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JUSTICE IN THE LIMINAL: THE COUNCIL OF EUROPE AND THE RIGHT TO A HEALTHY ENVIRONMENT

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Abstract As the human right to a healthy environment is codified around the globe, some systems still lag behind. One noticeable straggler is the Council of Europe, which is currently undergoing its fourth attempt to recognize the right. This article examines the proposals tabled within this system in light of overarching debates about climate justice and environmental rights, before focusing specifically on the spatial and temporal limits of the European Convention on Human Rights (ECHR) and the institutional features of its Court. First, the article describes what the author sees as the current liminal moment in the development of human rights law, a time of transition in which established legal concepts can be questioned or reaffirmed. Second, it sketches recent proposals for locating and conceptualizing the right to a healthy environment within the Council of Europe. Evaluating different options, it makes the case for including this right in the ECHR. Third, the article discusses the right's potential to reshape the spatial and temporal limitations on legal subjectivity and Convention protections. These proposals come at a crucial time when the system's ability to protect human rights from environment-related impacts is being tested by climate litigation. The article understands these developments as interrelated and discusses whether current proposals could deliver on demands for climate justice by extending protection to future generations and for extraterritorial environmental impacts.

Keywords: public international law, right to a healthy environment, future generations, climate change, extraterritoriality, climate justice, Council of Europe, European Convention of Human Rights.

I. INTRODUCTION

Recognition of the human right to a (safe, clean, sustainable and) healthy environment is proliferating around the world.[1] In a landmark Resolution, the United Nations (UN) General Assembly (UNGA) recognized this right in

[1] Like the Council of Europe (CoE), this article uses the term 'right to a healthy environment' as a shorthand. See CoE's Steering Committee for Human Rights Drafting Group on Human Rights and Environment (CDDH-ENV), 'Draft Report on the Need for and Feasibility of a Further Instrument

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2022.[2] Previously, iterations of the right had been recognized by a majority of the world's States, although its substance and justiciability differ across jurisdictions, as do the adjectives included in its formulation.[3] The right has furthermore been recognized by all major regional human rights systems, with one significant exception: the Council of Europe (CoE).[4]

Although efforts have repeatedly been made to fill this gap in the CoE system, past recognition efforts have foundered. In 2021, the system's Parliamentary Assembly (PACE) again recommended recognition of the right to a healthy environment.[5] This—its fourth such effort to date—triggered an internal process evaluating the necessity and feasibility of recognition. It also raised expectations for the CoE's 2023 Reykjavík Summit. Civil society organizations hoped that this summit, only the fourth in the CoE's long history, would finally fill the 'yawning gap in the European human rights framework' by taking a firm stand on environmental rights.[6] However, the attending heads of State and government remained non-committal, refusing to recognize the right to a healthy environment even in non-binding form.

As these efforts stagnate, one CoE body—the European Court of Human Rights (ECtHR)—faces new and pressing questions about the interdependence of human rights and the environment. These questions are

or Instruments on Human Rights and the Environment' (30 August 2023) CDDH-ENV(2023)06, para 72.

[2] UNGA, 'The Human Right to a Clean, Healthy and Sustainable Environment' (26 July 2022) UN Doc A/76/L.75, adopted with 161 votes in favour, no votes against, and eight abstentions.

[3] DR Boyd, 'Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment' in JH Knox and R Pejan (eds), *The Human Right to a Healthy Environment* (CUP 2018) 19–23; JH Knox, 'Constructing the Human Right to a Healthy Environment' (2020) 16(1) AnnRevLSocSci 79, 82.

[4] This includes the African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, art 24; the San Salvador Protocol to the American Convention (adopted 17 November 1988, entered into force 16 November 1999) Organization of American States Treaty Series No 69, art 11; Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (adopted 4 March 2018, entered into force 22 April 2021) 3397 UNTS, arts 1, 4(1) (the Escazú Agreement); League of Arab States, Arab Charter on Human Rights (adopted 15 September 1994, entered into force 15 March 2008) arts 38, 39(2); and the ASEAN [Association of Southeast Asian Nations] Human Rights Declaration (adopted 19 November 2012) arts 28(f), 35–36; all recognize the right. Note that the Charter of Fundamental Rights of the European Union also does not recognize this right, although art 37 requires the European Union to integrate a high level of environmental protection and improvement of the quality of the environment into its policies (Article 37: Environmental protection [2010] OJ C83/399); the European Union has ratified the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 20 October 2001) 2161 UNTS 447 (Aarhus Convention).

[5] PACE, 'Anchoring the Right to a Healthy Environment: Need for Enhanced Action by the Council of Europe' (29 September 2021) Recommendation 2211 (2021), 89 votes in favour, 0 votes against, 19 abstentions. On previous recognition attempts in the CoE, see n 25.

[6] S Duyck et al, 'Litmus Test for the Council of Europe: Time to Recognise and Protect the Right to Healthy Environment' (Greenpeace, 15 May 2023) <https://www.greenpeace.org/international/story/59704/litmus-test-for-the-council-of-europe-time-to-recognise-and-protect-the-right-to-healthy-environment/>.

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being brought to a head by the first climate-related cases brought before the Court, awaiting decision at the time of writing. This article submits that these two parallel developments—namely (a) discussions concerning the recognition of the right to a healthy environment and (b) the high-profile climate cases now before the ECtHR—must be examined in relationship to each other.

The substance of recognition-related debates[7] and the framing of climate cases before the ECtHR[8] show that these twin processes are intertwined, a reality that is further underscored by the frequent overlap in personnel and fora. For example, at a recent meeting concerning the CoE's potential recognition of the right to a healthy environment, State representatives paused the proceedings to cross the Allée des Droits de l'Homme and exercise their functions as government agents in a climate hearing before the ECtHR.[9] Exchanges between the author and various stakeholders involved in these processes have likewise indicated a mutual awareness and consideration. In short, while these are institutionally separate developments, and the right to a healthy environment covers more than climate change, these two processes have a clear potential to inform each other.

This article presents these twin processes as taking place during a liminal moment of transition within which legal change is acutely possible (Section II). The existence of such a moment warrants engagement now, before transformative energies have settled into definitive outcomes. The following takes up this invitation. It begins by sketching the concrete proposals being tabled at the CoE (Section III) before making a case for including the right to a healthy environment specifically in the ECHR (Section IV). The article takes PACE's 2021 proposal as its starting point for examining arguments concerning *why* the right to a healthy environment should be recognized; *how* or in which legal form this might take place; *what* its content and scope could be, including substantive questions like its impact on causality tests and on other rights; and *who* could claim the right, ie how it could reshape the ECHR's victim status requirements to admit collective or non-governmental organization (NGO)-led cases or cases on behalf of future generations.

[7] See eg CDDH-ENV (n 1) paras 53–54.

[8] As evidenced by the decision by both applicants and the ECtHR itself to embed climate cases in the Court's wider environmental case law, which is the closest the Court has come to recognizing an 'implicit' right to a healthy environment in the ECHR. See eg the framing employed in the Court's factsheet on climate change (ECtHR, Press Unit, February 2023) <https://www.echr.coe.int/documents/d/echr/FS_Climate_change_ENG>; by the applicants in *Duarte Agostinho and Others v Portugal and 32 Other Member States* App No 39371/20 (Communicated Case, 30 November 2020, relinquished to the Grand Chamber 29 June 2022, Submissions of the Applicants to the Grand Chamber 5 December 2022, 29–33); and by the applicants in *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* App No 53600/20 (Communicated Case, 17 March 2021, relinquishment to the Grand Chamber 26 April 2022, Submissions of the Applicants to the Grand Chamber December 2022, 27–30).

[9] See Drafting Group on Human Rights and Environment (CDDH-ENV), Report of 8th Meeting (25–26 and 28–29 September 2023) CDDH-ENV(2023)R8; and the concurrent hearing in the *Duarte Agostinho* case, ibid, held on 27 September 2023.

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In doing so, the article unpacks three core absences that exist within the CoE system in general, and the ECHR in particular: the absence of a human right to a healthy environment; the absence of extraterritorial environmental obligations; and the absence of rights for future generations. While examining possible ways to fill these absences, and the ways in which they might not be absences at all, the article engages with the ongoing demands for climate justice formulated in the ECtHR's first climate cases (Section V).

II. LEGAL LIMINALITIES

This article approaches the current environment-related transition within the Strasbourg system as a liminal moment. Liminality, as an anthropological concept, was developed to describe transitional moments before and during rites of passage.[10] Pioneered by Arnold van Gennep, this concept has since been discussed in other contexts, where—drawing on its Latin origin *limen*, or threshold—it is used to describe 'times of transition, specifically the time when it is realized that the way things were [is] over, but the way things will be [is] not yet clear'.[11] Understood in this way, the concept lends itself to application in different disciplinary contexts.[12] It describes moments of ambiguity, understood as threshold situations that are also 'a vital moment of creativity, a potential platform for renewing the societal'.[13]

Drawing on the idea of liminality here serves not only to explain *why* research on engagement with environmental rights is needed in the present context, but also *how* it can be done. As the CoE begins to respond to the 'triple planetary crisis' of climate change, pollution and biodiversity loss, and as the ECtHR engages with climate change for the first time, the limitations of this system are being discussed alongside demands for change in the temporal and spatial scope of the CoE, and especially the ECHR. This represents a threshold or liminal moment of possible transition: the way things will be is not yet clear, but there is no turning back in the sense that, for better or worse, decisions on the scope of environmental human rights protection will be made, and baselines will be set. Driven particularly by the ongoing 'turn to rights' in climate litigation,[14] this liminal space is shared with other human rights bodies and domestic courts, who likewise find themselves in times of transition as concerns environmental rights. By understanding that the liminal or transitional moment represents a crucial 'moment of creativity', it can be

[10] A van Gennep, *The Rites of Passage* (University of Chicago Press 1960); V Turner, *The Ritual Process: Structure and Anti-Structure* (Cornell University Press 1966); M Mälksoo, 'The Challenge of Liminality for International Relations Theory' (2012) 38(2) RevIntlStud 481, 481.

[11] A Scheyett, 'A Liminal Moment in Social Work' (2023) 68(2) SocWork 101, 102. See also G Laurie, 'Liminality and the Limits of Law in Health Research Regulation: What Are We Missing in the Spaces In-Between?' (2017) 25(1) MedLRev 47, 55.

[12] Mälksoo (n 10) 481.

[13] ibid.

[14] J Peel and HM Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7(1) TEL 37.

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seen that engagement with different options and outcomes must take place now in order to harness this energy and formulate practically meaningful normative outcomes.

This understanding of liminality as a moment of creativity evokes Walter Benjamin's '*Jetztzeit*', the 'time of now' filled with energy, 'revolutionary possibility' and an understanding of the injustices of the past.[15] According to Stephen Humphreys, in the environmental context, such moments allow us to design futures that counter 'the historical injustices that have brought us to the sorry ledge upon which we now teeter'.[16] However, there is no guarantee of any given outcome. Understanding the liminality of this moment simultaneously means understanding that its outcomes are uncertain, and that they may never arrive at all. Juan Auz, who has described the liminality of the Inter-American human rights system as it faces demands for climate justice, warns of the possibility that human rights could 'stay in a state of permanent liminality, where the accumulation of unfulfilled expectations can generate a permanent crisis'.[17] This warning is equally applicable to the CoE, which may never recognize a right to a healthy environment. Even if recognized, the content of the right may never be settled and it may never deliver global and intergenerational environmental or climate justice.

The idea of climate justice explored here is narrower than climate law or climate ethics, although it reflects concepts and demands that are core to both regimes. It means an engagement with the inequalities that shape both the phenomenon of climate change and the experience of its impacts, on different levels—namely based on generational, spatial, racialized, class-based, gendered and anthropogenic imbalances. This means not only understanding climate justice as an effort to 'advance the rights and dignity of the world's most vulnerable people',[18] but also interrogating structural exclusions of certain subjects from protection in human rights law and understanding that the unmitigated progression of global warming constitutes an injustice in and of itself.[19]

While these understandings of climate justice may not have reshaped the CoE system to date, there is a clear current potential for change in this regard. Within the law, as elsewhere,[20] liminal moments are important opportunities for reaffirming accepted doctrines and foundational concepts—or questioning them. To understand what change might look like here, a direction of travel can be discerned by revisiting liminality's roots in the anthropological literature. Since its conception, liminality has been concerned with *becoming*,

[15] W Benjamin, *Illuminations* (H Zohn trans, Schocken Books 1969) 261–4, as discussed in S Humphreys, 'Climate Justice: The Claim of the Past' (2014) 5 JHRE 134, 137–8.

[16] Humphreys ibid 138.

[17] J Auz, '"So, This Is Permanence": The Inter-American Human Rights System as a Liminal Space for Climate Justice' (2021) 22(2) MJIL 187.

[18] JR May and E Daly, 'Global Climate Constitutionalism and Justice in the Courts' in J Jaria-Manzano and S Borràs (eds), *Global Climate Constitutionalism* (Edward Elgar 2019) 235.

[19] As shown particularly by intergenerational accounts of climate justice. See T Skillington, *Climate Change and Intergenerational Justice* (Routledge 2019).

[20] Laurie (n 11) 55.

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meaning with attaining certain rights. Those undergoing these liminal moments are described as 'liminal *personae*' or 'threshold people' who 'elude or slip through the network of classifications … assigned and arrayed by law, custom, convention, and ceremonial'.[21] Although the concept of liminality used in this article departs from the anthropological, lacking its depth of engagement with concrete experiences across human societies and cultures, it examines ways of becoming—or mattering, or belonging—in another way. Namely, it draws demands for global and intergenerational environmental and climate justice into current debates, building a case for rethinking *who* should be protected by human rights law—both in a temporal sense, as concerns the rights of future generations, and in a territorial sense, as concerns claims brought by climate-vulnerable people against high-emitting States.

