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School of Law – University of Minho

Environmental human rights defenders, the rule of law and the human right to a healthy, clean, and sustainable environment: last trends and challenges

Núria Saura-Freixes*

ABSTRACT: Recently, the United Nations (UN) General Assembly has recognised the universality of the human right to a healthy, clean and sustainable environment. However, for decades, environmental human rights defenders have struggled for this right and have paid a high price for it: threats, reprisals, penalisation, and even their lives. The strengthening of the environmental rule of law correlates with the reciprocal synergy and interdependence on environmental rights and human rights as highlighted by the Special Rapporteurs of the United Nations under the scope of the 1998 United Nations Declaration on Human Rights Defenders. The Escazú Agreement and the Aarhus Convention are among the latest developments of legal and institutional guarantees for environmental defenders: a legal protection clause in the Escazú Agreement for human rights defenders in environmental matters and the setting of a new Special Rapporteur on environmental defenders for the Aarhus parties as a rapid response mechanism, under Article 3(8). The most recent trends on climate litigation have reached the European Court of Human Rights with several pending applications on greenhouse emissions and compliance with the Paris Agreement that merits attention, as well as the protection of human rights defenders in the case-law and the third-party interventions of the Council of Europe (COE) Commissioner for Human Rights.

KEYWORDS: Environmental defenders – human right to a healthy environment – United Nations Declaration on Human Rights Defenders – Special Rapporteur on environmental defenders.

* She has been a lecturer in Constitutional Law at the Autonomous University of Barcelona, and Visiting Scholar at the Max Planck Institute for Comparative Public Law and International Law.

1. Environmental human rights defenders and the human right to a healthy, clean and sustainable environment

In his post-war Nobel Prize speech, 1957, Albert Camus theorized the possibility of, at least, preventing the world from self-destruction, humans being incapable of neither reforming it nor making it greater: "*Each generation doubtless feels called upon to reform the world. Mine knows that it will not reform it, but its task is perhaps even greater. It consists in preventing the world from destroying itself* ".[1] His words take on a new relevance in the wake of the disaster of Fukushima, climate change, forest fires, environmental disaster, biodiversity loss and heatwaves, which compel a rethink of the relationship between human rights and the environment. What might emerge as a turning point in consciousness around the world on the effects of human action in the planet? Climate change is not only a threat against the planet, it is a threat against humankind on the planet and therefore, it cannot be considered outside of the framework of human rights and vice-versa.

This reciprocal approach is unfortunately quite weak in legal terms. The Universal Declaration on Human Rights 1948 did not yet recognize the right to a healthy environment yet. However, the effects of war and postwar, the erosion of biodiversity and landscapes, made it necessary to set not a *tabula rasa*, but a stronger legal framework revising the interdependence between human rights and environmental rights. Since the Declaration on the Human Environment, Stockholm, 1972,[2] up to present times, there have been moves to reconsider the interdependence of rights set in the 1993 Vienna Declaration[3] among civil and political rights, and economic, social, and cultural rights to include environmental rights among them. The 1992 Rio Conference on Environment and Development[4] introduced a new commitment that is necessary to keep in mind, when establishing new legislation to consider environmental matters not only a problem of southern countries, but a commitment for the world to avoid the unequal distribution on pollution and environmental threats.

Environmental and human rights law should be considered as reciprocal spheres, following the trends in global constitutional law and the need to address these threats on the planet. On October 8, 2021, there was a turning point in the evolution of human rights with the Human Rights Council's historic resolution[5] "*recognizing, for the first time at the global level, the human right to a clean, healthy and sustainable environment (Resolution 48/13)*".[6]

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[1] Albert Camus, "Banquet Speech" (Albert Camus' speech at the Nobel Banquet at the City Hall in Stockholm, December 10, 1957), accessed August 2, 2022, https://www.nobelprize.org/prizes/literature/1957/camus/speech/.

[2] UN, "Declaration of the United Nations Conference on the Human Environment", adopted on June 16, 1972, Stockholm. (UNEP (092)/E5).

[3] UNGA, "Vienna Declaration and Programme of Action", adopted on July 12, 1993, A/CONF.157/23.

[4] UN, "Rio Declaration on Environment and Development", United Nations Conference on Environment and Development/Rio Earth Summit, 3-14 June 1992, [(A/CONF.151/26 (vol. I)] 31 ILM 874 (1992).

[5] Human Rights Council (HRC), "The human right to a clean, healthy and sustainable environment", resolution adopted by the Human Rights Council on October 8, 2021, A/HRC/RES/48/13, accessed August 2, 2022, https://digitallibrary.un.org/record/3945636.

[6] HRC, The right to a clean, healthy and sustainable environment: non-toxic environment. Report of the Special Rapporteur on the issue of Human Rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, adopted on January 12, 2022, (A/HRC/49/53), para. 1, accessed July 9, 2022, https://digitallibrary.un.org/record/3945636.

Nevertheless, the necessary recognition of the universality of the right to the environment as a human right was achieved recently, on July 28, 2022, when the UN General Assembly finally adopted the milestone Resolution A 76/300 on "*the human right to a clean, healthy and sustainable environment*",[7] declaring that: "*Recognizes the right to a clean, healthy and sustainable environment as a human right*";[8] with 161 votes in favour and eight abstentions.[9] During decades, environmental defenders struggled and even died for this recognition: they suffered the effects of the lack of universal recognition. This resolution, even if not binding, is an indicator that something is changing in the necessary interdependence between having a healthy environment and the fulfillment of human rights. Only in 2020, 227 environment defenders were reportedly killed.[10] How long can this be ignored as the tip of the iceberg from the gaps on human rights and environmental law guarantees for them?

The new UN resolution recognising the universal human right to a clean, healthy and sustainable environment must be considered not a final goal, but a step toward a necessary binding instrument that recognises the universality of the human right to a healthy environment. This lack of a legal binding framework endangers the action of environmental defenders when they fight against projects and decisions which undermine their right to a healthy environment. They are striving against what Andersen called "*a triple planetary crisis of climate change, nature and biodiversity loss, and pollution and waste*".[11] For the Executive Director of the UN Environment Programme (UNEP), "*This resolution sends a message that nobody can take nature, clean air and water, or a stable climate away from us – at least, not without a fight*".[12] However, the price of struggling over environmental matters and human rights can be a tall order for some individuals. They must cope against statist and non-statist actors that take decisions that affect them under a wider dimension: individuals, their communities, transboundary areas and humankind. However, the state-based framework of human rights was built under a jurisdictional paradigm often eroded by environmental threats due to inaction of the states or to the excessive privatisation of environmental decisions that go further and even beyond state borders of the state. In these cases, it is worthwhile to remind ourselves that individuals are not the holders of positive obligations on human rights, that must be fulfilled by states.[13] human rights defenders on environmental matters or environmental defenders must assume a high risk in contexts of hard erosion of these rights. The case law of the European Court of Human Rights (ECtHR) takes into account the positive

[7] UN General Assembly (UNGA), "The human right to a clean, healthy and sustainable environment", resolution adopted on July 28, 2022, A/RES/76/300.

[8] UNGA, "The human right to a clean, healthy and sustainable environment", para. 1.

[9] UN, "UN General Assembly declares access to clean and healthy environment a universal human right", UN News, 28 July 2022, accessed August 2, 2022, https://news.un.org/en/story/2022/07/1123482.

[10] Global Witness, "Last line of defence", Report, 13 September 2021, accessed August 2, 2022, https://www.globalwitness.org/en/campaigns/environmental-activists/last-line-defence/.

[11] United Nations Environment Programme (UNEP), "In historic move, UN declares healthy environment a human right", 28 July 2022, accessed August 2, 2022, https://www.unep.org/news-and-stories/story/historic-move-un-declares-healthy-environment-human-right#:~:text=In%20historic%20move%2C%20UN%20declares%20healthy%20environment%20a%20human%20right,-Photo%20by%20Abigail&text=The%20United%20Nations%20General%20Assembly,decline%20of%20the%20natural%20world.

[12] UNEP, "In historic move, UN declares healthy environment a human right".

[13] Juan Carlos Gavara, "La vinculación positiva de los poderes públicos a los derechos fundamentales", *Teoría y Realidad Constitucional*, no. 20 (2007): 277-278.

obligations of the states under the umbrella of other human rights. Being the right to a healthy environment not directly recognised in the European Convention of Human Rights (ECHR), it is often analysed under the right to private life, the right to life or the right to a fair remedy.[14]

It is useful, in this case, the interpretation of the ECHR considered as a living instrument "*in the light of present day conditions*", as reminded by the COE's Commissioner on Human Rights as third party intervention, in the case *Duarte Agostinho and others v. Portugal and 32 Other States* on climate change, pending nowadays at the Grand Chamber.[15] Legal action can lead to a consistent pattern of legal remedy, but it makes it harder to prove the obligation of prevention, due to this gap in the right of healthy environment not present in the main treaties on human rights. In the COE area, on 29 September 2021 "*the 29 September 2021, the Parliamentary Assembly of the Council of Europe recommended the drafting of an additional protocol in this respect*".[16] However, we can find some references in other regional treaties[17] such as the Aarhus Convention, 1998, in the Preamble[18] or in the Article 24 of the African Charter on Human and Peoples' Rights, under a collective dimension: "*all peoples shall have the right to a general satisfactory environment favorable to their development*";[19] the 1994 Arab Charter of Human Rights, Article 38: "*every person has the right […] to a healthy environment*";[20] and the Protocol of San Salvador, Article 16: "*everyone shall have the right to live in a healthy environment*".[21] The International Covenant on Economic, Social and Cultural Rights mentions environmental and industrial hygiene in Article 12,[22] but what is a step forward is the acknowledgement in the Paris Agreement "*when taking action to address climate change, respect, promote and consider their respective obligations on human rights*".[23]

In the European Union (EU) area, Article 37 of the European Charter on Fundamental Rights recognized in Article 37 that "*A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development*". However, there is a lack of recognition of the right to environment as an individual

[14] European Court of Human Rights Press Unit, "Environment and the European Court of Human Rights", July 2022, accessed August 2, 2022, https://www.echr.coe.int/Documents/FS_Environment_ENG.pdf.

