

The right to a healthy environment: Reconceptualizing human rights in the face of climate change

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Abstract

There is hardly any doubt that climate change threatens the enjoyment of a wide range of human rights. Yet, in the absence of a distinct right to a healthy environment, a victim of climate change impacts would have to rely on existing rights to bring a claim. However, not only are these avenues not always successful or even sufficient to effectively and adequately compensate the victims, but they appear especially problematic in the context of climate change. This article explores the implications of the recognition of a stand-alone substantive right to a healthy environment in the context of climate change. In doing so, it argues that such a recognition could trigger a paradigm shift that would facilitate the reconceptualization of human rights law to better adapt to the negative impacts of climate change, in particular by incorporating key environmental law principles in the human rights system.

[L]aws and institutions for the defence of human rights [must] evolve to adapt to the new reality of climate change.¹

1 | INTRODUCTION

Over the last two decades, the number of rights-based climate change claims brought to domestic courts has known a sharp increase, and so have their success rates.² Certainly, this rapidly evolving

jurisprudence represents an important step forward for (human) rights arguments in the climate change context,³ and given the global nature of climate change, it was inevitable that similar claims would be brought to international bodies against the world's major polluters.⁴ However, the very first claim based on international human rights law—the petition brought in 2005 to the Inter-American Commission of Human Rights (IACHR) on behalf of the Inuit populations of the American and Canadian Arctic (Inuit Petition)⁵—was not as successful as domestic cases. In fact, the Inuit Petition—which argued that climate change was violating several human rights of the Inuit populations and that the United States

¹Submission of Mali to OHCHR Study, *Human Rights and Climate Change* (September 2008) <<https://www2.ohchr.org/English/issues/climatechange/docs/Mali.pdf>>.

²See, e.g., *Leghari v Pakistan*, Lahore High Court Green Bench, Judgement 25 January 2018 [W.P. No. 25501/2015]; *Stichting Urgenda v. Government of the Netherlands* (Ministry of Infrastructure and the Environment), Rechtbank Den Haag, 24 June 2015, ECLI:NL:RBDHA:2015:7145 (*Urgenda v the Netherlands*); *Juliana v United States*, 947 F.3d 1159 (9th Cir. 2020); *Third Runway at Vienna International Airport case*, Case No. W109 2000179-1/291E, Federal Administrative Court, Austria, 2 February 2017; *Earthlife Africa Johannesburg v Minister for Environmental Affairs & Others*, Case No. 65662/16, Judgment of High Court of South Africa, Gauteng Division, Pretoria (South Africa), 8 March 2017. For an overview of these and other similar cases, see J Peel and HM Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7, *Transnational Environmental Law* 37; S Varvastian,

'The Human Right to a Clean and Healthy Environment in Climate Change Litigation' (2019) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3369481>.

³Peel and Osofsky (n 1) 41.

⁴S Atapattu, 'Climate Change, Differentiated Responsibilities and State Responsibility: Devising Novel Legal Strategies for Damage Caused by Climate Change' in BJ Richardson et al (eds), *Climate Law and Developing Countries: Legal and Policy Challenges for the World Economy* (Edward Elgar 2009) 37, 47.

⁵S Watt-Cloutier, 'Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States' (7 December 2005) <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2005/20051208_na_petition.pdf>.

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was responsible for at least a portion of those violations—was dismissed by the IACHR the following year.⁶

While it is widely accepted that climate change has a significant impact on the enjoyment of several human rights, it presents—as a global environmental phenomenon with multiple causes and multiple effects—a series of nearly unsurmountable obstacles to the concrete application of human rights law to its adverse effects on the world population. To date, the attempts to obtain justice for such adverse effects through the channels provided by human rights law have built on the linkage between environmental protection and human rights.⁷ In fact, the interdependence of environmental protection and the enjoyment of a vast range of human rights is now well established and, over time, a number of human rights—such as the right to private life, to property, to health and to water—have been ‘greened’ to allow victims of environmental harm to seek justice through human rights channels.⁸ In the case of climate change impacts, however, State responsibility for the violation of specific human rights has proven more difficult to establish. There are several theoretical difficulties, deriving from the complex, global and intergenerational nature of climate change, that significantly complicate its relationship with human rights law.

Since the dismissal of the Inuit Petition, recent developments have shed new light on the applicability of human rights law to climate change impacts. On the one hand, the evolution of domestic rights-based climate litigation has unveiled ways to overcome the ‘causation’ problem inherent in the application of human rights law to climate change impacts. On the other hand, the interdependence of environmental and human rights protection has led to the understanding that States’ duties to respect, protect and fulfil human rights in the event of environmental damage need to be determined taking into account environmental principles and obligations.

Yet, despite these developments, several important questions remain unanswered, in particular regarding the collective nature of climate change impacts and the difficulty of applying human rights law extraterritorially. This article argues that answering these questions

requires reconceptualizing human rights law through the lenses of environmental law and principles, introducing a new way of ‘greening’ human rights law. Such a paradigm shift could be facilitated by the recognition at all levels of a right to a healthy environment, a right that is already enshrined in numerous national constitutions, regional human rights instruments and, as of October 2021, has been recognized by the Human Rights Council (HRC) in one of its latest resolutions. This overarching environmental human right, as this article will suggest, could mark the first step towards the introduction, within the realm of human rights law, of the duty for each State to protect the global environment and the global climate per se, regardless of the repercussions of environmental harms on existing individual human rights. Moreover, it could open the door to environmental principles in the interpretation and application not only of this right but of all other human rights that may be, in one way or another, affected by environmental harms.

To this end, this article is structured as follows. Section 2 describes the legal relationship between climate change and human rights law, highlighting the difficulties that underpin the application of human rights law to climate change. Section 3 introduces the right to a healthy environment, and Section 4 presents the paradigm shift that could be produced by this right, allowing for the ‘reconceptualization’ of international human rights law. Finally, Section 5 concludes.

2 | CLIMATE CHANGE AND HUMAN RIGHTS: A ‘SIMPLE FACT’ AND A ‘LESS SIMPLE’ LEGAL RELATIONSHIP

In 2008, the International Council on Human Rights Policy stated that ‘as a matter of *simple fact*, climate change is already undermining the realisation of a broad range of internationally protected human rights’.⁹ Today, the ‘simple fact’ that climate change affects human rights is not only well documented in legal scholarship¹⁰ but set forth in a wide variety of United Nations (UN) procedures and instruments.¹¹ However, if the ‘simple fact’ that climate change has serious and widespread

⁶Inter-American Commission's on Human Rights rejection of the petition (2006) <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2006/20061116_na_decision.pdf>.

⁷See, e.g., L Boisson de Chazournes and R Desgaines, ‘Le respect des droits de l'homme et la protection de l'environnement à l'épreuve des catastrophes écologiques: une alliance nécessaire’ (1995) 12 *Revue de droit de l'Université libre de Bruxelles* 29; AE Boyle and MR Anderson (eds), *Human Rights Approaches to Environmental Protection* (Oxford University Press 1996); M Dejeant-Pons and M Pallemerts (eds), *Human Rights and the Environment* (Council of Europe 2002); D Shelton, ‘Human Rights and the Environment: Jurisprudence of Human Rights Bodies’ (2002) 32 *Environmental Policy and Law* 158; D Shelton, ‘Human Rights, Health and Environmental Protection: Linkages in Law and Practice’ (2007) 1 *Human Rights and International Legal Discourse* 9; DK Anton and D Shelton, *Environmental Protection and Human Rights* (Cambridge University Press 2011).

