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Environmental law and other legal fields

2024

Editors

Carla Amado Gomes . Heloísa Oliveira . Madalena Perestrelo de Oliveira

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ENVIRONMENTAL LAW
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I.

HUMAN RIGHTS AND FUNDAMENTAL RIGHTS

Armando Rocha & Heloísa Oliveira

Abstract: The growing awareness of the link between the protection and preservation of the environment and the realization of human rights explains why, since the 1970s, we have witnessed a process of greening the traditional list of human and fundamental rights – by fleshing out environmental-related obligations under mainstream human and fundamental rights provisions – and to the emergence of new substantive and procedural rights to, or related to, a healthy environment. In this chapter, both processes are analyzed in the fields of human and fundamental rights, including the main methodological questions in the field of human rights, on the one hand, and in the field of fundamental rights, on the other hand.

Keywords: human rights; fundamental rights; separation of powers; margin of appreciation; right to a healthy environment; environmental rights; rights of nature

Resumo: A crescente consciencialização da ligação entre proteção e preservação do ambiente e realização de direito humanos e fundamentais tem levado a que, desde a década de 1970, se tenha assistido a um processo de greening do catálogo tradicional de direitos humanos e fundamentais – identificando obrigações ambientais ao abrigo de direitos humanos e fundamentais mainstream – e à emergência de novos direitos substantivos e procedimentais ao e relativos a um ambiente sadio. Neste capítulo, são analisados como ambos os processos se têm desenvolvido no campo dos direitos humanos e fundamentais, bem como quais são as principais questões metodológicas que se levantam nos domínios dos direitos humanos e dos direitos fundamentais.

Palavras-chave: direitos humanos; direitos fundamentais; separação de poderes; direito a um ambiente saudável; direitos ambientais; direitos da natureza

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1. Introduction

Human rights law and fundamental rights are growingly being used as instruments for environmental protection. Although not created for the specific purpose of environmental protection, these two fields hold strong grips in international and domestic law, not only substantively (with high-level value in the normative pyramid, as well as developed legal doctrines and reasoning), but also procedurally (due to the creation of specific and more permissive rules allowing for legal standing and requests before international and domestic courts and decision-making bodies).

In spite of their common features, they also present distinctive traits. They belong to different legal systems – human rights law to international law, whereas fundamental rights are a part of domestic constitutional laws –, with their different doctrinal and normative frameworks and specificities. But they also share many of the same problems and limits, as we will try to prove through a comparative analysis.

2. Human rights

Bringing an environmental claim into human rights bodies is not a silver bullet but shows that alternative avenues may be picked to boost States' environmental policies. The reasons for using human rights as a tool for promoting environmental policies are manifold but start with the fact that the link between human rights and the environment is intricate, since human dignity and the possibility of life and enjoyment of human rights depends on the existence of a sound and healthy environment.

Additionally, the human rights toolbox helps identifying vulnerable individuals, balancing competing interests, and providing moral standing to environmental issues; human rights bodies provide a more ecumenical access to dispute settlement and allow individuals to challenge domestic environmental policies — although judicial comity is part of the grammar of supranational bodies; human rights' activism explains why these latter bodies are more prone to conduct a judicial review of sovereign decisions than other international law courts or non-judicial bodies; and pouring environmental concerns into human rights law helps fleshing out States' obligations in more tangible terms.

Of course, one can always ask whether human rights law is the best place to advocate for the protection, preservation, and improvement of the environment

— for instance, human rights law is premised upon an anthropocentric view of legal protection, which explains in part the dogmatic difficulties regarding the autonomy of the right to a healthy environment *vis-à-vis* other human rights, or regarding the holder of this right. However, pursuing environmental justice through human rights means is complimentary to other means — it does not (and ought not to) prevent the use of more direct and eco-centric approaches to environmental protection.

As such, human rights can be used as an additional tool for advocating environmental concerns and pursuing environmental justice. In this framework, the question for this section is how does current international human rights law protect the environment, namely if it protects the right to a healthy environment, or at least if other human rights may be "greened" and used to pursue environmental goals.

2.1. The human right to a healthy environment

The link between human rights and the environment was first mentioned in the 1972 Stockholm Declaration[1], but only on 26 July 2022 the UN General Assembly "recognize[d] the right to a clean, healthy and sustainable environment as a human right"[2] — without prejudice to the intricate link between the environment and other human rights, on the one hand, and the need to coordinate the promotion of the right to a healthy environment with the implementation of general international environmental law, on the other hand[3].

Recognizing a human right to a healthy environment was a bold step from the UN General Assembly, but it relied upon the work and dialogue between human rights courts and other non-judicial bodies[4], as well as upon a HRC

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[1] See Principle 1 of the Stockholm Declaration.

[2] UNGA Resolution no. A/76/300, 26 July 2022, §1.

[3] *Ibidem*, §§2 & 3.

[4] The ICJ is excluded from this analysis, since it does not hold jurisdiction to enforce human rights treaties. However, since the request for an advisory opinion on States' obligations in relation to climate change also includes a question on States' obligations under general human rights law (and under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights) it is likely that it will have an opportunity for contributing to the international stocktake on human rights and the environment.

resolution adopted in 2021[5], which — although adopting a conservative approach that conditions the effective enjoyment of mainstream human rights to a certain level of environmental protection[6] — paved the way for the for the UN General Assembly to adopt a more audacious resolution recognizing a standalone human right to a healthy environment.

The UN General Assembly resolution is landmark but also deceptive, since it suggests a universal recognition of the human right to a healthy environment or, alternatively, that the resolution itself could be the very source of that human right. However, according to Article 38 of the Statute of the ICJ and to the wording of the UN Charter, UN General Assembly resolutions are not externally binding. In fact, UN General Assembly resolutions fall into the category of soft law instruments and thus are not able to create a human right to a healthy environment[7].

Nonetheless, the wording of Resolution no. A/76/300 also does not point to the "creation" of a human right to a healthy environment, but rather to its "recognition", suggesting that this right pre-exists the resolution itself. As such, one question for this chapter is whether a norm incorporating the human right to a healthy environment can be found elsewhere in current international law — be it a general principle of law, a custom, or a treaty. Curiously, the instruments mentioned in UNGA Resolution no. A/76/300 refer to other human rights, but not to the right to a healthy environment[8].

To make this assessment, this chapter needs to analyze the environmental protection by human rights instruments at the universal and regional levels separately. To that end, one must bear in mind that some human treaties predate the Stockholm Declaration and thus they do not refer explicitly to the link between human rights and the environment, and much less to a right to a healthy environment[9], as happens with the European and the Inter-American

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[5] HRC Resolution A/HRC/RES/48/13, 8 October 2021 (*The human right to a clean, healthy and sustainable environment*).

[6] Oliveira, H., "Direitos Humanos e Proteção do Ambiente", in Duarte, M.L., Gil, A.R., and Fidalgo de Freitas, T., (eds.), *Direitos Humanos e Estado de Direito — Proteção no Quadro Europeu e Internacional*. Lisbon: AAFDL, 2022, pp. 773-774.

[7] See, *inter alia*, Oliveira, H., cit. note 6, p. 774.

[8] *Ibidem*.

[9] See, *inter alia*, Dupuy, P.-M., and Viñuales, J.E., *International Environmental Law*. 2nd ed. Cambridge: Cambridge University Press, 2018, p. 366; Fitzmaurice, M., Wong, M.S., and Crampin, J., *International Environmental Law — Text, Cases and Materials*. Cheltenham: Edward Elgar, 2022, p. 118.

Conventions on Human Rights (despite the adoption of the 1989 San Salvador Protocol). But some treaties adopted afterwards make this link explicitly. However, an assessment of the current international human rights law needs to consider also all universal and regional human rights systems that bridge the gap between human rights and the environment, in order to ascertain what has been crafted as States' environmental obligations under human rights law — directly under a right to a healthy environment, or indirectly flowing from another human right. As such, this chapter considers not only treaty-based provisions at the universal or regional level, but also the work of human rights bodies (judicial or non-judicial) that, despite the silence of their constitutive treaties, have been building a cohesive *acquis* related to States' environmental obligations under human rights law.

As a result, our analysis is premised on a simplistic but pragmatic binary distinction between two clusters of human rights treaties: first, treaties that autonomize a standalone human right to a healthy environment, which then allows us to elaborate on the actual autonomy of the right to a healthy environment *vis-à-vis* other human rights; second, treaties that do not mention a right to a healthy environment, but whose treaty bodies have been unveiling States' obligations under other provisions.

In this latter case, environmental protection is instrumental to the protection of human rights and it raises the question of what human rights are mobilized as a tool to face environmental degradation: the rights to life and/or health seem more obvious, but it depends on the set of human rights covered by the treaty, the geographic and cultural tradition of States Parties to the treaty, and the dogmatic affiliation of the enforcement body.

2.2. Human rights and the environment at the universal level

At the universal level, Article 24(2)(c) and (e) of the UN Convention on the Rights of the Child places environmental protection within the scope of the right to health, although apparently without substantive autonomy in relation to the right to health[10], which precludes its understanding as a standalone right. The reference is explicit and undisputed — but, despite the universal scope of the treaty, it only recognizes the relevance of the right to a healthy environment within the microcosmos of children's rights; and it is not possible to derive from that provision a general principle of law concerning the protection of the right

[10] Oliveira, H., cit. note 6, p. 774.

to a healthy environment. The potential of this provision is relevant, as could be seen in the recent case of *Sacchi et al. v. Argentina et al.*, where Article 24 of the UN Convention on the Rights of the Child was used to bring the climate issue before the UN Committee on the Rights of the Child[11]. However, it is short to support a universal human right to a healthy environment, especially as a standalone right.

Apart from the UN Convention on the Rights of the Child, no other human rights treaty with universal and general scope refers to the human right to a healthy environment. At most, one finds an elliptical and encrypted reference in Article 12(2)(b) of the of the ICESCR, which, also in relation to the right to health, refers to the improvement of all aspects of environmental hygiene and industrial hygiene: i.e., the wording suggests that a healthy environment is a precondition for the enjoyment of the right to health, but it does not point to a human right to a healthy environment.

In this light, and having in mind the role of State consent in the creation of international obligations, the potential contribution of universal human rights bodies is short. However, being tied does not equate to being impossible. One good example is the work of the Human Rights Committee[12], which was first asked to decide on cases regarding nuclear tests and nuclear waste[13], although the inauguration of its environmental case-law was left Article 27 of the ICCPR related to the enjoyment of one's culture[14]. Another example of a contribution by human rights bodies is the above-mentioned HRC Resolution adopted in 2021. From a formal angle, it also fits in that category of soft law instruments, but its authoritativeness was able to pave the way for the adoption of the UN General Assembly resolution a year later. The HRC Resolution adopted a conservative approach according to which the effective enjoyment of human

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[11] Committee on the Rights of the Child, *Sacchi et al. v. Argentina et al.,* Decision of 22 September 2021, CRC/C/88/D/104/2019.

[12] Hereinafter referred to as "CCPR".

[13] The first cases were declared inadmissible: *E.H.P. v. Canada* (Communication no. 67/1980) CCPR 27 October 1982; *Bordes & Temeharo v. France* (Communication no. 645/1995) CCPR 22 July 1996.

[14] *Kitok v. Sweden* (Communication no. 197/1985) CCPR 27 July 1988; *Bernard Ominayak and the Lubicon Lake Band v. Canada* (Communication no. 167/1984) CCPR 26 March 1990; *Ilmari Länsman and Others v. Finland* (Communication no. 511/1992) CCPR 8 November 1995; *Jouni Länsman and Others v. Finland* (Communication no. 671/1995) CCPR 30 October 1996; *Apirana Mahuika and Others v. New Zealand* (Communication no. 547/93) CCPR 27 October 2000; *Diergaardt v. Namibia* (Communication no. 760/1997) CCPR 6 September 2000; *Poma Poma v. Peru* (Communication no. 1457/2009) CCPR 27 March 2009.

rights is conditioned to a certain environmental quality, and, consequently, the respect, protection, and promotion of human rights implies negative and positive States' environmental obligations. The set of human rights listed in that resolution includes the right to life, physical and mental health, an adequate standard of living, adequate food, housing, drinking water and sanitation, and participation in cultural life. To that end, and following a broader understanding of the international rule of law that requires cross-regime interaction[15], the resolution links human rights obligations to other obligations under multilateral environmental treaties. This is particularly relevant with regards to procedural environmental obligations (e.g., environmental impact assessment, notification, exchange of information, or consultation[16]) that are regulated in treaties such as the Aarhus Convention or the Escazú Agreement, and which can be used as a benchmark to flesh out States' obligations under human rights law also.

The genealogy of this resolution traces to the request to the UN High Commissioner for Human Rights to carry out a detailed study on the relationship between the environment and human rights[17] and the creation of the mandate of Special Rapporteur for Human Rights and the Environment in 2012. The Special Rapporteur developed and published in 2018 a set of framework principles on the relationship between the environment and human rights[18].

The HRC adopted the *Framework Principles* in the same year and urged States "to implement fully their obligations to respect and ensure human rights […], including in the application of environmental laws and policies"[19]. Having in mind the legal status of the HRC resolutions, urging States' action is possible only because the *Framework Principles* are perceived as an authoritative interpretation of current States' obligations under international human rights law.

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[15] Article 31(3)(c) Vienna Convention on the Law of Treaties.

[16] Okowa, P.N., "Procedural Obligations in International Environmental Agreements", *The British Year Book of International La,*. 1997, Vol. 67(1), pp. 275-336.

[17] HRC Resolution A/HRC/RES/16/11, 12 April October 2011 (*Human rights and the environment*) §1.

[18] Framework principles on human rights and the environment. The main human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. Annex to the Report of the Special Rapporteur on the Issue of Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John Knox, UN Doc A/HRC/37/59 (24 January 2018) (Report of the Special Rapporteur).

[19] HRC Resolution A/HRC/RES/37/L.19, 22 March 2018 (*Human rights and the environment*) §3.

In this regard, one of the goals of the *Framework Principles* is to systematize States' obligations. The perspective is comprehensive and includes the relation between human rights and environmental protection, the fight against discrimination and violence directed against environmentalists, the specification of human rights relevant for environmental protection, and procedural duties (such as the duty to carry out environmental impact assessment studies or the duties relating to the right of access to information, participation, and access to justice). Another set of principles is dedicated, in short, to linking international environmental law and human rights law, insofar as the obligations to create and implement environmental protection standards and the duty to cooperate are recognized as human rights obligations. Finally, a particular detail was given to the obligations to protect and promote in relation to indigenous peoples and, more generally, any people in a particularly vulnerable position.

The *Framework Principles* seem to have been inspired by the previous work of the CCPR and, especially, the Committee on Economic, Social and Cultural Rights[20]. Both are non-judicial bodies responsible for receiving communications regarding the ICCPR[21] and the ICESCR[22] and issuing non-binding recommendations for States. However, their most significant contribution to the *acquis* of environmental obligations under human rights law is the approval of *General Comments* on the interpretation of the ICCPR and the ICESCR.