[15] Judgment ECtHR *Duarte Agostinho and Others v. Portugal and 32 Other States,* 7 September 2020, Application no. 39371/20.

[16] Ionel Zamfir, "A universal right to a healthy environment", *European Parliament Research Service*, December 2021, accessed August 2, 2022, https://www.europarl.europa.eu/RegData/etudes/ATAG/2021/698846/EPRS_ATA(2021)698846_EN.pdf.

[17] Ionel Zamfir, "A universal right to a healthy environment".

[18] Convention on access to information, public participation in decision-making and access to justice in environmental matters, adopted on June 25, 1998, entered into force on October 30, 2001, 2161 UNTS 447.

[19] African Charter on Human and Peoples' Rights, adopted on June 27, 1981, entered into force on October 21, 1986, 21 ILM 58.

[20] Arab Charter of Human Rights, adopted on May 22, 2004, entered into force on March 15, 2008.

[21] Organization of American States (OAS), "Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights («Protocol of San Salvador»)", adopted on November 17, 1988, entered into force on November 16, 1999, OAS TS no. 69.

[22] International Covenant on Economic, Social and Cultural Rights, adopted on December 16, 1966, entered into force on January 3, 1976, 993 UNTS 3.

[23] United Nations Framework Convention on Climate Change (UNFCCC), *Paris Agreement*, adopted on December 12, 2015, entered into force on November 4, 2016.

right. Thus, the EU Parliament position with the resolution on the EU Biodiversity Strategy for 2030: Bringing nature back into our lives[24] reminds us that "*the right to a healthy environment should be ecognized in the EU Charter and that the EU should take the lead on the international recognition of such a right*".

This lack of universality makes climate litigation harder, mostly focusing on the lack of preventive measures, which are often dealt as lack of compliance with positive obligations related to the other rights, such as the right to life. However, it is time to tackle with it under a twofold perspective integrating environmental law criteria of interpretation on human rights. Otherwise, once the environmental threat is done, even with the loss of lives, it can be hard to assume a remedy that is merely legal, but that cannot reverse the long-term impact of environmental risks and harms. Therefore, the development of a binding universal instrument that clearly sets the binding duty of compliance on environmental positive obligations or the reform of the regional treaties enforcing the right to healthy environment as an individual human right is the next step to foresee, after the recognition of it by the UN General Assembly on 28 July 2022.

What is more relevant, however, in this new UN resolution is the hybrid character of the right to a healthy environment as a human right. Thus, the UN General Assembly resolution 76/300 recognises a twofold dimension as protection of the environment which is inherent to the enjoyment of human rights: "*Recognizing further that environmental degradation, climate change, biodiversity loss, desertification and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to effectively enjoy all human rights*".[25]

This is a major contribution because it breaks the division between the private and public sphere, considering it under a global perspective of interdependence. However, to undertake a constitutional function, the resolution is not yet a binding instrument, and the right to a healthy environment is spread among obligations from several multi-lateral treaties on environmental law not directly related to human rights.

Nevertheless, it is time to consider the environmental rule of law and governance matters. Social injustices are too much often close to environmental disasters, because, despite all of us suffer pollution, when talking about "polluted areas" there is a human side of social inequality that cannot be neglected. In this regard, the Special Rapporteur on human rights obligations and the environment reminds us of this: "*While all humans are exposed to pollution and toxic chemicals, there is compelling evidence that the burden of contamination falls disproportionately upon the shoulders of individuals, groups and communities that are already enduring poverty, discrimination and systemic marginalization. Women, children, minorities, migrants, Indigenous peoples, older persons and persons with disabilities are potentially vulnerable, for a variety of economic, social, cultural and biological reasons. Workers, especially in low- and middle-income nations, are at risk because of elevated exposures on the job, poor working conditions, limited knowledge about chemical risks and lack of access to health care*".[26]

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[24] European Parliament resolution of 9 June 2021 on the EU Biodiversity Strategy for 2030: Bringing nature back into our lives, accessed 3 August 2022, https://www.europarl.europa.eu/doceo/document/TA-9-2021-0277_EN.html.

[25] UNGA, "The human right to a clean, healthy and sustainable environment".

[26] HRC, "The right to a clean, healthy and sustainable environment: non-toxic environment. Report of the Special Rapporteur on the issue of Human Rights obligations relating to the enjoyment of a

Therefore, the answer – also inherent in the UN Agenda of Development Sustainable Goals, 2015[27] – is a reciprocal synergy between human rights and the right to a healthy environment "*achieving sustainable development in its three dimensions – economic, social and environmental – in a balanced and integrated manner*".[28]

This synergy is present in the Framework Principles on Human Rights and the Environment set by the Special Rapporteur on healthy environment, J.H. Knox, in his 2018 report[29] that calls for a global recognition. However, going further, the subject of rights with the lack of universal recognition is being often diffuse in the case of environmental rights. However, it would change if the enjoyment of a healthy environment is considered under human rights personhood, as in the last trends from the UN General Assembly and the Human Rights Council resolutions, 2022 and 2021. Any violation of it is, thus, a violation of human dignity, the axis of the paradigm set after World War II. Nevertheless, in our analysis, when considering the paradigm of human rights defenders, there is a new dimension that emerges. The right to strive, promote and protect human rights, including the right to a healthy environment is universal, and it does not depend on a statist or status recognition, but on the individual free exercise of the defense of human rights including environmental matters.

The rights set in the 1998 UN Declaration on Human Rights Defenders are instrumental rights, as developed later in this Article. This universality then makes it necessary to think of the human condition as the paradigm for the 21st century going across borders in a global world where the state cannot cope alone, with these main threats to human rights coming from environmental damage. Individuals must be considered, but not held responsible for the fulfillment of positive obligations on human rights that lie within the state.[30] Nobody can be asked to substitute the need of public action to protect environment, but this often happens in "failed" states[31] or under lack of democratic governance and excessive privatization of public decisions. As for, in the case of projects that consider land and sea not natural resources to preserve but resources to exploit.

Another aspect to consider is the previous existence of a spread legal framework on environmental law that is applying but it must not narrow it out of the framework of human rights. Due to the lack of a binding universal instrument, reform of regional treaties and global recognition is still necessary. The UN resolution recognises this previous legal framework, and it can be an indicator about the crystallisation of this trend. In the case of environmental law, however, considering a multi-level system of environmental law without global recognition, could lead down a dangerous path. This path would allow asymmetric compliance on the right to a healthy environment if it is not a universal right that requires international cooperation. Despite this, the right to a clean, healthy and sustainable environment is mostly recognised at a constitutional level, which

safe, clean, healthy and sustainable environment", para. 21.

[27] UNGA, "Transforming our world: the 2030 Agenda for Sustainable Development", October 21, 2015, A/RES/70/1.

[28] UNGA, "Transforming our world", para. 2.

[29] 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", July 19, 2018, A/73/188.

[30] Juan Carlos Gavara, "La vinculación positiva de los poderes públicos a los derechos fundamentales".

[31] Nicolas J. Owen, *Human Rights, Human Wrongs. The Oxford Amnesty Lectures* (Oxford: Oxford University Press, 2001), 3.

is also a sign of the possible consensus for greater universal recognition. This is mentioned in the resolution passed by the UN General Assembly on July 28, 2022: "*Nothing also that a vast majority of States have recognized some form of the right to a clean, healthy and sustainable environment through international agreements, their national constitutions, legislation, laws or policies*".[32] Nevertheless, environmental defenders are not mentioned in the resolution. They are assuming obligations neither undertaken by states nor by non-state actors, mainly, international organisations and private companies and businesses. This gap makes it necessary to remind the human rights defenders of the legal framework for compliance.

2. Environmental defenders, the United Nations Declaration on Human Rights defenders and the environmental rule of law

Human rights defenders in environmental matters or environmental defenders are a new subject of rights under the framework of the United Nations (UN) Declaration on Human Rights Defenders set in 1998, under the official title of Declaration on the right and responsibility of individuals, groups and organs of society to promote and protect universally recognized human Rights and fundamental freedoms.

This Declaration was set after years of debate in the UN Working Group on a draft Declaration on the right and responsibility of individuals, groups and organs of society to promote and protect universally recognized human rights and fundamental freedoms. These debates and discussions were held under the tensions of the Cold War since 1985. But, if there was a division in the drafting group among civil and political rights, closer to the Western Bloc and economic, social, and cultural rights nearer of the Soviet Bloc,[33] the final Declaration was built under the 1993 Vienna Declaration and Programme of Action, considering that "*human rights are interdependent, indivisible and interrelated*".[34] This interdependence of rights applies to the criteria to be fulfilled in order to have the status of human rights defenders, and so on, environmental defenders or human rights defenders on environmental matters.

