicated to this work. However, the lack of consensus on human rights obligations has not been met with complete silence by doctrine and institutions and some coordinates can be drawn with the aim – persistent throughout this Part – to provide a guiding framework for the analysis of the jurisprudence.

States' obligations in relation to human rights, and specifically with regard to the right to a healthy environment, have been set out above. An overview has also been provided of the elements contained in the Paris Agreement, understood as a codification of international efforts to address the climate crisis. The purpose of the present Section is to bring these two strands together through the instruments currently available.

As a preliminary matter, it must be acknowledged what remains absent: no comprehensive global instrument currently clarifies the human rights obligations arising in relation to the climate crisis. Indeed, in the past few years, States have begun to look for different venues to obtain answers to this question. Specifically, through the form of requests for advisory opinions.⁴⁰⁹

⁴⁰⁹ V. LANOVOY, M. COHEN, *Climate Change Before International Courts and Tribunals: Reflections on the Role of Public Interest in Advisory Proceedings*, in *Heidelberg Journal of International Law*, 2025, p. 97 ff., for the characterisation of the three climate advisory proceedings as a form of public interest litigation before international courts and

The first request was presented in 2022 by the Commission of Small Island States on Climate Change and International Law (COSIS) to the International Tribunal for the Law of the Sea (ITLOS).⁴¹⁰ In 2023, two others followed: a request to the IACtHR and one to the ICJ.⁴¹¹

The ITLOS Advisory Opinion was also the first to be delivered in 2024.⁴¹² It focuses on the issue of marine pollution and is therefore mainly targeted on inter-State obligations. Despite what some authors have labelled as “contextual and systemic approach to interpretation”,⁴¹³ and despite the deep analysis of Article 293 UNCLOS which enshrines such systemic approach,⁴¹⁴ it must be noted that the Advisory Opinion makes

tribunals, and for their potential catalytic effects beyond the formal binding/non-binding divide.

⁴¹⁰ Co-chairs of the Commission of Small Island States on Climate Change and International Law, “Request for Advisory Opinion”, 12 December 2022.

⁴¹¹ “Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile”, 9 January 2023; UNGA Resolution on “Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change”, cit.

A further request is currently pending before the African Court on Human and Peoples’ Rights, confirming the global expansion of advisory proceedings on climate-related obligations. For a reflection on its potential impact on the African system see M. ADIGUN, *Climate Change Litigation before International Human Rights Tribunals in Africa: The Role of Advisory Opinions*, in *International Community Law Review*, 2025, p. 136 ff.

⁴¹² ITLOS, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion of 21 May 2024. The question was framed in this way: «What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea (the “UNCLOS”), including under Part XII: (a) *to prevent, reduce and control* pollution of the marine environment in relation to the deleterious effects that result or are likely to result *from climate change*, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere? (b) *to protect and preserve* the marine environment *in relation to climate change impacts*, including ocean warming and sea level rise, and ocean acidification?» (emphasis added).

⁴¹³ J. PAINE, *The ITLOS Advisory Opinion on Climate Change: Selected Issues of Treaty Interpretation*, in *EJIL:Talk!*, 3 June 2024. See also V. LANOVOY, M. COHEN, *Climate Change Before International Courts and Tribunals: Reflections on the Role of Public Interest in Advisory Proceedings*, cit.

⁴¹⁴ UNCLOS, Art. 293(1): «A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention».

reference to human rights only once in 153 pages.⁴¹⁵ It is a short sentence at page 35, paragraph 66: «In this respect, the Tribunal notes that climate change represents an existential threat and raises human rights concerns».⁴¹⁶ It can be quickly noted that the Advisory Opinion refers to obligations of due diligence and mentions obligations to “prevent”, “reduce” and “control” marine pollution – also deriving from climate change – through “all necessary measures”, in light with Article 194 UNCLOS.⁴¹⁷

It should also be noted that no connection with human rights is made in the request for the Advisory Opinion presented by COSIS. The other two requests, on the other hand, deal more explicitly with human rights, either directly or indirectly. Both have obtained their answers in the summer of 2025, but before considering those, it is relevant to frame the context in which they have been developed, in order to better understand their outcome.⁴¹⁸

See C. MCLACHLAN, *The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention*, in *International and Comparative Law Quarterly*, 2005, p. 279 ff.; E. CAVALCANTI DE MELLO FILHO, *The Normative Porosity of the UN Convention on the Law of the Sea: From “Human Rights at Sea” to “Ocean-Climate Nexus”*, in *Minnesota Journal of International Law*, 2025, p. 87 ff.

⁴¹⁵ See also ITLOS, *Advisory Opinion on Climate Change*, cit., Separate Opinion of Judge Kittichaisaree, para. 28: «In this Advisory Opinion, the Tribunal merely states briefly, in paragraph 66, that it “notes that climate change represents an existential threat and raises human rights concerns.” In doing so, the Tribunal sidesteps the need to construe article 293 (Applicable law) of the Convention to cover human rights issues in order to answer the questions posed by the Request».

⁴¹⁶ On this point see also K. ELMAHMOUD, *The ITLOS Advisory Opinion: Human Rights as a Withered Branch of International Law?*, in *EJIL:Talk!*, 24 June 2024. On the employment of “considerations of humanity” in the jurisprudence of the ITLOS see A. PETRIG, *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects*, Leiden, 2014.

⁴¹⁷ ITLOS, *Advisory Opinion on Climate Change*, cit., paras. 189, 195-198, 201-243.

⁴¹⁸ For a general reflection on the requests for the three advisory opinions mentioned, see A.L.S. ROCHA, M.A. TIGRE (eds), *The Role of Advisory Opinions in International Law in the Context of the Climate Crisis*, Leiden, 2025.

2.1.2.1 *The 2025 Advisory Opinion of the Inter-American Court on the Climate Emergency and Human Rights*

From a chronological point of view, the first request to be sent and the first opinion to be delivered was the one of the Inter-American Court of Human Rights. It was presented by the Republic of Colombia and the Republic of Chile on 9 January 2023, it is 13 pages long and it encompasses a view of the climate crisis particularly attentive to the impact on human rights – as it would have been expected from a request directed to a human rights’ court. It recognises the urgency of the matter and “the need for Inter-American *standards* to *accelerate* the response to the climate emergency”.⁴¹⁹ On this point, the request underlines that those responses must take into account both mitigation and adaptation measures.⁴²⁰ It is of interest that human rights are identified as a “guide” for the adoption of those measures.⁴²¹

This last point is particularly relevant because it shifts the traditional view of the relationship between climate obligations and human rights obligations. Through an analysis of the report published by John H. Knox in 2016 (the “Climate Change Report”),⁴²² Boyle affirms that the reference made by the Paris Agreement to the respect of human rights is not made to reinforce human rights in the implementation of climate obligations.⁴²³ On the contrary this reference would serve as a way to reinforce climate obligations, to give strength to those dispositions which ought to be interpreted in the light of human rights obligations.⁴²⁴

The request continues mentioning the Advisory Opinion of 2017 and demanding clarification on States’ obligations – individual *and* collective – to address the negative consequences on human rights brought by the climate crisis. The questions are detailed, specific obligations are

⁴¹⁹ “Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights”, cit., p. 5 (emphasis added).

⁴²⁰ *Ibidem*.

⁴²¹ *Idem*, p. 6.

⁴²² J.H. KNOX, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Climate Change Report*, cit.

⁴²³ A. BOYLE, *Climate Change, the Paris Agreement and Human Rights*, in *International and Comparative Law Quarterly*, 2018, p. 759 ff.

⁴²⁴ See also M. MONTINI, *Verso una giustizia climatica basata sulla tutela dei diritti umani*, in *Ordine internazionale e diritti umani*, 2020, p. 513.

demanded under the American Convention, in light of the Paris Agreement and considering the issue from an *intersectional perspective*.⁴²⁵

Other sets of questions are asked in regard to specific categories: rights of participation and environmental information, rights of children and intergenerational equity, access to justice, environmental defenders. Finally, the request considers the “shared and differentiated human rights obligations and responsibilities of States in the context of the climate emergency”.⁴²⁶

The request to the IACtHR undoubtedly reflects the advanced level of its jurisprudence on the matter of human rights and environment.⁴²⁷ The questions asked are clear, technical, specific and they cover all aspects of the climate crisis which intersect human rights. It is an *informed* request to an informed Court.

On this point, and before delving into the analysis of the Opinion, it is relevant to remember the way in which the IACtHR has outlined the obligations of States regarding the right to a healthy environment. In its Advisory Opinion of 2017, the Court has affirmed that States «shall promote the protection, preservation, and improvement of the environment»,⁴²⁸ through non-discrimination.⁴²⁹ Furthermore, the Court

⁴²⁵ Here the specific questions asked: «1. What is the scope of the State’s duty of prevention with regard to climate events caused by global warming, including extreme events and slow onset events, *based on the obligations under the American Convention, in light of the Paris Agreement and the scientific consensus* which recommend that global temperatures should not increase beyond 1.5°C? 2. In particular, what measures should States take to minimize the impact of the damage due to the climate emergency in light of the obligations established in the American Convention? In this regard, *what differentiated measures should be taken in relation to vulnerable populations or based on intersectional considerations?* 2.A. What should a State take into consideration when implementing its obligations: (i) to regulate; (ii) to monitor and oversee; (iii) to request and to adopt social and environmental impact assessments; (iv) to establish a contingency plan, and (v) to mitigate any activities under its jurisdiction that exacerbate or could exacerbate the climate emergency? 2.B. What principles should inspire the actions of mitigation, adaptation and response to the losses and damage resulting from the climate emergency in the affected communities?» (Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights”, cit., p. 8-9, emphasis added).

⁴²⁶ *Idem*, p. 12-13.

⁴²⁷ See V. KAHL, J.D. RODRÍGUEZ ORÚE, *A Rights Revolution in the Anthropocene: Reflections on the IACtHR Advisory Opinion on the Climate Emergency*, in *Environmental Policy and Law*, 2026, p. 1 ff.

⁴²⁸ Protocol of San Salvador, Art. 11.

⁴²⁹ IACtHR, *Environment and Human Rights*, cit., para. 60.

emphasises other four general obligations related to the right to a healthy environment, which derive from a combination of IHRL and IEL: «(1) the obligation of prevention; (2) the precautionary principle; (3) the obligation of cooperation, and (4) the procedural obligations relating to environmental protection». ⁴³⁰

The Court delivered its Advisory Opinion in July 2025. ⁴³¹ Building upon its previous one on *Environment and Human Rights*, the Court reaffirmed the autonomous nature of the right to a healthy environment under the American Convention and the San Salvador Protocol, while significantly expanding the normative reach of States' obligations in the context of the climate crisis.

In continuity with the progressive approach that has long characterised the Inter-American system, ⁴³² the Court framed the climate emergency as both a human rights and an existential challenge, where ecological integrity, intergenerational justice, and social equity converge as the basis of legal responsibility.

More specifically, the Court begins by situating a healthy climate within the broader framework of the right to a healthy environment, as recognised in its Advisory Opinion No. 23/17, and conceptualising climate stability as a *precondition* for the enjoyment of all other human rights. ⁴³³ This right, the Court explains, is informed by intergenerational equity and intersectionality, two guiding principles that ensure both temporal and social inclusiveness in climate action. As already discussed diffusely in this book, the former calls upon States to safeguard the interests of future generations, while the latter requires acknowledging that the burdens of the climate crisis fall unequally across groups, often

⁴³⁰ *Idem*, para. 125. On the point, see also *supra* Chapter II.

⁴³¹ IACtHR, *Climate Emergency and Human Rights*, Advisory Opinion of 29 May 2025. At the time in which I am writing, most of the contributions on the Opinion are in the form of blogposts. For some overviews of the main issues touched by the Court see R. CELORIO, *Advisory Opinion 32/25 on the Climate Emergency and Human Rights: The Inter-American Court of Human Rights Meets the Moment*, in *ASIL Insights*, 9 October 2025; J. AUZ, *The Inter-American Court of Human Rights' Advisory Opinion on the Climate Emergency: A Global South Contribution to Climate Governance*, in *EJIL:Talk!*, 18 July 2025; M.A. TIGRE, M. BÖNNEMANN, K. SILVERMAN-ROATI, *A Blueprint for Rights-Based Climate Action: The Inter-American Court of Human Rights' Advisory Opinion on the Climate Emergency*, in *Verfassungsblog*, 9 July 2025.

⁴³² See also, more diffusely, *infra* Chapter V, Section 1.

⁴³³ IACtHR, *Climate Emergency and Human Rights*, cit., paras. 42 ff.

reinforcing pre-existing forms of discrimination and structural inequality.⁴³⁴

Against this normative backdrop, the Court articulates a tripartite structure of State obligations: to respect, to guarantee, and to cooperate.⁴³⁵ These duties, it clarifies, are mutually reinforcing and demand “all necessary measures” at the domestic and international levels. The obligation to *respect* prohibits actions that directly or indirectly cause environmental harm; the obligation to *guarantee*, linked to the concept of due diligence, entails adopting effective policies, laws, and institutions to prevent foreseeable damage; and the obligation to *cooperate* reflects the inherently transboundary nature of climate change, requiring States to act collectively in good faith and in accordance with the principle of common but differentiated responsibilities.

Perhaps the most striking pronouncement in the Opinion is the Court’s recognition of the obligation not to cause significant and irreversible environmental damage as a norm of *jus cogens*.⁴³⁶ This marks an unprecedented development in international law, as it elevates a core environmental duty to the highest hierarchical status, thereby rendering any conflicting conduct or treaty incompatible with peremptory international norms.⁴³⁷ By doing so, the Court gives environmental protection a privileged status in the international order, affirming that climate integrity is indispensable to the protection of life and human dignity.

Equally significant is the Court’s definition of States’ duties of mitigation and adaptation.⁴³⁸ These duties are described as *continuous and progressive*: States must not only adopt and implement mitigation and adaptation measures, but also periodically revise them to enhance ambition and effectiveness. This obligation is rooted in the precautionary principle, which operates as a standard of conduct requiring States to act even in the face of scientific uncertainty. Moreover, the Court integrates an intersectional perspective, insisting that mitigation and adaptation

⁴³⁴ On intersectionality and vulnerability, see also *infra* Section 2.2.2.

⁴³⁵ IACtHR, *Climate Emergency and Human Rights*, cit. para. 217 ff.

⁴³⁶ *Idem*, paras. 287-294.

⁴³⁷ On the point, see M. GEHRING, *Jus Cogens and the Climate Crisis: The Inter-American Court’s Landmark Climate Emergency Advisory Opinion and its Jus Cogens Ruling*, in *Verfassungsblog*, 16 July 2025.

⁴³⁸ IACtHR, *Climate Emergency and Human Rights*, cit. para. 317 ff.

strategies must prioritise the needs and knowledge of groups in situations of vulnerability, including Indigenous peoples, women, children, and rural communities.

Finally, the Advisory Opinion underscores the procedural dimension of climate obligations.⁴³⁹ It identifies as indispensable the guarantees of public participation, access to environmental and scientific information, and access to justice. To these, the Court adds a distinctive contribution: the protection of the right to science, which encompasses both access to scientific knowledge and the freedom of research necessary to inform evidence-based climate policy.⁴⁴⁰ The Opinion also gives special recognition to Indigenous knowledge systems, which it describes as integral to climate governance and resilience.⁴⁴¹ In a novel articulation, the Court frames vulnerability as a *dynamic and context-dependent condition*, implying that protective measures must evolve alongside changing climatic, social, and economic realities.

Through this multilayered reasoning, the IACtHR places human rights law at the centre of climate governance, positioning the individual and the collective as concurrent subjects of protection. In doing so, the Court moves beyond the anthropocentric paradigm, again adopting an ecocentric and ecosystemic approach whereby the protection of nature constitutes both a right and a duty of humankind.

The Advisory Opinion thus consolidates a comprehensive interpretive framework for climate-related State responsibility which was already developing quickly in the Inter-American system. In conclusion, the Court's reasoning extends the horizon of international environmental law towards an integrated vision of climate justice, grounded in solidarity, precaution, and intergenerational dialogue. It anticipates a future in which the duty to protect the climate system becomes a cornerstone of both State conduct and judicial enforcement.

⁴³⁹ *Idem*, para. 458 ff.

⁴⁴⁰ *Idem*, para. 471 ff.

⁴⁴¹ *Idem*, para. 476.

2.1.2.2 *The ICJ Advisory Opinion on Climate Change (2025): Human rights obligations and beyond*

The General Assembly of the United Nations requested an advisory opinion to the ICJ in March 2023.⁴⁴² This request, as could have been expected from the General Assembly, is framed with a more synthetic approach and more general terms.⁴⁴³ However, it is interesting to note that some of the elements included in the request to the IACtHR are mentioned here as well, albeit in less detail.⁴⁴⁴ This is particularly relevant because, despite not being a human rights court, the ICJ was indeed called to analyse the question of the obligations deriving from the climate crisis with an approach that strongly takes into account human rights and their interplay with environmental protection.⁴⁴⁵

⁴⁴² UNGA Resolution on “Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change”, cit.

⁴⁴³ *Idem*, p. 8: «(a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations? (b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to: (i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change? (ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?».

⁴⁴⁴ The coexistence of multiple advisory proceedings across different fora raises questions of coherence and fragmentation, requiring a degree of harmonisation in order to avoid conflicting interpretations of States’ obligations. On this point Z. BUSZMAN, *The pursuit of environmental justice: the adjudicative role of advisory opinions of creating obligations on States in respect of climate change*, in *Cambridge International Law Journal*, 2025, p. 261 ff.; C.U. PRIESS, *Parallel Advisory Proceedings: The Climate Change Advisory Proceedings Before the ICJ, the ITLOS and the IACtHR*, in *International Community Law Review*, 2025, p. 7 ff.

⁴⁴⁵ In the request mention is made to the International Bill of Human Rights (ICCPR, ICESCR and UDHR) as well as environmental instruments and principles (UNFCCC, Paris Agreement, duty of due diligence, principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment).

On the role of the ICJ in protecting human rights see, *ex multis*: R. HIGGINS, *Human Rights in the International Court of Justice*, in *Leiden Journal of International Law*, 2007, p. 745 ff.; B. SIMMA, *Mainstreaming Human Rights: The Contribution of the International Court of Justice*, in *Journal of International Dispute Settlement*, 2012, p. 7 ff.; M. KRAJEWSKI, C. SINGER, *Should Judges Be Front-Runners? The ICJ, State Immunity and the Protection of Fundamental Human Rights*, in A. VON BOGDANDY, R. WOLFRUM (eds), *Max*

Intergenerational equity is mentioned in two passages. First, the request around States' obligations regarding the climate crisis frames them in relation to *other States* as well as *present and future generations*, in this way foregoing the strictly inter-State approach typical of traditional environmental law and adopting a more integrated perspective of the relationship between environmental protection and human rights. Secondly, the request does not only tackle the question of States' primary obligations, but also the "legal consequences" with respect to both other States and «[p]eoples and individuals of the present and future generations affected».⁴⁴⁶

It should be preliminarily remembered that it was the General Assembly which recognised the right to a healthy environment as an autonomous human rights in 2022.⁴⁴⁷ Some scholars had suggested that it could be expected from the ICJ to draw on that resolution and affirm obligations also regarding the right to a healthy environment.⁴⁴⁸ The occasion would have been particularly favourable for the analysis of the right from a collective point of view, seen as the issue relates to the climate crisis and its essence of "common concern of humankind".

In this endeavour, guidance could also have been offered by the Key Messages on Human Rights and Climate Change (from now "Key Messages") developed by the Office of the High Commissioner for Human Rights (OHCHR) in 2016.⁴⁴⁹ In these, the OHCHR highlights

Planck Yearbook of United Nations Law, 2012, p. 1 ff.; J. CRAWFORD, A. KEENE, *Interpretation of the human rights treaties by the International Court of Justice*, in *The International Journal of Human Rights*, 2019, p. 935 ff.; T. SPARKS, M. SOMOS, *The Humanisation of Provisional Measures?—Plausibility and the Interim Protection of Rights Before the ICJ*, in F.M. PALOMBINO, R. VIRZO, G. ZARRA (eds), *Provisional Measures Issued by International Courts and Tribunals*, The Hague, 2021, p. 77 ff.

⁴⁴⁶ UNGA Resolution on "Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change", cit., p. 8.

⁴⁴⁷ UNGA Resolution on "The Human Right to a Healthy, Clean and Sustainable Environment", cit.

⁴⁴⁸ M. WEWERINKE-SINGH, A. GARG, J. HARTMANN, *The advisory proceedings on climate change before the International Court of Justice*, in *Questions of International Law*, 2023, p. 23 ff., in which the authors predict the possibility for the right to a healthy environment to be recognised as part of the corpus of customary international law. On the point see also W. SCHABAS, *The Customary International Law of Human Rights*, Oxford, 2021, p. 337.

⁴⁴⁹ Office of the United Nations High Commissioner for Human Rights, *Key Messages on Human Rights and Climate Change*, 2016.

ten obligations combining the elements seen so far both in human rights obligations relating to the right to a healthy environment and climate obligations. The combination of the two could have indeed provided a useful tool to interpret – via systemic integration – IHRL and IEL.

Mitigation is linked to preventing negative human rights impacts; adaptation with specific regard also to adaptability of human rights; accountability is seen with regard to effective remedies; resources must be mobilised taking into account “human rights-based development”; duties of cooperations among States are reinforced; climate action needs to be conducted with *equity*, science must be shared by all equally;⁴⁵⁰ the activities of business must be conducted in respect of the UN Guiding Principles on Business and Human Rights (UNGPR); States have to commit to equality and non-discrimination; and, finally, meaningful and informed participation must be implemented.

These ten principles could have been of guidance, especially for the ICJ, in the development of the answers requested. Nevertheless, they were not mentioned and, despite the undoubtedly ground-breaking impact of the Advisory Opinion that was delivered, human rights end up mainly in its margins.

The long-awaited Opinion was finally delivered in July 2025,⁴⁵¹ and it has marked a pivotal moment in the development of international law on climate change and human rights.⁴⁵² Indeed, it represents the first time that the principal judicial organ of the United Nations directly addressed the legal consequences of States’ action and inaction in the context of the climate crisis.

Relying heavily on the legal framework of reference – i.e. the UN Framework Convention on Climate Change, the Kyoto Protocol and the Paris Agreement – and on customary international law, the International Court of Justice clarified that the nature of climate obligations is largely

⁴⁵⁰ In respect of Art. 15 ICESCR.

⁴⁵¹ ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion of 23 July 2025. At the time in which I am writing, the contributions on the Opinion are largely in the form of blogposts. For an overview of the opinion see M.A. TIGRE, M. BÖNNEMANN, *The ICJ’s Advisory Opinion on Climate Change*, in *Verfassungsblog*, 24 July 2025.

⁴⁵² C.E. FOSTER, *The 2025 International Court of Justice Advisory Opinion on Obligations of States in respect of Climate Change*, in *International and Comparative Law Quarterly*, 2025, p. 775 ff.

universal.⁴⁵³ In particular, the Court reaffirmed that States owe obligations of due diligence «to prevent, reduce and control the risk of transboundary climate harm» and that such obligations are «owed *erga omnes*» and grounded in the «common concern of humankind».⁴⁵⁴ In other words, the Court has clarified that the prohibition of transboundary *environmental* harm, previously examined and part of its prolific jurisprudence,⁴⁵⁵ applies where there is a «risk of significant harm to the environment, *including to the climate system*».⁴⁵⁶ Furthermore, this framing departs from the classical inter-State model of environmental harm, as it is not tied to a specific bilateral dispute but to a structurally global risk.⁴⁵⁷

From a structural perspective, the Opinion integrates three key elements. First, it affirms the due diligence obligations of all States, regardless of their level of emissions. Second, it frames mitigation, adaptation, and international cooperation as interdependent and mutually reinforcing. Third, it situates climate change within the legal architecture of *erga omnes* obligations, reinforcing the collective dimension of responsibility. This combination gives the Opinion both a universalist tone and a systemic reach.

The Court indeed clarifies that obligations under international climate agreements (such as the UNFCCC and the Paris Agreement) must be interpreted consistently with general international law, and do not constitute *lex specialis*. Importantly, the Court recognises the special position of vulnerable States in suffering the consequences of climate

⁴⁵³ ICJ, *Obligations of States in respect of Climate Change*, cit., paras. 113-173.

⁴⁵⁴ *Idem*, paras. 152-156.

⁴⁵⁵ *Inter alia*, ICJ: *Legality of the threat or use of nuclear weapons*, cit.; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, cit.; *Whaling in the Antarctic (Australia v. Japan)*, cit.; *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, cit. More extensively, see *supra* Chapter II, Section 2.

⁴⁵⁶ *Idem*, paras. 272-300 (emphasis added). In examining these two sets of obligations, the Court clarifies that the ones deriving from treaties are obligations *erga omnes partes* while obligations deriving from customary international law, and specifically the duty to prevent significant harm, are obligations *erga omnes* (paras. 439-443). See also F. PADDEU, M. JACKSON, *State Responsibility in the ICJ's Advisory Opinion on Climate Change*, in *EJIL:Talk!*, 25 July 2025.

⁴⁵⁷ On this point see C. VOIGT, “*Doing the Utmost*”, in *Verfassungsblog*, 3 September 2025.

change despite their minimal contribution to the problem.⁴⁵⁸ However, it stops short of imposing specific differentiated legal consequences on major emitters, instead favouring a general framework of shared responsibility.

Regarding State responsibility, the Court reaffirmed the relevance of the *Articles on the Responsibility of States for Internationally Wrongful Acts* (ARSIWA) as the normative framework governing climate-related breaches.⁴⁵⁹ An internationally wrongful act, the Court noted, arises whenever a State fails to comply with an international obligation attributable to it, irrespective of the occurrence of material damage.⁴⁶⁰ In this respect, and most relevantly, the element of causation is not a prerequisite for establishing the breach itself but rather determines the scope and nature of reparation.⁴⁶¹

The Opinion identifies two guiding questions for such assessment: first, whether the adverse event can be linked to anthropogenic climate change, as evidenced by the best available scientific knowledge (notably, IPCC findings); and second, whether the contributing conduct is attributable to a State organ or entity, which should be evaluated contextually, on a case-by-case basis.⁴⁶²

This reasoning extends potential accountability beyond acts of commission – such as authorising emission-intensive activities – to omissions and regulatory failures that permit foreseeable climate harm. Moreover, by classifying the duties «to protect the climate system and other parts of the environment from anthropogenic greenhouse gas emissions» as obligations *erga omnes*, the Court implicitly recognises that all States possess a legal interest in ensuring their observance and may invoke responsibility for their breach.⁴⁶³

⁴⁵⁸ *Idem*, paras. 231-234.

⁴⁵⁹ ARSIWA, cit. On this point see *inter alia* M. WEWERINKE-SINGH, J. VIÑUALES, *The Great Reset: The ICJ Reframes the Conduct Responsible for Climate Change Through the Prism of Internationally Wrongful Acts*, in *EJIL:Talk!*, 4 August 2025.

⁴⁶⁰ ICJ, *Obligations of States in respect of Climate Change*, cit., para. 403.

⁴⁶¹ *Idem*, para. 433. The potential effects of this reconstruction are particularly relevant for climate litigation, where causation is one of the most relevant obstacles for plaintiffs. See *infra* Chapter VI.

⁴⁶² *Idem*, para. 437.

⁴⁶³ *Idem*, para. 440; ARSIWA, art. 48(1)(b): «1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: [...] (b) the obligation breached is owed to the international community as a whole».

A key structural feature of the ICJ's Advisory Opinion lies in the shift from the human-rights paradigm – typically framed as *individuals versus the State* – to one that pits *vulnerable States against powerful emitters*. This change of scale raises distinctive questions of accountability, evidence, and enforcement which are outside the scope of this study. Unlike in regional human-rights fora, where individuals claim specific violations and seek remedies, the ICJ context foregrounds inter-State inequalities: differing capacities to mitigate, historical responsibility, and the unequal distribution of climate impacts.

The Court's reasoning implicitly recognises this asymmetry. By framing obligations as *erga omnes* and embedding them within the principle of cooperation, the Opinion makes clear that even States with minimal emissions may invoke the responsibility of others whose inaction or excessive emissions cause global harm. Yet the Court avoided attributing differentiated legal consequences to major emitters, limiting itself to general duties of cooperation and assistance. This approach strengthens the legitimacy of small States' claims but leaves open practical mechanisms for redress and enforcement.

Doctrinally, the move from “individual” to “collective” victimhood signals a broader conceptual shift: the recognition of climate harm as a structural wrong within the international legal order. Whether small and vulnerable States can operationalise these principles – through negotiations, claims, or future contentious cases – will depend on the degree to which the advisory reasoning translates into practice.

The Court also placed a distinctive emphasis on the interrelationship between environmental protection and human rights, acknowledging that the effects of climate change «undermine the effective enjoyment of a range of human rights, including the right to life, to health, to food, and to an adequate standard of living».⁴⁶⁴ This is the first time the ICJ has made such a direct and detailed connection between climate obligations and human rights, aligning its reasoning with developments in regional human rights courts and international soft law instruments.

Moreover, and as for the object of this inquiry, the ICJ Advisory Opinion confirms and amplifies the interdependence between climate obligations and the human right to a healthy environment, framing the former within a collective and universal legal architecture which echoes

⁴⁶⁴ ICJ, *Obligations of States in respect of Climate Change*, cit., para. 188.

the intrinsic nature of the latter. It also exposes the tensions inherent in this universality: a symmetrical legal framing set against profoundly asymmetrical political and material realities.

Nevertheless, scholarly and other commentaries have likewise underlined the Opinion's cautious contribution to the consolidation of climate obligations as shared *human rights duties*.⁴⁶⁵ More specifically, it has been pointed out that the Court failed – or, more probably, refused – to address the issue of individuals (and peoples) as beneficiaries of States' climate obligations,⁴⁶⁶ which was not entirely unforeseeable since, it should be reminded, the ICJ is *not* a human rights court. Yet, it could be wondered in which of the categories of obligations invoked by the Court – *erga omnes* and *erga omnes partes* – human rights obligations relating to the climate would fall. A question of this tenor would have opened the doors to a necessary confrontation with the principles elaborated in the Advisory Opinion of the Inter-American Court of Human Rights, and the status of *jus cogens* that the judges of San José attributed to the right to a healthy environment.

The separate opinions appended to the Advisory Opinion also show its limitations. Judge Charlesworth emphasised that the Court failed to define with sufficient clarity the substantive and procedural dimensions of the right to a clean, healthy, and sustainable environment as an autonomous right under international law.⁴⁶⁷ Judge Bhandari, in his separate declaration, observed that the Court's treatment of the right to a clean, healthy and sustainable environment left some ambiguity regarding its precise normative status. In his view, while the Opinion acknowledged this right as “inherent” in the enjoyment of other human rights, it did not clearly define its independent standing or its relationship

⁴⁶⁵ J. ODERMATT, *What the Court Didn't Say: The ICJ's Climate Opinion and the Politics of Judicial Restraint*, in *Climate Law*, 30 July 2025; P. JANTARASOMBAT, I. CHAN, *ICJ Climate Change Advisory Opinion: Peoples and Individuals as Obligees*, in *EJIL:Talk!*, 17 October 2025; Climate Rights International, *Q&A on the ICJ Advisory Opinion on Climate Change and International Law*, in *CRI*, 7 August 2025.

⁴⁶⁶ P. JANTARASOMBAT, I. CHAN, *ICJ Climate Change Advisory Opinion: Peoples and Individuals as Obligees*, cit. The authors go as far as suggesting that an analysis of the sort could lead to an evolution in the list of the subjects allowed to bring forward petition before the ICJ, possibly including individuals.

⁴⁶⁷ ICJ, *Obligations of States in respect to Climate Change*, cit., Separate Opinion of Judge Charlesworth.

with existing rights frameworks.⁴⁶⁸ Noting that the Opinion devoted a distinct subsection to this right but omitted it from the concluding discussion of States' human rights obligations, Judge Bhandari regarded this as indicative of the Court's cautious approach. Nonetheless, he considered that the Opinion implicitly recognized the existence of such a right under customary international law, even if it refrained from delineating its specific normative content or its autonomous character.

On the other side, the Court's restraint, often criticised as judicial minimalism,⁴⁶⁹ may in fact serve a strategic function: by grounding its reasoning in established sources, the Opinion has laid the foundation for future contentious proceedings. Indeed, it could open promising avenues for future contentious litigation providing interpretative guidance that small or vulnerable States may invoke when framing claims against high-emitting counterparts, especially regarding the State duty to regulate private actors, historic emissions, and transboundary harm.⁴⁷⁰ The Opinion could enhance the capacity of vulnerable States to assert their rights on the international plane, but it also highlights the limits of enforcement and differentiation in the current legal system. In this sense, the Opinion is both a legal milestone and a stress test for the future of climate litigation.

Whichever the specifics of this outcome, it is clear that all these advisory proceedings represent a turning point in the path towards the recognition of the right to a healthy environment. The connection

⁴⁶⁸ *Idem*, Separate Opinion of Judge Bhandari, par. 3.

⁴⁶⁹ M. PROST, *Disaster Passing as Miracle? A Critical Take on the ICJ's Climate Advisory Opinion*, in *EJIL:Talk!*, 14 August 2025.

⁴⁷⁰ In this sense, the Opinion may catalyse litigation at the domestic level under *business and human rights* frameworks, where courts could rely on the ICJ's findings to assess corporate due diligence failures in connection with climate impacts. On this point, see also Judge Bhandari and Judge Cleveland Joint Declaration: the judges argued that the stance taken by the Court could have been bolder taking into account the impact of fossil fuels on climate change as confirmed by specialised reports and State practice. On the point, J. PAINE, *Due Diligence, Obligations to Cooperate and to Regulate Private Actors: Insights from Three Climate Change Advisory Opinions*, in *Environmental Policy and Law*, 2025, p. 1 ff.; M. MCVEY, A. SAVARESI, *The ICJ Advisory Opinion on Climate Change: A Business and Human Rights Perspective*, in *Opinio Juris*, 4 August 2025; J. VON BERNSTORFF, I. VENZKE, *The Struggle Against Fossil Sovereignty*, in *Verfassungsblog*, 6 August 2025. See also G. PANE, *Budgeting for war: The climate-security trade-off and profiles of responsibility in international law*, in *Questions of International Law*, 2025, p. 27 ff.

between human rights and the environment has been made, and there is no unmaking it. These proceedings represent the need for clarity in normative dispositions and will contribute to the development of State practice in this field.⁴⁷¹ In one way or the other, the next – few – years will determine the content of the obligations required from States to guarantee the protection of the right to a healthy environment for all of humankind.⁴⁷²

2.1.3. *The impact of collectiveness on jurisdiction and extraterritoriality*

One point remains nebulous and neglected in most of the determinations around the right to a healthy environment: the issue of jurisdiction. This element, which has been tackled by part of the jurisprudence in the field of human rights, is one of the true obstacles to the recognition of the collective nature of the right to a healthy environment.

Despite everything that has been said until now, despite the fact that the principles analysed and the rights examined all support a collective reconstruction of the right to a healthy environment, practical implementation of the right still results in difficulties arising from the collective formulation.

While most of these issues will be tackled in Part II under the concept of justiciability, it is important to outline the theoretical problems arising from a lack of proper integration between IEL and IHRL. The question is that of the extension of jurisdiction of States beyond its territorial

⁴⁷¹ M. WEWERINKE-SINGH, A. GARG, J. HARTMANN, *The advisory proceedings on climate change before the International Court of Justice*, cit., p. 39 ff.

On the impact of the Advisory Opinions of the ICJ see also V. REZADOOST, *Unveiling the 'author' of international law – The 'legal effect' of ICJ's advisory opinions*, in *Journal of International Dispute Settlement*, 2024, p. 1 ff.

⁴⁷² It should also be reminded that another request for an advisory opinion concerning States' obligations in relation to climate change is currently pending before the African Court on Human and Peoples' Rights. Although its outcome remains to be seen, the very fact that the matter has reached the African regional human rights system confirms that the clarification of climate-related obligations has become the object of systemic judicial engagement across both universal and regional fora. Particularly in the African context – where the right to a satisfactory environment is expressly recognised under Art. 24 of the African Charter – the pending proceedings may further contribute to consolidating the collective dimension of climate-related human rights obligations.

scope. This will be touched upon in the cases analysed in Part II, but it is essential to the understanding of the limits of States' human rights obligations related to the protection of the environment.

International environmental law recognises climate change as a “common concern of humankind”, as already said multiple times, and one of its core principles (fully integrated in the UNFCCC) is the principle of common but differentiated responsibilities (CBDR). Not only that, but States also accept as part of customary international law the “no harm principle”, that is the prohibition of transboundary environmental harm.⁴⁷³ This means that States *recognise* that certain activities conducted on their territory can have *negative effects* on other territories, independently from their presence on said territories. Moreover, they *accept* that they carry responsibility if they do not act with due diligence in prevention of these effects.

This is very different from the approach adopted by international human rights law with regards to what States are expected to do in relation to people in other territories.

Most of human rights treaties have a clause on jurisdiction, and for those who do not there is jurisprudence clarifying it.⁴⁷⁴ Article 2 ICCPR affirms that the State must guarantee the rights enshrined in the Covenant «to all individuals within its territory and subject to its jurisdiction». With similar language, art. 1 ECHR states: «The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention». The same for the American Convention («to all persons subject to their jurisdiction», Article 1) and

⁴⁷³ See, *ex multis*, ICJ: *Legality of the threat or use of nuclear weapons*, cit.; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, cit.; *Whaling in the Antarctic (Australia v. Japan)*, cit.; *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, cit.; *Corfu Channel (United Kingdom v. Albania)*, cit. See also, more in detail, *supra* Chapter II.

⁴⁷⁴ N. BERNAZ, *State Obligations with regard to the Extraterritorial Activities of Companies Domiciled on Their Territories*, in C. M. BUCKLEY, A. DONALD, P. LEACH (eds), *Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems*, Leiden, 2017, p. 435 ff.; D. PALOMBO, *Business and Human Rights: The Obligations of the European Home States*, Oxford, 2020; P. ALSTON, J. CRAWFORD (eds), *The Future of UN Human Rights Treaty Monitoring*, Cambridge, 2000; F. COOMANS, *The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights*, in *Human Rights Law Review*, 2011, p. 1 ff.

the Convention on the Rights of the Child («to each child within their jurisdiction», Article 2).

As regards extraterritorial jurisdiction, the monitoring mechanisms of these conventions have developed criteria to determine when a State is responsible for violations happening in other territories.

On this point three general approaches can be identified, on a spectrum from a more restrictive one to an expansive one.⁴⁷⁵ To the first category belong those mechanisms which recognise extraterritorial jurisdiction in two circumstances: effective control over a territory, or authority and control over a person (so-called “traditional approach”).⁴⁷⁶ The second is the “functional” or “foreseeability approach”, according to which «jurisdiction depends on the foreseeable effects that a territorial state’s action or omission has abroad».⁴⁷⁷ In this case, the State is responsible because it should have reasonably *foreseen* that an action/omission would have caused a violation of human rights.⁴⁷⁸ The third approach is global in nature: jurisdiction is triggered depending «on the decisive influence or measures that a state may exercise or take to achieve a collective goal» (“decisive influence jurisdictional test”).⁴⁷⁹

⁴⁷⁵ See O. DE SCHUTTER, A. EIDE, A. KHALFAN, M. ORELLANA, M. SALOMON, I. SEIDERMAN, *Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, in *Human Rights Quarterly*, 2012, p. 1084 ff.

⁴⁷⁶ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004; ECtHR, *Al-Skeini and Others v. United Kingdom*, application no. 55721/07, Judgment of 7 July 2011; ECtHR, *Jaloud v. The Netherlands*, application no. 47708/08, Judgment of 20 November 2014; ECtHR, *Bankovic and Others v. Belgium*, application no. 52207/99, Judgment of 19 December 2001.

⁴⁷⁷ D. PALOMBO, *Extraterritorial, Universal, or Transnational Human Rights Law?*, in *Israel Law Review*, 2023, p. 101.

⁴⁷⁸ IAComHR, *Alejandro Jr v. Cuba*, Report No 86/99, Decision of 29 September 1999; IAComHR, *Franklin Guillermo Aisalla Molina Ecuador v. Colombia*, Report No112/10, Decision of 21 October 2010; IAComHR, *Danny Honorario Bastidas Meneses and Others v. Ecuador*, Report No 153/11, Decision 2 November 2011. This is also the approach adopted by the Human Rights Committee (Human Rights Committee, *General Comment No 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, (UN Doc CCPR/C/GC/36), 3 September 2019, paras. 21-22).

⁴⁷⁹ D. PALOMBO, *Extraterritorial, Universal, or Transnational Human Rights Law?*, cit., p. 102. See also CRC, *General Comment No. 16 on State Obligations regarding the Impact of the Business Sector on Children’s Rights*, UN Doc CRC/C/GC/16, 17 April 2013, para. 46; CESCR, *General Comment No. 24*, cit., para. 13; CESCR, *Concluding Observations on the Fourth Periodic Report of France*, UN Doc E/C.12/FRA/CO/4, 13

The different approaches to extraterritorial jurisdiction are particularly relevant in the field of the human right to a healthy environment. In order fully to grasp its collective nature, it is necessary to acknowledge not only that the right to a healthy environment is owed to humankind as a whole – including present and future generations – but also that it is owed to humankind *everywhere*. This is coherent with formulations of intergenerational and *intragenerational* equity.⁴⁸⁰

Once more, the Advisory Opinion rendered by the IACtHR in 2017 clarifies this link. At para. 102:

«In cases of transboundary damage, the exercise of jurisdiction by a State of origin is based on the understanding that it is the State in whose territory or under whose jurisdiction the activities were carried out that has the *effective control* over them and is *in a position to prevent them from causing transboundary harm that impacts the enjoyment of human rights of persons outside its territory*. The potential victims of the negative consequences of such activities are under the jurisdiction of the State of origin for the purposes of the possible responsibility of that State for failing to comply with its obligation to prevent transboundary damage» (emphasis added).

The interesting aspect of this approach (which can be ascribed to the “functional” or “foreseeability” one) is that effective control does not need to be exercised on persons or territories. It is recognised that the State can have effective control also on *activities* and can prevent them from causing human rights’ violations *elsewhere*. Finally, it is affirmed that when the State fails to do so, those violations trigger its responsibility, falling in its jurisdiction.

It is clear how this approach could be relevant for human rights violations depending on the climate crisis – an apparent example is the control over industrial activities which generate GHG emissions and cause pollution and sea-level rise. Of course, at this point the question of

July 2016, paras. 9-10; CESCR, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Switzerland*, UN Doc E/C.12/CHE/CO/2-3/, 26 November 2010, para. 24; UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Switzerland*, UN Doc A/HRC/22/11, 7 December 2012, para. 123.85; CRC, *Concluding Observations on the Combined Second to Fourth Periodic Reports of Switzerland*, UN Doc CRC/C/CHE/CO/2-4, 4 February 2015, para. 24.

⁴⁸⁰ See *supra* Chapter I.

causality would come into play, but that happens at a second stage.⁴⁸¹ Jurisdiction is a preliminary question, to be tackled and solved before going into the heart of the matter.