The CCPR's commentary on Article 6 of the ICCPR (right to life)[23] refers to environmental protection, listing multiple threats to life caused by environmental degradation and climate change, and also various environmental protection duties resulting from the right to life[24], including the due diligence obligation to adopt adequate measures to respond to environmental degradation. It is clearly stated that States' environmental obligations are result from the right to life; therefore, in addition to environmental quality being a condition for the enjoyment of human rights, environmental protection also is part of human rights law[25].

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[20] Hereinafter referred to as "CESCR".

[21] Article 1 of the First Optional Protocol to the International Covenant on Civil and Political Rights.

[22] Article 1 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

[23] General Comment no. 36. Article 6: Right to Life (UN Doc. CCPR/C/GC/36) 3 September 2019.

[24] See §§26 & 62.

[25] Almost 20 years earlier, see Shelton, D., "Human Rights, Environmental Rights, and the Right

With regard to the activity of the CESCR, three *General Comments* are worth analyzing: the General Comments on Article 11, on, among others, the right to adequate food[26] and accommodation[27], and, in particular, the General Comment on Article 12, on the right to health[28], and General Comment 15, on the right to water[29], all from the ICESCR[30]. On the right to adequate food and housing, the CESCR simply stated that these rights are inseparable from the environmental policy. Concerning the right to health, the CESCR declares that a healthy environment is an essential socioeconomic factor and that the right to health entails the duty to prevent and reduce people's exposure to degraded environmental conditions, in the professional context and in general[31]. With regards to the access to water, the CESCR was much more detailed in establishing substantive parameters of environmental protection of freshwater pools. Under the three general comments, States' obligations are framed not as mere obligations of means, but also as obligations of result requiring a certain level of environmental quality[32].

The absence of a human right to a healthy environment with a general and universal scope is linked to the difficulty of legally devising a substantive right to the environment (and not just a set of procedural rights related to

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to Environment", *Stanford Journal of International Law*, 1991, Vol. 28, pp. 112-114, already made this distinction.

[26] General Comment no. 12: The Right to Adequate Food (UN Doc. E/C.12/1999/5) 12 May 1999.

[27] General Comment no. 4: The Right to Adequate Housing (UN Doc. E/1992/23) 13 December 1991.

[28] General Comment no. 14: The Right to the Highest Attainable Standard of Health (UN Doc. E/C.12/2000/4) 11 August 2000. There are other international law instruments that connect the right to life to environmental protection: see Shelton, D., "Human Rights, Health and Environmental Protection: Linkages in Law and Practice", *Human Rights & International Legal Discourse*. 2007, Vol. 1(1), pp. 9-60.

[29] General Comment no. 15: The Right to Water (UN Doc. E/C.12/2002/11) 20 January 2003.

[30] Feris, L., "The Human Right to Sanitation: A Critique on the Absence of Environmental Considerations", *Review of European, Comparative & International Environmental Law*, 2015, Vol. 24(1), pp. 16-26, notes that the connection between environmental problems and sanitation (also under article 11 of the Covenant) is not sufficiently studied.

[31] See §§4 & 15 of the General Comment. The Committee considered the 1972 Stockholm Declaration, the 1992 Rio Declaration, and regional human rights treaties, such as the San Salvador Protocol.

[32] Saul, B., Kinley, D., and Mowbray, J., *The International Covenant on Economic, Social and Cultural Rights. Commentary, Cases and Materials*. Oxford: Oxford University Press, 2014, pp. 1030-1031.

the environment)[33], but also with the difficulty of reaching consensus at the universal level on a normative content accepted by all States, as the economic, social, and cultural priorities and needs for environmental risk management differ from one geographical context to another. This explains why the right to a healthy environment appears at the universal level in a special norm (i.e., the UN Convention on the Rights of the Child) and not in a general norm; but it also explains why non-judicial bodies as the CCPR or the CESCR are hands-tied and can only contribute to the development of States' environmental obligations to a short extent. At the regional level, however, where greater harmonization of values and economic, social and cultural priorities among States Parties exist, the potential to enhance environmental protection by human rights mechanisms is more tangible. At the universal level, it is more likely that States will agree only in low-density environmental obligations under human rights treaties, despite the laudable exception of Article 24 of the UN Convention on the Rights of the Child; and thus human rights bodies have a limited potential to contribute to the crafting and development of a human right to a healthy environment.

2.3. Human rights and the environment at the regional level

2.3.1. The African system

At the regional level, in the first cluster of treaties, one finds Article 24 of the AChHPR, the first to recognize a right of peoples (not of individuals)[34] "to a general satisfactory environment favourable to their development".

The African human rights system is based on the work of the African Court of Human and Peoples' Rights and the African Commission of Human and Peoples' Rights — this latter having the competence to examine communications submitted by States and non-State actors (including individuals), provided there was a prior exhaustion of domestic remedies[35]. A landmark case in the

[33] See, *inter alia*, Amado Gomes, C., "Escrever Verde por Linhas Tortas: O Direito ao Ambiente na Jurisprudência do Tribunal Europeu dos Direitos do Homem", *Revista do Ministério Público*, 2009, Vol. 120(5), pp. 5-7.

[34] Amado Gomes, C., "Direito ao Meio Ambiente na Carta Africana dos Direitos do Homem e dos Povos: Direito do Homem, Direito dos Povos ou *Tertium Genus*?", in Amado Gomes, C. (ed.), *Direito Internacional Do Ambiente: Uma Abordagem Temática*. Lisboa: AAFDL, 2018, pp. 101-106.

[35] Articles 47, 55 and 56 of the AfrCHPR.

AfrCommHPR's understanding of the human rights and the environment is the *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*[36]. The case referred to the exploitation of oil fields that caused significant environmental degradation and health problems in people of the Ogoni ethnicity, which constituted a violation of their human rights. Because the Nigerian State acknowledged all the facts alleged and its responsibility thereunder, the AfrCommHPR could take a bold step and use the opportunity to develop its understanding of States' environmental obligations under the AfrCHPR. To that end, it stated that the right to a satisfactory general environment "imposes clear obligations [...]. It requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources"[37]. Several instruments are then listed as possible means to fulfil these duties, such as land use planning, monitoring, evaluation, and information procedures[38].

This decision should be credited for advancing the environmental case-law in Africa, but also for establishing that economic, social, and cultural rights are as justiciable as any other human right[39]. Furthermore, if comity is a pragmatic methodology of supranational bodies, the *Ogoniland* case is remarkable in terms of how far the AfrCtHPR went in fleshing out detailed environmental States' obligations[40].

However, it is curious how the AfrCommHPR was uncomfortable with referring to States' obligations by reference to a standalone right to a healthy environment and mentioned that a healthy environment is a necessary condition for respecting other rights, namely the right to health. This suggests, faced with the *magna questio* underlying the right to a healthy environment (i.e., does the right hold an autonomous legal content?), the AfrCommHPR was inclined to give a negative answer. A downstream impact of such dogmatic

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[36] Communication no. 155/96, Decision 27 May 2002.

[37] *Idem*, §52.

[38] *Idem*, §53.

[39] Nwobike, C., "The African Commission on Human and Peoples' Rights and the Demystification of Second and Third Generation Rights under the African Charter: Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria", *African Journal of Legal Studies*, 2005, Vol. 1-2, pp. 129-146; Oliveira, H., cit. note 6, p. 778.

[40] Boyle, A., and Redgwell, C., *Birnie, Boyle & Redgwell's International Law and the Environment*. 4th ed. Oxford: Oxford University Press, 2021, p. 288.

difficulty is the fact that the AfrCommHPR could only point to procedural rights related to the environment[41]. Accordingly, a dismaying conclusion seems to be that, had the AfrCHPR not singled out a right to a healthy environment, and the AfrCommHPR would still adopt an identical ruling[42].

This decision was mentioned by the Court of Justice of the Economic Community of West African States ("ECOWAS"), which ruled in 2012 in a case regarding the exact same facts[43]. The ECOWAS Court of Justice audaciously declared that the duties resulting from the enshrinement of the right to a satisfactory environment constitute not only obligations of means, but also of results; and, therefore, that it is by analyzing the existing environmental quality that it can be determined whether States are in breach of the right to a satisfactory environment. Very broadly, the ECOWAS Court of Justice declared that States have the duty to adopt all legislative, administrative, or other measures of surveillance and due diligence to achieve concrete results. Therefore, and despite recognizing that Nigeria had adopted several measures over the years, according to the ECOWAS Court of Justice, these actions were held insufficient for the effective fulfilment of its duties[44].

Despite the explicit reference to the right to a healthy environment under Article 24 of the AfrCHPR, the environmental case-law in the African system also includes an assessment of States' obligations under other human rights provisions, implying that enshrining a right to a healthy environment does not preclude the "green" use of other human rights[45]. This was visible in the *Endorois*[46] and in the *Ogiek*[47] cases, regarding indigenous groups' cultural rights

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[41] *Ibidem*.

[42] *Ibidem*. See, also, Merrills, J.G., "Environmental Rights", in Bodansky, D., Brunnée, J., and Hey, E. (eds.), *The Oxford Handbook of International Environmental Law*. Oxford: Oxford University Press, 2008, p. 669. Also sharing a more nuanced and critical understanding of the "limited" contribution of this case for the development of an environmental case-law, see Lewis, B., *Environmental Human Rights and Climate Change — Current Status and Future Prospects*. Singapore: Springer Nature Singapore, 2018, p. 74.

[43] *Case SERAP v Federal Republic of Nigeria*, Judgment no. ECW/CCJ/JUD/18/12, 14 December 2012.

[44] *Ibidem*, §100.

[45] Dupuy, P.-M., and Viñuales, J.E., cit. note 9, p. 374.

[46] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (AfrCommHR App. no. 276/2003), §§250-251.

[47] *African Commission on Human and Peoples' Rights v. Republic of Kenya* (App. no. 006/2012) AfrCtHPR 26 May 2017, §§176-190.

pursuant to Article 17 of the AfrCHPR. Complementarity is welcome, but also suggestive of the dogmatic difficulties and limited use of an autonomous right to a healthy environment.

2.3.2. The American system

The American system of human rights is another example of a treaty that fits in the first cluster, although in its original, as adopted in 1969, the IACHR had no reference to a right to a healthy environment, or to any environmental value linked to a mainstream social or political human right. Nonetheless, Article 11 of the San Salvador Protocol states that everyone has "the right to live in a healthy environment"[48], which entails States' duties to protect, preserve, and improve the state of the environment. However, this provision is mitigated by Article 19(6) of the protocol, which sets out the non-justiciable character of most human rights set out in the San Salvador Protocol (including the right to a healthy environment), as well as by the fact that not all States Parties to the San Salvador Protocol are also Parties to the IACHR. In this light, Colombia requested the requested the IACtHR to render an advisory opinion regarding States' obligations regarding the marine environment, which implied that the court had first to consider whether a right to a healthy environment is protected directly under the IACHR, or whether at least if there are States' obligations to protect and preserve the marine environment under other human rights listed in the IACHR[49].

Before analyzing this advisory opinion, a brief word is needed to mention that, in the American system, the IACtHR is the centralized judicial authority to settle human rights disputes or to render advisory opinions — but whereas States have direct access to the IACtHR, non-State actors' (including individuals') communications are filtered bby the IACommHR[50]; and whereas some States are under the jurisdiction of both the IACtHR and the IACommHR, others are only subject to the jurisdiction of the IACommHR. Accordingly, both the court and the commission are key for understanding the environmental case-law

[48] See §2.

[49] *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 (IACtHR 15 November 2017) (hereinafter referred to as "OC-23/17").

[50] Article 61 of the IACHR.

under the IACHR, provided there is a prior exhaustion of domestic remedies[51].

In earlier early rulings, the IACtHR and the IACommHR mentioned States' obligations on the protection and preservation of the environment as related and incidental to indigenous groups' right[52]/[53] and other human rights such as the right to access to information[54] — but in OC-23/17, the IACtHR was asked to consider environmental protection detached from indigenous groups' rights. Having in mind the limits imposed by Article 19(6) of the San Salvador Protocol, the IACtHR said that a right to a healthy environment is included in the IACHR by operation of Article 26's open clause[55] (i.e., it allows the IACtHR to recognize as a human right under the IACHR any social, economic, and cultural right that aims to develop the standards set out in the Charter of the Organization of American States)[56]. In particular, the IACtHR noted that the right to a healthy environment under Article 11 of the San Salvador Protocol is included among the economic, social and cultural rights protected by Article 26 IACHR, since Article 29(d) IACHR protects the rights derived from the American Declaration on the Rights and Duties of Man and other international acts of the same nature, which includes the San Salvador Protocol. As such, a standalone right to a healthy environment is perceived by the IACtHR as

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[51] Article 46(1)(a) of the IACHR.

[52] *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, IACtHR Series C no. 79 (31 August 2001), §§145-155; *Indigenous People Kichwa of Sarayaku v. Ecuador*, IACtHR Series C no. 245 (27 June 2012), §§145-147; *Case of the Kuna Indigenous People of Madungandí and the Emebrá Indigenous People of Bayano and their Members v. Panama*, IACtHR Series C no. 284 (14 October 2014) §§111-113; *Kaliña and Lokono Peoples v. Suriname*, IACtHR Case no. 12639 (25 November 2015) §§129-132. See, also, *Yanomani Indians v. Brazil* (IACommHR Decision of 5 March 1985); *Maya Indigenous Community of Toledo District v. Belize* (IACommHR Report of 12 October 2004).

[53] On this topic, see, *inter alia*, Abello-Galvis, R., and Arevalo-Ramirez, W., "Inter-American Court of Human Rights Advisory Opinion OC-23/17: Jurisdictional, Procedural and Substantive Implications of Human Rights Duties in the Context of Environmental Protection", *Review of European, Comparative & International Environmental Law*, 2019, Vol. 28(2), p. 217; Tigre, M.A., "Climate Change and Indigenous Groups: The Rise of Indigenous Voices in Climate Litigation", *e-Publica*. 2022, Vol. 9(3), pp. 210-256.

[54] *Claude Reyes and Others v. Chile*, IACtHR Series C ,o. 151 (19 September 2006) §99.

[55] See, *inter alia*, Rocha, A., and Sampaio, R., "Climate Change before the European and Inter-American Courts of Human Rights: Comparing Possible Avenues before Human Rights Bodies", *Review of European, Comparative, and International Environmental Law*, 2023, Vol. 32(2), p. 281.