The Declaration contains another aspect to consider that comes from its precedent, the Helsinki Final Act, 1975. The right to know and act, set by the Chapter VII of the Helsinki Final Act, led to the emergence of East Dissent and is at the origin of the right to strive and protect human rights.[35] Hence, this right is built under a paradigm based on the individual, as opposed to the state. The subject is built by the exercise of the right and has no definition to qualify for the status of human rights defenders: personhood is universal. What makes someone a human rights defender is the fulfillment of the criteria developed to become a subject, without neither citizenship status, nor a restricted entitlement. This can be considered under the individualisation of international law, theorised by Peters.[36] The criteria for being considered a human rights defender, from the practice of

[32] UNGA, A/RES/76/300.

[33] Allan McChesney and Nigel Rodley, "Human Rights Defenders. Drafting a Declaration", *International Commission of Jurists Review*, (1992): 49-55.

[34] UNGA, "Vienna Declaration and Programme of Action".

[35] Allan McChesney and Nigel Rodley, "Human Rights Defenders. Drafting a Declaration".

[36] Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge: Cambridge University Press, 2016).

the Special Rapporteur on the situation of human rights defenders and the UN Declaration legal framework can be summarised as:

- Acting by peaceful means
- Respecting the interdependence and universality of rights
- Defending human rights by the activity of exercising the instrumental rights of the Declaration on human rights defenders
- Undertaking a "special effort" to defend human rights.[37]

In the case of human rights defenders in environmental matters or environmental defenders the criteria are the same, but they have a specific domain of action. The UN Special Rapporteur in her 2016 thematic report uses this definition: "*Individuals and groups who, in their personal or professional capacity and in a peaceful manner, strive to protect and promote human rights relating to the environment, including water, air, land, flora and fauna. Land and environmental rights are interlinked and are often inseparable*".[38]

The action of environmental defenders is inside the scope of the 1998 Declaration on the right and responsibility of individuals, groups and organs of society to promote and protect universally recognized human rights and fundamental freedoms.[39] The main nine instrumental rights set by this Declaration are:

a) The right to be protected (Article 2, Article 9, Article 12)
b) The right to freedom of assembly (Article 5a, Article12)
c) The right to freedom of association [Article 5(b)]
d) The right to access and communicate with international bodies [Article 5c, 9(4)]
e) The right to freedom of opinion and expression (Article 6)
f) The right to protest (Article 5a)
g) The right to develop and discuss new human rights ideas (Article 7)
h) The right to an effective remedy (Article 9)
i) The right to access funding (Article 13)

Unfortunately, these rights are too often neglected in the case of environmental defenders, the most vulnerable group of human rights defenders that have to cope with threats and killings.[40]

Another factor to consider is their vulnerability, that comes from the background of dissent. Dissent is at the core of the Declaration on Human Rights Defenders, but in the case of environmental defenders, dissenting is a legitimate action necessary for a democratic society. But in environmental matters, dissent is against projects that are held by private companies and business or public decisions that impact on the environment, water, land, flora and fauna. Therefore, it is necessary to give relevance of granting a public access, information and the right to opposition to projects with

[37] Special Rapporteur on the situation of human rights defenders, "About human rights defenders", accessed August 3, 2022, https://www.ohchr.org/en/special-procedures/sr-human-rights-defenders/about-human-rights-defenders.
[38] Michel Forst, UN Secretary-General, UN Human Rights Council, Special Rapporteur on the Situation of Human Rights Defenders, "Situation of human rights defenders", August 3, 2016, A/71/281, para. 7.
[39] HRC, "Report of the Independent Expert on the issue of Human Rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox", December 24, 2012, A/HRC/22/43, paras. 27-28.
[40] UNGA, A/71/281.

environmental impact where the decision of an owner can harm individuals, groups, indigenous communities or even humankind.

Another reason is the emergence of threats both from state and non-state actors. Let us make a particular comment in this regard. Human rights are constructed within a state framework, under the paradox that the same state that must protect human rights can be responsible for the violations of human rights by themselves or by non-state actors under their jurisdiction if the state is not fulfilling some of their positive obligations. This is particularly relevant, in the case of regional treaties like the ECHR. In this case, the environment is not specifically recognised, but it is mainly addressed by the case-law on the right to life (Article 2 ECHR), and the right to private life (Article 8 ECHR),[41] considering the damage caused by prejudice to these rights.

Environmental litigation is then an aspect of environmental defenders, but not the only one because the defense of environment, biodiversity, land or fauna can be done through any of the nine key rights of the Declaration on Human Rights Defenders. Thus, being a human rights defender on environmental matters can be, for instance, undertaking climate litigation, holding a peaceful protest march, writing in the newspapers, making a film, or teaching at a school, because it is the activity of defending human rights that makes the subject and not the entitlement to a particular right.

The right to a healthy environment which is not under universal recognition makes their task of environmental advocacy harder, but not impossible. The UN Declaration on human rights defenders recognises human rights defenders on environmental matters under their scope, as set by the Special Rapporteur, and they can act under any of the rights set by the UN Declaration, the UN and the regional treaties, which are instrumental to the right to promote and protect human rights. For instance, environmental damage can render useless/impractical the right to life, private and family life, or lead to discrimination and the reduced likelihood of getting a fair trial before the courts of law.

This is why it is important to remember that the Declaration is built on the exercise of the rights, and not just under the physical protection – even if necessary – of the individual holding these rights. Thus, another concept to have in mind is the environmental rule of law. In 2012, the Environment UN Program adopted the Rio+20 Declaration on Justice, Governance and Law for Environmental Sustainability, using the term "rule of law". The environmental rule of law expands sustainability with a connection to governance, thereby being, not merely a moral concern, but also the basis for the protection of environmental rights. Hence, sustainability and rule of law require:

> "*(a) Fair, clear and implementable environmental laws;*
>
> *(b) Public participation in decision-making, and access to justice and information, in accordance with Principle 10 of the Rio Declaration, including exploring the potential value of borrowing provisions from the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) in this regard;*
>
> *(c) Accountability and integrity of institutions and decision makers, including through the active engagement of environmental auditing and enforcement institutions.*

[41] European Court of Human Rights Press Unit, "Environment and the European Court of Human Rights".

(d) Clear and coordinated mandates and roles
(e) Accessible, fair, impartial, timely and responsive dispute resolution mechanisms, including developing specialized expertise in environmental adjudication, and innovative environmental procedures and remedies;
(f) Recognition of the relationship between human rights and the environment; and
(g) Specific criteria for the interpretation of environmental law".[42]

In 2013, the UNEP governing body adopted the Decision 27/9 on advancing justice, governance and law for environmental sustainability – "*this decision is the first internationally negotiated document to establish the term 'environmental rule of law'*".[43] Respecting the environmental rule of law is a way of respecting the rights of environmental defenders and reducing the risks and threats to them. However, the impunity of non-state actors or the lack of enforcement of the state obligations makes it crucial not only to prosecute the responsible subject of violations of environmental law, but also those responsible for the violations of environmental defenders' rights. This is sometimes hard to achieve because the main structure of the rights in court, and in the face of the lack of responsibility on human rights – built under a state framework – where human rights and environmental violations are committed by large factories and companies.

When private actors are the ones responsible of diffuse harm with a higher threshold of impact on certain areas and groups of population – such as those living closer to natural resources, indigenous communities, or affected environmental areas – the harmed groups are the ones who pay a high price to defend the environment, sometimes even with their lives. Therefore, it is important to remember that positive obligations and treaty obligations remain with the state, which must guarantee the environmental rule of law by means of public policies and positive obligations, which is not a duty of individuals. A particularity on the environment defence is the "cascade effect", because even those who live far from the area are affected by the global threat. Firstly, there are individuals directly affected; secondly, groups or communities; thirdly, transboundary areas; and, finally, humankind.

However, under this rights scheme, threats to "environmental defenders" lead to a wider "chilling effect"[44] in civic space and governance, with no possibility of dissent and a lower democratic response to environmental projects. Environmental damage is transboundary, and public actions merely within borders under this scheme are not the answer. Instead, it is necessary to develop more synergies among constitutional and international law under the trends of global constitutionalism that can be defined as follows: "*Global constitutionalism comprises different strands of thought most of which read (or reconstruct) some features of the status quo of global law and governance as "constitutional" and even "constitutionalist" (positive analysis) and which also seek to provide arguments for their further development in a specific direction (normative analysis)*".[45]

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[42] UNEP, "Advancing justice, governance and law for environmental sustainability: Rio+20 and the World Congress of Chief Justices, Attorneys General and Auditors General", 2012, 2, accessed August 3, 2022, https://wedocs.unep.org/bitstream/handle/20.500.11822/9969/advancing_justice_governance_law.pdf?sequence=1&amp%3BisAllowed=.

[43] UNEP, "Environmental rule of law", accessed August 3, 2022, https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/promoting-environmental-rule-law-0.

[44] UNGA, "Exercise of the rights to freedom of peaceful assembly and of association as essential to advancing climate justice. Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Clément Nyaletsossi Voule", July 23, 2021, A/76/222, para. 21.

[45] Anne Peters, "Global Constitutionalism", in *The Encyclopedia of Political Thought*, ed. Michael T.

What becomes imminent is the time to recognise the interdependence of human rights and the environment and to set global recognition of the human right to a healthy, clean and sustainable environment. The precious rights to life or to health cannot be considered outside of a healthy environment; both rights require more than a *a posteriori* compensation, they require a task of prevention, coincident with the prevention of environmental damages and the impact that harms the life of millions of inhabitants on this planet. For instance, there are currently three pending requests on climate change retrieved in 2022 for the Grand Chamber at the ECtHR. These applications are a sign of the concern about greenhouse emissions that undermine the right to life, under Article 2 of the ECHR. In the Inter-American system, it is worth mentioning the issue related to indigenous communities.