The problem with failing to recognise extraterritorial jurisdiction in cases of violations of human rights deriving from climate change is not merely one for the judiciary,⁴⁸² it is a problem of coordination. If systemic integration is to be encouraged – as is argued here – the question of extraterritorial jurisdiction gives rise to a paradox in the articulation of human rights and climate obligations, simultaneously risking the denial of State responsibility while, at the same time, affirming its existence.⁴⁸³ An interpretation of climate obligations in the light of human rights, as evoked by Boyle,⁴⁸⁴ must become also an interpretation of human rights in the light of climate obligations.

There is no “pick-and-choose” among which parts of obligations to include. In order to adopt a cohesive approach to human rights responses to the climate crisis, and to realise the right to a healthy environment in its collective nature, comprehension of the global nature of this type of environmental degradation must be considered.

2.2. *Right-holders: which collective entity?*

The second part of this paragraph devoted to subjects is dedicated to the beneficiaries of the right to a healthy environment: right-holders. The issue of “group rights” has already been examined in Chapter I and will not be revisited here. However, this part has the aim to frame in a more practical way the possible *concrete* right-holders.

It has been maintained from the outset, notwithstanding certain difficulties of conceptual coordination, that the right to a healthy

⁴⁸¹ On the issue of causality in climate cases see also R.F. STUART-SMITH, F.E.L. OTTO, A.I. SAAD ET AL., *Filling the evidentiary gap in climate litigation*, in *Nature Climate Change*, 2021, p. 651 ff.; T. PFROMMER, T. GOESCHL, A. PROELSS ET AL., *Establishing causation in climate litigation: admissibility and reliability*, in *Climatic Change*, 2019, p. 67 ff.

⁴⁸² I will return on this aspect in Part II.

⁴⁸³ On this point, may it be allowed to refer to G. PANE, *Casi climatici ed extraterritorialità: quali prospettive d'integrazione fra diritto internazionale dell'ambiente e diritto internazionale dei diritti umani?*, cit.

⁴⁸⁴ A.E. BOYLE, *Climate Change, the Paris Agreement and Human Rights*, cit.

environment possesses a collective nature, deriving from the collective character of the interests underlying it: namely the environment as a global common good. However, such statements would remain devoid of substantive meaning unless consideration is given to the manner in which collectiveness is framed in terms of the beneficiaries of the right, in the same way as this has already been undertaken with regard to States' obligations.

Consideration will first be given to "peoples", drawing upon the approach adopted by the African Charter; attention will then turn to vulnerable categories, in order to examine relevant discriminatory factors. Finally, the analysis will conclude in favour of recognising the right to a healthy environment in accordance with the formulation of the Stockholm Declaration: as pertaining to the whole of humankind, encompassing both present and future generations.

2.2.1. *Peoples*

Article 24 of the African Charter states that «[a]ll peoples shall have the right to a general satisfactory environment favourable to their development». As said before,⁴⁸⁵ this is the first recognition of the right to a healthy environment in a regional convention on human rights. It is also the formulation that most advances the issue of collectiveness.

The recognition of rights to peoples does not start with the African Charter, as it finds its roots in the principle of self-determination: peoples should be free from colonial dominion, free to choose their rulers.⁴⁸⁶ It is a principle enshrined in the UN Charter,⁴⁸⁷ and which has been embraced

⁴⁸⁵ See *supra* Chapter II.

⁴⁸⁶ R. PISILLO MAZZESCHI, *Diritto internazionale dei diritti umani: Teoria e prassi*, cit., p. 306.

⁴⁸⁷ Charter of the United Nations, Arts. 1(2), 55 and 56.

by the ICJ since the 1970s, through the Advisory Opinion on *Namibia*,⁴⁸⁸ and recognised also in its case law.⁴⁸⁹

It is clear from the beginning, then, that rights of peoples are strictly linked to self-determination and to a generally decolonial perspective.⁴⁹⁰

One of the key issues in identifying peoples as exclusive holders of the right to a healthy environment lies in the definition of what constitutes a “people”. This has been the subject of discussion both inside and outside the African system.

The African Commission has adopted a generally flexible approach to the concept,⁴⁹¹ first by identifying whether a group or community could be considered “people” in reference to the specific case,⁴⁹² while in a second phase embracing some attempts at definition.⁴⁹³ More generally,

⁴⁸⁸ ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, para. 52. See also ICJ: *Western Sahara*, Advisory Opinion of 16 October 1975, para. 54; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, cit., para. 156; *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion of 22 July 2010, para. 79; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, para. 155.

⁴⁸⁹ ICJ, *Case concerning East Timor (Portugal v. Australia)*, Judgment of 30 June 1995, para. 29.

⁴⁹⁰ It should be noted that doctrinal debate can be registered around the possibility of peoples to be beneficiaries of *rights* of self-determination. Some authors have declined this option, considering that self-determination is applied between *States*, which are the only ones capable of *acting* to have it realised (see B. CONFORTI, *Diritto internazionale*, 10th ed., Napoli, 2015, p. 31). On the contrary, others have argued that peoples are beneficiaries of rights even if they do not have the instruments to invoke them (see R. PISILLO MAZZESCHI, *Diritto internazionale dei diritti umani: Teoria e prassi*, cit., p. 310).

⁴⁹¹ F. OUGUERGOUZ, *African Charter of Human and Peoples' Rights*, in *Max Planck Encyclopedia of Public International Law*. See also A.A. YUSUF, *The Progressive Development of Peoples' Rights in the African Charter and in the Case Law of the African Commission on Human and Peoples' Rights*, in F. LENZERINI, A. VRDOLJAK (eds), *International Law for Common Goods*, cit., p. 41 ff.

⁴⁹² ACHPR: *Katangese Peoples' Congress v. Zaire*, Communication 75/92, Decision of October 1995; *Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria*, cit.

⁴⁹³ ACHPR: *Kevin Mgwanga Gunme et al v. Cameroon*, Communication 266/03, Decision of 27 May 2009; *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*, Communication 279/03-296/05, Decision of 27 May 2009; *Centre for Minority Rights Development (CEMIRIDE) (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, Communication 276/03, Decision of 29 November 2009.

Pisillo Mazzeschi has identified three definition of “people”.⁴⁹⁴ The first, traditional approach defines “people” as an undefined group belonging to a territory. Another categorisation considers both objective (language, culture, history etc.) and subjective criteria (the members’ own identification) to determine whether a group is a people.⁴⁹⁵ Finally, and this is the thesis adopted by UNESCO, other elements should be taken into account when considering a «description (not a definition) of a “people”»: common objective features, a certain number (“not large” but neither “a mere association of individuals”), subjective elements, minimum institutionalisation.⁴⁹⁶

Nevertheless, the issue with considering “peoples” as right-holders in relation to the right to a healthy environment is another. Recognising the right to a healthy environment exclusively as a right of peoples would incur in the same problem considered in Chapter I when clarifying the nature of the right to a healthy environment: it would exclude the possibility for individuals to invoke it.

As previously observed, the right to a healthy environment can be said to have a peculiar, hybrid, nature. This is true in regard to obligations and also in regard to its right-holders. The collectiveness of the right to a healthy environment is intrinsic in the dimension of its interests, but it is not exclusive of individuals’ aspirations to it. As the IACtHR stated, it is both a fundamental right of humans, as well as a collective right of *humanity*.

Restricting it to a right of peoples would risk weakening its normative force and jeopardising the prospects of justiciability emerging in recent

⁴⁹⁴ R. PISILLO MAZZESCHI, *Diritto internazionale dei diritti umani: Teoria e prassi*, cit., pp. 308-309.

⁴⁹⁵ This makes it very similar to the definition of “minorities” contained in F. CAPOTORTI, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN Doc. E/CN.4/Sub.2/384/Rev.1, 1979, para. 568: «[...] a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population, and show, if only implicitly, a sense of solidarity directed towards preserving their culture, traditions, religion or language».

⁴⁹⁶ UNESCO, *Final Report and Recommendations, International Meeting of Experts on Further Study of the Concept of the Rights of Peoples*, UN Doc. SHS.89/CONF.602/7, 22 February 1990, para. 22.

jurisprudence. Accordingly, alternative conceptual frameworks must be explored.

2.2.2. *From vulnerability to intersectionality*

The same considerations just made for the inadequacy of confining the right to a healthy environment to a right of peoples can be transferred to the consideration of “vulnerable categories”.⁴⁹⁷

This premise, however, does not dispense with the need to acknowledge that certain categories are exposed to heightened forms of harm due to environmental degradation in respect to others.

Violations of the components of the right to a healthy environment have a greater impact on women and girls, for example. This is true for all of the substantive components: a report of former Special Rapporteur David R. Boyd analyses how women and girls are more likely to die prematurely from polluted air in closed spaces;⁴⁹⁸ being primarily responsible for water collection in 80% of households that lack water on the premises, they are also at higher risk and 800,000 of them die annually due to this reason.⁴⁹⁹ They are half of the global agricultural workforce for which they are paid in average 30% less than men, «they account for 70 per cent of the world’s hungry and are disproportionately affected by

⁴⁹⁷ On the concept of vulnerability, specifically in relation to the threat of climate change, see M. MARCHEGIANI, *L’incidenza della nozione di vulnerabilità sullo sviluppo del diritto internazionale in materia di cambiamenti climatici*, Torino, 2023. The author offers a systematic and multi-layered analysis of climate vulnerability, distinguishing between its individual, collective and geographical dimensions, and examines its impact on the evolution of international cooperation in climate matters. Particular attention is devoted to the way in which vulnerability interacts with classical institutions of international law, including State responsibility, international subjectivity and the distribution of obligations among different actors. The volume argues that the increasing recognition of climate vulnerability contributes to reshaping the traditionally State-centred paradigm of international law, favouring a gradual expansion of legal protection towards communities and other non-State actors disproportionately affected by climate change. In this sense, vulnerability emerges not merely as a descriptive category, but as a normative lens capable of influencing the interpretation and progressive development of international law.

⁴⁹⁸ UN Human Rights Council Resolution on “Women, girls and the right to a clean, healthy and sustainable environment” UN Doc. A/HRC/52/33, 5 January 2023, para. 15.

⁴⁹⁹ *Idem*, para. 17 ff. This is also linked to higher risk of mortality during childbirth, as well as elevated risk of diseases like cholera and other bacterial infections.

malnutrition, poverty and food insecurity».⁵⁰⁰ Threats to ecosystems and biodiversity are more likely to impact women – especially Indigenous ones – which fight to defend a “self-sufficient way of life”.⁵⁰¹ Toxic pollutants in beauty products are more likely to cause cardiovascular diseases, respiratory illnesses, cancer and reproductive harms to women and girls.⁵⁰² Finally the climate crisis has a devastating impact on health, social participation, education and access to work for women and girls.

«Harmful gender norms, stereotypes, biases and discrimination exclude women and girls from participating in environmental decision-making and enjoying a fair share of nature’s benefits, while imposing disproportionate impacts related to the climate emergency, biodiversity collapse and pervasive pollution».⁵⁰³

Societies based on extractive industries collaborate to the reinforcement of traditional gender roles by implementing a stereotyped division of labour.⁵⁰⁴

According to the former United Nations High Commissioner for Human Rights Michelle Bachelet, «the exclusion of half of society from

⁵⁰⁰ *Idem*, para. 20.

⁵⁰¹ E.E. MUÑOZ, M.C. VILLARREAL, *Women’s Struggles Against Extractivism in Latin America and the Caribbean*, in *Contexto Internacional*, 2019, p. 303 ff.

⁵⁰² UN Human Rights Council Resolution on “Women, girls and the right to a clean, healthy and sustainable environment”, cit., paras. 29-31.

⁵⁰³ *Idem*, para. 2.

⁵⁰⁴ *Idem*, para. 7: «[...] women and girls face profound socioeconomic disadvantages that erode their political agency and power. Legal, social and cultural obstacles prevent them from securing jobs, promotions and leadership positions, and limit their access to land, natural resources, finance, technologies, agricultural equipment and inputs, training and extension services. The following facts illustrate the pervasive, devastating nature of gender discrimination today: (a) Women comprise 70 per cent of the world’s poor; rural women have fared worse than rural men and urban women and men on every development indicator; (b) Women do three times more unpaid household and care work than men in both high- and low-income countries, resulting in time poverty, lower employment and lower earnings; (c) Women are overrepresented in informal economies (and thus lack social and legal protections); receive 20 per cent lower wages than men for the same work; and frequently experience worse working conditions; (d) Women are underrepresented in leadership, management and decision-making roles across all levels and all sectors: (i) Across 156 countries, women hold only 22.9 per cent of parliament seats and represent only 16.1 per cent of ministers; (ii) In 2022, only 8.8 per cent of chief executive officers at Fortune 500 companies were women». See also E.E. MUÑOZ, M.C. VILLARREAL, *Women’s Struggles Against Extractivism in Latin America and the Caribbean*, cit.

effectively helping to shape environmental policies means those policies will be less responsive to the specific damage being caused, less effective in protecting communities and may even intensify the harm being done». ⁵⁰⁵ This approach considers not only the specific harm women and girls face, but also how that harm will negatively shape the society of tomorrow. At the Fourth World Conference on Women in Beijing in 1995 it was affirmed that «[w]omen have an essential role to play in the development of sustainable and ecologically sound consumption and production patterns and approaches to natural resource management». ⁵⁰⁶

Moreover, all these considerations are exacerbated for women and girls who are also Indigenous, Afrodescendent, peasants, older, belong to the LGBTQIA+ community, migrants, displaced, refugees, unmarried, informally married, widowed or living in armed conflict, or have disabilities. ⁵⁰⁷

This leads to other categories disproportionately affected by environmental degradation.

Indigenous Peoples and local communities face a double set of prejudices. They are often forcibly displaced from their lands, when States or companies want to exploit those territories for extractive projects (i.e. oil drilling). ⁵⁰⁸ Moreover, they are not safe even when those projects are about renewable energies. They are usually not consulted before the State concedes the use of their land for hydroelectric or large wind-energy projects or biofuel plantations, in violation of their right to free, prior and informed consent (FPIC). ⁵⁰⁹ For Indigenous Peoples of coastal areas or small States, sea-level rise caused by the climate crisis means the loss of their homes, their lands, their traditional way of

⁵⁰⁵ M. BACHELET, *Opening statement by UN High Commissioner for Human Rights*, Geneva, 9 September 2019, available at www.ohchr.org.

⁵⁰⁶ UN Fourth World Conference on Women, Beijing Declaration and Platform for Action, 15 September 1995, para. 246.

⁵⁰⁷ UN Human Rights Council Resolution on “Women, girls and the right to a clean, healthy and sustainable environment”, cit., para. 13.

⁵⁰⁸ Conference on Indigenous Peoples and Climate Change, *Meeting Report Submitted by the International Work Group for Indigenous Affairs (IWGIA)*, UN Doc. E/C.19/2008/CRP.3, 10 March 2008.

⁵⁰⁹ UN Declaration on the Rights of Indigenous Peoples, cit.

living.⁵¹⁰ This means also that they can face another type of discrimination due to the fact that they are migrants, displaced persons or refugees.

Climate change is a powerful driver of internal migration because of its impacts on people's livelihoods and loss of liveability in highly exposed locations. A report from the World Bank estimated that by 2050, 216 million climate refugees will have been displaced in six world regions, with the top three being in sub-Saharan Africa (86 million), East Asia and the Pacific (49 million), South Asia (40 million).⁵¹¹ This is further complicated by the uncertain status of climate migrants in international law.⁵¹²

Children and future generations are another category which faces serious danger of irreparable harm from global environmental degradation. The Committee on the Rights of the Child (CRC) has considered this particular vulnerability in the recent recognition of the right to a healthy environment. In General Comment No. 26, the CRC has urged States to implement the right to a healthy environment, despite not formally endorsing the formulation of an autonomous right of the sort.⁵¹³

The CRC analysed the right to non-discrimination, encouraging States to collect disaggregated data to identify the specific harm children suffer,⁵¹⁴ the right to life, survival and development by clarifying how long-term challenges have a higher impact on those who will be the adults of tomorrow;⁵¹⁵ right to health, both physical and mental – the CRC

⁵¹⁰ IPCC, M.L. PARRY, O.F. CANZIANI, J.P. PALUTIKOF, P.J. VAN DER LINDEN, C.E. HANSON (eds), *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, Cambridge, 2007, pp. 779-810. On Indigenous Peoples and the right to a healthy environment see also the jurisprudence of the IACtHR *infra* Chapter V.

⁵¹¹ K.K. RIGAUD, A. DE SHERBININ, B. JONES, J. BERGMANN, V. CLEMENT, K. OBER, J. SCHEWE, S. ADAMO, B. MCCUSKER, S. HEUSER, A. MIDGLEY, *Groundswell: Preparing for Internal Climate Migration*, Washington DC, 2018.

⁵¹² On the topic see C.M. SUSSMAN, *A Global Migration Framework Under Water: How Can the International Community Protect Climate Refugees?*, in *Chicago Journal of International Law*, 2023, p. 41 ff.; G. SCIACCALUGA, *International Law and the Protection of "Climate Refugees"*, Berlin, 2020; S. BEHRMAN, A. KENT (eds), *Climate Refugees: Beyond the Legal Impasse?*, London, 2018.

⁵¹³ CRC, *General Comment No. 26 (2023) on children's rights and the environment, with a special focus on climate change*, UN Doc. CRC/C/GC/26, 22 August 2023.

⁵¹⁴ *Idem*, para. 15.

⁵¹⁵ *Idem*, para. 20 ff.

explicitly mentions “eco-anxiety” – whose violation can determine serious damages in the development of the child.⁵¹⁶ The Committee also focused on the procedural elements of the right to a healthy environment, and the specific needs for their realisation in regard to children (i.e. the right to be heard).⁵¹⁷

After a wide consultation with over 16,000 contributions from children, from 121 countries, the CRC produced a detailed document analysing the impact of serious environmental degradation on children, adopting an intersectional lens to forms of vulnerability.

This approach is of relevance because, as already considered in this paragraph, talking about vulnerability factors is maybe simplistic. Singular elements of discrimination should be tackled and evaluated, but not just in themselves. Applying an intersectional lens to discriminatory factors means comprehending them in a big picture, seeing how they interact with one another and what *comprehensive* situation they produce. This makes it possible to understand how «aspects of identity, such as race and gender, are mutually constitutive and intersect to create unique experiences of discrimination and subordination».⁵¹⁸

As the analysis now turns to the final part of this overview of right-holders, the foregoing paradigm is retained as a guiding framework. The considerations expressed in this paragraph with reference to discriminatory factors are not intended to be set aside; on the contrary, they are regarded as essential in the concrete assessment of the various dimensions of the justiciability of the right to a healthy environment.

⁵¹⁶ *Idem*, para. 37 ff.

⁵¹⁷ *Idem*, paras. 26-34.

⁵¹⁸ J. BOND, *Global Intersectionality and Contemporary Human Rights*, Oxford, 2021, p. 2. Intersectionality theory was born and developed primarily to deal with the intersection of gender and race (see K. CRENSHAW, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, in *Stanford Law Review*, 1993, p. 1241 ff.). However, the theory can be applied to broader questions, responding to the need to evaluate multiple factors. In her book, Bond provides also a detailed analysis of how intersectionality is represented – or not – in the work of regional human rights systems.

2.2.3. *Humanity: present and future generations*

Reference may once again be made to the wording of the Stockholm Declaration, and in particular to the responsibility «to preserve and improve the environment for present and future generations» set out in Principle 1.⁵¹⁹ Attention should likewise be drawn to the approach of the requests for advisory opinions,⁵²⁰ including the explicit reference to responsibilities towards future generations contained in the preambular part of UNGA Resolution 76/300.⁵²¹

Among a numerous amount of treaties which mention future generations,⁵²² the UNFCCC must also be reminded, which at Article 3 states: «[t]he Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities».

All of these are mentions of future generations in very general terms, as an abstract part of humankind situated somewhere in the days to come. This does not make them beneficiaries of rights – maybe of interests.

⁵¹⁹ The Stockholm Declaration mentions future generations also in Principle 2 regarding the safeguard of natural resources.

⁵²⁰ “Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile”, cit.; UNGA Resolution on “Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change”, cit.

⁵²¹ UNGA Resolution on “The Human Right to a Healthy, Clean and Sustainable Environment”, cit.: «Recognizing further that environmental degradation, climate change, biodiversity loss, desertification and unsustainable development constitute some of the most pressing and serious threats to the *ability of present and future generations to effectively enjoy all human rights* [...]» (emphasis added).

⁵²² They are also mentioned in the Convention on Biological Diversity, in the Brundtland Report, in the Rio Declaration, in the 1972 Convention for the Protection of the World Cultural and Natural Heritage (Art. 4), and in numerous other treaties: African Convention on the Conservation of Nature and Natural Resources (1968); Convention on International Trade in Endangered Species (1973); Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (1977); Bonn Convention on the Conservation of Migratory Species of Wild Animals (1979); Berne Convention on the Conservation of European Wildlife and Natural Habitats (1979); ASEAN Agreement on the Conservation of Nature and Natural Resources (1985).

Future generations are also mentioned in the IACtHR Advisory Opinion of 2017 as direct beneficiaries of the right to a healthy environment in its collective dimension. This is in line with the reconstruction of intergenerational equity proposed by Edith Brown Weiss in her work on future generations and sustainable development.⁵²³

In order to assist in the reconstruction of the principles underlying the recognition of future generations as a category of right-holders, reference will be made to the Maastricht Principles on the Rights of Future Generations (“Maastricht Principles IV”).⁵²⁴

They were drawn up by a group of experts⁵²⁵ at the end of a seminar at the University of Maastricht in order to highlight the intergenerational dependence of human rights in the face of the existence of a plurality of intersecting threats, in response to the lack of appropriate instruments in international human rights law in this regard.

One of the central themes of the debate on the subject was the use of the term “rights” instead of “interests” of future generations.⁵²⁶

From this point of view, it seems necessary to recall that the Committee on the Rights of the Child, in General Comment No. 26, specifically in the section on intergenerational equity and future

⁵²³ E.B. WEISS, *In Fairness To Future Generations and Sustainable Development*, cit., p. 20.

⁵²⁴ Available for free consultation at www.rightsoffuturegenerations.org.

⁵²⁵ Among which there are several Special Rapporteurs and members of treaty bodies. The complete list of original endorsers of the Principles is here – I include it to show the tenor and quality of the people who collaborated to this project: James Anaya, Virginia Brás Gomes, David R. Boyd, Agnes Callamard, Lilian Chenwi, Danwood Chirwa, Fons Coomans, Olivier de Frouville, Olivier De Schutter, Surya Deva, Yvonne Donders, Sébastien Duyck, Isha Dyfan, Mahjoub El Haiba, Dorothy Estrada-Tanck, Michael Fakhri, Cees Flinterman, Michel Forst, Soledad Garcia Muñoz, Fernanda Hopenhaym Cabrera, Paul Hunt, David B. Hunter, Philip D. Jaffé, Ashfaq Khalfan, Miloon Kothari, Rolf Künemann, Sandra Liebenberg, June Lorenzo, Daniel Magraw, Rashida Manjoo, Sharon Manyfingers, Kinda Mohamadieh, Carroll Muffett, Aoife Nolan, Manfred Nowak, Joy Ngozi Ezeilo, Tony Oposa, Nicholas Oraga, Navi Pillay, Astrid Puentes, Julieta Rossi, Fabian Salvio, Heisoo Shin, Nico Schrijver, Magdalena Sepúlveda Carmona, Ann Skelton, Sigrun Skogly, Ana Maria Suarez-Franco, Velina Todorova, Vicky Tauli-Corpuz, Baskut Tuncak, Melissa Upreti, Theo van Boven, Attiya Waris, Margaretha Wewerinke-Singh, Michael Windfuhr, Alicia Ely, Yamin Vicente, Paolo Yu.

⁵²⁶ See more generally the Proceedings of the XXVI Annual Meeting of the Italian Society of International Law: M. FRULLI (eds), *L'interesse delle generazioni future nel diritto internazionale e dell'Unione europea*, Napoli, 2023.

generations, chooses to adopt the term “interests” instead of the more stringent term “rights”.⁵²⁷

The Maastricht Principles IV opt for a bolder choice, explicitly referring to the *rights* of future generations, because of the need to identify legal obligations and effective remedies. From this point of view, they lay the foundations for future strategic legal impact.

It should be specified that the Maastricht Principles IV adopt a very broad definition of future generations, which includes «those generations who do not yet exist but will exist and will inherit the Earth»⁵²⁸ in this sense embracing a “continuative” conception of time that recognises the profound impact of actions and omissions present on those human beings who are born at every moment, but also decades or even centuries in the future.⁵²⁹

This approach makes it possible to ensure coordination between present and future generations. It brings forward the acknowledgement that actions and omissions realised now have an impact on both present and future generations, including adults and children (future yet born generations) and people not yet born (unborn generations).⁵³⁰

In this respect, the Maastricht Principles IV identify also the development of States’ obligations around the three duties to “respect”, “protect” and “fulfil”. The obligation to respect is met when States abstain from committing acts directed at violating the rights of future generations, for example: depriving future generations of natural

⁵²⁷ CRC, *General Comment No. 26*, cit., para. 11 ff.

⁵²⁸ Maastricht Principles IV, Principle 1.

⁵²⁹ See also K. MCNEILLY, B. WARWICK (eds), *The Times and Temporalities of International Human Rights Law*, London, 2022.

⁵³⁰ See Maastricht Principles IV, Principle 7: «a) States must address and remedy intragenerational human rights violations – that is violations affecting members of present generations – in order to both realize the human rights of present generations and to avoid transmitting these violations to future generations. b) States must respect and ensure the full enjoyment of children’s human rights in the present as well as ensuring that their human rights in the future are not jeopardized, and refrain from conduct that would undermine their human rights as adult persons. c) To meet their obligations to future generations, States must necessarily impose reasonable restrictions on activities that undermine the rights of future generations, including the unsustainable use of natural resources and the destruction of Nature. Such restrictions must not impair or nullify the enjoyment of human rights of present generations; must rectify the vastly disproportionate levels of control over and use of resources by some members of the present generation; and not impose disproportionate burdens on disadvantaged groups».

resources, unsustainably using and depleting nature resources, polluting or degrading ecosystems, declining biodiversity. Protection is linked to the continuing obligation to reasonably foresee and prevent the creation of circumstances likely to result in violations of the human rights of future generations (i.e. failure to phase out fossil fuels). And finally, to fulfil the rights of future generations States are required to recognise them, consider review mechanisms to assess the impacts of laws on future generations, ensure burdens are not shifted to future generations unfairly.⁵³¹ This last element entails the need to guarantee some form of legal standing for future generations, as will be considered in Part II.

The only way to truly embrace a collective formulation of the right to a healthy environment is to take into account these theoretical considerations. Intergenerational and intragenerational equity, as said many times before, are interdependent.⁵³² Future generations must necessarily be taken into account if the right to a healthy environment is understood as pertaining to humanity *as a whole*, since no meaningful conceptual rupture can be drawn between the present and a distant, indeterminate future.. Future could be later today, tomorrow, next week or in hundreds of years.

A full realisation of the right to a healthy environment, that is a protection of the environment which respects the human rights of *everyone*, needs an effort in reconstructing the classical juridical categories. Future generations cannot be excluded only because it is *complicated* to envisage a way to consider them.

This is not just wishful thinking either. Most of the instruments related to the protection of the environment recognise this aspect, and the recent developments suggest that this is the direction that international law will take in the next steps. It remains to be seen how the implementation of these principles will happen in practice.

⁵³¹ On this point see also *infra* Chapters V and VI.

⁵³² See *supra* Chapter I.

2.3. *Procedural rights*

Procedural rights are a component of the right to a healthy environment which contributes to its full realisation.⁵³³ They form part of the content of another set of obligations owed by States to right-holders and are, for the most part, less controversial as far as definitions go.⁵³⁴ Regarding the right to a healthy environment, they are usually identified as: access to environmental information, public participation in environmental decision-making, and access to justice.⁵³⁵ These are drawn from the Framework Principles identified by John H. Knox in 2018.⁵³⁶

Framework Principle 7 identifies access to environmental information as the obligation of States to «provide public access to environmental information by collecting and disseminating information and by providing affordable, effective and timely access to information to any person upon request».⁵³⁷

Framework Principle 9 affirms that «States should provide for and facilitate public participation in decision-making related to the environment and take the views of the public into account in the decision-making».

Finally, access to justice is enshrined in Framework Principle 10: «States should provide for access to effective remedies for violations of human rights and domestic laws relating to the environment». At this stage, certain key components of the elements that will also be examined in Part II may already be identified, as they contribute to the realisation of the justiciability of the right to a healthy environment. Within the

⁵³³ See also L.J. KOTZÉ, *Human Rights, the Environment, and the Global South*, in S. ALAM, S. ATAPATTU, C.G. GONZALEZ, J. RAZZAQUE (eds), *International Environmental Law and the Global South*, Cambridge, 2015, p. 171 ff.

⁵³⁴ B.H. WESTON, D. BOLLIER, *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons*, cit., p. 328. They consider procedural environmental rights as «[a]rguably the most widely recognized and entrenched of environmental rights».

⁵³⁵ D.R. BOYD, *Report of the Special Rapporteur on Issue of Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Right to a Healthy Environment—Good Practices*, cit., paras. 14-37.

⁵³⁶ J.H. KNOX, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Framework Principles*, cit.

⁵³⁷ See also, T. PALONIITTY, *On Cracks, Lights and Environments*, in *Journal of Environmental Law*, 2023, p. 319 ff.

dimension of access to justice, reference is made in particular to access to “effective remedies” and to “domestic laws relating to the environment”. This is of course linked to the realisation of the substantive components of the right to a healthy environment⁵³⁸ and to States’ obligations of ensuring that violations of the human right to a healthy environment are punished and investigated, and harm is redressed.

The procedural component of the right to a healthy environment – or procedural environmental rights – are recognised in a plethora of international and regional instruments.⁵³⁹ Three of them are of particular relevance. The first is the Rio Declaration, a universal, albeit non-binding instrument. The other two are regional treaties focused on procedural environmental rights: the Aarhus Convention in Europe and the Escazú Agreement in Latin America.

Principle 10 of the Rio Declaration crystallises procedural environmental rights in the following way:

«Environmental issues are best handled with *participation* of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate *access to information* concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the *opportunity to participate in decision-making processes*. States shall facilitate and encourage public awareness and participation by making information widely available. *Effective access to judicial and*

⁵³⁸ L.E. RODRIGUEZ-RIVERA, *The Human Right to Environment in the 21st Century: A Case for Its Recognition and Comments on the Systemic Barriers It Encounters*, in *American University International Law Review*, 2018, p. 189.

⁵³⁹ Citing a few: Universal Declaration of Human Rights (Arts. 7, 8, 19-21); ICCPR (Arts. 2, 19, 21, 22, 25), considered “inherent to human dignity”; 1982 World Charter for Nature (Principle 23: «All persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation») (UNGA Resolution on “World Charter for Nature”, UN Doc. A/RES/37/7, 28 October 1982); UNFCCC (Art. 6); Kyoto Protocol (Art. 10(e)); UNCBD; UNCCD (Art. 5(d)).

See also L.E. RODRIGUEZ-RIVERA, *The Human Right to Environment in the 21st Century*, cit., p. 190 ff.; and B.H. WESTON, D. BOLLIER, *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons*, cit., p. 331, at note 205.

administrative proceedings, including redress and remedy, shall be provided» (emphasis added).

Clearly, Principle 10 includes all three procedural components of the right to a healthy environment. Despite the fact that access to information is framed as belonging to “each individual”, procedural environmental rights can be interpreted as being available also in their collective dimension. This is confirmed by the first part of Principle 10, where it is affirmed that the “best way” to handle environmental concerns is to grant participation to “all concerned citizens”.⁵⁴⁰ In practice, as will be shown, this is more difficult especially with regard to access to justice. For the latter, implementation is realised through practical rules of procedure in courts, and issues arise with regard to standing and jurisdiction in some of the cases considered in Part II.⁵⁴¹ However, it is argued that an extensive – or rather “non-restrictive” – interpretation of procedural environmental rights would conduct to the need to develop rules of procedure coherent with the respect of access to justice in environmental claims.⁵⁴²

The regional framework offers more detail in the specification of the implementation of procedural environmental rights.

The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (“Aarhus Convention”) was adopted in 1998 under the UNECE (UN Economic Commission for Europe). It is a treaty which articulates a «comprehensive system of procedural environmental rights».⁵⁴³ The

⁵⁴⁰ B. PETERS, *Unpacking the Diversity of Procedural Environmental Rights: The European Convention on Human Rights and the Aarhus Convention*, in *Journal of Environmental Law*, 2018, p. 2.

⁵⁴¹ This consideration stems from the inaptitude of many jurisdictions to deal with collective interests and rights. See also A. MORELLO, C. SBDAR, *Acción Popular y Procesos Colectivos*, Buenos Aires, 2007; A. PEÑALVER I CABRÉ, *La Defensa de los Intereses Colectivos en el Contencioso-Administrativo*, Pamplona, 2015; N.A. CAFFERATTA, *El debido proceso ambiental en el Acuerdo Regional de Escazú*, in M. PRIEUR, G. SOZZO, A. NÁPOLI (eds), *Acuerdo de Escazú, hacia la democracia ambiental en América Latina y el Caribe*, Santa Fe, 2021, p. 233 ff.

⁵⁴² O. KELLEHER, *Systemic Climate Change Litigation, Standing Rules and the Aarhus Convention: A Purposive Approach*, in *Journal of Environmental Law*, 2022, p. 107 ff. See also *infra* Chapter IV.

⁵⁴³ L.E. RODRIGUEZ-RIVERA, *The Human Right to Environment in the 21st Century*, cit., p. 193. It includes: «information concerning the physical elements of the

Preamble of the Convention recognises the right to a healthy environment, with the adoption of the language from the Stockholm Declaration in relation to the responsibility towards future generations.⁵⁴⁴ It also reinstates that the procedural environmental rights enlisted are to be guaranteed with the aim to «contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being» (Article 1 – Objective). After that, the first articles affirm and define environmental participation (Articles 6-8), access to environmental information (Article 4), and access to justice (Article 9).

These rights are granted to the general public, defined in Article 2(4) as «one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups». It also recognises specific interest for the “public concerned”, that is the «public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest» (Article 2(5)).

Moreover, the Aarhus Convention contemplates a specific “Compliance Committee”, which is enabled to receive communications

environment, such as water and biological diversity, as well as information about activities, administrative measures, agreements, policies, legislation, plans, and programmes likely to affect the environment, human health, safety or conditions of life. Cost benefit and other economic analyses and assumptions used in environmental decision-making are also included. Rights of access are extended to NGOs 'promoting environmental protection' in accordance with national law. There are detailed provisions, consistent for the most part with [European Community] law, on access to and collection of environmental information» (A. BOYLE, *Human Rights and the Environment: A Reassessment*, First Preparatory Meeting of the World Congress on Justice, Governance and Law for Environmental Sustainability, 12-13 October 2011, Kuala Lumpur, Malaysia).

⁵⁴⁴ Aarhus Convention, Preamble: «[...] Recognizing also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations, [...]».

from members of the public concerning a State Party's compliance with the Convention.⁵⁴⁵

The “twin” to the Aarhus Convention in the Latin American region is the 2018 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (“Escazú Agreement”). The Agreement entered into force in 2021, and it has been currently ratified by 16 of the 25 signatories.⁵⁴⁶

The Escazú Agreement codifies more or less the same procedural environmental rights included by the Rio Declaration and the Aarhus Convention (access to information, participation in decision-making processes, access to justice). Similarities do not end here. The Escazú Agreement has established a compliance committee accessible to the public (the Committee to Support Compliance and Implementation, established by Article 18). And, as the Aarhus Convention, it grants attention to the protection of environmental defenders (Article 9).⁵⁴⁷

However, most of these rights are considered more extensively in the Escazú Agreement. The possibility to access the compliance committee is linked to violations due to actions, omissions and «any other decision», an open clause which is missing in the Aarhus Convention. Moreover, access to justice is further developed with elements aimed at facilitating the recourse to environmental justice (broad legal standing, reversal of the burden of proof, timely enforcement of decisions, redress options and financial assistance – Article 8(3)).

While the Aarhus Convention is somewhat more “reserved” in its “human rights dimension”,⁵⁴⁸ the Escazú Agreement openly recognises the need to guarantee the right to a healthy environment as one of the core obligations deriving from the Agreement (Article 4) rather than a mere aim like the Aarhus Convention.

⁵⁴⁵ See also G. SAMVEL, *Non-Judicial, Advisory, Yet Impactful? The Aarhus Convention Compliance Committee as a Gateway to Environmental Justice*, in *Transnational Environmental Law*, 2020, p. 211 ff.

⁵⁴⁶ These are: Antigua and Barbuda, Argentina, Belize, Bolivia, Chile, Dominica, Ecuador, Grenada, Guyana, Mexico, Nicaragua, Panama, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Uruguay.

⁵⁴⁷ See also T. WEBER, *Are climate activists protected by the Aarhus Convention? A note on Article 3(8) Aarhus Convention and the new Rapid Response Mechanism for environmental defenders*, in *Review of European, Comparative & International Environmental Law*, 2023, p. 67 ff.

⁵⁴⁸ B. PETERS, *Unpacking the Diversity of Procedural Environmental Rights*, cit.

Commentators have also argued for the simplicity of the structure of the Escazú Agreement in contrast to its European companion, underlining the use of clear language in the affirmation of rights and guarantees.⁵⁴⁹ It also adopts a “socially conscious” approach to procedural environmental rights, raising the awareness around the difficulties that can arise, specifically regarding access to information (obstacles relating to the language, to illiteracy or to the technical difficulties of the process itself).⁵⁵⁰ On the same account, the Escazú Agreement recognises the needs of vulnerable categories and marginalised communities and identifies specific support.⁵⁵¹

In summary, the Escazú Agreement adopts a “regional approach” to Principle 10 of the Rio Declaration, by acknowledging the specific (social) needs of the region of Latin America and the Caribbean.⁵⁵²

While procedural environmental rights are, as mentioned above, less controversial in the definition of their content, they are also strictly linked to the practical implementation of the substantive component of the right to a healthy environment. With these coordinates in view, the analysis now turns to Part II, in which the interplay among these elements will be examined in light of the practice of courts and tribunals.

⁵⁴⁹ E. BARRITT, *Global values, transnational express: from Aarhus to Escazú*, in V. HEYVAERT, L. DUVIC-PAOLI (eds), *Research Handbook on Transnational Environmental Law*, Cheltenham, 2020, p. 198 ff.

⁵⁵⁰ See also S. ATAPATTU, *The Significance of International Environmental Law Principles in Reinforcing or Dismantling the North–South Divide*, in S. ALAM, S. ATAPATTU, C.G. GONZALEZ, J. RAZZAQUE (eds), *International Environmental Law and the Global South*, cit., p. 74 ff.

⁵⁵¹ Escazú Agreement: Arts. 4(5), 5(3), 6(6) on vulnerable situations; Art. 7(14) on the engagement of vulnerable groups to facilitate their participation; Arts. 7(9) and 8(4)(d) on Indigenous Peoples (providing decision-making processes also carried out through “customary methods”, and the need for materials to be produced in non-official languages).

⁵⁵² S. STEC, J. JENDROSKA, *The Escazú Agreement and the Regional Approach to Rio Principle 10: Process, Innovation, and Shortcomings*, in *Journal of Environmental Law*, 2019, p. 533 ff. See also G. MEDICI-COLOMBO, T. RICARTE, *The Escazú Agreement Contribution to Environmental Justice in Latin America: An Exploratory Empirical Inquiry through the Lens of Climate Litigation*, in *Journal of Human Rights Practice*, 2023, p. 1 ff.

**PART II – COLLECTIVE JUSTICIABILITY AND HUMAN RIGHTS
OBLIGATIONS: WHICH FORUM (IF ANY)?**

CHAPTER IV: ELEMENTS OF COLLECTIVE JUSTICIABILITY

The Merriam-Webster dictionary defines “justiciability” as relating to a matter «liable to trial in a court of justice». More specifically, in the context of human rights, justiciability refers to «the ability to claim a remedy before an independent and impartial body when a violation of a right has occurred or is likely to occur».⁵⁵³

The International Commission of Jurists, in its 2008 study, while maintaining that recourse to courts should be the “last resort”, has underlined the negative effects of the absence of justiciability for any human right stating that it «narrows the range of mechanisms available for victims of rights violations to receive remedies and reparations; weakens the accountability of States; undermines deterrence; and fosters impunity for violations».⁵⁵⁴

According to Bílková, this broad definition entails a three-fold component: the existence of a body with characteristics of independency and impartiality; the concrete capacity of «certain actors» to appeal to it; and, finally, «the possibility of the body to decide on the application and award adequate reparation to victims».⁵⁵⁵

In examining the requirement of an “independent and impartial body”, the perspective adopted is that of international human rights law. Accordingly, consideration is given to regional fora (Inter-American, African and European), as well as to two United Nations treaty-body mechanisms (the Human Rights Committee and the Committee on the Rights of the Child – two venues which have dealt with the human rights’ impacts of the climate crisis in explicit relation to intergenerational equity).⁵⁵⁶ At the same time, given that primary human rights obligations

⁵⁵³ International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability*, 2008, p. 6.

⁵⁵⁴ *Idem*, p. 3.

⁵⁵⁵ V. BÍLKOVÁ, *Justiciability of Human Rights*, in C. BINDER, M. NOWAK, J.A. HOFBAUER, P. JANIG (eds), *Elgar Encyclopedia of Human Rights*, Cheltenham, 2022, p. 370.

⁵⁵⁶ See *infra* Chapter V.

rest upon States, it is also necessary to assess recent developments in national climate litigation and the principles emerging therefrom.⁵⁵⁷

Having clarified the “independent and impartial bodies” that will be examined, the remaining components of justiciability now require analysis.

In other words, in seeking to define the elements that compose the broader concept of justiciability, reference may be made to three core dimensions: access to justice, effective remedies, and the limits of judicial authority.

The purpose of this Chapter is to introduce these categories in relation to the right to a healthy environment as framed in Part I. This theoretical premise on justiciability is developed with due regard to the characteristics identified thus far. It should therefore be recalled that the right to a healthy environment has been characterised as collective, in so far as it pertains to humanity as a whole, including present and future generations. Its substantive content has been clarified as encompassing six principal components: clean air, a safe climate, healthy and sustainably produced food, water and sanitation, a non-toxic living environment, and healthy ecosystems and biodiversity. The obligations incumbent upon States have likewise been examined in terms of respect, protection and fulfilment.

Before engaging in a detailed examination of the three elements identified above, it is first necessary to address the question of the alleged non-justiciability of economic, social and cultural rights. Most of these arguments are similar to the ones against the recognition of an autonomous right to a healthy environment: vagueness of its content, lack of specificity in its scope.⁵⁵⁸ In Chapter III, a strict categorisation of rights was rejected, on the ground that the right to a healthy environment is more appropriately characterised as a “hybrid” right, combining features of both civil and political rights and economic, social and cultural rights.⁵⁵⁹ However, the question of justiciability of the right to a healthy environment should take into account its “ESC component”, in order to dispel any remaining doubts about its theoretical justiciability.