[56] OC-23/17 §57; *Indigenous Communities of The Lhaka Honhat (Our and) Association v Argentina, Merits, Reparations, and Costs,* IACtHR Series C no. 420 (6 February 2020) §202. See, also, *Comunidad de La Oroya v. Peru* (IACommHR Decision of 19 November 2020), §142.

part of the *acquis* of human rights protected under the IACHR. Afterwards, in *Lhaka Honhat*, the IACtHR further mentioned that the right to a healthy environment under Article 26 of the IACHR is immediately enforceable[57]. The extraction of a justiciable human right to a healthy environment directly under the IACHR gave rise to significant dissent and two dissenting opinions[58]. For instance, as not all States Parties to the IACHR are also Parties to the San Salvador Protocol, this means that the IACtHR has effectively ignored the role of State consent in international law and extended the scope *ratione personae* of the San Salvador Protocol to States that did not consent to it. Moreover, Article 19(6) of the San Salvador Protocol establishes that only complaints on breaches of the right to trade union association or the right to education may be brought before the IACommHR and the IACtHR, which means that the court has also expanded its own jurisdiction *ratione materiae*. From a methodological angle, obliterating the meaning and scope of Article 19(6) of the San Salvador Protocol and binding non-State Parties to the protocol to the right to a healthy environment raises eyebrows.

In any case, OC-23/17 should be credited for its merits[59]. To begin with, it should be credited for dealing with the topic in a comprehensive manner, elaborating not only on what was requested, but also on all the ramifications concerning the link between human rights and environmental protection. The premises of OC-23/17 are the interdependence between human rights and the environment, and the unity and indivisibility of all human rights. In that light, it should be noted that the IACtHR stated that the right to a healthy environment is an individual and a collective right at the same time[60], which implies that not only individuals, but also groups and communities are rights-holders at the level of primary norms and have standing to enforce the right to a healthy environment. Furthermore, the IACtHR stated that the right to a healthy environment protects autonomous environmental components[61], thus

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[57] *Lhaka Honhat* [2020] §272.

[58] See, *inter alia*, Papantoniou, A., "Inter-American Court of Human Rights Advisory Opinion OC 23/17 of November 15, 2017", *American Journal of International Law*, 2018, Vol. 112(3), p. 463.

[59] On this topic, see, *inter alia*, Tigre, M.A., and Urzola, N., "The 2017 Inter-American Court's Advisory Opinion: Changing the Paradigm for International Environmental Law in the Anthropocene", *Journal of Human Rights and the Environment*, 2021, Vol. 12(1), pp. 24-50.

[60] OC-23/17, §59.

[61] OC-23/17, §62; *Lhaka Honhat*, §203.

having content distinct from other human rights[62] (referring to the protection of forests, rivers, and the sea: this allows the right to a healthy environment to be judicially enforced in the absence of a direct affectation to individuals. The consequences of such a conclusion are of the greatest relevance, at least in theory: damages caused exclusively to protected species, atmospheric pollution, the use of certain chemicals, may be considered a breach of the human right to a healthy environment even when no individual has been directly affected by them[63]. For climate change litigation, for instance, where individual affectation is difficult to establish, this is a major opportunity. Although this is "the" underlying question of the entire building of environmental law[64], this eco-centric statement is particularly significant in an anthropocentric field as human rights law.

The explicit reference to the autonomous content of the right to a healthy environment in the American context is certainly not unrelated to the fact that the regional refusal of a fully anthropocentric model has led to the recognition of rights to nature or natural components (especially for rivers), as provided for in the Constitution of Ecuador and in Bolivian national laws[65]. Therefore, the IACtHR's conclusions from the IACtHR must be considered exclusively at a regional level. Although some discussion has occurred in Europe on this paradigm shift, the rooted and classic Western doctrine of protection of rights for the optimization of spheres of individual freedom may explain why this evolution seems to find resistance[66], thus maintaining a strictly reflexive environmental protection in the context of human rights.

However, it should also be noted that it is not clear whether the IACtHR

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[62] OC-23/17, §63.

[63] Oliveira, H., cit. note 6, p. 782; Siwior, P., "The Inter-American Court of Human Rights Advisory Opinion OC-23/17 on the Relationship between Human Rights and the Environment", *Review of European and Comparative Law*, 2021; XLVI(3), pp. 185-186.

[64] See, *inter alia*, Gillespie, A., "An Introduction to Ethical Considerations in International Environmental Law", in Fitzmaurice, M., Ong, D. M., and Merkouris, P. (eds.), *Research Handbook on International Environmental Law*. Cheltenham: Edward Elgar Publishing, 2010, pp. 118-133; Stone, C.D., "Ethics and International Environmental Law", in Bodansky, D., Brunnée, J., and Hey, E. (eds.), *The Oxford Handbook of International Environmental Law*. pp. 295-300.

[65] Borràs, S., "New Transitions from Human Rights to the Environment to the Rights of Nature", *Transnational Environmental Law*, 2016, Vol. 5(1), pp. 113-43.

[66] Schimmöller, L., "Paving the Way for Rights of Nature in Germany: Lessons Learnt from Legal Reform in New Zealand and Ecuador", *Transnational Environmental Law*, 2020, Vol. 9(3), p. 585; Gutmann, A., "Pachamama Als Rechtssubjekt", *Zeitschrift Für Umweltrecht*, 2019, Vol. 11, pp. 616-17.

is actually autonomizing a substantive right to a healthy environment: on the one hand, it still stresses the correlation between vulnerability and the direct or indirect repercussion on individuals due to their connection with other rights[67], and elaborates on the environmental obligations arising from the rights to life and personal integrity[68], since the request submitted by Colombia asked about States' obligations under these latter human rights specifically[69]; on the other hand, the environmental obligations identified by the IACtHR are only procedural obligations related to the environment, namely the obligation of supervising and monitoring activities, the obligation of carrying out environmental impact assessment studies, and the obligation of guaranteeing access to environmental information and participation in procedures and access to justice. In this regard, the line of arguments of the IACtHR is more duty-based, than rights-based, as it defined the content of the right to a healthy environment based on the conclusions from a 2015 Report of the Working Group to monitor the implementation of the San Salvador Protocol[70], which were exclusively duty-based. The same line of arguments is likely to be followed in the future, namely in the advisory opinion requested by Chile and Colombia regarding States' obligations to mitigate and adapt to climate change, where the IACtHR is likely to resort to the duty-based grammar of the IACommHR's Resolution no. 3/2021[71]/[72]. Following a duty-based approach, however, seems to contradict the existence of an autonomous and substantive right to a healthy environment.

2.3.3. The Arab and Asian contexts

The first cluster of treaties also includes Article 38 of the Arab Charter

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[67] OC-23/17, §59.

[68] OC-23/17, §§64 & 69.

[69] Lewis, B., cit. note 43, p. 74.

[70] Progress indicators for measuring rights contemplated in the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, "Protocol of San Salvador" (OEA/Ser.D/XXVI.11), 2015, by the Working Group of the San Salvador Protocol, p. 97.

[71] IACommHR, Resolution no. 3/2021, *Climate Emergency: Scope of the Inter-American Human Rights Obligations* (31 December 2021).

[72] Rocha, A., and Sampaio, R., cit. note 56, p. 282.

on Human Rights, which states that everyone has the right to an "adequate standard of living for himself and his family, which ensures their well-being and a decent life, including [...] the right to a healthy environment". It is unclear how autonomous the right to a healthy environment is in relation to the human right to an adequate standard of living and to well-being and a decent life, but the explicit reference to environmental values is significant. In the Asian context, Article 28(f) of the ASEAN Human Rights Declaration also recognizes explicitly the human right "to a safe, clean and sustainable environment, as a component element of the right to an adequate standard of living", although the autonomy of the right to a healthy environment is questionable and, in any case, this declaration is not formally binding[73].

2.3.4. The European system

The European context is a good example of the second cluster of treaties, where judicial development led by the ECtHR ended up with the incorporation of derivative environmental obligations in the scope of mainstream human rights. Leaving aside treaties such as the Aarhus Convention[74] (whose scope is limited to the rights of access to environmental information and participation in administrative or judicial proceedings concerning environmental issues)[75], it should be noted that, in the European context, there is no provision specifically designed to protect the right to a healthy environment[76], without prejudice

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[73] However, the ASEAN Human Rights Declaration can be conceived of as a precursor of a future human rights treaty in the region. See Renshaw, C.S., "The ASEAN Human Rights Declaration 2012", *Human Rights Law Review*, 2013, Vol. 13(3), p. 558.

[74] *Convention on the Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*.

[75] The preamble of the Aarhus Convention refers to the link between procedural rights related to the environment and the very protection of a healthy environment (see §8), and further recognizes that an "adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself" (see §6), as well as 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" (see §7, emphasis added).

[76] *López Ostra v. Spain* (App. no. 16798/90) ECtHR 9 December 1994, §40; *Kyrtatos v. Greece* (App. no. 41666/98) ECtHR 22 May 2003, §52; *Hatton and Others v. the United Kingdom* (App. no. 36022/97) ECtHR [GC] 8 July 2003, §96; *Fadeyeva v. Russia* (App. no. 55723/00) ECtHR 9 June 2005, §68; *Hamer v. Belgium* (App. no. 21861/03) ECtHR 27 November 2007, §79; *Fägerskiöld v. Sweden* (App. no. 37664/04) ECtHR (Decision) 26 February 2008, p. 14; *Rimer and Others v. Turkey* (App. no. 18257/04) ECtHR 10 March 2009, §38; *Leon and Agnieszka Kania v. Poland* (App. no.

to the Parliamentary Assembly of the Council of Europe's proposal and draft text of a new protocol to the ECHR on the right to a safe, clean, healthy and sustainable environment[77] (which is defined as "the right of present and future generations to live in a non-degraded, viable and decent environment that is conducive to their health, development and well-being")[78] — protocol that has not been adopted yet.

In fact, historically and ontologically, the ECHR was designed to protect civil and political rights and freedoms[79], but this did not prevent the ECHR from "greening"[80] the ECHR's articles: thus, insofar as a healthy environment is a necessary and prior condition for the enjoyment of human rights, environmental values are indirectly and implicitly incorporated into the ECHR[81]. In this regard, the ECtHR noted, in *López Ostra*, that "severe

12605/03) ECtHR 21 July 2009, §98; *Oluić v. Croatia* (App. no. 61260/08) ECtHR 20 May 2010, §45; *Ivan Atanasov v. Bulgaria* (App. no. 12853/03) ECtHR 2 December 2010, §66; *Dubetska and Others v. Ukraine* (App. no. 30499/03) ECtHR 10 February 2011, §105; *Zammit Maempel v. Malta* (App. no. 24202/10) 22 November 2011, §36; *Martínez Martínez and Pino Manzano v. Spain* (App. no. 61654/08) ECtHR 3 July 2012, §42; *Flamenbaum and Others v. France* (Apps. nos. 3675/04 and 23264/04) ECtHR 13 December 2012, §133; *Cordella and Others v. Italy* (Apps. nos. 54414/13 & 54264/15) ECtHR 24 January 2019, §100. However, in *Tătar* and in *Di Sarno*, Sarno, the ECHR specifically specifically referred to a protected legal interest to a healthy environment, which is close to stating a standalone right to a healthy environment: *Tătar v. Romania* (App. no. 67021/01) [2009] §107; *Di Sarno and Others v. Italy* (App. no. 30765/08) [2012] §110.

[77] Parliamentary Assembly of the Council of Europe, "Recommendation no. 2211, Anchoring the Right to a Healthy Environment: Need for Enhanced Action by the Council of Europe" (29 September 2021). Historically, however, all proposals for the recognition of a human right to a healthy environmental have been refused, in part because of the highly developed environmental case-law of the ECtHR under the current catalog of human rights: see Boyle, A., and Redgwell, C., cit. note 41, p. 290; Schabas, W.A., *The European Convention on Human Rights: A Commentary*. Oxford: Oxford University Press, 2015, pp. 23-24.

[78] Article 1.

[79] Rocha, A., "Alterações Climáticas", in Amado Gomes, C., and Oliveira, H. (eds.), *Tratado de Direito do Ambiente*. Lisbon: AAFDL, 2022, p. 102.

[80] Report of the Special Rapporteur on the Issue of Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John Knox, UN Doc A/HRC/73/188 (19 July 2018) (Report of the Special Rapporteur) §§12 ff.. See also, inter alia, Boyle, A., and Redgwell, C., cit. note 41, pp. 302 ff.; Fitzmaurice, M., Wong, M. S., and Crampin, cit. note 9, p. 118.

[81] See, e.g., Edel, F., "Les obligations en trompe-l'œil des États parties à la Convention Européenne des Droits de l'Homme en matière de l'environnement", *Revue Française d'Administration Publique*, Vol. 179, 2021, p. 700; Rocha, A., and Sampaio, R., cit. note 56, p. 3; Sudre, F., Milano, L., Surrel, H., and Pastre-Belda, B., *Droit européen et international des droits de l'homme*. 15th ed. Paris: PUF, 2021, p. 745.

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"[82]. Accordingly, although the ECtHR does not (and cannot) mention a human right to a healthy environment[83], if environmental degradation endangers the effective enjoyment of any human right listed in the ECHR (in this latter case, under Article 8), States have derivative obligations to protect and preserve the environment — i.e., they bear secondary environmental obligations derived from other human rights provisions and are instrumental to the fulfilment of their obligation to respect, protect and ensure the enjoyment of those other human rights[84]. After *López Ostra*, it became established in the case-law that the ECHR incorporates an indirect protection of the environment under Articles 8 (right to domicile and family life) and 2 (right to life) of the ECHR, and under Article 1 of Protocol 1 to the ECHR (right to property)[85]. Other human rights provisions can also be triggered, if *in casu* they are relevant. For instance, freedom of speech was at stake in the recently decided *Bryan* case[86], putting an end to the *Arctic Sunrise* saga.[87] In fact, the evolutive interpretation of the ECHR that incorporates environmental obligations in the scope of mainstream human rights means that any other human right may be mobilized

[82] *López Ostra* [1994] §51.

[83] Edel, F., cit. note 82, p. 699; Marguénaud, J.-P., "Droit de l'homme à l'environnement et Cour européenne des droits de l'homme", *Revue juridique de l'environnement* 2023, special issue, p. 1.

[84] *López Ostra* [1994] §51.

[85] See, *inter alia*, *Fredin v. Sweden* (App. no. 12033/86) ECtHR 18 February 1991; *Pine Valley Developments Ltd. and Others v. Ireland* (App. no. 12742/87) ECtHR 29 November 1991; *Hamer v. Belgium* (App. no. 21861/03) ECtHR 27 November 2007; *Depalle v. France and Brosset-Triboulet and Others v France* (Apps. nos. 34044/02 & 34078/02) ECtHR 29 March 2010; *Costel Popa v. Romania* (App. no. 47558/10) ECtHR 26 April 2016; *Kristiana Ltd. v. Lithuania* (App. no. 36184/13) ECtHR 6 February 2018; *O'Sullivan McCarthy Mussel Development Ltd. v. Ireland* (App. no. 44460/16) ECtHR 7 June 2018; *Yasar v. Romania* (App. no. 64863/13) ECtHR 26 November de 2019.