III. COUNCIL OF EUROPE EFFORTS TO RECOGNIZE THE RIGHT TO A HEALTHY ENVIRONMENT

Divisive questions have been asked about the CoE's recognition of the right to a healthy environment. Should the right be recognized at all? Where should it be located within the overall CoE system? And how would its content align with demands for environmental and climate justice or more inclusive subjectivity? Answering these questions requires an understanding of how the current status quo was reached, and specifically of: the failed past efforts at recognizing the right, which focused on the ECHR (Section III.A); the 2021 PACE draft protocol proposal, which again proposed the inclusion of the right in the ECHR (Section III.B); the CoE's Steering Committee for Human Rights (CDDH) Drafting Group on Human Rights and Environment's (CDDH-ENV) work to date (Section III.C); and the growing emphasis on political or non-binding recognition since 2022 (Section III.D).

A. The Failure of Past Efforts at Recognition in the ECHR

Although the CoE is no stranger to environmental protection treaties,[22] and academic proposals to recognize the right to a healthy environment in this system arose as early as the 1970s[23] (around the time of the Stockholm

[21] Turner (n 10) 95.

[22] CoE, Convention on the Conservation of European Wildlife and Natural Habitats (19 September 1979) European Treaty Series (ETS) No 104.

[23] H Steiger and the Working Group for Environmental Law, 'The Right to a Humane Environment: Proposal for an Additional Protocol to the European Human Rights Convention' (1973) 27 Beitr.z.Umweltgestaltung; as discussed in B Van Dyke, 'A Proposal to Introduce the Right to a Healthy Environment into the European Convention Regime' (1994) 13(3) VaEnvtlLJ 323, 336–7, fn 54.

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Declaration[24]), it has not yet recognized this right. This has not been for lack of trying: PACE unsuccessfully recommended the right's recognition in the ECHR in 2003, 2009 and 2012.[25] In 2021, it launched an emphatic fourth effort to recognize this right, which is still ongoing.[26]

To date, PACE's efforts to encourage recognition of the right to a healthy environment have failed to garner the necessary support from the CoE's Committee of Ministers,[27] which is the organ of the CoE responsible for treaty-making and is made up of Member States' ministers of foreign affairs.[28] In essence, representatives of national parliaments (the PACE membership) have continually pushed for recognition of environmental rights, but domestic executives (whose representatives make up the Committee of Ministers) are wary of accepting any new binding obligations. Different reasons have been given for the failure to adopt a corresponding protocol to the ECHR, including the perceived ambiguity of the right to a healthy environment, its supposed redundancy in the already 'greened' ECHR framework, the risk of devaluing other rights or drawing judges into the political arena, and the supposed inability of this right to provide a solid basis for regulating environmental harm.[29] Aside from these official reasons, concerns about accepting new and binding legal obligations in or adjacent to the strong enforcement machinery of the ECHR are also likely to play an underlying role. Remarkably, even nations that championed recognition of the right to a healthy environment at the UN level have proven reluctant to recognize it in the context of the CoE.[30]

Of all the arguments made against recognizing this right, one deserves particular attention. This is the idea that the European human rights system 'already indirectly contributes to the protection of the environment through

[24] Declaration of the United Nations Conference on the Human Environment (16 June 1972) UN Doc A/RES/2994(XXVII).

[25] PACE, 'Future Action to be Taken by the Council of Europe in the Field of Environment Protection' (4 November 1999) Recommendation 1431 (1999); PACE, 'Environment and Human Rights' (27 June 2003) Recommendation 1614 (2003); PACE, 'Drafting an Additional Protocol to the European Convention on Human Rights Concerning the Right to a Healthy Environment' (30 September 2009) Recommendation 1885 (2009); overall, see H Balfour-Lynn and S Willman, 'The Right to a Healthy Environment in the United Kingdom: Supporting the Proposal for a New Protocol to the European Convention on Human Rights' (Environmental Rights Recognition Project, May 2022) 16–18 (2022) <https://www.kcl.ac.uk/legal-clinic/assets/briefing-paper-environmental-rights-recognition-project.pdf>.

[26] PACE Recommendation 2211 (2021) (n 5).

[27] OW Pedersen, 'The European Court of Human Rights and International Environmental Law' in Knox and Pejan (eds) (n 3) 91.

[28] Statute of the Council of Europe (adopted 5 May 1949, entered into force 3 August 1949) ETS No 1, arts 14, 15(a).

[29] Balfour-Lynn and Willman (n 25) 16.

[30] Specifically Switzerland and Slovenia, two champions of this right at the UN. See, however, for a recent development in France, 'Déclaration pour la reconnaissance d'un droit à un environnement sain dans le cadre d'un instrument contraignant du Conseil de l'Europe', Journal officiel de la République française no 0230 of 4 October 2023.

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existing convention rights and their interpretation in the evolving case law of the European Court of Human Rights'.[31] There is truth to this argument: the Court has progressively 'greened' the rights that it interprets,[32] which were not 'specifically designed to provide general protection of the environment as such'.[33] In other words, while the text of the ECHR does not cover environmental rights, the ECtHR has interpreted the rights in the Convention —especially Articles 2 and 8 (the right to life and the right to respect for private and family life), but also the right to property (Article 1 of Protocol 1)[34] and procedural rights (Article 6(1))[35]—as providing some baseline environmental protections. This has resulted in nearly 400 environmental judgments and decisions.[36] However, while this 'greening' means that the rights in the ECHR can and do apply to environmental cases, it still provides only limited environmental protection. This protection is procedurally difficult to obtain, outweighed by competing interests, and always mediated by the need for a connection to an individual person's life, health or another Convention right.

PACE's recent renewed effort to codify the right to a healthy environment shows that it too finds the present approach of the 'greened' ECHR unsatisfactory. Rik Daems, President of PACE, has expressed frustration with the Committee of Ministers' inaction, noting that 'we adopted a similar Recommendation back in 2003 and in 1999. Twenty years ago. Indeed, all of us are making an effort. But it is not enough, and it is not timely enough.'[37] Sentiments like this culminated in the fourth and most recent effort by PACE to recognize this right within the CoE system explicitly, discussed in the next section.

[31] Committee of Ministers, 'Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment: Reply to Recommendation' (19 June 2010) Doc 12298, para 9.

[32] On 'greening', see submission to the CDDH-ENV by J Knox, 'Addressing the Question: "How Are Environmental Aspects of Human Rights Law Related to Environmental Law, Including the Legal Framework Relating to Human Rights and the Environment and the Status and Enforcement of Existing Standards?"' (13 September 2022) <https://rm.coe.int/intervention-john-knox/1680a90260>.

[33] *Kyrtatos v Greece* App No 41666/98 (ECtHR, Judgment 22 May 2003) para 52.

[34] Protocol No 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 20 March 1952, entered into force 18 May 1954) ETS No 9.

[35] For an overview, see N Kobylarz, 'The European Court of Human Rights: An Underrated Forum for Environmental Litigation' in HT Anker and B Egelund Olsen (eds), *Sustainable Management of Natural Resources: Legal Instruments and Approaches* (Intersentia 2018); H Keller and C Heri, 'The Future is Now: Climate Cases Before the ECtHR' (2022) 40(1) NordJHumRts 153.

[36] T Eicke, 'Climate Change and the Convention: Beyond Admissibility' (2022) 3(1) EurConvHumRtsLRev 8, 13.

[37] Speech by Rik Daems included in CoE, *Manual on Human Rights and Environment* (2nd edn, 2020) 14 <https://rm.coe.int/protection-environnementale-en/16809fb087>.

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B. A Fresh Start: The 2021 PACE Draft Protocol

PACE's 2021 recommendation to recognize the right to a healthy environment did something unprecedented. Instead of simply recommending the right's recognition, PACE prepared its own draft protocol to the ECHR, which it appended to its recommendation.[38] This draft text, which sets out substantive rights, also contains general principles to guide the protocol's interpretation. It includes references to transgenerational responsibility, equity and solidarity (Article 2), a prohibition of environmental and intergenerational discrimination (Article 3), and the principles of prevention, precaution, non-regression and *in dubio pro natura*. Previous additional protocols to the ECHR have not featured interpretative principles, making this a comparative novelty.[39]

The substantive rights set out in the PACE draft protocol include an individually formulated right to a healthy environment ('[e]veryone has the right to a safe, clean, healthy and sustainable environment'), which is clarified as meaning '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'.[40] The adjective 'safe' has since largely been dropped from the discussions, in line with the formulation used by the UN ('right to a clean, healthy and sustainable environment'), with seemingly no effect on the scope of the proposed right.[41] The draft also includes procedural rights to information relating to the environment, a very broadly formulated right to consultation ('[i]f a project, programme or policy has an impact on the environment and biodiversity, everyone shall be entitled to be consulted in advance'), and rights to access to justice and an effective remedy in matters relating to the environment (Article 6(a)–(d)). These procedural rights reflect aspects of the Aarhus Convention,[42] to which the ECtHR has referred only sporadically in its past case law.[43]

Aside from the substance of a putative CoE right to a healthy environment, its form would also be of crucial importance. Generally speaking, the ECHR system is open to two types of protocols. The first are optional additional protocols, here called 'rights-expansion' protocols, which create new obligations only on those States that ratify them. The second are 'reform' protocols, which amend the Convention itself and cannot enter into force until all CoE Member States have ratified them.[44] Protocol No 15,[45] which

[38] PACE Recommendation 2211 (2021) (n 5) Appendix.
[39] On this see Eicke (n 36) 11.
[40] PACE Recommendation 2211 (2021) (n 5) Appendix, arts 1, 5.
[41] CDDH-ENV (n 1) passim; UNGA (n 2).
[42] Aarhus Convention (n 4).
[43] See *Grimkovskaya v Ukraine* App No 38182/03 (ECtHR, Judgment 21 July 2011) para 69; *Di Sarno and Others v Italy* App No 30765/08 (ECtHR, Judgment 10 January 2012) para 107; *Tătar v Romania* App No 67021/01 (ECtHR, Judgment 27 January 2009) para 118.
[44] See Protocol No 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms (adopted 24 June 2013, entered into force 1 August 2021) Council of Europe Treaty Series (CETS) No 213, art 7.
[45] ibid.

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changed the text of the ECHR's preamble and reduced the time limit for applying to the Court from six months to four, was a reform protocol, as were Protocol No 14[46] (introducing the single judge procedure and extending the judges' term of office, among other changes) and Protocol No 11[47] (creating a full-time Court and eliminating the Commission). An advantage of rights-expansion protocols is that they can enter into force for a subset of the CoE membership without requiring universal acceptance.

In other words, while it is not possible to change the text of the ECHR without the agreement of all States Parties, it is possible to create new additional rights that potentially apply only to a smaller number of ratifying States. The PACE Draft Protocol on the Environment is the latter kind of protocol, ie an optional or rights-expansion protocol.[48] It would accordingly not amend the text of the ECHR but would impose additional obligations on those States that ratify it. Of course, PACE's draft protocol is still merely at the proposal stage. It does not have any legal force as an international treaty, and it would only achieve such force if ratified by States. Neither is this draft text definitive: it would likely undergo (potentially major) changes before a putative ratification process could begin, if it ever reaches that stage. Despite these caveats, the draft provides a basis for much-needed discussion on what *could* happen in this regard.

C. *The Work of the CDDH-ENV*

The PACE draft protocol not only makes it possible to evaluate the very idea of recognizing the right to a healthy environment within the Convention system, but also provides the opportunity to discuss the different options available as well as the potential content and scope of such a right. These discussions are currently taking place before the CDDH, which functions as an advisory body providing legal expertise to the Committee of Ministers.[49] This body is undertaking necessity and feasibility studies concerning the elaboration and adoption of a next draft of the Protocol.[50] In 2021, the CDDH tasked the

[46] Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention (adopted 13 May 2004, entered into force 1 June 2010) CETS No 194.

[47] Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby (adopted 11 May 1994, entered into force 1 November 1998) ETS No 155.

[48] See PACE Recommendation 2211 (2021) (n 5) art 11, which provides that it will enter into force once five Member States have ratified it.

[49] Set up by the Committee of Ministers under art 17 of the Statute of the Council of Europe. See CoE, 'Terms of reference for the CDDH and the DH-SYSC (2022–2025)', <https://rm.coe.int/mandat-en/1680a4e2f6>.

[50] N Kobylarz, 'Anchoring the Right to a Healthy Environment in the European Convention on Human Rights: What Concretized Normative Consequences Can Be Anticipated for the Strasbourg Court?' in G Antonelli et al, *Environmental Law Before the Courts* (Springer International Publishing 2023).

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CDDH-ENV Drafting Group with carrying out the Committee of Ministers' invitation to consider the necessity and feasibility of a further instrument or instruments on human rights and the environment.[51] Since then, the CDDH-ENV has, among other things, consulted leading legal experts,[52] participated in conferences,[53] prepared a draft non-binding instrument[54] and collected information showing that a majority of CoE Member States already provide constitutional protection of the right to a healthy environment.[55]

While PACE's initiatives have all highlighted the potential recognition of the right to a healthy environment in the ECHR,[56] the work ongoing at the CDDH-ENV is not limited to this option, and several alternative possibilities are currently being discussed. These would locate recognition of the right not in the ECHR, but elsewhere in the CoE system. Several of these alternatives are discussed below—including a purely political recognition, the adoption of a separate CoE treaty[57] or the recognition of this right within the CoE's social rights instrumentation, ie the European Social Charter, which has also been 'greened' to some extent.[58] However, as Section IV argues, these alternative possibilities have clear disadvantages when compared to locating this right within the ECHR system.