⁵⁵⁷ See *infra* Chapter VI.

⁵⁵⁸ On which see *supra* Chapter I, especially Section 2.2.

⁵⁵⁹ See *supra* Chapter III, especially Section 2.1.

Part of the critical doctrine on the matter revolves mainly around questions of “legitimacy” and “competence” of courts.⁵⁶⁰ This means that courts are not equipped and, in theory, *should not* be equipped to deal with economic, social and cultural rights, which are best suited for policy-making processes.⁵⁶¹ This argument can preliminarily be countered by taking into account that lines between what is political and what is strictly legal are not fixed.⁵⁶² This is especially true when considering human rights – both civil/political and ESCR – which always entail, to some degree, ideological and political considerations for their recognition.⁵⁶³

Arguments in favour of distinctions between categories of rights are more and more void of significance. The differentiation between rights of a higher level (civil and political) and lower level (ESCR) begins to feel impossible to maintain, especially considering the interdependency of human rights and adopt an intersectional approach. This is all the more true in relation to the right to a healthy environment.

Moreover, practical refusal to consider it justiciable has the only result of slowing the elaboration of principles to enrich its correct justiciability.⁵⁶⁴ As will be shown, this is countered by at least *the majority* of global case law.⁵⁶⁵

With these preliminary considerations in place, the analysis now turns to an examination of each of the three elements of justiciability as they relate to the collective right to a healthy environment: access to justice (Section 1), effective remedies (Section 2), and limits of judicial authority (Section 3).

1. *A collective access to justice?*

Francioni defines access to justice as «the right of an individual not only to enter a court of law, but to have his or her case heard and

⁵⁶⁰ A. NOLAN, B. PORTER, M. LANGFORD, *The Justiciability of Social and Economic Rights: An Updated Appraisal*, in CHRGJ Working Paper No. 15, 2009, p. 4.

⁵⁶¹ On which see *infra* Section 3.

⁵⁶² V. BÍLKOVÁ, *Justiciability of Human Rights*, cit., p. 372.

⁵⁶³ *Ibidem*.

⁵⁶⁴ International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights*, cit., p. 16.

⁵⁶⁵ See *infra* Chapters IV and V.

adjudicated in accordance with substantive standards of fairness and justice».⁵⁶⁶

As already seen, this right – or “sub-right” in relation to the right to a healthy environment – is enshrined in a multitude of instruments and declarations: i.e. the Rio Declaration, the Aarhus Convention and the Escazú Agreement for environmental justice. More generally, it is also contained in Article 8 of the 1948 Universal Declaration, Article 6(1) of the European Convention on Human Rights, Article 25 of the American Convention, and Article 7.1 of the African Charter on Human and Peoples’ Rights.

Moreover, in the reconstruction offered by John H. Knox, the procedural obligations related to the realisation of the right to a healthy environment include «access to effective remedies for violations of human rights and domestic laws relating to the environment».⁵⁶⁷ These features have been considered in Chapter III and will not be repeated here.

What is of relevance for the purpose of the present analysis is the way in which access to justice can be framed taking into account the specific characteristics of the right to a healthy environment.

Specifically, this paragraph will be devoted to the issue of collective access to justice by considering also standing and representation for future generations.

The questions that arise around access to justice can be different in nature. First, they can be practical: access to justice can be impaired by lack of funding or accessibility of the judicial venue. Some of these issues are tackled by the Aarhus Convention and the Escazú Agreement – it should be remembered that the latter contains provisions specifically directed at offering financial assistance and facilitating recourse to environmental justice through removal of social and cultural obstacles. A second set of issues can be considered “substantial” in nature. Accessing environmental justice is not always convenient nor helpful, which is why “strategic” considerations come into play when climate cases are

⁵⁶⁶ F. FRANCONI, *The Rights of Access to Justice under Customary International Law*, in F. FRANCONI (ed), *Access to Justice as a Human Right*, Oxford, 2007, p. 1.

⁵⁶⁷ J.H. KNOX, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Framework Principles*, cit., Framework Principle 10.

prepared.⁵⁶⁸ Finally, and this point is of particular relevance, the obstacles can be of a procedural nature, relating to strict admissibility criteria such as legal standing.⁵⁶⁹

1.1. “*Un pour tous, tous pour un*”: invoking a right pertaining to all of humanity

Locus standi or “legal standing” is a concept which aids in determining «whom a court may hear make arguments about the legality of an official decision».⁵⁷⁰ In other words, it is the gatekeeper of cases. As such, its dimension largely depends on the specific rules of the venue appealed.

Usually, the ability to bring a claim before a court – domestic or international – is connected to the position of holder of the right invoked. However, the way in which this *connection* is framed varies depending on the system of reference. This connection may be conceptualised as a spectrum: at one end lies the full correspondence between direct victim status and legal standing; at the other, the possibility of alleging a violation in the absence of strict victim status and in the pursuit of the public interest (*actio popularis*).⁵⁷¹

This gets more complicated when considering the collective approach to the right to a healthy environment.

In Chapter III, the right-holders were identified as “humanity”, encompassing present and future generations. In so doing, it was clarified that the dual nature of the right to a healthy environment entails the need to safeguard both its collective and its individual dimensions. Accordingly, in analysing the justiciability of the right to a healthy

⁵⁶⁸ See, more in detail, *infra* Chapter VI.

⁵⁶⁹ See also C. REDGWELL, *Access to Environmental Justice*, in F. FRANCONI (ed), *Access to Justice as a Human Right*, cit., p. 160, where key recurring issues are considered. For example: «(1) restrictive rules on standing; (2) the absence, or limited availability, of injunctive relief; and (3) weak or no enforcement» as well as «(1) costs; (2) lack of judicial understanding of environmental issues; (3) limited scope for judicial review; and (4) remedies (specifically, inability to obtain injunctive relief)» (see also the doctrine there cited).

⁵⁷⁰ See J. VINING, *Legal Identity: The Coming of Age of Public Law*, New Haven, 1978.

⁵⁷¹ See E. SCHWELB, *The Actio Popularis and International Law*, in *Israel Yearbook of Human Rights*, 1972, p. 46 ff.

environment, attention must extend beyond the formal capacity of collective entities to invoke the right, and encompass the broader question of the concrete possibility of its collective realisation, whether through NGO representation or by means of *actio popularis*.

Indeed, to collectively invoke a right, different options can be explored. The collective entity could present a claim through representation by a third “body”, such as a non-governmental organisation (NGO); or it could “delegate” one of its members to bring forward the claim. The stance on collective legal standing is very different in the three main regional systems for the protection of human rights.

The European system has so far adopted a very strict approach to legal standing, which is inherently connected to victim status. Only people – almost exclusively individuals – who cover a substantial position as right-holders can procedurally be allowed to bring a claim before the European Court of Human Rights. More specifically, the ECtHR has identified three categories of victims under Article 34 ECHR.⁵⁷² While the Article in itself is labelled “individual applications”, it contains explicit reference also to NGOs and groups of individuals. However, the afore-mentioned categories have been subject of a largely restrictive interpretation by the Court itself. They are direct, indirect, and potential victims.

Direct victims include those applicants who have been «personally affected by an alleged violation of a Convention right» by the State.⁵⁷³ Indirect victims are those who haven’t been “directly” harmed by the violation of the Convention right but «to whom the violation would cause harm or who would have a valid and personal interest in seeing it brought to an end».⁵⁷⁴ Finally, the Court recognises also the status of “potential” victim, when an applicant produces «reasonable and convincing

⁵⁷² ECHR, Art. 34: «The Court may receive applications from any *person, non-governmental organisation or group of individuals* claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right» (emphasis added).

⁵⁷³ ECtHR, *Karner v. Austria*, application no. 40016/98, Judgment of 23 July 2003, para. 25.

⁵⁷⁴ ECtHR, *Vallianatos and Others v. Greece*, applications nos. 29381/09 and 32684/09, Judgment of 7 November 2013, para. 47.

evidence of the likelihood that a violation affecting them personally will occur», not being enough the «mere suspicion or conjecture».⁵⁷⁵

It is also useful to note that the Court itself has stated that the interpretation of the term “victim” must be subject to evolution in light of conditions in society.⁵⁷⁶ With specific reference to environmental cases, two cases are worth mentioning. In *Cordella and others v. Italy*, the Court refused to recognise the victim status for people who lived in cities other than the ones directly affected by the pollution.⁵⁷⁷ On the other hand, in a more recent case, *Pavlov and others v. Russia*, the judges of Strasbourg affirmed that proximity is but one of the «relevant factors to be considered [...] among other circumstances of a particular case».⁵⁷⁸

More recently, the European Court has determined that NGOs have a “special” standing as it regards climate cases, and they are able to bring forward a case in the following circumstances:

«In order to be recognised as having *locus standi* to lodge an application under Article 34 of the Convention on account of the alleged failure of a Contracting State to take adequate measures to protect individuals against the adverse effects of climate change on human lives and health, the association in question must be: (a) *lawfully established* in the jurisdiction concerned or have standing to act there; (b) able to demonstrate that it pursues a *dedicated purpose* in accordance with its statutory objectives in the defence of the human rights of its members or other affected individuals within the jurisdiction concerned, whether limited to or including collective action for the protection of those rights

⁵⁷⁵ ECtHR, *Case of Centre for Legal Resources on Behalf of Valentin Câmpeanu v. Romania*, application no. 47848/08, Judgment of 17 July 2014, para. 101. See also ECtHR: *Klass and others v. the Federal Republic of Germany*, application no. 5029/71, Decision of 18 December 1974; *Soering v. the United Kingdom*, application no. 14038/88, Decision of 10 November 1988; *Case of Open Door and Dublin Well Women v. Ireland*, applications nos. 14234/88; 14235/88, Judgment of 29 October 1992.

⁵⁷⁶ *Inter alia*, ECtHR: *Monnat v. Switzerland*, application no. 73604/01, Judgment of 21 September 2006, paras. 30-33; *Gorraiz Lizarraga and others v. Spain*, application no. 62543/00, Judgment of 27 April 2004, para. 38; *Stukus and others v. Poland*, application no. 12534/03, Judgment of 1st April 2008, para. 35; *Ziętal v. Poland*, application no. 64972/01; Judgment of 12 May 2009, paras. 54-59.

⁵⁷⁷ ECtHR, *Cordella and others v. Italy*, applications nos. 54414/13 and 54264/15, Judgment of 24 January 2019, paras. 103-109.

⁵⁷⁸ ECtHR, *Pavlov and others v. Russia*, application no. 31612/09, Judgment of 11 October 2022, para. 66. See also E. KRAJNYÁK, *Up in Smoke? Victim Status in Environmental Litigation before the ECtHR*, in *EJIL:Talk!*, 14 March 2025.

against the threats arising from climate change; and (c) able to demonstrate that it can be regarded as *genuinely qualified and representative* to act on behalf of members or other affected individuals within the jurisdiction who are subject to specific threats or adverse effects of climate change on their lives, health or well-being as protected under the Convention»⁵⁷⁹ (emphasis added).

Despite the possible contradictions that these criteria can provoke – which will be explored more in depth in Chapter V – the Court has remained adamant in stating that there is no *actio popularis* in the European system.⁵⁸⁰

The other two regional mechanisms are more lenient on this requirement.

The African Charter allows for communications from “peoples”, as well as individuals on behalf of the public interest, clearly allowing for *actio popularis*. This is confirmed by the decision in the *Ogoniland* case, which was brought forward by NGOs.⁵⁸¹

More nuanced is the solution adopted by the Inter-American system. No *actio popularis* is *stricto sensu* allowed, as there is no possibility to bring a claim *in abstracto*.⁵⁸² However, when determining redress, the

⁵⁷⁹ ECtHR, *Verein KlimaSeniorinnen Schweiz and others v. Switzerland*, cit., para. 502.

⁵⁸⁰ *Idem*, para. 460. See also ECtHR: *Klass and others v. the Federal Republic of Germany*, cit., para. 33; *Case of Georgian Labour Party v. Georgia*, application no. 9103/04, Decision of 22 May 2007; *Burden v. the United Kingdom*, application no. 13378/05, Judgment of 29 April 2008, para. 33; *Aksu v. Turkey*, applications nos. 4149/04 and 41029/04, Judgement of 15 March 2012, para. 50; *Cordella and others v. Italy*, cit., para. 100.

It should be noted that some authors have contended that the pilot judgment procedure in the European system is in itself a form of class action, achieving substantially the same result as an *actio popularis*. While partially agreeing with this concept, especially on the “impact” factor, it should be reminded that the pilot judgment is still anchored to the strict admissibility criteria of the victim status. On the point see L.R. HELFER, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, in *European Journal of International Law*, 2008, p. 148.

⁵⁸¹ F. HAMPSON, C. MARTIN, F. VILJOEN, *Inaccessible apexes: Comparing access to regional human rights courts and commissions in Europe, the Americas, and Africa*, in *International Journal of Constitutional Law*, 2018, p. 180. On the point see also *infra* Chapter V.

⁵⁸² IAComHR: *Emérita Montoya González v. Costa Rica*, Admissibility, Report No. 48/96, Decision of 16 October 1996, para. 28; *Maria Morales de Sierra v. Guatemala*,

IACtHR considers also the «affected community, and not just the individual».⁵⁸³ Moreover, as stated in the *Sarayaku* case, Indigenous Peoples are considered as «collective subjects of international law and not only as *members* of such communities or peoples».⁵⁸⁴

Both approaches are in line with the collective reconstruction of the right to a healthy environment in the African and Inter-American systems.

Nevertheless, if every member of the human community is regarded as a right-holder of the right to a healthy environment, it follows that any human can directly, indirectly or potentially claim the violation of this right, at least *in theory*. The practical realisation of this logical consequence is however more complicated and will be considered in Chapter V, with regard to each regional system's case law.

What remains problematic, even from a theoretical point of view, is the recognition of standing for future generations.

1.2. *The issue with representation for future generations*

If the right to a healthy environment is understood, as previously argued, as belonging to humanity in an “intertemporal” – as in “diachronic” – sense, the question arises as to how future generations may assert a claim for its violation. In other words, is the right to a healthy environment – which in theory belongs also to future generations – *justiciable* for them?

In order to address this question, it is necessary to proceed from the imperatives of intergenerational equity, as outlined in Chapter I, bearing in mind that the reference to future generations encompasses both the “future yet born” – that is, children – and “future unborn” generations.⁵⁸⁵

Admissibility, Report No. 28/98, Decision of 6 March 1998, para. 31; *Mario R. Chang Bravo v. Guatemala*, Petition 283-06, Decision of 24 July 2008, para. 39.

⁵⁸³ F. HAMPSON, C. MARTIN, F. VILJOEN, *Inaccessible apexes*, cit., p. 181.

⁵⁸⁴ IACtHR, *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment of 27 June 2012, para. 231 (emphasis added).

⁵⁸⁵ Following the definition adopted by the Maastricht Principles on the Rights of Future Generations. Maastricht Principles IV, Principle 1. See also *supra* Chapter III, at Section 2.2.3.

When considering intergenerational equity, Edith Brown Weiss identified three normative principles, all marked by elements of “custody” and “conservation”.⁵⁸⁶ In this sense, the author considered the need to preserve in some way the substantive elements of human rights – specifically, the right to a healthy environment – in order to allow future generations to enjoy it. Does this mean that, if these “normative principles” are not exhausted, future generations can act and claim a violation of their right? Moreover, is this question necessary when considering that the violations of human rights deriving from gross environmental damages could very well prove irreversible? Is *redress* truly satisfactory? Is it enough to consider the right “realised”?

Some authors have contended that instead of focusing on invoking the rights of future generations, the attention of courts and tribunal should be on the “objective profile” with a focus on the *duties* that present generations owe future ones.⁵⁸⁷ This approach follows the idea of the existence of “interests” of future generations, which must be protected by present ones, without entering the complicated realm of rights.

However, apart from limiting the entitlements of future *unborn* generations, this does not solve the juridical problem for future *yet born* generations. And even if the discrimen were to be drawn at “birth”, the issue remains for representation of those children who are born but are not yet capable or do not have the procedural possibility to claim a violation before a court or a tribunal. In other words, such an approach would compel the recognition as right-holders only of those children – in accordance with the definition adopted by the Committee on the Rights of the Child (i.e. persons under 18 years of age) – who have attained a sufficient degree of maturity to assert a claim, thereby excluding all those children – from one day old onwards – who have not yet developed such capacity. In order to avoid this discriminatory outcome, it must therefore be acknowledged that even children born only a day earlier are to be regarded as right-holders. What true difference is there between this

⁵⁸⁶ See *supra* Chapter I.

⁵⁸⁷ L. GÜNDLING, *Our Responsibility to Future Generations*, in *American Journal of International Law*, 1990, p. 207 ff.; M. GERVASI, *Equità intergenerazionale, tutela dei diritti umani e protezione dell'ambiente nel contenzioso climatico*, in M. FRULLI (ed), *L'interesse delle generazioni future nel diritto internazionale e dell'Unione europea*, Napoli, 2023, p. 297 ff.

category and that of future generations in terms of possibility to invoke the right to a healthy environment?

Moreover, non-birth or non-physical existence does not mean non-legal existence. Legal systems all over the world recognise the legal existence of entities which are not physically present and which do not own an individual personality in the sense of personal *will* (i.e. corporations).⁵⁸⁸ In some way, the recognition of the will of *States* itself is a *factio iuris*. No individual brain activity can be identified in any of these entities, yet they are easily considered as *existing* and *entitled*.

It could also be highlighted that approaching the right to a healthy environment in a collective way means foregoing all strict considerations of individual subjectivity – coherently with the configuration of intergenerational equity posited by Edith Brown Weiss⁵⁸⁹ – and recognising that some cases call for “communal responses”, which, in turn, resolve itself in an *actio popularis*.

This, of course, is not the case for *every* type of environmental damage, but it risks being true for the greatest emergencies, like the climate crisis.

Dinah Shelton identifies essentially four ways in which intergenerational equity can be implemented in practice: compensation, strategic planning, public trust doctrine, and rights-based representation.⁵⁹⁰

The first one, as Shelton describes it, is a representation of the “polluter pays” principle, according to which destruction of the environment must be *compensated* through the establishment of welfare indexes which take into account the “amount of destruction” that natural resources have suffered due to reckless actions of past and present

⁵⁸⁸ D. SHELTON, *Intergenerational Equity*, in R. WOLFRUM, C. KOJIMA (eds.), *Solidarity: A Structural Principle of International Law*, cit., p. 127 at note 12. The author also asks the interesting question whether intergenerational equity should stop at humans, or if it could include «a broader temporal axis that includes concern for future life and well-being of other species» (p. 128). This is linked to the recognition of an inter-species solidarity, a call that has been answered by some legal systems with the rights of nature (or animals). On the point see also *supra* Chapter I, Section 1.1.

⁵⁸⁹ E.B. WEISS, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity*, Tokyo-New York, 1993, pp. 95-97.

⁵⁹⁰ D. SHELTON, *Intergenerational Equity*, cit.

generations.⁵⁹¹ While this approach is not entirely dismissed, caution is warranted against endorsing solutions that merely provide for economic sanctions in response to pollution and environmental degradation. The positive aspect of this idea is that of recognising a tangible expression of responsibility for past and present generations. It must nevertheless be borne in mind that no amount of financial compensation can adequately redress the everlasting destruction of ecosystems and environments.

Strategic planning can cover this aspect of intergenerational equity. Considering long-term solutions instead of short-term ones is a step in the right direction as it forces present generations to *take into account* and plan the way in which present plans will develop in the future, and how they will impact future generations. It does not, however, account for justiciability.

Similar conclusions can be drawn for the public trust doctrine. Like strategic planning, also the public trust doctrine focuses on the *duties* of present generations rather than the *rights* of future ones.

According to this well renowned domestic doctrine, common resources which «fall within the public domain» should be covered by a public trust conferred to governments to act *on behalf of* such public interests.⁵⁹² This reconstruction would fall nicely with the configuration of the environment as a global public good considered in Chapter I. It could also offer enough stability to allow for equitable use by all members of the community – present and future.⁵⁹³

However, as mentioned, when applied to future generations it considers them as beneficiaries of interests, putting the accent on the duties of States rather than the position of the right-holders. This means that interests of *States* will be competing in the balancing with the interests of present and future generations, that elements such as “industrialisation” and “development” would enter more easily than they

⁵⁹¹ *Idem*, pp. 155-156. See also H.E. DALY, J.B. COBB JR., *For the Common Good: Redirecting the Economy toward Community, the Environment, and a Sustainable Future*, Boston, 1989.

⁵⁹² D. SHELTON, *Intergenerational Equity*, cit., pp. 156-157. See also M.T. KIRSCH, *Up-holding the Public Trust in State Constitutions*, in *Duke Law Journal*, 1997, p. 1169 ff.; D. TAKACS, *The public trust doctrine, environmental human rights, and the future of private property*, in *New York University Environmental Law Journal*, 2008, p. 711 ff.

⁵⁹³ D. TAKACS, *The public trust doctrine, environmental human rights, and the future of private property*, cit., p. 722.

already do.⁵⁹⁴ And yet, the natural contraposition between States and individuals relies precisely on the possibility of those “subjects” to contest said balancing. Putting all the weight of environmental choices in the hands of States means quite literally “trusting” them with always making the right choice. And it could be argued that the history of our planet shows the exact opposite.

Moreover, the public trust could be extended only to those parts of the environment which could reasonably be claimed as public, i.e. pertaining to the State sovereign. This circumstance leaves with two consequences. First, no use of private property could be inserted in the public trust unless it impacts on public areas.⁵⁹⁵ Secondly, the elements of extraterritoriality following from the principle of common but differentiated responsibilities would be disregarded. In other words, while the State can be held responsible before other States for the misuse of its territory, no space for individuals can be found. And, in this way, all possibilities of justiciability are waived.

Finally, rights-based representation remains the strongest of the four proposed methods of implementation of intergenerational equity. It is the only one that links rights and duties, and the only one that identifies venues of justiciability. It is the approach adopted by the Supreme Court of the Philippines in the *Minors Oposa* case, which was brought forward by parents representing children, which in turn represented future unborn generations.⁵⁹⁶ The Supreme Court not only recognised legal standing but it also affirmed that future generations have a fundamental right to a healthy environment and that it falls on each generation to preserve the environment for future generations. Finally, children may sue to enforce that right on behalf of both their generation and future generations.

Therefore, in this reconstruction of future generations’ representations, it is children who are entitled to bring forward claims for future generations. But this is not the only way.

Pirjatanniemi believes that four obstacles should be tackled in order to “operationalise” human rights of future generations: giving more

⁵⁹⁴ *Ibidem*.

⁵⁹⁵ D. SHELTON, *Intergenerational Equity*, cit., p. 157.

⁵⁹⁶ Supreme Court of the Philippines, *Minors Oposa v. Secretary of the Department of Environmental and Natural Resources*, judgment of 30 July 1993.

space to group-related rights, give more relevance to the principles of precaution, broaden the concept of “victim”, and allow for guardianship of future rights.⁵⁹⁷ The author suggests doing so through the tool of *actio popularis*, which is most certainly the best suited and easier to employ. However, it is argued that this does not necessarily mean exclusion of those systems – whether national or international – which do not allow for such an instrument.

Indeed, this could also be the direction taken by the European Court of Human Rights in the recent judgment *KlimaSeniorinnen v. Switzerland*, where standing for NGOs was granted in representation of victims.⁵⁹⁸ At the same time, however, the judgment failed to recognise the members of said NGO as victims, pushing authors and commentators to question *whose* representation was recognised to the association. According to an author, since *actio popularis* is explicitly prohibited in the European system, the only reasonable solution would be that legal standing of the NGO was recognised in representation of a category of people unable to resort to the Court: i.e. future generations.⁵⁹⁹

2. *Effective remedies to environmental degradation*

As Dinah Shelton poses it, «[t]he word ‘remedies’ contains two separate concepts».⁶⁰⁰ In a first procedural meaning, remedies are «the processes by which arguable claims of human rights violations are heard and decided».⁶⁰¹ In the second substantial notion they refer «to the outcome of the proceedings, the relief afforded the successful claimant».⁶⁰² In other words, when talking about effective remedies in international human rights law – and for the purpose of this paragraph – reference must be made both to the possibility to access the independent

⁵⁹⁷ E. PIJATANNIEMI, *Pathways for future generations in existing legal human rights provisions*, in M. DÜWELL, G. BOS, N. VAN STEENBERGEN (eds), *Towards the Ethics of a Green Future: The Theory and Practice of Human Rights for Future People*, London and New York, 2018, p. 76.

⁵⁹⁸ ECtHR, *Verein KlimaSeniorinnen Schweiz and others v. Switzerland*, cit., para. 502. On the point see also *infra* Chapter V.

⁵⁹⁹ G. LETSAS, *The European Court’s Legitimacy After KlimaSeniorinnen*, in *The European Convention on Human Rights Law Review*, 2024, p. 444 ff.

⁶⁰⁰ D. SHELTON, *Remedies in International Human Rights Law*, Oxford, 2015, p. 16.

⁶⁰¹ *Ibidem*.

⁶⁰² *Ibidem*.

and impartial body mentioned above, as well as the concrete measures granted by such a body.

International law recognises the possibility for individuals to invoke the responsibility of the State due to the breach of primary obligations – generally determined by a human rights treaty but in many cases also by custom.⁶⁰³ The right to an effective remedy is recognised by all the main instruments for human rights’ protection.

It is included in general terms under Article 8 of the Universal Declaration of Human Rights «for acts violating the fundamental rights granted him by the constitution or by the law». The ICCPR is more specific, requiring States

«(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.»⁶⁰⁴

This means that States should not only allow for effective remedies, but also make sure that those remedies are determined by a competent authority, and that they are enforced.⁶⁰⁵

The American Convention on Human Rights includes effective remedies under the “right to judicial protection” (Article 25), which substantially repeats the formulation adopted by the ICCPR, focusing on “effective recourse”, “competent courts or tribunals”, and enforcement of such recourse.

⁶⁰³ The International Law Commission (ILC) has implicitly recognised this option in its *Draft articles on Responsibility of States for Internationally Wrongful Acts*, at Art. 33(2): «This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to *any person or entity other than a State*» (emphasis added). See ILC, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (ARSIWA), in *Yearbook of the International Law Commission*, vol. II (Part Two), 2001.

⁶⁰⁴ ICCPR, Art. 2(3).

⁶⁰⁵ Similar formulations are included in CAT (Art. 14(1)), CRC (Art. 39), CERD (Art. 6), CEDAW (Art. 2),

A similar provision is included in the European Convention on Human Rights (Article 13), which establishes that «[e]veryone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity».

Despite its synthetic formulation, the European Court has contributed to its clarification through relevant case-law.⁶⁰⁶ The principles on effective remedies taken into account by the ECtHR are numerous.⁶⁰⁷ The Court has established that to be effective, the remedy must be capable of *directly* remedying the impugned situation, by preventing the violation or offering appropriate redress.⁶⁰⁸ Effectiveness depends specifically on the concrete examination of the merits of the case by domestic authorities.⁶⁰⁹ Remedies must be sufficient, accessible, prompt.⁶¹⁰

The African Charter does not have an explicit reference to the right to effective remedies,⁶¹¹ but the jurisprudence of the African Commission has filled this gap by declaring that remedies must be effective, available and sufficient.⁶¹²

⁶⁰⁶ ECtHR: *Kudla v. Poland*, application no. 30210/96, Judgment of 26 October 2000, paras. 146-156; *Rumpf v. Germany*, application no. 46344/06, Judgment of 2 September 2010.

⁶⁰⁷ See also the Guide on Article 13 of the European Convention on Human Rights.

⁶⁰⁸ ECtHR: *Kudla v. Poland*, cit.

⁶⁰⁹ ECtHR: *Smith and Grady v. the United Kingdom*, applications nos. 33985/96 and 33986/96, Judgment of 27 September 1999, para. 138; *Peck v. the United Kingdom*, application no. 44647/98, Judgment of 28 January 2003, paras. 105-106; *Hasan and Chaush v. Bulgaria*, application no. 30985/96, Judgment of 26 October 2000, para. 100; *Hatton and Others v. the United Kingdom*, cit., para. 141; *Glas Nadezhda EOOD and Elenkov v. Bulgaria*, application no. 14134/02, Judgment of 11 October 2007, para. 69; *Boychev and Others v. Bulgaria*, application no. 77185/01, Judgment of 27 January 2011, para. 56.

⁶¹⁰ ECtHR: *Paulino Tomás v. Portugal*, application no. 58698/00, Decision of 27 March 2003; *Çelik and İmret v. Turkey*, application no. 44093/98, Judgment of 26 October 2004, para. 59; *Kadiķis v. Latvia (no. 2)*, application no. 62393/00, Judgment of 4 May 2006, para. 62.

⁶¹¹ See more in detail G.M. MUSILA, *The right to an effective remedy under the African Charter on Human and Peoples' Rights*, in *African Human Rights Law Journal*, 2006, p. 442 ff.

⁶¹² ACHPR, *Sir Dawda K Jawara v. The Gambia*, Communications 147/95 and 149/96, Decision of 11 May 2000, para. 32. It has also clarified that «a remedy is considered available if the petitioner can pursue it without impediment, it is deemed

The right to an effective remedy is generally linked to the recognition of a *right to reparation*, which entails the obligation – secondary in nature – for States to repair the offense caused to the individual victim.⁶¹³

Whether this right is a component of the right to access to justice or an autonomous one has been subject of extensive doctrinal debate,⁶¹⁴ however, this distinction is of limited relevance for the purposes of the present inquiry, as both are regarded, in relation to the right to a healthy environment, as sub-rights or “consequential rights”.

Reparation can take different forms (restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition), which will be explored with specific consideration to the right to a healthy environment.

Indeed, in order to assess whether effective remedies may be secured in relation to the right to a healthy environment, it is first necessary to clarify what is meant by ecological damage, to delineate its contours, and to determine the extent to which it overlaps with other components of the right to a healthy environment. Subsequently, consideration must be given to whether remedies are invariably available and to the criteria by which their effectiveness may be evaluated within the three regional systems of human rights protection.

effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint».

⁶¹³ See ICJ: *LaGrand (Germany v. United States of America)*, Judgment of 27 June 2001; *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment of 31 March 2004; *Legal Consequences of the Construction of a Wall*, cit., paras. 151-153.

On the right to reparation see also UNGA Resolution on “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Flagrant Violations of Human Rights and Serious Breaches of Humanitarian Law”, UN Doc. A/RES/60/147, 14 December 2005; R. PISILLO MAZZESCHI, *Diritto internazionale dei diritti umani: Teoria e prassi*, cit., p. 23; G. BARTOLINI, *Riparazione per violazione dei diritti umani e ordinamento internazionale*, Napoli, 2009.

⁶¹⁴ See ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012, Dissenting Opinion of Judge Cançado Trindade, para. 221. More diffusely, see R. PISILLO MAZZESCHI, *Diritto internazionale dei diritti umani: Teoria e prassi*, cit., p. 286, where human rights treaties recognising the right to reparation are mentioned.

2.1. *Ecological damage as collective and personal*

When discussing remedies, the assessment of the damage is a preliminary aspect to be considered, together with identifying the subjects harmed and the obligation breached.⁶¹⁵ The damage to be redressed can be referred to, in broad terms, as “ecological damage”, keeping in mind that this concept can incorporate a multitude of meanings and should concur with all the sub-rights included in the right to a healthy environment.

This content can be partly derived from the obligation breached: that is the set of States’ duties examined in Chapter III with specific reference to the six components of the right to a healthy environment. The breach of any of those obligations can, in theory, constitute ecological damage in the sense of the one protected by the right to a healthy environment. In this sense a distinction may be drawn between ecological damage *stricto sensu*, understood as «damage to the environment itself»,⁶¹⁶ and a broader meaning of the concept, which relates to those personal harms *derived* from the first one.

Indeed, in approaching this right as a collective one, its dual dimension must be duly taken into account: the collective nature of the good protected (the environment) and the individual – *rectius* personal – entitlement of its right-holders (all members of humanity).

UN General Assembly Resolution 73/284 adopts this approach by establishing the UN Decade on Ecosystem Restoration,⁶¹⁷ which officially started on 5 June 2021, and which considers the need for restoration of ecosystems «*for the benefit of people and nature*».⁶¹⁸

As already seen in Chapter II, the Inter-American Court of Human Rights fully embraces this dual characteristic of the right to a healthy environment. In its Advisory Opinion of 2017, it recognised that

⁶¹⁵ D. SHELTON, *Remedies in International Human Rights Law*, cit., p. 13.

⁶¹⁶ A. CARETTE, *Right to a healthy environment and the remediation of ecological damage: seeking effective remedies?*, in H. SCHOUKENS, F. BOUQUELLE (eds), *The Right to a Healthy Environment in and Beyond the Anthropocene: A European Perspective*, Cheltenham, 2024, p. 304 ff.

⁶¹⁷ UNGA Resolution on “United Nations Decade on Ecosystem Restoration 2021-2030”, UN Doc. A/RES/73/284, 1 March 2019.

⁶¹⁸ A. CARETTE, *Right to a healthy environment and the remediation of ecological damage*, cit., p. 310.

«[...] as an autonomous right, the right to a healthy environment, 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*. This means that it protects nature and the environment, not only because of the benefits they provide to humanity or the effects that their degradation may have on other human rights, such as health, life or personal integrity, but because of their importance to the other living organisms with which we share the planet that also merit protection in their own right.»⁶¹⁹ (emphasis added).

By recognising its dual nature, the IACtHR stressed that no personal “risk to individuals” is deemed necessary in order to recognise a violation of the right to a healthy environment. This means that environmental degradation and ecological damage *stricto sensu* perfectly overlap in the reconstruction of the judges of San José.

Indeed, on the other hand, the Court also underlines that «in addition to the right to a healthy environment, damage to the environment may affect all human rights, in the sense that the full enjoyment of all human rights depends on a suitable environment».⁶²⁰ Therefore, the broader meaning of ecological damage here adopted embraces both the collective – and ecocentric – dimension of the right to a healthy environment as well as the personal – and individual – one.

In this sense, recognising the dual dimension of the right to a healthy environment also entails bridging the apparent gap existing between the different damages. Moreover, adopting such an approach could lead to the recognition of a mutual dependence of the right to a healthy environment and the rights of nature, hinted at in Chapter I.⁶²¹ Humans – present and future generations – could be entitled to represent nature even without the recognition of explicit juridical personality to its components, due to the fact that they are holders of the right to a healthy environment.

It should be said that, at the international and regional level, this approach is adopted only by the Inter-American Court of Human Rights.

⁶¹⁹ IACtHR, *Environment and Human Rights*, cit, para. 62.

⁶²⁰ *Idem*, para. 64.

⁶²¹ More specifically, see *supra* Chapter I, Section 1.1.

The European Court of Human Rights, on the other hand, has consistently clarified that no redress can be granted if no risk to individuals can be identified.⁶²² This is also in line with the anthropocentric and individualistic approach of the Court towards admissibility criteria, and specifically victim status. The Court only examines those cases in which damage or risk of damage has happened or will happen to individuals due to the action or the inaction of a State. This means excluding completely any type of protection of the environment in itself.

However, while the anthropocentric critiques can hardly be denied, the individualistic approach of the Court does not need to be considered as closing *all* opportunities for considerations of ecological damage. The Court itself has admitted that “quality of life” is a vague and “subjective” concept.⁶²³ It is not far-fetched to imagine that the quality of life could, one day, include living in a sustainable and safe environment, apart from its “health” component. Indeed, even while claiming that no autonomous right to a healthy environment exists in the Convention, the Court has already recognised in the past that «in today’s society the protection of the environment is an increasingly important consideration» which forms part of «constant and sustained interest of the public».⁶²⁴

This is clearly very far from the broad recognition of the Inter-American Court, but, for the purpose of considering the elements of damage, it can be useful as a starting point. Of course, when recognising redress for environmental degradation, the two Courts will adopt very different approaches to evaluating *what* constitutes harm. The IACtHR will consider both personal damages – to health, life, access to information, participation, culture – as well as collective ones – direct harm to nature’s components in the form of pollution and all other forms of degradation. The ECtHR will limit itself to considering those forms of degradation (even collective ones) which have an impact on the rights of individuals.

⁶²² ECtHR: *Kyrtatos v. Greece*, application no. 41666/98, Judgment of 22 May 2003, para. 52; *Hamer v. Belgium*, application no. 21861/03, Judgment of 27 November 2007, para. 79; *Çiçek and others v. Turkey*, application no. 44837/07, Decision of 4 February 2020, para. 20 ff.

⁶²³ ECtHR, *Cordella and others v. Italy*, cit., para. 160.

⁶²⁴ ECtHR, *Hamer v. Belgium*, cit., para. 79.

Identifying the limits of ecological damage – in its broader sense – serves to evaluate the possible available remedies and consider their concrete effectiveness both in terms of procedures and measures attainable.

2.2. *Effectiveness of remedies to environmental degradation*

As mentioned above, effectiveness of a remedy is linked to a number of criteria (accessibility, promptness, sufficiency). Most of all, remedies must be able to *tackle* the alleged injustice, and in this way they are inevitably linked to the issue of reparation.

The three classical forms of reparations are compensation, restitution and satisfaction.⁶²⁵

With the first, the State responsible is given a secondary obligation of *reimbursing* the victim for what was lost by the means of a *monetary* equivalent. In this sense, compensation has the aim «to restore to individuals, to the extent possible, their capacity to achieve the ends that they personally value».⁶²⁶ As such, it can have «an important rehabilitative effect, alleviate suffering, and provide for material needs».⁶²⁷

Compensation in relation to environmental damages can be complicated. This consideration becomes all the more compelling when account is taken of the potential for harm affecting humanity as a whole. It is not even necessary to confine the discourse to the climate crisis, which obviously affects all humankind – albeit in different manners. Following the hypothesis of the beginning of this discourse – that the environment is a *global common good* – the number of cases which fall into this category multiplies exponentially.

It might be argued, for example, that damage to a local park or lake should be regarded as detrimental only to the community residing in its immediate vicinity. However, even if such a narrowing of the scope of harm were to be accepted – and it is doubtful that this would not conflict with the characterisation of the environment as a global common good – a vast number of complex situations would nonetheless remain

⁶²⁵ See R. PISILLO MAZZESCHI, *Diritto internazionale dei diritti umani: Teoria e prassi*, cit., p. 289.

⁶²⁶ D. SHELTON, *Remedies in International Human Rights Law*, cit., p. 20.

⁶²⁷ *Ibidem*.

unresolved. Any type of environmental degradation caused to rivers, seas, oceans, the atmosphere or even just large forests (without mentioning areas as gargantuan as those covered by the Amazon rainforest), would inevitably fall into the category of damages impossible to compensate.

Even were such astronomical sums to be accepted as adequate – and practically attainable – compensation, the vexed question would nonetheless remain as to how the *worth* of nature is to be determined. Should it be linked to the *market value* of nature? How can this be determined? It is very difficult to imagine a scenario in which these considerations can be compatible with an ecocentric view of nature.

An author proposes to move past the market value and include in the evaluation «also the services supplied by the damaged elements of the environment prior to the damage being inflicted», by taking into account “ecosystem services”, that is the services that part of nature offers in balancing the ecosystem.⁶²⁸ In this sense, when considering episodes of gross pollution, to the intrinsic value of the environment one should add the domino effect that gross pollution has to the other parts of the environment *dependant* on the first. «A wood damaged by a chemical spill will, after clean-up and replanting of trees, not provide the same ecosystem services as before for decades. Additional compensatory measures are necessary.»⁶²⁹

A different route would be to consider the costs needed to *restore* the environment to the *status quo ante*, which leads to analysing the limitations of the second form of reparation: restitution.

⁶²⁸ A. CARETTE, *Right to a healthy environment and the remediation of ecological damage*, cit., p. 312. See also M. FEVRE, *Services écologiques et compensation environnementale: perspective et limites d'une nouvelle synergie dans le champ du droit*, in *Aménagement et Environnement*, 2012, p. 71 ff.

⁶²⁹ A. CARETTE, *Right to a healthy environment and the remediation of ecological damage*, cit., p. 312. The author refers to the ICJ case *Certain Activities Carried Out by Nicaragua in the Border Area* (cit.), as an example of the ecosystem services criterium where the Court recognised «the principle of full reparation due for damage to the environment itself and the consequent impairment or loss of the ability of the environment to provide goods and services, and the compensability of this damage under international law (para. 42 of the judgment)». And yet, when confronted with the need to assess the damage, the ICJ granted Costa Rica only 120,000 US\$, instead of the 2,880,745.82 US\$ requested by the State.

Restitution or *restitutio in integrum* is the preferable form of reparation,⁶³⁰ in every case of human rights violations but especially in the case of the right to a healthy environment. The Inter-American Court has issued judgments focusing on restoration of land subject to environmental damage, ordering that pollution be removed and that no act be committed which could hinder that process.⁶³¹ It has also established that this must be the preferred course, whenever possible,⁶³² considering that «owing to [the] particularities [of environmental harm], after the damage has occurred, it will frequently not be possible to restore the previous situation».⁶³³

Indeed, restitution is not always possible. Loss of biodiversity which amounts to extinction of a species, for example, cannot be restored. On this aspect, the climate crisis is of special relevance.

Already in 2001, some authors described the impact of humans on the climate through greenhouse gas emissions as causing damages impossible to reverse.⁶³⁴ In 2022, the Sixth Assessment Report of the

⁶³⁰ R. PISILLO MAZZESCHI, *Diritto internazionale dei diritti umani: Teoria e prassi*, cit., p. 289.

⁶³¹ IACtHR: *Kichwa Indigenous People of Sarayaku v. Ecuador*, cit.; *Case of the Garifuna Community of Triunfo de la Cruz and its members v. Honduras*, Judgment of 8 October 2015; *Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina*, Judgment of 6 February 2020.

⁶³² IACtHR, *Lhanka Honhat v. Argentina*, cit., para. 307.

⁶³³ *Idem*, para. 208. In this case, the Court identified the following specific measures: «First, remove livestock and fences belonging to outsiders from indigenous territory since this and related activities such as illegal logging affect water and access of indigenous communities to drinking water plus cause environmental degradation. Secondly, conserve the surface and groundwater in indigenous territory. Thirdly, guarantee permanent access to drinking water for all the victims who are members of indigenous communities. Fourthly, avoid the decrease in or loss of forestry resources in indigenous territories and seek their gradual recovery, ensuring reasonable conservation and improvement of environmental resources. Fifthly, measures to appropriately guarantee indigenous peoples' effective access to, use of, and participation in nature reserves, ensuring the compatibility of environmental protection and the rights of indigenous peoples so that nature reserve maintenance is not an excessive obstacle to their rights. Sixthly, measures on reviewing and revoking mining concessions within the nature reserves on traditional indigenous territory» (J. PEREZ-LEON-ACEVEDO, *Reparations in environmental cases: should the International Criminal Court consider the Inter-American Court of Human Rights' jurisprudence?*, in *Journal of International Dispute Settlement*, 2024, pp. 385-386).