[86] *Bryan and Others v. Russia* (App. no. 22515/14) ECtHR 27 June 2023. Before this ruling, see also *Vides Aizsardzības Klubs v. Latvia* (App. no. 57829/00) ECtHR 27 May 2004; *Rovshan Hajiyev v. Azerbaijan* (Apps nos. 19925/12 & 47532/13) ECtHR 9 December 2021; Bumbes v. Romeania (App. no. 18079/15) ECtHR 3 May 2022.

[87] For a bird's eye view of the ECtHR's environmental case-law, see Oliveira, H., cit. note 6, pp. 795-799.

in case of environmental degradation[88]. A similar approach was adopted by the European Committee of Social Rights, which mentioned that environmental degradation may amount to an infringement of the right to health protected by Article 11 of the ESC[89]. To help States to understand their obligations under the ECHR, the Council of Europe published, in 2012, the *Manual on Human Rights and the Environment*, which provides a comprehensive list of States' environmental obligations under the ECHR and the ESC. Curiously, although the European context is deprived of a rule enshrining a standalone right to a healthy environment, it is also where one finds the most developed and detailed environmental case-law.

This open-ended approach is unsurprising. Using Wessel's terminology[90], human rights treaties are not an end-game, but rather open to evolutionary interpretation in the light of the new circumstances and threats to the enjoyment of human rights[91]. If environmental factors impair the enjoyment of the human rights listed in the ECHR, the ECtHR may assess violations based on environmental deterioration.[92] Judicial constrain explains why the court cannot mention a right to a healthy environment, but can unveil derivative, environment-related obligations under the ECHR.[93] This is what the "greening" of human rights means.

As a result, in the European context, environmental obligations were first identified in *López Ostra* as implicit in Article 8 of the ECHR. According to the ECtHR, this provision entails substantive obligations of respecting and securing one's well-being, and of ensuring that environmental harms are not of such

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[88] Dupuy, P.-M., and Viñuales, J.E., cit. note 9, p. 365. The authors give an example of the imaginative interpretation of the ECtHR, which considered environmental degradation (i.e., passive smoking) as being under the prohibition of torture: *Florea v. Romania* (App. no. 37186/03) ECtHR 14 September 2010, §§50-51; *Elefteriadis v. Romania* (App. no. 38427/05) ECtHR 25 January 2011, §§47-55.

[89] *Marangopoulos Foundation for Human Rights (MFHR) v. Greece* (Complaint no. 30/2005) Decision (Merits) 6 December 2006, §§202 ff..

[90] Wessel, J., "Relational Contract Theory and Treaty Interpretation: End-Game Treaties v. Dynamic Obligations", *NYU Annual Survey of American Law*, 2004, Vol. 60, p. 149.

[91] *Tyrer v. the United Kingdom* (App. no. 5856/72) [1978] §31. In the case of the ESC, see *Mangaropoulos* [2006] §194.

[92] Boyle, A., and Redgwell, C., cit. note 41, p. 290.

[93] Knox, J., "Climate Change and Human Rights Law", *Virginia Journal of International Law*, 2009, Vol. 50, pp. 169 ff..

magnitude to severely impair one's capacity to enjoy it, including protection from detrimental environmental effects caused by other States.[94] There is an ontological reason why the ECtHR uses Article 8 of the ECHR: in most cases, harm was caused to individuals living in the vicinity of the risk-source, meaning that harm, victims, and causation links were physically visible.[95] Therefore, Article 8 of the ECHR provided a useful spatial and temporal tool to set causation and identify the pool of victims, and to connect them to the risky activity. The bulk of the ECtHR's case-law refers to Article 8 of the ECHR, since most cases affected the well-being of individuals, but not their lives directly. But once life is affected, as happened in *Öneryildiz*,[96] cases fit better in Article 2 of the ECHR.

The dogmatic key used in *López Ostra* is the doctrine of positive obligations inherent to the effective enjoyment of human rights[97]. Under this doctrine, States are required to adopt a regulatory framework that orchestrates private conduct in order to properly prevent, mitigate, eliminate, or repair environmental harms, as well as to authorize, control, and subsequently monitor such conduct[98]. Binding States to an obligation to prescribe rules and to a due diligence obligation of controlling private conduct is especially stringent in the case of dangerous activities[99], and includes the adaptation and adoption of

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[94] Boyle, A., and Redgwell, C., cit. note 41, p. 293; Lewis, B., cit. note 43, p. 178.

[95] Rocha, A., and Sampaio, R., cit. note 56, p. 283.

[96] *Öneryildiz v. Turkey* (App. no. 48939/99) ECtHR 30 November 2004.

[97] *López Ostra* [1994] §52; *Guerra and Others v. Italy* (App. no. 14967/89) ECtHR 19 February 1998, §58; *Hatton* [2003] §98; *Moreno Gómez v. Spain* (App. no. 4143/02) ECtHR 16 November 2004, §55; *Öneryildiz* [2004] §71; *Fadeyeva* [2005] §89; *Giacomelli* (App. no. 59909/00) ECtHR 2 November 2006, §78; *Budayeva and Others v. Russia* (Apps. nos. 15339/02, 11673/02, 15343/02, 20058/02 & 21166/02) ECtHR 20 March 2008, §130; *Borysiewicz v. Poland* (App. no. 71146/01) ECtHR 1 July 2008, §50; *Branduse v. Romania* (App. no. 6586/03) ECtHR 7 April 2009, §63; *Leon and Agnieszka Kania* [2009] §99; *Tătar* [2009] §87; *Băcilă v. Romania* (App. no. 19234/04) ECtHR 30 March 2010, §60; *Deés v. Hungary* (App. no. 2345/06) ECtHR 9 November 2010, §21; *Oluić* [2010] §46; *Di Sarno* [2012] §§105-106; *Maempel* [2012] §61; *Martínez Manzano* [2012] §42; *Cordella* [2019] §§159-160.

[98] *Hatton* [2003] §98; *Öneryildiz* [2004] §§89-90; *Fadeyeva* [2005] §89; *Tătar* [2009] §§87-88; *Ledyayeva, Dobrokhotova, Zolotareva & Romashina v. Russia* (Apps. nos. 53157/99, 53247/99, 53695/00 & 56850/00) ECtHR 26 October 2006, §108; *Budayeva* [2008] §129; *Tătar* [2009] §§87-88; *Kolyadenko and Others v. Russia* (Apps. nos. 17423/05, 20534/05, 20678/05 23263/05, 24283/05 & 35673/05) ECtHR 20 February 2012, §157.

[99] *Öneryildiz* [2004] §90; *Budayeva* [2008] §§130 & 132; *Tătar* [2009] §88; *Băcilă* [2010] §61; *Kolyadenko* [2012] §158.

preventive measures with regards to natural disasters[100]. Most environmental threats are not directed to one individual specifically, but States' obligations to prescribe, enforce, monitor, and control include the protection against threats directed to society in general[101]. In this regard, States' obligations include the obligation to deploy all means (prescriptive and enforcement) to secure the effective enjoyment of the human rights to life and to one's well-being, domicile, and family life, hand in hand with procedural obligations regarding the right of access to information, the conduction of the appropriate environmental studies (including environmental impact assessment studies), the right of participation in proceedings before administrative authorities, and the right of access to justice in environmental cases. Unsurprisingly, the bulk of the ECtHR's case-law refers to these procedural obligations[102].

As a result of the absence of a standalone right to a healthy environment in the ECHR, the use of the ECHR in environmental cases is "heavily circumscribed"[103] for three reasons — although much more developed than in other human rights systems. In the first place, because mainstream human rights are only mobilized if there is a minimum level of severity[104]. The ECtHR is intentionally vague with regards to the minimum level of pollution and aimed to establish a plastic guideline that may be adapted to different cases. The threshold was not established when human life is threatened, but a high level of pollution severity implies that the case is raised under Article 2 of the ECHR, instead of Article 8 ECHR[105].

In *Fadeyeva*, of the ECtHR established its understanding of the minimum level of severity test by stating that "the adverse effects of environmental

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[100] *Murillo Saldias and Others v. Spain* (App. no. 76973/01) ECtHR (Dec.) 28 November 2006; *Budayeva* [2008] §111.

[101] E.g., *Mastromatteo v. Italy* (App. no. 37703/97) ECtHR 24 October 2002, §§72-77; *Maiorano and Others v. Italy* (App. no. 28634/06) ECtHR 15 December 2009, §107; *Choreftakis and Choreftaki v. Greece* (App. no. 46846) ECtHR 17 January 2012, §48; *Bljakaj and Others v. Croatia* (App. no. 74448/12) ECtHR 18 September 2014, §121.

[102] Sudre, F., cit. note 82, p. 748.

[103] Edel, F., cit. note 82, p. 706; Rainey, B., McCormick, P., and Ovey, C., *Jacobs, White, and Ovey The European Convention on Human Rights*. 8th ed. Oxford: Oxford University Press, 2021, p. 453.

[104] *López Ostra* [1994] §51; *Guerra* [1998] §60; *Kyrtatos* [2003] §§52-54; *Fadeyeva* [2005] §69; *Dubetska* [2011] §105; *Di Sarno* [2012] §104.

[105] Harris, D.J., O'Boyle, M., Bates, E.P., and Buckley, C.M., *Harris, O'Boyle & Warbrick Law of the European Convention on Human Rights*. 4th ed. Oxford: Oxford University Press, 2018, p. 563.

pollution must attain a certain minimum level [...]. The assessment of that minimum is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance, and its physical or mental effects. The general context of the environment should also be taken into account. There would be no arguable claim [...] if the detriment complained of was negligible in comparison to the environmental hazards inherent to life in every modern city"[106]. Therefore, "complaints relating to environmental nuisances have to show, firstly, that there was an actual interference with the applicant's private sphere, and, secondly, that a level of severity was attained"[107]. Afterwards, in *Dubetska*, the ECtHR further mentioned that "no issue will arise if the detriment complained of is negligible in comparison to the environmental hazards inherent in life in every modern city. However, an arguable claim [...] may arise where an environmental hazard attains a level of severity resulting in significant impairment of the applicant's ability to enjoy his home, private or family life."[108]

In the second place, the limited use of the ECHR in environmental cases results from the ECtHR's understanding of victimhood, which is subject to an assessment of a personal and differentiated interest in comparison with other members of society[109], as well as to a test of a "direct and immediate impact"[110]. This assessment is more flexible under Article 2 of the ECHR than under Article 8 of the ECHR: whilst in the first case the ECtHR is satisfied with a proof of likelihood of the harm[111], in the second case the ECtHR at best is satisfied with reasonable and convincing evidence on the probability of causation of the harm, or resorts to the precautionary principle as it did in *Tătar*.

The reason is straightforward: not only the value protected under Article 2 of the ECHR is particularly sensitive, but also Article 8 of the ECHR provides a spatial tool to assess what harm was caused to what individuals in small-scale, spatially confined events — which means that it is

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[106] *Fadeyeva* [2005] §69.

[107] *Fadeyeva* [2005] §70.

[108] *Dubetska* [2011] §105.

[109] *Marckx v. Belgium* (App. no. 6833/74) [1979] §27.

[110] *Guerra* [1998] §57; *Hatton* [2003] §96; *Kyrtatos* [2003] §52; *Fadeyeva* [2005] §68; *Tătar* [2009] §86.

[111] *L.C.B. v. United Kingdom* (App. no. 23413/94) ECtHR 9 June 1998 §38; *Öneryildiz* [2004] §93; *Budayeva* [2008] §147.

not particularly demanding for the ECtHR to ask for a demonstration of an effective harm being produced under Article 8 of the ECHR.

In the *Cordella* case, however, the ECtHR lightened its approach and relied on science to state that a high environmental risk was 'undoubtedly' responsible for harmful consequences to the applicants' well-being[112], and the same flexibility is obviously inherent to Article 2 of the ECHR. Nonetheless, assessing the direct and immediate impact is problematic, because in most cases applicants need to demonstrate the indirect, downstream, aggregate, time-delayed, and disruptive effect of a particular event — having in mind that "it is hard to distinguish the effect of environmental hazards from the influence of other relevant factors"[113]. This fits in the very definition of a *probatio diabolica*[114] and explains why the environmental case-law of the ECtHR (premised on the absence of a standalone right to a healthy environment) is more conservative and concerned with causation assessments if compared with other human rights courts.

2.4. Margin of appreciation

From an institutional angle, there are common challenges faced by human rights bodies resulting from their nature as *supranational* and (*quasi-*)*judicial* bodies: on the one hand, being detached from the domestic judiciary apparatus means they are legally and culturally more distant from the political community and do not have the same direct legitimacy, which implies that they only have a subsidiary role in human rights governance (in spite of the presence of a national judge in the panel of judges); on the other hand, the separation of powers principle entails that courts cannot replace the political and legislative branches of the government in the making of value-based choices and trade-offs. The problem, however, is that the protection of a human right to a healthy environment (even if directly protected as a standalone right under a treaty-based provision) is rarely clear-cut, since in most cases, the protection of a component of the environment conflicts with other the enjoyment of another human right and/or with a State's public policies. Therefore, a supranational, judicial review of a national measure or policy can easily be perceived as

[112] *Cordella* [2019] §§106-107.

[113] *Ledyayeva* [2006] §90; *Dubetska* [2011] §106.

[114] E.g., Report of the Office of the UN High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights, UN Doc. A/HRC/10/61, 15 January 2009, §70.

more intrusive in environmental-related cases than in other human rights cases. This concern was voiced in *Hatton*, where the ECtHR "reiterate[d] the fundamentally subsidiary role of the Convention", since "national authorities have direct democratic legitimation and are [...] in principle better placed than an international court to evaluate local needs and conditions. [...] In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight"[115].

The case-law of the AfrCtHPR and of the IACtHR is not sufficiently developed yet on this topic, but the ECtHR has already touched upon it, especially when having to read the list of exceptions set out in Articles 2(2) and 8(2) of the ECHR. In general, their reading by the ECtHR is restrictive and includes an assessment of the goal aimed by the national measure and the balance of competing interests performed by domestic authorities — although whilst the ECtHR is reluctant to defer to national authorities in cases regarding the right to life, such deference is common in cases under Article 8 of the ECHR. In environmental cases, however, a policy of deference to national authorities was forged in *Hatton*. Here, the ECtHR mentioned that "[e]nvironmental protection should be taken into consideration by States in acting within their margin of appreciation and by the Court in its review of that margin, but it would not be appropriate for the Court to adopt a special approach in this respect by reference to a special status of environmental human rights"[116]. Therefore, it concluded that "[w]hilst the State is required to give due consideration to the particular interests, the respect for which it is obliged to secure by virtue of Article 8, it must in principle be left a choice between different ways and means of meeting this obligation. The Court's supervisory function being of a subsidiary nature, it is limited to reviewing whether or not the particular solution adopted can be regarded as striking a fair balance"[117]. In this light, the ECtHR established that "in cases raising environmental issues the State must have a *wide* margin of appreciation"[118].