The CDDH-ENV's work was still ongoing at the time of writing, with its report on the need for and feasibility of a further instrument on environmental rights due to the Committee of Ministers by 30 June 2024 for

[51] Extract of the decisions taken at the 1416th meeting of the Ministers' Deputies, 3 November 2021 (18 October 2022) CDDH-ENV(2022)01REV, 2.

[52] Exchange of views with independent experts and representatives from PACE and the European Committee of Social Rights (13–15 September 2022). For a summary of this event, see CDDH-ENV(2023)10 (30 November 2023).

[53] 'The Right to a Clean, Healthy and Sustainable Environment in Practice: Proceedings of the High-Level Conference Organised by the Icelandic Presidency of the Committee of Ministers, with the Support of the Council of Europe Secretariat' (CoE, June 2023) <https://rm.coe.int/the-right-to-a-clean-healthy-and-sustainable-environment-le-droit-a-un/1680aba11e>.

[54] CDDH-ENV, 'Draft Recommendation on Human Rights and the Protection of the Environment' (20 April 2022) CDDH-ENV (2022)R4Addendum.

[55] See on this, CDDH-ENV, 'Compilation of Replies Received from Member States on the Questionnaire with a View of the Preparation of a Study on the Need for and Feasibility of a New Instrument on Human Rights and the Environment' (10 February 2022) CDDH-ENV (2022)09 <https://rm.coe.int/steering-committee-for-human-rights-comite-directeur-pour-les-droits-d/1680aae37d>.

[56] See eg PACE Recommendation 1431 (1999) (n 25) para 8; PACE Recommendation 1614 (2003) (n 25) paras 9, 10.2; PACE Recommendation 1885 (2009) (n 25) para 10.1; PACE Recommendation 2211 (2021) (n 5).

[57] Speech by Marija Pejčinović Burić, Secretary General of the Council of Europe, 'High-level Conference on the Right to a Clean, Healthy and Sustainable Environment in Practice' (3 May 2023) <https://www.coe.int/en/web/secretary-general/-/high-level-conference-on-the-right-to-a-clean-healthy-and-sustainable-environment-in-practice>.

[58] European Social Charter (Revised) (adopted 3 May 1996, entered into force 1 July 1999) ETS No 163. See *ATTAC ry, Globaali sosiaalityö ry and Maan ystävät ry v Finland* (Decision on Admissibility and on Immediate Measures 22 January 2019) European Committee of Social Rights (ECSR) Complaint No 163/2018, para 12, finding that the protection of the environment is at the heart of the Charter. See also *Marangopoulos Foundation for Human Rights (MFHR) v Greece* (6 December 2006) ECSR Complaint No 30/2005, paras 195–196.

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further decision-making.[59] In its work to date, the CDDH-ENV has noted several reasons supporting the recognition of a separate right to a healthy environment. It has considered that doing so would address gaps in the international human rights framework, strengthen discussions about human rights and the environment, clarify private actors' responsibilities, and harmonize national standards.[60] However, the exact substance of the putative CoE right to a healthy environment is still undefined, and the CDDH-ENV seems unwilling to make firm stipulations in this regard: it currently describes the right as a 'developing right' that the CoE States could help shape through recognition.[61] In understanding this process, it is important to note that the work of the CDDH-ENV—which serves a preparatory and advisory function, and is accordingly likely to influence further developments at the CoE—is largely being conducted by State representatives. This institutional reality is closely related to another development: the turn towards a purely political recognition of the right to a healthy environment, as discussed in the next section.

D. A Political Turn Since 2022

Since 2022, a political turn or softening of ambitions for the right to a healthy environment has become discernible at the CoE. In that year, the Committee of Ministers issued a recommendation on human rights and the environment.[62] This document uses soft or aspirational language, recommending for Member States to 'reflect' on the right to a healthy environment and to 'actively consider' recognizing this right at the national level. It also recommends for States to review their national legislation and practice in light of the general principles of international environmental law (including the no-harm principle, the principles of prevention and precaution, the polluter-pays principle, and the need for intergenerational equity), as well as the prohibition of discrimination and other human rights, including those of the most vulnerable. This emphasis on domestic action reflects the logic of subsidiarity that has (re-)shaped the ECHR and its interpretation in recent decades. However, even given this background, the Committee of Ministers' 2022 recommendation is decidedly underwhelming. After all, earlier that same summer, all current CoE Member States had already voted in favour of the UN's (likewise political and thus non-binding, but international) recognition of the right to a healthy

[59] CDDH-ENV(2023)R8 (n 9) 2.

[60] CDDH, Drafting Group on Human Rights and Environment, 6th Meeting Report, 8–10 February 2023 (10 February 2023) CDDH-ENV(2023)R6, 11 <https://rm.coe.int/steering-committee-for-human-rights-comite-directeur-pour-les-droits-d/1680aa23bd>.

[61] CDDH-ENV (n 1) para 130.

[62] Committee of Ministers, 'Recommendation CM/Rec(2022)20 of the Committee of Ministers to Member States on Human Rights and the Protection of the Environment' (27 September 2022).

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environment.[63] And, as the explanatory memorandum to the recommendation notes, many Member States have also recognized this right in their own legal systems.[64]

A turn towards political recognition was likewise evident in the outcome of the CoE's Fourth Summit of heads of State and government, held in Reykjavík in May 2023. The Summit's outcome document, the Reykjavík Declaration, fell decidedly short of expectations that this might become 'the moment to act' on the right to a healthy environment.[65] In their Declaration, the CoE Member States underlined 'the urgency of additional efforts to protect the environment, as well as to counter the impact of the "triple planetary crisis" of pollution, climate change and loss of biodiversity on human rights, democracy and the rule of law'.[66] They accordingly committed to strengthening their work on the human rights aspects of the environment, including by initiating a 'Reykjavík process of focusing and strengthening the work of the Council of Europe in this field', which is laid out in an appendix to the Declaration.[67] This appendix affirms 'that human rights and the environment are intertwined and that a clean, healthy and sustainable environment is integral to the full enjoyment of human rights by present and future generations'.[68] It declares an intention to recognize the right to a healthy environment domestically and commits to strengthening the CoE's work on human rights and the environment 'based on the *political* recognition of the right to a clean, healthy and sustainable environment as a human right' without, however, amounting to such a recognition.[69]

As part of the 'Reykjavík process', and to make environmental matters 'a visible priority for the Organisation', Member States encouraged the creation of a new intergovernmental committee on environment and human rights, called the Reykjavík Committee.[70] This reflects a recommendation from PACE, made in the run-up to the Summit in Reykjavík, suggesting the creation of a 'platform to share information, promote best practice, provide legal advice and develop tools for evaluating policies and legislation in the area of environmental protection and the fight against climate change'.[71] The Reykjavík Committee had not yet been operationalized at the time of writing,

[63] UNGA (n 2). All current CoE Member States voted in favour, while the Russian Federation abstained from the vote.

[64] CDDH, 'Explanatory Memorandum to Recommendation CM/Rec(2022)20 of the Committee of Ministers to Member States on Human Rights and the Protection of the Environment' (27 September 2022) CM(2022)141-add3final.

[65] 4th Summit of Heads of State and Government of the Council of Europe, Reykjavík Declaration: United Around Our Values (2023) <https://rm.coe.int/4th-summit-of-heads-of-state-and-government-of-the-council-of-europe/1680ab40c1>; Statement by Tiny Kox, President of PACE, at the 4th Summit of Heads of State and Government of the Council of Europe (26 May 2023) SUM (2023)PV.

[66] Reykjavík Declaration ibid 6, Appendix V: The Council of Europe and the Environment.

[67] ibid 6–7. [68] ibid 20. [69] ibid 21 (emphasis added). [70] ibid 21.

[71] PACE, 'The Reykjavik Summit of the Council of Europe – United Around Values in the Face of Extraordinary Challenges' (24 January 2023) Recommendation 2245 (2023), recital 16.3.

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although PACE had urged the Committee of Ministers to take further steps in this regard,[72] and it is not yet clear what its role, if any, will be. While the relevant PACE recommendations had endorsed the creation of such a Committee alongside a legally binding protocol recognizing the right to a healthy environment, the latter recommendation fell away in Reykjavík.[73] Together with the 'political turn', these developments display States' foot-dragging on environmental rights.

IV. SEIZING THE LIMINAL MOMENT: AN ARGUMENT FOR RECOGNIZING THE RIGHT TO A HEALTHY ENVIRONMENT IN THE ECHR

In the current liminal or transitional moment, it is not clear what the right to a healthy environment might look like in the CoE system, if recognized. It is precisely within this moment, however, that discussion of the available possibilities and normative arguments becomes particularly important. Like any liminal moment, this one holds transformative potential; here, it is the potential to break with or reaffirm existing interpretations of human rights law, and more specifically the relationship between human rights and the environment and the corresponding understandings of legal subjectivity (thereby engaging with demands to understand the legal subject or bearer of rights more broadly, transcending the separation of the human from the natural to cover non-human subjects, the environment as a whole or future generations[74]). This liminal moment invites the design of an adequate rights-based response to environmental destruction. To contribute to this process, this section analyses and builds on proposals to include the right to a healthy environment in the ECHR, and the following section focuses on two particularly controversial issues: the temporal and spatial coverage of this right.

The following discussion centres around the 2021 PACE draft protocol to the ECHR. In many ways, this document represents no more than a starting point: it may never materialize as proposed, and the CDDH-ENV is currently evaluating other options too. However, it is argued that integrating the right to a healthy environment into the ECHR specifically would offer the strongest protection of environmental rights within the CoE system. As a result, the PACE draft represents a valuable point of departure, and a focal point for both aspiration and critique. This section accordingly draws on that draft in analysing: (a) why this right should be recognized within the ECHR (as opposed to alternative loci within the CoE system); (b) how it might be recognized; (c) what its potential content and scope could be, including substantive questions

[72] PACE, Opening of the sitting No 17 (21 June 2023), statement by Rik Daems (Belgium); PACE, Opening of the sitting No 21 (10 October 2023), statement by Bjarni Jonsson (Iceland); PACE, 'Budgets and Priorities of the Council of Europe for the Period 2024–2027' (21 June 2023) Opinion 301 (2023).

[73] PACE Recommendation 2245 (n 71) recital 16.1–16.3.

[74] See, on legal subjectivity and posthuman subjects of rights, eg, J Norman, *Posthuman Legal Subjectivity: Reimagining the Human in the Anthropocene* (Routledge 2021).

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like its impact on causality tests and on other rights; and (d) who the right could be applicable to, ie whether and how it could reshape the ECHR's victim status requirements to admit collective or NGO-led cases.

A. The Why: Need for Recognition

While the ECHR does not refer to the environment in its text, a degree of environmental protection is already possible even without a new protocol. By 'greening' existing rights, the ECtHR has developed an expansive (if imperfect and substantively limited) case law on environmental matters, having long ago established that environmental harm can fall within the ambit of the Convention.[75] In fact, some scholars consider that the ECHR already provides for a right to a healthy environment 'all but in name'.[76] The Court's Grand Chamber is currently hearing its first three climate change cases,[77] which promise to take its environmental case law to a new level. As it does so, it is not entirely inconceivable—although institutionally unlikely[78]—that the ECtHR could follow in the footsteps of the UN Committee on the Rights of the Child (CRC), which recently found that the right to a healthy environment was implicit in its own Convention, requiring no amendment of the text to ensure protection of the right.[79]

Countering these proposals, it has been argued—by Judge Serghides within the ECtHR, and by John Knox outside it—that (State) recognition of the right to a healthy environment is the only way to fill existing gaps in the ECHR's environmental protection.[80] Gaps are certainly present, because there are limits to how far the rights in the ECHR and its Protocols can be stretched through interpretation, and the Court's existing recognition of 'greened' rights is by no means a complete alternative to the right to a healthy environment. Its environmental case law has regularly been limited by the idea that the Convention was not designed to provide environmental protection[81] and cannot allow public interest

[75] For early cases, see eg *Lopez Ostra v Spain* App No 16798/90 (ECtHR, Judgment 9 December 1994), finding a violation of art 8 of the ECHR given the nuisance caused by a waste treatment plant; or *Guerra and Others v Italy* App No 14967/89 (ECtHR, Judgment 19 February 1998), finding a violation of art 8 in light of failures to protect and inform local residents affected by industrial pollution.

[76] Pedersen (n 27) 86.

[77] These are *KlimaSeniorinnen* (n 8); *Duarte Agostinho* (n 8); and *Carême v France* App No 7189/21 (ECtHR, filed 28 January 2021, relinquished to the Grand Chamber 31 May 2022).

[78] For a sceptical position on 'top-down' judicial imposition of environmental rights, see R Spano, 'Keynote Speech', Council of Europe Conference on the Right to a Clean, Healthy and Sustainable Environment in Practice (3 May 2023) <https://rm.coe.int/coe-speech-environment-spano-final-2787-8240-6407-v-1/1680aae80b#:~:text=Before%20a%20right%20to%20a,effective%20realisation%20of%20that%20right>.

[79] UN CRC, 'General Comment No 26 (2023) on Children's Rights and the Environment with a Special Focus on Climate Change' (22 August 2023) UN Doc CRC/C/GC/26, para 63.

[80] Separate opinion of Judge Serghides in the case of *Pavlov and Others v Russia* App No 31612/09 (ECtHR, Judgment 11 October 2022) paras 18–22; and Knox (n 32) 27. See also Kobylarz (n 50).

[81] *Kyrtatos v Greece* (n 33) para 52.