⁶³⁴ M. SCHEFFER, S. CARPENTER, J. FOLEY, C. FOLKE, B. WALKER, *Catastrophic shifts in ecosystems*, in *Nature*, 2001, p. 591 ff. See more diffusely IPCC, Fourth Assessment Report, *Climate Change*, 2007.

IPCC stated once more that surpassing the 1,5°C limit would lead to catastrophic consequences and irreparable harm to the environment. It considers that irreversible losses have already been suffered due to climate change «in terrestrial, freshwater and coastal and open ocean marine ecosystems».⁶³⁵ «Other impacts are approaching irreversibility such as the impacts of hydrological changes resulting from the retreat of glaciers, or the changes in some mountain [...] and Arctic ecosystems [...]».⁶³⁶

In these cases, adopting a precautionary approach is the only way to preserve ecosystems,⁶³⁷ which – it should be reminded – is part of the duties that present generations owe to future ones in Edith Brown Weiss's reconstruction.⁶³⁸

Finally, satisfaction usually refers to some sort of formal recognition of the violation on part of the State.⁶³⁹ The European Court of Human Rights interprets the term “just satisfaction” rather narrowly, adopting decisions on reparations based mainly on non-pecuniary damages⁶⁴⁰ and showing reluctance to order individual or general measures in

⁶³⁵ IPCC, Sixth Assessment Report, *Climate Change, Summary for Policymakers*, 2022, para. B.1.2.

⁶³⁶ *Ibidem*.

⁶³⁷ On this point, some authors have suggested a re-elaboration of the precaution principle, turning it into the “Irreversible Harm Precautionary Principle”, by taking into account the type of action required to act to prevent such nefarious circumstances (C.R. SUNSTEIN, *Irreversibility*, in *Law, Probability and Risk*, 2010, p. 227 ff.; S. FARROW, *Using Risk-Assessment, Benefit-Cost Analysis, and Real Options to Implement a Precautionary Principle*, in *Risk analysis: an official publication of the Society for Risk Analysis*, 2004, p. 727 ff.). However fascinating this vague concept might be, it does not seem to move away from the traditional configuration of the precautionary principle, as considered in Principle 15 of the Rio Declaration: «[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental damage». See *supra* Chapter II.

⁶³⁸ E.B. WEISS, *In Fairness To Future Generations and Sustainable Development*, cit., p. 20. See *supra* Chapter I.

⁶³⁹ R. PISILLO MAZZESCHI, *Diritto internazionale dei diritti umani: Teoria e prassi*, cit., p. 289. On the point see also G. ARANGIO-RUIZ, *Report of the Special Rapporteur on State responsibility*, UN Doc A/CN.4/469, 9 May 1995; J. PERSONNAZ, *La réparation du préjudice en droit international*, Paris, 1938; D. SHELTON, *Remedies in International Human Rights Law*, cit., p. 383.

⁶⁴⁰ In the terms used until now, closer to compensation than satisfaction.

environmental cases.⁶⁴¹ In the *Cordella* case, for example, the Court considered the declaratory judgment of violation of Articles 8 and 13 enough to meet the criteria for “just satisfaction” and awarded no other form of reparation.⁶⁴²

It is frequent for mechanisms of human rights protection to consider the judgment in itself a form of satisfaction, without the need for a separate act of the State formally recognising the violation.⁶⁴³ This does not mean that satisfaction in itself should be considered as always sufficient, but that the judgment recognising *other forms of reparation* can fulfil also satisfactory objectives.

This was the direction adopted by the IACtHR in the *Kaliña and Lokono* case, where the existence of other measures of reparations and the full diffusion of the judgment was deemed enough to achieve satisfaction of the victims.⁶⁴⁴

The Inter-American Court is also a prolific source of examples regarding two other forms of reparations: rehabilitation of the victim(s) and guarantees of non-repetition.⁶⁴⁵

More generally, most of international and regional tribunals for the protection of human rights offer some sort of indication on other measures that should follow compensation or restoration.⁶⁴⁶

⁶⁴¹ See H. KELLER, C. HERI, R. PISKÓTY, *Something Ventured, Nothing Gained? Remedies before the ECtHR and Their Potential for Climate Change Cases*, in *Human Rights Law Review*, 2022, p. 17.

⁶⁴² ECtHR, *Cordella and others v. Italy*, cit., para. 187.

⁶⁴³ *Ibidem*.

⁶⁴⁴ IACtHR: *Kaliña and Lokono Peoples v. Suriname*, Judgment of 25 November 2015, para. 316 ff.; *Lhanka Honbat v. Argentina*, cit., paras. 348-349.

⁶⁴⁵ IACtHR: *Kaliña and Lokono Peoples v. Suriname*, cit., para. 290; *Kichwa Indigenous People of Sarayaku v. Ecuador*, cit., paras. 293-295; *Moiwana Community v. Suriname*, Judgment of 15 June 2005, para. 209; *Sawboyamaxa Indigenous Community v. Paraguay*, Judgment of 29 March 2006, para. 235. On the practice of the Inter-American Court see more in detail J. PEREZ-LEON-ACEVEDO, *Reparations in environmental cases: should the International Criminal Court consider the Inter-American Court of Human Rights' jurisprudence?*, cit. On the impact of the Inter-American jurisprudence on the development of international law with regard to environmental cases see also C. VOIGT, *Introduction-International Courts and the Environment: the Quest for Legitimacy* in C. VOIGT (ed), *International Judicial Practice on the Environment*, Cambridge, 2019, p. 1 ff.

⁶⁴⁶ D. SHELTON, *Remedies in International Human Rights Law*, cit., p. 383 ff.

It is clear that when establishing whether a remedy is *effective* in the field of environmental degradation, multiple elements come into consideration.

Restitution remains the preferred reparation measure, especially when it consists in restoring ecosystems and biodiversity. Unfortunately, before cases of gross ecological damage or when considering climate change, restitution is not always possible. Attention must then be directed to compensation, which entails a series of difficulties, beginning with the assessment of the damage, followed by the valuation of the loss, and culminating in the determination of the appropriate award. This is further complicated by the consideration of the collective nature of the right-holder of the right to a healthy environment and the number of potential victims in these cases.

Once more, the Inter-American Court provides a positive example with its jurisprudence recognising collective reparations, which «concern measures for individual beneficiaries within ‘collective’ awards, and/or beneficiaries forming a specific group (other than a community)». ⁶⁴⁷ As such, they are usually linked to a previously identified community, which is not the same as awarding reparations to *humanity* (especially considering present and future generations). It is, nevertheless, a good example of awards which focus on strengthening community-based initiative for the preservation of the environment. This could mean, for example, establishing a fund to be used by a community to take care of an area (a forest, a lake, a river). But it could also mean identifying different measures (ensure access, delimitation and protection of natural reserves). ⁶⁴⁸

A similar tendency can be observed in the jurisprudence of the African Court on Human and Peoples’ Rights. In *Lidho and Others v. Côte d’Ivoire*, concerning the destruction and mismanagement of protected forest areas traditionally used by local communities, the Court not only held the State responsible for violating the rights to life, health, information and a satisfactory environment by failing to prevent and address the dumping of hazardous waste, but also ordered a set of

⁶⁴⁷ J. PEREZ-LEON-ACEVEDO, *Reparations in environmental cases: should the International Criminal Court consider the Inter-American Court of Human Rights’ jurisprudence?*, cit., p. 388.

⁶⁴⁸ *Ibidem*.

reparative measures that go beyond mere pecuniary compensation.⁶⁴⁹ These included obligations to ensure medical and psychological assistance to victims, to amend domestic legislation to prohibit hazardous waste importation and dumping, and to strengthen regulatory frameworks and accountability of corporate actors involved in environmental harm. Such measures illustrate that reparations in environmental human rights litigation can encompass structural, non-monetary obligations aimed at tackling the root causes of harm and preventing recurrence, thereby contributing to a more substantive form of satisfaction and rehabilitation.

Finally, other measures of reparation can serve a complementary function in satisfying and rehabilitating the victim, along with guaranteeing non-repetition of the offense.

Orders to enact or amend legislation, for example, could serve the role of guaranteeing non-repetition, as well as satisfying the victim(s). However, courts are generally reluctant to adopt these kinds of measures due to the political pressure they would put on the State, potentially creating tension with the principle of subsidiarity.

3. *Limits of judicial authority: the principle of subsidiarity and the justiciability of the right to a healthy environment*

The third element of justiciability examined relates to the limits of judicial authority. In some way, it could be said that for the matter to be justiciable even only in theory this requirement is paramount. An author has also referred to this issue as “justiciability *stricto sensu*”.⁶⁵⁰

As already seen at the beginning of this Chapter, the question of the justiciability *stricto sensu* of the right to a healthy environment relates to the broader theme of economic, social and cultural rights. In particular, attention was devoted to the “competence” or “legitimacy” objection, according to which economic, social and cultural rights are deemed not

⁶⁴⁹ ACtHPR, *Ligue Ivoirienne des droits de l'homme (LIDHO) and others v. Republic of Côte d'Ivoire*, application no. 041/2016, Judgment of 5 September 2023, para. 201 ff.

⁶⁵⁰ As opposed to “justiciability *lato sensu*” which would include all those “factors exterior to international law”. See S. SOLOMON, *The Justiciability of International Disputes: The Advisory Opinion on Israel's Security Fence - A Case Study*, Jerusalem, 2009.

to be “suitable” for adjudication by courts and tribunals by virtue of their inherent nature.⁶⁵¹ Those considerations will not be reiterated here.

Instead, focus will be drawn on larger reflections of the respect of the principle of subsidiarity in relation to these “political issues”, such as the right to a healthy environment. The question arises because the right to a healthy environment intersects different “branches” of international law – IHRL and IEL – and it is positioned at the crossroads between human rights and political commitments of the State.

This is not, in itself, problematic. In fact, it could be argued that one of the strengths of the right to a healthy environment is precisely the development of international environmental law standards in regard to the protection of the environment.⁶⁵² It could be even said that no right to a healthy environment would exist without the development of those standards.

However, a right that is not justiciable is hardly relevant for people. It would be a nonsense to imagine the existence of a right to a healthy environment and then exclude it from the matters which courts and tribunals can examine. Arguments in favour of this option are inevitably against the recognition of an autonomous right to a healthy environment and have been explored elsewhere in this book.⁶⁵³

The principle of subsidiarity, however, is not foreign to the regime of international human rights law. It has been defined as «one of the keys to the vault on which the international law of human rights is built».⁶⁵⁴ It refers, in the words of Carozza, to «the principle that each social and political group should help smaller or more local ones accomplish their respective ends without, however, arrogating those tasks to itself».⁶⁵⁵ The principle of subsidiarity permeates the work of both the European Court

⁶⁵¹ See *supra* at the beginning of this Chapter.

⁶⁵² See *supra* Chapter II, especially Section 2.

⁶⁵³ See *supra* Chapter I.

⁶⁵⁴ F. PASCUAL-VIVES, *Consensus-Based Interpretation of Regional Human Rights Treaties*, Leiden, 2019, p. 54.

⁶⁵⁵ P.G. CAROZZA, *Subsidiarity as a Structural Principle of International Human Rights Law*, in *American Journal of International Law*, 2003, p. 38 at note 1.

of Human Rights and the Inter-American Court of Human Rights,⁶⁵⁶ but it is also present in the way other human rights instruments are framed.⁶⁵⁷

To summarise its tenets, «(i) States have the primary responsibility to secure human rights, on the one hand, and (ii) international human rights institutions have only a supervisory function [...] in cases where minimal human rights standards are not protected effectively [...]».⁶⁵⁸ In other words, this means that when that primary functions – of human rights protection – is not exercised properly by the State, international courts are not only entitled to step in, but they *should*.⁶⁵⁹

This is also the reasoning that the European Court of Human Rights has followed in its recent judgment on human rights and climate change. At para. 449 of the *KlimaSeniorinnen* judgment, the Court analysed its role *vis-à-vis* the States on issues related to environmental policy-making, clarifying that it recognised the difficulty in distinguishing «issues of law from questions of policy and political choices».⁶⁶⁰ However, the judges of Strasbourg added that

«[T]his does not exclude the possibility that where complaints raised before the Court relate to State policy with respect to an issue affecting the Convention rights of an individual or group of individuals, this subject matter is no longer merely an issue of politics or policy but also a matter of law having a bearing on the interpretation and application of the Convention. In such instances, the Court retains competence, albeit with substantial deference to the domestic policy-maker and the

⁶⁵⁶ F. PASCUAL-VIVES, *Consensus-Based Interpretation of Regional Human Rights Treaties*, cit., p. 55 ff. The author analyses the presence of the principle with reference to three moments: conclusion of the treaty, suspension clauses, and enforcement. See also M. KANETAKE, *Subsidiarity in the Practice of International Courts*, in M. KANETAKE, A. NOLLKAEMPER (eds.), *The Rule of Law at the National and International Levels: Contestations and Deference*, London, 2016, p. 269 ff.

⁶⁵⁷ See P.G. CAROZZA, *Subsidiarity as a Structural Principle of International Human Rights Law*, cit., on the International Bill of Rights (UDHR, ICCPR, ICESCR) and the European Union.

⁶⁵⁸ S. BESSON, *Subsidiarity in International Human Rights Law—What is Subsidiary about Human Rights?*, in *The American Journal of Jurisprudence*, 2016, p. 72.

⁶⁵⁹ M. KANETAKE, *Subsidiarity in the Practice of International Courts*, cit., p. 280: «[...] subsidiarity is inseparable from an idea that international courts would step in should a state be no longer seen as an appropriate forum».

⁶⁶⁰ ECtHR, *Verein KlimaSeniorinnen Schweiz and others v. Switzerland*, cit., para. 449. On the argument of separation of powers in domestic jurisprudence, see *infra* Chapter VI.

measures resulting from the democratic process concerned and/or the judicial review by the domestic courts. Accordingly, the margin of appreciation for the domestic authorities is not unlimited and goes hand in hand with a European supervision by the Court, which must be satisfied that the effects produced by the impugned national measures were compatible with the Convention».⁶⁶¹

This means that the principle of subsidiarity cannot exclude *a priori* the intervention of an international court of tribunal when the matter of the case remains human rights. Even if this case does not refer specifically to the right to a healthy environment – as already seen, it is not included in the ECHR – this reasoning can be applied to this discourse as well.

It could be argued that it is precisely the role of international human rights mechanisms to intervene when the State has proven incapable of respecting, protecting and fulfilling human rights. More than that, it is their role to *inquire* whether the State has breached a human rights obligation or not. This role would be disregarded by the exclusion of all cases relating to the environment just because they *intersect* with public policy.

Indeed, at para. 412:

«Judicial intervention, including by this Court, cannot replace or provide any substitute for the action which must be taken by the legislative and executive branches of government. However, *democracy cannot be reduced to the will of the majority of the electorate and elected representatives, in disregard of the requirements of the rule of law*. The remit of domestic courts and the Court is therefore complementary to those democratic processes. The task of the judiciary is to ensure the necessary oversight of compliance with legal requirements».⁶⁶²

The respect of human rights *is* a political issue, as well as it *is* a legal issue. There is no configuration of any right in which these two aspects do not interact with one another. Therefore, the extent of judicial authority is necessarily part of the elements to evaluate when considering the justiciability of the right to a healthy environment.

It is not in the mere possibility for the judges to examine a question the true potential clash with political will in the case of the right to a

⁶⁶¹ *Idem*, para. 450.

⁶⁶² *Idem*, para. 412 (emphasis added).

healthy environment. The terrain on which tension can be found is that of the measures which can be ordered once a violation has been found. But as already shown in the last Section – and as international jurisprudence will prove in next Chapter – this is rarely the case as courts and tribunals take consideration of subsidiarity in great account. Rather the risk is in the opposite direction: that fear of backlash from States could force judges to shy away from bold decisions and hinder the justiciability of the right to a healthy environment.

4. *Concluding reflections on possibilities of justiciability*

No right can truly exist if it is not justiciable, both *lato sensu* and *stricto sensu*. This is also the way the system for the protection of human rights is framed. Allowing for the possibility of accessing justice and bring a claim to a court or tribunal in order to obtain redress is the foundation of the respect for human rights.

In this Chapter, the elements relevant to determining whether a right may be regarded as justiciable have been examined. In relation to the collective right to a healthy environment, several potentially problematic issues have been identified.

First, it has been argued that the most coherent means of ensuring access to justice for right-holders would consist in the recognition of an *actio popularis*, as this appears to be the only procedural device capable of reflecting the dual nature of the right to a healthy environment. It is the only one that allows an individual to claim a violation suffered by a community, in this case all of humanity. At the same time, it has been observed that such a mechanism is recognised in only two of the three regional human rights systems.

Secondly, recalling that the right to a healthy environment also pertains to future generations, various mechanisms for safeguarding their interests have been considered. The analysis has led to the conclusion that the only fully rights-based solution consists in allowing representation by present generations, in a manner analogous to existing models of representation for young children.

The analysis then turned to identifying the characteristics of effective remedies in relation to ecological damage, through the delineation of its scope and the consideration of the various forms of reparation available.

It was demonstrated that, although restitution remains the preferred form of reparation, it is not invariably feasible, and that compensation should, in any event, be complemented by a precautionary approach in human rights adjudication, requiring *preventive* action prior to the occurrence of harm.

Attention was subsequently directed to the limits of judicial authority, and it was argued that the principle of subsidiarity is capable of being interpreted in a manner that accommodates the justiciability of politically sensitive human rights claims without entailing a rupture with State sovereignty.

These considerations provide the theoretical framework that will inform the following Chapters, by identifying the core elements required for a right to attain full justiciability.

This does not imply that such conditions are necessarily realised *in practice*. The obstacles briefly outlined in this Chapter are likely to re-emerge in the analysis of the jurisprudence concerning the right to a healthy environment and environmental rights more broadly. The next Chapter will therefore apply these considerations to the case-law of human rights mechanisms, in order to assess their resilience in practice.

CHAPTER V:
INTERNATIONAL STANDARDS IN PRACTICE: DIFFERENT LEVELS OF
COLLECTIVE JUSTICIABILITY

This Chapter is devoted to the analysis of the practice of international courts and tribunals with regard to the right to a healthy environment and from a collective point of view.

The standards elaborated in the previous Chapters will be put to the test of the jurisprudence in order to evaluate whether full justiciability of the right to a healthy environment can be found at the international and regional level.

The Chapter will be divided into two parts. The first (paragraph 5.1) will deal with regional mechanisms of human rights protection: namely, the Inter-American system, the African system and the case-law of the European Court of Human Rights. As a preliminary matter, it should be clarified that the analysis will encompass not only practice expressly recognising the right to a healthy environment, but also, more broadly, jurisprudence concerning environmental rights. This is justified by the structure of the right as defined in Part I, with all the sub-rights that constitute its substantive components and guide the obligations of States.

The second Section will consider the practice of two UN treaty bodies: the Committee on the Rights of the Child and the Human Rights Committee. In the recent years, these two venues have dealt with specific issues related to the right to a healthy environment, facing the question of climate change and intergenerational equity. The climate crisis is but one form of environmental degradation, however, it is also one of the greatest emergencies of our time. As such, tackling it requires some additional considerations, which has been underlined in the past Chapters (especially, the issue of extra-territoriality and the concept of “imminency” of the damage).

1. *Regional human rights mechanisms: (too) high expectations?*

This Section is dedicated to the cases before mechanisms of human rights’ protection at the regional level. Reference will be made, therefore, to the work of the Inter-American system (considering both the Court

and the Commission), the African system (especially the Commission), and the European Court of Human Rights. The practical application of the principles examined in Chapter II will now be considered, with a view to assessing the effective justiciability of the collective right to a healthy environment before the fora entrusted with the protection of human rights.

An evaluation will be undertaken as to whether any of these systems withstands the test of time and of the evolving understanding of human rights, with due regard to all dimensions of justiciability, both procedural and substantive. It will be argued that, although each of the three systems presents areas in need of improvement, they already display meaningful avenues for further development.

1.1. *Healthy environment and Indigenous Peoples: the case-law of the Inter-American Court of Human Rights*

The principal characteristics of the Inter-American system have already been outlined. They will be briefly restated here in order to enable a more focused engagement with its jurisprudence. As previously noted, the Inter-American human rights framework comprises two mechanisms: the Inter-American Commission of Human Rights, which is a quasi-judicial body tasked with receiving complaints from individuals (and groups); and the Inter-American Court of Human Rights, which is the only one that can deliver binding judgments, and which can only receive complaints from States or if referred from the Commission.⁶⁶³

The case-law that these two bodies have developed regarding the right to a healthy environment (and environmental rights) is strictly related to the impulse of Indigenous Peoples-based litigation. Indeed, the strong presence of local communities and Indigenous Peoples mostly in Central and Latin American States has offered a unique perspective of reflection on the relationship between humans and nature. This is also made possible by the recognition of legal personality to nature (“Pacha Mama”) in some of the constitutions of Latin-American countries (Ecuador and Bolivia). This point has been considered in Chapter I,

⁶⁶³ See *supra* Chapter II, Section 3.1.

where the possibility of an ecocentric approach to the relationship with nature has been explored.⁶⁶⁴

Given this premise, it is no surprise that both the Inter-American Commission (IAComHR) and the Inter-American Court of Human Rights (IACtHR) have dealt with several cases put forward by Indigenous communities.

Already in 1984, for example, in the case of *Miskitos of Nicaragua*, the Commission focused on three points: (i) a general and wholesome recognition of the Indigenous land as the community held land, as opposed to parcels or sections; (ii) recognition of Indigenous community rights to natural resources within their territories; and (iii) recognition of Indigenous community rights to self-determination and autonomy.⁶⁶⁵

Also the Court has developed an interesting jurisprudence on the matter, relying mainly on the rights of Indigenous Peoples to natural resources, self-determination and property of ancestral lands.

The latter is examined by the judges in the case of *Mayagna (Sumo) Awas Tingi v. Nicaragua*.⁶⁶⁶ This case was centred around Article 21 of the American Convention on Human Rights, which protects the right to property.⁶⁶⁷ No explicit reference to Indigenous Peoples is made in the Convention itself, but the Court applied an evolutive interpretation of Article 21, affirming that the right to property encompasses the rights of Indigenous communities in a “collective property framework”.⁶⁶⁸ The Court ordered the States of Nicaragua to «adopt in its domestic law the necessary legislative, administrative, or other measures to create an effective mechanism for delimitation and titling of the property of the members of the Awas Tingni Mayagna Community, in accordance with

⁶⁶⁴ See *supra* Chapter I, Section 1.1.

⁶⁶⁵ IAComHR, *Resolución sobre el procedimiento de solución amistosa sobre la situación de los derechos humanos de un sector de la población nicaragüense de origen Miskito*, 16 May 1984.

⁶⁶⁶ IACtHR, *Caso de la Comunidad Mayagna (Sumo) Awas Tingni v. Nicaragua*, cit.

⁶⁶⁷ ACHR, Art. 21: «1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. 3. Usury and any other form of exploitation of man by man shall be prohibited by law».

⁶⁶⁸ G. PENTASSUGLIA, *Towards a Jurisprudential Articulation of Indigenous Lands Rights*, in *European Journal of International Law*, 2011, p. 165 ff.

the customary law, values, customs and mores of that Community».⁶⁶⁹ In doing so, the Court gave explicit weight to all those cultural elements that permeate the tradition of Indigenous Peoples' cosmogonies, and which are strictly linked to the territory comprised in their ancestral lands.⁶⁷⁰ The Court based its reasoning mainly on the "cultural" aspect of this link.⁶⁷¹

A similar approach was adopted by the Court in the *Saramaka* case of 2007.⁶⁷² Again it is a case of violation of Article 21 ACHR, but in this case the judges recognised also a violation of Article 25 (right to judicial protection). They affirmed that the State of Suriname was not equipped with dealing with Indigenous Peoples-led cases on "communal" property,⁶⁷³ and that

«[...] the safeguard of effective participation that is necessary when dealing with major development or investment plans that may have a profound impact on the property rights of the members of the Saramaka people to a large part of their territory must be understood to additionally require the free, prior, and informed consent of the Saramakas, in accordance with their traditions and customs.»⁶⁷⁴

Once more, the Court ordered the State to adopt all the necessary measures to implement the rights of Indigenous Peoples to the communal property of their ancestral lands.⁶⁷⁵ Still, in this phase of its jurisprudence, the Court maintains a focus on the right to property rather than environmental rights and on the "cultural" impact.

The first case in which the IACtHR recognises the thread connecting cultural rights to communal property over ancestral lands and

⁶⁶⁹ IACtHR, *Caso de la Comunidad Mayagna (Sumo) Awas Tingni v. Nicaragua*, cit., para. 138.

⁶⁷⁰ M.A. TIGRE, A. HARRINGTON, N. URZOLA, H. EVANS, A. KASZMAR, A. BERNAL, A. VAN DER KLEYN, *Las respuestas del Sistema Interamericano durante la pandemia por COVID-19: El desarrollo de los derechos humanos verdes en casos de pueblos originarios a nivel nacional y regional*, in *Revista de Derecho Ambiental* 2021, p. 7 ff.

⁶⁷¹ A. BRENDALEE, A. CUNNINGHAM, *Los pueblos indígenas en el sistema interamericano por la defensa de sus territorios: el Caso de la Comunidad Mayagna (Sumo) de Awas Tingni vs Nicaragua*, in *Revue Québécoise de droit international*, 2022, p. 71 ff.

⁶⁷² IACtHR, *Saramaka People v. Suriname*, cit.

⁶⁷³ *Idem*, para. 96 ff.

⁶⁷⁴ *Idem*, para. 137.

⁶⁷⁵ *Idem*, paras. 194-201.

fundamental rights is that of the *Xákmok Kásek v. Paraguay*.⁶⁷⁶ After repeating what was already in its established jurisprudence (violations of rights to property, to effective remedy and to non-discrimination, and the link with the cultural identity of the Xákmok Kásek), the judges affirmed that the State of Paraguay had not taken «all appropriate measures to protect and preserve the right to life (positive obligation)» and had not kept with «the obligation to ensure the full and free exercise, without discrimination, of the rights of all persons under [its] jurisdiction».⁶⁷⁷

In this way, the Court recognised a violation of the right to life (Article 4 ACHR) due to the “special vulnerability” of the community caused by the “precarious conditions” in which they lived by not having title to their ancestral lands.⁶⁷⁸ Furthermore, it ordered the reparation in the form of *restitutio in integrum*, restitution of 10,700 hectares of land.⁶⁷⁹

All the reasoning is centred around Indigenous Peoples’ specific cosmovision, which forces a collective – and ecocentric – understanding of property. Rather than being owned by a multitude of single individuals in parcels, land is valued in its relationship with the entire community, that acts as right holder.

This type of reasoning is not foreign to the judges of San José. As already said, the intrinsic relation between nature’s rights and the human right to a healthy environment has been explored in depth in the Advisory Opinion of 2017 on “Environment and Human Rights”.⁶⁸⁰ In the Advisory Opinion, requested by Colombia, the Court finally affirms the existence of an autonomous right to a healthy environment, which «differs from the environmental content that arises from the protection of other rights»,⁶⁸¹ and which can be invoked independently from the recognition of harm being inflicted upon humans. Nature’s components are therefore protected as having legal interest in themselves, and explicit reference is made to rights of nature, due to the importance they have in relation «to the other living organisms with which we share the planet

⁶⁷⁶ IACtHR, *Case of the Xákmok Kásek Community v. Paraguay*, Judgment of 24 August 2010.

⁶⁷⁷ *Idem*, para. 187.

⁶⁷⁸ *Idem*, paras. 189-190.

⁶⁷⁹ *Idem*, para. 281 ff.

⁶⁸⁰ IACtHR, *The Environment and Human Rights*, cit.

⁶⁸¹ *Idem*, para. 63.

that also merit protection in their own right».⁶⁸² This last point is relevant to the present reflection.

Indeed, the judges operate a very delicate and very bold juridical analysis of the right to a healthy environment, in stating that it has a “dual nature”, both individual and collective.⁶⁸³ In its individual component, its violation may have a direct and indirect impact on the individual (connected to the rights to life, health and personal integrity). In this dimension, it is easy to conclude that a healthy environment is a fundamental right for the existence of humankind. However, in its collective dimension, the right to a healthy environment constitutes a «universal value that is owed to both present and future generations».⁶⁸⁴

It is this dual nature that allows the protection of a healthy environment to have both an anthropocentric and ecocentric *ratio*, by protecting the existence of humankind together with the very components of the environment itself.

The impact of this Advisory Opinion on the reasoning of the IACtHR is made evident by the case of *Lhaka Honbat v. Argentina*, decided in 2020.⁶⁸⁵ This is the case that clarified the full justiciability of the right to a healthy environment in the Inter-American system.

Indeed, the Court found a violation of Article 26, which is titled “progressive development” but after the Advisory Opinion of 2017 includes also the right to a healthy environment. It was, once again, a case regarding land ownership, but it also underlines the protection of forest resources and biodiversity, by linking these to the possibility of accessing food and water of over ninety Indigenous Communities.⁶⁸⁶

In this case, the Court dedicated almost thirty pages to the analysis of the violation of the right to a healthy environment, together with the right

⁶⁸² *Idem*, para. 62.

⁶⁸³ *Idem*, para. 59. See also *supra* Chapters II and III.

⁶⁸⁴ *Ibidem*.

⁶⁸⁵ IACtHR, *Case of the Indigenous Communities of the Lhaka Honbat (Our Land) Association v. Argentina*, Judgment of 6 February 2020. Previously, the Court had already found a violation of the right to a healthy environment but only in connection to the right to life in the case of *Lagos del Campo v. Peru* (IACtHR, *Lagos del Campo v. Peru*, Judgment of 31 August 2017).

⁶⁸⁶ *Idem*, paras. 23, 36, 51-52. See also M.A. TIGRE, *The Indigenous Communities of the Lhaka Honbat (Our Land) Association v. Argentina. Merits, Reparations, and Costs, Judgment*, in *The American Journal of International Law*, 2021, p. 706 ff.

to food, water and the right to take part in cultural life.⁶⁸⁷ Specifically, the judges considered the legal basis of the right to a healthy environment, relying heavily on the Advisory Opinion of 2017, and highlighting its interdependence to the other three rights mentioned. The judgment clarified that «States not only have the obligation to respect [the right to a healthy environment], but also the obligation established in Article 1(1) of the Convention to ensure it, and one of the ways of complying with this is by preventing violations».⁶⁸⁸ In doing so, the judges explicitly mentioned the principle of prevention as a customary norm, underlining its importance in these types of cases «taking into account that, owing to [the] particularities [of environmental damage], after the damage has occurred, it will frequently not be possible to restore the previous situation».⁶⁸⁹ Finally, they added that “greater intensity” can be felt by communities who find themselves in “vulnerable situations”.⁶⁹⁰

As Tigre noticed, this is not only the first time that the IACtHR recognises the justiciability of the right to a healthy environment in a contentious case, but it is also the first time that it recognises rights of Indigenous Peoples over natural resources without connecting it exclusively to the right to communal property.⁶⁹¹

The judgment has been met with mixed reactions. The majority of the commentators have praised it for being ecocentric and intergenerational, and for adopting a collective approach to the right to a healthy environment which does not require personal damage made to individuals in order to be invoked.⁶⁹² Others have shown scepticism over

⁶⁸⁷ IACtHR, *Case of the Indigenous Communities of the Lhaka Honbat (Our Land) Association v. Argentina*, cit., paras. 186-289.

⁶⁸⁸ *Idem*, para. 207.

⁶⁸⁹ *Idem*, para. 208.

⁶⁹⁰ *Idem*, para. 209.

⁶⁹¹ M.A. TIGRE, *The Indigenous Communities of the Lhaka Honbat (Our Land) Association v. Argentina. Merits, Reparations, and Costs, Judgment*, cit., p. 711. For a critique of this aspect see L. MARDIKIAN, *The Right to a Healthy Environment before the Inter-American Court of Human Rights*, in *International and Comparative Law Quarterly*, 2023, p. 945 ff.

⁶⁹² M.A. TIGRE, *The Indigenous Communities of the Lhaka Honbat (Our Land) Association v. Argentina. Merits, Reparations, and Costs, Judgment*, cit.; L. RONCONI, M. BARRACO, *La consolidación de los DESCAs en la Corte Interamericana de Derechos Humanos: reflexiones a propósito del caso Lhaka Honbat vs. Argentina*, in *Revista de la Facultad de Derecho*, 2021, p. 1 ff; G. AGUILAR CAVALLLO, *El derecho humano al acceso a la información ambiental y la jurisprudencia interamericana*, in *Revista Brasileira de*

the direct justiciability of ESC rights, especially regarding the enforceability of judgments (a matter to which further attention will be given in the following paragraph).⁶⁹³

It should also be remembered that one of the strengths of the Inter-American case-law is also its limit. While the Court has analysed the relationship between environmental rights and Indigenous Peoples' rights in depth in the *Lhaka Honbat* case, at that point it still had never approached issues of environmental degradation in other settings, nor dealt with pollution or the climate crisis.⁶⁹⁴

This last point will presumably change in the near future, now that the Court has delivered its advisory opinion on climate change and human rights, as requested by Colombia and Chile in 2023.⁶⁹⁵

As regards other types of environmental degradation, one last case should be mentioned: *People of La Oroya v. Peru*, of 2023.⁶⁹⁶ The judgment, which has been defined as a "landmark decision"⁶⁹⁷ and has

Políticas Públicas, 2020, p. 82 ff.; M. FERIA-TINTA, *Climate Change as a Human Rights Issue: Litigating Climate Change in the Inter-American System of Human Rights and the United Nations Human Rights Committee*, in I. ALOGNA, C. BAKKER, J.P. GAUCI (eds), *Climate Change Litigation: Global Perspectives*, Leiden, 2021, p. 310 ff.

⁶⁹³ D. MEJÍA-LEMONS, *The Protection of the Environment through International Human Rights Litigation: Taking Stock of Challenges and Opportunities in the Inter-American System*, in *Human Rights Law Review*, 2022, p. 1 ff. The author argues against drawing direct justiciability of rights derived only *implicitly* from existing articles of the American Convention on Human Rights, accusing the Court of "blurring the line" between interpretation and creation of norms. See also E. FERRER MAC-GREGOR POISOT, M. MORALES ANTONIAZZI, R.A. FLORES PANTOJA (eds), *El caso Lhaka Honbat vs. Argentina y las tendencias de su interamericanización*, Mexico City, 2022.

⁶⁹⁴ D. MEJÍA-LEMONS, *The Protection of the Environment through International Human Rights Litigation*, cit., p. 712.

⁶⁹⁵ See *supra* Chapter III, Section 2.1.2.

⁶⁹⁶ IACtHR, *Case of La Oroya Population v. Peru*, Judgment of 27 November 2023. It is worth noting that in this case over 60 pages have been dedicated to the reconstruction of the right to a healthy environment and its main substantive as well as procedural components.

⁶⁹⁷ J. SALDAÑA, *People from La Oroya vs Peru, Inter-American Court of Human Rights: How Effective is International Law to Protect the Environment in Extractive Contexts?*, in *EJIL:Talk!*, 11 April 2024. The author also analyses the way this case represents a prime example of the effects of a society based on extractive activities: «[...] the La Oroya case should not be characterized simply as the failure of the company and the State to fulfil legal obligations, but as a confluence of international and domestic politico-economic forces that reproduce an extractive *status quo* where people are forced to exchange their health for work; in other words, a human rights trade-off». See also A. VALENCIA, *Human*

been authoritatively considered «the strongest decision and most comprehensive judgment of any regional human rights court to date».⁶⁹⁸ This case relates to gross environmental degradation caused by severe pollution due to the activities of the mining company La Oroya Metallurgical Center.⁶⁹⁹

The Court affirmed what have been previously considered as the procedural and substantive components of the right to a healthy environment: access to information, participation and access to justice on the one hand; and safe air, water, food, ecosystem and climate among others.⁷⁰⁰ It has once again reiterated the ecocentric approach to this right by mentioning the Advisory Opinion of 2017 and reminding States that they are «obligados a proteger la naturaleza no solo por su utilidad o efectos respecto de los seres humanos, sino por su importancia para los demás organismos vivos con quienes se comparte el planeta».⁷⁰¹

What is new in the reasoning of the Court is the express provision of the need for a *higher* standard of due diligence when the toxicity of substances is well established, and the order to the State of Peru to elaborate a “plan of action” as a form of collective reparation in La Oroya area.⁷⁰²

This gives rise to a second limitation of the IACtHR, calling into question the effective justiciability of the rights concerned: lack of enforceability of its decisions.

1.1.1. *Effective justiciability of the collective right to a healthy environment in the Inter-American system*

It is no question that the reasoning of the Inter-American Court on the right to a healthy environment is one of the most advanced – if not

Rights Trade-offs in Times of Economic Growth: The Long-Term Capability Impacts of Extractive-Led Development, New York, 2016.

⁶⁹⁸ D. BOYD, *Landmark Court Decision on Right to a Healthy Environment: La Oroya v Peru*, in GNHRE, 24 March 2024.

⁶⁹⁹ IACtHR, *Case of La Oroya Population v. Peru*, cit., para. 263.

⁷⁰⁰ *Idem*, para. 118.

⁷⁰¹ *Ibidem*.

⁷⁰² J. SALDAÑA, *People from La Oroya vs Peru*, *Inter-American Court of Human Rights: How Effective is International Law to Protect the Environment in Extractive Contexts?*, cit.; IACtHR, *Case of La Oroya Population v. Peru*, cit., para. 333 ff.

the most – among the systems of human rights protection. Its Advisory Opinion of 2017 is one of the boldest reconstructions of the right, and the questions around its justiciability have been surpassed by recent jurisprudence. The Court has developed a highly innovative evolutive interpretation of Article 26 ACHR, by drawing on its equally bold interpretation of Article 11 of the San Salvador Protocol and using it as interpretative guidance.⁷⁰³ The definition of the elements of the right to a healthy environment has provided what could be described as a successful example of bridging the gap between anthropocentric and ecocentric approaches to environmental degradation, at least from a theoretical point of view. Finally, the Court has done so by consistently applying the core principles of international environmental law, using them as basis to adapt international human rights law.

And yet, issues of effective justiciability of the right to a healthy environment still arise when considering the positive outcomes of these judgments. Indeed, it has been argued that the Inter-American Court has had issues with enforcement of its judgments. An author highlighted how «[t]he overall level of compliance with remedies [at the IACtHR] is 38.87%».⁷⁰⁴ This result is based largely on the compliance of member States with «compensatory and satisfactory remedies [which] have higher levels of compliance in comparison to other remedies that include a level of transformation of institutions, such as rehabilitation, guarantees of non-repetition, or the obligation to investigate, prosecute, and sanction».⁷⁰⁵ The Court has also established a series of monitoring mechanisms to supervise compliance with its judgments.⁷⁰⁶

It should be noted the scepticism regarding the real implementation of such judgments is not to be underestimated. Full justiciability of the right to a healthy environment cannot be granted if one of its essential

⁷⁰³ See *supra* Chapter II, Section 3.1.

⁷⁰⁴ P. CRUZ MARIN, *Compliance of Judgments of the Inter-American Court of Human Rights*, 2020, available at SSRN: <https://ssrn.com/abstract=3647326>, p. 2.

⁷⁰⁵ *Ibidem*.

⁷⁰⁶ P. SAAVEDRA ALESSANDRI, *The Role of the Inter-American Court of Human Rights in Monitoring Compliance with Judgments*, in *Journal of Human Rights Practice*, 2020, p. 178 ff.; J. CONTESE, *Implementation of Human Rights Judgments in Latin America*, in A. GATTINI, M. DIMETTO (eds), *Time and International Adjudication*, Leiden, 2025, p. 532. See also E. JACKSON, *Potential Climate Remedies at the Inter-American Court of Human Rights*, in *OpinioJuris*, 1 August 2024, for an analysis of such possibilities in regard to the climate crisis.

aspects – effective remedies – remains on paper. Moreover, the refusal to implement a judgment could go to the detriment of the Court’s credibility and strain the relationship with member States.⁷⁰⁷

However, this is not only a problem of the Inter-American Court of Human Rights. Already in 2015, Keller and Marti highlighted the progressive “judicialization” of the execution of judgments also at the European level.⁷⁰⁸ They argued in favour of «a process that begins and ends in Strasbourg», by considering the involvement of the Court in assuring enforcement of its judgment as a positive step forward.⁷⁰⁹ This is very similar to what the Inter-American Court does through its monitoring and reporting mechanisms. It does not need to equate to lack of justiciability. On the contrary, it could be said that the existence of such mechanisms reinforces the effectiveness of remedies at the regional level.

In contemplating the full justiciability of the right to a healthy environment, no utopian model is envisaged in which every violation is immediately and comprehensively remedied by the State. Nor is the mere recurrence of a violation, in itself, regarded as indicative of systemic failure. To do so would mean questioning the entire human rights protection system. There would soon be no need for conventions and courts and tribunals if all States always implemented human rights judgments.

Justiciability, as the etymology of the word suggests, refers to the “possibility of justice”, not in the sense of a far-away dream but in a very real way, with all its difficulties. What should be praised in the Inter-American system is the *legal reasoning* behind the judgments, the depth with which the Court has reflected on the elements of the right to a healthy environment, in the hopes that such interpretation seeps through in the reasoning of national judges and policymakers.⁷¹⁰

⁷⁰⁷ L. MARDIKIAN, *The Right to a Healthy Environment before the Inter-American Court of Human Rights*, cit., p. 969. See also D. MEJÍA-LEMO, *The Protection of the Environment through International Human Rights Litigation: Taking Stock of Challenges and Opportunities in the Inter-American System*, cit.

⁷⁰⁸ H. KELLER, C. MARTI, *Reconceptualizing Implementation: The Judicialization of the Execution of the European Court of Human Rights’ Judgments*, in *European Journal of International Law*, 2015, p. 829 ff.

⁷⁰⁹ *Idem*, p. 850.

⁷¹⁰ On the role of domestic courts see *infra* Chapter VI.

All in all, the Inter-American system has provided – and continues to provide – powerful guidelines to implement the right to a healthy environment and advance jurisprudence – and justiciability – of the same.

1.2. The collective approach within the African human rights system

Though with substantial differences in quantity and quality of the decisions, the African case-law can be said to remain in the tracks of the Inter-American one.

As previously noted, the African Charter on Human and Peoples' Rights (ACHPR) enshrines the right to a healthy environment in Article 24.⁷¹¹ It should be recalled that this instrument constitutes the first treaty to recognise the right to a healthy environment expressly in collective terms.

It is also worth remembering that the monitoring system of the ACHPR consists in the African Commission and the African Court, and that – differently from the Inter-American system – direct access to the Court from individuals and NGOs is possible alongside direct access to the Commission. However, this is only possible if the State concerned has signed an optional declaration recognising this possibility for individuals and NGOs with observer status before the African Commission.⁷¹²

In this case, as well as the Inter-American construction, there is a right which is intrinsically both collective and individual. Even though neither the African Court nor the African Commission have gone into detail on the “communal” nature of the interests underlying the right to a healthy environment, this can be considered true by following its interpretation of the concept of “peoples”.⁷¹³

The right to a healthy environment is positioned under the rights of peoples in the African Charter, which, according to the African Commission, should manifest «a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, and a common economic life

⁷¹¹ See *supra* Chapter II, Section 3.2.