⁸See, e.g., *López Ostra v Spain* App No. 16798/90 (ECtHR, 9 December 1994); *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Merits, Reparations and Costs) (31 August 2001) Inter-American Court of Human Rights Series C No. 79; ACHPR, *Communication 155/96: Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* (2001) (*Ogoniland*); *Hatton v the United Kingdom* App No. 36022/97 (ECtHR, 8 July 2003); *Taşkın and Others v Turkey* App No. 46117/99 (ECtHR, 10 November 2004); African Commission on Human and Peoples’ Rights, *Communication 276: Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2003); *Saramaka People v Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Inter-American Court of Human Rights Series C No. 172 (28 November 2007); *Kichwa Indigenous People of Sarayaku v Ecuador*, Merits and Reparations, Inter-American Court of Human Rights Series C No. 245 (27 June 2012).

⁹International Council on Human Rights Policy, *Climate Change and Human Rights: A Rough Guide* (2008) (emphasis added).

¹⁰See, e.g., JH Knox, ‘Linking Human Rights and Climate Change at the United Nations’ (2009) 33 *Harvard Environmental Law Review* 477; JH Knox, ‘Climate Change and Human Rights Law’ (2009) 50 *Virginia Journal of International Law* 163; S Humphreys (ed), *Human Rights and Climate Change* (Cambridge University Press 2010); S Adelman, ‘Human Rights in the Paris Agreement: Too Little, Too Late’ (2018) 7 *Transnational Environmental Law* 17; L Rajamani, ‘Human Rights in the Climate Change Regime’, in JH Knox and R Pejan (eds), *The Human Right to a Healthy Environment* (Cambridge University Press 2018) 236.

¹¹See, e.g., Joint Statement of the Special Procedure Mandate Holders of the Human Rights Council on the UN Climate Change Conference (7 December 2009) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23982&LangID=E>>. UNGA ‘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 H. Knox: Mapping Report’ UN Doc A/HRC/25/53 (30 December 2013). Human Rights Council (HRC) ‘Resolution 18/22, Human Rights and Climate Change’ UN Doc A/HRC/RES/18/22 (17 October 2011) para 1 (‘climate change poses an immediate and far-reaching threat to people and communities around the world and has adverse implications for the full enjoyment of human rights’); HRC ‘Resolution 28/11, Human Rights and the Environment’ UN Doc A/HRC/RES/28/11 (7 April 2015); HRC ‘Resolution 29/15, Human Rights and Climate Change’ (22 July 2015); United Nations Development Programme, ‘Human Development Report 2007/08: Fighting Climate Change—Solidarity in a Divided World’ (UNDP 2007); United Nations Environment Programme, ‘Climate Change and Human Rights’ (December 2015).

implications for the full enjoyment of human rights is now recognized in international law, it is less clear to what extent such threats can be qualified as human rights violations in a strict legal sense.

2.1 | Climate change impacts on human rights

The Inuit Petition filed before the IACHR in 2005 represents the first concrete attempt to apply human rights law to climate change. Despite its dismissal, the case succeeded in giving a ‘human face’ to climate change, introducing the idea that rather than being merely an abstract and intangible environmental phenomenon ‘belonging squarely to the natural sciences’,¹² climate change is a human process with human causes and consequences for all humanity.¹³ And, for the first time, climate issues were framed as human rights issues, triggering a subsequent hearing at the IACHR on global warming and human rights in the Americas.¹⁴

The momentum created by the Inuit Petition was swiftly seized by the government of the Maldives which, in November 2007, convened a Small Island States Conference in Malé to address the linkages between climate change and human rights.¹⁵ The outcome of the meeting—the Malé Declaration on the Human Dimension of Global Climate Change—is the first international instrument to explicitly recognize said linkages, noting that ‘climate change has clear and immediate implications for the full enjoyment of human rights’.¹⁶ The Declaration, however, did more than simply acknowledge the threats posed by climate change to internationally recognized human rights, and went on to call on the UN HRC ‘to address the issue as a matter of urgency’.¹⁷ And the Council did address the issue, the following year, with the adoption of Resolution 7/23 on human rights and climate change.¹⁸

Resolution 7/23 of 2008 was the first UN resolution to state explicitly that climate change poses ‘an immediate and far-reaching threat to people and communities around the world and has implication for the full enjoyment of human rights’¹⁹ and was later followed by other resolutions where the same message was conveyed with even stronger wording.²⁰ Similarly, the link between human rights and

climate change slowly began to find its way in climate change instruments, such as the Cancún Agreements and the Paris Agreement.²¹

2.2 | Three theoretical difficulties

Resolution 7/23 asked the Office of the High Commissioner for Human Rights (OHCHR) to prepare a study on the nature and extent of the implications of climate change on the enjoyment of human rights. This study, in addition to detailing the adverse impacts of global warming on a spectrum of human rights,²² identified three core legal questions with regard to the complex and delicate relationship between climate change and human rights: (i) whether there is in fact a relationship between climate change and human rights, (ii) whether climate change constitutes a violation of human rights and (iii) what are States’ human rights obligations pertaining to climate change at both the national and international level.²³ While the answer to the first question seemed fairly straightforward,²⁴ the other two questions proved much more difficult to address.

While today it has become nearly unthinkable for the international community to ignore the real and present threats posed by climate change to human rights,²⁵ it is far less obvious to what extent such threats can be qualified as human rights violations in a strict legal sense.²⁶ Climate change is not like any other environmental problem. It is a global and extremely complex environmental phenomenon whose nature makes it more difficult to argue that its adverse effects represent a human rights violation triggering human rights obligations upon States. As clearly stated in the OHCHR study, the application of human rights to climate change presents indeed three main theoretical difficulties.²⁷

First, climate change is characterized by a long and complex chain of steps between the initial human activities that produce greenhouse

¹²M Limon, ‘Human Rights and Climate Change: Constructing a Case for Political Action’ (2009) 33 *Harvard Environmental Law Review* 439, 441.

¹³Atapattu (n 4) 47.

¹⁴Letter from the IACHR to representatives of the Inuit Circumpolar Conference, Earth Justice, and CIEL, Ref: Global Warming and Human Rights, Hearing—127th Ordinary Period of Sessions (1 February 2007) <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2007/20070201_na_reply-1.pdf>.

¹⁵Limon (n 12) 442.

¹⁶Malé Declaration on the Human Dimension of Global Climate Change (14 November 2007) <http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf>.

¹⁷Limon (n 12) 442.

¹⁸HRC ‘Resolution 7/23, Human Rights and Climate Change’ UN Doc A/HRC/RES/7/23 (28 March 2008).

¹⁹*Ibid* para 1.

²⁰The preamble to Resolution 10/4, for instance, reads: ‘Noting that climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights including, inter alia, the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination and human rights obligations related to access to safe drinking water and sanitation, and recalling that in no case may a people be deprived of its own means of subsistence’. HRC ‘Resolution 10/4, Human Rights and Climate Change’ UN Doc A/HRC/RES/10/4 (25 March 2009) preamble, para 4.

²¹The Cancún Agreements were the first ones where the parties explicitly urged to ‘fully respect human rights’ in all climate-related actions, while the Paris Agreement addresses the relevance of considering human rights when dealing with climate change in its preamble. United Nations Framework Convention on Climate Change (UNFCCC) ‘Decision 1/CP.16, The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention’ UN Doc FCCC/CP/2010/7/Add.1 (15 March 2011) para 8; Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 55 ILM 740 preamble.