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complaints.[82] This case law also downplays environmental interests when balanced against others, especially economic interests;[83] it does not protect future generations; and it has not tailored the territorial scope of Convention protection to encompass cross-boundary environmental harms.

Recognizing the right to a healthy environment could counteract these limitations to some degree: it would certainly consolidate and clarify the applicable legal standards, would give the Court a clear mandate to deal with environmental matters, and could contribute to filling gaps and overcoming conceptual limitations of existing rights.[84] In addition, it has been argued that the right has paradigm-shifting potential to revise extraterritoriality rules and implement preventive approaches aligned with environmental law principles.[85] The right could also empower the Court to overcome its own legitimacy concerns—as Elisabeth Lambert has noted, the Court systematically invokes the absence of environmental rights in the ECHR to limit its findings, justify a 'low profile' and declare cases inadmissible.[86] Given that ECtHR judges apparently do not feel vested with sufficient legitimacy to recognize or apply a human right to a healthy environment, an explicit recognition of the right could counteract judicial self-limitation.[87] As César Rodríguez-Garavito has suggested, explicitly recognizing the right to a healthy environment would send 'an authoritative institutional message about the importance of the entitlement in question'.[88] In addition, research has shown that recognition of this right is effective in helping applicants in environmental proceedings win their cases, or, in other words, recognizing the right to a healthy environment has practical implications.[89]

Further arguments can be made for adopting the right. These include its contribution to placing environmental interests on equal footing with other human rights; de-fragmenting 'greened' human rights; and closing gaps in

[82] Referring here to the *actio popularis* doctrine. For an early case, see *Asselbourg and others v Luxembourg* App No 29121/95 (ECtHR, Decision 29 June 1999) para 2.

[83] H Keller, Submission to the CDDH-ENV (13 September 2022) 2 <https://rm.coe.int/intervention-helen-keller/1680a9025f>.

[84] A Ordóñez Vahi, 'The Council of Europe and the Right to a Clean, Healthy, and Sustainable Environment' (*Universal Rights Blog*, 21 June 2023) <https://www.universal-rights.org/the-council-of-europe-and-the-right-to-a-clean-healthy-and-sustainable-environment/#:~:text=The%20Summit%20concluded%20with%20the,of%20technology%20and%20the%20environment>.

[85] E Cima, 'The Right to a Healthy Environment: Reconceptualizing Human Rights in the Face of Climate Change' (2022) 31(1) RECIEL 38.

[86] E Lambert, Submission to the CDDH-ENV (12 September 2022) <https://rm.coe.int/intervention-elisabeth-lambert/1680a9025e> (translation by the author).

[87] P Baumann, *Le droit à un environnement sain et la Convention européenne des droits de l'Homme* (LDGJ 2018).

[88] C Rodríguez-Garavito, 'A Human Right to a Healthy Environment? Moral, Legal, and Empirical Considerations' in Knox and Pejan (eds) (n 3) 159.

[89] P de Vilchez and A Savaresi, 'The Right to a Healthy Environment and Climate Litigation: A Game Changer?' (2021) 32(1) YIntlEnvL 3, corroborating the work of UN Special Rapporteurs John Knox and David Boyd in this regard. See, eg, 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' (30 December 2019) UN Doc A/HRC/43/53.

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existing case law, including by protecting ecosystems and environmental human rights defenders and by creating a more meaningful role for civil society.[90] Studies have already shown that recognizing the right to a healthy environment yields better environmental protection in domestic policy, legislation and jurisprudence.[91] Beyond substantive entitlements, recognition of the right also strengthens procedural rights, reshapes power relationships, and provides a mobilizing tool for environmental advocates and victims of violations.[92]

At the same time, some have taken a 'been there, done that' approach to the CoE's efforts to recognize the right to a healthy environment.[93] Several potential drawbacks of recognition within the ECHR system have been raised. Some examples are the right's impact on the Court's workload,[94] its potentially strained interaction with domestic standards,[95] and (the limits of) its ability to shift the basic premise of human rights law away from individualism and overwhelming anthropocentrism and towards a more ecocentric perspective or the redistribution of resources.[96] However, it is likewise argued that such issues can be addressed, that it is possible to recognize such a right in the ECHR system, and that resistance to doing so is of a predominantly political nature.[97]

With the recognition of any purportedly 'new' human right, an anti-inflationist argument is likely, ie an argument that human rights are being overextended. Three counterarguments can be made to this: first, that anti-inflationist objections must be scrutinized to understand the power dynamics that underpin them;[98] second, that rights must necessarily evolve to retain their relevance and function; and third, that the proposal is often not in fact about recognizing 'new' rights per se, but about consolidating or concretizing existing entitlements. In the ECHR context, it has been clearly established that environmental harms or hazards can make an impact on a range of Convention rights. Furthermore, as mentioned above, all CoE Member States supported the

[90] See Knox (n 32). See also G Palmisano, Submission to the CDDH-ENV (13–14 September 2022) <https://rm.coe.int/intervention-giuseppe-palmisano/1680a90281>; Rodríguez-Garavito (n 88) 159.

[91] DR Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (University of British Columbia Press 2011).

[92] Rodríguez-Garavito (n 88) 163–4. [93] Lambert (n 86) 6. [94] Keller (n 83).

[95] For an overview of domestic recognition of the right to a healthy environment, and of the justiciability of this right, see CDDH-ENV, 'Compilation of Replies Received from Member States on the Questionnaire with a View of the Preparation of a Study on the Need for and Feasibility of a New Instrument on Human Rights and the Environment' (10 February 2022) CDDH-ENV(2022)09 <https://rm.coe.int/steering-committee-for-human-rights-comite-directeur-pour-les-droits-d/1680aae37d>.

[96] On a shift from the 'strong (extractive) anthropocentrism' that currently defines the ECHR to 'immersive anthropocentrism' or even an ecocentric perspective, see Kobylarz (n 50). On the current limitations of the system in providing distributive justice, see L Raible, 'Expanding Human Rights Obligations to Facilitate Climate Justice? A Note on Shortcomings and Risks' (*EJIL:Talk!*, 15 November 2021) <https://www.ejiltalk.org/expanding-human-rights-obligations-to-facilitate-climate-justice-a-note-on-shortcomings-and-risks/>. [97] Lambert (n 86) 2.

[98] JT Theilen, 'The Inflation of Human Rights: A Deconstruction' (2021) 34(4) LJIL831.

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UN's recognition of the right to a healthy environment, many of them have codified it in their national constitutions, and—as César Rodríguez-Garavito argues—it may even already be part of customary international law.[99] This right may accordingly not be as 'new' as it seems, and a discussion of its novelty depends on the scope of the recognized right, which is considered in more detail below.

B. The How: Legal Form and Status, and Problems with Political Recognition

Different forms of recognition of the right to a healthy environment are currently on the table at the CoE. The recent turn towards 'political' or domestic recognitions of the right reflects a State preference for a subsidiary and non-binding approach, leaving it to States to decide whether, when and how they will recognize such a right.

Political or soft-law approaches certainly have their place, and can provide a first step towards the creation of further (binding) instruments.[100] In some contexts, they may also contribute to the identification of norms of customary international law,[101] and even a non-binding recognition of the right to a healthy environment could potentially lead to domestic legislative action and increased civic participation.[102] It could also encourage the adoption of domestic constitutional protections of the right to a healthy environment, which in turn has been shown to bring about stronger environmental protection.[103] However, political declarations are not a substitute for clear and binding legal rights. They do not bind States on the international level, and accordingly preclude access to monitoring or enforcement mechanisms, ie individual applications to the ECtHR.

It is precisely individual access to the ECtHR which illustrates the importance of recognizing the right to a healthy environment within the ECHR system itself. Political action fails to provide the legal clarity, protection and access to justice that are sorely needed given that impacts on the environment—including anthropogenic climate change—demonstrably affect the enjoyment of many human rights. Questions also remain in relation to political recognition, such as whether and how rights can be litigated to demand better protection and changes to existing domestic policies, how responsibility for

[99] Rodríguez-Garavito (n 88) 160.

[100] Disagreeing here with Lambert (n 86), who argues that there is no advantage to a non-binding recognition.

[101] Rodríguez-Garavito (n 88) 162–3.

[102] H Balfour-Lynn and S Willman, 'The Right to a Healthy Environment: The Case for a New Protocol to the European Convention on Human Rights' (Environmental Rights Recognition Project, September 2022) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4206563>.

[103] See eg C Jeffords and L Minkler, 'Do Constitutions Matter? The Effects of Constitutional Environmental Provisions on Environmental Outcomes' (2016) 69(2) Kyklos 294; A Ceparullo, G Eusepi and L Giurato, 'Can Constitutions Bring About Revolutions? How to Enhance Decarbonization Success' (2019) 93 EnvtlSci&Pol 200.

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transboundary harms can be proven and shared, and who must bear which share of the burden of taking and financing the measures necessary in response.

Against the background of political recognition, human rights bodies like the ECtHR face unparalleled opportunities to interpret rights in a future-proof way, but also unprecedented challenges to accepted doctrines and understandings of their roles. If States were to ratify a treaty (an optional additional protocol to the ECHR) issuing a clear mandate to engage with environmental matters and clarifying the scope of protection, this would send a clear signal of State support for environmental rights protection. It would also prepare and protect these institutions against allegations of judicial activism or overreach in the interpretation of rights. However, large-scale State refusal to ratify such an instrument would send the opposite signal, potentially undermining the developing protection of environmental human rights.

Of course, binding legal protections could take other forms beyond that of an additional protocol to the ECHR, with some options preferable to others. One option is for the Court to interpret existing ECHR rights as containing an implicit right to a healthy environment—ie a more extensive case law-based 'greening' of the Convention. Given institutional pressures on the Court, and contestation and legitimacy concerns, this is unlikely, and it would also be constrained by existing doctrines under the Convention, including in terms of subjectivity—the limitation of rights protection to living human subjects[104]—and territoriality.

Another possibility would be the creation of a separate treaty on these issues, which would stand outside the ECHR system but under the CoE umbrella. However, such an approach would not give access to the ECtHR's supervisory machinery and does not resolve the pressing problem at hand: environmental degradation affects the enjoyment of justiciable ECHR rights, and the ECtHR will continue to be called to take a stand on these issues.

Yet another—albeit highly unlikely—approach would be to propose a protocol amending the ECHR itself by including the right directly in its text. Although such a protocol would provide the most clear and comprehensive protection of environmental rights, it would require ratification by all 46 Member States to come into force, presenting a significantly higher hurdle for acceptance.

The creation of a separate optional protocol to the Convention has distinct advantages. This instrument would create binding obligations for ratifying States, and a clear environmental mandate for the Court. Because this protocol would stand alongside the ECtHR's current 'greened' case law, its adoption would create a situation comparable to that of the ECHR's non-discrimination norm: that right is protected both (as an accessory right) in the Convention itself, and (as an independent right) in

[104] On this, see Norman (n 74).

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Protocol No 12.[105] The Court interprets these standards in harmony,[106] and it could do the same for the right to a healthy environment by applying the right without prejudicing the application of the existing 'greened' case law for non-ratifying States.[107]

Because ratification of an additional protocol would be optional, it could enter into force without being ratified by all States. This would prevent a few reticent States from impeding its entry into force and leave room for gradual expansion to all 46 Member States. However, if few States ratify the protocol, this could give the impression that environmental matters are a fringe issue under the Convention or strengthen arguments that it is illegitimate for the Court to consider environmental and especially climate-related issues *tout court*. There are, in other words, a series of trade-offs involved in choosing any one option for recognition, even though the option of an additional protocol to the ECHR is the most promising one.

C. *The What: Content, Causation and Interaction with Other ECHR Rights*

As phrased in the 2021 PACE draft protocol, the 'right to a safe, clean, healthy and sustainable environment' is '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'.[108] PACE's proposed right to a healthy environment is not of an ancillary or accessory nature; it does not need to be co-invoked with another Convention right.[109] This is important, as accessory norms easily recede behind other rights, rendering them undervalued 'Cinderella' provisions.[110] Here, the self-standing nature of the right would mean that harm to the environment itself could be contested as a violation of human rights, without needing to prove an associated impact on life, health, property or another aspect of human life protected by an ECHR right.

When compared to litigation concerning current, 'greened' ECHR rights, a free-standing right to a healthy environment would provide better protection by tempering existing victim status and causality tests. It would do so by eliminating the need to prove that a specific impact on an individual person's life, health or another right has been caused by environmental factors.[111] This would build on the Court's existing efforts to design a case law that takes into account the 'evidentiary difficulties' facing environmental

[105] ECHR, art 14; Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 2000, entered into force 1 April 2005) ETS No 177.
[106] *Sejdić and Finci v Bosnia and Herzegovina* App Nos 27996/06 and 34836/06 (ECtHR, Judgment (GC) 22 December 2009) paras 55–56.
[107] Kobylarz (n 50).
[108] PACE Recommendation 2211 (2021) (n 5) Appendix, art 1.
[109] Kobylarz (n 50).
[110] See eg R O'Connell, 'Cinderella Comes to the Ball: Art. 14 and the Right to Non-discrimination in the ECHR' (2009) 29(2) LS 211.
[111] In this regard, see DR Boyd in CoE (n 37) 18.