⁷¹² Protocol on the Establishment of An African Court, Arts. 5(3) and 34 (6). See *supra* Chapter II, Section 3.2.

⁷¹³ See also *supra* Chapter III, Section 2.2.1.

or other bonds, identities and affinities they collectively enjoy». ⁷¹⁴ On the other hand, this does not exclude the “uncontested” fact that the right to a healthy environment is *also* a right of individuals. ⁷¹⁵

The Commission has also considered the “composite” nature of the right to a healthy environment as including protection of the environment as well as development, the two being fully interdependent as established by Article 24 ACHPR. ⁷¹⁶ Reprising a discussion already considered in Chapter III, it could be noted that this aspect connects the right to a healthy environment to a “socio-economical dimension”. However, its links with other rights do not stop there. Some authors have underlined the connection existing between the right to a healthy environment and the right to life in the African system, in this way also marking a link with fundamental rights. ⁷¹⁷ It is contended that this further corroborates a hybrid reconstruction of the right to a healthy environment, as both socio economical as well as civil and political.

The elements of Article 24 ACHPR have been first explored in the famous *Ogoniland* case, decided by the African Commission in 2001. ⁷¹⁸ The case originated from a petition launched in 1996 against the Nigerian government by two NGOs: the Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR). ⁷¹⁹ It regarded gross violations of human rights in the Niger Delta

⁷¹⁴ ACHPR, *Centre for Minority Rights Development (CEMIRIDE) (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, cit., para. 151.

⁷¹⁵ M. VAN DER LINDE, L. LOUW, *Considering the Interpretation and Implementation of Article 24 of the African Charter on Human and Peoples' Rights in Light of the SERAC Communication*, cit., p. 174.

⁷¹⁶ L. CHENWI, *The right to a satisfactory, healthy, and sustainable environment in the African regional human rights system*, cit., p. 66. See also W. SCHOLTZ, *Human Rights and the Environment in the African Union Context*, in A. GREAR, L.J. KOTZÉ (eds), *Research Handbook on Human Rights and the Environment*, Cheltenham, 2015, p. 102 ff.; E.P. AMECHI, *Enhancing Environmental Protection and Socio-Economic Development in Africa: A Fresh Look at the Right to a General Satisfactory Environment under the African Charter on Human and Peoples' Rights*, cit.

⁷¹⁷ L. CHENWI, *The right to a satisfactory, healthy, and sustainable environment in the African regional human rights system*, cit., p. 67. See also ACHPR, *General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)*, 18 November 2015.

⁷¹⁸ ACHPR, *Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria*, cit.

⁷¹⁹ It is worth noting that this has been considered an *actio popularis*, which, as previously mentioned, is possible in the African system. See also E. BUYS, B. LEWIS,

region of the Ogoniland, mainly inhabited by the Ogoni people. The area – rich in oil resources – was largely dependent on an extractive economy, mainly led by the Shell Petroleum Development Company of Nigeria (a joint venture between the Nigerian government and the multinational Shell), whose activities in the region allegedly caused environmental degradation and health problems among the Ogoni due to contamination of the environment.⁷²⁰

In particular, the complaint denounced the widespread contamination of soil, water and air; the destruction of homes; the burning of crops and the killing of livestock; the climate of terror in which the communities of Ogoni had lived, the violation of their rights to health, a healthy environment, home and food.⁷²¹ Therefore, the NGOs lamented the violations of several Articles of the African Charter: Article 2 (non-discriminatory enjoyment of rights), Article 4 (right to life), Article 14 (right to property), Article 16 (right to health), Article 18 (family rights), Article 21 (the right of peoples to freely dispose of their natural resources and wealth) and finally Article 24 (the right of peoples to a satisfactory environment).

The communication also claimed that the Nigerian government had condoned and facilitated these violations by making legal and military forces of the state available to oil companies, failing to monitor the operations of oil companies and provide the Ogoni people with information on the dangers created by these activities. The communication also alleged that Nigerian security forces attacked, burned and destroyed several villages and houses on the pretext of removing officials and supporters of the Movement for the Survival of the Ogoni People (MOSOP) between 1993 and 1996. The government had not investigated these attacks, nor punished those responsible; in other words, it had not exercised due diligence.⁷²²

Environmental protection through European and African human rights frameworks, in *The International Journal of Human Rights*, 2021, p. 960. On the topic and effectiveness of *actio popularis* for the purpose of this inquiry see *supra* Chapter IV, Section 1.

⁷²⁰ A.P.M. COOMANS, *The Ogoni Case Before the African Commission on Human and Peoples 'Rights'*, in *International and Comparative Law Quarterly*, 2003, p. 749 ff.

⁷²¹ ACHPR, *Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria*, cit., para. 50 ff.

⁷²² A.P.M. COOMANS, *The Ogoni Case Before the African Commission on Human and Peoples 'Rights'*, cit., pp. 749-750; ACHPR, *Communication 155/96, The Social and*

The Commission concluded that all the Articles considered by the applicants were indeed violated seeing as the government failed to prevent widespread killings of the Ogoni as well as environmental pollution and degradation. It declared that «the Nigerian Government [had] given the green light to private actors, and the oil companies in particular, to *devastatingly affect the well-being of the Ogonis*».⁷²³

The Commission affirmed that Article 24 imposes “clear obligations” upon governments, and that States should «take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources».⁷²⁴ The Commission also stressed the importance of monitoring mechanisms and, specifically, of environmental impact assessments.⁷²⁵

It also explicitly linked the right to a healthy environment to the right to health and stated that this means that «[t]he state is under an obligation to respect the just noted rights and this entails largely non-interventionist conduct from the state for example, not from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual».⁷²⁶

Finally, it concluded:

«The uniqueness of the African situation and the special qualities of the African Charter imposes upon the African Commission an important task. International law and human rights must be responsive to African circumstances. Clearly, *collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa*. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that *there is no right in the African Charter that cannot be made effective*. As indicated in the preceding paragraphs, however, the

Economic Rights Action Center and the Center for Economic, and Social Rights v. Nigeria, cit., paras. 1-9.

⁷²³ ACHPR, *Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria*, cit., para. 58 (emphasis added).

⁷²⁴ *Idem*, para. 52.

⁷²⁵ See also *supra* Chapter II, Section 2.1.

⁷²⁶ *Ibidem*.

Nigerian Government did not live up to the minimum expectations of the African Charter.»⁷²⁷

In this way, the Commission clarified that the right to a healthy environment is fully justiciable under the African Charter on Human and Peoples' Rights.

Despite these obvious positive outcomes, the decision has also been criticised by some authors who have underlined the lack of specificity of the substantive components of the right to a healthy environment and the unanswered question of whether a violation of this right could be recognised even in absence of harm to individuals.⁷²⁸ Lewis, in particular, underlined these limitations by considering the attention the Commission dedicated to the development of procedural obligations and the corresponding lack of depth in the area of substantive obligations.⁷²⁹

The only other case in which the African Commission dealt with environmental concerns – but not with the right to a healthy environment as recognised by Article 24 – is the *Endorois* case.⁷³⁰ This case focused on the rights of Indigenous Peoples to dispose of their natural resources and on the right to development. As such it is linked to the right to a healthy environment, but does not face it explicitly. What is interesting about this case, as Chenwi reported, is the fact that the Kenyan government wanted to evict the Endorois people in order to *protect* and *preserve* environment and wildlife.⁷³¹

The African Commission based a large part of its reasoning on the need to allow participation of the Endorois people and to obtain their

⁷²⁷ ACHPR, *Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria*, cit., para. 68 (emphasis added).

⁷²⁸ R. CHURCHILL, *Environmental rights in existing human rights treaties*, in A.E. BOYLE, M.R. ANDERSON (eds), *Human rights approaches to environmental protection*, cit., p. 89 ff.; O.W. PEDERSEN, *European environmental human rights and environmental rights: a long time coming?*, in *Georgetown International Environmental Law Review*, 2008, p. 21 ff.

⁷²⁹ B. LEWIS, *Environmental Human Rights and Climate Change: Current Status and Future Prospects*, Singapore, 2018, pp. 72-73.

⁷³⁰ ACHPR, *Centre for Minority Rights Development (CEMIRIDE) (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, cit.

⁷³¹ *Idem*, para. 164. See also L. CHENWI, *The right to a satisfactory, healthy, and sustainable environment in the African regional human rights system*, cit., p. 76.

consent before removing them from their ancestral lands, focusing once again on the procedural aspect of environmentally related rights.⁷³²

What is particularly relevant with regard to the work of the African Commission, however, is that its environmental jurisprudence remains largely confined to *Ogoniland* and the subsequent procedural developments in *Endorois*. In this sense, it is difficult to assess, on the basis of the Commission's own practice alone, the full effectiveness of Article 24 in guaranteeing comprehensive justiciability of the right to a healthy environment. This observation, however, should be qualified in light of more recent developments before the African Court on Human and Peoples' Rights. In *Lidho and Others v. Côte d'Ivoire* (2023), concerning the dumping of hazardous waste and its impact on affected communities, the Court found violations of the rights to life, health, information and to a satisfactory environment.⁷³³

Although the case does not provide a detailed theoretical reconstruction of the collective nature of the right to a healthy environment, it demonstrates that environmental harm affecting a community can give rise to binding judicial remedies at the continental level. In this respect, the African system – through the Court – appears to complement and reinforce the collective logic originally articulated by the Commission in *Ogoniland*.

Nevertheless, these judicial developments at the level of the African Court do not entirely resolve the structural limitations that characterise the African human rights system as a whole. While the Court delivers binding judgments, the broader institutional framework – particularly at

⁷³² Very similarly, this was also the reasoning of the African Court in the *Ogiek* case (ACtHPR, *African Commission on Human and Peoples' Rights v. Kenya*, Application No. 006/2012, Judgment of 26 May 2017). Once again, also in this case no mention nor application of Art. 24 ACHPR is made.

⁷³³ ACtHPR, *Ligue Ivoirienne des droits de l'homme (LIDHO) and others v. Republic of Côte d'Ivoire*, cit. For some reflections on this case, see E. CARPANELLI, *Lo smaltimento di rifiuti tossici al vaglio della Corte africana dei diritti umani e dei popoli: la pronuncia nel caso LIDHO e altri c. Costa d'Avorio*, in *Federalismi.it*, 2025, p. 48 ff.; K.A. KPLA, *L'arrêt Ligue ivoirienne des droits de l'homme (LIDHO) et autres c. Côte d'Ivoire: une mutation complexe du contentieux environnemental* *Trafigura*, in *African Human Rights Yearbook/Annuaire Africain des Droits de l'Homme*, 2024, p. 523 ff.; Y. SUEDE, M. FALL, *Ligue Ivoirienne des Droits de l'Homme and Others v. Cote D'Ivoire*. App. No. 041/2016, in *American Journal of International Law*, 2024, p. 710 ff.; S. DERSSO, E. BOSHOF, *Extending Human Rights Accountability for Corporate Actors in the LIDHO v Cote d'Ivoire case of the African Court*, in *EJIL:Talk!*, 21 February 2024.

the level of the Commission – continues to face significant challenges in terms of monitoring and enforcement. Despite its clear affirmation in the *Ogoniland* case – namely, that «there is no right in the African Charter that cannot be made effective»⁷³⁴ – the African Commission struggles with the implementation of its decisions and does not have any monitoring mechanism to enforce them. This is mainly due to limited financial resources and the difficulty in ordering provisional measures, which have «been met with virtually universal disregard, thus inhibiting any positive impact or a proper assessment of their impact».⁷³⁵ Moreover, it should be remembered that the African Commission is a quasi-judicial body, incapable of delivering binding judgments *per se*, even though it considers its recommendations binding.⁷³⁶

1.3. The “derivative” approach of the European Court of Human Rights

The European Court of Human Rights (ECtHR) is the judicial body tasked with overseeing the respect of the European Convention of Human Rights (ECHR). Established in 1959 in Strasbourg, the Court has both contentious and advisory competence, and has worked as a full-time court since 1998. Before that time, it was supported by the work of the European Commission of Human Rights, now abolished.

As previously mentioned, the European Convention does not have a norm which recognises an autonomous right to a healthy environment, and the Court has been adamant in its jurisprudence denying its existence. It could be unusual to see a paragraph devoted to its work.

⁷³⁴ ACHPR, *Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria*, cit., para. 68.

⁷³⁵ See L. CHENWI, *The right to a satisfactory, healthy, and sustainable environment in the African regional human rights system*, cit., p. 77, and the doctrine cited therein.

⁷³⁶ See M. SSENIONJO, *Responding to Human Rights Violations in Africa: Assessing the Role of the African Commission and Court on Human and Peoples’ Rights (1987–2018)*, cit. The author also notes «that the implementation of, or State compliance with, the recommendations have generally remained very low. This is due to the lack of political will to implement the Commission’s recommendations and inadequate ‘follow up’ or monitoring of the implementation of the Commission’s recommendations, in terms of reporting, information-gathering, assessment and enforcement. Unsatisfactory follow up has been caused, at least in part, by the lack of a reliable mechanism to assess compliance and data on the implementation of all decisions, as well as insufficient funding to develop such a mechanism or data base» (p. 20).

However, despite this obvious deficiency, since the 1960s the ECtHR has dealt with over 270 environmental cases,⁷³⁷ perfecting a prolific jurisprudence on both substantive and procedural aspects of environmental rights (mainly through Articles 2 and 8 ECHR) and only recently dealing also with three climate cases.⁷³⁸ Proceeding in a detailed analysis of all the environmental jurisprudence of the ECtHR is outside the scope of this study, but some of its cases will be useful to the research questions.

This paragraph will be devoted to the analysis of that case-law in search for elements of collectiveness and perspectives of evolution. As will be shown, even though no right to a healthy environment is recognised under the European system, some of its basic characteristics can be found in the jurisprudence of the Court. It should be noted that this will mean that the right that can be drawn from the case law is decisively derivative in nature, as well as anthropocentric (or rather “individualistic”).⁷³⁹

An attempt will also be made to assess whether interpretative techniques are capable of supporting the conclusion that an environmental “sub-right” may be read into Article 8 ECHR, and to examine how its reconstruction has been addressed in recent climate-related cases. Finally, conclusions will be drawn regarding the effective justiciability of the right to a healthy environment within the European system, notwithstanding the limitations stemming from its lack of explicit recognition.

⁷³⁷ N. KOBYLARZ, *The ECtHR: an underrated forum for environmental litigation*, in H. TEGNER ANKER, B. EGELUND OLSEN (eds), *Sustainable Management of Natural Resources: legal instruments and approaches*, Cambridge | Antwerp | Portland, 2018, p. 101. See also the *Manual on Human Rights and Environment*, 3rd ed, Council of Europe, 2022.

⁷³⁸ On the climate cases, see *infra* Section 1.3.2 in this Chapter.

⁷³⁹ F. FRANCONI, *International Human Rights in an Environmental Horizon*, in *European Journal of International Law*, 2010, p. 41 ff.; B. PETERS, *The European Court of Human Rights and the Environment*, in E. SOBENES, S. MEAD, B. SAMSON (eds), *The Environment through the Lens of International Courts and Tribunals*, The Hague, 2022, p. 189 ff.

1.3.1. A “sub-right” of an environmental character under Article 8 ECHR?
Effectiveness as both a principle and a norm

One of the first cases in which the European Court had to deal with the relationship between human rights and environmental protection was the case of *Lopez Ostra v. Spain* of 1994.⁷⁴⁰ In this case, for the first time, the Court held that a failure by the State to control industrial pollution was a violation of Article 8 (right to private and family life) where there was a sufficiently serious interference with the applicants’ enjoyment of their home and private life. It also clarified that “interference” did not need to amount to a serious harm to personal health. Indeed, «[s]evere environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health».⁷⁴¹

The Court also noted that regard must be given to the fair balance between competing interests of individual and community as a whole. Indeed, in some cases the economic interest of a State (which is regarded as the interest of the community as whole) can override the interest of an individual. Finally, it stated that there is a positive duty of a state to take measures, which would secure the enjoyment of the individual rights to private life and property.⁷⁴²

In the case *Guerra and others v. Italy*, a few years later, the Court again found a violation of Article 8.⁷⁴³ This time it was due to the direct effect of toxic emissions on the applicants’ right to respect for their private and family life.⁷⁴⁴ This case dealt specifically with the procedural aspect of environmental rights, as it considered the failure of the State to provide the local population with information about risk factors and how to proceed in the event of an accident at a nearby chemical factory.

⁷⁴⁰ ECtHR, *Lopez Ostra v. Spain*, cit. The very first environmental case in the European system was decided by the European Commission in 1960 (*Schmidt v. Federal Republic of Germany*, application no. 715/60, decision of 5 August 1960).

⁷⁴¹ ECtHR, *Lopez Ostra v. Spain*, cit., para. 51. See also O.W. PEDERSEN, *The European Court of Human Rights and International Environmental Law*, in J.H. KNOX, R. PEJAN (eds.), *The Human Right to a Healthy Environment*, cit., p. 86 ff.

⁷⁴² ECtHR, *Lopez Ostra v. Spain*, cit., para. 51.

⁷⁴³ ECtHR, *Guerra and others v. Italy*, application no. 14967/89, Judgment of 19 February 1998.

⁷⁴⁴ *Idem*, para. 57.

The applicants all lived in the town of Manfredonia, approximately 1 km away from Enichem Agricoltura company's chemical factory. In 1988 the factory, which produced fertilizers, was classified as "high risk" according to the criteria set out in a Presidential Decree regarding the major-accident hazards of certain industrial activities dangerous to the environment and the well-being of the local population. The applicants said that in the course of its production cycle the factory released large quantities of inflammable gas: a process which could have led to explosive chemical reactions, releasing highly toxic substances and other dangerous substances.

Regarding Article 8 the Court emphasised that the direct effect of toxic emissions on the applicants' right to respect for their private and family life meant that Article 8 was applicable.⁷⁴⁵ The question was whether national authorities had taken the necessary steps to ensure effective protection of the applicants' right to respect for their private and family life. The applicants had waited, right up until production of fertilisers had ceased in 1994, for essential information that would have enabled them to assess risks they and their families might run if they continued to live around the factory. The Court concluded that the respondent State had not fulfilled its obligation to secure the applicants' right to respect for their private and family life.⁷⁴⁶

It was in 2003 that the first clear indication on the limits of environmental protection under ECHR were defined. In the case of *Kyrtatos v. Greece*, the Court failed to recognise a violation of Article 8 because the case was framed almost in ecocentric terms.⁷⁴⁷ The applicants contended that urban development in the area in which they lived had led to the destruction of their physical environment and had affected their life. They complained that urban development had destroyed the swamp which was adjacent to their property and about other environmental pollution.

However, the Court clarified that «[t]he crucial element which must be present in determining whether, in the circumstances of a case, environmental pollution has adversely affected one of the rights safeguarded [...] is the *existence of a harmful effect on a person's private*

⁷⁴⁵ *Ibidem*.

⁷⁴⁶ *Idem*, para. 60.

⁷⁴⁷ ECtHR, *Kyrtatos v. Greece*, cit.

or family life and not simply the general deterioration of the environment». ⁷⁴⁸ The same was then contended in other cases. ⁷⁴⁹

Again, on Article 8, in *Tătar v. Romania* the judges considered the importance of access to information in cases of high risk. ⁷⁵⁰ In this judgment the Court drew heavily from principles and sources of international environmental law, by explicitly mentioning the Stockholm Declaration, the Rio Declaration, the Aarhus Convention, as well as the principles enshrined in the case-law of the International Court of Justice.

The case concerned an environmental accident occurred in January 2000. A United Nations study had reported that a dam had breached, releasing about 100,000 metric cubes of cyanide-contaminated tailings water into the environment. The report stated that the company operating the gold mine had not halted its operations. The applicants complained that the activities carried out by the company put their lives in danger, and that the authorities had failed to take any action.

The Court carried out a “raisonnement probabiliste” on the effects of cyanide in the absence of conclusive proof, affirming that it is possible «dans le cas d’une incertitude scientifique accompagnée d’éléments statistiques suffisants et convaincants». ⁷⁵¹ The judges affirmed that in order for States’ obligations to be relevant there is no need for a causal probability, but a serious and substantial risk is enough. ⁷⁵²

The element of the foreseeability of the risk is also relevant with regard to the jurisprudence related to Article 2 (right to life). In two cases the Court underlined the duty for States to put in place adequate plans in order to avoid the deaths caused by foreseeable accidents. ⁷⁵³

⁷⁴⁸ *Idem*, para. 52 (emphasis added).

⁷⁴⁹ *Inter alia*, ECtHR: *Hamer v. Belgium*, cit., para. 79; *Çiçek and others v. Turkey*, cit., para. 20 ff.; *Ivan Atanasov v. Bulgaria*, application no. 12853/03, Judgment of 2 December 2010, para. 66.

⁷⁵⁰ ECtHR, *Tătar v. Romania*, application no. 67021/01, Judgment of 27 January 2009.

⁷⁵¹ *Idem*, para. 105.

⁷⁵² *Idem*, para. 107.

⁷⁵³ ECtHR: *Öneryıldız v. Turkey*, application no. 48939/99, Judgment of 30 November 2004, on the responsibility of the State for the deaths caused by a methane explosion; *Budayeva v. Russia*, applications no. 15339/02, 21166/02, 20058/02, 11673/02, 15343/02, Judgment of 20 March 2008, on the responsibility of the State for the inadequate maintenance of a mud-defence infrastructure and the failure to set up a warning system for mudslides.

The risk must be “real, severe and imminent”, and it should be assessed following the evidentiary rule of “beyond reasonable doubt”.⁷⁵⁴ However, the Court itself clarified that «such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact».⁷⁵⁵

A significant development has recently occurred in *Cannavacciuolo and Others v. Italy*,⁷⁵⁶ in which the Court found, for the first time, a violation of Article 2 ECHR in connection with large-scale environmental pollution. The case concerned the chronic exposure of the population living in the so-called *Terra dei Fuochi* – “land of fires” – to toxic waste and the prolonged failure of the Italian authorities to adopt adequate preventive, monitoring and information measures.⁷⁵⁷ What is particularly relevant, for present purposes, is that the Court considered the threshold under Article 2 to be met in relation not to a sudden disaster, but to a systemic and long-term situation of environmental contamination. In

⁷⁵⁴ ECtHR, *Ivan Atanasov v. Bulgaria*, cit., para. 75. The characteristics of seriousness, specificity and imminency of the danger have been defined as the “Balmer test”, on which see N. KOBYLARZ, *The ECtHR: an underrated forum for environmental litigation*, cit., p. 109 ff.

⁷⁵⁵ ECtHR, *Ivan Atanasov v. Bulgaria*, cit., para. 75.

⁷⁵⁶ ECtHR, *Cannavacciuolo and others v. Italy*, applications nos. 51567/14, 39742/14, 74208/14, 21215/15, Judgment of 30 January 2025. For some comments on the judgment see C. HERI, *Vindicating the ECtHR Role in Environmental Matters: Cannavacciuolo and Others v. Italy*, in *Strasbourg Observers*, 11 March 2025; S. ZIRULIA, *A New Step in the Greening of the Right to Life. The ECtHR Judgment on the Land of Fires*, in *Verfassungsblog*, 20 February 2025; K. HAMANN, *Cannavacciuolo and Others v. Italy: Towards Applying a Precautionary Approach to the Right to Life*, in *EJIL:Talk!*, 5 March 2025.

⁷⁵⁷ A further distinctive feature of the judgment lies in its qualification as a “pilot judgment”, the first of its kind in the environmental field. Pursuant to Art. 61 of the Rules of Court, this procedural mechanism is typically employed to address structural or systemic problems giving rise to repetitive applications. Its first application dates back to *Broniowski v. Poland* [GC], application no. 31443/96, Judgment of 22 June 2004, concerning property restitution. The procedure has subsequently been used in a variety of fields, including prison conditions and the excessive length of judicial proceedings, but had never before been applied in the environmental context. On this point see A. CANNONE, *La sentenza “Cannavacciuolo e altri c. Italia” del 2025 e il ricorso alla procedura di sentenza pilota in caso di violazioni di tipo sistemico in materia ambientale*, in *Diritti umani e diritto internazionale*, 2025, p. 393 ff.; J. SOMMARDAL, *A Landmark Judgment: Three Crucial Aspects of Cannavacciuolo and Others v. Italy*, in *ECHR Blog*, 4 February 2025. More generally, on pilot judgments, F. PALOMBINO, *La «procedura di sentenza pilota» nella giurisprudenza della Corte europea dei diritti dell'uomo*, in *Rivista di diritto internazionale privato e processuale*, 2008, 91 ff.

doing so, it confirmed that the State's positive obligations under the right to life may also arise where the risk is progressive and cumulative, provided that it is serious, sufficiently ascertainable and known to the authorities. The judgment is also notable for implicitly endorsing a *precautionary approach*: the fact that scientific uncertainty persisted as to the exact health consequences of prolonged exposure was not considered sufficient to relieve the State of its duty to act.⁷⁵⁸ On the contrary, once the authorities had long been aware of the existence of a potentially lethal environmental risk, the absence of full scientific certainty could not justify administrative inertia. In this respect, *Cannavacciuolo* marks an important step in the Court's environmental case-law, as it shifts the focus of Article 2 from a merely reactive logic to one that is also genuinely preventive.

From this brief overview, it would seem that, although the Court considers and develops what have been defined as the procedural elements of the right to a healthy environment, and although it frames positive obligations for States, it still does it in an exclusively individualistic way.

The limitations inherent in the procedural requirements for lodging an application before the ECtHR have already been examined.⁷⁵⁹ It has likewise been argued that the manner in which the European Court conceptualises ecological damage – as contingent upon personal harm – does not amount to a complete bar to the articulation of ecocentric arguments.⁷⁶⁰ What seems to remain unchallenged is the idea that the interests underlying environmental protection are still connected to the *use* that an individual makes of the environment, and not nature itself.

Although this position may be difficult to contest, it must also be acknowledged that the Court has, at times, connected the interest in environmental preservation to that of the “community” at large.⁷⁶¹ Even though this “community” usually coincides with the State, this does not in principle exclude the possibility of recognising that environmental interests are intrinsically collective in nature. In *Fadeyeva* the judges stated that in the balance between individual and collective interests «the

⁷⁵⁸ ECtHR, *Cannavacciuolo and others v. Italy*, cit., para. 391.

⁷⁵⁹ See *supra* Chapter IV.

⁷⁶⁰ See *supra* Chapter IV.

⁷⁶¹ ECtHR: *Fadeyeva v. Russia*, cit.; *Hamer v. Belgium*, cit.

general context of the environment should also be taken into account», to consider whether the damage rises above a certain threshold.⁷⁶² Despite not being recognised as a collective right – and specifically, because *no collective right* is recognised as such in the ECHR – the “public interest” to the environment is seen as a collective “shield” that the State could use when restricting property rights.⁷⁶³ This is still far from the reconstruction of the IACtHR and the ACHPR but it shows that there are possibilities for evolutive interpretations.

The Court is no stranger to such interpretations, especially as it regards the content of Article 8 ECHR. Judge Serghides, in its recent concurring opinion to the *Pavlov* judgment,⁷⁶⁴ highlighted the emergence of what he called a “sub-right” of an environmental character under Article 8.⁷⁶⁵ He did so by basing his reconstruction on a dynamic interpretation of the Convention, relying fundamentally on two arguments: the living instrument doctrine and the doctrine of positive obligations.⁷⁶⁶

Since the 1980s, the Court has consistently interpreted the European Convention as «a living instrument which [...] must be interpreted in the light of present-day conditions».⁷⁶⁷ It has been argued that this is also in line with Article 31(1) of the Vienna Convention on the Law of the Treaties, which states that «[a] treaty shall be interpreted in good faith in

⁷⁶² ECtHR, *Fadeyeva v. Russia*, cit., para. 69.

⁷⁶³ *Idem*, para. 103. See also ECtHR, *Fredin v. Sweden (no. 1)*, application no. 12033/86, Judgment of 18 February 1991.

⁷⁶⁴ ECtHR, *Pavlov and others v. Russia*, cit. This is a case of severe industrial pollution, in which the European Court recognised a violation of Art. 8. What is particularly relevant about it is the fact that the Russian authorities had taken some measures to assess and avoid the risk, but the Court deemed them insufficient in relation to the standard of due diligence required to meet the positive obligations enshrined in Art. 8. See also the commentary of O.W. PEDERSEN, *Case of Pavlov and others v. Russia*, App. No. 31612/09, in *The American Journal of International Law*, 2023, p. 689 ff.

⁷⁶⁵ See also R.P. HISKES, *Human Right to a Green Future – Environmental Rights and Intergenerational Justice*, Cambridge, 2009.

⁷⁶⁶ For an in-depth analysis of the positive obligations doctrine see V. STOYANOVA, *Positive Obligations under the European Convention on Human Rights: Within and Beyond Boundaries*, Oxford, 2023.

⁷⁶⁷ ECtHR, *Tyrer v. The United Kingdom*, application no. 5856/72, Judgment of 25 April 1978, para. 31.

accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose*.⁷⁶⁸

Judge Serghides considers these doctrines in the light of the concept of “effectiveness” of the Convention, which he frames as both a principle and a norm.⁷⁶⁹

More specifically, he considers these two doctrines as:

«[...] capacities or functions or dimensions of the principle of effectiveness as a norm of international law, vested with a particular mission to assist in the development of the norm of effectiveness and to ensure that the Convention rights are always practical and effective. On the other hand, the principle of effectiveness as a method of interpretation can assist the norm of effectiveness in its pragmatic application in the particular circumstances of a case. The principle of effectiveness in both of its capacities, namely, as a norm of international law and as method of interpretation, may enable the flourishing of the “green” and moral dimension of the right concerned.»⁷⁷⁰

In this sense, the norm of effectiveness would encompass the living instrument doctrine, guaranteeing that the Convention is always “up to date” with the evolving context. In the same way the principle of effectiveness as a method of interpretation would ensure that the doctrine of positive duties could be used to «ensure the exercise and enjoyment of the right to live a private life free from environmental hazards». ⁷⁷¹ In other words, effectiveness would guarantee that such an evolutive interpretation of the Convention does not “break” its confines. According to Judge Serghides, this would make the European Court a valid forum for the protection of human rights related to the environment.⁷⁷²

⁷⁶⁸ Vienna Convention on the Law of the Treaties, Art. 31(1) (emphasis added). See also G. ULFSTEIN, *Interpretation of the ECHR in light of the Vienna Convention on the Law of Treaties*, in *The International Journal of Human Rights*, 2019, p. 917 ff.

⁷⁶⁹ ECtHR, *Pavlov and others v. Russia*, cit., Concurring Opinion Judge Serghides, para. 11.

⁷⁷⁰ *Ibidem*.

⁷⁷¹ *Ibidem*.

⁷⁷² In its Concurring Opinion, Judge Serghides applies this principle also to the evolution of the requisite of victim status which «like the term “right” it should be interpreted broadly and in an evolutive manner. The term “victim” should be read in conjunction with the word “everyone” in Article 8 § 1 of the Convention, so as to include without discrimination every person who is a victim of a violation of an environmental

The same point has been recently made by Natalia Kobylarz.⁷⁷³ The author argues that through the development of “ecological minimum standards”: «a set of notions that emanate from the legal paradigms of immersive anthropocentrism and ecocentrism; that give due consideration to climate and biodiversity crises; and that include the concepts of sustainable development and use of natural resources, as well as the principles of intergenerational equity, precaution and *in dubio pro natura*».⁷⁷⁴ This would also mean that, in doubt, when striking a fair balance with other interests, the “sub-right” to a healthy environment should prevail.⁷⁷⁵

Developing and applying these standards would bridge the gap between ecocentrism and anthropocentrism and make the European Court apt to deal with environmental rights, even in the absence of the explicit recognition of the right to a healthy environment.

A further development in the debate surrounding the environmental “sub-right” has emerged in the wake of *Cannavacciuolo*. In his partly concurring and partly dissenting opinion, Judge Serghides appeared to extend his earlier construction beyond Article 8, suggesting that the environmental dimension should also be read as inherent in Article 2.⁷⁷⁶ Such an extension, however, raises significant theoretical and practical concerns.

Articles 2 and 8 operate within markedly different normative frameworks. Article 2 imposes a particularly stringent threshold, requiring the existence of a “real and imminent” risk to life and triggering heightened evidentiary standards. Article 8, by contrast, has developed as a more flexible provision, capable of accommodating environmental harms that are diffuse, progressive and not necessarily immediately life-

character [...]. It is, in my view, the principle of effectiveness as a norm of international law and the interpretation made by the Court which broaden the scope of both the “right” and the “victim” so as to protect them from any environmental hazards» (*idem*, para. 14).

⁷⁷³ N. KOBYLARZ, *Balancing its Way out of Strong Anthropocentrism: Integration of ‘Ecological Minimum Standards’ in the European Court of Human Rights ‘Fair Balance’ Review*, cit.

⁷⁷⁴ *Idem*, p. 18.

⁷⁷⁵ ECtHR, *Pavlov and others v. Russia*, cit., Concurring Opinion Judge Serghides, para. 16.

⁷⁷⁶ ECtHR, *Cannavacciuolo and others v. Italy*, cit., Partly Concurring Partly Dissenting Opinion Judge Serghides.

threatening. To anchor the same “sub-right” simultaneously in both provisions risks flattening these structural distinctions.⁷⁷⁷

Moreover, if Article 2 is understood to absorb the gravest environmental violations, as the Court’s case-law tends to suggest, the environmental dimension under Article 8 may be reduced to a subsidiary or residual function. This would paradoxically narrow the interpretative space that has allowed Article 8 to evolve as the principal vehicle for environmental protection within the Convention system. In this sense, the transversal extension of the environmental sub-right across Articles 2 and 8 may generate doctrinal ambiguity rather than coherence.

The difficulty does not lie in recognising that environmental degradation may implicate both the right to life and the right to private and family life. Rather, it lies in conceptualising whether the same normative construct can operate identically within provisions that embody distinct logics of protection, evidentiary thresholds and degrees of judicial scrutiny. Without a clear differentiation, the risk is that the environmental dimension becomes over-rigid under Article 2 and under-theorised under Article 8.

It is submitted that this reconstruction clearly illustrates the manner in which the European Court has progressively “greened” human rights, and in particular the right to private and family life enshrined in Article 8 ECHR. Yet, the extension of the environmental dimension across distinct Convention provisions also reveals underlying tensions that remain unresolved. The lack of an autonomous recognition – which is still to be wished for – has been met and partially compensated by the development of interpretative standards already in place at the Court of Strasbourg.

However, the limitations of these standards are apparent when considering cases which aim at protecting nature or the environment in itself, and the drawbacks can be found even in “ground-breaking” jurisprudence, such as the one on climate change.

⁷⁷⁷ For more detailed reflections on this point see also G. PANE, *Ambiente vs clima? La posizione della Corte europea sulla “Terra dei Fuochi” nel caso Cannavacciuolo e altri c. Italia*, in *Diritto e Salute*, 2025, p. 163 ff.

1.3.2. *Environmental claims vs. climate litigation: recent case-law between wins and foretold delusions*

On 9 April 2024, the European Court of Human Rights has delivered one judgment and two decisions on the climate cases before the Grand Chamber. In the case of *Verein KlimaSeniorinnen Schweiz and others v. Switzerland*⁷⁷⁸ the judges found a violation of Articles 6 (right to a fair trial) and 8 (right to private and family life) ECHR. The other two cases – *Duarte Agostinho and others v. Portugal and 32 Other States*⁷⁷⁹ and *Carême v. France*⁷⁸⁰ – were declared inadmissible.

The three cases fall in the broader context of so-called “climate litigation”. This broad term refers to all those cases directed against States or private actors, which aim at denouncing the actions or omissions that contribute to the climate crisis.⁷⁸¹ It is sometimes called “strategic” because some of the cases are designed to achieve results that go beyond the individual dispute.⁷⁸² These cases seek to advance climate policy and encourage public debate. The parties make strategic decisions about who will bring the case, where and when the case will be brought and what legal remedy will be sought.

Within this heterogeneous group, a consistent strand uses human rights as its legal basis, complaining about the violation of these rights as a result of climate change: it is the so-called “human rights turn”.⁷⁸³ In Europe, a surge of such cases has emerged recently: where the human rights obligations arising from the case law of the European Court of

⁷⁷⁸ ECtHR, *Verein KlimaSeniorinnen Schweiz and others v. Switzerland*, cit.

⁷⁷⁹ ECtHR, *Duarte Agostinho and others v. Portugal and 32 Other States*, application no. 39371/20, decision of 9 April 2024.

⁷⁸⁰ ECtHR, *Carême v. France*, application no. 7189/21, decision of 9 April 2024.

⁷⁸¹ J. SETZER, C. HIGHAM, *Global trends in climate change litigation: 2024 snapshot*, London, 2024.

⁷⁸² *Idem*.

⁷⁸³ A. SAVARESI, J. SETZER, *Rights-based litigation in the climate emergency: mapping the landscape and new knowledge frontiers*, in *Journal of Human Rights and the Environment*, 2022, p. 7 ff. See also S. JODOIN, A. SAVARESI, M. WEWERINKE-SINGH, *Rights-based approaches to climate decision-making*, in *Current Opinion in Environmental Sustainability*, 2021, p. 45 ff., which shows the evolution of the relationship between human rights and climate change legislation and policy.

Human Rights are used as a means of interpreting the obligations of states towards their citizens.⁷⁸⁴

KlimaSeniorinnen is a classic example: it started as strategic climate litigation in 2016, based on Articles 2 and 8 ECHR, and it was rejected at all levels on the basis of issues related to the status of victim under the ECHR and because according to Swiss courts it was a matter for the democratic process, not the judiciary. After having exhausted all national remedies available, in 2020 an association of senior women (Senior Women for Climate Protection Switzerland) lodged an application before the European Court of Human Rights lamenting the violation of Articles 2, 6, 8 and 13 (right to an effective remedy) ECHR. In 2022, the case was referred to the Grand Chamber because it raised «a serious question affecting the interpretation of the Convention».⁷⁸⁵

Duarte Agostinho followed a different path. It was raised directly against 33 Member States of the ECHR. As such, it did not pass through internal judicial systems and went directly to the Court, where it clearly presented the greatest difficulties in relation to the exhaustion of domestic remedies and the limits of State jurisdiction under Article 1 ECHR. This also was referred to the Grand Chamber following the procedure of Article 30 ECHR.

Together with the *Carême* case, the three formed the first tranche of the climate docket of the European Court of Human Rights. While *Carême* was declared inadmissible for relatively clear reasons,⁷⁸⁶ the

⁷⁸⁴ A famous example is the *Urgenda* case in the Netherlands. On national climate litigation and the “human rights turn” see also *infra* Chapter VI.

⁷⁸⁵ ECHR, Art. 30.

⁷⁸⁶ The case was declared inadmissible due to the lack of victim status *ex* Art. 34 ECHR. The application had been presented by the former mayor of the city of Grande-Synthe, because of the high risk of flooding caused by climate change and the refusal of the State to adopt adequate measures to contrast it. However, he had become a member of the European Parliament in 2019 and had moved to Brussels. Therefore, according to the ECtHR, he had «no relevant links with Grande-Synthe and [...] moreover, he currently does not live in France, the Court does not consider that for the purposes of any potentially relevant aspect of Article 8 – private life, family life or home – he can claim to have victim status under Article 34 of the Convention as regards the alleged risks linked to climate change threatening that municipality. This is true irrespective of the status he invoked, namely that of a citizen or former resident of that municipality. The same considerations apply as regards the applicant’s complaint under Article 2 of the Convention» (ECtHR, *Carême v. France*, cit., para. 83).

decision in *Duarte Agostinho* warrants a deeper analysis, as well as the judgment in *KlimaSeniorinnen*.

Despite the fact that the paths of these two cases end with very different outcomes, they also share several similarities. Both of them lamented the violations of Article 2 and 8, and raised the problematic issue of “heat waves” and their impact on human rights. The *Duarte Agostinho* case also claimed the violation of Articles 3 (prohibition of torture) and 14 (prohibition of discrimination). It also referred to the existing and future impacts of the climate crisis: particularly, in relation to forest fires and fire smoke, which had affected the lives, well-being, mental health (due to the so-called “ecoanxiety”) of the applicants and the comfort of their homes.

The main issues with *Duarte Agostinho*, however, related to the non-exhaustion of domestic remedies and the issue of extraterritoriality of human rights obligations in relation to the climate crisis. This issue has already been considered when examining States’ obligations in Chapter III.⁷⁸⁷ It is nevertheless relevant to mention it once more, delving into the reasoning of the European Court.

On this point, it should be reminded that the ECtHR follows what has been called a “traditional approach” to extraterritorial jurisdiction, allowing for it only in two circumstances: effective control over a territory, or authority and control over a person.⁷⁸⁸

The applicants – which were six Portuguese citizens aged between 8 and 21 at the time of the application – had offered two alternative constructions, calling either for an evolutive interpretation or an exceptional one.

Both of the theories were based on the reasoning of the IACtHR in the Advisory Opinion of 2017 and of the Committee on the Rights of the Child in the *Sacchi* case.⁷⁸⁹ In a nutshell: extraterritorial jurisdiction in the field of climate crisis is justified by the fact that it is the State on whose territory or under whose jurisdiction the activities have been carried out which has effective control over them and is able to prevent them from

⁷⁸⁷ See *supra* Chapter III, Section 2.1.3.

⁷⁸⁸ *Inter alia* ECtHR: *Al-Skeini and Others v. United Kingdom*, cit.; *Jaloud v. The Netherlands*, cit.; *Bankovic and Others v. Belgium*, cit.

⁷⁸⁹ On which see *infra* Section 2 in this Chapter.

causing an effect harmful cross-border activity which affects the enjoyment of human rights by persons outside its territory.

The applicants argued in this regard that State control should be referred to the sphere of the person's "Convention interests", and that any action or inaction by the State which had an effect on them would fall within the jurisdiction of the State, regardless of the *locus* of the damage. Subordinately, if this evolutive interpretation could not be accepted by the Court, they requested an exceptional interpretation, due to the urgency and importance of the case.

The European Court reiterated that the only two circumstances in which the jurisdiction of a State can be extended beyond its territorial confines are "effective control" by the State over an area (*spatial* concept of jurisdiction) and "authority and control by the State agent" over individuals (*personal* concept of jurisdiction).⁷⁹⁰ The Strasbourg judges also clarified that the theory of control refers to «control over the person himself or herself» and not control «[on] the person's interests as such».⁷⁹¹

The Court rejected any kind of evolution in its consolidated jurisprudence on the matter arguing that it would cause a «critical lack of foreseeability of the Convention's reach», because of the multilateral dimension of the climate crisis.⁷⁹² As an attempt to limit the potentially indefinite scope of such a reconstruction, the applicants had suggested limiting the extension of jurisdiction to the "legal space" of the Convention. But according to the judges, this limitation would have been arbitrary, and it would not have solved the difficulty of determining the direct allocation of emissions in relation to specific damages.⁷⁹³

Finally, the Court refused any exception invoking the principle of subsidiarity, clarifying that «it is not a court of first instance. It does not have the capacity, nor is it appropriate to its function as an international court, to adjudicate on large numbers of cases which require the finding of basic facts which should, as a matter of principle and effective practice, be the domain of domestic jurisdictions».⁷⁹⁴

⁷⁹⁰ ECtHR, *Duarte Agostinho and others v. Portugal and 32 Other States*, cit., para. 170.