²²OHCHR ‘Report on the Relationship between Climate Change and Human Rights’ UN Doc A/HRC/10/61 (15 January 2009); see M Limon, ‘The Politics of Human Rights, the Environment, and Climate Change at the Human Rights Council’ in Knox and Pejan (n 10) 189, 196.

²³OHCHR (n 22).

²⁴*Ibid* para 92.

²⁵Limon (n 22) 195. See UNGA ‘Report of the Special Rapporteur on the Issue of Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment’ UN Doc A/HRC/31/52 (1 February 2016); ‘Understanding Human Rights and Climate Change. Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change’ (26 November 2015).

²⁶OHCHR (n 22) para 70.

²⁷*Ibid*. These theoretical difficulties have encouraged a number of delegations, led by the United States, to argue that ‘moving toward a human rights-based approach to climate protection would be impractical and unwise’, as climate change is ‘a complex global environmental problem [which] does not lend itself to human rights-based solutions’. See United States, ‘Observations by the United States of America on the Relationship Between Climate Change and Human Rights’ (2008) <<https://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/USA.pdf>> paras 17, 23.

gas emissions and the final physical impacts that may result from those emissions,²⁸ making it problematic both to identify the individual human rights potentially impaired by climate change and to attribute said climate-related harms to specific acts or omissions of specific States.²⁹ Under the law of State responsibility, an internationally wrongful act of a State exists when conduct consisting of an action or omission is attributable to the State under international law and constitutes a breach of an international obligation of the State.³⁰ In the context of climate change, there are two causality inquiries that need to be conducted, both of which encounter significant difficulties: the first one between a State action or inaction and a specific threat or degradation to the climate and the second between such threat or degradation and an individual impairment of a human right.³¹ All the ‘environmental’ cases considered by the African, the Inter-American or the European human rights systems were characterized by the presence of direct actions or omissions by the State in the face of a concrete situation, leading to the impairment of specific human rights of well-defined individuals or groups. By contrast, in the climate change context, it is the countries’ global emissions that contribute—albeit in different proportions—to higher concentrations of greenhouse gases in the atmosphere and, in turn, to a series of environmental and climatic phenomena, which may impair one or more internationally recognized human rights.

Second, the global nature of climate change raises the question of the extraterritorial application of human rights law with regard to actions occurring outside the State or States where its impacts are produced.³² Here, the main limitation stems from the very nature of human rights treaties, which create a legal system where States assume duties towards those individuals that are subject to their jurisdiction,³³ while climate change is inherently global in scope.³⁴ It has nevertheless been suggested that ‘a good case can ... be made for the extraterritorial application of human rights treaties to environmental nuisances’.³⁵ However, as Section 4.3 will explain, while these arguments may justify the extraterritorial application of human rights treaties to certain *transboundary* environmental harms, they are not necessarily equally valid in cases of *global* environmental harm, such as climate change, where, because of the multiplicity of victims, ‘it is much harder to frame such a problem in terms of jurisdiction or

control over persons or territory as required by the human rights case law’.³⁶

Finally, climate change impacts ‘are often projections about future impacts, whereas human rights violations are normally established after the harm has occurred’.³⁷ As a result, the link between the adverse impacts of climate change and the impairment of a specific human right cannot always be easily established, and even when it can, it may be too late to obtain relief.³⁸ Similarly, this third theoretical difficulty raises questions regarding the possibility for current generations to seek remedies for human rights violations that will only affect future generations.³⁹

2.3 | Attribution in climate change litigation

These three theoretical difficulties have challenged early rights-based climate change litigation, as is well illustrated by the outcome of the Inuit Petition. In particular, it was the difficulty of tracing back the complex chain of steps from specific climate change impacts and violations of specific human rights to United States greenhouse gas emissions that had led to the dismissal of the petition in 2005: ‘How [can there] be a relationship—not just any relationship, a legal relationship, a relationship of responsibility of the states’, asked the IACHR, ‘for violations of the rights that you have very clearly described’?⁴⁰

Causation is indeed a key challenge in climate litigation. It is challenging to establish a complete causal chain linking a source’s emissions to specific impacts on the climate system, considering in particular that climate change is not a product of a single pollutant or polluting activity and that greenhouse gases accumulate over time in the atmosphere.⁴¹

Since 2005, however, science has evolved, and so has its role in the courtroom. Regarding the first step of causation (between a State action or inaction and a specific threat or degradation to the climate), researchers have developed methodologies to attribute specific climate change impacts to specific sources—be it a particular actor, sector or activity.⁴² In recent years, attribution science, intended as ‘the process of evaluating the relative contributions of multiple causal factors to a change or event with an assignment of statistical confidence’,⁴³ has become a potential means to resolve the issue of causation.⁴⁴

²⁸ibid para 18.

²⁹OHCHR (n 22) para 26.

³⁰International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, in ‘Yearbook of the International Law Commission, 2001, vol. II, Part Two’ (2001) art 2.

³¹PM Dupuy and JE Viñuales, *International Environmental Law* (Cambridge University Press 2018) 396.

³²Peel and Osofsky (n 1) 46. See also S McInerney-Lankford, ‘Climate Change and Human Rights: An Introduction to Legal Issues’ (2009) 33 *Harvard Environmental Law Review* 431, 433.

³³Atapattu (n 4) 265. IACtHR, *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity—Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*, Advisory Opinion OC-23/17, Inter-American Court of Human Rights Series A No. 23 (15 November 2017) (IACtHR Advisory Opinion) para 41.

³⁴Limon (n 22) 203.

³⁵AE Boyle, ‘Human Rights and the Environment: Where Next?’ (2012) 23 *European Journal of International Law* 613, 637.

³⁶ibid 640–641.

³⁷OHCHR (n 22) para 70.

³⁸Atapattu (n 4) 265–266.

³⁹Peel and Osofsky (n 1) 46.

⁴⁰Video: General Hearing on Global Warming and Human Rights, IACHR 127th Ordinary Period of Sessions’ (1 March 2007), question of Commissioner Victor Abramovich, as quoted in MS Chapman, ‘Climate Change and the Regional Human Rights Systems’ (2010) 10 *Sustainable Development Law and Policy* 37, 38.

⁴¹M Burger et al, ‘The Law and Science of Climate Change Attribution’ (2020) 45 *Columbia Journal of Environmental Law* 60, 129.

⁴²ibid 63, 128.

⁴³GC Hegerl et al, ‘Good Practice Guidance Paper on Detection and Attribution Related to Anthropogenic Climate Change’ in T Stocker et al (eds), *Meeting Report of the Intergovernmental Panel on Climate Change Expert Meeting on Detection and Attribution of Anthropogenic Climate Change* (IPCC Working Group I Technical Support Unit 2010) 2.

⁴⁴T Pfrommer et al, ‘Establishing Causation in Climate Litigation: Admissibility and Reliability’ (2019) 152 *Climate Change* 67–69 and 81.