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applicants.[112] Recognizing a self-standing right would not only further reduce these difficulties, but would also better reflect the precautionary principle, which the ECtHR has, with one exception, refused to recognize so far.[113] However, this right is also potentially broad enough to capture any degree of impact on the environment. To ensure that human rights protection is not extended to trivial impacts, it has been proposed that it might be necessary to introduce a certain standard of 'minimum severity' of environmental harm,[114] as with, for example, the ILC's understanding of transboundary harm, which must be 'significant'.[115] At the same time, it is possible that such a test would ultimately replicate the causality test purportedly relaxed by the introduction of the right, ie that it will reintroduce a requirement of impact on human life or health, and continue the ECtHR's currently restricted approach to environmental harm by another name.[116]

Instead of trying to design a test that determines which kinds of environmental harms are significant or important enough to merit human rights protection, an alternative approach could focus on the limitation of the right to a healthy environment. This means proposing a right to a healthy environment that is not absolute, and instead open to proportionate limitations based on a legitimate aim. This is the approach currently set out by the PACE draft protocol,[117] and it would allow the Court to ensure that this right does not jeopardize the enjoyment of other Convention rights. In other words, it would allow for a balancing exercise between competing rights. While creating a limitable right is a sound approach that fits the overall logic of the Convention, caution is required to avoid hollowing out the right to a healthy environment. After all, in the Court's present case law, environmental interests are routinely subjugated to economic ones in the context of balancing; in these cases, the impacts of environmental degradation on individuals are outweighed by the presumed collective interest in economic growth and development.[118]

D. The Who: Subjectivity, and the Importance of Collective (NGO) Entitlements

After determining how the right to a healthy environment could be protected, and what it covers, the next important question concerns legal subjectivity

[112] *Locascia and Others v Italy* App No 35648/10 (ECtHR, Judgment 19 October 2023) para 122. [113] *Tătar v Romania* (n 43) paras 109, 120, as noted in Keller (n 83) 4.
[114] Keller ibid 6; Knox (n 32) 31; Lambert (n 86) 44.
[115] International Law Commission, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries (2001), comment (4) to art 2, as discussed in Keller (n 83) 3.
[116] *Luginbühl v Switzerland* (dec.) App No 42756/02 (ECtHR, 17 January 2006), as discussed in Kobylarz (n 50). [117] PACE Recommendation 2211 (2021) (n 5) Appendix, art 7.
[118] For a classic example, see *Hatton and Others v the United Kingdom* App No 36022/97 (ECtHR, Judgment (GC) 8 July 2003) paras 98, 122–3.

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under the right. In other words, who could benefit from its protection, and how could this create and aggravate vulnerabilities and inequalities? To explore the question of subjectivity, this article adopts an understanding of climate justice that goes beyond efforts to 'advance the rights and dignity of the world's most vulnerable people',[119] and interrogates structural exclusions of certain subjects (future generations, the environment as such, and racialized subjects in developing countries[120]) from the protection of human rights law.

Legal subjectivity under the Convention is plagued by a number of exclusions, and human rights frameworks generally have been criticized for their construction of the human as premised on 'disembodied rationalism, historical gender assumptions and the subjugation of "nature"', as well as colonial legacies and extractivist models of the 'good'.[121] Anna Grear, for example, has discussed the fact that 'liberal legal subjectivity centres round a disembodied juridical subject … whose structure simultaneously delivers a juridical objectification of the "natural world"'.[122] This critique, which essentially concerns the ways in which the law's anthropocentrism normalizes environmental degradation, shows that the image of a legal subject separate from the natural environment, from human vulnerabilities, and from difference, can work to obscure injustices.[123] An examination of this critique results in greater understanding of how the Convention—or human rights frameworks, or the law as a whole—produces or replicates substantive, procedural and epistemic injustices.

The current liminal moment invites creativity and contestation in relation to subjectivity. It provides the opportunity to include 'liminal *personae*' or 'threshold people'[124] in human rights protection, redefining whose interests matter to the law. This may not always be seen as an adequate reflection of radical demands for change. Because the underlying structures are left intact, critical scholars argue that contestation and justice demands may be watered down by fitting them into existing systems.[125] This ties into what Margot Salomon calls 'nihilistic' perspectives on international law, which are disillusioned by the capitalist bias of the law and consider that reform efforts cannot go beyond 'tinkering' with the surface of its institutions.[126] It is

[119] May and Daly (n 18) 235.

[120] Aligning here with the terminology used by prominent Third World approaches to international law (TWAIL) scholars such as Anthony Anghie; see A Anghie, 'Rethinking International Law: A TWAIL Retrospective' (2023) 34(1) EJIL 7.

[121] A Grear, 'Deconstructing *Anthropos*: A Critical Legal Reflection on "Anthropocentric" Law and Anthropocene "Humanity"' (2015) 26 Law&Crit 225; LJ Kotzé, 'The Right to a Healthy Environment and Law's Hidden Subjects' (2023) 117 AJIL Unbound 194.

[122] Grear ibid 236. [123] ibid. [124] Turner (n 10) 95.

[125] See, in this regard, R Kapur, 'TWAIL and Alternative Visions: "Talking About a Revolution"' (2023) 34(4) EJIL 771.

[126] ME Salomon, 'Nihilists, Pragmatists and Peasants: A Dispatch on Contradiction in International Human Rights Law' in E Christodoulidis, R Dukes and M Goldoni (eds), *Research Handbook on Critical Legal Theory* (Edward Elgar 2019), referring to C Miéville, 'The Commodity-Form Theory of International Law: An Introduction' (2004) 17(2) LJIL 271, 301.

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certainly clear that a globally inclusive and post-human subjectivity is difficult to reconcile with the accepted nature and workings of a system like the CoE, as an institution without a global scope that focuses heavily on civil and political rights in a spatially limited context. However, and despite these problems, expanding equal and legally binding protection to liminal *personae* would constitute an improvement over the currently limited understanding of the subject of human rights. Even if not a fully transformative solution, this aligns with Salomon's idea that 'to do nothing is also to take a position', namely, to affirm the status quo.[127] Expanding subjectivity would provide a foothold for the legal contestation of inequalities and ensures the conceptual integrity of human rights law while additionally aiding social and legal mobilization. These advantages appear to be appreciated by environmental litigants and litigators, who see rights as a tool for gap-filling that can be 'pressed into service' when other avenues fail.[128]

Measured by accounts like Grear's critique of the liberal legal subject, it is clear that the CoE's proposals to recognize the right to a healthy environment are not a radical departure from anthropocentric accounts of subjectivity. Natalia Kobylarz has observed that the current proposals do not go as far as creating rights for animals, nature or its elements, ie they neither propose to recognize the environment as a legal person in and of itself, nor envision rivers, trees or animals as rights-holders.[129] They also do not address the ECHR's protective lacunae around Indigenous peoples' rights.[130] In other words, and although current proposals go some way towards protecting the law's 'hidden subjects' in the form of future generations,[131] the right is still mediated by the presence of an individual human subject. This helps to integrate the right within the existing system of human rights protection and ensures its feasibility while also reducing its ability to protect against a comprehensive spectrum of environmental harms or a shift in baseline assumptions around subjectivity.

One less radical way to contest the individualistic, anthropocentric approach to subjectivity is by recognizing the representative standing of NGOs.[132] Unlike proceedings before the European Committee of Social Rights,[133] ECHR rights are highly individualized. The currently pending climate cases show that environmental cases before the Court may be backed and supported by environmental NGOs, but these NGOs are rarely the applicants

[127] Salomon ibid 523.

[128] S Iyengar, 'Human Rights and Climate Wrongs: Mapping the Landscape of Rights-based Climate Litigation' (2023) RECIEL 305.

[129] See Kobylarz (n 50).

[130] On this case law, see G Gismondi, 'Denial of Justice: The Latest Indigenous Land Disputes before the European Court of Human Rights and the Need for an Expansive Interpretation of Protocol' (2016) 18 YaleHumRts&DevLJ 1.

[131] Kotzé (n 121).

[132] H Keller and V Gurash, 'Expanding NGOs' Standing: Climate Justice through Access to the European Court of Human Rights' (2023) 14(2) JHRE 194.

[133] Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (adopted 9 November 1995, entered into force 1 July 1998) ETS No 158.

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themselves.[134] This is because the NGOs are not bearers of the rights primarily concerned, ie the rights to life and respect for private and family life, and the ECHR's requirements around representative standing are restrictive.[135] Allowing environmental NGOs to bring environmental and especially climate cases to the Court would mean revising the victim status requirement, which hampers this kind of litigation because cases brought in the collective interest are routinely declared inadmissible.[136] Revising these rules might make it possible for NGOs to bring cases on behalf of their members. This is currently not possible as a general rule, although there have been certain exceptions in selected environmental cases,[137] and one of the pending climate cases before the Court's Grand Chamber is further challenging these standards, as will be explained below.[138] In the future, perhaps it could also mean NGOs bringing cases on behalf of the environment itself, or of future generations.

The victim status requirement as it currently stands means that applicants must have been 'actually affected' by an alleged Convention violation. Although there are certain limited exceptions here,[139] as a rule the Court rejects cases that can be understood as an *actio popularis*, ie a public interest challenge to policy or legislation.[140] Applicants accordingly cannot 'complain against a law *in abstracto* simply because they feel it contravenes the Convention'.[141] It is not the Court's role to re-examine the outcomes of domestic decision-making processes—unless, that is, they have led to the violation of individual rights.

Given the often legally and technically complex and/or financially demanding nature of environmental litigation, it has increasingly been argued

[134] For examples from the pending climate cases, the *Duarte Agostinho* case (n 8) was supported by the Global Legal Action Network and others, while the *KlimaSeniorinnen* case (n 8) was initiated by Greenpeace.

[135] As recently recapitulated, eg in *Calvi and CG v Italy* App No 46412/21 (ECtHR, Judgment 6 July 2023) paras 64–70.

[136] This is the prohibition of *actio popularis* cases, as discussed in *Yusufeli İlçesini Güzelleştirme Yaşatma Kültür Varlıklarını Koruma Derneği v Turkey* App No 37857/14 (ECtHR, Decision 7 December 2021) paras 38, 41, 43; see also *Plan B Earth and Others v the United Kingdom* App No 35057/22 (ECtHR, Decision 1 December 2022).

[137] *Gorraiz Lizarraga and Others v Spain* App No 62543/00 (ECtHR, Judgment 27 April 2004); *L'Erablière A.S.B.L. v Belgium* App No 49230/07 (ECtHR, Judgment 24 February 2009) para 26; and *Collectif national d'information et d'opposition à l'usine Melox – Collectif stop Melox et Mox v France* App No 75218/01 (ECtHR, Decision 28 March 2006); see Kobylarz (n 50).

[138] *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* (n 8).

[139] eg for indirect victims (the family members of deceased or disappeared victims, or NGOs representing the interests of especially vulnerable people) as well as for potential victims. See eg *Dudgeon v the United Kingdom* App No 7525/76 (ECtHR, Judgment 22 October 1981) para 41; *Hirsi Jamaa and Others v Italy* App No 27765/09 (ECtHR, Judgment (GC) 23 February 2012) paras 137–138.

[140] *Ada Rossi and Others v Italy* App Nos 55185/08, 55483/08, 55516/08, 55519/08, 56010/08, 56278/08, 58420/08, 58424/08 (ECtHR, Decision 16 December 2008) 4.

[141] *Klass and Others v Germany* App No 5029/71 (ECtHR, Judgment 6 September 1978) para 33; as reiterated in *Ada Rossi and Others v Italy* ibid 4.

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that these requirements raise excessive barriers in access to justice.[142] A promising case in this regard was the 2004 judgment in *Gorraiz Lizarraga and Others v Spain*, concerning a dam construction project, where the Court noted that the term 'victim' must be adapted to changing conditions in contemporary societies, and found that in some situations 'recourse to collective bodies such as associations is one of the accessible means, sometimes the only means, available to [individuals] whereby they can defend their particular interests effectively'.[143] The Court also noted that '[a]ny other, excessively formalistic, interpretation of that concept would make protection of the rights guaranteed by the Convention ineffectual and illusory'.[144] This finding was developed further in the *Melox* case, on information and participation rights, where the Court again emphasized the important role of environmental NGOs for bringing certain kinds of cases.[145] This case law concerns NGOs' ability to challenge purported violations of procedural rights, specifically under Article 6 of the ECHR, and similar findings have been made in a small number of later cases,[146] albeit without leading to an overhaul of victim status requirements for environmental NGOs generally.[147]

The PACE draft protocol does not address issues of victim status, which is often also termed 'standing' (although this is, technically speaking, a different but related matter under the ECHR system).[148] In the CDDH's consultations with experts, it has been argued that the victim status requirement should change, and that the draft protocol should relax the corresponding requirements for environmental NGOs.[149] There are different proposed forms that this could take. For example, it has been proposed that the relaxation of rules could be limited to environmental NGOs that have received previous accreditation from the CoE.[150]

There are certainly good reasons for rethinking the ECHR's victim status requirements. Doing so could ease access to justice in cases that are complex and costly for individuals to bring, which particularly applies to cases in which a large amount of technical, scientific or legal expertise is needed. It

[142] See Keller and Gurash (n 132).

[143] *Gorraiz Lizarraga and Others v Spain* (n 137) para 38.

[144] ibid.

[145] *Collectif national d'information et d'opposition à l'usine Melox – Collectif stop Melox et Mox v France* (n 137) para 4.

[146] *Beizaras and Levickas v Lithuania* App No 41288/15 (ECtHR, Judgment 14 January 2020) para 81; *L'Erablière A.S.B.L. v Belgium* (n 137) para 29.

[147] *Yusufeli İlçesini Güzelleştirme Yaşatma Kültür Varlıklarını Koruma Derneği v Turkey* (n 136) para 43; *Bursa Barosu Başkanlığı and Others v Turkey* App No 25680/05 (ECtHR, Judgment 19 June 2018) para 115.

[148] Under art 34 of the ECHR (n 105), standing concerns the requirement that applicants must fall into one of the categories of petitioners specified in the provision, while victim status relates to the fact that they must be able to claim to be direct, indirect or potential victims of a Convention violation.