⁷⁹¹ *Idem*, para. 205.

⁷⁹² *Idem*, para. 206.

⁷⁹³ *Ibidem*.

⁷⁹⁴ *Idem*, para. 228.

Therefore, and consequently, since the case would have been conceivable only in relation to Portugal, no mitigating circumstances can be taken into account with regard to the need to exhaust domestic remedies, and the failure to comply with this requirement predictably led to a decision of inadmissibility under Article 35 ECHR.⁷⁹⁵

Even though the decision was not unexpected, it also disappointed those who imagined a reconstruction more in line with those adopted by the Committee on the Rights of the Child and the Inter-American Court. The consideration of the global nature of the climate crisis – confirmed by the European Court⁷⁹⁶ – regarding both its causes and its effects, requires a joint effort. With this decision, the judges of Strasbourg have removed the Convention from this challenge, clarifying that it would confer it the role of “global climate-change treaty”,⁷⁹⁷ and rejecting – without analysing it – the “functional” jurisdiction elaborated by the Committee and the Inter-American Court.⁷⁹⁸

Moreover, it is worth considering how the critiques to so-called “attribution science”, are – at least in part – surmountable.⁷⁹⁹ For some years now, scientific models have been used to quantify the effects of the climate crisis and assess its specific contributions.⁸⁰⁰ Of course, the

⁷⁹⁵ *Idem*, para. 231.

⁷⁹⁶ *Idem*, para. 191 ff.

⁷⁹⁷ *Idem*, para. 208.

⁷⁹⁸ The Court’s restrictive approach to extraterritorial jurisdiction in climate matters was subsequently confirmed in *De Conto v. Italy and 32 Others*, application no. 14615/21, and *Uricchio v. Italy and 31 Others*, application no. 14620/21 (decisions of 7 May 2025). In both cases, the First Section reiterated that jurisdiction under Art. 1 ECHR cannot be extended on the basis of a State’s contribution to global greenhouse gas emissions alone. The applicants’ claims against States other than their State of residence were declared incompatible *ratione personae*, thereby consolidating the refusal to recognise a form of “functional” or emissions-based jurisdiction in climate litigation.

⁷⁹⁹ See the Bulletins of the American Meteorological Society; M.D. RISSER, M.F. WEHNER, *Attributable human-induced changes in the likelihood and magnitude of the observed extreme precipitation during Hurricane Harvey*, in *Geophysical Research Letters*, 2017, p. 12457 ff.; K. EMANUEL, *Assessing the present and future probability of Hurricane Harvey’s rainfall*, in *Proceedings of the National Academy of Sciences*, 2017, p. 12681 ff.; T. KNUTSON, *Detection and attribution methodologies overview*, in D.J. WUEBBLES, D.W. FAHEY, K.A. HIBBARD, D.J. DOKKEN, T.I.C. STEWART, T.K. MAYCOCK (eds), *Climate science special report: Fourth national climate assessment, volume 1*, 4th ed, US Global Change Research Program, 2017, p. 443 ff.

⁸⁰⁰ R.F. STUART-SMITH, F.E.L. OTTO, A.I. SAAD ET AL, *Filling the evidentiary gap in climate litigation*, cit.

question of how to translate scientific results into elements which can be usefully assessed by national and international courts remains open.

The issues in the *KlimaSeniorinnen* case were of a partially different nature, and they were both procedural and substantive.

Moving from the first, the main question related to the existence of a *locus standi* for NGOs and individuals in relation to a global problem like the climate crisis. In particular, the Court had to consider whether the victim status for environmental NGOs was possible, without infringing the prohibition of *actio popularis*.

As mentioned above,⁸⁰¹ the judges found a creative solution to this problem, establishing that environmental NGOs have a “special” standing to bring forward environmental – and climate – cases. More specifically, they have to meet the following criteria: lawful establishment in the jurisdiction concerned; dedicated purpose in accordance with its statutory objectives in the defence of the human rights affected by climate change; genuinely qualified and representative.⁸⁰² These criteria will then be evaluated on the basis of a series of assessment factors: the purpose for which the association was established (non-profit); the nature and extent of its activities within the jurisdiction; its composition and representativeness; its principles and transparency of governance; and if, in the overall context of a particular case, the granting of such legitimation is in the interest of the proper administration of justice.⁸⁰³

The Court added that for individuals only if there is high intensity of exposure of the applicant to the adverse effects of climate change; and if there is the urgent need to ensure individual protection of the

⁸⁰¹ See *supra* Chapter IV, Section 1.1.

⁸⁰² ECtHR, *Verein KlimaSeniorinnen Schweiz and others v. Switzerland*, cit., para. 502.

⁸⁰³ *Ibidem*. The strictness of these criteria was illustrated shortly thereafter in *De Conto* and *Uricchio* (cit.). In both decisions, the Court found that the applicants had failed to demonstrate a sufficiently individualised and imminent risk deriving from climate change. Allegations of climate-related anxiety, generalised exposure or generational vulnerability were considered insufficient in the absence of concrete medical or factual evidence establishing a specific and heightened level of personal endangerment. These decisions confirm that the opening created in *KlimaSeniorinnen* remains narrowly circumscribed and does not amount to a relaxation of the individual victim requirement.

applicant.⁸⁰⁴ On this point, the judges failed to recognise that elder women face a *greater* impact from the climate crisis.⁸⁰⁵

This reconstruction was welcomed for its immediate consequences in the case, but some commentators have expressed perplexities in relation to its compatibility with the prohibition of *actio popularis*. Letsas raised the following question: «How can the four individual applicants lack victim status, as the Court held, yet the association, of which the applicants were members, had standing and won the case on the merits?». ⁸⁰⁶ According to the author, the only way to reconcile this reasoning with the prohibition of *actio popularis* is that of including as represented members of the NGO the only category who has no other way of claiming a violation to the European Court: future generations.

This approach would be in line with the affirmation of the Grand Chamber according to which “burden-sharing” should take into account intergenerational equity.⁸⁰⁷ The judgment recognises the impact that today’s decisions will have on future generations, who do not have the possibility to participate to the democratic process and yet will suffer the most from the effects of the climate crisis. By taking into account international commitments deriving from IEL, the Court has highlighted how the reasoning around human rights should consider future generations.

«By their commitment to the UNFCCC, the States Parties have undertaken the obligation to protect the climate system for the benefit of present and future generations of humankind (see paragraph 133 above; Article 3 of the UNFCCC). This obligation must be viewed in the light of the already existing harmful impacts of climate change, as well as the urgency of the situation and the risk of irreversible harm posed by climate change. In the present context, having regard to the prospect of aggravating consequences arising for future generations, the intergenerational perspective underscores the risk inherent in the relevant political decision-making processes, namely that short-term interests and concerns may come to prevail over, and at the expense of,

⁸⁰⁴ *Idem*, paras. 478-488.

⁸⁰⁵ *Idem*, paras. 523-527.

⁸⁰⁶ G. LETSAS, *Did the Court in Klimaseniorinnen create an actio popularis?*, in *EJIL:Talk!*, 13 May 2024.

⁸⁰⁷ ECtHR, *Verein KlimaSeniorinnen Schweiz and others v. Switzerland*, cit., para. 420 ff.

pressing needs for sustainable policy-making, rendering that risk particularly serious and adding justification for the possibility of judicial review.»⁸⁰⁸

This is perhaps one of the most interesting aspects of this judgment, since it is the first time that the Court recognises the relationship existing between human right violations and the effects of the climate crisis.

Indeed, moving to the substantive questions, the Grand Chamber affirmed that it falls into the category of positive obligations deriving from Article 8 ECHR, in the light of the Paris Agreement, that there is an obligation to reduce national GHG emissions.⁸⁰⁹ The Court does not define a *quantity* of GHG emission reduction, but only that they should be cut, leaving States free to decide how and how much. This is in line with the doctrine of the margin of appreciation,⁸¹⁰ with the approach of the Paris Agreement – which is based largely on NDCs,⁸¹¹ and avoids conflict with the argument of separation of powers.

Para. 449 clarifies that «national authorities have direct democratic legitimation and are in principle better placed than an international court to evaluate the relevant needs and conditions. In matters of general policy, or political choices, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker [*sic*]

⁸⁰⁸ *Idem*, para. 420.

⁸⁰⁹ *Idem*, para. 573. The Court highlighted an “intermediate reduction goal” and a “target timeline for achieving carbon neutrality” (*idem*, para. 550). On the issue of “carbon neutrality” and mitigation obligations in the *KlimaSeniorinnen* judgment see C. HILSON, O. GEDEN, *Climate or carbon neutrality? Which one must states aim for under Article 8 ECHR?*, in *EJIL:Talk!*, 29 April 2024; S. HUMPHREYS, *A Swiss human rights budget?*, in *EJIL:Talk!*, 12 April 2024.

⁸¹⁰ See *supra* Chapter IV, Section 3. See also, more in depth, M.R. HUTCHINSON, *The Margin of Appreciation Doctrine in the European Court of Human Rights*, in *International and Comparative Law Quarterly*, 1999 p. 638 ff.; Y. SHANY, *Toward a General Margin of Appreciation Doctrine in International Law?*, in *European Journal of International Law*, 2005, p. 907 ff.; G. LETSAS, *Two Concepts of the Margin of Appreciation*, in *Oxford Journal of Legal Studies*, 2006, p. 705 ff. More recently, L. ACCONCIAMESSA, *Exporting the Margin of Appreciation: The Role of the European Court of Human Rights in Shaping a General Principle on the Exercise of the International Judicial Function*, in *The Law & Practice of International Courts and Tribunals*, 2024, p. 310 ff.

⁸¹¹ See *supra* Chapter III, Section 2.1.1.

is given special weight». However, this does not exempt the Court from analysing issues which infringe the rights protected by the Convention.⁸¹²

«In such instances, the Court retains competence, albeit with substantial deference to the domestic policy-maker and the measures resulting from the democratic process concerned and/or the judicial review by the domestic courts. Accordingly, the margin of appreciation for the domestic authorities is not unlimited and goes hand in hand with a European supervision by the Court, which must be satisfied that the effects produced by the impugned national measures were compatible with the Convention.»⁸¹³

Finally, the judges also clarified that in assessing whether States are acting within their margin of appreciation, the Court would take into account the existence of «procedures through which the view of the public, and in particular the interests of persons concerned or at risk of being affected by the relevant regulations and measures or the absence thereof, can be taken into account in the decision-making process».⁸¹⁴

The ruling has been widely described as “groundbreaking”, and it may indeed be regarded as a significant step in the appropriate direction. Nevertheless, certain shortcomings remain discernible.

The first is the one highlighted by Pedersen, in his *EJIL:Talk!* Blogpost. The author commented on the judgment noting that it is only in continuity with what the States are already doing at national level,⁸¹⁵ and therefore at the level of “policy” of the European Court, it is not really a “leading case”.⁸¹⁶

Secondly, despite copious references to international actions regarding the recognition of the right to a healthy environment, the Court merely registers the lack of political will on the part of the States to include it. More specifically, the judges mark a clear distinction between human rights protected by the Convention and «the weight of environmental concerns in the assessment of legitimate aims and the

⁸¹² ECtHR, *Verein KlimaSeniorinnen Schweiz and others v. Switzerland*, cit., para. 450.

⁸¹³ *Ibidem*.

⁸¹⁴ *Idem*, para. 554.

⁸¹⁵ See *infra* Chapter VI.

⁸¹⁶ O.W. PEDERSEN, *Climate Change and the ECHR: The Results Are In*, in *EJIL:Talk!*, 11 April 2024.

weighing-up of rights and interests in the context of the Convention».⁸¹⁷ Therefore, the European Court subtracts itself from the interpretative work conducted by the Inter-American Court, by stating that

«It is therefore not for the Court to determine whether the general trends regarding the recognition of such a right give rise to a specific legal obligation [...]. Such a development forms part of the international-law context in which the Court assesses Convention issues before it (see *Demir and Baykara*, cited above, § 76), notably as regards the recognition by the Contracting Parties of a close link between the protection of the environment and human rights.»⁸¹⁸

This could have been an occasion to urge States in filling the gap existing not only between regional systems, but also between the European Convention and national regimes in Europe.

It is to be commended the application and adaptation that the Court has done of its environmental jurisprudence in order to include human rights' violations deriving from the climate crisis. However, in terms of what the judges of Strasbourg *could have done*, a reluctance in fully embracing the relationship existing between the two must still be registered. The refusal to consider an evolution in its doctrine on extraterritorial jurisdiction for fear of becoming “a climate change treaty” proves that there is still misunderstanding around how close the climate crisis truly is to human rights. In the same way, the absence of evolution in the interpretation of the Convention in the optics of including a right to a healthy environment keeps the European system lagging behind.

Some positive considerations on the collective dimension of the climate crisis can be underlined, specifically with regard to the recognition of *locus standi* to environmental associations, but this is still very far from the reasoning of the Inter-American Court and the African Commission, as it remains in the procedural field, without analysing the collective nature of the interests at hand.

A further element complicates the picture emerging from the Court's recent climate jurisprudence. Only one year after *KlimaSeniorinnen*, the

⁸¹⁷ ECtHR, *Verein KlimaSeniorinnen Schweiz and others v. Switzerland*, cit., para. 447.

⁸¹⁸ *Idem*, para. 448.

Court in *Cannavacciuolo* found a violation of Article 2 in relation to large-scale environmental pollution.⁸¹⁹ The contrast between these strands of case-law is instructive. In the climate cases, the systemic and global nature of the phenomenon was invoked to justify jurisdictional restraint, strict admissibility filters and a cautious articulation of positive obligations. In *Cannavacciuolo*, by contrast, the prolonged and structural nature of toxic contamination did not prevent the Court from recognising the existence of a “real and imminent” risk to life and from imposing robust preventive duties on the State.

Admittedly, the factual contexts differ. Yet climate change and large-scale pollution share structural characteristics: diffuse causation, scientific complexity, cumulative effects and intergenerational impact. Despite these similarities, they appear to be treated as conceptually distinct categories of harm, subject to different procedural sensitivities and interpretative attitudes. This differentiated treatment becomes particularly visible when considering collective representation. In *KlimaSeniorinnen*, the Grand Chamber developed a specific framework for granting standing to environmental associations, thereby acknowledging – albeit cautiously – the collective implications of climate harm. In *Cannavacciuolo*, however, the reasoning remained anchored to individually identifiable victims exposed to toxic risk, without engaging in a comparable reflection on the collective dimension of environmental degradation.⁸²⁰

The resulting jurisprudence thus seems to evolve along partially parallel tracks: one in which climate litigation prompts procedural innovation but substantive caution, and another in which environmental contamination triggers substantive protection under Article 2 but remains framed within a traditional individualised model. The Court does not fully articulate the normative basis for this differentiation, leaving an impression of doctrinal asymmetry between climate-related and environmental claims under the Convention. This emerging asymmetry invites a broader reflection on whether the Convention system possesses a sufficiently integrated conceptual framework to address ecological harm in its systemic dimension.

⁸¹⁹ ECtHR, *Cannavacciuolo and Others v. Italy*, cit. See also the Concurring Opinion of Judge Krenč, paras. 10-11.

⁸²⁰ *Idem*, para. 220-222.

1.3.3. *On the effective possibility of invoking a collective right to a healthy environment under the ECHR: current and future perspectives*

Finding justiciability for the collective right to a healthy environment inside the European system is a complicated task. The difficulties arising from the way the system works and the absence of the autonomous recognition of a right to a healthy environment make it impossible to conclude that justiciability is directly attainable for it.

Turning from the procedural obstacles, specific reference is made to the admissibility criteria for application before the European Court of Human Rights: namely, the victim status requirement and the exhaustion of domestic remedies.

As for the first, while it is true that the *KlimaSeniorinnen* judgment has opened the doors to environmental and climate associations, subsequent case-law has demonstrated how narrowly this opening is construed in practice.⁸²¹ The criteria of “high intensity of exposure” and “urgent need for individual protection” set out by the Grand Chamber have been applied in a stringent manner, confirming that the individual threshold remains particularly demanding in the context of climate harm. For individuals, the possibility of proving a serious, specific and imminent danger continues to pose considerable difficulties, especially in relation to diffuse, long-term and cumulative risks.

It is certain that some positive development can be seen in recent climate litigation, especially when considering NGOs representation of future generations as an author suggested.⁸²² However, considering the characteristics of the right-holders of the right to a healthy environment, these developments cannot be said to grant full justiciability for humanity in the form of present and future generations.

The exhaustion of domestic remedies likewise remains an issue for the collective nature of the right to a healthy environment with specific regard to the climate crisis. As illustrated in *Duarte Agostinho* and the subsequent decisions in *Uricchio* and *De Conto*, the Court maintains a restrictive understanding of jurisdiction and subsidiarity, insisting that climate grievances be channelled primarily through domestic systems.

⁸²¹ ECtHR: *Cannavacciuolo and others v. Italy*, cit.; *Uricchio v. Italy and 31 Other States*, cit.; *De Conto v. Italy and 32 Other States*, cit.

⁸²² G. LETSAS, *The European Court’s Legitimacy After KlimaSeniorinnen*, cit.

This is also an issue with which the Committee on the Rights of the Child has dealt in the *Sacchi* case, which will be examined in the next Section. In any case, it can be said with confidence that on this specific point, linked to the issue of extraterritoriality, the Court maintains a restrictive and formalistic approach which is not compatible with full justiciability of the right to a healthy environment.

Of course, the main obstacle still lies in the lack of recognition of an autonomous right to a healthy environment, especially considering that the European Convention of Human Rights does not recognise any collective right.⁸²³

The Parliamentary Assembly of the Council of Europe (PACE) has called for the adoption of an additional protocol to the Convention recognising the right both in 2009 and 2021.⁸²⁴ In the latter, the Parliamentary Assembly recognised that protecting “traditional” civil and political rights is not enough to prevent «[t]hese novel threats to human life, well-being and health», and that they are caused by governments’ «lack of action to prevent cumulative harm to individuals from environmental degradation caused by the commercial exploitation of nature».⁸²⁵ In the same text, the Assembly noted that the right to a healthy environment is linked to fundamental rights and “first generation rights” since the Stockholm Declaration in 1972.⁸²⁶ It proceeded to mention the need for “ecological human rights” and encouraged «the Council of Europe to recognise, in time, the intrinsic value of nature and

⁸²³ An exception could be somewhat offered by the right to collective bargaining encompassed in Art. 11 (freedom of assembly and association), as interpreted by the judges (see ECtHR, *Demir and Baykara v. Turkey*, application no. 34503/97, GC, Judgment of 12 November 2008, para. 140). However, the nature of European environmental protection shies away from a collective reconstruction. There is no right to a healthy environment in the European Convention and nature is protected only if there is a damage – or risk thereof – to *humans*.

⁸²⁴ Parliamentary Assembly of the Council of Europe, Recommendation on “Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment”, Rec. 1885 of 30 September 2009; Parliamentary Assembly of the Council of Europe, Recommendation on “Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe”, Rec. 2396 of 29 September 2021.

⁸²⁵ Parliamentary Assembly of the Council of Europe, Recommendation on “Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe”, cit., para. 2.

⁸²⁶ On generations of rights see *supra* Chapter I.

ecosystems in the light of the interrelationship between human societies and nature». ⁸²⁷ In this way, the Parliamentary Assembly called for a protocol which explicitly tackles an ecocentric approach to the right to a healthy environment, taking into account its collective component. The Assembly reminded the Committee of Ministers that 32 Member States of the Council of Europe already recognise such a right in their national constitutions.

Despite copious support received from civil society associations, ⁸²⁸ no action in this direction has been taken so far by the Committee of Ministers. It is apparent that until such action is taken, the confines of the Court's jurisdiction remain bound.

Beyond procedural constraints and the absence of an autonomous recognition, a further structural limitation emerges from the way in which the Court conceptualises environmental harm. The recent developments in *KlimaSeniorinnen* and *Cannavacciuolo* illustrate both progress and hesitation. While the Court has shown increasing willingness to recognise positive obligations in the face of climate change and large-scale pollution, it continues to approach these phenomena through compartmentalised doctrinal categories.

In particular, the conceptual separation between environmental pollution and climate change — despite their scientific and normative interdependence — reveals the absence of an ecosystemic perspective. This fragmentation affects not only substantive protection, but also the possibility of articulating a genuinely collective dimension of the right at stake.

An ecosystemic approach would require acknowledging that climate change, biodiversity loss, soil degradation, air and water pollution form part of a single ecological crisis, which conditions the very possibility of exercising Convention rights. Such an approach does not necessarily entail the explicit recognition of an autonomous right to a healthy environment; however, it would require interpreting existing rights in a

⁸²⁷ Parliamentary Assembly of the Council of Europe, Recommendation on “Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe”, cit., para. 6.

⁸²⁸ Call of support for the adoption of an additional protocol to the European Convention have come from more than 200 civil society organisations, social movements and Indigenous Peoples Organizations. The letter can be found on the website of Amnesty International, available at www.amnesty.eu.

manner that reflects their embeddedness within ecological systems. The current jurisprudence, by contrast, remains anchored to an individualised model of harm, whereby environmental degradation becomes legally relevant only insofar as it can be translated into personalised interference or imminent risk.

In this sense, the challenge for the European system is not merely the formal adoption of an additional protocol, but the gradual incorporation of an ecosystemic understanding of rights protection. Without such a shift, the justiciability of a collective right to a healthy environment will remain constrained by doctrinal categories that were not designed to confront systemic ecological degradation.

Conclusively, the European system is moving with some reluctance as opposed to the Inter-American one. Hesitancy to change legal parameters, however, does not equate to impossibility to put them in question. The PACE's initiatives and the judgment in *KlimaSeniorinnen*, combined with the high level of the legal reasoning of the Court make it possible to see a path for the future. The very fact that issues as collectiveness of environmental rights are gathering traction at the national level is a factor not to be taken lightly.⁸²⁹

2. UN treaty bodies as a "fortuitous" venue for climate litigation

The second Section of this Chapter will be devoted to the brief analysis of two specific tribunals which have dealt with environmental cases in their collective form. More specifically, by dealing with *climate* cases.

Attention will be drawn on the cases brought before the UN Human Rights Committee and the UN Committee on the Rights of Child. Both, indeed, have been tasked with analysing two of the thorniest issues when contemplating the collective dimension of the right to a healthy environment: its spatial and temporal collective confines. They have dealt with intergenerational and intragenerational approaches as well as extraterritorial jurisdiction issues and are therefore relevant for the development of legal principles for the protection of ecological human rights.

⁸²⁹ See *infra* Chapter VI.

2.1. *Human Rights Committee: from Teitiota to Torres Strait Islanders and the way forward*

The Human Rights Committee (HRCtee) is the body in charge of supervising the application of the UN International Covenant on Civil and Political Rights (ICCPR). Its decisions, called “views”, are delivered under the procedure established by the Optional Protocol and only in cases of communications directed against a State which has signed the Protocol.⁸³⁰ These views, which are non-binding recommendations, form the “case-law” of the Human Rights Committee. The Committee also retains competence to adopt General Comments on the interpretation of the rights contained in the Covenant. It is worth noting, preliminarily, that the ICCPR *does not* include the right to a healthy environment.

However, the Committee has, albeit quite recently, dealt with issues relating to the interface between human rights and the environment. Its first reasoning on this matter is contained in General Comment No. 36.⁸³¹ In carrying out its function of interpreting the Covenant on Civil and Political Rights, the Committee has contributed by affirming the link between human rights violations and environmental damage, especially climate change, with particular reference to the threat to the right to life (Article 6 ICCPR).⁸³² This commentary analyses the implications of the right to life in different contexts, including environmental degradation and climate change. On this occasion, explicit mention is made «to the ability of present *and future generations* to enjoy the right to life».⁸³³

The Committee invoked the need for States to respect their commitments under international environmental law and apply the standards elaborated in such circumstances, by assuring a mutual interpretation of their obligations under the ICCPR in the light of such IEL commitments and vice versa.⁸³⁴ This applies to the threat of pollution and climate change caused by both private and public actors.

Regarding obligations of States, the Committee affirmed:

⁸³⁰ Optional Protocol to the International Covenant on Civil and Political Rights, Art. 1.

⁸³¹ Human Rights Committee, *General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, (UN Doc CCPR/C/GC/36), 3 September 2019.

⁸³² *Idem*, para. 62.

⁸³³ *Ibidem* (emphasis added).

⁸³⁴ *Ibidem*.

«States parties should therefore ensure sustainable use of natural resources, develop and implement substantive environmental standards, conduct environmental impact assessments and consult with relevant States about activities likely to have a significant impact on the environment, provide notification to other States concerned about natural disasters and emergencies and cooperate with them, provide appropriate access to information on environmental hazards and pay due regard to the precautionary approach.»⁸³⁵

In other words, the Human Rights Committee created an interplay between the obligations of States under Article 6 ICCPR and the well-known principles of precaution, environmental impact assessment, prevention of transboundary harm and sustainable development.

The first case in which the Committee was able to apply these principles was *Portillo Cáceres v. Paraguay* of 2019.⁸³⁶ In this case, where a family member of the applicant (*rectius* and from now forward “author”) died due to the poisoning caused by high amounts of pesticides and insecticides used by industrial farms, the Committee recognised the violation of the right to life which was “undeniably linked” to environmental protection.⁸³⁷ It also found a violation of Article 17 ICCPR (right to privacy, family and home), along the lines of the judgments carried by the European Court of Human Rights, underlining the fact that the authors had not only lost a family relative, but also the natural resources off which they lived.⁸³⁸

The issue of human rights and environmental protection came up with specific regard to the climate crisis in the same year in the *Teitiota* case.⁸³⁹ The author of this communication was a Kiribati national who tried to apply for asylum status in New Zealand, claiming that his home-land was becoming inhabitable due to climate change.⁸⁴⁰ The HRCtee found the evidence reliable and yet it ruled in favour of the State.

⁸³⁵ *Ibidem*.

⁸³⁶ Human Rights Committee, *Portillo Cáceres v. Paraguay*, cit.

⁸³⁷ *Idem*, para. 7.3.

⁸³⁸ *Idem*, para. 7.8.

⁸³⁹ Human Rights Committee, *Ioane Teitiota v. New Zealand*, Communication No. 2728/2016, Views of 24 October 2019 (UN Doc. CCPR/C/127/D/2728/2016).

⁸⁴⁰ For a more in-depth analysis of the case, see also S. BEHRMAN, A. KENT, *The Teitiota Case and the limitations of the human rights framework*, in *QIL*, 2020, p. 25 ff.

It acknowledged that in certain regions, the absence of alternatives to subsistence livelihoods can increase the vulnerability of individuals to the negative effects of climate change. It also affirmed that:

«Reports indicate that sudden onset events are discrete occurrences that have an immediate and obvious impact over a period of hours or days, while slow-onset processes may have a gradual, adverse impact on livelihoods and resources over a period of months or years. Both sudden-onset events, such as intense storms and flooding, and slow-onset processes, such as sea level rise, salinization, and land degradation, can propel cross-border movement of individuals seeking protection from climate change-related harm. [...] The Committee is of the view that without robust national and international efforts, the effects of climate change in receiving states may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the non-refoulement obligations of sending states. Furthermore, given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized.»⁸⁴¹

Despite recognising that a slow-onset event such as sea-level rise could give cause the migration of people “seeking protection”, and despite having recognised that the effects of climate change could potentially hinder the right to life in General Comment No. 36, the Committee rejected the claim of Mr. Teitiota because it considered that the damage would not happen for another 10-15 years, which would give the government of Kiribati enough time to reverse it.⁸⁴² Therefore, even though the risks to the right to life of the author were deemed existing and concrete, potentially triggering the principle of *non-refoulement*,⁸⁴³ they were not deemed “imminent” enough to meet the threshold of

⁸⁴¹ Human Rights Committee, *Ioane Teitiota v. New Zealand*, cit., para. 9.11.

⁸⁴² *Idem*, para. 9.12. This is regardless of the fact that illnesses were already spreading among the children of Kiribati as well as other dire conditions of life on the island, or the fact that a lot of the solutions already taken by Kiribati had proven to be useless.

⁸⁴³ The principle of *non-refoulement* is a core principle of customary international law which prohibits States from forcibly removing people from their territory and transferring them in countries in which they could face serious risks of persecution, torture, ill treatment or other serious human rights violations. See S. BEHRMAN, A. KENT, *The Teitiota Case and the limitations of the human rights framework*, cit.

severity required by Article 6 ICCPR. In other words, they did not amount to “irreparable harm”.⁸⁴⁴

The Committee also stressed that the damage must be “personal”,⁸⁴⁵ as in “specific”, in this way anticipating a paradoxical situation that the European Court of Human Rights has followed in its *KlimaSeniorinnen* judgment. Behind this reasoning is the idea that harm or danger can trigger the intervention of the tribunal (or the Court) only if they are specific, “unique”, to the situation of the applicant. This means that in the cases of violation of human rights linked to the climate crisis, one should be able to prove the specific damage that such a crisis – which is inherently global in nature – provokes. This is not only problematic for the systemic dimension of climate change, but also for the collective reconstruction of the right to a healthy environment.

Furthermore, the Committee underlined the need for a collective effort, affirming that Kiribati could reverse the effects of the climate crisis by seeking the help of the international community.⁸⁴⁶ While this is an application of the general principle of solidarity and a call to respect the common but differentiated responsibilities, it is also deeply unsatisfactory for a country like Kiribati, who has no effective way of soliciting such a cooperation and will not realistically be able to put in place adaptation measures capable of safeguarding all its citizens from the threat of sea-level rise. It will not, moreover, be of help for the immediate condition of Mr. Teitiota and its family.

The outcome was different in the more recent case of *Billy and others v. Australia*, also known as the *Torres Strait Islander* case.⁸⁴⁷ The case was brought forward by eight islanders and their six children claimed the infringement of their rights under Articles 6 and 17, as well as Articles 24 (children’s rights), and 27 (minority/IPs’ rights), claiming Australia’s failure «a) to implement an adaptation program to ensure the long-term

⁸⁴⁴ Human Rights Committee, *Ioane Teitiota v. New Zealand*, cit., para. 9.3: «The Committee has also indicated that the risk must be personal, that it cannot derive merely from the general conditions in the receiving State, except in the most extreme cases, and that there is a high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists».

⁸⁴⁵ *Ibidem*.

⁸⁴⁶ *Idem*, para. 9.12.

⁸⁴⁷ Human Rights Committee, *Daniel Billy et al. v. Australia*, Communication No. 3624/2019, Views of 21 July 2022, UN Doc. CCPR/C/135/D/3624/2019.

habitability of the islands; and b) to mitigate the impact of climate change».⁸⁴⁸

The effects of such a conduct, as recognised by the Committee, were the following:

«[...] flooding and inundation of villages; flooding and inundation of ancestral burial lands; loss by erosion of their traditional lands, including plantations and gardens; destruction or withering of traditional gardens through salinification caused by flooding or seawater ingress; decline of nutritionally and culturally important marine species caused by climate change, and associated coral bleaching (reef death) and ocean acidification; and a reduced ability to practice their traditional culture and pass it on to the next generation. They also experience anxiety and distress owing to erosion that is approaching some homes in the community. For six of the authors, upkeeping ancestral graveyards and visiting and feeling communion with deceased relatives is at the heart of their cultures, and the most important ceremonies (such as coming-of-age and initiation ceremonies) are only culturally meaningful if performed on the native lands of the community whose ceremony it is.»⁸⁴⁹

The main reason for the recognition of the violation of the authors' human rights lies in the fact that rights of minorities were involved.⁸⁵⁰ Indeed, the Committee found a violation of Articles 17 (right to privacy) and 27 (rights of minorities and Indigenous Peoples).⁸⁵¹ Once more, it excluded the violation of Article 6 for lack of "imminency" of the damage, again affirming that «the time frame of 10 to 15 years, as

⁸⁴⁸ *Idem*, para. 3.1.

⁸⁴⁹ *Idem*, para. 5.2.

⁸⁵⁰ See R. LUPORINI, *Climate Change Litigation before International Human Rights Bodies: Insights from Daniel Billy et al. v. Australia (Torres Strait Islanders Case)*, in *The Italian Review of International and Comparative Law*, 2023, p. 238 ff.; C. CERETELLI, *Tutela dei diritti umani e lotta al cambiamento climatico: il caso Torres Strait Islanders dinanzi al Comitato dei diritti umani*, in *Diritti Umani e Diritto Internazionale*, 2023, p. 761 ff.; C. VOIGT, *UNHRC is Turning up the Heat: Human Rights Violations Due to Inadequate Adaptation Action to Climate Change*, in *EJIL:Talk!*, 26 September 2022; M.A. TIGRE, *United Nations Human Rights Committee finds that Australia is violating human rights obligations towards Torres Strait Islanders for climate inaction*, in *Climate Law – A Sabin Center Blog*, 27 September 2022; E. DALY, *The UNHCR's Torres Strait Islands decision: A Major Advance, and a Roadmap for the Future*, in *The Global Network for Human Rights and the Environment*, 2023.

⁸⁵¹ Human Rights Committee, *Daniel Billy et al. v. Australia*, cit., paras. 8.12 and 8.14.

suggested by the authors, could allow for intervening acts by the State party to take affirmative measures to protect and, where necessary, relocate the alleged victims».⁸⁵²

Therefore, the Human Rights Committee deemed it necessary to declare only a violation of those cultural rights which were already infringed by Australia due to the specific dependence of the islanders from their way of living, failing to assess the severe risk caused by the future “uninhabitability” of the islands and proving once more that the right to life is possibly “not elastic enough” to be stretched up to including also the right to a healthy and sustainable environment.

The Committee focused again on the necessary interaction of international environmental law and human rights’ law, mentioning both adaptation and mitigation – even though the latter are some-what “vague”.⁸⁵³ The distinction between the two is particularly relevant in the contest of the “shared responsibility” for the climate crisis. Indeed, as Feria-Tinta clearly depicted,

«causation is irrelevant for assessing State obligations concerning obligations in relation to adopt adaptation measures. Even if the climate change threat were wholly extraneous to a given State, said State would still be under the same duty to take positive measures to address foreseeable climate change impacts on the human rights of those under its jurisdiction (measures of adaptation). This obligation is not dependent upon the causal relationship between a State and global climate change.»⁸⁵⁴

⁸⁵² *Idem*, para. 8.7.

⁸⁵³ *Idem*, para. 7.8 and 8.2. See also Human Rights Committee, *Daniel Billy et al. v. Australia*, cit., Annex II, *Individual Opinion by Committee Member Gentian Zyberi (concurring)*, para. 6: «[...] In my view, the Committee should have linked the State obligation [...] more clearly to mitigation measures, based on national commitments and international cooperation – as it is mitigation actions which are aimed at addressing the root cause of the problem and not just remedy the effects. If no effective mitigation actions are undertaken in a timely manner, adaptation will eventually become impossible».

⁸⁵⁴ M. FERIA-TINTA, *Climate Change Litigation in the European Court of Human Rights: Causation, Imminence and Other Key Underlying Notions*, in *Europe of Rights and Liberties*, 2021, p. 61.

The same cannot be said for mitigation measures, the most famous being the reduction of GHG emissions. And yet, even on this aspect, the Committee concluded that Australia

«With respect to mitigation measures, although the parties differ as to the amount of greenhouse gases emitted within the State party's territory, and as to whether those emissions are significantly decreasing or increasing, the information provided by both parties indicates that the State party is and has been in recent decades among the countries in which large amounts of greenhouse gas emissions have been produced. The Committee also notes that the State party ranks high on world economic and human development indicators.»⁸⁵⁵

It is true that this decision is a bold step for the Human Rights Committee, and the recognition of the violation of two sets of rights is relevant in the fight against the climate crisis. The recognition of “full reparation” and guarantees of non-repetition mirrors the terminology employed by the Inter-American Court of Human Rights and provides grounds for cautious optimism regarding future developments. Nevertheless, the lack of recognition of an autonomous right to a healthy environment is not without its effect. A “traditional” approach to environmental rights and their collective dimension is still observable, one which appears – at least partially – incapable of ensuring effective justiciability for collective ecological interests.

2.2. *The rights of children as future generations in fieri: the work of the Committee on the Rights of the Child*

The philosophical considerations behind the concepts of future generations and children have already been examined in the previous Chapter.⁸⁵⁶ The fragile temporal distinction between future *unborn* generations and future *yet born* generations has been analysed. In an optic of strategic litigation, it could be argued that foregoing every distinction in the responses to threats to these two categories could harm the specific needs of children, who can already benefit from the

⁸⁵⁵ Human Rights Committee, *Daniel Billy et al. v. Australia*, cit., para. 7.8.

⁸⁵⁶ See *supra* Chapter IV, Section 1.2.

recognition of specific rights. However, for the purpose of this inquiry, some reflections can be drawn.

Indeed, despite recognising the particular form of vulnerability that children suffer in the face of gross environmental degradation (and, more specifically, in the case of the climate crisis),⁸⁵⁷ in considering the intergenerational dimension of the right to a healthy environment, reference is made to all of humanity, embracing what has so far been called an “intertemporal” concept of human rights.⁸⁵⁸ Adopting such an approach when developing legal reasoning means fostering possibilities of significant advancement in the way human rights legal theory is conceptualised. As an author considered, this «would transform [the human rights system] in a forward-looking system, capable of encouraging the evolution of robust, effective and sustainable policy responses».⁸⁵⁹ This is especially relevant in light of the intergenerational and collective impact of environmental degradation.

It is for this reason that the work of the Committee on the Rights of the Child (CRC) is relevant in conclusion of this Chapter. As already seen with the Human Rights Committee, the CRC is not a specialist forum neither for environmental nor climate cases. The relevant treaty, the Convention on the Right of the Child, does not explicitly include the right to a healthy environment as an autonomous right. However, the Committee has been called upon to express views – non-binding decisions – on the matter.

The *Sacchi* case has offered such an opportunity. In 2019, a group of sixteen young people, including the well-known Swedish activist Greta Thunberg, from twelve countries in the world, aged between eight and eighteen, filed an official petition against five countries (Argentina, Brazil,

⁸⁵⁷ UNGA Resolution on “Declaration of the Rights of the Child”, UN Doc. A/4354, 20 November 1959, Preamble: «[...] the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth». See also *supra* Chapter III, Section 2.2.2.

⁸⁵⁸ See *supra* Chapter III, Section 2.2. See also J. BRUNNÉE, *The Stockholm Declaration and the Structure and Processes of International Environmental Law*, cit.; J.H. KNOX, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Framework Principles*, cit.

⁸⁵⁹ E. CIMA, *The right to a healthy environment: Reconceptualizing human rights in the face of climate change*, in *Review of European, Comparative & International Environmental Law*, 2022, p. 48.

France, Germany and Turkey) under the Optional Protocol to the Convention on the Rights of the Child on a Complaints Procedure (OPIC).

The authors of the communication provided evidence on how climate change was affecting their lives, including the devastating effect of heat waves caused by global warming, fires, drought and storms. They said that «[t]he climate crisis is not an abstract future threat»,⁸⁶⁰ but that it has a concrete and current impact. They focused on the intergenerational and collective dimension of the climate crisis, which they referred to as the “ultimate tragedy of the commons”.⁸⁶¹

In particular, noting the communal effort needed to stop the effects of the climate crisis, the authors highlighted that:

«Every country’s emissions matter in the race to reverse global warming. To fulfill [*sic*] their human rights duties, states must reduce their domestic emissions and cooperate internationally to decarbonize the global economy. For decades, the excuse that no site-specific harm can be traced to any particular emission or country, and thus that no state bears responsibility, has been used to justify inadequate climate action. This excuse has turned the climate crisis into what economists call a “tragedy of the commons.” This is where a common resource, like Earth’s lifesustaining [*sic*] atmosphere, is spoiled by individual actors, such as individual states, acting in their individual, short-term economic interests, ruining everyone’s long-term collective interest.»⁸⁶²

In doing so, the authors directed the communication against five countries whose efforts so far have been too slow and weak to prevent a climate catastrophe (Argentina, Brazil, France, Germany, Turkey),⁸⁶³ countries that have all ratified the UN Convention on the Rights of the Child and which, therefore, have specific obligations to provide for children’s health and well-being, which are not met as the climate crisis intensifies. They referred to their right to life (Article 6), health (Article 24), participation in cultural life (Article 30) and the “primary

⁸⁶⁰ Communication to the Committee on the Rights of the Child, *Sacchi et al. v. Argentina et al.*, 23 September 2019, para. 3.

⁸⁶¹ *Idem*, para. 205. See also G. HARDIN, *The Tragedy of the Commons*, cit.

⁸⁶² Communication to the Committee on the Rights of the Child, *Sacchi et al. v. Argentina et al.*, cit., para. 204.

⁸⁶³ *Idem*, paras. 214-228.

consideration” of the child’s best interests in the adoption of state policies (Article 3).

As said before, no right to a healthy environment is included in the Convention. However, the CRC has drawn such right from the interpretation of other Articles of the Convention.

«Children have the right to a clean, healthy and sustainable environment. This right is implicit in the Convention and directly linked to, in particular, the rights to life, survival and development, under article 6, to the highest attainable standard of health, including taking into consideration the dangers and risks of environmental pollution, under article 24, to an adequate standard of living, under article 27, and to education, under article 28, including the development of respect for the natural environment, under article 29.»⁸⁶⁴

As in the other cases examined so far, also in the *Sacchi* case the authors based their reasoning on the connection existing between international human rights obligations and commitments deriving from international environmental law (specifically, the Paris Agreement).⁸⁶⁵ On this line, they also focused on the transboundary impact of the climate crisis and on the extraterritorial jurisdiction of the States involved, explicitly mentioning the Advisory Opinion of 2017 of the Inter-American Court of Human Rights.⁸⁶⁶

To this last aspect is linked the reason of the decision of inadmissibility of the Committee on the Rights of the Child. Indeed, despite agreeing with most of the findings of the authors, the CRC considered the communication inadmissible due to the lack of exhaustion of domestic remedies. The Committee did not, in this sense, find reason in the exceptions raised by the authors.

The Convention on the Rights of the Child contemplates an exception to the rule of exhaustion of domestic remedies at Article 7(e)

⁸⁶⁴ CRC, *General Comment No. 26 (2023) on children’s rights and the environment, with a special focus on climate change*, cit., para. 63.

⁸⁶⁵ Communication to the Committee on the Rights of the Child, *Sacchi et al. v. Argentina et al.*, cit., paras. 168-196.

⁸⁶⁶ *Idem*, para. 242 ff. This point was also supported by John H. Knox and David Boyd – former Special Rapporteurs on Human Rights and the Environment – who provided an *amicus* brief urging the CRC to use its position to provide effective remedies against multiple State parties (*Amici curiae* brief of the Special Rapporteurs on Human Rights and the Environment in support of admissibility, para. 50).