In this light, the ECtHR stated that its core function is to examine the fairness of the domestic decision-making process — and "only in exceptional

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[115] *Hatton* [2003] §97.

[116] *Hatton* [2003] §122.

[117] *Hatton* [2003] §123. See also *Dubetska* [2011] §141.

[118] *Hatton* [2003] §100; *Taşkin and Others v. Turkey* (App. no. 46117/99) [2004] §116; *Dubetska* [2011] §141 (emphasis added).

circumstances may it go beyond this line and revise the material conclusions of the domestic authorities"[119]. As such, in *Fadeyeva*, for instance, the ECtHR corrected the domestic balance of interests, but only after noticing "a manifest error of appreciation by the national authorities in striking a fair balance between the competing interests"[120]. The primary focus of the ECtHR is to assess if domestic authorities conducted sufficient studies to evaluate the risks of a potentially hazardous activity; if, on the basis of the information available, they developed an adequate policy *vis-à-vis* polluters; if all necessary measures have been taken to enforce this policy in good time; and if the affected individuals were able to contribute to the decision-making process, including if they had access to the relevant information and the ability to challenge the authorities' decisions in an effective way[121]. Furthermore, it also mentioned that States have the onus "to justify, using detailed and rigorous data, a situation in which certain individuals bear a heavy burden on behalf of the rest of the community"[122], but this assessment seems to be merely formal and procedural.

Accordingly, the standard of review adopted by the ECtHR is essentially procedural and the "domestic legality" does not seem to be just one factor to assess, as the ECtHR said[123], but actually the very standard of assessment. This suggests that in cases "where the State's failure to act was in issue, the Court [prefers] to refrain from revising domestic environmental policies"[124]. This implies that, apparently, it is more likely for the ECtHR to declare an infringement on grounds of manifest error or failure to comply with procedural obligations, or if the national conduct is in breach of the State's own legislation[125]. As a consequence, a proportionality test (which should be

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[119] *Fadeyeva* [2005] §105; *Dubetska* [2011] §142.

[120] *Fadeyeva* [2005] §105. See also *Taşkin* [2004] §117 (prior to *Fadeyeva*); *Dubetska* [2011] §142.

[121] *Guerra* [1998] §60; *Hatton* [2003] §§127-128; *Taşkin* [2004] §119; *Giacomelli* [2006] §§86 and 92-93; *Ledyayeva* [2006] §104; *Dubetska* [2011] §143.

[122] *Fadeyeva* [2005] §128; *Dubetska* [2011] §145.

[123] *Dubetska* [2011] §141.

[124] *Fadeyeva* [2005] §104.

[125] *López Ostra* [1994] §§54-56; *Hatton* [2003] §120; *Moreno Gómez* [2004] §63; *Taşkin* [2004] §117; *Fadeyeva* [2005] §§116; *Olui*ć [2010] §66; *Deés* [2010] §§23-24; *Dzemyuk v. Ukraine* (App. no. 42488/02) ECtHR 4 September 2014, §88. See, also, Boyle, A., and Redgwell, C., cit. note 41, pp. 305-306; Lewis, B., cit. note 43, pp. 26-27.

the crux of issue) is not common in the case-law of the ECtHR; and when it its performed, in environmental cases the ECtHR follows the lenses of States' economic interests (in order not to encroach on its sovereignty)[126], instead of using individuals-based lenses (in order to shield one's rights or freedoms). Recognizing such a wide margin of appreciation is explained by the fact that States also have a constitutional duty to fulfil other human rights and satisfy other social needs, although resources are limited — but what this ultimately means is that the ECtHR has been forfeiting the exercise of judicial control on grounds of proportionality or balance of interests in environmental cases except in *ad terrorem* cases, thereby lowering the standard of compliance.[127] In the *Cordella* case, however, the ECtHR resorted instead to the expression "a *certain* margin of appreciation", but that only helps to a very limited extent[128]. Future cases will explain if the ECtHR will lighten its policy of deference to national authorities — and if the AfrCtHPR and the IACtHR adopt a looser conception of the separation of powers principle.

Although dogmatically autonomous from the topic of the margin of national appreciation, the execution of judgments and other decisions from human rights bodies and courts is a controversial topic where the same issue of States' discretion is raised. Once again, the ECHR is the best example of a sophisticated regional system of human rights, where a duty to enforce the ECtHR's judgments at the domestic level and a supervision procedure are established[129]. However, even in the ECHR system, States hold a margin of discretion in the execution and implementation of the ECtHR's judgments[130], since such implementation can require the intervention of the legislative and executive branches of the government. The subsidiary nature of the ECtHR's intervention, thereby, explains why States hold the freedom to choose the means to enforce and implement the judgments issued by the ECtHR[131]. Accordingly, the enforcement supervision entrusted to the Committee of

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[126] Edel, F., cit. note 82, pp. 710-711.

[127] Edel, F., cit. note 82, p. 709; Sudre, F., *et al.* cit. note 82, pp. 748-750.

[128] *Cordella* [2019] §158 (emphasis added).

[129] See Article 46 ECHR.

[130] See, *e.g.*, Rocha, A., *O Contencioso dos Direitos do Homem no Espaço Europeu — O Modelo da Convenção Europeia dos Direitos do Homem*. Lisboa: Universidade Católica Editora, 2010, p. 159.

[131] Rocha, A., cit. note 130, pp. 167 ff..

Ministers[132] aims to assist States in finding the best means to enforce an ECtHR's judgment, notwithstanding the freedom of the State to decide how to execute and implement such judgment in light of its constitutional framework and the ruling of the ECtHR. At that level, State organs can balance the *dictum* of an ECtHR's decision with other domestic needs and priorities, as well as the available means, so that to decide how to better enforce that decision. Here, however, it is less evident whether supranational bodies (judicial or not) have a sociological and constitutional legitimacy to intervene and micromanage the execution and implementation of a judgment from the ECtHR or other human rights body.

2.5. Extraterritoriality

The most difficult topic with regards to human rights and the environment refers to States' extraterritorial jurisdiction under clauses such as Article 2 of the ICCPR, Article 2 of the UN Convention on the Rights of the Child, Article 1 of the ECHR, or Article 1(1) of the IACHR: by nature, environmental harms have a transboundary potential (and in the cases of global commons, such as the marine environment or the atmosphere, the transboundary impact is inherent), but States prescriptive and enforcement means are limited by the territoriality of State sovereignty. In fact, the doctrine of jurisdiction is challenging to apply in the context of human rights[133]. These difficulties largely derive from the fact that the concept of (*de jure*) jurisdiction used in general international law differs from the concept of (*de facto*) jurisdiction under human rights treaties. To determine States' *de jure* jurisdiction arising from environmental harms is a difficult task, but to determine their *de facto* jurisdiction under human rights treaties is much more difficult. Furthermore, a liberal understanding of States' *de facto* extraterritorial jurisdiction could imply that States would have to claim *de jure* extraterritorial jurisdiction they do not have under the current general international law.

De facto jurisdiction is needed for triggering the application of human rights treaties[134]. Because human rights bodies need to adopt a rights-based approach, jurisdiction is assessed in terms of "effective control" over the

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[132] Article 46(2) ECHR.

[133] MILANOVIĆ, M., *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*. Oxford: Oxford University Press, 2011.

[134] *Ilaşcu and Others v Moldova and Russia* (App. no. 48787/99) ECtHR 8 July 2004, §311.

"affected individuals"[135]. In most cases, one can presume *de facto* jurisdiction if States hold *de jure* territorial jurisdiction, but the "effective control over the affected individual" is needed to establish extraterritorial jurisdiction. But not with regards to environmental harms.

The concept of *de facto* extraterritorial jurisdiction refers to cases where the "effective control" exists over both the "source of risk" and the "affected individual". This may lead to the odd but uncommon situation in which a harmful conduct (e.g., deprivation of human life) could be attributable to the State under the general rules of State responsibility for an internationally wrongful act (although it does not necessarily mean the wrongfulness of the conduct), but human rights treaties are not applicable on grounds of lack of extraterritorial jurisdiction for failure to exercise effective control over the victim[136]. The drafters of human rights treaties assumed that States would infringe human rights of those within their territory, and exceptions would be marginal and covered by the doctrine of *de facto* jurisdiction — but environmental risk defies any notion of spatially determined jurisdiction[137]. Here, the mismatch between "control" over the "source of risk" and the "victim" is the normal case: if an environmental harm or risk is transboundary, a State may exercise "effective control" over the source of the risk and activity but lack any "control" over those affected by the activity. Ultimately, this is the result of an intrinsic feature of most environmental risk and harm: being transboundary, there is a mismatch between those who create and those who are affected by the risk or harm. This means that, in such cases, the conduct is attributable to a State under general international law, but *de facto* jurisdiction (a concept different from attribution) is not possible to establish. The question from the point of view of applicants, therefore, is how to extend *de facto* jurisdiction diagonally to include individuals living outside the State territory.

A more flexible notion of extraterritorial jurisdiction is not alien to legal discourse. The *Trail Smelter* award and Principle 21 of the Stockholm Declaration, for instance, establish that States cannot cause environmental harms beyond their borders. In that light, some authors have asked whether States can have an obligation to secure the human rights of individuals in other States against the environmental harms produced within their jurisdiction[138].

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[135] *Ilașcu* [2004] §115.

[136] *Banković and Others v Belgium and Other 16 European States* (App. no. 52207/99) ECtHR 12 December 2001.

[137] Rocha, A., and Sampaio, R., cit. note 56, pp. 286-287.

[138] Boyle, A., and Redgwell, C., cit. note 41, p. 293.

In that context, they have invoked the universality of human rights law or the principle of non-discrimination which requires the rights to life and to one's well-being to be equally respected, protected and secured irrespective of where one lives[139]. However, Article 1 of the ECHR also demarcates spatially the pool of potential applicants before the ECtHR (and not who can be a human rights' victim in general or applicant before domestic courts). At most, what can be said is that those living outside the State's jurisdiction hold procedural entitlements (e.g., to information and participation in EIA)[140]. This happens because the jurisdiction of the ECtHR is limited to the interpretation and enforcement of the ECHR, which means not only that the jurisdiction of the ECtHR *ratione materiae* is limited to the rights and freedoms listed in the ECHR, but also that the jurisdiction *ratione personae* of the ECtHR is limited to those individuals under States' *de facto* jurisdiction according to Article 1 of the ECHR[141], i.e., victims who are under State *de facto* control. Accordingly, it does not seem that this view of "jurisdiction-as-impact" will be adopted by the ECtHR regarding Article 1 of the ECHR. That reading would allow the ECtHR to bridge the gap between wrongdoers and the affected individuals, but it stretches the wording and purpose of the ECHR and the established ECtHR's case law too far[142]: impact is attribution, not jurisdiction. In the ECHR context, any attempt to close the gap between GHG emitters and victims must be sought elsewhere.

A different, avant-garde view was apparently adopted by the IACtHR in OC-23/17[143], although it is possible to reconcile the views of the IACtHR with those of the ECtHR. According to the IACtHR, the concept of "jurisdiction" under Article 1(1) of the IACHR also includes an extraterritorial dimension.[144] In this regard, the IACtHR considered that States have an obligation under the IACHR to avoid transboundary environmental damage that can affect the human rights of individuals outside their territory by activities originating in their territory or under its effective control or authority, regardless of the lawful

[139] *Ibidem*, p. 319.

[140] *Ibidem*, p. 320.

[141] Sudre, F., *et al.*, cit. note 82, pp. 312-313.

[142] Mayer, B., "Climate Change Mitigation as an Obligation under Human Rights Treaties?", *American Journal of International Law*, 2021, Vol. 115, pp. 427-428; Rocha, A., and Sampaio, R., cit. note 56, p. 287.

[143] OC-23/17, §§103-104.

[144] See also *Sacchi* [2021] §10.9.

or unlawful nature of the conduct in the domestic or in the international sphere. Nonetheless, to avoid opening a Pandora box, the IACtHR noted that this is an exceptional situation and must be examined restrictively and according to the specific circumstances of each case. As such, according to the IACtHR, it is necessary to establish a causal link between the damage caused and the act or omission of the State of origin in relation to the activities in its territory or under its jurisdiction or control (e.g., the State must be in a position to prevent transboundary harm that impacts the enjoyment of human rights of persons outside its territory, through due diligence, prevention or precautionary measures)[145].

At first sight, this view of "jurisdiction-as-impact" seems to be significantly more liberal and better suited than the understanding of the ECtHR to deal with environmental harms, but it is methodologically incorrect, since it mixes the notions of jurisdiction (i.e. control over the victim) and attribution (i.e. control over the perpetrator or the source of the risk)[146]. Furthermore, while this view of "jurisdiction-as-impact" may offer opportunities for global environmental litigation, some caution is recommended, since it means a lack of reciprocity: individuals in Europe would to be able to lodge a communication under Articles 1 and 44 of the IACHR, whereas individuals in America would not be able to submit an application under Articles 1 and 34 of the ECHR.

In our view, both approaches are conceptually reconcilable by detaching the notion of extraterritorial States' obligations from their justiciability. In fact, it is not difficult to say, as the IACtHR or the Committee on the Rights of the Child implied in their reasonings, that States must exercise their *de jure* jurisdiction to regulate and control environmental risk having in mind the impact on third States and their populations. The ECtHR is not likely to disagree with this conclusion, at least explicitly. However, the pool of potential applicants under Article 44 of the IACHR and Article 34 of the ECHR is demarcated pursuant to the notion of *de facto* jurisdiction — and this was not ruled out by the IACtHR. Accordingly, it is possible to say that at the level of primary norms, States bear extraterritorial environmental obligations according to an understanding of "jurisdiction-as-impact", although at the level of secondary norms, reaction in case of defection is limited to those that fall in the category of "jurisdiction-as-control". This view maintains the gap between emitters and affected individuals but may be a sensible first step and a symbolic manner of

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[145] OC-23/17, §§95-104.

[146] Milanović, M., cit. note 134, pp. 51-52.

forging States' extraterritorial obligations[147].

2.6. Conclusion

In the current state of development of international law, there is no hard law provision with a general and universal scope that explicitly recognizes or protects a standalone human right to a healthy environment[148] — without prejudice of its timid affirmation in the special (but universal) framework of the rights of the child, the "greening" of the ECHR, and some boldness in the African, Arab, and Inter-American regional systems. Also, State practice does not support the existence of a customary rule on a standalone right to a healthy environment[149]. Nonetheless, the almost universal enshrinement of the right to a healthy environment at constitutional level[150] (see section 3.), in parallel with the reference to environmental protection obligations in special treaties (*e.g.*, the UNCLOS, the UNFCCC, or the Paris Agreement, where a link between human rights and climate change is specifically established), allow us to conclude that international law is heading towards the recognition of a human right to a healthy environment with a general and quasi-universal scope, even though its exact content and scope of application (including, its obligational scope) is still to be fleshed out.