As an example, in the case *Awas Tingni Community v. Nicaragua*,[46] in which the Court "*recognized for the first time*", as reminded by Sánchez[47] "*the lack of specific and effective legislation for indigenous communities to exercise their rights*".[48] This case shows the relevance of the environmental rule of law, when the problem emerges not only by an individual decision but also from the need to reform the legal measures. This is not an isolated situation and, as Sánchez highlights: "*The same type of measures, related to the implementation of legal mechanisms for indigenous communities to claim their ancestral lands, were also included in three further judgments against Paraguay and two against Suriname*".[49] Furthermore, the Inter-American Court, in the Advisory Opinion OC-23/17 of 15 November 2017 on human rights and environment, reinforces the perspective on the relationship between human rights and the right to a healthy environment, having "*recognized the existence of an undeniable relationship between the protection of the environment and the realization of other human rights, in that environmental degradation and the adverse effects of climate change affect the real enjoyment of human rights*".[50] It is necessary to mention the recognition of the right to a healthy environment with an axiological basis that the Inter-American Court establishes on human dignity.[51]

The environmental rule of law is recognised for those who strive for it and promote environmental matters, without discrimination and with participation in decision-making. Under the Article 3 of the Declaration on Human Rights Defenders, there is multi-level system of legal guarantees related to them, which takes on a constitutional function: "*Domestic law consistent with the Charter of the United Nations and other international obligations of the State in the field of human rights and fundamental freedoms is the juridical framework within which human rights and fundamental freedoms should be implemented and enjoyed and within which all activities referred to in the present Declaration for the promotion, protection and effective realization of those rights and freedoms should be conducted*".[52]

(John Wiley & Sons: 2015), accessed August 3, 2022. DOI: 10.1002/9781118474396.wbept0421.

[46] Judgment IACtHR *Mayagna (Sumo) Awas Tingni Community v Nicaragua,* 31 August 2001 (Merits, Reparations and Costs), Series C, no. 79.

[47] Lucas Sánchez, "Legislative remedies at the Inter-American Court of Human Rights", in *Derechos Humanos, Derecho Constitucional y Derecho Internacional: Sinergias Contemporáneas. Human Rights, Constitutional Law and International Law: Contemporary Synergies,* ed. Núria Saura-Freixes , (Madrid: Centro de Estudios Políticos y Constitucionales, 2021), 482.

[48] Judgment IACtHR , *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, 31 August 2001, para. 128.

[49] Lucas Sánchez, "Legislative remedies at the Inter-American Court of Human Rights", 482.

[50] IACtHR, "Advisory Opinion OC-23/17 of November 15, 2017, Requested by the Republic of Colombia: The Environment and Human Rights", para. 47.

[51] "Advisory Opinion OC-23/17", para. 47.

[52] UNGA, "Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms",

This Article drives a synergy between international and constitutional law, in which the UN Charter and the international obligations in the field of human rights play a constitutional function of establishing the primacy of human rights obligations over domestic law when it is not consistent with the UN Charter values and the human rights Treaty obligations. This constitutional function under Article 3 of the Declaration on Human Rights Defenders can be considered as a trend in global constitutionalism, but it does not come from a binding instrument. Therefore, there is an overriding duty on states' legitimacy to protect human rights that must be applied not abstractly, but as per Martin-Ortega: "*The first duty of states, to protect human rights, extends to taking reasonable steps to prevent harmful actions by third parties, including both natural and legal persons*".[53]

In the case of decisions that have an environmental impact, it is relevant to apply the principles set by the Aarhus Convention and the Escazú Agreement in order to grant public access, information and participation. In this way, a decision on environmental matters is not exclusively considered under the private scheme of two parties – being one of them the State – or among two private persons, legal or natural. The responsibility of the state can emerge from the action undertaken by third parties, if they do not comply with the standards of the Escazú Agreement, the Aarhus Convention or human rights obligations. In the opposite case, it could be considered a decision against the environmental rule of law. Thus, the protests and rising voices of environmental defenders cannot be silenced, by law or by force, under private interests.

3. Human rights defenders in environmental matters and the Escazú Agreement

In the case of the environmental treaties, some of them can be considered under the environmental rule of law. Particularly, the Aarhus Convention and the Escazú Agreement will apply in their regional areas. Despite the commitment to non-discrimination, information, public participation will be applied in their regional localisation and access to information and to justice, the rising number of reprisals and threats to environmental defenders made it necessary to set two specific guarantees in both Treaties. The parties to the Aarhus Convention recently established on October 21, 2021 an institutional guarantee with a Special Rapporteurship on environmental defenders,[54] and the Escazú Agreement set a specific legal guarantee with a binding clause on human rights defenders regarding environmental matters under the conventional text, Article 9.[55] The Escazú

adopted on December 9, 1998, A/RES/53/44.

[53] Olga Martin-Ortega and Claire Methven O'Brien, "Public procurement and Human Rights: interrogating the role of the state as buyer", in *Public Procurement and Human Rights. Opportunities, Risks and Dilemmas for the State as buyer*, ed. Olga Martin-Ortega and Methven O'Brien (Cheltenham: Edward Elgar Publishing, 2019), 3.

[54] UN Economic Commission for Europe (UNECE), "Decision VII/9 on a rapid response mechanism to deal with cases related to Article 3(8) of the Convention on Access to information, Ppublic participation in decision-making and access to justice in environmental matters", (18-20 October 2021), ECE/MP.PP/2021/2/Add.1.

[55] Economic Commission for Latin America and the Caribbean (ECLAC), "Regional Agreement on Access to information, public Participation and justice in environmental matters in Latin America and the Caribbean", adopted on March 4, 2018, entered into force on April 22, 2021, C.N.195.2018 (The Escazú Agreement), Article 9.

Agreement entered into force on April 22, 2021. The choice to give binding force to the first rule at the conventional level on environmental defenders is an imperative to consider.

Establishing a binding legal framework that binds countries on environmental human rights defenders is crucial for the area of Latin America, the area most affected by the deaths of environmental defenders. Chico Mendes from Brazil or Berta Caceres from Honduras are among those who had to die to defend the rainforest and lead protests against projects damaging their lands. The increasing number of killings in this area makes it necessary to establish legal protection measures that recognise their legitimate right to protest, which is sometimes the last resort under the overreaching power left to the private decisions of big businesses and corporations. Thus, the Escazú Agreement is the first Treaty that explicitly recognises the environmental defenders' protection, and it can be considered a step forward under global constitutionalism and the environmental rule of law. However, some of the states with the most troubling cases of human rights defenders in environmental matters, like Brazil, must ratify it. The Escazú Agreement recognises "*the important work of the public and of human rights defenders in environmental matters for strengthening democracy, access rights and sustainable development and their fundamental contributions in this regard*".[56]

However, what is most relevant is that it is not just a declaration because the Treaty is a binding ruling with a clause on human rights defenders in environmental matters set on Article 9. Firstly, the Escazú Agreement recognises that "*Each Party shall guarantee a safe and enabling environment for persons, groups and organizations that promote and defend human rights in environmental matters, so that they are able to act free from threat, restriction and insecurity*".[57]

The lack of definition and the individual and collective dimension of the subject "*human rights defenders in environmental matters*" follows the footsteps of the 1998 UN Declaration: it is not restricted to recognised associations. The right to promote and defend human rights in environmental matters is recognised to individuals, organisations and even undefined groups, such as student movements or indigenous groups. It is necessary to guarantee their rights because they are among the most vulnerable human rights defenders, as highlighted by the Special Rapporteur on the situation of human rights defenders' thematic report on environmental defenders in 2016.[58] Since the concept is not narrowly defined both in the Declaration and in the Escazú Agreement, it opens the scope of Article 9 to the free exercise of this right. But unfortunately, the reality is that the Latin American and Caribbean area "*is the most insecure region for land and environmental defenders*".[59] However, it is necessary to provide not only physical measures of protection to those defending human rights in environmental matters, but also to reinforce the rule of law and their fundamental rights as set by Article 9(2) of the Escazú Agreement: "*Each Party shall take adequate and effective measures to recognize, protect and promote all the rights of human rights defenders in environmental matters, including their right to life, personal integrity, freedom of opinion*

[56] Escazú Agreement, C.N.195.2018, Preamble.
[57] Escazú Agreement, C.N.195.2018, Article 9(1).
[58] UNGA, A/71/281.
[59] Global Campus of Human Rights, "Killings of environmental defenders in Latin America", accessed August 3, 2022, https://gchumanrights.org/preparedness/article-on/killings-of-environmental-defenders-in-latin-america.html.

and expression, peaceful assembly and association, and free movement, as well as their ability to exercise their access rights, taking into account its international obligations in the field of human rights, its constitutional principles and the basic concepts of its legal system".[60]

The obligation remains with the state, which must establish the measures to recognise not only the right of human rights defenders to environmental protection, but also all of their rights. This action has a multi-level effect, including those set out in the UN Declaration on human rights defenders, international human rights obligations, and the constitutional principles of each country. This can be a system of converging multi-level guarantees and is in fact a real milestone, as it was before the UN Declaration on environmental human rights defenders.[61] The Treaty addresses previous gaps in the protection and promotion of the environment and human rights. Moreover, it is a legal warning in the face of the wide range of unaddressed illegal actions by non-state actors, public inaction and "failed states".