OPIC «where the application of the remedies is unreasonably prolonged or unlikely to bring effective relief». The authors contended that due to the global nature of the climate crisis, no “effective relief” could be granted because the communication involved «legal questions that raise, with respect to diplomatic relations, non-justiciable issues in their domestic tribunals».⁸⁶⁷ This is of course caused by the existence of immunity of sovereign States, which would forbid the State to provide a domestic forum for the claims raised and remedies sought in this case, but also by the fact that no single State could tackle the cross-border issues related to the climate crisis. Moreover, as it has been pointed out,⁸⁶⁸ only some of those countries have legislation in place that would allow for children filing autonomous petitions for climate change.

The Committee did not agree with this reconstruction and stated that «mere doubts or assumptions» on the prospects of success or effectiveness of such remedies did not exempt the authors from exhausting them.⁸⁶⁹ Nevertheless, the CRC did comment on the merits of the case, agreeing with the authors’ claims that, although climate change and the resulting environmental damage and its impact on human rights are collective global issues that require a global response, States Parties must assume individual responsibility for their actions or omissions in relation to climate change and their contribution to it – also respecting the principle of common but differentiated responsibilities.⁸⁷⁰

Finally, the Committee also considered that, on the basis of what is «generally accepted and corroborated by scientific evidence», the State has «effective control over the source of carbon emissions within its territory, which have a transboundary effect».⁸⁷¹

Although the Committee’s reasoning has been interpreted as opening international human rights protection mechanisms to the possibility of making significant progress in the field of international climate

⁸⁶⁷ *Idem*, para. 315.

⁸⁶⁸ A. DALY, *Child and youth-friendly justice for the climate crisis: Relying on the UN Convention on the Rights of the Child*, in *The International Journal of Children’s Rights*, 2024, p. 632 ff. See also B. ÇALI, *A Handy Illusion? Interpretation of the ‘Unlikely to Bring Effective Relief’ Limb of Article 7(e) OPIC by the CRC in Saachi et. al.*, in *EJIL:Talk!*, 1 November 2021.

⁸⁶⁹ Committee on the Rights of the Child, *Sacchi et al. v. Argentina et al.*, Decision of 11 November 2021, para. 10.17.

⁸⁷⁰ *Idem*, para. 10.19.

⁸⁷¹ *Idem*, paras. 10.8 and 10.9.

litigation,⁸⁷² this decision severely limits the practical possibilities of bringing such cases before international courts and tribunals. Moreover, the conclusions of the CRC seem to be contradictory for at least two reasons.

First, it should be recalled that the Committee formally endorsed the Advisory Opinion on “Environment and Human Rights” issued by the Inter-American Court of Human Rights. In doing so, it acknowledged the existence of a State’s responsibility for the transboundary impact of the climate crisis, stating that, in the case of transboundary damage, the exercise of jurisdiction by a State of origin is based on the assumption that it is the State *in whose territory or under whose jurisdiction the activities have been carried out* which has effective control over them and is able to prevent them from having an effect harmful cross-border which affects the enjoyment of human rights by persons outside its territory.⁸⁷³ On this point, the authors had maintained that pursuing domestic remedies would be pointless as they would have no real prospect of success. In doing so, they argued that the State Party has not demonstrated that the obligation to use remedial measures would be fair to authors residing outside its borders.

The authors specifically cited Article 15(c) of the “Draft articles on diplomatic protection”, adopted by the International Law Commission in 2006,⁸⁷⁴ stating that this Article – supported, in the opinion of the authors, by practice and *opinio juris* – would demonstrate that there is no need for domestic remedies in the case of transboundary environmental damage, where the victim has not voluntarily established a link with the State of origin and has not taken the risk of being harmed by pollution from that State.

⁸⁷² Y. SUEDI, *Litigating Climate Change before the Committee on the Rights of the Child in Sacchi v Argentina et al.: Breaking New Ground?*, in *Nordic Journal of Human Rights*, 2022, p. 549 ff.; B. LEWIS, ‘*Sacchi et al v Argentina, Brazil, France, Germany and Turkey*’ (United Nations Committee on the Rights of the Child), in *Australian Environment Review*, 2022, p. 201 ff.; L. MAGI, *Cambiamento climatico e minori: prospettive innovative e limiti delle decisioni del Comitato per i diritti del fanciullo nel caso Sacchi e altri*, in *Diritti umani e diritto internazionale*, 2022, p. 157 ff.

⁸⁷³ Committee on the Rights of the Child, *Sacchi et al. v. Argentina et al.*, cit., paras. 10.5 and 10.7.

⁸⁷⁴ ILC, “Draft articles on diplomatic protection”, in *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10)*, 2006.

Secondly, it is true that “mere doubts” cannot justify an exception to the rule of exhaustion of local remedies. However, the authors had argued that the unique circumstances of their case would have unreasonably delayed domestic proceedings as they should have pursued five separate cases in five Member States, each of which would have taken years. They had stated that the resolution of complex environmental cases is often time-consuming, and that solving even only the *locus standi* problem would have taken years of litigation. Among other things, in some cases the mere attempt to bring a case before national courts may entail a high risk of irreversible damage. On this point, as pointed out above, the children had reported not only the possible damages but also those already realised.

The Committee’s decision, embracing a doctrine of broad “global” extraterritorial jurisdiction,⁸⁷⁵ constitutes an important precedent for the analysis of climate cases. However, by rejecting the communication on the grounds that it had not exhausted its appeals, the Committee chose to shy away from the long-standing question of the practical application of this theory. And in some way, the decision in the *Duarte Agostinho* case shows that the European Court followed a similar logical path.⁸⁷⁶

3. *Partial conclusions and partial justiciability*

The present paragraph offers a partial response to the question that has guided this Chapter. The analysis of international case-law has been undertaken with a view to determining whether the standards elaborated in Part I are reflected in the practice of courts and tribunals entrusted with the protection of human rights.

The collective reconstruction of the right to a healthy environment is definitely supported by instruments of both soft and hard law, respectively at the universal and regional level. The intergenerational aspect, as seen, is also part of a copious amount of documents, especially in the most recent times.

Both of these aspects form part of the configuration adopted in the Inter-American and African systems. The former has offered several examples of both advisory and contentious jurisdiction which confirm

⁸⁷⁵ On which see *supra* Chapter III, Section 2.1.3.

⁸⁷⁶ See *supra* Section 1.3.2.

the collective nature of the interests underlying the right to a healthy environment and the need to claim it also in the name of future generations. The Advisory Opinion of 2017 has provided a guiding light for the interpretation of standards also in other jurisdictions.

The African system also embraces a collective dimension of the right to a healthy environment, especially in relation with local communities and through the development of the concept of “peoples”. However, even more so than the Inter-American system, the non-binding decisions of the African Commission find the unavoidable limit of lack of implementation. Moreover, the limited number of cases does not allow to delve deeply in the elaboration of interpretative standards related to the substantive content of the right in exam.

On the opposite side of the spectrum stands the European Court of Human Rights, whose prolific environmental jurisprudence has given enough elements to conduct an in-depth analysis notwithstanding the lack of an autonomous right to a healthy environment. The Court’s anthropocentric and individualistic approach has already been examined, yet recent climate litigation suggests a degree of doctrinal hesitation. Issues of intergenerational equity and interplay between human rights and international environmental law commitments have surfaced in the most recent jurisprudence in the *KlimaSeniorinnen* case. However, the same interplay has resulted in a negative outcome in the case of *Duarte Agostinho*, where the questions of extraterritoriality of human rights obligations have been sharply cut off. Therefore, in this case, it could be concluded that the European Court of Human Rights offers but a *partial* possibility for the justiciability of the right to a healthy environment, which is more than it could have been hoped considering once more the absence of such a right in the Convention.

Finally, climate litigation provides the lens through which the case-law of two UN treaty bodies can be assessed. The views of the Human Rights Committee have shown the development of a more environmentally conscious jurisprudence. Yet, from the point of view of the substantive elements of the right to a healthy environment, a more “traditional” approach remains discernible, one that appears incapable of fully understanding the collective dimension of gross environmental degradation and the imminency of the damages caused by the climate crisis.

As for the Committee on the Rights of the Child, the discourse is of a procedural nature. The Committee embraces the notions of intergenerational equity and extraterritoriality of the Advisory Opinion of the Inter-American Court, but proves unable to apply them in the practice. Despite the elaboration of interpretative standards in line with the most evolutive of the systems, the CRC has not yet offered full justiciability of the right to a healthy environment.

All these considerations suggest that, at the international level, certain seeds for the justiciability for the collective right to a healthy environment are emerging, but they are not in themselves sufficient to grant the full realisation of the right. This is not, however, a negative circumstance and should not discourage from the future possibilities of development of international standards. As the final Chapter of this book argues, the prospect of a solution for the question of justiciability lies not in one system above all others, but in the constant interaction between international and national regimes.

CHAPTER VI:
NATIONAL CLIMATE LITIGATION FOR THE COLLECTIVE REALISATION
OF THE RIGHT TO A HEALTHY ENVIRONMENT: A FLAWED BUT
INTERESTING PERSPECTIVE

This Chapter moves from the international and regional regimes to the national one, in search for the feasibility of environmental claims at the domestic level with specific relation to the collective right to a healthy environment. For this purpose, the legal reasoning of courts and tribunals in different parts of the world will be considered.

Setting aside all evaluation of a comparativist nature, the analysis will instead focus on the local implementation of the standards elaborated at the international level, to test whether national fora may be regarded as a valid alternative or as a complementary venue to international mechanisms.

Maintaining the connection existing between environmental degradation and climate issues, this Chapter will mainly consider the cases belonging to the so-called “climate litigation” in order to stress the collective dimension of the right to a healthy environment. Indeed, as seen with the cases before UN treaty bodies and the recent cases before the ECtHR, the climate crisis offers a unique way to evaluate episodes of gross environmental degradation, because it allows to comprehend the strict interaction existing between those episodes and failing responses to calls for climate welfare. Most of these claims are also framed in terms of intergenerational equity and responsibility, and take into account environmental commitments in light of human rights’ standards.

The analysis will move from the legal bases of the claims, which can often count on some form of constitutional recognition of the right to a healthy environment (Section 1). Then, the phenomenon of “strategic” climate litigation will be briefly framed (Section 2), before moving to the analysis of cases outside Europe (Section 3). The wave of European climate litigation will be considered as a positive example of this interaction and possible judicial dialogue (Section 4). Given the breadth and rapid development of climate litigation, the selection of cases examined in Sections 3 and 4 does not aim at exhaustiveness. Rather, it is guided by their relevance in illustrating key procedural and substantive

issues, their contribution to the development of innovative legal arguments, and their capacity to shed light on the collective and intergenerational dimensions of the right to a healthy environment.

1. *The legal bases for national justiciability of the collective right to a healthy environment*

In the course of this Chapter, attention will be directed to forms of national climate litigation grounded in human rights.⁸⁷⁷ In general terms, this entails consideration of claims framed in the language of environmental rights – which, it should be reminded, can be seen as the substantive elements of the right to a healthy environment – searching for perspectives of collectiveness and intergenerational equity.

The bases of these claims vary considerably. The present analysis does not engage with the specific features of civil, criminal, or administrative law; rather, it focuses on the legal reasoning underpinning judicial decisions, addressing procedural aspects only insofar as they result in findings of inadmissibility.

However, one specific aspect of domestic law is relevant for the purpose of this inquiry, and that is the already mentioned diffusion of what may be described as “environmentally conscious” constitutions. The phenomenon is often referred to as “environmental constitutionalism”, an all-encompassing term which refers to «substantive rights, procedural rights, directive policies, reciprocal duties, or combinations of these and other qualities».⁸⁷⁸ It sits at the crossroads of human rights and protection of the environment, drawing from elements of international and national law, of environmental, constitutional and human rights character.

⁸⁷⁷ See *infra* next Section.

⁸⁷⁸ J.R. MAY, E. DALY, *Global Environmental Constitutionalism*, 3rd ed., UNEP, 2019, p. 7. See also D. AMIRANTE, S. BAGNI (eds), *Environmental Constitutionalism in the Anthropocene: Values, Principles and Actions*, cit.; R. O’GORMAN, *Environmental Constitutionalism: A Comparative Study*, in *Transnational Environmental Law*, 2017, p. 435 ff.; L.J. KOTZÉ, *Global Environmental Constitutionalism in the Anthropocene*, Oxford, 2016; L. COLLINS, *The Ecological Constitution: Reframing Environmental Law*, London, 2021; J. JARIA-MANZANO, S. BORRAS, *Research Handbook on Global Climate Constitutionalism*, Cheltenham, 2019.

In general, environmental constitutionalism can explicitly include the right to a healthy environment or extrapolate it from other environmental rights or provisions.⁸⁷⁹ According to the Special Rapporteur Good Practices of 2019, 126 States are part of at least one binding treaty recognising the right to a healthy environment.⁸⁸⁰ Moreover, «more than 80 per cent of States Members of the United Nations (156 out of 193) legally recognize the right to a safe, clean, healthy and sustainable environment».⁸⁸¹ Of these, 110 include it in their constitution (of which 18 implicitly, and 92 explicitly).⁸⁸²

An author contends that environmental constitutionalism in itself can be “a potentially dangerous concept”, because «it calls for urgent and high-level action on environmental issues, without revealing what sort of action is required».⁸⁸³ May and Daly underline how the formulation of constitutional provisions, and their lack of self-executing force, can

⁸⁷⁹ D.R. BOYD, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment*, cit.

⁸⁸⁰ D.R. BOYD, *Report of the Special Rapporteur on Issue of Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Right to a Healthy Environment—Good Practices*, cit., para. 11: «This includes 52 States that are parties to the African Charter on Human and Peoples’ Rights, 45 States that are parties to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), 16 States that are parties to the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) and 16 States that are parties to the Arab Charter on Human Rights. As at 1 December 2019, five States had ratified the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement) [...]».

⁸⁸¹ *Idem*, para. 13.

⁸⁸² *Idem*, Annex II.

⁸⁸³ S. BOOKMAN, *Demystifying Environmental Constitutionalism*, in *Environmental Law*, 2024, p. 6. The author analyses environmental constitutionalism by dividing it into three “strands”, each with its own legal and interpretative consequence: the so-called “liberal-conservative strand”, which «provides the answer “because environmental matters fall within existing conceptions and traditions of mainstream constitutional theory”»; the “technocratic” strand, which «provides the answer “because environmental governance requires a high degree of expertise, which is beyond the capacity of electoral majorities”»; and finally the “transformative” strand, which «[i]n response to the question “why environmental constitutionalism?”, [...] provides the answer “because environmental crises require fundamental changes in interrelated social, political and economic systems, and constitutions can embody the necessary legal and aspirational framework for such transformation”».

«[dilute] the efficacy of these rights at inception», and therefore hinder justiciability.⁸⁸⁴

It could be argued that this consideration is also one of the reasons behind the need for clarification of the concept through litigation. Claimants often invoke the illegitimacy of an act in relation to the constitution and require in that way interpretation of the constitutional provision, which is often done in light of international human rights and environmental commitments.

This dimension, in turn, directs attention to another critical feature of national climate litigation, which relies on the concept of the separation of powers and which has been anticipated when discussing the *KlimaSeniorinnen* case.⁸⁸⁵ The argument, which will be explored with reference to national jurisprudence in Europe, lies on the premise that judges *should not* proceed in interpretation of domestic laws to annul or ask for revision of political acts. One of the counterarguments, in brief, replies by focusing on those commitments taken by national governments (typically coming from IEL and IHRL) to affirm that interpretation of the norms should take them into account.

Environmental constitutionalism is not invoked in the present research as a comprehensive solution to the question of the right to a healthy environment; rather, it serves to contextualise the legal and constitutional settings within which such cases are brought. It should also be reminded that States which include the right to a healthy environment in their constitutions have proven to «have smaller ecological footprints, rank higher on comprehensive indices of environmental indicators, are more likely to ratify international environmental agreements and have made faster progress in reducing emissions of sulphur dioxide, nitrogen oxides and greenhouse gases than nations without such provisions».⁸⁸⁶ This is the aspect that is of particular relevance for the purpose of this analysis.

⁸⁸⁴ J.R. MAY, E. DALY, *Global Environmental Constitutionalism*, cit., p. 34. This is also linked to the issue of legal standing, which changes substantially depending on the State. May and Daly suggest that Latin American and Asian States are among the most expansive when it comes to allowing for *locus standi* in constitutional matters (p. 36).

⁸⁸⁵ See *supra* Chapter V, Section 1.3.2.

⁸⁸⁶ UNGA, Resolution on “Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment”, cit., para. 44.

A significant number of these cases also invoke the Paris Agreement, as well as the principles of international environmental law examined in Part I. Claimants often put these in relation to human rights commitments deriving from both soft and hard law instruments, whether global or regional in nature.⁸⁸⁷

2. “Strategic” climate litigation

“Climate litigation” broadly encompasses judicial or quasi-judicial proceedings addressing climate-related harms or responsibilities, and may target either States or private actors. For the purposes of this work – which examines the implementation of the right to a healthy environment under international human rights law – only cases directed against States will be considered. This is because primary human rights obligations rest upon States, which remain the principal duty-bearers for ensuring the protection of such rights.⁸⁸⁸

Climate cases usually involve invoking the responsibility of the State for its alleged inaction in reaching the objectives established by the Paris Agreement, typically the reduction of GHG emissions in order to limit the increase in global temperature «to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change».⁸⁸⁹

Climate litigation is often referred to as “strategic”, when the case is designed to obtain results that go beyond the outcome of the dispute. More specifically, strategic climate litigation refers to cases deliberately designed to produce outcomes that transcend the immediate dispute – whether by setting legal precedents, mobilising public opinion, or holding governments accountable for their climate commitments.⁸⁹⁰

⁸⁸⁷ On the “human rights-based approach” applied in case-law, see S. JODOIN, A. SAVARESI, M. WEWERINKE-SINGH, *Rights-based approaches to climate decision-making*, cit.

⁸⁸⁸ See *supra* Chapter III, Section 2.1.

⁸⁸⁹ Paris Agreement, Art. 2 letter a). On climate litigation see also W. KAHL, M.P. WELLER (eds), *Climate change litigation. A handbook*, London, 2021; F. SINDICO, M. MOÏSE MBENGUE (eds), *Comparative climate change litigation: beyond the usual suspects*, Berlin, 2021.

⁸⁹⁰ J. SETZER, C. HIGHAM, *Global trends in climate change litigation: 2024 snapshot policy report*, London, June 2024. The authors add a third category of “semi-strategic”,

Since 2015, the year of the Paris Agreement, strategic cases have become a central instrument of climate governance “from below”. After a steady growth in their number, the 2024 Snapshot of the Sabin Center showed a decrease which has been traced back to a number of reasons.⁸⁹¹

«[...] the possible slowdown might also be a result of delays in data collection. For example, when our last report was published in June 2023, 222 cases filed in 2022 had been identified, but this number has since increased to 270. This suggests that what currently appears to be a downward trend may become a more stable plateau as more data is collected.

Other factors contributing to the apparent decline in new cases may include the diversification of case strategies, with more cases addressing climate issues only peripherally and thus not captured in existing databases. It is also possible that more resources might be being directed towards a smaller number of cases anticipated to have a more lasting or wide-ranging impact.»⁸⁹²

Nevertheless, the 2025 UNEP/Sabin Center Status Review clarifies that the trend likely reflects a consolidation of strategies rather than a real decline, with litigants focusing on fewer but more ambitious cases expected to generate systemic impact. Since the first UNEP/Sabin Center “status review” in 2017, climate cases have globally increased by roughly 250%, reaching over 3,000 cases across more than 50 national jurisdictions and 24 international or regional fora.⁸⁹³ Approximately 70% of these cases are filed by NGOs or individuals, and over 70% are

which refers to a case that «meets some of the criteria above, even where it may not meet all of them. This includes many ‘site-specific’ challenges to oil and gas projects or other potentially climate-damaging developments. The litigants in such cases are often local groups directly concerned with the impact on their local communities. However, the pleadings in such cases also often exhibit engagement with broader questions of climate policy. For example, in the case of *Frack Free Balcombe Residents Association v. Secretary of State for Levelling Up, Housing and Communities*, local community groups unsuccessfully objected to the approval of a permit allowing hydrocarbon exploration in an Area of Outstanding Natural Beauty (a specific designation under UK law) in West Sussex, South East England, on the basis of both the local impacts and the broader climate impacts» (p. 23).

⁸⁹¹ J. SETZER, C. HIGHAM, *Global trends in climate change litigation: 2024 snapshot policy report*, cit., p. 11.

⁸⁹² *Ibidem*.

⁸⁹³ UNEP, *Climate change in the courtroom: Trends, impacts and emerging lessons*, Nairobi, 2025.

directed at government actors, even though the number of cases directed at corporations is growing.⁸⁹⁴ These figures highlight the collective dimension of the right to a healthy environment, when its realisation is invoked at the domestic level. The role of NGOs in these cases is paramount, and the arguments advanced mostly rely on the responsibility that governments have towards the whole of their citizens, often with an intergenerational approach.

Yet, the global expansion of climate litigation has been accompanied by an increasingly visible countermovement. Alongside pro-climate or “strategic” cases, *backlash litigation* – or *anti-climate litigation* – has gained momentum. These cases are typically brought by actors who perceive climate measures as a threat to their economic or political interests, seeking to delay, weaken or roll back climate action. They include challenges against State regulations, corporate climate policies, and, increasingly, actions targeting civil society organisations and activists.

Within this trend, a growing number of proceedings may be qualified as Strategic Lawsuits Against Public Participation (SLAPPs), directed at silencing or intimidating climate advocates through defamation suits, nuisance claims, or criminal charges arising from protest activities.⁸⁹⁵ The 2025 UNEP/Sabin Center Report highlights a rising wave of such cases across jurisdictions – a development that risks “chilling” civic engagement and undermining environmental democracy.⁸⁹⁶

For instance, in *Energy Transfer LP v. Greenpeace International* (North Dakota, 2024), Greenpeace entities were found liable for over USD 667 million for protest-related activities against the Dakota Access

⁸⁹⁴ J. SETZER, C. HIGHAM, *Global trends in climate change litigation: 2024 snapshot policy report*, cit., pp. 18-19.

⁸⁹⁵ J. VAN ERP, T. VAN DER LINDEN, *Silencing Those Who Speak Up against Corporate Power: Strategic Lawsuits against Public Participation (SLAPPs) in Europe*, in N. LORD, É. INZELT, W. HUISMAN, R. FARIA (eds), *European White-Collar Crime*, Bristol, 2021, p. 207 ff. For a critical overview of policy and legislative responses to this phenomenon see P. COE, R. MOOSAVIAN, P. WRAGG, *Addressing strategic lawsuits against public participation (SLAPPs): a critical interrogation of legislative, and judicial responses*, in *Journal of Media Law*, 2025, p. 1 ff. For an analysis of the efficacy of the Aarhus mechanism for the protection of environmental defenders see T. WEBER, *Are climate activists protected by the Aarhus Convention? A note on Article 3(8) Aarhus Convention and the new Rapid Response Mechanism for environmental defenders*, cit.

⁸⁹⁶ R.E. DEMING, *The Big Chill: Are Public Participation Rights Being SLAPP-ed?*, in *Pace Environmental Law Review*, Winter 2022-2023, p. 62 ff.

Pipeline (DAPL), a case now the subject of counter-litigation under the EU anti-SLAPP directive in Dutch courts.⁸⁹⁷ Similar proceedings have targeted activists in New Zealand, Switzerland, the Vatican City State Tribunal, the United Kingdom and Italy revealing the global reach of this backlash.⁸⁹⁸

The emergence of SLAPPs against climate defenders marks a troubling inversion of the original strategic litigation dynamic: while early climate cases sought to amplify collective voices to hold States accountable, backlash litigation seeks to suppress those very voices through legal intimidation. This evolution calls for renewed attention to the procedural and substantive safeguards necessary to protect environmental human rights defenders.

At the time of writing, at least 156 cases have been launched globally against governments using human rights as a base. Of these, 39 explicitly rely on the right to a healthy environment. It is immediately acknowledged that an exhaustive examination of all such cases is not feasible; accordingly, the analysis will be confined to a selection of the

⁸⁹⁷ North Dakota Supreme Court, *Energy Transfer LP v. Greenpeace International*, Case No. 30-2019-0V-00180, decision of 5 March 2025.

⁸⁹⁸ Southwark Crown Court, *R v. Hallam & Others (Just Stop Oil)*, judgment of 18 July 2024: five Just Stop Oil activists were convicted of *conspiracy to cause public nuisance* in relation to protests targeting the M25 motorway in November 2022 and were sentenced to 4-5 years, the longest sentences in UK history for non-violent environmental protest. Vatican City State Tribunal, *Vatican Prosecutor v. Ultima Generazione Activists*, decision of 18 July 2023: case of two activists convicted for damage to cultural heritage in protest actions at the Vatican Museums in August 2022, they were sentenced to 9 months imprisonment and fined (€28,000), plus other costs. Court of Appeals of Geneva, *Renovate Switzerland Activists case*, decision of 26 January 2024: the Swiss group “Renovate Switzerland” organised traffic blockades since 2022 as a form of climate protest; the defendants in these cases were found guilty of coercion and disruption of public services; coercion convictions generally carry suspended sentences and entry into the criminal record unless conditions are violated. High Court of New Zealand, *Olsen v. Police*, decision of 21 September 2023: Ms Olsen, associated with the climate protest group “Restore Passenger Rail (RPR)”, allegedly glued her hand to a motorway in Wellington during protest actions, breaching conditions of bail; the High Court, in deciding the appeal, accepted that the rights to protest and the climate emergency context must be interpreted purposefully under the New Zealand Bill of Rights Act 1990, but ultimately allowed the appeal on changed circumstances.

most significant decisions within national, European and non-European jurisprudence.⁸⁹⁹

3. *An overview of the cases outside Europe*

Notwithstanding the general consideration that most of the cases are brought forward in the countries of the so-called “Global North”, it should be noted that cases in the Global South are also rising, where an increasing receptivity to human rights arguments can be registered. There are jurisdictions where the procedures allow for rights claims more easily and the judiciary is willing to accept them, where the prospects for rights-based climate cases seem bright.⁹⁰⁰ In other jurisdictions, however, particularly in the US, where traditional and law-based climate cases have dominated, claims for rights in climate change cases face a much more difficult path.⁹⁰¹

3.1. *Constitutional justiciable environmental rights in Latin America*

Latin American countries are home to the most environmentally conscious of national constitutions.⁹⁰² In the field of climate change, the Constitution of the Dominican Republic contains a provision according to which «[e]s prioridad del Estado la formulación y ejecución, mediante ley, de un plan de ordenamiento territorial que asegure el uso eficiente y sostenible de los recursos naturales de la Nación, acorde con la necesidad de *adaptación al cambio climático*».⁹⁰³ In other words, the need to adapt

⁸⁹⁹ For a comprehensive account of climate cases around the globe, refer to the database elaborated by the Sabin Center for Climate Change Law at the Columbia University, available at www.climatecasechart.com.

⁹⁰⁰ J. PEEL, H.M. OSOFSKY, *A Rights Turn in Climate Change Litigation?*, in *Transnational Environmental Law*, 2018, p. 37 ff.

⁹⁰¹ D.R. BOYD, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment*, cit.

⁹⁰² J.R. MAY, E. DALY, *Global Environmental Constitutionalism*, cit., p. 34 ff.; D.R. BOYD, *Report of the Special Rapporteur on Issue of Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Right to a Healthy Environment—Good Practices*, cit.

⁹⁰³ Constitution of Dominican Republic, Art. 194, labelled “plan de ordenamiento territorial” (emphasis added).

to climate change is constitutionalised where plans for the organisation of the territory are developed.

A similar provision is included in the Constitution of Ecuador. In this case the reference is to “mitigation measures” to combat the climate crisis. This is a bolder provisions, which determines that the State will adopt «medidas adecuadas y transversales para la mitigación del cambio climático, mediante la limitación de las emisiones de gases de efecto invernadero, de la deforestación y de la contaminación atmosférica [...]». ⁹⁰⁴ Moreover, the Article proceeds in binding the State to take measures to preserve biodiversity and protect at-risk population. ⁹⁰⁵

It is worth remembering that the Ecuadorian Constitution, together with the Bolivian one, also include the concept of *buen vivir*, that is a philosophy that recognises the interdependency of humans and nature, by fostering a relationship based on care and respect. ⁹⁰⁶ These are also constitutions which recognise rights to Nature.

The unique features of constitutional provisions in Latin America clearly derive from the “intercultural” dimension of these States, explicitly acknowledged in their Preambles and their operative provisions. ⁹⁰⁷ The input of Indigenous Peoples to the development of environmental rights in the national jurisprudence has already been mentioned, as it has left its mark also on the regional case-law of the Inter-American Court and Commission. ⁹⁰⁸

Moreover, some authors highlight how these has been reflected also by the receptiveness of constitutional courts in Latin America to the implementation of constitutional rights to a healthy environment. ⁹⁰⁹ Many of these States allow for some form of collective action in defense of the environment.

⁹⁰⁴ Constitution of Ecuador, Art. 414.

⁹⁰⁵ *Ibidem*.

⁹⁰⁶ See, *inter alia*, E. PIVA, A. BONET DE VIOLA, *Aportes del Buen Vivir para repensar el derecho humano a un nivel de vida adecuado*, cit. See also *supra* Chapter I, Section 1.1.

⁹⁰⁷ See *supra* Chapter I, Section 1.1.

⁹⁰⁸ See *supra* Chapter V, Section 1.1.

⁹⁰⁹ J.R. MAY, E. DALY, *Global Environmental Constitutionalism*, cit., p. 34. See also M.A. TIGRE, A. HARRINGTON, N. URZOLA, H. EVANS, A. KASZMAR, A. BERNAL, A. VAN DER KLEYN, *Las respuestas del Sistema Interamericano durante la pandemia por COVID-19: El desarrollo de los derechos humanos verdes en casos de pueblos originarios a nivel nacional y regional*, cit., p. 32 ff.

In Argentina, for example, Section 43 of the Constitution allows for a *tutela* action of a “diffuse” nature, which May and Daly have described in this way:

«The environmental *tutela* reinforces the duties that each citizen has for the care of the rivers, the diversity of the flora and fauna, the nearby soil, the atmosphere. These duties are the correlation that the same citizens have to enjoy a healthy environment, for themselves and for future generations, because the harm that an individual can cause to the collective good is a harm to himself. The improvement or degradation of the environment benefits or harms the whole population, because it is a good that belongs to the social and trans-individual sphere, and it is from here that the judges derive the particular energy to give effect to these constitutional commands.»⁹¹⁰

A similar action for collective realisation of constitutional rights is recognised by Brazil under the name “Ação de Descumprimento de Preceito Fundamental” (ADPF),⁹¹¹ and in Colombia and Mexico the State allows for *acciones populares*.⁹¹² The same can be said for Peru, and Ecuador permits collective actions under the *amparo* law.

Reference has already been made to certain decisions recognising and enforcing the rights of Nature within some of these jurisdictions. Emblematic is the case of the Atrato river in Colombia, where the Constitutional Court affirmed that the Atrato river is a subject of rights of paramount ecological importance, invoking the right to a healthy

⁹¹⁰ J.R. MAY, E. DALY, *Global Environmental Constitutionalism*, cit., p. 37.

⁹¹¹ M.A. TIGRE, A. HARRINGTON, N. URZOLA, H. EVANS, A. KASZMAR, A. BERNAL, A. VAN DER KLEYN, *Las respuestas del Sistema Interamericano durante la pandemia por COVID-19: El desarrollo de los derechos humanos verdes en casos de pueblos originarios a nivel nacional y regional*, cit., p. 36. In Brazil a case is now pending on whether the Constitution guarantees the right to a stable climate and if on that basis the Court can impose measures of emissions and deforestation reduction on the government (case of the Institute of Amazonian Studies v. Brazil).

⁹¹² On the *actio popularis* see *supra* Chapter IV, Section 1. The case of *Greenpeace Mexico v. Ministry of Energy and Others* is also worth mentioning, because the Administrative Court recognised the unconstitutionality of national policies on the basis of the right to a healthy environment as well as international environmental law (UNFCCC, Kyoto Protocol, Paris Agreement) and structured its reasoning moving from the *in dubio pro natura* principle, intergenerational equity and participation rights (see Mexico City’s Second District Administrative Court, *Greenpeace Mexico v. Ministry of Energy and Others (on the National Electric System policies)*, Amparo No. 104/2020, Judgment of 17 November 2020).

environment and the principle of precaution.⁹¹³ This represents clearly the interdependency between the right to a healthy environment and rights of Nature which was hinted at in Chapter I.

Another case of the Colombian jurisdiction that confirmed this is the one of *Generaciones Futuras v. Minambiente*, decided in 2018, which recognised the Amazon as a subject of rights.⁹¹⁴ The Court affirmed that fundamental rights can only exist in a healthy environment, and embraced an intergenerational approach to it, by affirming the need to protect future generations, who «merecen disfrutar de las mismas condiciones medioambientales vividas por nosotros».⁹¹⁵

The Court stated:

«[...] los derechos fundamentales de la vida, salud, el mínimo vital, la libertad y la dignidad humana están ligados sustancialmente y determinados por el entorno y el ecosistema. Sin ambiente sano los sujetos de derecho y los seres sintientes en general no podemos sobrevivir, ni mucho menos resguardar esos derechos, para nuestros hijos ni para las generaciones venideras [...]».⁹¹⁶

The precautionary approach has also been invoked by the Constitutional Court of Ecuador in the already mentioned *Los Cedros* case.⁹¹⁷ In this case the Court elaborated on an extensive – and bold – interpretation of the precautionary principle, with the aim of placing stricter limits on the granting of mining permits.

The judges said that there are two elements to be taken into account in assessing the environmental impact of a project: the existence of a potential risk of serious and irreversible damage to nature and the lack

⁹¹³ Constitutional Court of Colombia, *Atrato river* case, cit. In another case involving exploitation of the rivers Combeima and Cocora the Council of State halted the mining titles on the basis of the right to a healthy environment, recognising the link existing between human rights and the climate crisis and affirming the latter as the main driver for water scarcity (Council of State of Colombia, Case no. 73001-2331-000-2011-00611-03, judgment of 14 September 2020).

⁹¹⁴ Constitutional Court of Colombia, Case no. 11001-22-03-000-2018-00319-01, Judgment of 4 April 2018.

⁹¹⁵ *Idem*, p. 19.

⁹¹⁶ *Idem*, p. 13.

⁹¹⁷ Constitutional Court of Ecuador, *Los Cedros* case, cit. See also *supra* Chapter I, Section 1.1.

of full scientific certainty about the negative impacts of an activity.⁹¹⁸ Both elements are referred to as applications of the precautionary principle, as enshrined in Principle 15 of the Rio Declaration. However, it has been noted that the standard set by the *Los Cedros* case is *higher* than the one provided for in the Rio Declaration.⁹¹⁹ The Constitutional Court of Ecuador has in fact provided that for a government mining concession to be legitimate there must be “scientific certainty” that the activity will not have negative effects on the environment, and no mention of a cost-benefit analysis is made.

The dominant interpretation, which persists in case law and doctrine, of the principle under consideration regards them as *negative* limits, providing a threshold beyond which it is not allowed to act. Such a threshold is the result of the balance between economic needs of the State and environmental protection. The whole discipline of international environmental law in this sense is marked by allowing States to do *everything that is not forbidden*.

The reading offered by the Constitutional Court of Ecuador, however, overturns the roles. Inspired by the respect of Indigenous tradition and the protection of rights of Nature, the judgment in question is part of the constitutional and regional jurisprudence in Latin America and other countries belonging to the Global South,⁹²⁰ from which comes the openness towards interpretations that envisage an inclusion of economic development within respect for the environment in a broad sense, understood as the entire ecosystem of which human beings are only a part.⁹²¹

Taken together, these considerations lead to the recognition that the Latin American national landscape, much like the regional framework, provides a particularly fertile ground for the development and

⁹¹⁸ *Idem*, para. 62.

⁹¹⁹ G. PRIETO, *The Los Cedros Forest has Rights: The Ecuadorian Constitutional Court Affirms the Rights of Nature*, in *Verfassungsblog*, 10 December 2021.

⁹²⁰ On the diffusion of this approach in the Global South see also K. SANDERS, ‘Beyond Human Ownership?’ *Property, Power and Legal Personality for Nature in Aotearoa New Zealand*, cit.; E.L. O’DONNELL, *At the Intersection of the Sacred and the Legal: Rights for Nature in Uttarakhand, India*, cit.; E. DALY, *Environmentalism Constitutionalism in Defense of Nature*, in *Wake Forest Law Review*, cit.

⁹²¹ K. BOSSELMAN, *Shifting the Legal Paradigm: Earth-centred Law and Governance*, cit.; R. BROOKS, R. JONES, *Law and Ecology: The Rise of the Ecosystem Regime (Ecology and Law in Modern Society)*, cit.

implementation of evolutive interpretative standards when it comes to the collective and intergenerational dimension of the right to a healthy environment.

3.2. *Public Interest Litigation in Asia*

Mention has already been made of the famous *Minors Oposa* case,⁹²² one of the first cases in which a national court has recognised the responsibility that each generation bears to preserve and protect the environment for the next. In this case, dating back to 1993, the Supreme Court of the Philippines gave a pioneering interpretation of the right to a “balanced ecology” included in the national constitution,⁹²³ granting the possibility for a class action on the matter.

Indeed, the Court affirmed that the case was of «common and general interest», and it could not be limited to just a category of people.⁹²⁴ In the same way, it could not be limited only to present, adult, generations.

More specifically on climate change, the Supreme Court of the Philippines also ruled in favour of the citizens in the *Manila Bay* case of 2008,⁹²⁵ which regarded issues of clean-up and restoration, reinstating – relying heavily on the *Minors Oposa* case – that the right to a balanced ecology is “inherent” to humankind and has strong intergenerational implications.⁹²⁶

There are different examples of this so-called “public interest litigation” in the Asian region. This term refers to a phenomenon typical of India and Pakistan, which can be said to have spread also to China, Nepal, South Korea and Thailand.⁹²⁷ It is a type of litigation in some way

⁹²² Supreme Court of the Philippines, *Minors Oposa v. Secretary of the Department of Environmental and Natural Resources*, cit. On the issue of legal standing of future generations see also *supra* Chapter IV, Section 1.

⁹²³ Constitution of the Philippines, Art. 16.

⁹²⁴ *Idem*, p. 11.

⁹²⁵ Supreme Court of the Philippines, *Metropolitan Manila Development Authority v. Concerned Residents of Manila Bay*, judgment of 18 December 2008.

⁹²⁶ E.A. IMPARATO, *Climate change litigation in Asia between human rights and dignity. The Chinese case and the public interests*, in *federalismi.it*, 2022, p. 57 ff.

⁹²⁷ *Idem*. See also Supreme Court of Nepal, *Sbrestba v. Office of the Prime Minister et al.*, judgment of 25 December 2018; Seoul District Court, *Kang et al. v. KSURE and KEXIM*, pending since 2022; Chiang Mai Administrative Court, *Residents of Omkoi v.*

similar to “strategic” climate litigation in the sense that it aspires to reach goals of a collective and communal nature and inspire societal change.

It is therefore relevant for the present analysis because it involves an exquisitely collective approach to environmental claims, by grounding them in the idea that the environment is indeed a common good.

India and Pakistan share a prolific jurisprudence in the area of public interest litigation.⁹²⁸ Attention will be directed to a selection of the most relevant cases concerning climate change and environmental rights.

Already in 2006, when considering sustainable development and overpopulation, the Supreme Court of India referred to the importance of taking into account future generations «in order to secure “our common future”».⁹²⁹ It should also be reminded that India provides a specific environmental tribunal called “National Green Tribunal”, established in 2010 with the aim to allow for «the effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources».⁹³⁰

Since then, the Tribunal has developed its jurisprudence by considering environmental issues as strictly linked with climate change and human rights,⁹³¹ embracing the principle of non-regression which requires «that norms which have already been adopted by states [*sic*] not be revised if this implies going backward on the subject of standards of protection».⁹³²

In another case, the Green Tribunal, *proprio motu*, issued restrictions on black carbon emissions because it found a correlation between them

Expert Committee on EIA Consideration and the Office of Natural Resources and Environmental Policy and Planning, pending since 2022.

⁹²⁸ See B. OHDEDAR, *Climate Change Litigation in India and Pakistan: Analyzing Opportunities and Challenges*, in I. ALOGNA, C. BAKKER, J.P. GAUCI (eds), *Climate Change Litigation: Global Perspectives*, cit., p. 103 ff.; J. RAZZAQUE, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh*, Alphen aan den Rijn, 2004.

⁹²⁹ Supreme Court of India, in Intellectuals Forum, *Tirupathi v. State of A.P. & Others*, judgment of 23 February 2006. See also E. CHATURVEDI, *Climate Change Litigation: Indian Perspective*, in *German Law Journal*, 2021, p. 1459 ff.

⁹³⁰ National Green Tribunal Act, 2010, Preamble, No. 19.

⁹³¹ See for examples National Green Tribunal of India, *Society for Protection of Environment & Biodiversity v. Union of India*, order of 8 December 2017.

⁹³² Principle 12 of General and Emerging Substantive Principles for Promoting and Achieving Environmental Justice through the Environmental Rule of Law, IUCN World Declaration on the Environmental Rule of Law, 2016.

and the retreat of glaciers in the Himalaya region.⁹³³ Moreover, it took the opportunity to declare that Article 48A of the Constitution granted the right to a clean and sustainable environment, correlated to a duty of both the State and the citizens (Article 51A) to protect and improve the environment.

Another leading case on the topics of the collective right to a healthy environment and intergenerational equity is the *Leghari* case in Pakistan.⁹³⁴ The case was brought by a Pakistani farmer who sued the government for failing to adequately implement the 2012 National Climate Change Policy and the Framework for Implementation of Climate Change Policy (2014-2030). The Court stated that climate change poses a serious threat to the water, food and energy security of Pakistan and therefore violates fundamental rights protected by the Pakistani Constitution, including the right to life, the right to dignity of the person and privacy of the domicile, which include the right to a healthy environment.⁹³⁵

In this sense, and by linking human rights with development, the Court established climate justice as the rightful successor of environmental justice, moving from the mere fight against local pollution to that around global issues and «the need for equitable stewardship of the world's resources».⁹³⁶

It should also be noted that the Court nominated a “supervising body”, the Climate Change Commission, composed of representatives for the Ministries, NGOs, and technical experts to monitor the government's progress.⁹³⁷

⁹³³ National Green Tribunal of India, *In re Court on its own motion v. State of Himachal Pradesh and others*, order of 9 May 2016.

⁹³⁴ High Court of Lahore, *Leghari v. Federation of Pakistan*, 25 January 2018.

⁹³⁵ Another case is currently pending before the High Court of Lahore, which laments the violation of the right to a healthy environment with specific reference to women and future generations due to the government's inaction in the face of climate change (*Maria Khan et al. v. Federation of Pakistan et al.*, pending since 2018).

⁹³⁶ E.A. IMPARATO, *Climate change litigation in Asia between human rights and dignity. The Chinese case and the public interests*, cit., p. 61.

⁹³⁷ On the “supervisory role” of the Court see E. BARRITT, B. SEDITI, *The Symbolic Value of Leghari v Federation of Pakistan: Climate Change Adjudication in the Global South*, in *King's Law Journal*, 2019, p. 203 ff.