Domestic climate litigation, for many years, has involved statutory law causes of action alleging that governments failed to take climate change considerations sufficiently or at all into account in their decision-making processes. In these cases, attribution science has proven key to solve the question of causation which was often central to proving both standing and merits of each case. In cases like *Massachusetts v EPA*, for instance, attribution science was used to demonstrate a causal connection between the government failure to regulate greenhouse gas emissions and specific injuries to public health and welfare.⁴⁵

Over the last few years, as the linkage between climate change and human rights was increasingly recognized internationally, rights-based claims have emerged as a dominant climate litigation strategy,⁴⁶ and the role of attribution science has been crucial to the courts and tribunals' analysis. This was the case in the Hague District Court decision in *Urgenda v The Netherlands*, where the Court upheld the petitioner's claim that the State's emission reduction target for 2020 was inadequate to meet the global 2°C target.⁴⁷ Attribution science was used both to demonstrate the harms incurred by Dutch people as a result of climate change and to determine the emissions reductions necessary to meet the 2°C target.⁴⁸ Although the discussion on human rights was only peripheral to the final decision—which mostly focused on the State's duty of care towards the petitioner and, more broadly, Dutch society—the decision marked a significant step forward in the discussion on causation. The Court noted that '[t]he fact that this risk ... will not impact specific persons or a specific group of persons but large parts of the population does not mean [that human rights] offer no protection from this threat'⁴⁹ and clarified that the fact that the risks connected to rising emissions 'will only be able to materialize a few decades from now' should not rule out the protection offered by human rights instruments.⁵⁰ Similarly, in *Juliana v United States*, the Oregon District Court rejected the idea that causation between emissions and climate change impacts cannot be established where there are a multitude of alternative culprits and found that 'a causal chain does not fail simply because it has several links, provided those links are not hypothetical or tenuous and remain plausible'.⁵¹

3 | BEYOND 'GREENING' HUMAN RIGHTS: RECOGNIZING A RIGHT TO A HEALTHY ENVIRONMENT

The recent domestic climate change litigation demonstrates the possibility to overcome the three theoretical difficulties that have undermined the establishment of a human rights-based approach to climate

protection. As attribution science continues to develop and the impacts of climate change worsen, the foundations for such cases can be deemed to only become greater.⁵² Most of these cases, at least recently, have advanced human rights arguments—whether arguing that the State's act or omission that has led to climate change impacts violated the petitioners' human rights or by using human rights as an interpretative tool to evaluate other legal claims.⁵³

Moreover, several of these cases are not simply based on the alleged breach of several human rights as a result of climate change. Increasingly often, the *right to a healthy environment* is invoked, alongside other human rights, and—at least so far—the recognition of this right 'seems to have contributed to the success of human rights-based climate cases'.⁵⁴

It has been argued that 'the recognition of the right to a healthy environment provides a lever to overcome classical hurdles in human rights-based environmental litigation, such as *locus standi* and, more generally, a burden of proof that is often too heavy on applicants'.⁵⁵ At the same time, the existence of such a right in domestic constitutions is not necessarily sufficient to support claims associated with alleged climate change-induced human rights violations.⁵⁶ This limitation of a constitutional right to a healthy environment was well illustrated by the decision of the Norwegian Supreme Court in *Nature and Youth Greenpeace Nordic v the Government of Norway*. In its decision, the Norwegian Supreme Court found that, although Article 112 of the Norwegian Constitution, which enshrines the right to a healthy environment, can be read as establishing an obligation for the State, it does not recognize a corresponding fundamental right *inter alia* because of the absence of an internationally recognized human right to a healthy environment.⁵⁷ In fact, while many national constitutions have been recognizing a constitutional right to a healthy environment since the 1970s, when the aforementioned disputes occurred, international human rights law did not recognize a stand-alone human right to a healthy, clean or proper environment. The road to such a recognition, which led in October 2021 to the adoption of HRC Resolution 48/13, was a long and difficult one, marking an important milestone for both international human rights and environmental law.

3.1 | The right to a healthy environment: Origins and early developments

The recognition of a right to a healthy environment has always been surrounded by an aura of scepticism.⁵⁸ At the national level, this right

⁵²Peel and Osofsky (n 1) 61.

⁵³See, e.g., *Urgenda*, *Leghari* and *Juliana*.

⁵⁴P de Vilchez and A Savaresi, 'The Right to a Healthy Environment and Climate Litigation: A Mutually Supportive Relation?' (18 April 2021) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3829114> 15.

⁵⁵DR Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press 2011) 181; de Vilchez and Savaresi (n 54) 4.

⁵⁶de Vilchez and Savaresi (n 54) 10. Peel and Osofsky (n 1) 62.

⁵⁷*Nature and Youth et al v Norway*, HR-2020-2472-P (Case No. 20-051052SIV-HRET), 22 December 2020, para 92. See de Vilchez and Savaresi (n 54) 10.

⁵⁸Boyle, for instance, believed it to look like 'an attempt to turn an essentially political question into a legal one': Boyle (n 35) 627; see also AE Boyle, 'The Role of International Human Rights Law and the Protection of the Environment' in Boyle and Anderson (n 7) 43.

⁴⁵*Massachusetts et al, Petitioners v Environmental Protection Agency et al*, 549 U.S. 497 (2007).

⁴⁶J Setzer and R Byrnes, 'Global Trends in Climate Change Litigation: 2020 Snapshot' (London School of Economics and Political Science 2020) 14.

⁴⁷*Urgenda v the Netherlands* (n 2) para 5.1.

⁴⁸Burger et al (n 41) 63, 186.

⁴⁹*State of the Netherlands v Urgenda Foundation*, HR 20 December 2019, ECLI:NL:HR:2019:2006 para 5.6.2.

⁵⁰*ibid*.

⁵¹*Juliana v United States*, 217 F. Supp. 3d 1,224, 1,248 (D. Or. 2016) 1268. See Burger et al (n 41) 63, 165.

has been at the centre of a lively debate between those who believed that its recognition would contribute to a variety of positive procedural and substantive outcomes ‘ranging from increased public participation in environmental management to cleaner air and water’, and those who vehemently opposed its introduction arguing that it would simply duplicate existing rights and would ultimately prove ineffective.⁵⁹ While the former position seems to have prevailed in the majority of national jurisdictions, at the international level States have resisted the idea of introducing such a right for a long time, showing a hard time in accepting the notion that ‘environmental harm [has] implications for fundamental rights [and] that promoting human rights norms [can] help protect against environmental damage’.⁶⁰

At the international level, the first reference to a right to a healthy environment, albeit indirect, was made during the 1972 Stockholm Conference by its Secretary-General Maurice Strong, who opened the Conference with a speech that drew heavily on both the UN Charter and the Universal Declaration of Human Rights:

the environmental crisis points up the need to review our activities, not just in relation to the particular purpose and interest they are designed to serve, but in their overall impact on the whole system of interacting relationships, which determines the quality of human life.⁶¹

Along these lines, Principle 1 of the Stockholm Declaration referred to a right to a healthy environment,⁶² and so did a growing number of national constitutions and legislations. Portugal was the first country to adopt, in 1976, a ‘right to a healthy and ecologically balanced human environment’, followed by Spain in 1978 and by more than 100 States as of today, where in one way or another the right to a healthy environment has gained constitutional recognition and protection.⁶³

While no reference to such a right exists in international human rights treaties, the right to a healthy environment has been included in several regional human rights instruments drafted after the 1970s. The African Charter on Human and Peoples’ Rights, for instance, provides that ‘all peoples shall have the right to a general satisfactory environment favourable to their development’.⁶⁴ Similar formulations can be found in the 1988 Additional Protocol to the American

Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador),⁶⁵ the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, adopted by the African Union in 2003,⁶⁶ the 2004 Arab Charter on Human Rights⁶⁷ and the Human Rights Declaration adopted by the Association of Southeast Asian Nations in 2012.⁶⁸