Finally, the last clause of the Escazú Agreement highlights the three most specific principles in environmental matters, with particular emphasis on prevention, investigation and punishment to avoid the impunity and the "chilling effect" of silencing human rights defenders in environmental matters under violence, attacks and intimidation: "*Each Party shall also take appropriate, effective and timely measures to prevent, investigate and punish attacks, threats or intimidations that human rights defenders in environmental matters may suffer while exercising the rights set out in the present Agreement*".[62]

Thus, as highlighted by Parra,[63] the Escazú Agreement must be considered a standard minimum of environmental democracy and a specific realisation of the interdependence between human rights and the environment,[64] and as for Muñoz Avila, it is a summary of the relationships among governments, the private sector and civil society.[65] Parra notes the synergy between human rights and environment that converges under this binding rule and the environmental rule of law the first time around.[66]

To sum up, those who strive to prevent and protect their right to a clean environment and human rights in environmental matters, can be considered human rights defenders in environmental matters, or environmental defenders. They share most of aspects in common with human rights defenders, but there are some particularities that render their action necessary to diminish the increasing vulnerability, threats, and killings. Both the Escazú Agreement and the Aarhus

[60] Escazú Agreement, C.N.195.2018, Article 9(2).

[61] Karen Bennet, Danna Ingleton, Alice M. Nah and James Savage, "Critical perspectives on the security and protection of human rights defenders", *The International Journal of Human Rights*, vol. 19, no. 7, (2015): 883.

[62] Escazú Agreement, C.N.195.2018.

[63] Rocío Parra, "Protección de defensores ambientales en el Acuerdo de Escazú: Sinergias entre derechos humanos y medio ambiente", in *Derechos Humanos, Derecho Constitucional y Derecho Internacional: Sinergias Contemporáneas. Human Rights, Constitutional Law and International Law: Contemporary Synergies*, ed. Núria Saura-Freixes (Madrid: Centro de Estudios Políticos y Constitucionales, 2021), 513.

[64] Lina Muñoz Ávila, "Enfoques Para El Abordaje De La Conflictividad Ambiental En América Latina: La Propuesta Del Acuerdo De Escazú Sobre Democracia Ambiental", in *Interculturalidad, Protección De La Naturaleza Y Construcción De Paz*,, ed. Manuel Restrepo(Bogotá: Editorial Universidad Del Rosario, 2020), 226.

[65] Lina Muñoz Ávila, "Enfoques Para El Abordaje De La Conflictividad Ambiental En América Latina: La Propuesta Del Acuerdo De Escazú Sobre Democracia Ambiental", 225.

[66] Rocío Parra, "Protección de defensores ambientales en el Acuerdo de Escazú: Sinergias entre derechos humanos y medio ambiente", 511-530.

Convention highlight the rights of access to environmental information, public participation in the environmental decision-making process and access to justice in environmental matters. Without these rights, it becomes rather difficult to respect the environmental rule of law, democracy, human and environmental rights.

4. Environmental defenders and the new rapid response mechanism of the Aarhus Convention: a Special Rapporteur on environmental defenders

4.1 Environmental defenders and the UN thematic mechanisms: an overlap of the statist framework

The Declaration on Human Rights Defenders established, in 1998, a legal framework with a relevant shift in the paradigm of the subject to universal personhood and status for the exercise of rights. This Declaration "*marked a 'milestone' in the development of a multilevel, multi-actor international protection regime for the rights of human rights defenders*".[67]

However, human rights defenders already existed. What changed was the paradigm of law. It changed in the sense of a recognition of the status of the individual as not just a passive rights-holding actor, but as an active actor who fights for and protects human rights, away from the state-centric approach.[68] It was recognised by the former Special Rapporteur on human rights defenders, Michel Forst, now appointed as the Special Rapporteur on environmental defenders under the new rapid response mechanism of the Aarhus Convention: "*To be clear human rights defenders were not born of the Declaration, rather the Declaration was born of the recognition of human rights defenders. The Declaration recognized a new approach to human rights as its founding principle: the centrality of individuals and groups within society to the realization of the human rights project. As such, it represents a paradigm shift away from a top-down, State centric approach to the realization of human rights*".[69]

As for the Special Rapporteur on human rights and environment, these rights apply to environmental defenders: "*Again, these rights apply no less to human rights defenders seeking to exercise them for the protection of the environment than they do for other purposes protective of the full enjoyment of human rights*".[70] But, *"In practice, environmental human rights defenders have proved to be especially at risk when trying to exercise these rights*".[71]

Under the UN system, it is relevant to mention the action of the thematic mechanisms. Particularly, the Special Rapporteur on the situation of human rights defenders, because the action of environmental defenders is inside the scope of the 1998 Declaration on the right and responsibility of individuals, groups and organs of society to promote and protect universally recognized human rights and fundamental freedoms.[72]

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[67] Karen Bennet, Danna Ingleton, Alice M. Nah and James Savage, "Critical perspectives on the security and protection of Human Rights defenders", 883.
[68] UNGA, "Report of the Special Rapporteur on the situation of human rights defenders", July 23, 2018, A/73/215, para. 10.
[69] UNGA, A/73/215, (2018), para. 10.
[70] HRC, "Report of the Independent Expert on the issue of Human Rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox", December 24, 2012, A/HRC/22/43, para. 27.
[71] HRC, A/HRC/22/43, (2012), para. 28.
[72] HRC, A/HRC/22/43, (2012), paras. 27-28.

For environmental protection, it is relevant to mention: (i) the Special Rapporteur on the promotion and protection of human rights in the context of climate change; (ii) the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; (iii) the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and waste for their particular incidence as a vulnerable group; (iv) the Special Rapporteur on the rights of indigenous peoples; and (v) for non-state actors, the UN Working Group on Business and Human Rights. All of them are an institutional guarantee of the instrumental rights held by environmental and human rights defenders. The action of the other specific thematic mechanisms is also relevant, such as the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, or the Special Rapporteur on the rights to freedom of peaceful assembly and of association, with a remarkable report on the "*Exercise of the rights to freedom of peaceful assembly and of association as essential to advancing climate justice*".[73]

Why are, however, environmental defenders or human rights defenders in environmental matters among the most vulnerable groups when fighting for, promoting or protecting the environment, land, biodiversity, flora, sea, fauna and forest? Why is it so when the right to a healthy environment is included in regional treaties ratified by 126 states and recognised under several constitutions?

Human rights were built under a state-law framework, and the action of human rights defenders and environmental defenders should not be considered a duty. It should be regarded as a responsibility coming from an individual choice within the free exercise of rights, because the main obligation to promote and protect human rights and the environment remains with the state, and, in the case of environmental issues, it requires international cooperation. However, the gaps in the system come mainly from several aspects, summarised in the analysis of the practice and reports of the two Special Rapporteurs on human rights defenders and the Special Rapporteur on human rights and the environment.

Firstly, the state framework built after World War II from a state-centered perspective – human rights – is overtaken by global threats to the environment that no single state can address alone, such as climate change: "*Climate change is a paradigmatic example of a global threat that is impossible to address effectively without coordinated international action. As States have acknowledged in the text of the United Nations Framework Convention on Climate Change itself, as well as in Human Rights Council resolutions 26/27 and 29/15, 'the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response'*".[74]

Reciprocally, climate change is a threat for human rights that goes far beyond the exclusive jurisdiction of one state. Nevertheless, there is one aspect of human rights that is sometimes overlooked: the asymmetric distribution of the environmental risks and threats. The effects of climate change can affect the planet globally, therefore requiring global action, but its causes affect from an unequal

[73] UNGA, "Exercise of the rights to freedom of peaceful assembly and of association as essential to advancing climate justice. Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Clément Nyaletsossi Voule", July 23, 2021, A/76/222.

[74] 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", February 1, 2016, A/HRC/31/52, para. 44.

and discriminatory perspective. In the 2022 report of the Special Rapporteur on the human rights and environment, he considers what "sacrifice zones" are: "*where communities are exposed to extreme levels of pollution and toxic contamination*".[75] Thus, the second main aspect to consider is the responsibility of non-state actors, business, companies and factories under a binding treaty framework for states. But none of these treaties bind the universality of the human right to a healthy environment in their texts.[76]

Lastly, the lack of a universal binding instrument and the narrow competence of international organisations makes it necessary to cope with the situation of environmental defenders with institutional guarantees such as through reporting, but without binding measures. Therefore, there is a legal asymmetry under the environmental law if it is considered outside of the framework of human rights , because environmental injustices are related to human rights violations' patterns, when "*pollution and the production, export, use and disposal of toxic substances are rooted in racism, discrimination, colonialism, patriarchy, impunity and political systems that systematically ignore human rights*".[77]

Finally, there is a wider temporary dimension. Future generations can be harmed by present actions that merit attention to the best interests of children and the unborn, such as the recent climate litigation cases put on the table. Environmental damage is transboundary and can be very harmful. It alters ecosystems, and some disasters can affect areas far from where they first occurred in just a few hours. This urgency makes it difficult to stop environmental damage by the mere traditional system of human rights or conventional treaties. As an additional support, the principles and treaties of environmental law require attention, not merely from the perspective of impossible remedy. Recently, in the case of *Juliana v. United States*, the lack of legal remedy was disappointing because the jurisdictional system is not prepared to prevent future damage, which puts on the table the inconsistency of judicial power when greater legal enforcement is needed on preventing harm to the future or the unborn: "*the Ninth Circuit held that ordering the federal government to adopt 'a comprehensive scheme to decrease fossil fuel emissions and combat climate change' would exceed a federal court's remedial authority*".[78]

Therefore, due to the gaps between environmental law, the rule of law, and human rights, other mechanisms such as Rapporteurships have been built under the paradigm of the human condition without state boundaries. The lack of definition of human rights defenders attempts to fill in the gaps in the state system, making it more difficult to be activated when violations of the right to a healthy environment are committed by third parties. If we examine the system of human rights defenders, we can observe the development of a multi-level system of protection for human rights defenders since the adoption of the 1998 UN Declaration.[79]

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[75] HRC, "The right to a clean, healthy and sustainable environment: non-toxic environment. Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment", para. 2.
[76] HRC, A/HRC/49/53, (2022), para. 17.
[77] HRC, A/HRC/49/53, (2022), para. 22.
[78] Harvard Law Review, "Juliana v. United States", *Harv. L. Rev*, 134 (1929), March 10, 2021, accessed August 5, 2022, https://harvardlawreview.org/2021/03/juliana-v-united-states/.
[79] Karen Bennet, Danna Ingleton, Alice M. Nah and James Savage, "Critical perspectives on the security and protection of human rights defenders", 883.