The process of recognizing a standalone right to a healthy environment as a general principle or a rule of international law is not without obstacles. In addition to the political issues that prevent its enshrinement in a treaty of general and universal scope (but which did not prevent the adoption of UNGA Resolution no. A/76/300), there are three issues that need to be considered, but which we only briefly note here: first, the dogmatic difficulty of constructing an

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[147] Rocha, A., and Sampaio, R., cit. note 56, pp. 287-288.

[148] Hayward, T., *Constitutional Environmental Rights*. Oxford: Oxford University Press, 2005, pp. 54-58; Oliveira, H., cit. note 6, pp. 772-773.

[149] Lewis, B., cit. note 43, p. 87.

[150] Knox, J., "Human Rights", in Rajamani, L., and Peel, J. (eds.), *The Oxford Handbook of International Environmental Law*. 2nd ed. Oxford: Oxford University Press, 2021, p. 786; Shelton, D., "Human Rights and the Environment: Substantive Rights", in Fitzmaurice, M., Ong, D.M., and Merkouris, P. (eds.), cit. note. 9, p. 267. For an overview of constitutional environmental protection, see Gomes, C.A., Tavares Lanceiro, R., and Oliveira, H., "O Objeto e a Evolução do Direito do Ambiente", in Gomes, C.A., and Oliveira, H. (eds.), *Tratado de Direito do Ambiente.* Vol. I. 2nd ed.. Lisboa: CIDP — Centro de Investigação de Direito Público/ICJP — Instituto de Ciências Jurídico-Políticas, 2022, p. 53-57.

autonomous legal content of the right to a healthy environment, as opposed to procedural or information rights related to the environment, as well as opposed to the environmental obligations arising from other rights such as the right to life, physical integrity, or well-being; second, the deeply anthropocentric view of human rights, which is at odds with the need to protect the environment as a legal good worthy of value in its own right; and finally, the fact that the grammar of human rights is based mainly on "individual" rights, which is also at odds with a good shared on a global scale, as is the case with the environment.

In any case, the link between human rights and a healthy environment is clear. As seen, the enjoyment of human rights lacks an adequate level of environmental protection[151], but more than that, it is important to bear in mind that human rights are also a matter of vulnerability. Therefore, if environmental degradation makes human beings more vulnerable and exposed — putting in crisis values such as (the possibility of) human life, physical integrity, health or well-being —, then human dignity is at risk. For this reason, there is a certain fundamentality in the value "healthy environment" that explains its protection through human rights mechanisms. This was touched upon by the IACtHR, when it said that "[e]nvironmental degradation may cause irreparable harm to human beings [and not only to human rights]; thus, a healthy environment is a fundamental right for the existence of humankind"[152]. It is not a coincidence that the most vulnerable in our society (i.e., the poorest and the most fragile) are the most exposed to, and the least able to cope with, extreme environmental risk[153]. For vulnerable groups, coping with environmental risk is not just a prior a condition for the enjoyment of human rights — it is a condition of dignity and survival.

As the ICJ stated, "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including unborn generations"[154]. The environment is more than a support for the

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[151] Report of the Independent Expert on the Issue of Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John Knox, UN Doc A/HRC/22/43 (24 December 2012) §19.

[152] OC-23/17, §59.

[153] E.g., Report of the Special Rapporteur on the Issue of Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John Knox, UN Doc A/HRC/31/52 (1 February 2016) §§81 ff..

[154] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion, 8 July 1996) ICJ Rep. 226, §29. Cf., também, *Gabčikovo-Nagymaros Project (Hungary v. Slovakia)* (Judgment, 25 September 1997) ICJ Rep. 7, §112.

enjoyment of human rights — it is the ontological support for human dignity and life. Accordingly, it is because environmental degradation creates and enhances human vulnerability that the right to a healthy environment might be conceived of as inherent to human dignity, and thus as a human right. Its operative content can often be difficult to disconnect from claims that might arise from other human rights (e.g., the right to life or health): however, not only a standalone right to a healthy environment does not require a direct affectation on the individual (although this is often known but difficult or even impossible to establish), but it also applies autonomously in situations where environmental degradation does not necessarily endanger other human rights, but exposes the individual to greater vulnerability and places stress on their physical substrate of life.

3. Fundamental rights

Because the establishment of a set of norms limiting the exercise of public power is a critical feature of a state governed by the rule of law[155], Constitutions – due to their higher hierarchical value in domestic law – enjoy nowadays a strong legal grip in all democratic national legal systems. That is why, in the context of rapid and constant expansion of environmental law, the constitutionalization movement in favor of environmental protection is a relevant element that cannot be overlooked. In fact, environmental protection has been progressively enshrined in national constitutions through diversified means (*e.g.*, competence rules, procedural rules, public entities' duties in what concerns natural resources). We will be focusing here on constitutional environmental protection through fundamental rights.

3.1. A fundamental right to a healthy environment

The Portuguese Constitution was the first in the recognition of a fundamental right to a healthy environment, in 1976[156], rapidly followed by

[155] Sellers, M., "What is the rule of law and why is it so important?", in Goudappel, F. A., and Ballin, E. M. H. (eds.), *Democracy and Rule of Law in the European Union*. Springer, 2016, pp. 5-6.; Hasebe, Y., and Pinelli, C., "Constitutions", in Tuschnet, M., Fleiner, T., and Saunders, C. (eds.), *Routledge Handbook of Constitutional Law*. Routledge, 2013, pp. 9–20.

[156] Aragão, A., "Environmental standards in the Portuguese Constitution", in Turner, S., *et*

the Spanish Constitution, in 1978, and the Constitution of Peru, in 1979. In the following decades, another 79 States have followed this lead. Currently, 28 African States, 14 Asian States, 15 American States, 24 European States, and one Oceanian State have enshrined a specific fundamental right concerning a healthy or balanced environment in their national constitutions. More frequently than not, this is only one of the constitutional provisions that concern environmental protection. Moreover, 130 constitutions impose generic or specific environmental duties on private and/or public entities, 57 of which do not include the environment as an object of protection in their fundamental rights catalogue.

Considering the specific role of constitutions in domestic law, in particular in what concerns the material connection with core values and human dignity in fundamental rights systems, we can conclude that ecological balance has been overwhelmingly recognized as an essential issue for a contemporary state[157]. This evolution in constitutional law follows the development of environmental law at the international level[158].

As is commonly accepted, fundamental rights – in that respect, as all rights[159] –give rise to duties. This is not different from international human rights law, analyzed in the previous section. Whether these duties are binding for private entities is very much debated[160] and also a matter for constitutional decision-making[161]. But the claim that environmental protection duties imposed on

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al. (eds.), *Environmental rights. The development of standards*. Cambridge University Press, 2019, p. 248.

[157] Hayward, T., "Greening the constitutional state: environmental rights in the European Union", *The State and the Global Ecological Crisis*. 2005, p. 139.

[158] Sands, P., and Peel, J., *Principles of international environmental law*. Cambridge University Press, 2018, p. 21.

[159] Hohfeld, W. N., "Some fundamental legal conceptions as applied in judicial reasoning", *The Yale Law Journal*, Vol. 23(1), 1913, pp. 30–32; Duarte d'Almeida, L., "Fundamental legal concepts: the hohfeldian framework", *Philosophy Compass*, 2016, pp. 554–569.

[160] Bilchitz, D., "Do Corporations Have Positive Fundamental Rights Obligations?", *Theoria: A Journal of Social & Political Theory*, Vol. 57(125), 2010, pp. 1–35. For an analytical perspective, cf. Duarte, D., "Structuring Addressees in Fundamental Rights Norms: An Application", in Himma, K., and Spaic, B. (eds.), *Fundamental Rights Justification and Interpretation*. Eleven International Publishing, 2016, pp. 83–92.

[161] For example, the Constitution of the Federal Republic of Germany declares that "*The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law*" (art. 1-3), whereas the Constitution of the Portuguese Republic determines that "*The constitutional precepts with regard to rights, freedoms and guarantees are directly applicable and are binding on*

states – both negative (*non facere*) and positive duties (*facere*) – (also) result from fundamental rights is without dispute[162]. The exact content and nature of these duties, however, is not.

Constitutional rights create defenses against state interference (duty to respect), but also require positive actions to prevent and sanction offenses to these rights. This enhances judicial review of decisions once considered purely political[163]. Moreover, proposals on a duty to fulfil fundamental rights – understood as a positive duty to ensure the effective enjoyment of the right – have been gaining momentum both in international law[164] and constitutional law[165].

However, the specification of the object and content of such a right and the duties arising from it are not without argument. In fact, much like most fundamental rights (but probably even more so), the boundaries of the area of protection of the right to a healthy environment are blurred[166].

The expression "right to a healthy environment" must be interpreted, like all words, but this task itself invokes and is influenced by ecocentric and anthropocentric philosophies[167] and preconceptions on what is a right. Moreover, e*nvironment* is both a polysemic and a vague word[168], and healthy

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public and private entities" (art. 18-1). On the debate concerning the Portuguese constitution and how the duty to protect materially intertwines with the subjective scope of protection, Reis Novais, J., *Direitos fundamentais nas relações entre particulares. Do dever de protecção à proibição do défice*. Coimbra: Almedina, 2018.

[162] Sarlet, I. W., and Fensterseifer, T., "Fundamental rights theory and climate protection through the lens of the Brazilian Constitution", *e-Publica*, Vol. 9(3), pp. 40–47.

[163] Kumm, M., "Who is afraid of the total constitution? Constitutional rights as principles and the constitutionalization of private law", *German Law Journal*, Vol. 7(4), 2006, pp. 341–369.

[164] Fredman, S., *Comparative Human Rights Law*. Oxford University Press, 2018, p. 66.

[165] Reis Novais, J., *Direitos sociais*. Lisboa: AAFDL, 2017, p. 347.

[166] On this topic, specifically concerning the interpretation of the Portuguese Constitution, cf. Amado Gomes, C., "Constituição e ambiente: errância e simbolismo", in *Textos dispersos de Direito do Ambiente - Vol. II*. Lisboa: AAFDL, 2008, pp. 21–44.

[167] For a discussion on ecocentrism and anthropocentrism in constitutional law, and the consequences for recognizing constitutional rights of nature, cf. Kotzé, L. J., and Calzadilla, P. V., "Somewhere between rhetoric and reality: environmental constitutionalism and the rights of nature in Ecuador", *Transnational Environmental Law*, Vol. 6(3), 2017, pp. 401–433.

[168] Duarte, D., "Linguistic objectivity in norm sentences: alternatives in literal meaning", *Ratio Juris*, Vol. 24(2), 2011, p. 124.

is a vague multidimensional word[169]. Merriam-Webster's definition of environment[170] includes not only *"the complex of physical, chemical and biotic factors (such as climate, soil, and living things) that act upon an organism or an ecological community and ultimately determine its form and survival"*, but also *"the circumstances, objects, or conditions by which one is surrounded"* and the *"the aggregate of social and cultural conditions that influence the life of an individual or community"*. And the definition of healthy is not any narrower: *"enjoying good health"*, *"free from disease"*, *"not displaying clinical signs of disease or infection"*, *"beneficial to one's physical, mental, or emotional state : conducive to or associated with good health or reduced risk of disease"*, *"showing physical, mental, or emotional well-being"*, *"prosperous, flourishing"*, *"no small or feeble"*[171].

Are all of these situations to be considered under the scope of the right to a healthy environment? Can a Brazilian citizen living in the southern part of the country invoke that the State is in breach of her right to a healthy environment due to significant impact in the biodiversity of the Amazonian Forest, over 4.000 km away? We are not questioning this from a legal standing point of view. What we are questioning is: what do the words "healthy environment" mean and do they refer to a biodiverse environment that does not have a direct impact on individual health? And: does the word "right" mean a legal position in which a personal interest or an individual enjoyment of the object of legal protection (*i.e.,* the environment) is at stake? Another example: can a Portuguese fisherman invoke that his right to a healthy environment is put into question when there is a severe reduction of fish due to wastewater discharges? And does a right to a healthy environment include his right to fish? As an economic activity or just for his own nutrition? Can a French person claim that their right to a healthy environment is not being ensured due to rotten smells coming from a neighboring waste management facility? So: does a "healthy environment" refer to smelling unpleasant scents, even when they are ecologically irrelevant? These matters might entail – or, more often, be confused with – some questions of substance as well, but they are first of all matters of interpretation.

This topic apparently shares walls with a few others in fundamental rights theory. The renowned Alexy's understanding of fundamental rights as legal

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[169] For a critical analysis on vagueness, with multiple examples and distinctions, cf. Moreso, J. J., "Marry me a little, how much precision is enough in law", *Droit & Philosophie: Droit et Indétermination*, Vol. 9(1), 2017, pp. 45–69. Determining what *environment* and – even more intensely – *environmental harm* seems to be an example of vagueness.

[170] Available here.

[171] Available here.

principles[172] is not a theory on interpretation of legal sentences, but rather on the structure of norms and their application. However, it did result in the definition of wide legal boundaries of fundamental rights norms' scope of application[173] through the *prima facie* inclusion of any position relevant for the object of legal protection. Applied to environmental law, this could lead to the conclusion that the "environment" refers to any situations related to the environment (if the redundancy is allowed), which seems a useless delimitation, since everything is materially related to, and dependent on, the quality of the environment that surrounds us permanently. There would be no difference in the law, then, between legal protection of the environment, culture, religion, life, health, food, water, housing, property, and so on[174]. It is generally agreed upon today that the interdependence between environmental protection and several fundamental rights (and, similarly, international human rights) has positive effects.

Now that the question is laid and before concluding with what we consider to be an adequate delimitation of the object of the right to a healthy environment, let us first consider the relevance of this discussion. Fundamental rights to life, health, culture, and others, have been successful instruments in domestic environmental litigation[175]. However, the delimitation between the content of these rights is relevant. First, we must highlight that defining the scope of a norm (any norm) must necessarily start with the interpretation of the relevant norm sentence(s), which is a step logically prior to any other considerations or operations. Second, it should become apparent that not defining what the word "environment" means in law has a high cost: how will a court rule on a case without being certain if a fundamental right is or is not at stake, particularly in constitutional law, where the declaration of a fundamental right norm as not self-executing renders it practically irrelevant for the purpose of judicial review of legislative acts or omissions? Third, this is a crosscutting theme for all environmental law, since a legal field with a particular structure and ruling principles must first have a defined object.

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[172] Alexy, R., *A theory of constitutional rights*. Oxford University Press, 2002, p. 47. This theory is revisited in detail considering emerging criticism – Alexy, R., "On the Structure of Legal Principles", *Ratio Juris*, Vol. 13(3), 2000, pp. 294–304.