3.2 | Towards an internationally recognized right to a healthy environment

Despite more than 40 years of experience with national constitutions and regional human rights instruments, States have been reluctant to recognize a stand-alone substantive right to a healthy environment in international human rights law for a long time. It was only in October 2021 that the HRC, in its Resolution 48/13, recognized ‘the right to a safe, clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights’ and encouraged States ‘to adopt policies for the enjoyment of the right to a safe, clean, healthy and sustainable environment’.⁶⁹ The resolution represents a victory for those members of the international community convinced that such a global recognition would contribute to filling ‘a glaring gap in the architecture of international human rights’.⁷⁰ Given the inherent interdependence of environmental protection and the enjoyment of human rights—a healthy environment is fundamental for the full enjoyment of a vast range of human rights and, conversely, environmental degradation interferes with said enjoyment—the mere ‘greening’ of existing human rights was not deemed sufficient, considering in particular the multiple current environmental challenges. On the other hand, the recognition of a right to a healthy environment in a global instrument would ‘serve as an acknowledgement that [this right] must be universally protected’.⁷¹

The adoption of Resolution 48/13 represents the culmination of a process that started in 2011, when the HRC requested the OHCHR to prepare a study on human rights and the environment.⁷² After 1 year, and after having consulted the study prepared by the OHCHR, the HRC concluded that the subject of the human rights obligations related to the enjoyment of a safe, clean, healthy and sustainable environment required further study and clarification and, to this end, appointed an independent expert to explore the subject

⁵⁹DR Boyd, ‘Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment’ in Knox and Pejan (n 10) 17.

⁶⁰Limon (n 22) 190.

⁶¹M Strong, ‘1972 Stockholm Conference Opening Statement’ <https://www.mauricestrong.net/index.php?option=com_content&view=article&id=154&Itemid=78>.

⁶²‘Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being ...’. Declaration of the United Nations Conference on the Human Environment in ‘Report of the United Nations Conference on the Human Environment’ UN Doc A/CONF.48/14/Rev.1 (1973) Principle 1.

⁶³UNGA ‘Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment’ UN Doc A/73/188 (19 July 2018) (Special Rapporteur 2018 Report) para 30. See Boyd (n 56); Boyd (n 59); JR May and E Daly, *Global Environmental Constitutionalism* (Cambridge University Press 2015).

⁶⁴African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58 (African Charter) art 24.

⁶⁵Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (adopted 16 November 1988, entered into force 16 November 1999) OAS Treaty Series No. 69 (Protocol of San Salvador) art 11(1).

⁶⁶Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, (adopted 1 July 2003, entered into force 25 November 2005) arts 18–19.

⁶⁷Arab Charter on Human Rights (adopted 15 September 1994, entered into force 15 March 2008) <<https://digitallibrary.un.org/record/551368?ln=en>> art 38.

⁶⁸ASEAN Human Rights Declaration (adopted 18 November 2012) para 28(f).

⁶⁹HRC ‘Resolution 48/13, The Human Right to a Clean, Healthy and Sustainable Environment’ UN Doc A/HRC/RES/48/13 (18 October 2021).

⁷⁰Special Rapporteur 2018 Report (n 63) para 53.

⁷¹*ibid* para 49.

⁷²HRC ‘Resolution 16/11, Human Rights and the Environment’ UN Doc A/HRC/RES/16/11 (12 April 2011).

further.⁷³ Over the years, the HRC has continued to offer an important platform for the development and advancement of the analysis on the human rights obligations related to the enjoyment of a healthy environment, facilitating intergovernmental discussions and providing the independent expert (whose mandate was renewed after 3 years but this time as Special Rapporteur) with the necessary framework to further the understanding of this complex matter.

Within this framework, and thanks to the contribution of the experience of 'national courts, regional tribunals, treaty bodies, special procedures and many international institutions',⁷⁴ the Special Rapporteur was able to start defining the content, scope and parameters of this right, laying them out in a document aptly titled 'Framework Principles on Human Rights and the Environment'.⁷⁵ The Framework Principles, presented to the HRC in March 2018, set out the basic obligations—both procedural and substantive—of States under human rights law as they relate to the enjoyment of a healthy environment. The use of the word 'enjoyment' in connection with 'a safe, clean, healthy, and sustainable environment' in several HRC Resolutions has been seen by some as a stepping stone towards the recognition of the 'healthy environment' as a human right.⁷⁶ In October 2021, after the explicit recommendations of the Special Rapporteur, the HRC transformed the previous formulation 'enjoyment of a safe, clean, healthy and sustainable environment' into the long-awaited 'enjoyment of the right to a safe, clean, healthy and sustainable environment', opening the door for a subsequent formal recognition of this right by the UN General Assembly.

3.3 | Not just an empty vessel waiting to be filled⁷⁷

One of the main criticisms directed to the recognition of a human right to a healthy environment has been based on the difficulty to define the exact parameters of this right. States may be reluctant to recognize a 'new' human right if its meaning and content appear uncertain and its scope and implications unclear.⁷⁸ However, over the last 45 years, the meaning, content and scope of this right—as well as its relationship with other human rights—have been progressively defined and clarified by national tribunals and regional human rights courts.

While it is evident that the enjoyment of a vast range of human rights depends on a safe and clean environment, there is hardly any doubt that the right to a healthy environment is an autonomous right, which 'differs from the environmental content that arises from the

protection of other rights'.⁷⁹ The question of the content of this right—and States' obligations to ensure its enjoyment—initially received attention in 2001 in the context of the *Ogoniland* case before the African Commission of Human and Peoples' Rights, which recognized both substantive and procedural aspects of the right enshrined in Article 24 of the African Charter. According to the African Commission, Article 24 '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'.⁸⁰ In other words, States need to comply with the environmental principle of prevention—requiring each State to act with *due diligence* to avoid harming the environment of other States and even of areas beyond the limits of national jurisdiction—to fully comply with Article 24.⁸¹ The African Commission continued to spell out specific duties required of States to ensure the respect, protection and fulfilment of this right, which include 'ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicizing environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities'.⁸²

After the *Ogoniland* case, the content of the right to a healthy environment was further defined and clarified on several other occasions. Notable examples include the Malé Declaration, which provides a brief description of what this overarching environmental right would actually require of States (as well as of any other international actor subject to human rights obligations),⁸³ and the above-mentioned Framework Principles, in which the Special Rapporteur summarized the relevant obligations of States under human rights law, focusing on both procedural and substantive obligations.⁸⁴

The domestic sphere—in particular the way in which constitutional formulations of this right have been applied by domestic courts—can similarly help define the scope of an international human right to a healthy environment.⁸⁵ As it emerges from several national constitutions, the right to a healthy environment has been understood both as an individual and a collective right, as well as a right that can

⁷⁹IACtHR Advisory Opinion (n 33) para 63.

⁸⁰*Ogoniland* (n 8) para 52.

⁸¹Rio Declaration on Environment and Development in 'Report of the United Nations Conference on Environment and Development' UN Doc A/CONF.151/26 (vol I) (12 August 1992) Principle 2.

⁸²*Ogoniland* (n 8) para 53.

⁸³Malé Declaration (n 16). See DB Magraw and K Wienhöfer, 'The Malé Formulation of the Overarching Environmental Human Right' in Knox and Pejan (n 10) 230.