It has been built in the form of thematic mechanisms or rapporteurs present at the United Nations at the regional level in the Inter-American Human Rights system and the African system of Human Rights. This is however a sign that legal guarantees – within a state-centered framework – were not solid enough to cope with the situation of human rights defenders, which made it necessary to set a two-tier system of legal and institutional guarantee under the scope of a thematic mechanism or Rapporteurship in order to protect defenders. The EU does not have a thematic Rapporteurship on human rights defenders, but a system *ad intra* based in the area of freedom, security and justice; and *ad extra* with a specific policy on human rights defenders under the scope of the European External Action, and systems of protection and relocation with a specific system of a consortium of NGOs – protectdefenders.eu – that is activated from the field to cope with the most urgent cases.

It is also worth mentioning the effort done under the Inter-American and the ECtHR case law. Thus, the Inter-American appeal system, as highlighted by Sánchez,[80] can lead even to a reform of legal measures, under remedial action, and is also an instrument to deal with the environment, and there is not only a single case. The Inter-American Commission has had to deal with the paradigmatic cases of *Awas Tingny v. Nicaragua,*[81] and currently the case of *Comunidad la Oroya vs. Perú.*[82] In this case, the Inter-American Court must react, after the Inter-American Commission has filed the petition, regarding Peru's responsibility for non-compliance with international obligations harming a community of inhabitants of La Oroya due to the impact of the pollution from a metallurgical industry that damages their health.[83] What needs to be highlighted, even going further in the scope of this article, is all the jurisprudence on this subject from the Inter-American Court of Human Rights, which has under this system, a triple guarantee at various levels that converges from judicial jurisprudence, the Special Rapporteurship on human rights defenders and the Special Rapporteurship on Economic, Social, Cultural and Environmental Rights, as well as the binding regional treaties, with the Charter and the Protocol of San Salvador. In particular, we would like to emphasise some concepts from the Inter-American system which are necessary in order to reinforce this synergy between human rights and the environment. For instance, the necessary "*precautionary principle and due diligence*",[84] "*the obligation to avoid transboundary environmental damage*"[85] or the concept of "*decent existence*".[86] The obligation to protect the environment and human rights applies not merely inside borders but it also requires avoiding effects beyond borders.[87]

[80] Lucas Sánchez, "Legislative remedies at the Inter-American Court of Human Rights", 469-510.
[81] Judgment IACtHR, *Mayagna (Sumo) Awas Tingni Community v* Nicaragua, 31 August 2001.
[82] Judgment IACtHR, *Community of La Oroya v. Peru,* 30 September 2021 (pending application), Report No. 330/20, September 2021*,* accessed August 5, 2022, https://www.corteidh.or.cr/docs/tramite/comunidad_la_oraya.pdf;
[83] OAS, "IACHR Files Case Before IA Court on Peru's Responsibility for the Effects of Contamination in La Oroya Community", October 14, 2021, accessed August 5, 2022, https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/media_center/PReleases/2021/274.asp.
[84] IACHR, "Advisory opinion on the Environment and Human Rights", OC-23/17.
[85] IACHR, "Advisory opinion on the Environment and Human Rights", OC-23, 17, para. 101.
[86] Judgment IACtHR *Xákmok Kásek Indigenous Community v. Paraguay*, 24 August 2010 (Merits, Reparations and Costs), Serie C, No. 214, para. 195.
[87] IACH, "Advisory opinion on the Environment and Human Rights", OC-23/17, para. 101.

However, until this year 2022, there was not a specific Rapporteurship as a rapid response mechanism in the European arena – not until the appointment of the new Special Rapporteur on environmental defenders, under the Aarhus Convention. So, this is a milestone. Under this new instrument related also to the environmental rule of law, it is worth noting the development of the perspective of interdependence between the environment and human rights. J. H. Knox, the Special Rapporteur on the issue of human rights obligations, summarises the reciprocal perspective of human rights and environment considering it as two spheres not connected but interrelated: "*A safe, clean, healthy and sustainable environment is necessary for the full enjoyment of a vast range of human rights, including the rights to life, health, food, water and development. At the same time, the exercise of human rights, including the rights to information, participation and remedy, is vital to the protection of the environment*".[88]

4.2 The Aarhus Convention' rapid response mechanism: the new Special Rapporteur on environmental defenders

The creation of a specific mechanism under the Aarhus Convention merits analysis. It is both a victory and a paradox. On the one hand, because the origin of such institutions – Rapporteurships – is too often related to weaknesses in the enforcement of legal guarantees and state constraints to avoid reprisals despite the rights recognised, in this case, by a binding Treaty. On the other hand, it is good news to know that, at least, a mechanism exists as an institutional guarantee to cope with the increasing cases of environmental defenders who are penalised, persecuted or threatened – even in the European area – just for seeking the rights set in the Aarhus Convention.

The Economic Commission for Europe (UNECE) adopted, during its seventh session held in Geneva from 18 to 20 October 2021, Decision VII/9 on a rapid response mechanism to deal with cases related to Article 3(8) of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. The Article 3(8) of the Aarhus Conventions states that: "*Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings*".[89]

It is necessary to understand that this is only the tip of the iceberg of the plight of environmental defenders, and it requires the setting of a specific mechanism to cope with it. In this sense, Decision VII/9 recognises the "*existing challenges, such as fear of reporting such cases, impunity and difficulty in uncovering the identity of those behind the ordering and conducting of such acts*" being alarmed by "*the serious situation faced by environmental defenders, including, but not limited to, threats, violence, intimidation, surveillance, detention and even killings, as reported by States Members of the United Nations, and by intergovernmental and nongovernmental organizations and other stakeholders*".[90] This can lead

[88] HRC, "Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment", January 24, 2018, A/HRC/37/59, para. 2.

[89] Aarhus Convention (1998), Article 3(8).

[90] UNECE, "Decision VII/9 on a rapid response mechanism to deal with cases related to Article 3(8) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters", Excerpt from ECE/MP.PP/2021/2/Add.1, 18-20 October 2021, accessed August 5, 2022, https://unece.org/sites/default/files/2022-01/Aarhus_MoP7_Decision_on_RRM_E.pdf.

to a "chilling effect" in the use of the convention that harms not only individuals who are afraid to report cases, but the entire society of States parties, which is why the decision recognises under the convention's strategic plan for 2022-2030 its mission: "*To reaffirm the commitment to: (i) ensuring due protection of environmental defenders; (ii) having in place appropriate legislative and policy frameworks so that such defenders can exercise their rights in accordance with the Convention; and (iii) preventing the erosion of civic space*".[91]

In the context of these challenges, it is necessary to highlight that the new mechanism is a Special Rapporteur on environmental defenders, with a view to providing *"a rapid response to alleged violations of the obligations under article 3 (8)*".[92] However, it does not diminish the obligation of the states. If the legal framework and the rule of law are forgotten, the number of cases on environmental defenders will be higher. Thus, it is necessary "*to review their legal frameworks and practical arrangements in line with the Convention's obligations and to take all necessary measures to ensure that persons exercising their rights in conformity with the Convention's provisions are not penalized, persecuted or harassed in any way for their involvement*".[93]

The decision goes on to take the option of recognising the subject of rights by the exercise of the rights rather than by a narrower definition: "*Recognizing that an 'environmental defender' is any person exercising his or her rights in conformity with the provisions of the Convention*".[94] However, it may be biased due to the difficulties in having legal standing to claim or review acts in environmental law for years, for instance, individuals having access to the EU courts. This is why the new amendment of the EU Aarhus Regulation No. 1367/2006 is worth mentioning.

The EU is a party to the Aarhus Convention and has adopted, as of 2021, an amendment to EU Aarhus Regulation No. 1367/2006 through Regulation (EU) 2021/1767 of the European Parliament and of the Council of October 6, 2021 amending Regulation (EC) No. 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.[95] With this new legal framework, not only NGOs but also individuals can challenge environmental decisions in EU Courts, opening the door to direct action for environmental defenders.

The Aarhus Conference recently decided, at its third extraordinary session held in Geneva on 23-24 June 2022 by the 46 countries parties to the Aarhus Convention and the EU, to appoint Michel Forst as independent Special Rapporteur on environmental defenders.[96] Michel Forst was the former UN Special Rapporteur on human rights defenders and has a strong experience in this domain. The first thematic UN mechanism on human rights defenders was created in 2000 by the Commission on Human Rights under the form of a Special Representative of the Secretary General

[91] UNECE, Decision VII/9 ECE/MP.PP/2021/2/Add.1.
[92] UNECE, Decision VII/9 ECE/MP.PP/2021/2/Add.1, 7.
[93] UNECE, Decision VII/9 ECE/MP.PP/2021/2/Add.1, 2.
[94] UNECE, Decision VII/9 ECE/MP.PP/2021/2/Add.1.
[95] European Commission, "The EU & the Aarhus Convention: in the EU Member States, in the Community Institutions and Bodies", accessed August 5, 2022, https://ec.europa.eu/environment/aarhus/legislation.htm.
[96] UNECE, "Rapid Response mechanism to protect environmental defenders under the Aarhus Convention", accessed July 22, 2022, https://unece.org/env/pp/aarhus-convention/environmental-defenders.

on the situation of human rights defenders,[97] the first being held by Hina Jilani (Pakistan). Later, the Human Rights Council extended the mandate with a Special Rapporteur on the situation of human rights defenders held by Margaret Sekkagya (Uganda) 2014-2018, Michel Forst (France) 2014-2020, and currently the mandate is being held by Mary Lawlor (Ireland) since 2020.