[173] Alexy, R., cit. note 173, p. 200.

[174] On the inadequacy of radical wide scopes of protection of fundamental rights and the methodological misunderstanding of two different steps (interpretation and application), cf. Novais, J. R., *Limites dos Direitos Fundamentais. Fundamento, Justificação e Controlo*. Almedina, 2023, p. 119.

[175] Cf. *infra* section 3.3..

Environmental law is consensually very much dependent on scientific knowledge, even for its legitimacy and enforcement[176]. This is relevant for many purposes, but for what is here of interest it is also relevant for interpretation. We give meaning to a certain word based on how it is generally interpreted by a certain community of speakers[177]. However, the community of speakers in environmental law – like other areas of the law – is not the community of speakers in general of a certain language[178]. It is a qualified community of scientists, an epistemic community[179] that is able to identify problems and solutions that are described using certain words which will be inscribed in legal sentences, which must then be interpreted.

An exhaustive analysis of environmental law and its main legal concepts[180], has led us to the conclusion that the term *environment* in ordinary law and natural sciences refers, to summarize, to the ecological functions of natural resources that are commonly enjoyed and associated with and allow for the existence of life and quality of life (and not just human life)[181]. These are strong indicators that the word "environment" is understood, in the relevant legal and scientific community, in an ecological fashion, although occasionally with a particular focus on ecological needs for human beings' life and well-being. This, we believe, literally excludes from the right to a healthy environment benefits that human beings are capable of extracting from the environment through economic rights, since these refer to a private exclusionary use entirely different from ecological functions. The right to a healthy environment will however refer to all claims concerning ecological balance, even when the interference does not particularly impact the holder of the right – as happens, for example,

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[176] Just an example of a piece of literature on the topic in international law, cf. Sulyok, K., *Science and Judicial Reasoning. The Legitimacy of International Environmental Adjudication*. Cambridge University Press, 2022.

[177] As explained by David Duarte: *"Clearly, for normative authorities enacting norm sentences, natural language rules ought to be observed (…) because that is the only way norm sentences can reach their communicative goal"*. Duarte, D., cit. note 169, p. 115.

[178] It should be mentioned that international law poses additional and far more complex problems in this, considering the multiplicity of languages at stake.

[179] Haas, P., "Epistemic communities", in Bodansky, D., Brunnée, J., and Hey, E. (eds.), *The Oxford Handbook of International Environmental Law*. Oxford University Press, 2008, pp. 792–806.

[180] Oliveira, H., *A reparação do dano ambiental*. Lisboa: AAFDL, 2022, p. 149.

[181] Interestingly, this is not much different from the wording used by the German Federal Constitution when it refers to the state's duty to *"protect the natural foundations of life and animals"*.

in claims concerning loss of biodiversity[182].

Also related to this discussion is that of the overlapping areas between the right to a healthy environment and many other fundamental rights, such as the right to life, the right to health, the right to culture, etc.[183] Although this discussion frequently mixes interpretation and application (namely through norm-conflict solving), it is relevant for interpretation for those who are not convinced by the linguistic arguments put forth. Choosing between alternative meanings must resort to criteria other than the linguistic one, such as systematic or teleological criteria[184]. Choosing a certain meaning for the words "healthy environment" – *e.g.*, ecological balance – over another – *e.g.*, all situations related to human well-being – due to the effect that this interpretation will have for environmental or fundamental rights protection in general – *e.g.*, considering that a wider concept will reduce the level of efficacy due to overlapping areas between several fundamental rights scope of protection and judicial self-restraint due to wider margins of discretion – is another path ending in an ecological definition of the content of a fundamental right to a healthy environment.

3.2. Fundamental rights of nature?

A brief mention to the possible pathway of recognition of constitutional fundamental rights to nature itself is currently inescapable. The question if not new in theory – in fact, it was in 1972 that if first emerged in legal literature[185]. But in 2008 Ecuador approved the first Constitution to enshrine a right of nature to have integral respect for its existence and for the maintenance

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[182] We are building on a notion of right that does not require a personal interest – detailed on rights as formal structures, and thus waiving any material notion of right as a personal interest, cf. Duarte, D., "Rights as Formal Combinations of Normative Variables", *Revus [Online]*,Vol. 51, 2023.

[183] In detail considering the difficulties in defining what is environment as an object of constitutional protection considering other legal objects with a focus on comparative constitutional law, cf. Amado Gomes, C., *Risco e modificação do acto autorizativo concretizador de deveres de protecção do ambiente*. Coimbra: Coimbra Editora, 2007, p. 25.

[184] Duarte, D., cit. note 169, pp. 112–139.

[185] Stone, C. D., "Should Trees Have Standing - Toward Legal Rights for Natural Objects", *Southern California Law Review*, 1972, pp. 450–501. This paper follows the discussion on the *Sierra Club v. Morton* case, also in 1972, before the Supreme Court of the United States concerning the standing of the Sierra Club to defend nature in court.

and regeneration of its life cycles, structure, functions, and evolutionary processes[186]. Not only does the Constitution recognize such a right, but it also includes an entire Chapter dedicated to the rights of nature – including the right to be restored[187], and several duties, such as the duty to apply preventative and restrictive measures on activities that might lead to the destruction of ecosystems and the permanent alteration of natural cycles[188]. These provisions have been grounds for adjudication in domestic Ecuadorian courts[189], although their effectiveness has been rightfully challenged[190].

This novelty could be considered a singularity of no global relevance, a mere result of political national processes[191] and local cultural features[192], were it not for the fact that this seems to constitute a trend in other jurisdictions[193]. In fact, in 2010 Bolivia legislated on the rights of Mother Earth[194], including the creation of an Ombudsman for the Rights of Mother Earth, and on integral development to live in harmony and balance with Mother Earth[195], following the 2009 Constitution provision that states that everyone has the right to a healthy, protected, and balanced environment and that the exercise of this rights must be granted to living things[196]. In 2016, the Constitutional Court of Colombia

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[186] Article 71 of the Constitution of the Republic of Ecuador.

[187] Article 72 of the Constitution of the Republic of Ecuador.

[188] Article 73 of the Constitution of the Republic of Ecuador.

[189] Cano Pecharroman, L., "Rights of nature: Rivers that can stand in court", *Resources*, Vol. 7(1). 2018; Borràs, S., "New transitions from human rights to the environment to the rights of nature", pp. 138–139.

[190] Borràs, S., cit. note 66, text notes 90 and 191, pp. 136-137.

[191] Tanasescu, M., "The rights of nature in Ecuador: the making of an idea", *International Journal of Environmental Studies*, Vol. 6, 2013, pp. 846–861.

[192] Tigre, M. A., cit. note 54, p. 230.; Tănăsescu, M., "Rights of nature, legal personality, and indigenous philosophies", *Transnational environmental law*, Vol. 9(3), 2020, pp. 429–453.

[193] Boyd, D. R., *The rights of nature: A legal revolution that could save the world*. ECW Press, 2017, pt. IV.

[194] Law no. 071 of December 21st of 2010, approved by the Plurinational Legislative Assembly of Bolivia, called *"Ley de Derechos de la Madre Tierra"*, Law of the Rights of Mother Earth.

[195] Law no. 300 of October 15th of 2012, approved by the Plurinational Legislative Assembly of Bolivia, called *"Ley Marco de la Madre Tierra y Desarollo Integral para Vivir Bien"*, Framework Law of Mother Earth and the Integral Development for Living Well.

[196] Article 33 of Constitution of the Plurinational State of Bolivia.

recognized a river as an entity subject of rights of protection, conservation, maintenance, and restoration in the Atrato River Case[197]. And in 2022, Panama approved a law recognizing rights to nature as a collective, indivisible, and self-regulated entity, and the corresponding duties imposed on the state[198].

However, this movement is not limited to South America. Municipal ordinances in the United States of America[199], and laws in New Zealand, in 2014[200] and in 2017[201], have attributed rights to nature, rivers and ecosystems. Moving even further in diversified jurisdictions, high courts in India (Uttarakhand, and Punjab and Haryana, and Madras, more recently) have developed case-law attributing legal personality to rivers on religious grounds and invoking the doctrine of *in loco parentis*, and then extending this protection to the animal kingdom[202]. The Supreme Court of Bangladesh (High Court Division) has also declared a river to be a legal person and a living entity, using the *in loco parentis* doctrine, the Rio Declaration, and environmental law statutes[203].

Although not at a constitutional level, it should be noted that this movement has also recently arrived in Africa and Europe. Uganda has repealed and replaced its national environmental law, in 2019, and included in the new law a section dedicated to rights of nature, enshrining nature's right to exist, persist, maintain, and regenerate in its domestic legal system[204]. And Spain has recognized the legal personality of Mar Menor by law in 2022[205].

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[197] Judgment of November 10th of 2016, in Case T-622/16.

[198] Law no. 287 of February 24th of 2022.

[199] Boyd, D. R., "Recognizing the Rights of Nature: Lofty Rhetoric or Legal Revolution", *Natural Resources & Environment*, Vol. 32(4), 2017, p. 13.

[200] The Te Urewera Act 2014.

[201] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017.

[202] Pain, N., and Pepper, R., "Can Personhood Protect the Environment? Affording Legal Rights to Nature", *Fordham International Law Journal*, Vol. 45(2), 2021, pp. 357–359.; O'Donnell, E. L., "At the intersection of the sacred and the legal: Rights for nature in Uttarakhand, India", *Journal of Environmental Law*, Vol. 30(1), 2018, pp. 135–144.

[203] Pain, N., and Pepper, R., cit. note 203, pp. 360–361.

[204] The National Environment Act, Act 5, of 2019.

[205] Law no. 19/2022, of September 30th, for the recognition of legal personhood to Mar Menor's lagoon and its surroundings.

It is yet too soon to withdraw any conclusions from this growing movement[206] of recognition of fundamental rights of nature – either expressly or as a result of the interplay of other fundamental rights – or to predict how it might evolve[207] and be consequential. However, we would argue though that this is also a result of a lack of clarity in the definition of the specific object of legal protection when we address environmental protection in domestic constitutions. It also becomes apparent that this presents news challenges for fundamental rights theory, which is obviously built assuming that the primary and secondary subjects of norms are always human beings.

3.3. Fundamental rights and environmental protection

The link between environmental protection and other objects of legal protection such as life and health has already been explored throughout this text – not only in what concerns human rights law[208], but also in respect to the overlapping areas of legal protection with the fundamental right to a healthy environment[209]. This link has always been evidently true from an empirical perspective, but it is currently legally evidenced by courts and other decision-making bodies, not only at an international level, as already explored, but also in national courts. For example, exhaustive research concerning domestic case-law in 7 Latin-American countries has demonstrated that almost 50% of climate litigation cases invoke the right to life and/or the right to health as grounds for adjudication[210]. We will now explore a few cases in which this link has been consequential through the protection duties that correspond to all fundamental rights[211].

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[206] More details and a comparison analysis is made by Kauffman, C. M., and Martin, P.L., "Constructing rights of nature norms in the US, Ecuador, and New Zealand", *Global Environmental Politics*, Vol. 18(4), 2018, p. 45.

[207] Although the idea is planted and does not seem to be leaving the legal imagination soon – cf. Schimmöller, L., "Paving the way for rights of nature in Germany: lessons learnt from legal reform in New Zealand and Ecuador", *Transnational Environmental Law*, Vol. 9(3), 2020, pp. 569–592.

[208] Cf. *supra* sections 2.2. and 2.3..

[209] Cf. *supra* section 3.1..

[210] Viveros-Uehara, T., "The Fundamental Rights to Life and Health in Climate Litigation: Insights from Latin America", *e-Publica*. 2022, pp. 161–164.

[211] Cf. *supra* section 3.1.

The *Neubauer* case, decided in 2021 by the German Constitutional Court, was filed as a complaint alleging that the Federal Climate Protection Act violated the fundamental right to a future consistent with human dignity, the fundamental right to life and physical integrity. The Court used the scientific consensus declared by the Intergovernmental Panel on Climate Change to conclude that there is empirical evidence that climate change poses serious threats to life and physical integrity and from that concluded that *"[t]he protection of life and physical integrity under Art. 2(2) first sentence of the Basic Law encompasses protection against impairments of constitutionally guaranteed interests caused by environmental pollution […]. The state's duty of protection arising from Art. 2(2) first sentence of the Basic Law also encompasses the duty to protect life and health against the risks posed by climate change"*[212]. The German Constitution notably does not include a fundamental right to a healthy environment. However, the Court grounded its decision both on the duty to protect fundamental rights to life, physical integrity and freedom, and on the environmental protection duties resulting from article 20a[213] that include two key elements: the consideration of future generations and the duty to protect the natural foundations of life.

This case might demonstrate that the recognition of a fundamental right to a healthy environment might not be as consequential for environmental protection as one could initially consider. In fact, the key for all environmental cases appears to be essentially in the definition of states' duties to protect fundamental rights. To demonstrate this, let us now consider the Brazilian legal system. Article 225 of the Brazilian Constitution enshrines a right to a healthy environment[214]. The Federal Supreme Court of Brazil[215] ruled favorably on a non-compliance appeal concerning omissions by the executive power in implementing the Brazilian Climate Fund. The appeal invoked that the lack

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[212] Cf. §1 of *Neubauer, et al. v. Germany* (BvR 2656/18, 78/20, 96/20, and 288/20) headnotes.

[213] "*Mindful also of its responsibility towards 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.*"

[214] *"Everyone has the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life, and both the Government and the community shall have the duty to defend and preserve it for present and future generations".*

[215] The Federal Supreme Court of Brazil has a many relevant constitutional judgements on environmental protection. A recent overview of rights-based climate litigation before this court is presented by Moreira, D. de A., *et al.*, "Rights-Based Climate Litigation in Brazil: An Assessment of Constitutional Cases Before the Brazilian Supreme Court", *Journal of Human Rights Practice*, 2023, pp. 1–24.

of administrative action was a breach of the fundamental right to a healthy environment and the duties to protect nature. The Court decided that the recognition of such a right gave rise to legally binding duties, repeatedly referring to the serious harm that the omission caused to the core of fundamental rights, and concluded with the following thesis: *"[t]he Executive Branch has the constitutional duty to make the Climate Fund's resources work and allocate them annually, for climate change mitigation purposes, and its contingency is prohibited, due to the constitutional duty to protect the environment (CF, art. 225), international rights and commitments assumed by Brazil (CF, art. 5, para. 2), as well as the constitutional principle of separation of powers (CF, art. 2 c/c art. 9, para. 2, LRF)".*

These cases illustrate what in our opinion already resulted from human and fundamental rights theories: regardless of the recognition of specific or generic rights to the environment or to environmental protection, setting criteria and limits to defining states' duties to protect fundamental rights is the key task to enable courts with the tools needed to ensure effective judicial review of acts and omissions.