⁸⁴Procedural obligations include 'the duties of States to respect and protect the rights to freedom of expression, association and peaceful assembly in relation to environmental matters, provide for environmental education and public awareness, provide public access to environmental information, require the prior assessment of the possible environmental and human rights impacts of proposed projects and policies, provide for and facilitate public participation in decision-making related to the environment and provide for access to effective remedies for violations of human rights and domestic laws relating to the environment', while substantive obligations refer to the setting and implementation of standards 'at levels that would prevent all environmental harm from human sources and ensure a safe, clean, healthy and sustainable environment'. Special Rapporteur 2018 Report (n 63) paras 14–15.

⁸⁵E Daly and JR May, 'Learning from Constitutional Environmental Rights' in Knox and Pejan (n 10) 50.

⁷³HRC 'Draft Resolution on Human Rights and the Environment' UN Doc A/HRC/19/L.8/Rev.1 (20 March 2012) para 2.

⁷⁴Special Rapporteur 2018 Report (n 63) para 29.

⁷⁵Framework Principles on Human Rights and the Environment, in 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' UN Doc A/HRC/37/59 (24 January 2018) Annex.

⁷⁶See, for example, HRC (n 73); and HRC 'Resolution 31/8, Human Rights and the Environment' UN Doc A/HRC/RES/31/8 (22 April 2016).

⁷⁷Special Rapporteur 2018 Report (n 63) para 38.

⁷⁸*ibid.*

be asserted on behalf of future generations. The Constitution of Papua New Guinea, for instance, identifies as its fourth goal for the country's 'natural resources and environment to be conserved and used for the collective benefit of us all, and be replenished for the benefit of future generations'.⁸⁶

A similar conceptualization of environmental rights as 'collective' rather than purely individual entitlements can be found in the jurisprudence of regional human rights courts and commissions. The African Commission, for instance, in the *Ogoniland* case construed the human rights guarantees linked to Article 24 of the Charter in broad collective terms. Along the same lines, in its 2017 Advisory Opinion, the Inter-American Court of Human Rights (IACtHR) confirmed that the right to a healthy environment (as enshrined in the Protocol of San Salvador) presents both individual and collective connotations and that 'in its collective dimension', it 'constitutes a universal value that is owed to both present and future generations'.⁸⁷

4 | RECONCEPTUALIZING HUMAN RIGHTS LAW: THE RIGHT TO A HEALTHY ENVIRONMENT AND HUMAN RIGHTS SEEN THROUGH AN ENVIRONMENTAL 'LENS'

The implications of the recognition of an international human right to a healthy environment could be several and significant, as pointed out by the Special Rapporteur. In his words, it would

serve as an acknowledgement that the right to a healthy environment must be universally protected, serve as an impetus for more nations to incorporate this right into their constitutions and legislation and potentially provide a mechanism for increased accountability where national governments violate or fail to protect this vital human right.⁸⁸

Moreover, recognizing such an overarching environmental right alongside already existing human rights could trigger a paradigm shift in the international human rights regime, which would make this regime more readily applicable to address climate change. On the one hand, human rights law has been 'greened' over the years with the introduction of environmental considerations and principles in the interpretation of human rights norms, and the 'theoretical difficulties' of applying human rights law to climate change have been, at least in part, overcome, as domestic litigation shows. On the other hand, several questions remain unanswered and will continue to be so unless a reconceptualization of human rights law occurs. Such a

reconceptualization is made possible by the paradigm shift that could be triggered by the recognition of a right to a healthy environment.

4.1 | Limitations of the existing framework

Under human rights law, negative impacts on the environment are only relevant to the extent that they interfere with the sphere of rights guaranteed by human rights treaties to individuals and communities.⁸⁹ Without the express recognition of a right to a healthy environment, human rights courts have often stated that they are not 'specifically designed to provide general protection to the environment as such'.⁹⁰ As exemplified by the 2003 judgement of the European Court of Human Rights (ECtHR) in *Kyrtatos v Greece*, 'environmental integrity is not seen as a value *per se* for the community affected or society as a whole, but only as a criterion to measure the negative impact on a given individual's life, property, private and family life'.⁹¹ In this decision, the ECtHR, ruling on the applicability of Article 8 of the Convention, concluded that the deterioration of the environment would have become relevant only had it directly affected the individual rights of the plaintiffs, who were not instead 'entitled to live in any particular environment, or to have the surrounding environment indefinitely preserved'.⁹²

A more progressive attitude with respect to the understanding of environmental integrity as a value *per se* and of environmental rights seen as 'collective' rather than purely individual entitlements can be found in the jurisprudence of the African Commission of Human and Peoples' Rights, the IACtHR and certain national courts and tribunals. Certainly, this attitude can be explained with the specific formulations contained, respectively, in the African Charter, the Protocol of San Salvador and the relevant national constitutions. The African Charter, for instance, expressly refers to human rights as 'people's rights' and Article 24 recognizes that '[a]ll peoples shall have the right to a general satisfactory environment favourable to their development'.⁹³

Conversely, the lack of reference to a right to a healthy environment in the text of the European Convention on Human Rights explains the different approach outlined above. And although the jurisprudence of the ECtHR has repeatedly referred to the right to a healthy environment and has availed itself of the principles, rights and obligations of international environmental law, such 'systemic' interpretation has always remained confined within the limits of existing human rights. In its decision in *Fadeyeva v Russia*, the Court indicated that the European Convention (in this case, Article 8) is not violated every time that environmental degradation occurs, in so far as it does

⁸⁶F Francioni, 'International Human Rights in an Environmental Horizon' (2010) 21 *European Journal of International Law* 41, 50.

⁸⁹*Kyrtatos v Greece* App No. 41666/98 (ECtHR, 22 May 2003) para 52.

⁹¹Francioni (n 90) 50.

⁹²Boyle (n 35) 627. *Kyrtatos v Greece* (n 90) paras 51–55. A similar conclusion was reached the very same year by the Inter-American Commission on Human Rights. *Metropolitan Nature Reserve v Panama*, Inter-American Commission of Human Rights Rep No. 88/03 (22 October 2003), para 34.

⁹³African Charter (n 65) art 24. On the other hand, it has been argued that similar outcomes can be found in the context of the Inter-American system. See, for example, Francioni (n 89) 51.

⁸⁶Constitution of the Independent State of Papua New Guinea (1975) preamble.

⁸⁷IACtHR Advisory Opinion (n 33) para 59.

⁸⁸Special Rapporteur 2018 Report (n 64) para 49. See A Savaresi, 'The UN HRC Recognizes the Right to a Healthy Environment and Appoints a New Special Rapporteur on Human Rights and Climate Change: What Does It All Mean?' (EJIL:Talk!, 12 October 2021).

not include a right to a healthy environment.⁹⁴ As a result, the European Court has examined the impact of the environmental harm on the individual's home, family or private life, rather than the actual risk that exists for the environment or the level of environmental degradation.⁹⁵

In the context of climate change, this traditional approach towards the 'greening' of human rights may not solve the question of the applicability of human rights law in its entirety. Rather, a certain degree of adaptation or 'reconceptualization' of human rights law would be well advised. In other words, the conceptual and normative framework of international human rights law should be adapted 'to new situations so as to extend the scope of protection to novel risks and to the impact of environmental degradation on human rights'.⁹⁶ Such a reconceptualization could be made possible by the paradigm shift that may be triggered by the recent recognition by the HRC of the right to a healthy environment alongside other existing human rights.