The task of the new independent Special Rapporteur on environmental defenders will be

> "*to take measures to protect any person who is either:*
> *(a) Experiencing persecution, penalization or harassment, or*
> *(b) At imminent threat of persecution, penalization or harassment in any way, for seeking to exercise their rights under the Aarhus Convention. Such penalization, persecution or harassment may arise from the acts or omissions of public or private entities or individuals*".[98]

Making a complaint to the Special Rapporteur on environmental defenders does not require exhaustion of domestic remedies;[99] this is consistent with the necessary rapid response and the urgent nature of the action undertaken to protect environmental defenders.

The right to file a complaint has a broad framework on the subject. It is worth mentioning the legitimacy of individuals, state parties and the secretariat. Thus, a complaint to the Special Rapporteur on environmental defenders can be submitted by

> "*a) Any member of the public, either on their own behalf or on behalf of another member of the public;*
> *(b) A Party to the Convention;*
> *(c) The secretariat*".[100]

Once a complaint is submitted, the Special Rapporteur will examine the conditions of admissibility. It is relevant in this case, being the mention of abuse of rights, and a patently reasonable claim as a condition of non-admissibility. The anonymity of the complaint can lead, *a priori*, to non-admissibility due to the sensitive nature of the complaints "*although anonymous complaints making credible allegations that can be independently verified may be pursued*".[101] The protection is authorised to be sought by pursuing Aarhus Convention rights and it "*may arise from the acts or omissions of public or private entities or individuals*".[102] These grounds are necessary to protect defenders because harassment or persecution can be done by non-state actors.

Finally, the response of the Special Rapporteur will be to gather information to perform its duties and to protect the complainant from persecution, harassment or penalization. The Special Rapporteur on environmental defenders may take one or more of the following measures:

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[97] Office of the High Commissioner for Human Rights (OHCHR), "Human Rights Defenders", (27/4/2000), E/CN.4/RES/2000/61, para. 3.
[98] UNECE, Decision VII/9 ECE/MP.PP/2021/2/Add.1, Annex A.1.
[99] UNECE, Decision VII/9 ECE/MP.PP/2021/2/Add.1, Annex A.4.
[100] UNECE, Decision VII/9 ECE/MP.PP/2021/2/Add.1, Annex B.2.
[101] UNECE, Decision VII/9, ECE/MP.PP/2021/2/Add.1, Annex C.3.a.
[102] UNECE, Decision VII/9, ECE/MP.PP/2021/2/Add.1, Annex A.1.b.

a) "Issue an immediate protection measure to the Party concerned (see para. 13 below);
b) Issue an ongoing protection measure to the Party concerned (see para. 14 below);
c) Issue public statements and press releases and distribute them actively via the Special Rapporteur's website, the media and social media;
d) Use diplomatic channels;
e) Request the Chair of the Bureau of the Meeting of the Parties to use diplomatic channels, including bringing the matter to the attention of the Head of State or Government and/or another senior official of the Party concerned;
f) Bring the complaint to the attention of other relevant human rights bodies (for example, special rapporteurs, national independent human rights commissions, etc.) and, to the extent feasible and appropriate, coordinate efforts with those other bodies.
8. When addressing any body or entity of the Party concerned, the Special Rapporteur will inform the national focal point of the Aarhus Convention in parallel".[103]

The principle of non-discrimination is at the core of the Aarhus Convention, where "*the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile*".[104]

States still hold responsibility in environmental law and the Aarhus Convention. However, the need to establish a Special Rapporteurship on environmental defenders is a symptom that legal guarantees and the rule of law are not fulfilled enough when individuals, even in the European arena, need a specific protection mechanism to cope with the collapse of states or the weaknesses of the public legal system, harassment, and threats of penalty, when environmental defenders decide to intervene under the Aarhus Convention.

In the UN system, thematic mechanisms were set up in the 1970s and 1980s under a similar pattern to prevent the failure of states most responsible for gross patterns of human rights violations to comply with and sign major treaties. The remaining thematic group on enforced disappearance regrettably has to deal with cases related to the legal aspect of environment, land and natural resources and the reprisals for it from both, state and non-state actors.

The UN thematic mechanism has had a multi-level spillover effect[105] on the regional systems of the African Charter and the American Convention on Human Rights that developed two Special Rapporteurships for human rights defenders. In Europe, however, it was accomplished through a convergent multi-level system in the COE area, not including Russia as of today. In this multi-level system, the case law and the COE Commissioner on Human Rights are guarantees considered sufficient for the protection of human rights defenders, with a convergent EU protection system featuring a special *Protectdefenders.EU*[106] mechanism prepared to handle the bulk of human rights defenders' endangered protection under a consortium of 12 NGOs.

Another final aspect to mention is the need to refrain from considering the Special Rapporteur on environmental defenders under the rule of duplication of procedures on admissibility decisions of the ECtHR, because the role of the Special Rapporteurship is neither quasi-judicial nor judicial, but rather precautionary. It is

[103] UNECE, Decision VII/9, ECE/MP.PP/2021/2/Add.1, Annex G.7.
[104] Aarhus Convention (1998), Article 3.
[105] Karen Bennet, Danna Ingleton, Alice M. Nah and James Savage, "Critical perspectives on the security and protection of human rights defenders".
[106] "Protectdefenders.EU", accessed August 6, 2022, https://protectdefenders.eu.

an expedited first resort to be employed and cannot preclude a new case if it is under the competence and domain of the ECHR.

Thus, the adoption of this Special Rapporteurship on environmental defenders is paradoxical – an alarm signal about cases of harassment and threats to environmental defenders that, at the same time, comes to demand an urgent international institutional response because of the gaps in states' protection and respect for the rights of defenders.

5. Environmental defenders: the pending ECHR case law on climate change and the COE Commissioner on human rights third party interventions on human rights defenders

In the COE area, there is a twofold system based on ECHR case law and the action of the COE Commissioner on Human Rights. However, even the COE Secretary General created in 2018 a private procedure "*for investigating alleged reprisals against human rights defenders*". Revised in 2019, it launches a focal point.[107]

The COE Commissioner on Human Rights has acted as third party intervention in several cases, some of them related to environmental defenders, such as the case of *Mehmet Osman Kavala v. Turkey*.[108] We consider this particular case law relevant in our analysis for the use of the specific term "human rights defender".[109] When a human rights defender is being silenced, it drives a "chilling effect" not only on human rights defenders, but also on civil society. According to the Commissioner on Human Rights, the violation of human rights in the case *Mehmet Osman Kavala v. Turkey* resulted from an excessive use of force against peaceful protestors trying to prevent the cutting of the trees, leading to the Gezi Park Events, in a wave of demonstrations and protests around Turkey where extraordinary limitations on freedom of assembly occurred, with injuries and even fatalities. Of particular relevance to this Article, is the specific mention of human rights defenders and the "chilling effect" resulting from their arrest. There is a binding judgment of the ECHR that deems it a violation of his/her right of liberty – Article 5(1) ECHR, judicial review 5(4), and Article 18, ECHR, by Turkey.

In the following paragraph, another case in which the Commissioner intervened as a third party on human rights defenders will be addressed. The Commissioner is up against one of the instrumental rights guaranteed by the Declaration on human rights defenders, under the ECHR. This is the right to have funding and the collective exercise of this right in relation to the right to freedom of expression and association, all guaranteed by the 1998 Declaration, and Articles 10 and 11 of the ECHR.

[107] COE Secretary General, "Private Office procedure on Human Rights defenders interacting with the Council of Europe", accessed August 6, 2022, https://www.coe.int/en/web/secretary-general/procedure-human-rights-defenders.

[108] COE Commissioner for Human Rights, "Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights Application No. 28749/18 Mehmet Osman Kavala v. Turkey", 10 January 2019, accessed June 1, 2022, https://rm.coe.int/third-party-intervention-before-the-european-court-of-human-rights-%20cas/1680906e27.

[109] COE Commissioner for Human Rights, "Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights Application No. 28749/18 Mehmet Osman Kavala v. Turkey".