Due to its specificity, it should also be mentioned that also cases brought by indigenous people and communities have a singular importance in this matter. Traditional ways of life with a closer relation to nature and its cycles are more prone to be severely affected by environmental degradation. This is why a vast array of fundamental rights – not only the rights to life, physical integrity, and health, but also rights to culture, food, and to the exploitation of natural resources in indigenous lands – can be invoked in cases involving indigenous communities to flesh out the corresponding states' duties of environmental protection[216].

3.4. Balancing and separation of powers

As discussed previously, international courts have worked on the limits of judicial power under the concept of *state margin of appreciation*[217]. Similar problems, but with slightly different legal analysis and backgrounds, also arise in national courts.

It is widely known that constitutional adjudication raises specific problems

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[216] Tigre, M. A., cit. note 54, pp. 240–243.

[217] Cf. *supra* section 2.7..

in democratic regimes due to the separations of powers doctrine[218]. The legislative and executive powers hold democratic legitimacy and reserved spheres of action in the prosecution of public interests, and judges are limited in their appreciation to legal matters, setting aside political judgements, regardless of personal disagreement. This holds true for many topics and jurisdictions, but it is particularly acute in constitutional adjudication. Respecting, protecting, and promoting fundamental rights is expensive. And as previously mentioned, fundamental rights are generic, subject to balancing and optimization; many fundamental rights are in political tension with each other – let's consider how economic and social policies are occasionally both in conflict and coherent with environmental protection, depending on whether politicians consider shorter or longer-term perspectives. Moreover, the right to a healthy environment is by many constitutions and authors qualified as a socioeconomic right, which brings more discussions on whether judicial review would be admissible, precisely due to larger political discretion[219]. This means that environmental protection, like other fundamental interests and rights, is always subject to balancing with other public interests and dependent on political decisions concerning priorities, and financial and human resources availability. This gives room to views of judicial self-restraint that would leave environmental protection entirely dependent on political will and ideology, reducing constitutional provisions on the matter to mere recommendations or policies. A lot could be said on this – in general and specifically concerning environmental protection, namely the struggle to find criteria for defining legally binding ecological minimums[220] – but we will focus on what we consider to be the most pressing topic for deciding environmental cases.

The principle of proportionality is a generally accepted legal parameter that allows courts to assess the constitutionality or legality of acts enacted by the legislative and executive bodies. It is therefore a legal solution for what would otherwise be an area free of judicial control due to balancing[221]. However,

[218] Beatty, D. M., *The ultimate rule of law*. Oxford University Press, 2004, pp. 1–5.

[219] Bilchitz, D., "Towards a defensible relationship between the content of socio-economic rights and the separation of powers: conflation or separation?", in Bilchitz, D., and Landau, D. (eds.), *The evolution of the separation of powers. Between the global north and the global south*. Edward Elgar Publishing, 2018, pp. 57–84.

[220] Vidal Sampaio, M., "Ecological Minimum and State Duties: A Global View from the Perspective of Portuguese Law", *e-Publica*, Vol. 9(3), 2022, pp. 78–102.

[221] Sickmann, J.-R., and Borowski, M., "Limited review in balancing constitutional rights", in Sickmann, J.-R., and Borowski, M. (eds.), *Proportionality, Balancing, and Rights. Robert Alexy's Theory of Constitutional Rights*. Springer, 2021, pp. 135–162.

it should be noted that its application in what concerns environmental problems is subject to the interference of several environmental law principles. Many constitutions and laws have enshrined legal principles – originated in international law and governance – such as sustainable development, intergenerational justice or solidarity, and precaution. We argue that all of these principles are in fact norms on balancing, which creates new possibilities for judicial review under the principle of proportionality.

So, the principle of sustainable development raises many discussions, but one of its undeniable contents is the duty to consider and balance environmental, social, and economic impacts holistically[222]. In legal systems where such a principle has been adopted, the means that lack of consideration of environmental impacts in balancing when (i) regulating the exercise of restricting any fundamental rights or (ii) in any case when the right to a healthy environment is recognized and at stake is always a breach of the principle of proportionality.

Similarly, the principle of intergenerational justice or solidarity[223] imposes the consideration of impacts on the enjoyment of fundamental rights by future generations when balancing. This was pristinely demonstrated by German Constitutional Court in the *Neubauer* case when it was decided that *"the Basic Law imposes an obligation to safeguard fundamental freedom over time and to spread the opportunities associated with freedom proportionately across generations. In their subjective dimension, 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. Furthermore, in its objective dimension, the protection mandate laid down in Art. 20a of the Basic Law encompasses the necessity to treat the natural foundations of life with such care and to leave them in such condition that future generations who wish to carry on preserving these foundations are not forced to engage in radical abstinence"*[224]. This means that the Court accepted the

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[222] Magraw, D. B., and Hawke, L. D., "Sustainable development", in Bodansky, D., Brunnée, J., and Hey, E.(eds.), *The Oxford Handbook of International Environmental Law*. Oxford University Press, 2007, pp. 613–638; Barral, V., "The principle of sustainable development", in Krämer, L., and Orlando, E. (eds.), *Principles of Environmental Law*. VI. Edward Elgar Publishing, 2018, pp. 103–114.

[223] Tremmel, J. C., "Establishing intergenerational justice in national constitutions", in Tremmel, J. C. (ed.), *Handbook of intergenerational justice*. Edward Elgar Publishing, 2006, pp. 187–214; Häberle, P., "A constitutional law for future generations - the "other" form of the social contract: the generation contract", in Tremmel, J. C. (ed.), *Handbook of intergenerational justice*. Edward Elgar Publishing, 2006, pp. 215–229.

[224] Cf. §4 of *Neubauer, et al. v. Germany* headnotes.

intergenerational effect of fundamental rights[225]. The particularly vulnerable position of future generations – who will not only suffer the burden of delayed action by the current political community, but also who do not have political power to influence decision-making – might justify the consideration of a status similar to that of political minorities in fundamental rights theory[226].

Lastly, the principle of precaution is of the utmost importance in cases of significant epistemic uncertainty. Although losing practical relevance in some areas due to growing scientific consensus, such as climate change, the principle of precaution is a legal principle that determines that uncertainty as to environmental impacts is not grounds for decisions[227]. This impacts directly on one of the core elements of proportionality by imposing that lack of certainty cannot be considered as an element in balancing to weaken environmental policy when the possible consequences are severe.

Courts are well aware of the need to justify that judicial control is not undermining the separation of powers doctrine. Just to mention two examples:

In the *Urgenda* Judgement, the Supreme Court of the Netherlands concurred with The Hague Court of Appeal when stating that *"the State fails to fulfil its duty of care pursuant to Articles 2 and 8 ECHR by not wanting to reduce emissions by at least 25% by end-2020. A reduction of 25% should be considered a minimum (..) the current proposed policy the Netherlands will have reduced 23% by 2020 (…). Since moreover there are clear indications that the current measures will be insufficient to prevent a dangerous climate change, even leaving aside the question whether the current policy will actually be implemented, measures have to be chosen, also based on the precautionary principle, that are safe, or at least as safe as possible. (…). On these grounds, the State's reliance on its wide 'margin of appreciation' also fails. The Court furthermore points out that the State does have this margin in choosing the measures it takes to achieve the target of a minimum reduction of 25% in 2020"*[228].

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[225] Winter, G., "The Intergenerational Effect of Fundamental Rights: A Contribution of the German Federal Constitutional Court to Climate Protection", *Journal of Environmental Law*, Vol. 34(1), 2022, pp. 209–221.

[226] As proposed by Almeida Ribeiro, G., "Between a Rock and a Hard Place: Constitutional Theory and Intergenerational Equity", *e-Publica*, Vol. 9(3), 2022, pp. 4-25.

[227] Wiener, J. B., "Precautionary principle", in Krämer, L., and Orlando, E. (eds.), *Principles of Environmental Law*. VI. Edward Elgar Publishing, 2018, pp. 174–185.

[228] *Urgenda Foundation v. State of the Netherlands*, Case number: 200.178.245/01, Judgement of The Hague Court of Appeal, of October 9th, 2018, § 73 and 74.

The German Constitutional Court also pointed out in its climate case what is has been its long-standing doctrine in what is allowed under judicial review on failing to comply with the duty to protect – *i.e.*, to adopt positive measures. In the previously mention *Neubauer* Case, it stated that *"[i]n terms of purpose and content, defensive rights are aimed at prohibiting certain forms of state conduct, whereas duties of protection are essentially unspecified. It is for the legislator to decide how risks should be tackled, to draw up protection strategies and to implement those strategies through legislation. Even where the legislator is under obligation to take measures to protect a legal interest, it retains, in principle, a margin of appreciation and evaluation as well as leeway in terms of design (…). However, this does not mean that the question as to the effectiveness of state protective measures is beyond the scope of review by the Federal Constitutional Court where a duty of protection does exist. The Federal Constitutional Court will find a violation of a duty of protection if no precautionary measures whatsoever have been taken, or if the adopted provisions and measures prove to be manifestly unsuitable or completely inadequate for achieving the required protection goal, or if the provisions and measures fall significantly short of the protection goal"*[229].

Identifying limits to balancing defines the scope of judicial review. Fundamental rights problems in environmental cases always deal with political choices and are therefore significantly impacted by the separation of powers doctrine. This is therefore a crucial problem for the effective control of constitutionality for which legal scholarship must provide solutions.

3.5. Extraterritoriality

Extraterritoriality has been mostly a topic for international law in the field of human rights law and it has been previously analyzed in this chapter[230]. However, it should be noted that the extraterritorial effects of constitutional norms have also been a recent topic of discussion in the context of climate litigation. A constitution is part of a domestic legal system, produced by one state and crafted to produce effects on the territory under its jurisdiction. However, climate change is a multicausal, cross-border, intergenerational topic due to its causes and consequences. This means that actions taking place in a territory under the control of one state (*e.g.*, greenhouse gas emissions) will

[229] Cf. §152 of *Neubauer, et al. v. Germany* Judgment.

[230] Cf. supra section 2.8..

impact (*e.g.*, sea level rise, droughts, and respective consequences for nature and fundamental rights) territories outside its jurisdiction. This inevitably has an impact on fundamental rights theory raising questions on the extraterritorial effect of fundamental rights norms.

Naturally, climate change is not the only problem advancing such issues. The German Constitutional Court was also called upon to clarify the effects of the German Constitution in matters concerning the actions of the Federal Intelligence Service outside of Germany[231]. However, it should be noted that this case refers to German agents, that is, people with a high level of connection to the German state. The existing literature on this topic refers to cases in which there is some degree of connection to the states' territory or agents and much of the analysis is not quite transferable to environmental cases[232].

This was not the case in the *Neubauer* Judgment, where citizens of Nepal and Bangladesh with no connection to Germany or to German territory filed constitutional complaints under the German Constitution referring to emissions from the German territory impacting on their rights in Nepal and Bangladesh. These complaints were accepted and ruled on. Although the Court did not fully elaborate on the problem of extraterritorial effects of constitutional rights, it did explicitly address and accepted that foreign citizens living abroad with no specific connection to Germany could be affected by actions originating in Germany. Whilst pointing out that there were differences to be considered in comparison to purely domestic cases, these citizens could invoke a breach of fundamental rights enshrined in the German constitution and file a complaint on those grounds[233].

This seems to be the logical and inevitable conclusion when constitutions proclaim a generally universal recognition of fundamental rights regardless of place, conditions, or citizenship. Although the scope of protection can never be the same – for example, all actions that require jurisdiction over the territory, like adaptative measures to climate change, cannot be included –, this represents new grounds for research in constitutional law and fundamental rights theory on what concerns the addresses of such norms and the jurisdiction of domestic courts.

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[231] Fickentscher, T., "The Extraterritorial Effects of the Fundamental Rights of the German Constitution", *Tulane European and Civil Law Forum*, 2021, pp. 29–44.

[232] Rivlin, G., "Constitutions Beyond Borders: The Overlooked Practical Aspects of the Extraterritorial Question", *Boston University International Law Journal*, 2012, pp. 135–228.

[233] Cf. § 173-181 of the *Neubauer* Judgement.

4. Concluding remarks

Environmental law has always been a laboratory for testing the strength and adequacy of old and new solutions for societal problems. Much due to legal constraints on standing and to the lack of substantive legal obligations in international law, human rights law has proven to be an adequate instrument to deal with some environmental problems. However, human rights law holds an essentially anthropocentric perspective and seems therefore insufficient to deal with problems that do not concern exclusively or sometimes even essentially individual interests, but rather common and public interests, such as environmental protection. The same can be said for fundamental rights. All the conundrums and complexities of fundamental rights theory – such as interpretation v. application on the delimitation of the protective scope, negative v. positive duties, the separation of powers doctrine and balancing review – seem to be amplified in environmental cases, because they do not quite fit the paradigm for which they were devised.

This scenario has also led to searching for the existence of more specific human and fundamental rights. As we have demonstrated, the right to a healthy environment poses many challenges due to vagueness, multidimensionality, and polysemy. Some legal scholarship, both in international law and constitutional law, has delved into new substantive fundamental environmental rights such as the right to a balanced climate or the right to ecological integrity. In what concerns the right to a balanced climate, the major ground for these claims is the international legal protection of climate as an essential piece in protecting human rights[234]. Similarly, constitutional lawyers strive to identify specific climate protection and ecological integrity in constitutions through fundamental rights theory and its interplay with states' duties[235], human dignity and intergenerational protection[236].

The identification of specific rights resulting from more generic ones by deduction is not new or original in any way[237]. However, we believe that this a

[234] Mircea, D., "Right to a proper climate in the system of the right to an environment and the equation of fundamental human rights", *Union of Jurists of Romania, Law Review*, Vol. IV(2), 2014.

[235] Ayala, P. A., "O direito fundamental à integridade dos sistemas socioecológicos em um constitucionalismo climático", *e-Publica*, Vol. 9(3), 2022, pp. 107-150.

[236] Sarlet, I. W., and Fensterseifer, T., "Fundamental rights theory and climate protection …", pp. 26-54.

[237] Legal systems contain two sets of norms: those that are expressly enacted by a public authority (such as those enshrined in laws), and those that can logically be deduced or induced from the

direct result of the uncertainty surrounding the specific content and meaning of the right to a healthy environment, both in human rights and constitutional law, and of the insufficiency of a legal framework adequate for dealing with complex, multicausal, diffuse problems such as environmental protection. Regardless of the unequivocal scientific interest as a research field, human rights law and fundamental rights present structural limitations in environmental protection that can only be overcome by other legal instruments.

Reading suggestions

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first. Cf. Bulygin, E., and Mendonca, D., *Normas y sistemas normativos*. Marcial Pons, Ediciones Jurídicas y Sociales, 2005, pp. 67–69.

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