The following three sections will address such a reconceptualization from two angles. The first is the need to view the relationship between human rights and climate change through the lenses of important concepts of international environmental law, such as the concept of common concern of mankind and intergenerational equity, which require a move away from the understanding of human rights violation as the violation of specific human rights belonging to specific individuals or communities. These two concepts, as Section 4.2 will describe, would provide the lenses necessary to frame environmental integrity as a value per se and to view the human rights system as a system that can provide general protection to the environment as such. As a result, these lenses would also contribute to answering the question of the extraterritorial application of human rights law in the context of climate change impacts (Section 4.3). The second aspect of this reconceptualization, presented in Section 4.4, is the introduction of a preventive approach in international human rights law—once again along the lines of international environmental law. Such a preventive approach would in turn require abandoning the idea of the human rights system as a system predominantly aimed at allowing the victims to seek redress for what has happened, but as a forward-looking means of encouraging the evolution of, and providing a qualitative contribution to, robust, effective and sustainable policy responses at both the national and international level.

4.2 | Common concern of (present and future) humankind

Climate change and the right to a healthy environment share a clear and defining *collective* dimension. In 1988, the UN General Assembly declared in Resolution 43/53 that 'climate change is a common concern of mankind, since climate is an essential condition which sustains

life on earth'⁹⁷ and resolved to convene an International Negotiations Committee to draft a corresponding legal document, which then became the United Nations Framework Convention on Climate Change (UNFCCC).⁹⁸

The concept of common concern of humankind refers to a common concern for the global environment in broad terms. Trindade has pointed out that the environment is indeed a 'common good', which is a collective right and which may benefit all humans:

Such rights pertain at a time to each member as well as to all members collectively, the object of the protection being the same, a common good (*bien commun*) such as the human environment, so that the observance of such rights benefits at a time each member and all members of the human collectivity, and the violation of such rights affects or harms at a time each member and all members of the human collectivity at issue. This reflects the essence of 'collective' rights, such as the right to a healthy environment in so far as the object of protection is concerned.⁹⁹

The collective dimension of the right to a healthy environment is therefore well established.¹⁰⁰ Moreover, climate change is an inherently intergenerational problem,¹⁰¹ with extremely serious implications not only for the present but for future generations as well. It follows that the *collective right* discussed by Trindade should be collective also in a temporal rather than merely spatial dimension, as it can include the rights of future generations as well as those of the present.¹⁰² As aptly put by Brown Weiss, '[i]ntergenerational planetary rights may be regarded as group rights, as distinct from individual rights, in the sense that generations hold these rights as group in relation to other generations—past, present, and future'.¹⁰³

With a few exceptions, human rights law is generally based on a personal-injury-based approach to legal protection.¹⁰⁴ Within such an approach, as it has been suggested, 'there is little room, if any, for pure *ecocentric* environmental protection or perhaps even for

⁹⁷UNGA 'Protection of Global Climate for Present and Future Generations of Mankind' UN Doc A/RES/43/53 (6 December 1988). Cf also UNGA 'Protection of Global Climate for Present and Future Generations of Mankind' UN Doc A/RES/44/207 (22 December 1989); UNGA 'Protection of Global Climate for Present and Future Generations of Mankind' UN Doc A/RES/45/212 (21 December 1990) (Resolution 45/212).

⁹⁸F Biermann, 'Common Concern of Humankind': The Emergence of a New Concept of International Environmental Law' (1996) 34 *Archiv des Völkerrechts* 426, 439.

⁹⁹AAC Trindade, 'The Parallel Evolutions of International Human Rights Protection and Environmental Protection and the Absence of Restrictions upon the Exercise of Recognized Human Rights' (1991) 13 *Revista IIDH* 36, 66.

¹⁰⁰See IACtHR Advisory Opinion (n 33).

¹⁰¹E Brown Weiss, 'Climate Change, Intergenerational Equity, and International Law' (2008) 9 *Vermont Journal of Environmental Law* 615.

¹⁰²Trindade (n 99) 66–67. G Handl, 'Human Rights and the Protection of the Environment: A Middle 'Revisionist' View' in AAC Trindade (ed), *Human Rights, Sustainable Development, and the Environment* (IIDH 1992) 135; AE Boyle, 'The Role of International Human Rights Law in the Protection of the Environment' in Boyle and Anderson (n 7) 46.

¹⁰³E Brown Weiss, 'Our Rights and Obligations to Future Generations for the Environment' (1990) 84 *American Journal of International Law* 198, 203. Brown Weiss points out that human rights law, to a certain extent, for instance, with the genocide convention and the prohibition against racial discrimination, already foresees the protection of future, and not only present, generations.

¹⁰⁴Dupuy and Viñuales (n 31) 386.

⁹⁴Case of *Fadeyeva v Russia* App No. 55723/00 (ECtHR, 9 June 2005) para 68.

⁹⁵IACtHR Advisory Opinion (n 33) para 139.

⁹⁶Francioni (n 89) 42.

integrating the rights of unborn generations'.¹⁰⁵ This approach, however, is not suitable for addressing global environmental problems such as climate change. Instead, it would be necessary for human rights law to embrace the collective dimension of a right to a healthy environment as a fundamental condition of human security and welfare.¹⁰⁶ In other words, to be in any way meaningful, an overarching environmental right needs to address the environment as a public good, relying on the aforementioned concept of the global environment—and the global climate—as a common concern of humankind.¹⁰⁷

This approach to climate change and human rights would be based on the acknowledgement that the only viable perspective is a global one, focused not on the rights of individuals or communities but on the rights of humanity as a whole.¹⁰⁸ In this context, a right to a healthy environment could then entail the preservation and protection of the environment—which would include the stabilization of greenhouse gas concentrations in the atmosphere—on behalf of both present and future generations.¹⁰⁹

4.3 | Extraterritoriality

From a normative perspective, the concept of common concern of humankind focuses on the responsibilities of States to protect the global environment for the benefit of both present and future generations. In the context of climate change, as clearly set out in the UNFCCC, States have a duty to cooperate to address the adverse effects of climate change on the planet. They have the duty, under Article 2, to preserve a stable climatic system—which is a common concern of humankind—through the control of anthropogenic interference with the atmospheric composition. Although the climate system is global and transcends the territory of any and all States, its preservation requires the adoption of appropriate measures both within each State and at a larger scale through cooperative efforts.¹¹⁰

Broadly speaking, international environmental law revolves around each State's duty to avoid causing harm to the environment *beyond* its territory. The no harm principle, as first spelled out in the *Trail Smelter* arbitration prohibits States from harming the territory of other States with their activities.¹¹¹ Similarly, the prevention principle, as enshrined in Principle 2 of the Rio Declaration requires States to 'ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction'.¹¹² Most environmental treaties refer to transboundary environmental damage and require or demand

international cooperation to deal with this matter.¹¹³ Treaties addressing *global* environmental problems such as climate change require States to adopt measures within their territory to avoid environmental impacts well beyond their borders. Climate change mitigation measures adopted in a certain country will contribute to the *global* reduction of greenhouse gas concentration in the atmosphere and, as a result, to the reduction of the average global temperature, which in turn may reduce the likelihood or magnitude of extreme weather events in different regions of the world.