[149] Lambert (n 86) 43, 44, 50; see also Keller (n 83) 6, as discussed in Kobylarz (n 50).

[150] Keller ibid 5.

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could also help to collect and therefore streamline large numbers of individual applications concerning the same environmental impacts. Recognizing a right to a healthy environment also presents an (albeit imperfect) way to defragment and build on existing rights and obligations, providing an overarching entitlement that harmonizes—or at least provides a common minimum for—the law in different CoE Member States. At the same time, if it continues the ECHR's individual rights-based focus, the right might have 'an atomizing effect, as collective demands for justice become fragmented into individual litigation and claims'.[151]

To some, the conspicuous absence of the right to a healthy environment from the ECHR system—ie the environment-shaped hole in the Convention—practically begs for the recognition of the right. However, there are necessarily trade-offs involved in any effort to recognize the right to a healthy environment, especially when that recognition takes place within the constraint of existing institutions.[152] As argued by Giuseppe Palmisano, the former President of the European Committee of Social Rights, the ECHR 'is characterised by an individualistic conception of human rights that does not fit well with collective and so-called solidarity rights, as the rights concerning environmental issues undoubtedly are'.[153] Despite this, the ECtHR's ability to provide binding judgments against 46 States (compared to the European Committee of Social Rights' 16 States[154]), if expanded by a right to a healthy environment, supports hopes that it could provide stronger, more expansive, or more equitable environmental protection than is currently being provided within this or other systems. These hopes are particularly high as the Court hears its first climate cases. But what protection gaps would the right to a healthy environment concretely address in these cases? The following section further analyses this, asking whether the Convention, if enriched by a right to a healthy environment, could be expected to deliver a degree of climate justice.

V. FUTURE GENERATIONS, EXTRATERRITORIALITY AND CLIMATE CHANGE: MOVING THE NEEDLE TOWARDS SPATIAL AND TEMPORAL JUSTICE?

A. Justifying a Focus on Climate Change

The above has concerned environmental rights in a general sense and has only superficially touched on two major issues within the current liminal or threshold moment at the CoE: the temporal and spatial limitations on human rights protection, or, in other words, the rights of future generations and the extraterritorial application of rights. This section considers these two enduring legal exclusions through the lens of a specific institution—namely, the ECtHR—and a specific context—namely climate change.

[151] Rodríguez-Garavito (n 88) 165. [152] ibid 166. [153] Palmisano (n 90).
[154] An argument made by Lambert (n 86).

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Discussions around the right to a healthy environment are by no means limited to climate change. However, climate-related considerations are proving central in the CoE's ongoing discussions of that right.[155] This is partly because climate litigation and the corresponding demands for climate justice are bringing key aspects of the right to a healthy environment to a head. It could be argued that climate change is different in nature from other environmental issues given the need for a global solution and differentiated burden-sharing. At the same time, however, climate litigation exposes the underlying and legally entrenched oppositions and injustices that shape legal responses to any environmental issue, namely oppositions between the human and the natural, the economic and the environmental, the actionable and the political, and the 'us' and the 'other'. And while not all proposed climate solutions may be compatible with human rights law, as captured by cases comprising the phenomenon of 'just transition litigation',[156] this does not mean that a rights-based response is incorrect; in fact, it underscores the need for it.

When discussing proposals for recognizing the right to a healthy environment, and its implications for rights protection across time and place, climate change provides a context for understanding the transformations that the current liminal moment could deliver, and reveals the injustices wrapped up in current approaches to legal subjectivity. After all, climate change and the resulting impacts are inextricably linked with inequality, and more specifically with widespread adverse impacts that are inequitably distributed across different populations and regions of the world. In this regard, the Intergovernmental Panel on Climate Change (IPCC) has established that the '[v]ulnerability of ecosystems and people to climate change differs substantially among and within regions …, driven by patterns of intersecting socio-economic development, unsustainable ocean and land use, inequity, marginalisation, historical and ongoing patterns of inequity such as colonialism, and governance'.[157] It is widely recognized that the current and projected effects of unmitigated greenhouse gas emissions are caused and distributed in ways that are unjust and unethical.[158] Demands for climate justice have been funnelled into human rights claims, with the human rights system serving as a proxy for identifying climate injustice despite some

[155] See eg CDDH-ENV, 'Written Contributions Received from Member States and Participants on the Draft CDDH Report on the Need for and Feasibility of a Further Instrument or Instruments on Human Rights and the Environment' (26 September 2023) CDDH-ENV(2023)08REV.

[156] Defined as 'cases that rely in whole or in part on human rights to question the distribution of the benefits and burdens of the transition away from fossil fuels and towards net zero emissions' in A Savaresi and J Setzer, 'Rights-based Litigation in the Climate Emergency: Mapping the Landscape and New Knowledge Frontiers' (2022) 13(1) JHRE 7, 9–10.

[157] IPCC, *Climate Change 2023: Synthesis Report* (2023) 51 <https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_LongerReport.pdf>.

[158] See, among many others, EA Page, *Climate Change, Justice and Future Generations* (Edward Elgar 2006).

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scepticism concerning the law's inherent complicity in and predisposition towards environmental degradation through, among other things, its protection of corporate interests.[159]

To better understand the debate, and the systemic and institutional limitations, the next sections will discuss the possible recognition of rights for future generations, as an expression of an intergenerational climate justice, and the extraterritoriality of State obligations, as an expression of a global climate justice. This analysis will demonstrate how the current liminal moment could move the CoE closer to environmental and specifically climate justice, by placing these demands in the context of both wider discussions and institutional constraints.

B. Recognizing the Rights of Future Generations

The rights of future generations pervade existing discussions and regulatory instruments on the environment, although without creating human rights obligations.[160] The related[161] concept of intergenerational justice is aspirationally mentioned in the preamble of the Paris Agreement,[162] emphasized in the UN Framework Convention on Climate Change,[163] and foregrounded by different social movements.[164] As human rights bodies start to address climate change, they largely seem to be following this approach: they mention the protection of future generations as aspirations or givens, but without further examination or recognition of enforceable rights.[165] In other words, the temporal scope of climate-related human rights, ie the matter of whether and how the law can protect legally actionable rights for future generations, remains an unsettled question. This evokes a core (temporal)

[159] S Turner, *A Global Environmental Right* (Routledge 2013) 32–44. For a discussion, see A Grear, 'Towards "Climate Justice"? A Critical Reflection on Legal Subjectivity and Climate Injustice: Warning Signals, Patterned Hierarchies, Directions for Future Law and Policy' (2014) 5 JHRE 103.

[160] See eg the text of the Aarhus Convention (n 4), or the preamble of the Paris Agreement, which acknowledges the principle of intergenerational equity (Conference of the Parties to the UN Framework Convention on Climate Change, Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS 79). See also the UN's recognition of the right to a healthy environment, in UNGA (n 2), which mentions future generations twice in its preamble.

[161] E Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (Transnational 1989) 616, discussing intergenerational justice as leaving future generations with comparable options, a comparable quality of the planet and comparable access to resources. For a discussion, see B Lewis, 'The Rights of Future Generations within the Post-Paris Climate Regime' (2018) 7(1) TEL 69, 84.

[162] Paris Agreement (n 160).

[163] UN Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107, preamble, art 3(1).

[164] For a discussion, see eg H Knappe and O Renn, 'Politicization of Intergenerational Justice: How Youth Actors Translate Sustainable Futures' (2022) 10(6) EurJFutRes 6.

[165] eg see UN Human Rights Committee, *Daniel Billy et al v Australia*, Communication No 3624/2019 (22 September 2022) UN Doc CCPR/C/135/D/3624/2019, para 12.

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exclusion of legal subjectivity, and can be subdivided further into questions of how to theorize and how to implement intergenerational justice.[166]

1. Contesting the temporal scope of ECHR law

Discussions around rights for future generations have not yet led to any meaningful shifts in the ECHR system, where human rights protection is owed only to those alive at the material time. This has been well established in cases concerning the treatment of human remains, where rights violations arise only where the rights of living persons, ie the deceased's surviving family members, are affected.[167] When it comes to the rights of the unborn, where diverging views about the moment life begins continually endanger reproductive rights, rights are likewise understood through the prism of a living person, ie the gestating parent.[168]

Given that the ECHR system currently does not recognize the rights of future persons, whether individually or collectively, the 2021 PACE draft protocol—with its explicit recognition of the human rights of future generations—is a major innovation.[169] It proposes a 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'.[170] While the PACE protocol is currently at a draft stage, and one of many options being discussed by the CDDH-ENV, its proposal to recognize rights for future generations would entail far-reaching changes to the existing ECHR system, and therefore merits further discussion.

2. Justifying rights for future generations

Arguments in favour of rights for future generations take different forms, and can for example be based around the human dignity of the beneficiaries,[171] their voicelessness[172] or vulnerability,[173] or the idea that such rights have been the implicit purpose of postbellum international law all along.[174] Some

[166] On this, see eg AP Gosseries, 'On Future Generations' Future Rights' (2008) 16(4) JPolPhil, 446.

[167] *Polat v Austria* App No 12886/16 (ECtHR, Judgment 20 July 2021) paras 48, 94 summarizing the case law.

[168] *Vo v France* App No 53924/00 (ECtHR, Judgment (Grand Chamber) 8 July 2004) para 80, where the ECtHR found that 'the unborn child is not regarded as a "person" directly protected by Article 2 of the Convention and that if the unborn do have a "right" to "life", it is implicitly limited by the mother's rights and interests'.

[169] PACE Recommendation 2211 (2021) (n 5) Appendix, arts 1, 5.

[170] ibid.

[171] F Coomans, 'Towards 2122 and Beyond: Developing the Human Rights of Future Generations' (2023) 41(1) NQHR 53, 57; S Riley, 'Architectures of Intergenerational Justice: Human Dignity, International Law, and Duties to Future Generations' (2016) 15(2) JHumRts 272.

[172] AP Gosseries, 'Constitutions and Future Generations' (2008) 17(2) GoodSoc 32, 35.

[173] Lewis (n 161).

[174] See, eg United Nations Educational, Scientific and Cultural Organization (UNESCO), Declaration on the Responsibilities of the Present Generations Towards Future Generations, Paris

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scholars equate the rights of future generations with the rights of children alive today,[175] noting that many of those who will be alive in the year 2100, for example, are already living.[176] By contrast, others argue that using living children as a 'proxy' or a 'shortcut' for future generations creates a false equivalence that risks under-theorizing the rights of future generations while simultaneously levelling down the rights of today's children.[177] In short, there is a definitional debate as to who constitutes future generations. However, as rights-based climate litigation proliferates and ties the environmental present more firmly to the rights of future generations—as for example the German Federal Constitutional Court did in its ground-breaking 2021 climate ruling[178]—some are hopeful that a shift is happening in 'the hyper-individualised realm of human rights law'.[179]

The matter of individualism in rights protection plays an important role here, in more ways than one: it determines who can invoke these rights, the rights' content, and what reparation is owed in case of a violation; it also helps distinguish the putative rights of the unborn from the rights of future generations, with individualistic claims having potential implications for the protection of reproductive rights.[180] Recognizing the human rights of future generations within the CoE system could potentially reshuffle the interests prioritized by that system, thereby pushing back against what Stephen Gardiner has called 'the tyranny of the contemporary'.[181] Gardiner argues that—despite casual assumptions to the contrary—existing national institutions and political tendencies do not adequately represent and heed the interests of future generations.[182] At the same time, the emphasis of future generations' rights has recently been challenged by Stephen Humphreys, who

(12 November 1997) preamble, first recital <https://en.unesco.org/about-us/legal-affairs/declaration-responsibilities-present-generations-towards-future-generations>.

[175] K Arts, 'Children's Rights and the Sustainable Development Goals' in U Kilkelly and T Liefaard (eds), *International Human Rights of Children* (Springer 2018).

[176] 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' (24 January 2018) UN Doc A/HRC/37/58, para 68.

[177] See A Nolan, 'The Children are the Future – Or Not? Exploring The Complexities of the Relationship between the Rights of Children and Future Generations' (*EJIL:Talk!*, 26 May 2022) with further references <https://www.ejiltalk.org/the-children-are-the-future-or-not-exploring-the-complexities-of-the-relationship-between-the-rights-of-children-and-future-generations/>.

[178] Bundesverfassungsgericht (Federal Constitutional Court) of Germany, *Neubauer v Germany*, Order of the First Senate, Case No BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20, 24 March 2021.

[179] A Daly, 'Climate Competence: Youth Climate Activism and Its Impact on International Human Rights Law' (2022) 22(2) HRLRev ngac011, 21.

[180] Sandy Liebenberg (Chair) et al, 'Maastricht Principles on the Rights of Future Generations', (July 2023) art 4(c) <https://www.rightsoffuturegenerations.org/the-principles/english> (2023 Maastricht Principles).

[181] SM Gardiner, 'On the Scope of Institutions for Future Generations: Defending an Expansive Global Constitutional Convention That Protects against Squandering Generations' 36(2) Ethics&IntlAff (2022) 157, citing S Gardiner, *A Perfect Moral Storm: The Ethical Tragedy of Climate Change* (OUP 2013).

[182] ibid.