The case law of *Ecodefense and other associations v. Russia*[110] brings up the discussion about an extensive use of the term "political activity" and "foreign agent" to restrict the activity of non-commercial organisations. Thus, the Commissioner "*calls on the Russian authorities to revise the legislation on non-commercial organisations in order to establish a clear, coherent and consistent framework in line with applicable European and international standards*".[111] The Court makes two relevant assumptions on the role played by citizens' platforms and NGOs. They are undertaking a "public watchdog" role, and any activity under the restriction clause that must be "*necessary in a democratic society*" thus, can be only under a "*pressing social need*".[112] In the recent judgment, the ECtHR concludes on the violation of Article 11 of the ECHR, interpreted in light of Article 10. In March 2022, Russia ceased to be a member of the COE,[113] under the procedure of Article 8 of the Statute,[114] as a consequence of the aggression of the Russian Federation against Ukraine. The Russian Federation ceased to be a High Contracting Party to the ECHR on September 16, 2022.[115] However, as also stated in the Opinion of the Parliamentary Assembly, "*the Council of Europe will take initiatives to support and engage with human rights defenders, democratic forces, free media and independent civil society in the Russian Federation*".[116]

Therefore, another aspect to consider is that when applying to the European Court of Human Rights, this complaint may fall under both the ECHR and the UN Declaration on human rights defenders. In this sense, one who files a complaint to the ECtHR can become a human rights defender fighting not only on an individual basis, but by leading a body of jurisprudence that can have an impact on civil society for the promotion and protection of human rights. In this sense, it is worth mentioning the admissibility under the right of life – Article 2 of the ECHR – of three pending cases on climate change assigned to the Grand Chamber in 2022. These cases are:

- *Duarte Agostinho and Others v. Portugal and 32 Other States*[117]
- *Verein Klima Serionninen Shweiz and others v. Switzerland*[118]
- *Carême v. France*[119]

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[110] Judgment ECtHR *Ecodefence and others v. Russia*, 14 June 2022, Application no. 9988/13 and 60 others.
[111] COE Commissioner for Human Rights, "Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights Application n° 9988/13 *Ecodefence and others v. Russia* and 48 other applications", July 5, 2017, accessed June 1, 2022, https://rm.coe.int/third-party-intervention-by-the- council-of-europe-commissioner-for-hum/1680731087 ,123.
[112] Judgment ECtHR *Ecodefence and others v. Russia*, 14 June 2022.
[113] COE Committee of Ministers, "Resolution CM/Res (2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe", March 16, 2022.
[114] COE Committee of Ministers, "The Russian Federation is excluded from the Council of Europe", March 16, 2022, accessed August 6, 2022, https://www.coe.int/en/web/portal/-/the-russian-federation-is-excluded-from-the-council-of-europe.
[115] COE Committee of Ministers, "Resolution CM/Res (2022)3 on legal and financial consequences of the cessation of membership of the Russian Federation in the Council of Europe", March 23, 2022, para. 7.
[116] COE Committee of Ministers, "Resolution CM/Res (2022)3".
[117] Judgment ECtHR *Duarte Agostinho and Others v. Portugal and 32 Other States,* 7 September 2020, Application no. 39371/20. Application communicated to the defending governments in November 2020 – Relinquishment in favour of the Grand Chamber in June 2022.
[118] Judgment ECtHR *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, Application no. 53600/20. Application communicated to the Swiss Government in March 2021 – Relinquishment in favour of the Grand Chamber in April 2022.
[119] Judgment ECtHR *Carême v. France*, Application no. 7189/21 – Relinquishment in favour of the

The first case pending before the Grand Chamber, *Duarte Agostinho and Others v. Portugal and 32 Other States* is a complaint by six young people and children from Portugal who are claiming against 33 States – those of the EU – Turkey and Russia. They are lodging a complaint against adverse effects of climate change and greenhouse gas emissions and the violation of Article 2, Article 8, and non-discrimination under the ECHR. Under this case, the complaint highlights the failure to meet obligations to prevent the effects of climate change under the Paris Agreement, as well as the suffering imposed on them by the heatwaves leading to a life indoors, forest fires and the impact on their human rights, which is not necessary in a democratic society.

It is worth mentioning the broad scope of the complaint affecting 33 states and the Court's admissibility of it, which highlights that positive obligations have an extraterritorial dimension, and that environmental damage is in fact transboundary. We have to wait for the decision of the Grand Chamber, but there are several *Amicus Curiae* present in the case law that are relevant. We mention the two UN Special Rapporteurs David R. Boyd – UN Special Rapporteur on human rights and the environment – and Marcos A. Orellana – UN Special Rapporteur on toxics and human rights – because it summarises the legal framework applicable to both human rights and the environment.

In accordance with the principles of ECHR case law, they highlight the concept of "common interest": "*a particular characteristic of climate change calls for its adjustment. In climate cases, the interests of the individual and the community are not competing. Both the individual and the community share a common interest in a safe climate system. Moreover, this interest is common to all Convention Parties, as well as to the international community as a whole. This common interest is expressed in the objective of the UN Framework Convention on Climate Change to 'prevent dangerous anthropogenic interference with the climate system' (Article 2) and in the more granular global mitigation goal of the Paris Agreement, which indicates that a temperature increase above 1.5°C or at most 2.0°C would indeed be dangerous (Art. 2.1.a)*".[120]

Going further, the two UN Special Rapporteurs refer to the best interests of the child and non-discrimination, with climate change having a potentially longer and more adverse effect on them.[121] Firstly, the Special Rapporteurs advise on the integration of international environmental law into human rights going well beyond the mere right to life, as laid out by the UN Human Rights Committee.[122] Secondly, they suggest the Court seize the turning point in this jurisprudence to "…*elaborate on key principles of international environmental law that are particularly relevant to the adjudication of climate change cases*",[123] such as the precautionary principle, the

Grand Chamber in May 2022.

[120] *Duarte Agostinho and Others v. Portugal and 32 Other states,* Application no. 39371/20 European Court of Human Rights, Fourth Section. Amicus Curiae Brief submitted by David R. Boyd, UN Special Rapporteur on Human Rights and the environment Marcos A. Orellana, UN Special Rapporteur on toxics and Human Rights, May 4, 2021, 8. Accessed August 6, 2022, http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2021/20210504_3937120_na-1.pdf.

[121] *Duarte Agostinho and Others v. Portugal and 32 Other states.* Amicus Curiae Brief submitted by David R. Boyd, UN Special Rapporteur on Human Rights and the environment Marcos A. Orellana, UN Special Rapporteur on toxics and Human Rights, paras. 12-16.

[122] *Duarte Agostinho and Others v. Portugal and 32 Other states.* Amicus Curiae Brief submitted by David R. Boyd, UN Special Rapporteur on Human Rights and the environment Marcos A. Orellana, UN Special Rapporteur on toxics and Human Rights, paras. 17-24, 41.

[123] *Duarte Agostinho and Others v. Portugal and 32 Other states.* Amicus Curiae Brief submitted by David R. Boyd, UN Special Rapporteur on Human Rights and the environment Marcos A. Orellana, UN

principle of prevention of environmental harm, and the extraterritoriality of human rights obligations; to finally advocate that the "*Obligations and commitments under the Paris Agreement are relevant to the adjudication of climate-related cases*".[124] Under the obligations of the Paris Agreement, the EU must act with due diligence because any delay may be adding to an extreme risk, as posed by the climate crisis.[125]

There is also another third-party intervention by the COE Commissioner on Human Rights where she spoke in favor of the universal recognition of the right to a healthy environment and the need to consider this case as a turning point that goes further in protecting the right to life.[126]

In this regard, the second case, *Verein KlimaSeniorinnen Schweiz and others v. Switzerland*[127] was also referred to the Grand Chamber in April 2022.

Of particular relevance is the call for the fulfillment of positive obligations under the right to life. The complaint was filed by a Swiss association for the prevention of climate change on behalf of its elderly members, who complain of health problems under heatwaves due to climate change. Should national courts try to limit the concept of victims by deeming them not individually affected, the Court's admissibility is a step forward and it would be relevant to track this case and wait for the final decision of the Grand Chamber.

The third pending case – after being handed over to the Grand Chamber – is *Carême v. France.*[128] The plaintiff, who lives in a house in Grand Synthe and is the former Major of this municipality complains on the basis of on Article 2 and Article 8 ECHR. The relevant point of this case is the objection to the decision of the Conseil d'État, considering he had "*no interest in bringing proceedings*",[129] constituting a violation of Article 8. The Conseil d'État partially allowed the claim for the municipality, but not for him as an individual, overruling the government's tacit refusal and "*ordered the Government to take additional measures by 31 March 2022 to attain the target – pursuant to the Paris Agreement – of a 40% reduction in greenhouse gas emissions by 2030*".[130] He claims, however, under a human rights basis that merits attention in the final decision of the Grand Chamber, an interesting long-term perspective required to address litigation in climate cases.[131]

Special Rapporteur on toxics and Human Rights, para. 24.

[124] *Duarte Agostinho and Others v. Portugal and 32 Other states.* Amicus Curiae Brief submitted by David R. Boyd, UN Special Rapporteur on Human Rights and the environment Marcos A. Orellana, UN Special Rapporteur on toxics and Human Rights, para. 39.

[125] *Duarte Agostinho and Others v. Portugal and 32 Other states.* Amicus Curiae Brief submitted by David R. Boyd, UN Special Rapporteur on Human Rights and the environment Marcos A. Orellana, UN Special Rapporteur on toxics and Human Rights, para. 39.

[126] "Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights – Application No. 39371/20 – Cláudia DUARTE AGOSTINHO and others v. Portugal and 32 other States", May 5, 2021, accessed August 6, 2022, Third party intervention by the Council of Europe Commissioner for Human Rights - Application No. 39371/20 Cláudia DUARTE AGOSTINHO and others v. Portugal and 32 other States (coe.int).

[127] Judgment ECtHR *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, Application no. 53600/20.

[128] Judgment ECtHR *Carême v. France*, Application no. 7189/21.

[129] ECtHR, "Grand Chamber to examine complaint that France's action to prevent climate change has been insufficient" 184 (2022) 07.06.2022, Press Release.

[130] ECtHR, "Grand Chamber to examine complaint that France's action to prevent climate change has been insufficient", Press Release.

[131] ECtHR, "Grand Chamber to examine complaint that France's action to prevent climate change has been insufficient", Press Release.

The admissibility of this case law could become a turning point in ECtHR jurisprudence and decisions on climate litigation necessary for the protection against climate change. Plaintiffs acting in these cases on a climate litigation basis can be seen as human rights defenders in environmental issues.