On the other hand, one of the specificities of human rights treaties is the creation of a legal system where States assume obligations towards the persons on their territory or subject to their jurisdiction,¹¹⁴ and complaints may be filed for the violation of such treaties by those persons.¹¹⁵ International human rights law has recognized different situations in which human rights treaties could apply extraterritorially to environmental nuisances. This possibility relies on the fairly broad interpretation of 'jurisdiction' given by a number of international courts and tribunals. In its Advisory Opinion on the *Palestine Wall Case*, for instance, the International Court of Justice (ICJ) noted that

while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights [which does make a reference to territory and jurisdiction] it would seem natural that, even when such is the case, State parties to the Covenant should be bound to comply with its provisions.¹¹⁶

The same conclusion would seem natural in the application of the International Covenant on Economic, Social, and Cultural Rights, which does not mention territory or jurisdiction, and it too was interpreted by the ICJ as applying extraterritorially to occupied territory.¹¹⁷ The ECtHR, for instance, has indicated that, under the European Convention, the exercise of jurisdiction outside the territory of a State is possible but 'requires that a State Party to that Convention exercises effective control over an area outside its territory, or over persons who are either lawfully or unlawfully in the territory of another State ...'.¹¹⁸

¹⁰⁵*ibid.*

¹⁰⁶*ibid.* 44.

¹⁰⁷In national constitutions, there are several examples of collective rights with regard to environmental protection, and more than a dozen countries recognize the rights of future generations. May and Daly (n 63) 82–84.

¹⁰⁸Boyle (n 35) 633.

¹⁰⁹Resolution 45/212 (n 97).

¹¹⁰Dupuy and Viñuales (n 31) 98.

¹¹¹*Trail Smelter Arbitration (Canada/United States of America) (1938/1941)* 3 RIAA 1905.

¹¹²Rio Declaration (n 81) Principle 2.

¹¹³ACTHR Advisory Opinion (n 33) para 100.

¹¹⁴ACTHR, *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights*, Advisory Opinion OC-2/82, Inter-American Court of Human Rights Series A No. 2 (24 September 1982).

¹¹⁵ACTHR Advisory Opinion (n 33) para 41.

¹¹⁶*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136 (*Palestine Wall Case*) para 109. See also Human Rights Committee, 'General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' UN Doc. CCPR/C/21/Rev.1/Add. 13 (26 May 2004) para 10.

¹¹⁷*Palestine Wall Case* (n 116) para 112.

¹¹⁸ACTHR Advisory Opinion (n 33) para 79. See *Loizidou v Turkey* App No. 15318/89. (ECtHR, 23 March 1995) para 62; *Al-Skeini and Others v The United Kingdom* [GC] App No. 55721/07 (ECtHR, 7 July 2011) para 138; and *Catan and Others v Moldova and Russia* [GC] App Nos. 43370/04, 8252/05 and 18454/06 (ECtHR, 19 October 2012) para 311.

In its 2017 Advisory Opinion, the IACtHR acknowledged that the 'jurisdiction' referred to in Article 1(1) of the American Convention 'is not limited to the national territory of a State but contemplates circumstances in which the extraterritorial conduct of a State constitutes exercise of its jurisdiction'.¹¹⁹ In other words, while States can be deemed to have the obligation to avoid transboundary environmental damage that can affect the human rights of individuals outside their territory, such individuals need to be under the jurisdiction of the State of origin, and there is jurisdiction where 'there is a causal link between the act that originated in [the State's] territory and the infringement of the human rights of persons outside its territory'.¹²⁰

The requirement of a causal link poses the same theoretical challenges presented at the beginning of this contribution. In fact, this approach does not seem to reflect well the core idea that underpins international environmental (and climate) law: the duty of each State to prevent harm to the global environment. The same core idea, on the other hand, is perfectly embraced by the right to a healthy environment. Environmental integrity per se could be protected and any action or omission of a State that endangers said integrity could entail a violation of said right, unless the State had ensured that activities within its jurisdiction or control did not cause such endangerment.

4.4 | Prevention

The second aspect of the reconceptualization proposed in this article refers to the introduction of a 'preventive' approach in human rights law, which would transform it in a forward-looking system, capable of encouraging the evolution of robust, effective and sustainable policy responses.

Under human rights law, providing remedies for human rights violations is key. However, human rights law should not be seen solely as a way of seeking redress for harm that has already happened.¹²¹ Such a thin vision of human rights law would hardly be applicable in the context of climate change. While climate change impacts will continue and intensify in the future, it is imperative to act in the present in order to prevent future damage.¹²² The introduction of an overarching right to a healthy environment could be framed as a forward-looking means of providing a qualitative contribution to robust, effective and sustainable climate policy responses at the national and international levels.¹²³

Prevention is key in international environmental law, as most environmental damages are irreversible. This is clearly the case for

climate change impacts. Introducing a preventive approach in international human rights law would translate into a set of substantive and procedural duties for States. The content of such duties has already been identified and clarified in the Africa Commission's *Ogoniland* decision, the Malé Declaration, the Framework Principles, the IACtHR Advisory Opinion and several national judicial decisions. Compliance with those duties would be evaluated against the actual risk that exists for the environment or the level of environmental degradation rather than against the impact of the environmental harm on the individual's human rights.

Ultimately, such a paradigm shift would provide new tools for civil society to hold governments to account for ensuring access to the right, allowing the use of human rights law 'to address the impact of the greenhouse gas emitting activities which are causing climate change and adversely affecting the global environment'.¹²⁴ In other words, it could represent a way to 'elevate environmental issues "above the rank and file of competing societal goals"'¹²⁵ and endow it with an aura of timelessness, absoluteness, and universal validity'.¹²⁶

5 | CONCLUDING REMARKS

The severe impacts of climate change on human rights can hardly be ignored. And the same can be argued for the questions surrounding the delicate legal relationship between human rights and climate change. In the absence of a right to a healthy environment, all the efforts to apply human rights law to the negative impacts of climate change necessarily rely on existing human rights. As this contribution has described, despite the indisputable steps forward, this course of action continues to be covered in obstacles and difficulties. The recent recognition, at the international level, of a right to a healthy environment—along the same lines as many national constitutions—could trigger a paradigm shift within the human rights regime that could facilitate its reconceptualization to adapt to new situations, such as climate change. Such a reconceptualization, as this contribution has proposed, should rely on the incorporation of key environmental law principles and concepts—such as prevention, common concern of humankind and intergenerational equity—within the human rights law framework. By doing so, it would not only provide civil society with new tools to hold governments accountable if they do not integrate climate considerations in their policymaking, but it could have positive spillover effects on other related rights, such as rights to life, health, water, food, privacy, housing and sanitation, strengthening their application and making them more readily applicable to episodes of environmental harm.

¹¹⁹IACtHR Advisory Opinion (n 33) para 78. See also *Ecuador v Colombia*, Admissibility, Inter-American Commission on Human Rights Rep No. 112/10 (21 October 2011) paras 89–100.

¹²⁰IACtHR Advisory Opinion (n 33) para 101 (emphasis added).

¹²¹Limon (n 22) 458.

¹²²See generally Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2014: Impacts, Adaptation, and Vulnerability* (Cambridge University Press 2014); IPCC, *Climate Change 2021: The Physical Science Basis* (IPCC 2021); IPCC, *Global Warming of 1.5°C* (IPCC 2021). See also OHCHR (n 22) 6–7; *State of the Netherlands v Urgenda Foundation* (n 50) para 5.6.2.

¹²³Limon (n 22) 458.

¹²⁴Boyle (n 35) 629.

¹²⁵P Alston, 'Making Space for New Human Rights: The Case of the Right to Development' (1988) 1 *Harvard Human Rights Yearbook* 3.

¹²⁶R Bratspies, 'Do We Need a Human Right to a Healthy Environment?' (2015) 13 *Santa Clara Journal of International Law* 31, 42.

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