Public interest litigation in Asia offers interesting perspectives for the development of community-led initiatives in the area. As May and Daly put it:

«They are brought on behalf of the world's poorest people because people with means can often purchase immunity from environmental degradation: they can live in neighborhoods that are not used as landfills, they have sufficient access to medical care to be buffered from the worst health effects of industrial air pollution, they can access food and water from sophisticated infrastructures in global markets, and they do not depend on the nearby rivers remaining clean for their sustenance.»⁹³⁸

Moreover, despite the fact that no regional monitoring mechanism exists, some of the national courts in Asia have managed to embrace – and in some cases even anticipate – the collective instances underlying the right to a healthy environment. Their reasoning represents a positive example of the diffusion of the collective dimension of the right and offers some possibilities for domestic justiciability.

3.3. *The case-law in the United States: a doomed path for collective ecology?*

As an author stated, climate litigation in the United States can be summarised in the following way: «high volume of cases, mostly about statutes».⁹³⁹ The United States are home to the highest number of climate cases, more than the rest of the world combined.⁹⁴⁰ It is not the purpose of this paragraph to analyse all of them, a task more appropriately undertaken elsewhere in the literature.⁹⁴¹ This paragraph will only

⁹³⁸ J.R. MAY, E. DALY, *Global Environmental Constitutionalism*, cit., p. 39.

⁹³⁹ M.B. GERRARD, *Climate Change Litigation in the United States: High Volume of Cases, Mostly About Statutes*, in I. ALOGNA, C. BAKKER, J.P. GAUCI (eds), *Climate Change Litigation: Global Perspectives*, cit., p. 33 ff.

⁹⁴⁰ J. SETZER, C. HIGHAM, *Global trends in climate change litigation: 2024 snapshot*, cit., p. 11. Of the 2.666 cases filed up to 2024, 1.745 take place in the United States (around 65%).

⁹⁴¹ See, *inter alia*, M.B. GERRARD, *Climate Change Litigation in the United States: High Volume of Cases, Mostly About Statutes*, cit.; D.R. BOYD, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment*, cit.; W. KAHL, M.P. WELLER (eds), *Climate change litigation. A handbook*, cit., p. 237 ff.; M.

consider those cases based on the human right to a healthy environment, in an effort to look for collective approaches and future possibilities.

The United States cannot be defined as a forum which is lenient towards human rights-based litigation in the environmental field. Most of its climate cases are based on policy and statutes and do not explicitly tackle the issue of the impact on human rights.⁹⁴² A partial exception may be found in cases based on the so-called “public trust doctrine”, which have already been analysed in Chapter IV.⁹⁴³

As already discussed, the public trust presents structural limitations when invoked to balance individual interests with “public” ones. In a nutshell: placing the accent on the duties of States, the public trust doctrine generally makes it more difficult for individual claims – in the meaning of “claims of people” – to be brought forward, and human rights are mostly on the outskirts of these evaluations.

Although this context has generally constrained the development of human rights-based litigation in the United States, two cases merit particular attention for their engagement with collective and intergenerational dimensions of climate-related environmental degradation: *Juliana v. United States* and *Held v. Montana*.⁹⁴⁴

Juliana v. United States was collectively filed by a group of 21 youth, the nonprofit organization Earth Guardians and climate scientist James Hansen in August 2015 against the federal government, naming as defendants the US, the former President of the United States Donald Trump, and the heads of several executive agencies. The plaintiffs claimed that the government was aware that the industrial-scale release of carbon dioxide was causing dangerous changes to the global climate and that, instead of adopting policies to rationally reduce carbon pollution, had granted permits, authorisations and subsidies for fossil fuels, allowing CO₂ levels in the atmosphere to reach dangerous and unprecedented levels, thereby violating the fundamental right of the

ROSSO GROSSMAN, *Climate Change and the Individual in the United States*, in F. SINDICO, M. MOÏSE MBENGUE (eds), *Comparative climate change litigation: beyond the usual suspects*, cit., p. 199 ff.

⁹⁴² M. ROSSO GROSSMAN, *Climate Change and the Individual in the United States*, cit., p. 208.

⁹⁴³ See *supra* Chapter IV, Section 1.2.

⁹⁴⁴ For details on the cases see also www.climatecasechart.com, where procedural considerations are also taken into account.

plaintiffs to a climate system capable of supporting human life. According to them, this right would be granted by the XIV amendment to the American Constitution.⁹⁴⁵

The plaintiffs claimed that the inaction of the government had put their rights in danger, as well as those of future generations by not contributing to the preservation of natural resources.

In 2016, the District Court of the State of Oregon ruled in favour of the plaintiffs, affirming that «the right to a climate system capable of sustaining human life is fundamental to a free and ordered society», and the actions – or inactions – of the government which put it in danger fell under the umbrella of the “due process of law” clause contained in the XIV amendment.⁹⁴⁶

While this could have been seen as a victory, quickly turned into a procedural stalemate. The defendants – the US Department of Justice – made a series of attempts to block the case from moving forward and finally obtained a so-called “interlocutory appeal”, which is an appeal filed *during* the course of litigation.⁹⁴⁷ This appeal brought to a dismissal of the case on the grounds of the political act doctrine, stating that the claims, however valid, should be considered by the political powers and the electorate, rather than courts.⁹⁴⁸

«The plaintiffs have made a compelling case that action is needed; it will be increasingly difficult in light of that record for the political branches to deny that climate change is occurring, that the government has had a role in causing it, and that our elected officials have a moral responsibility to seek solutions. [...] We reluctantly conclude, however,

⁹⁴⁵ Constitution of the United States of America, XIV amendment, Section I: «[...] No State shall [...] *deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws» (emphasis added). The plaintiffs based their claim on the “due process of law” clause here highlighted.

⁹⁴⁶ District Court of the State of Oregon, *Juliana v. United States*, Case no. 217 F Supp 3d 1224 (D Ore 2016), p. 1233

⁹⁴⁷ M.B. GERRARD, *Climate Change Litigation in the United States: High Volume of Cases, Mostly About Statutes*, cit. This request was granted after the government filed a “writ of mandamus”, an act used to avoid reaching the processual stage. See also B. LAMMON, *Finality, Appealability, and the Scope of Interlocutory Review*, in *Washington Law Review*, 2018, p. 1809 ff.

⁹⁴⁸ Ninth Circuit Court, *Juliana v. United States*, Case no. 947 F 3d 1159 (9th Cir 2020), p. 1174.

that the plaintiffs' case must be made to the political branches or to the electorate at large, the latter of which can change the composition of the political branches through the ballot box. That the other branches may have abdicated their responsibility to remediate the problem does not confer on Article III courts, no matter how well-intentioned, the ability to step into their shoes.»⁹⁴⁹

After years of settlement discussions, the plaintiffs proceeded with an amended version of their claim, which the Ninth Circuit Court heard and then denied. The case then moved to the Supreme Court of the United States as a petition of rehearing, which was ultimately denied in March 2025.⁹⁵⁰ What can be drawn from this story is that the procedural hurdles of the system of the United States do not make it easy for young claimants to bring forward climate cases based on human rights, and clearly not on the right to a healthy environment.

The right has been invoked in the case *Held v. Montana*, also brought forward by a group of youth claiming that the State of Montana – *not* the federal government of the United States – had failed to protect and preserve their right to a clean, healthy and sustainable environment, which is enshrined in Article II§3 of the Constitution of the State of Montana. This was the first – and only – case to ever receive a favourable outcome on the recognition of a violation of the right to a healthy environment due to the climate crisis in the US.⁹⁵¹

Indeed, the Court declared that the «plaintiffs have a fundamental constitutional right to a clean and healthful environment, which includes climate as part of the environmental life-support system».⁹⁵² It also found that each of the fourteen claimants – which were heard by the Court – had suffered discomfort, anxiety, despair, asthma, economic deprivation and “loss of culture” due to the effects of the climate crisis.⁹⁵³

⁹⁴⁹ *Ibidem*.

⁹⁵⁰ Supreme Court of the United States, *Juliana v. United States*, Case 24-645, decision of 24 March 2025.

⁹⁵¹ District Court of the State of Montana, *Held v. Montana*, Case no. CDV-2020-307, Judgment of 14 August 2023. For the reconstruction of the factual elements of the case see also E.C. FERGUSON, *Held v State of Montana: A Constitutional Rights Turn in Climate Change Litigation?*, in *Journal of Environmental Law*, 2024, p. 1 ff.

⁹⁵² District Court of the State of Montana, *Held v. Montana*, cit., p. 102.

⁹⁵³ *Idem*, p. 28-34.

The first consideration that can be drawn is that one of the reasons for this outcome lies undoubtedly in the existence of a strong environmental provision in the Montana Constitution, further confirming that environmental constitutionalism is a good anchor for the justiciability of this right at the national level.

Secondly, as an author noticed, this was also an example of the role of experts in climate cases, where the issue of attribution science is paramount.⁹⁵⁴ In this case, the judges considered the “causation” to be established. In other words, by relying on the science and the elements brought forward by the claimants, the Court was able to declare that the inaction of the State of Montana had reasonably *caused* the violation of the right to a healthy environment due to gross environmental degradation caused by climate change.

When compared with the *Juliana* decision, it seems unlikely that this kind of litigation will have life beyond the confines of the States which explicitly recognise the right to a healthy environment in their national constitutions.⁹⁵⁵

A final point of reflection concerns the role of youth in these cases.. Both the *Juliana* and the *Montana* case were brought forward by young activists or youth-led NGOs. This is not an isolated phenomenon. The same happened at the international level with the *Duarte Agostinho* case before the European Court of Human Rights, and the *Sacchi* case before the Committee on the Rights of the Child. The prominence of youth-led claims is equally evident in European domestic climate jurisprudence.

The interest and strive that young generations put in human rights-based climate litigation have been the motor of the development that can now be witnessed in the case-law. By bringing forward their claims, they actively bridge the theoretical gap existing between present and future generations. They form part of the former as well as the latter, by sharing the present existence as children and the future expectations as part of their collective group.

⁹⁵⁴ E.C. FERGUSON, *Held v State of Montana: A Constitutional Rights Turn in Climate Change Litigation?*, cit., p. 5.

⁹⁵⁵ In the United States, at the time in which I am writing, these States are: New York (Art. I§19), Pennsylvania (Art. I§27), Illinois (Art. XI§2), Massachusetts (Art. XLIX), and Hawaii (Art. XI§9). See also A. POLK, *The Unfulfilled Promise of Environmental Constitutionalism*, in *Hastings Law Journal*, 2023, p. 123 ff.

4. *The principles elaborated by the European jurisprudence*

The study now turns to the European docket of climate cases, which in some way have followed in the footsteps traced by the Latin American and Asian cases, but also offer intriguing elements of legal reflection, especially on the issues of separation of powers and intergenerational equity.

A recurring structural feature of these cases lies in their constitutional basis. The Special Rapporteur Good Practices of 2019 underline that 19 out of 27 States of the European Union have – either implicitly or explicitly – enshrined the right to a healthy environment in their national constitutions, and 17 in their national law.⁹⁵⁶ Moreover, the European Union is party to the Aarhus Convention which encourages the recognition of this right in the Preamble and endorses public participation in environmental policies.

However, the truly impactful treaty on the matter remains the European Convention of Human Rights. Indeed, despite not formally including the right to a healthy environment in its text, the European Convention – as interpreted by the ECtHR – is the basis for the majority of the climate case brought forward in the European area.

The leading case on this point is *Urgenda v. The Netherlands*, decided in 2020.⁹⁵⁷ The case was issued in 2015 by an NGO, the Urgenda Foundation, and about 900 other citizens of the Netherlands, who sued the Dutch government for their inadequate response to the climate crisis – following a line of reasoning that has already been analysed in this study.

The claimants brought the case all the way to the Supreme Court in order to obtain a favourable judgment based on Articles 2 and 8 of the European Convention, protecting respectively the right to life and the right to private and family life.⁹⁵⁸ It should be reminded that, as discussed in Chapter V, the core of the environmental jurisprudence of the European Court relies precisely on those provisions.

⁹⁵⁶ D.R. BOYD, *Report of the Special Rapporteur on Issue of Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Right to a Healthy Environment—Good Practices*, cit., Annex II.

⁹⁵⁷ Supreme Court of the Netherlands, *Urgenda Foundation v. State of the Netherlands*, judgment of 20 December 2019.

⁹⁵⁸ For a detailed reconstruction of the case see M. MONTINI, *Verso una giustizia climatica basata sulla tutela dei diritti umani*, cit.

In a ruling which was considered «a landmark for future climate change litigation»⁹⁵⁹ – and, arguably, rightly so – the Supreme Court of the Netherlands officially recognised the relationship existing between human rights and the climate crisis. It did so by formally endorsing the applicants’ reconstruction of the environmental component of Articles 2 and 8 of the European Convention. The Court considered the jurisprudence of the ECtHR as forming a common flux, clarifying that:

«According to the ECtHR, when it comes to activities that are hazardous to the environment, the positive obligation implied by Article 8 ECHR largely overlaps with the obligation implied by Article 2 ECHR. The case law regarding the former obligation therefore applies to the latter obligation. In the case of environmentally hazardous activities, the state is expected to take the same measures pursuant to Article 8 ECHR that it would have to take pursuant to Article 2 ECHR.»⁹⁶⁰

More specifically, in paragraph 5 of the judgment – titled “Do Articles 2 and 8 ECHR oblige the State to take measures?” – the judges stated that:

«The obligation to take appropriate steps pursuant to Articles 2 and 8 ECHR also encompasses the duty of the state to take preventive measures to counter the danger, even if the materialisation of that danger is uncertain. This is consistent with the precautionary principle. [...]

The obligation pursuant to Articles 2 and 8 ECHR to take appropriate steps to counter an imminent threat may encompass both mitigation measures (measures to prevent the threat from materialising) or adaptation measures (measures to lessen or soften the impact of that materialisation).»⁹⁶¹

⁹⁵⁹ A. NOLLKAEMPER, L. BURGERS, *A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case*, in *EJIL:Talk!*, 6 January 2020.

⁹⁶⁰ Supreme Court of the Netherlands, *Urgenda Foundation v. State of the Netherlands*, cit., para. 5.2.4. This is confirmed by the jurisprudence of the European Court of Human Rights in the cases *Budayeva v. Russia*, cit., and *Brincat v. Malta*, application no. 60908/11, Judgment of 24 July 2014.

⁹⁶¹ Supreme Court of the Netherlands, *Urgenda Foundation v. State of the Netherlands*, cit., para. 5.3.2.

In a detailed analysis of the scope of Articles 2 and 8 – always duly referring to the case-law of the ECtHR – the Supreme Court of the Netherlands interpreted the obligations deriving from international human rights law also in light of the commitments deriving from international environmental law. It referred to the precautionary principle and considered the mitigation and adaptation measures required by the Paris Agreement.

Moreover, the judges clarified that the circumstance that the climate crisis is a “global threat” does not exempt the State of the Netherlands to “play their part” in preventing and combating this threat.⁹⁶² The argument at the basis of this conclusion was the IEL principle of “no harm”, which implies, according to the Supreme Court, the need to contribute to cutting global GHG emissions.⁹⁶³ In doing so, the judges also rejected the defence of the government, which claimed that the reduction target should be applied to “developed nations” as a group. The Court found that there was no reason to conclude that this meant adopting a lower target for the Netherlands. This is also in line with the principle of common but differentiated responsibilities.

The *Urgenda* ruling was indeed a groundbreaking one. The claimants successfully argued the interplay existing between international environmental principles and obligations deriving from international human rights law. No “branch” of international law exists in itself. The commitments deriving from one should never be read in contradiction with the other.

The European Court has repeatedly stated that the Convention should not be applied “in a vacuum”, but its interpretation should consider general principles of international law, including Article 31(3)(c) of the Vienna Convention on the Law of Treaties which demands to take into account «any relevant rules of international law applicable in

⁹⁶² *Idem*, para. 5.8.

⁹⁶³ *Idem*, para. 5.7.5. On the “no harm” principle see *supra* Chapter III, Section 2.1.3. See also M. GERVASI, *Le regole della responsabilità internazionale degli Stati dinanzi alla sfida del cambiamento climatico*, in A. SPAGNOLO, S. SALUZZO (eds), *La responsabilità degli Stati e delle organizzazioni internazionali: nuove fattispecie e problemi di attribuzione e di accertamento*, Milano, 2017, p. 61 ff.

the relations between the parties», especially international human rights law.⁹⁶⁴

Urgenda was followed by a “wave” of climate litigation in other European States,⁹⁶⁵ all relying on Articles 2 and 8 of the European Convention, creating in some way a paradox: national courts all over Europe had declared violations of the European Convention *before* the European Court had the chance to do it.

The road has been anything but straight, as decisions from different jurisdiction led to different outcomes. Some cases brought an expansion of this type of litigation,⁹⁶⁶ others were declared inadmissible – mainly on the argument of separation of powers.⁹⁶⁷ A significant part of the cases relied on the legal reasoning elaborated by the Supreme Court in *Urgenda*, quoting it either directly or indirectly.⁹⁶⁸

⁹⁶⁴ ECtHR, *Nada v. Switzerland*, application no. 10593/08, Judgment of 12 September 2012, para. 169.

⁹⁶⁵ On the “trailing” effect of *Urgenda* see P. PUSTORINO, *Cambiamento climatico e diritti umani: sviluppi nella giurisprudenza nazionale*, in *Ordine internazionale e diritti umani*, 2021, p. 596 ff.

⁹⁶⁶ *Inter alia*, Federal Constitutional Court, *Neubauer and others v. Germany*, judgment of 24 March 2021; Prague Municipal Court, *Klimatická žaloba CR v. Czech Republic*, judgment of 15 June 2022; Court of First Instance of Brussels, *VZW Klimaatzaak v. Kingdom of Belgium & Others*, judgment of 17 June 2021; Tribunal Administratif de Paris, *Notre Affaire à Tous and Others v. France* (“*Affaire du Siecle*”), judgment of 14 October 2021.

⁹⁶⁷ To mention some: Civil Court of Rome, *A Sud and others v. Italy*, judgment of 26 February 2024 (based on fundamental rights, denied on the grounds that the issue of climate change is a political one, the appeal is now pending); Civil Court of Appeal of London, *Plan B Earth v. The Secretary of State for Business, Energy and Industrial Strategy*, order of 25 January 2019 (alleged violation by the government of the Climate Change Act 2008 for failure to revise its emission reduction target, denied on the basis of government discretion); Administrative Court of Berlin, *Family Farmers and Greenpeace Germany v. Germany*, judgment of 31 October 2019 (alleged violation of the constitutional rights of plaintiffs with insufficient action to achieve its greenhouse gas reduction targets by 2020, denied on the basis of government discretion); Swiss Supreme Court, *Association of Swiss Senior Women for Climate Protection v. Federal Department of the Environment, Transport, Energy and Communications*, judgment of 20 May 2020 (adequacy of the climate change mitigation objectives and implementing measures of the Swiss Government and possible human rights violations, rejected as a “matter for the democratic process, non-judicial”. The latter was then the basis for the *KlimaSeniorinnen* case before the European Court of Human Rights).

⁹⁶⁸ On the point of callbacks between national courts on climate cases, I respectfully refer the reader to G. PANE, *Pro e contro dei rimedi domestici: prospettive di sinergia*

Among the national cases that followed *Urgenda*, particular attention should be devoted to the recent *Bonaire* judgment, delivered by the District Court of The Hague in 2026.⁹⁶⁹ The case was brought by several residents of Bonaire – a Caribbean special municipality of the Netherlands – together with Greenpeace Netherlands, challenging the adequacy of the Dutch State’s climate policy with specific regard to the island’s vulnerability to climate change.

While building upon the legal architecture established in *Urgenda*, the judgment introduces an additional and significant element: the dimension of substantive equality in climate protection. The claimants relied not only on Article 8 of the European Convention, but also on Article 14, arguing that the inhabitants of Bonaire were insufficiently protected compared to residents in the European part of the Netherlands. The Court accepted this reasoning, affirming that the State’s positive obligations under Article 8 ECHR require not merely the adoption of general mitigation policies, but also the implementation of concrete and adequate adaptation measures tailored to particularly exposed communities.

In doing so, the Court recognised that climate change may affect different territories and populations in structurally unequal ways, and that such differentiated impact triggers heightened obligations of protection. The failure to adopt adequate adaptation measures for Bonaire was therefore considered incompatible with the State’s duties under the Convention, especially when read in conjunction with the prohibition of discrimination.

The *Bonaire* decision thus expands the European climate litigation framework in two directions. First, it confirms the justiciability of climate mitigation obligations under Articles 2 and 8 ECHR, in line with *Urgenda* and subsequently endorsed by the European Court in *KlimaSeniorinnen*.⁹⁷⁰ Secondly, and more innovatively, it frames climate justice as a matter of substantive equality, requiring States to ensure that

europa nel contenzioso climatico collettivo, in *Ordine internazionale e diritti umani*, 2023, p. 375 ff.

⁹⁶⁹ District Court of The Hague, *Greenpeace Netherlands v The State of the Netherlands (Bonaire)*, judgment of 28 January 2026. For a comment on its implications see M. WEWERINKE-SINGH, *Climate Justice as Substantive Equality: What the Bonaire Judgment Adds to “Equity” in Climate Law*, in *EJIL:Talk!*, 3 February 2026.

⁹⁷⁰ On this point, see also *infra* Section 4.2.

particularly vulnerable communities are not disproportionately exposed to environmental harm. In this sense, the case strengthens the collective dimension of climate protection: the environment is not merely protected as an individual interest affected in isolated circumstances, but as a shared condition of existence whose degradation may produce structural inequality within the political community itself.⁹⁷¹

Such a reconstruction inevitably raises the institutional question of the role of courts in supervising climate policy, especially when collective and structural interests are at stake. Indeed, the main common features of all these cases, apart from the constitutional basis and the European Convention which have already been discussed in detail,⁹⁷² are the elements of collectiveness and intergenerational equity *in response* to the argument of separation of powers.

4.1. *The rights of future generations between collectiveness and separation of powers*

While the response to the *Urgenda* decision was generally positive, some commentators underlined the strain that such a ruling would put on the principle of separation of powers.⁹⁷³

⁹⁷¹ This dimension may also be read as an expression of intragenerational equity. While the *Neubauer* case – discussed below – addresses temporal inequality between present and future generations, the *Bonaire* judgment highlights spatial inequality within the same generation, where geographically or socio-economically vulnerable communities bear disproportionate climate burdens. Such reasoning resonates with broader theoretical reconstructions of the right to a healthy environment as protecting a collective interest against structurally uneven distributions of environmental harm (see *supra* Chapter I and Chapter III, Section 2.1.3). Although the present case concerns a territory formally integrated within the same State, the underlying logic potentially extends to transboundary and extraterritorial contexts, where climate impacts and protective capacities are unevenly distributed across States.

⁹⁷² On the former see *supra* in this Chapter Section 1; on the latter see *supra* Chapter V, Section 1.3.

⁹⁷³ See for example the following reactions: I. LEJTEN, *The Dutch Climate Case Judgment: Human Rights Potential and Constitutional Unease*, in *Verfassungsblog*, 19 October 2018; G. BOOGAARD, *Laten we de democratie niet onder curatele stellen*, in *deVolkskrant*, 11 October 2018; J. FANHER, *Climate Change before the Courts: Urgenda Ruling Redraws the Boundary between Law and Politics*, in *EJIL: Talk!*, 16 November 2018.

Invoked as a bastion of the rule of law, this principle considers that most modern democracies are based on the division of competences among the three major public branches: executive, judiciary and administrative.⁹⁷⁴ It has been used as an argument against “judicial activism”, based on the idea that the commitments deriving from international environmental law – specifically, the Paris Agreement – are of a political nature and should not be syndicated by courts.

And yet, it could be argued that the ground of modern democracy is precisely the possibility of courts to syndicate the work of the executive and the administrative.⁹⁷⁵ Leaving the actions of government branches completely unchecked *violates* the basis of democracy.⁹⁷⁶

Moreover, it should be reminded that the question of climate cases does not revolve around “making new law” where none exists.⁹⁷⁷ The effort of this book goes precisely in that direction. Apart from the commitments taken under the UNFCCC (including the Kyoto Protocol and the Paris Agreement), and not considering the fact that the majority of the doctrine now propends towards the recognition of binding obligations in the Paris Agreement,⁹⁷⁸ the *definitely* binding obligations deriving from international human rights law cannot be ignored. And in this framework, as already discussed, there are numerous elements, of both praxis and jurisprudence, that support the existence of a universal right to a healthy environment.

⁹⁷⁴ J. LOCKE, *Two treatises of government*, 1690; MONTESQUIEU, *L'esprit des lois*, 1748. On this point see also, E.G. ASSANTI, *Il ruolo innovativo del contenzioso climatico tra legittimazione ad agire e separazione dei poteri dello Stato: Riflessioni a partire dal caso Urgenda*, in *federalismi.it*, 2021, p. 66 ff.

⁹⁷⁵ R. FORST, *Justification and Critique: Towards a Critical Theory of Politics*, Ciaran Cronin (tr.), Cambridge, 2014.

⁹⁷⁶ On the issue of democratic legitimacy and the role of the environment see also C. ECKES, *Separation of Powers in Climate Cases*, in *Verfassungsblog*, 10 May 2021; L. BURGERS, *Should Judges Make Climate Change Law?*, in *Transnational Environmental Law*, 2020, p. 55 ff.

⁹⁷⁷ The same had already been clarified by the Appeal Court in *Urgenda*: «[...] Urgenda's claim is not intended to create legislation, either by parliament or by lower government bodies, and that the State retains complete freedom to determine how it will comply with the order. The order also will in no way prescribe the substance which this legislation must have. For this reason alone, the order is not an 'order to enact legislation' [...]» (Hague Court of Appeal, *The State of Netherlands v. Urgenda Foundation*, judgment of 9 October 2018, para. 68).

⁹⁷⁸ See *supra* Chapter III, Section 2.1.1.

The issue was tackled in the *Neubauer* case, decided by the Federal Constitutional Court of Germany in 2021.⁹⁷⁹ The relevant aspect of this judgment lies in the legal reasoning which justifies overcoming the argument of separation of powers, a reasoning which was then adopted by the European Court in the *KlimaSeniorinnen* case,⁹⁸⁰ and which reinforces the collective and intergenerational approach to the right to a healthy environment.

Indeed, the Federal Constitutional Court affirmed not only that the climate crisis is an issue of human rights, but also that it should take into account the intergenerational component. For this point, the judges relied on Article 20a of the Basic Law for the Federal Republic of Germany, which affirms the following principle:

«Mindful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.»

In other words, the German Constitution already adopts an intergenerational approach to environmental concern, coherent with a reconstruction of the right to a healthy environment as pertaining both to present and future generations. On the basis of this provision, the Federal Court was able to establish that the “burden-sharing” between generations should take into account the greater impact that the climate crisis will have on future generations,⁹⁸¹ in the light of a double type of discrimination faced by them.

On the one hand, they would be forced to bear the heavier costs, despite having contributed less to the climate crisis. They would be forced to adopt greater cuts and more impactful measures in order to mitigate and adapt to the effects of climate change.

Secondly, and consequently, «future generations – those who will be most affected – naturally have no voice of their own in shaping the

⁹⁷⁹ Federal Constitutional Court, *Neubauer and others v. Germany*, cit.

⁹⁸⁰ ECtHR, *Verein KlimaSeniorinnen Schweiz and others v. Switzerland*, cit., para. 450. See also *supra* Chapter V, Section 1.3.2.

⁹⁸¹ Federal Constitutional Court, *Neubauer and others v. Germany*, cit., para. 183: «[...] the fundamental rights, as intertemporal guarantees of freedom, afford protection against the greenhouse gas reduction burdens imposed by Art. 20a of the Basic Law being unilaterally offloaded onto the future».

current political agenda».⁹⁸² The Federal Court underlined one of the most important aspects of intergenerational equity, which is connected to the idea of preservation and protection of the environment for future generations.

This point has already been tackled when discussing the implementation of intergenerational equity.⁹⁸³ Depriving future generations of the possibility to *enter the juridical discourse* today may very well mean depriving them of *any possibility* at all. In other words, the temporal frame of political choices is not *equipped* with guaranteeing distant future effects. As the Federal Court affirmed:

«In Art. 20a GG, environmental protection is elevated to a matter of constitutional significance because the democratic political process is organised along more short-term lines based on election cycles, placing it at a structural risk of being less responsive to tackling the ecological issues that need to be pursued over the long term.»⁹⁸⁴

It is the same conclusion of the European Court in the *KlimaSeniorinnen* case. The intervention of the judicial is *justified* by the need to guarantee rights to future generations, bearing in mind the fact that in absence of this intervention those rights would probably not be invocable in the future.

The *Neubauer* case clearly shows why the right to a healthy environment must be framed in terms of collectiveness and intergenerational equity, and why it cannot be seen in any other way. Recognising the existence of this right – proven at this point by both soft and hard law instruments, both national and international – means understanding that the interests it protects are collective in nature and that its holders are identified in the whole of humanity, including present and future generations.

⁹⁸² *Idem*, para. 205.

⁹⁸³ See *supra* Chapter IV, Section 1.2.

⁹⁸⁴ Federal Constitutional Court, *Neubauer and others v. Germany*, cit., para. 205.

4.2. *Perspectives of reception at the international level: KlimaSeniorinnen and beyond*

The European case-law is particularly relevant for the purpose of this inquiry because it conveys a plausible solution for the research question: the justiciability of the right to a healthy environment. Despite being set in a regional system which does not explicitly recognise this right, through the development of environmental jurisprudence at the ECtHR and the parallel national recognition of ecological demands, the European case-law shows perspectives of integration between international and national regimes.

One of these possibilities is the development of the so-called “European consensus”. This concept stems from the fundamental consideration that, as any international treaty, the European Convention has a “consensual” nature, which means that it is based on mutual validation among States Parties. While not explicitly defining it,⁹⁸⁵ the Court elaborated this idea in its jurisprudence in this way:

«Since the Convention is first and foremost a system for the protection of human rights, the Court must, however, have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved. One of the relevant factors in determining the scope of the margin of appreciation left to the authorities may be the existence or non-existence of common ground between the laws of the Contracting States.»⁹⁸⁶

It is among the aims of the Convention to create a “uniform standard” of human rights protection, and the European consensus is an interpretative tool which can be used to identify whether such a standard

⁹⁸⁵ The term itself varies in the jurisprudence of the Court: «international consensus among contracting states of the Council of Europe» in *Lee v. UK*, Application no. 25289/94, Judgment of 18 January 2001, para. 95; «any European consensus» in *Evans v. UK*, Application no. 6339/05, Judgment of 10 April 2007, para. 45; «common standard between Member States of the Council of Europe» in *T. v. UK*, Application no. 24724/94, Judgment of 16 December 1999, para. 72; «common European standard» in *X, Y and Z v. UK*, Application no. 21830/93, Judgment of 22 April 1997, para. 44; «general trend» in *Unal Tekeli v. Turkey*, Application no. 29865/96, Judgment of 16 November 2004, para. 61.

⁹⁸⁶ ECtHR, *Glor v. Switzerland*, Application no. 3444/04, Judgment of 30 April 2009, para. 75.

exists. The concept is not clear and has given rise to fervent doctrinal debate, which is outside the scope of this analysis.⁹⁸⁷ What nevertheless emerges is that the European consensus operates as some sort of limit to the margin of appreciation doctrine, meaning that when the former is uncertain the latter will be wider and vice versa.

An author has argued that the European consensus could be used to identify strands of climate cases adjudicated on the basis of the climate science in Europe.⁹⁸⁸ In this sense, the scientific basis would serve as basis for the common interpretation of human rights obligations *vis-à-vis* the climate crisis. Using the *scientific* consensus existing around the “interest at stake” and the “means to protect it”, the author then employs *legal* interpretation to verify whether a consensus can be found in the relationship existing between the climate crisis and human rights protected by the Convention.⁹⁸⁹

The same could be applied to the possibility of deriving a European consensus on the collective right to a healthy environment. It is argued that the *relationship* existing between climate change and human rights can be considered as “common ground”, on the basis of the jurisprudence of European national courts and the lengthy reasoning of the European Court in *KlimaSeniorinnen*. National judgments, such as *Urgenda* in the Netherlands, *Neubauer* in Germany and, more recently, the *Bonaire* decision, demonstrate a converging judicial willingness to frame climate inaction as a matter of enforceable human rights obligations.

Although these cases differ in their constitutional foundations and argumentative structures, they share a core premise: that States bear positive obligations to adopt adequate mitigation and adaptation measures pursuant to their duties in the field of human rights, and that such obligations are subject to judicial scrutiny. This does not, however,

⁹⁸⁷ On this issue see K. DZEHTSIAROU, *European Consensus and the Legitimacy of the European Court of Human Rights*, Cambridge, 2015; L. WILDHABER, A. HJARTARSON, S. DONNELLY, *No Consensus on Consensus? The Practice of the European Court of Human Rights*, in *Human Rights Law Journal*, 2013, p. 248 ff.; C.E. LEWIS, *The European Court of Human Rights and its Search for Common Values*, in *European Convention on Human Rights Law Review*, 2023, p. 179 ff.

⁹⁸⁸ P. MINNEROP, *European Consensus as Integrative Doctrine of Treaty Interpretation: Joining Climate Science and International Law under the European Convention on Human Rights*, in *Berkeley Journal of International Law*, 2022, p. 206 ff.

⁹⁸⁹ *Idem*, p. 243 ff.

imply that the right to a healthy environment in its collective and intergenerational dimension is already a sufficiently homogeneous basis as to form a “trend” in national jurisprudence in Europe. Nevertheless, it contributes to narrowing the margin of appreciation traditionally invoked in politically sensitive areas such as climate policy.

The cases explored in this Section have shown that there is still resistance on the justiciability *stricto sensu* of climate actions – or inactions (for example, through the argument of the separation of powers). Nevertheless, it is submitted that there is not uncertainty in the justiciability *lato sensu* of the right to a healthy environment. As shown in Part II, the right to a healthy environment, as *any other human right*, entails the need to grant access to justice and effective remedies.

In other words, if the relationship between the climate crisis and human rights is established – and both case-law and state practice appear to confirm this – and if the existence of an autonomous right to a healthy environment protecting a collective interest – the global common good of the environment – for all of humanity is accepted, then a possible avenue for future development at the European level may be envisaged, whereby these two concepts could be harmoniously integrated within the European framework.

This cannot yet be regarded as settled law. Such a conclusion would be premature, since the European Court has decided only *one* climate case in favour of the applicants so far. Nevertheless, the foundations for such a landmark development may be identified both in the *scientific* consensus around the causes and consequences of the climate crisis as well as the emerging *legal* consensus on the impact of the latter on human rights. Given the number of European States recognising the right to a healthy environment, it is not far-fetched that such a recognition could be considered as “homogeneous” at the European level, particularly in light of the *unanimous* endorsement of the 2023 General Assembly Resolution on the right to a healthy environment.

By way of conclusion to this paragraph, and as this book draws to a close, a clearer picture emerges of the justiciability of the right to a healthy environment, also appreciating the impact that national climate litigation has had upon its development. By forming a wave of cases through Europe, climate litigation helps the development of standards on the interpretation of both human rights and environmental obligations. The fact that the European Court itself has embraced such

reasonings – on the relationship between the two branches of IEL and IHRL, and on the rejection of the separation of powers argument – is not without its importance. The full effects of this interpretative choice will be felt in the course of future cases, but it is certain that this “dialogue” between the European Court and the national courts opens possibilities of development for a complementary realisation of environmental rights and, arguably, also of the right to a healthy environment.

CONCLUSIONS

This book has been guided by two fundamental questions: first, does the current normative framework allow for the recognition of a right to a healthy environment in a collective form? And secondly, is this right effectively justiciable in international and/or regional fora?

The analysis undertaken leads to a conclusion that is, in essence, ambivalent: while the existence of the right can no longer be seriously contested, its justiciability remains fragmented and, in some contexts, structurally constrained.

At a normative level, the research has shown that the right to a healthy environment has progressively emerged as an autonomous human right, whose collective dimension is not merely incidental but intrinsic to the nature of the interests it protects. Environmental degradation affects individuals and communities, present and future generations simultaneously; as such, any attempt to frame environmental protection exclusively through individual rights appears increasingly inadequate. The recognition of an autonomous right contributes to bridging the gaps between international environmental law and international human rights law, fostering greater coherence in the identification of obligations and in the articulation of responsibilities, including those of non-State actors.

At the same time, the evolution of “green” human rights has revealed an internal tension. While rights such as the right to life or to private and family life have provided an essential entry point for environmental claims, their interpretative expansion risks reaching structural limits. Anchoring environmental protection exclusively to these rights, at this stage of development, no longer appears sufficient and may even generate contradictions. In this sense, the consolidation of an autonomous right to a healthy environment also responds to concerns of legitimacy, providing courts and tribunals with a clearer normative basis upon which to develop environmental protection without overstretching existing guarantees.

This reconstruction has also allowed for a more precise understanding of the content of the right. Drawing on the principles of international environmental law and on the interpretative work of Special Rapporteurs, the right to a healthy environment emerges as a complex

and hybrid right, combining elements traditionally associated with civil and political rights with those of economic, social and cultural rights. Its substantive core – clean air, a safe climate, access to water and food, non-toxic environments, and healthy ecosystems – reflects an ecosystemic approach, in which the interdependence of natural systems is mirrored by the interdependence of legal obligations.

Within this framework, the collective dimension of the right is closely linked to its intergenerational character. The environment, conceptualised as a global common good, cannot be reduced to the sum of individual entitlements, nor can it belong to a defined group. Rather, it is shared across humanity and across time. Indeed, the only way to consider an approach to the right to a healthy environment which is not fundamentally anthropocentric is to comprehend that it does not, in fact, *belong*, in the truest sense of the word. In other words, by belonging to all of humanity, it belongs to anyone and no one at the same time. This conceptualisation, while normatively compelling, also represents one of the main sources of tension when the right is translated into legal practice, particularly in relation to the identification of right-holders and the articulation of claims.

These tensions become particularly evident when addressing the question of justiciability. The effectiveness of the right depends not only on its recognition, but on the availability of procedural mechanisms capable of giving voice to collective and diffuse interests. In this respect, the *actio popularis* emerges as the most suitable instrument for ensuring access to justice in environmental matters, as it allows both the defence of common goods and the individual assertion of collective interests. Yet, its limited availability before international courts and tribunals – most notably within the European system – constitutes a significant obstacle.

The comparative analysis of regional systems confirms this asymmetry. The Inter-American and African systems have demonstrated a greater openness towards the collective and intergenerational dimensions of environmental protection, both in their normative frameworks and in their jurisprudence, including through innovative approaches to reparation and broad understandings of standing. By contrast, the European system remains anchored to an individualistic and predominantly anthropocentric conception of rights, which restricts both the substantive recognition of the right to a healthy environment and its procedural enforcement.

The most recent case law of the European Court of Human Rights reflects this ambivalence. On the one hand, the *KlimaSeniorinnen* judgment signals a willingness to engage more directly with environmental harm and its systemic implications, opening the door – albeit cautiously – to evolutive interpretation. On the other hand, decisions such as *Duarte Agostinho* illustrate the persistence of significant procedural barriers, particularly in relation to *locus standi* and extraterritoriality. These developments reveal the underlying tension between judicial function and democratic legitimacy, a tension that is further shaped by the political dynamics within the Council of Europe.

At the same time, the experience of other regional systems offers alternative interpretative pathways. The practice of the Inter-American Court of Human Rights, in particular, demonstrates how the justiciability of the right to a healthy environment can be affirmed even in the absence of explicit procedural provisions, through the combined interpretation of existing norms. This suggests that the evolution of the European system does not necessarily depend on formal amendments alone, but may also be pursued through interpretative innovation.

Beyond the regional level, national climate litigation has provided a crucial laboratory for the development of the right. Domestic courts have increasingly relied on the interaction between international environmental law principles and human rights standards to articulate States' obligations in the face of environmental degradation. Indeed, all over the world courts have relied on constitutional provisions and principles of human rights protection to affirm that States have a responsibility towards their citizens to guarantee a safe environment, also through a stable climate. This practice highlights the importance of dialogue between legal orders and confirms that the development of the right to a healthy environment is inherently multi-level, relying on processes of mutual reinforcement between national and international fora.

At the same time, the uncertainty surrounding the precise scope of States' obligations – particularly in the context of climate change – has been largely faced, while not disappearing completely. The advisory opinions recently delivered by the International Court of Justice and the Inter-American Court of Human Rights now constitute major interpretative landmarks, contributing significantly to the clarification of States' obligations and to the progressive integration of environmental

and human rights law. The request still pending before the African Court on Human and Peoples' Rights further confirms that this process of normative consolidation remains open and dynamic.

Yet, the climate crisis is but a part of the issues analysed during the course of this inquiry. The research has shown that no doubts can remain around the existence of an autonomous right to a healthy environment, whether it can be found in binding treaties or in universal instruments of soft law, or even through the evolutive interpretation of courts and tribunals.

Therefore, it may be concluded that the collective right to a healthy environment, not unlike any other human right, benefits from the complementarity between the work of national and international regimes. The development of human rights standards which take into account the collective dimension of environmental interests is shown both at the regional level and at the domestic one, where accent is put on the intergenerational responsibility the links present and future generations in a temporal *continuum*.

Against this background, the partial nature of the answers to the research questions should not be understood as a shortcoming of the analysis, but rather as a reflection of a legal framework in transition. The recognition of the right to a healthy environment – especially in its collective and intergenerational dimensions – has advanced considerably through soft law instruments, regional jurisprudence and domestic practice. However, its full justiciability still depends on the availability of appropriate procedural avenues and on the willingness of courts and tribunals to engage with its systemic implications.

From a *de iure condendo* perspective, several directions emerge. First, the consolidation of the right at the treaty level – whether through new instruments or through the evolution of existing ones – would contribute to strengthening its normative clarity and authority. Secondly, the expansion of procedural mechanisms capable of accommodating collective interests, including forms of *actio popularis* or functional equivalents, appears essential to ensure effective access to justice in environmental matters. Thirdly, greater attention should be devoted to the role of non-State actors, particularly in light of the global and transboundary nature of environmental harm, which calls for a more explicit articulation of business-related obligations, including in extraterritorial contexts.

In parallel, the evolution of interpretative standards will remain decisive. Courts and tribunals are increasingly called upon to navigate the intersection between law and politics, between subsidiarity and effectiveness, and between individual rights and collective interests. In doing so, they contribute to shaping a legal framework capable of responding to the systemic, cumulative and long-term nature of environmental harm.

In conclusion, the right to a healthy environment has reached a stage in which its existence is widely acknowledged, and its collective dimension increasingly recognised across different legal orders. What remains at stake is the capacity of legal systems to fully translate this recognition into effective protection. The trajectory traced throughout this work suggests that such a development is already underway, albeit unevenly and not without resistance.

The international legal order appears to be progressively adjusting to the idea that environmental protection is not merely a policy objective, but a matter of inherently collective rights. In this sense, and evoking the words which have opened this book, the time for this idea has indeed come, and the international legal order is now aware of it; what remains is to ensure that the law is capable of fully realising its implications.

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