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argues that it obscures existing structural inequities around climate change (including historical and geographic ones) by calling for solidarity towards the implicitly uniform generations of the future. It also, he argues, functions as a deflection of 'the urgency and scale of action required to meet the suffering of concrete persons alive now'.[183] And, he argues, future generations literature is still '"all about us", subject to our changing whims and priorities as to the kind of "good life" we can imagine for our [own] grandchildren'.[184]

Indeed, future generations discourse seems to overlap with the desire to protect young people who are known to us today.[185] While this is an understandable impulse, and while the distinction between future and present generations is inherently fluid and dynamic,[186] protecting living children does not mean quite the same thing as protecting the rights of future generations. The core of Humphreys' argument speaks to this. He argues that there is no need to frame climate change as an issue affecting future generations, because it already affects the rights of those alive today, in very unequal ways. The choice to do so anyway, he argues, redirects notions of responsibility from tangible concepts in the present, including loss and damage, climate-induced displacement, adaptation and technology transfer, to 'vague abstract

entities in a notional unbounded and ultimately unknowable future'.[187] In doing so, it banks on 'keeping half the world poor'.[188] It does so because a future generations approach creates a unitary 'us' and a homogeneous 'them', providing a 'redemptive fantasy' without regard for historical responsibility or existing inequality or due regard for the fact that there is no way out of climate change that does not require sacrifice, whether along lines of classes, States, generations or other axes of inequality.[189]

The concerns raised by Humphreys must be taken seriously. Anthropogenic climate change is, at its core, about inequality, not only in terms of the distribution of its causes and effects, but again in terms of the distribution of the power to influence policy and climate financing decisions. Like climate change itself, drastic greenhouse gas mitigation, absent meaningful redistribution, will have disastrous effects for people in certain areas of the world.[190] In other words, climate injustice unquestionably relates to North–South, colonial, racial, intergenerational and neoliberal inequities. And while these inequities are glaring, a solution—a rebalancing or redistribution of burdens—has not yet been found, despite ongoing efforts to define States'

[183] S Humphreys, 'Against Future Generations' (2023) 33(4) EJIL 1061, 1063.
[184] ibid 1069.
[185] Presentation of four reports by John H Knox, Special Rapporteur on human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, to the UN Human Rights Council (5 March 2018) 4 <https://www.ohchr.org/sites/default/files/Documents/Issues/Environment/37thHRC_Knox_statement.pdf>.
[186] Daly (n 179).
[187] Humphreys (n 183) 1069.
[188] ibid 1086.
[189] ibid 1074–5, 1078–9, 1091.
[190] ibid 1068–9.

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'fair shares'[191] or 'common but differentiated responsibilities'.[192] Humphreys accordingly asks whether recognizing rights for future generations is a solution, or a distraction.

Given the entrenched nature of the problem, it is unlikely that extending the temporal scope of human rights protection into the future—either in terms of future generations' rights, or children's rights, or human rights in a general sense—would be a magic bullet for structural issues. To counter the argument that human rights are accordingly complicit in these inequalities,[193] this article understands rights as a possible framework for identifying and better understanding them—a language for naming harms. Now is the time to map the myriad ways in which climate change affects rights, and the ways in which minimalistic views risk building exclusionary or inadequate accounts of rights that will not stand the test of time. This article accordingly aims to heed the call for nuance issued in response to Humphreys' article[194] by understanding environmental human rights across the generations in mutually reinforcing ways—positioned not self-destructively against each other, but against the forces at the root of both environmental degradation and global inequality.

3. *Situating these proposals*

An idea of how this could look is provided by a noteworthy recent development, namely the adoption of the 2023 Maastricht Principles on the Rights of Future Generations ('the Maastricht Principles'). These soft-law principles are discussed here as a starting point for understanding the possibilities and limits of human rights. The Maastricht Principles were drafted via large-scale consultations, aiming to inform the work of human rights bodies by consolidating existing international legal standards along with Indigenous and non-Western knowledge, the customary international no-harm rule, and conventional human rights principles.[195] Their central idea is that protection for future generations is already implicit in international (human rights) law. Premised on an inclusive, intergenerational, intersectional and global vision of justice, they declare that future generations are entitled to human rights on the basis of existing codified and customary international law and its general principles, linking this particularly to the principle of human dignity.[196]

A core objective of the Principles is the elimination of intergenerational discrimination and inequality, including by requiring redress of past

[191] For a discussion from the perspective of human rights law, see eg G Liston, 'Enhancing the Efficacy of Climate Change Litigation: How to Resolve the "Fair Share Question" in the Context of International Human Rights Law' (2020) 9(2) CILJ 241.

[192] Paris Agreement (n 160) preamble, arts 2(2), 4(3), 4(19).

[193] An argument made prominently in S Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard University Press 2018).

[194] M Wewerinke-Singh, A Garg and S Agarwalla, 'In Defence of Future Generations: A Reply to Stephen Humphreys' (2023) 34(3) EJIL 651.

[195] Coomans (n 171).

[196] 2023 Maastricht Principles (n 180) arts 2, 5(a)

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injustices and preserving resources, and this objective is to be realized by placing humanity in a position of trusteeship over the Earth's resources.[197] This trusteeship role is to be carried out in accordance with the principles of prevention and precaution and international solidarity,[198] and with respect for and inspiration from the rights of Indigenous peoples and peasants.[199] The Principles set out State obligations to respect, protect, fulfil and remedy future generations' rights, provide examples of violations of these rights, require participation, representation (by Ombudspersons, national human rights institutions, designated parliamentary seats, or others) and information, and set out extraterritorial obligations.[200] They also contain obligations for non-State actors,[201] and specify remedies for violations of rights.[202] At the same time, the Principles recognize the struggle for reproductive justice, and tackle it head-on by stating that '[n]othing in these Principles recognizes any rights of human embryos or fetuses to be born, nor does it recognize an obligation on any individual to give birth to another'.[203]

These principles have been endorsed by prominent scholars, UN special rapporteurs, NGO representatives and human rights body members.[204] They are not a binding legal instrument, but aim to clarify and build on existing entitlements, and go a long way towards doing so, providing a comprehensive framework for protecting the rights of future generations. However, some aspects of the Maastricht Principles raise questions. First, their definition of future generations ('those generations that do not yet exist but will exist and who will inherit the Earth') is tinged with religious language. While this likely stems from the fact that the Principles considered different faith traditions among their other sources, it also moves the Principles into the territory of a natural law or theological foundation. This terminology ('inherit') also evokes an ownership-oriented approach; in a related vein, the concept of 'trusteeship' can be interrogated from the perspective of its colonial history.[205] Second, it is regrettable that the Principles use non-binding language ('should') for example when resource redistribution across borders is concerned, and seem to distinguish between intergenerational and intragenerational injustice, instead of seeing the two as fundamentally interconnected.[206] The concerns raised by Humphreys loom large here, in the sense that moving the discussion away from existing rights and rights-holders may not necessarily help to address grievous underlying inequities.

Still, and despite these concerns, the temporal limitations on subjectivity under human rights law should not be accepted uncritically. The following

[197] ibid, arts 6, 8. [198] ibid, arts 9, 10. [199] ibid, arts 11, 12. [200] ibid, arts 13–24.
[201] ibid, arts 25–26. [202] ibid, arts 28–36. [203] ibid, art 4(c).
[204] See the 58 names listed in ibid, annex.
[205] On this, see R Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (OUP 2009).
[206] See eg 2023 Maastricht Principles (n 180) preamble, X.

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section considers the temporal limitations of existing rights, drawing out what efforts such as the Maastricht Principles can add to the ECHR system.

4. Rethinking the temporal subject

Perhaps it is not necessary to recognize new human rights—whether rights specific to future generations, or the right to a healthy environment as a whole—to allow human rights frameworks to address (at least some of) the impacts of environmental destruction and especially climate change on individuals living today. An alternative is to focus on the already existing rights to life, to health, to non-discrimination, to home, to culture, to property, to food, to water, to sustainable development, and more. These rights will inevitably be involved in responses to environment-related impacts on rights in various human rights systems.

The recognition of 'new' environmental rights may accordingly be met with concerns about the superfluity, inflationism or unenforceability of the rights involved. It was argued above that 'new' rights are often about consolidating or concretizing existing entitlements, which provides a justification for recognition based on defragmenting and clarifying existing law, but that is not the case for the recognition of rights for future generations, which extends the temporal rather than the substantive scope of protection. This entails a fundamental shift in the focus of rights protection, and not merely a consolidation of its substance. It frames intergenerational relations as a locus of dominance and harm and makes the link between temporal subjectivity and climate (in)justice visible. In other words, it furthers the realization 'that prevailing models of justice are in need of revision, bound as they are by spatially and temporally limiting frameworks'.[207] After all, a presentist focus on rights erases major harms caused by today's emissions. Efforts like the Maastricht Principles accordingly lower barriers to thinking human rights into the future, spelling out the concepts and protection needs at stake. Simultaneously, barriers of fact (and not of law)[208] are being lowered by climate scientists, whose models are increasingly able to quantify the impact of climate change on those living in the future and disaggregate these impacts by place.[209]

In terms of the ECHR—which, again, tends to be individualistic and anthropocentric, as well as temporally backward-looking, ill-equipped to provide redress for systemic and especially socio-economic inequalities, and deferential to States' consideration of the relevant interests—much of the Maastricht Principles' content can only be described as aspirational. Given the institutional constraints upon its work, the ECtHR is unlikely to reinvent

[207] Skillington (n 19) 11–12.
[208] Kobylarz (n 50).
[209] W Thiery et al, 'Intergenerational Inequities in Exposure to Climate Extremes' (2021) 374 Science 158–60.

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itself entirely by recognizing rights for future generations. Some prominent voices have even argued that a recognition of the rights of future generations is simply beyond the scope of existing human rights instruments.[210]

A more likely and workable—albeit less practically impactful—approach is to underline the protection of future generations as a guiding principle for interpreting existing rights. This is the approach taken by the CRC, in its recent General Comment No 26, which recognizes the principle of intergenerational equity and the interests of future generations without setting out any concrete rights entitlements in this regard.[211] This approach protects human rights bodies from having to speak on behalf of future generations without knowing their preferences or realities. At the same time, it should be clear that 'speaking for' is already taking place. Current policymakers and high-emitting State and corporate actors are making decisions that will shape the lives of future generations. Children's rights cover some of these harms, as do the rights of all living human individuals, and these entitlements must be foregrounded and taken seriously. At the same time, doubling down on these rights while refusing to question their temporal scope impoverishes human rights narratives and frameworks. The real question here seems to be whether moving the needle towards a more equitable engagement with the sources and impacts of climate change is worth striving for, even if it does not deliver a fully realized vision of global and redistributive climate justice. To consider this question, a second and related issue merits discussion, namely the extraterritoriality of human rights obligations.

C. Extraterritoriality

Arguments for future generations suggest that the right to a healthy environment cannot merely be a right of present-day individuals. Instead, it requires the recognition of a collective right to enjoy a viable environment and a habitable planet that avoids inequities along a temporal axis.[212] In other words, neglecting the factor of time and forcing this right to fit individual, presentist logics would impoverish it dramatically. A second impoverishment becomes apparent when the factor of place is considered, taking into account the globally inequitable benefits and impacts of extractivism and the resulting anthropogenic climate change. Heeding Humphreys, this article accepts that any struggle for climate justice that foregrounds one of these factors but ignores the other will be self-defeating.

The crucial question is whether human rights can or should or perhaps already do apply extraterritorially. When it comes to the ECHR system, its regional nature and narrow territorial focus stand in sharp tension with

[210] JH Knox, Comments on the CRC's Draft General Comment No 26, Letter to the Committee on the Rights of the Child (15 February 2023) <https://www.ohchr.org/sites/default/files/documents/hrbodies/crc/gcomments/gc26/2023/cs/GC26-CS-john-knox-2023-02-15.docx>.

[211] UN CRC (n 79) para 11.

[212] Lambert (n 86).

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current demands for global climate justice. Under the case law of the Court as it currently stands, drawing on the jurisdictional norm in Article 1 of the ECHR, it appears almost impossible for people from developing countries—who face the brunt of climate-related harms[213]—to rely on the ECHR to challenge the actions of historically and currently high-emitting CoE Member States. Or, as Lea Raible has noted, '[h]uman rights are still primarily a national affair'.[214] While the ECtHR does not yet have case law specific to cross-border environmental impacts,[215] it may be assumed that its existing—and limited, territorial or personal control-based—approach to territorial jurisdiction also applies to environmental cases.[216] In an expert report before the CDDH-ENV, Raible noted that while recent cases such as *Carter v Russia* indicate that the Convention may apply extraterritorially when a State controls whether a person lives or dies through its agents abroad,[217] the Court is still likely to find that climate cases lack the requisite proximity to the emitting State. Similarly, the Court's former president, Robert Spano, noted that he could not envision 'how the inherent cross-border and transversal nature of the right to a healthy environment can be reconciled meaningfully with the current formulation of Article 1 of the Convention and the Court's case-law'.[218] The recent hearing in the *Duarte Agostinho* case before the Court, much of which was dedicated to the issue of extraterritoriality, argued for a different outlook, with the applicants submitting that the existing doctrine needs to evolve to remain true to its underlying principles and guarantee effective rights protection and harmony with the international climate regime.[219] Collective causation, the applicants argued, should not allow States to escape responsibility for a civilization-threatening harm.[220] And there is, after all, a customary international legal rule requiring States to prevent transboundary environmental harms: the 'no-harm' principle.[221]

The fact that the PACE draft protocol does not address extraterritorial jurisdiction can thus be considered a significant lacuna. It could do so—for example, as Cima argues, it could bring human rights instruments closer to the climate regime's underpinning principle of the common concern of

[213] Intergovernmental Panel on Climate Change, 'Climate Change 2023: Synthesis Report, Summary for Policymakers' (2023) A.2.2 <https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf>.

[214] L Raible, Submission to the CDDH-ENV (13 September 2022) <https://rm.coe.int/intervention-lea-raible/1680a90261>.

[215] On this, see CoE, *Manual on Human Rights and the Environment* (3rd edn, 2022) 103 <https://rm.coe.int/manual-environment-3rd-edition/1680a56197>.

[216] For an example of this case law, albeit from a very different context, see *Al-Skeini v the United Kingdom* App No 55721/07 (ECtHR, Judgment 7 July 2011) paras 130–139; in all, see Raible (n 214); Spano (n 78).

[217] Raible ibid, discussing *Carter v Russia* App No 20914/07 (ECtHR, Judgment 21 September 2021) para 150.

[218] Spano (n 78).

[219] *Duarte Agostinho* case (n 8) Grand Chamber hearing, 27 September 2023.

[220] ibid.

[221] S Maljean-Dubois, 'The No-Harm Principle as the Foundation of International Climate Law' in B Mayer and A Zahar (eds), *Debating Climate Law* (CUP 2021).

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mankind, which collectivizes interests in the environment.[222] Or, as Raible suggests, it could extend jurisdiction to situations in which States control the source of harm, with the failure to regulate that harm adequately then constituting a potential violation of the right to a healthy environment.[223] However, this would, she notes, 'come at the cost of at least some of the main characteristics of the Convention and human rights protection generally', eg its focus on individual redress.[224] This stands alongside other, institutional costs: a further overloading of the Court's docket, a need to engage with legal and factual circumstances outside its established remit, and further contestation of its supposed overreach.

Extraterritorial climate change obligations certainly do raise difficult practical, conceptual and institutional questions. They potentially provide people around the world with access to the ECtHR, endangering the survival and legitimacy of a regional institution with a limited budget, an already overloaded docket and a contested role. They also raise questions about the modalities of redress to be offered in such cases, and about how to distribute responsibility—including historical responsibility—for anthropogenic climate change among States. While the Grand Chamber's pending climate cases *de facto* limit extraterritorial jurisdiction to the '*espace juridique*' of the Convention,[225] an increasingly intense debate around the extraterritorial scope of the ECHR and the untenability of current approaches based on effective control over person and territory[226] has foregrounded different models. Gone are the days of 'vague and often misleading gestures to the universality of human rights'[227] as scholars explore the potential of a functional approach to territorial jurisdiction,[228] one focused on limiting State power in any setting in which it exercises State functions or a sphere of influence.

Applied to a climate context, these approaches challenge the CoE's persistent failure to protect those most affected by the emissions of its Member States, ie persons living in vulnerable areas in developing countries. To quote Carmen Gonzalez, 'racialized communities all over the world have borne the brunt of

[222] Cima (n 85), discussing the principle enshrined in the UN Framework Convention on Climate Change (n 163) preamble, 1st recital; and the Paris Agreement (n 160) preamble, 11th recital.

[223] Raible (n 214) 3–4.

[224] ibid 5.

[225] The extraterritorial argument in *Duarte Agostinho* (n 8) concerns only CoE Member States; for a discussion of this concept see Keller and Heri (n 35).

[226] See the discussions between M Giuffré, 'A Functional-impact Model of Jurisdiction: Extraterritoriality Before the European Court of Human Rights' (2021) 82 QIL 53; C Mallory, 'A Second Coming of Extraterritorial Jurisdiction at the European Court of Human Rights?' (2021) 81 QIL 31; A Ollino, 'The "Capacity-impact" Model of Jurisdiction and its Implications for States' Positive Human Rights Obligations' 82 QIL 81; and L Raible, 'Extraterritoriality between a Rock and Hard Place' (2021) 81 QIL 7.

[227] S Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (2012) 25(4) LJIL 857.

[228] See, eg, V Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, *SS and Others v Italy*, and the "Operational Model"' (2020) GermanLJ 401; Giuffré (n 226).

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carbon capitalism from cradle (extraction of fossil fuels) to grave (climate change)'.[229] There are different ways to respond to this reality—from 'fair shares' and the Paris Agreement's principle of common but differentiated responsibilities,[230] to the polluter-pays principle under environmental law,[231] the customary international 'no-harm' rule[232] or positive obligations under the ECHR. While none of these approaches necessarily reflects a full or equitable account of climate justice—which, given the lack of any one monolithic account of climate justice, may prove to be a moving but worthy target—they attempt to respond to the unequal distribution of the developmental gains and catastrophic impacts associated with climate change. This is something that proposals at the CoE level are failing to redress adequately, or even address.

Institutional justifications for limited rights protection—territorial or otherwise—must be approached with the utmost care. At the same time, as successive waves of contestation reshape the Court's work,[233] there may be short-term legitimacy gains involved in siding with its (largely high-emitting and (hyper-)developed) Member States in terms of the spatial scope of human rights obligations. However, failing to understand climate change as an expression, source and aggravation of global inequality means failing to respond to the core injustices at stake, and entails comparative and long-term legitimacy deficits for any human rights institution.

Meanwhile, climate litigation is showing that there are alternatives. While the recognition of a purely territorial right to a healthy environment best reflects the current logic of the European human rights system, other bodies—among them the Inter-American system[234] and the CRC[235]—have recognized that it should suffice for the purposes of territorial jurisdiction for harmful greenhouse gas emissions to have originated in the territory of a given State. Admittedly, these bodies move in different institutional, legal and political contexts than

[229] CG Gonzalez, 'Racial Capitalism, Climate Justice, and Climate Displacement' (2021) 11(1) OñatiSoc-LegSer 108, 108. [230] Paris Agreement (n 160) preamble, arts 2(2), 4(3), 4(19).

[231] On this principle, see SA Atapattu, *Emerging Principles of International Environmental Law* (Brill/Nijhoff 2006) Ch 6. [232] Maljean-Dubois (n 221).

[233] One recent example being the decision to disclose the identity of judges making interim measures orders after political and media criticism from the UK of the decision in the Rwandan removals case. See *NSK v the United Kingdom* App No 28774/22 (ECtHR, interim measures order 13 June 2022); and the Court's Press Release, 'Changes to the Procedure for Interim Measures (Rule 39 of the Rules of Court)' (13 November 2023) ECHR 308 (2023).

[234] Inter-American Court of Human Rights Advisory Opinion OC-23/17 on 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) in relation to Articles 1(1) and 2 of the American Convention on Human Rights) (15 November 2017) paras 101–103.

[235] *Sacchi et al. v Argentina*; see UN CRC, 'Decision Adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communication No 104/2019' (11 November 2021) UN Doc CRC/C/88/D/104/2019, para 10.7.

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the ECtHR.[236] Neither would extraterritorial ECHR obligations be a panacea for anthropogenic climate change or global inequality; they would raise practical and resource difficulties, would not bind all global high emitters, and would be unlikely to lead to the redistribution of resources called for under the Paris Agreement regime.[237] Scholars have thus far struggled to justify extraterritorial environmental obligations based on accepted understandings of human rights.[238] A prominent example comes from former environmental Special Rapporteur John Knox, who in 2016 argued that 'attempting to describe the extraterritorial human rights obligations of every State in relation to climate change would be of limited usefulness even apart from its potential for controversy', noting that '[t]he practical obstacles to such an undertaking are daunting, and it is instructive that the international community has not attempted to address climate change in this way'.[239] In doing so, Knox (incorrectly) infers what is legally possible from the political decision to locate climate-related discussions in a cooperative regime lacking coercive machinery.

Knox's 2016 views are telling of the huge strides that human rights law, writ large, has taken in the intermittent years, as human rights bodies have outpaced scholars' legal imagination. Practice is starting to show that approaches to territorial jurisdiction based on causality—ie attaching to the point of emission of greenhouse gases—are possible, although deeply disruptive to the existing logics of especially regional human rights systems. In this regard, the applicants in the *Duarte Agostinho* climate case pending before the ECtHR's Grand Chamber argue—drawing on the Court's own case law—that, in exceptional cases, 'acts of the States Parties performed, or producing effects, outside their territories can constitute an exercise of jurisdiction'.[240]

When regarding this matter from the perspective of ensuring an adequate rights-based response to climate change, moving the needle even slightly towards a more equitable engagement with the sources and impacts of climate change is worth striving for. This will hold true as long as there are

[236] A number of differences could be discussed here, from differences in the role played by UN treaty bodies versus the quasi-constitutional role of the ECHR, to the recognition of environmental rights in the Inter-American system. It may also be relevant to discuss the fact that the CRC's finding was made in an inadmissibility decision, while the Inter-American Court's was made in an advisory opinion; holding a concrete State responsible for the extra-territorial effects of its emissions may present additional hurdles.

[237] Raible (n 96).

[238] L Raible, 'Justifying Extraterritorial Human Rights Obligations and Climate Change as a Counterexample' (*EJIL:Talk!*, 12 July 2023) <https://www.ejiltalk.org/justifying-extraterritorial-human-rights-obligations-and-climate-change-as-a-counterexample/>.

[239] 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' (1 February 2016) UN Doc A/HRC/31/52, para 41.

[240] *Duarte Agostinho* (n 8), final submissions of the applicants to the Grand Chamber (5 December 2022) para 43, citing *MN et al v Belgium* App No 3599/18 (ECtHR, Judgment (GC) of 5 March 2020) para 185 <https://youth4climatejustice.org/wp-content/uploads/2023/09/Applicants-submission-to-the-Grand-Chamber-5th-December-2022-1.pdf>.

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no better alternatives. In the meantime, failing even to discuss the racialized and colonial, temporal and spatial, present and historical global inequities at stake represents an avoidable and crucial injustice in and of itself. The same is true for all of the different dimensions and iterations of the right to a healthy environment discussed in this article. Within the liminal or threshold moment currently ongoing at the CoE, and in human rights systems around the world, creativity and contestation are possible. Failing to seize this opportunity means accepting and entrenching the limitations of these systems.

VI. CONCLUSION

There is an environment-shaped hole in the CoE system that begs for the recognition of a corresponding right. However, there are necessary trade-offs involved in recognizing the right to a healthy environment, especially when that recognition takes place within the constraints of existing institutions. Different options for recognizing this right within the CoE are currently being discussed. Of these, this article has argued that a new protocol to the ECHR would be the most desirable option from the perspective of the effective and justiciable protection of rights. Adopting such a protocol would provide the ECtHR with an explicit mandate to examine environmental cases; it could relax standing, victim status and territoriality requirements; and it could eliminate the need to prove that a given environmental harm has made an impact on human life, health or property, thereby counteracting the Convention's anthropocentrism.

Situated in a liminal moment between non-recognition and recognition of the right to a healthy environment at the CoE, this article has taken existing proposals as a starting point. It has discussed several key aspects of these proposals: arguments for and against recognizing the right; the legal form it could or should take; its potential content and scope, including substantive questions like its impact on causality tests and on other rights; and matters around who could claim the right, ie how it could reshape the Convention's victim status requirements to admit collective or NGO-led cases. Weighing the advantages and disadvantages of different forms of recognition, the article has identified (and contested) the tendency to recognize the right to a healthy environment only in a political or non-binding way. It has argued that legally binding recognition is the preferable option, noting that it can take different forms and have different outcomes. For example, while an additional protocol to the ECHR would be the best available option within the CoE system by creating a specific mandate and basis for legitimacy for engaging with environmental rights, it is not a sure-fire solution: if a large number of States refused to ratify this instrument, they could undermine existing case law-based protections.

Two central findings emerge. First, there are no necessary oppositions here. Regardless of the action taken on the human right to a healthy environment

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within the CoE system, it is crucially important to continue to realize and uphold the importance of existing 'greened' rights under existing frameworks, first and foremost the ECHR. Likewise, it is important to contest arguments framing the rights of one group as a justification for failing to protect another. While rights can and do conflict, it is important that these conflicts do not obscure the fundamental opposition between human rights and environmental catastrophe.

Second, a deeper examination of the incomplete protection offered by existing human rights law, and its understanding of legal subjectivity, is required. By looking specifically at the ECHR, this article has identified protection gaps that hamper consideration of environmental issues. This is especially true for climate change, where the temporally and spatially limited scope of Convention protection limits its ability to consider structural issues. As discussed above, looking more closely at proposals to recognize the rights of future generations and to expand the territorial scope of the ECHR allows for a re-examination of existing institutions and closer engagement with the temporal and spatial, racialized and colonial, present and historical global inequities at stake. It is not clear that the pressures on existing rights—or the Court—will necessarily be resolved by doing this. Still, these proposals create a much-needed opportunity to discuss the pervasive inequities concerned and understand what this system can and cannot do.

Discussing free-standing, extraterritorial and future environmental rights obligations may seem precipitate within the still-developing CoE response to demands for environmental justice. However, as this article has argued, liminal or threshold moments such as the present one supply a vital creative energy. Engaging with the justifications and ramifications of the different proposals being made provides an exceptional opportunity to think rights into the future. This work has barely begun, as legal questions, both old and new, clamour for solutions in the context of a triple planetary crisis. But it is urgently necessary to have these discussions now, because they reflect what is actually at stake here: the constitution and protection of the human as inextricably intertwined with the natural environment, and (to cite Anna Grear) the need for 'a significant shift in the fundamental *taken for granted* of human rights law and environmental law'.[241]

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[241] A Grear, 'Human Rights and the Environment: A Tale of Ambivalence and Hope' in D Fisher (ed.), *Research Handbook on Fundamental Concepts of Environmental Law* (Edward Elgar 2022) vol 2, 123 (emphasis in the original). See also (on the 'anthropogenetic' powers of human rights), A Grear, 'Framing the Project' of International Human Rights Law: Reflections on the Dysfunctional 'Family' of the Universal Declaration' in C Gearty and C Douzinas (eds), *The Cambridge Companion to Human Rights Law* (CUP 2012) 17, 18.

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