Minimum ecological standards for the evolution of the Strasbourg system towards ecological human rights

Natalia Kobylarz*
Registry of the European Court of Human Rights
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This chapter provides some answers to the questions: Is the protection offered by the European Court of Human Rights sufficient in the new ecological reality that poses complex challenges not only to the modern way of life, but also to the established systems of governance and law? In what direction could the current system evolve? The author argues that the Strasbourg system of environmental human rights can and ought to transition to the regime of ecological human rights. She proposes that, independently of the possible recognition of the autonomous right to a healthy environment, such transition can be achieved by integrating ecological minimum standards into the ECHR's 'fair balance' review. These ecological minimum standards are a set of notions that express the legal paradigms of immersive anthropocentrism and ecocentrism; that give due consideration to climate and biodiversity crises; that include the concepts of sustainable development and sustainable use of natural resources; as well as the principles of intergenerational equity, precaution, and in dubio pro natura.

Keywords: human rights, environment, climate change, right to a healthy environment, anthropocentrism, ecocentrism, sustainable development, intergenerational equity, precautionary principle, *in dubio pro natura*, courts, environmental litigation, climate litigation

* The author works as a Senior Lawyer at the Registry of the ECtHR in Strasbourg. The views expressed in this paper are those of the author and do not represent the official position of the ECtHR or the CoE. The Registry gives support to the Court and cannot in any way influence the Court's decisions on the admissibility and/or the merits of any case.

1. Introduction

The European Convention on Human Rights (hereinafter the "Convention" or "ECHR") has been called to operate at a time of climate and environmental crises, which have significant impacts on human rights, on society and the world order. The ECHR or its Protocols are not specifically designed to provide general protection for the Earth systems.[1] They do not guarantee the right to a healthy environment. But because human rights and the environment are intrinsically linked, the Convention organs have repeatedly ruled on cases with an environmental component, thus developing, in effect, a system of indirect environmental protection by proxy of civil and political rights.

This article provides some answers to the questions posed by academia, judiciary and citizens: Is the protection of the environment offered by the European Court of Human Rights (hereinafter the "ECtHR" or "Court") sufficient in the new ecological reality that poses complex challenges not only to the modern way of life, but also to the established systems of governance and law? (2) In what direction could the current system evolve? (3)

2. Is the protection of the environment offered by the current Strasbourg system sufficient?

Various environmental claims can and have been made in terms of traditional civil and political rights. The environmental jurisprudence of the ECtHR has already been extensively described and commented upon.[2] It can be

1 For example, ECHR, Cases: *X. v. Federal Republic of Germany* (dec.), 13 May 1976, (7407/76); *Kyrtatos v. Greece*, 22 May 2003, (41666/98), § 52; *Dubetska and Others v. Ukraine*, 10 February 2011, (30499/03), § 105.

2 P. Baumann, "The right to a healthy environment and the ECHR" (2021) LDGJ; O. Pedersen, "ECtHR and environmental rights", in *Human rights and the environment: legality, indivisibility, dignity and geography,* J.R. May, E. Daly, eds, Elgar, 2019, pp. 463-471; K. Morrow, "The ECHR, Environment-Based Human Rights Claims and the Search for Standards", in *Environmental Rights. The Development of Standards* S.J. Turner, D. Shelton, eds, Cambridge, 2019, pp. 41-59; D. Shelton, "Tătar v. Romania", in *American Journal of International Law*, Vol. 104, 2010, p. 247; Y. Winisdoerffer, "La jurisprudence de la CrEDH et l'environnement", in *Revue juridique de l'Environnement* (2003); N. Kobylarz, "The ECtHR, an Underrated Forum for Environmental Litigation", in *Sustainable Management of Natural Resources, Legal Instruments and Approaches,* H. Tegner anker and B. Egelund Olsen, eds, Intersentia, 2018; N. Kobylarz, "Balancing its way out of strong anthropocentrism: Integration of 'ecological minimum standards' in the ECtHR 'fair balance' review", *Journal of Human Rights and the Environment, Special Issue Human Rights and the Planet,* Elgar, 2022; J.-P. Costa and P. Titiun, "La Cour EDH et l'environnement", in *Terres du droit: mélanges en l'honneur d'Yves Jégouzo*, Dalloz, 2009, pp. 31-41; L. López guerra, "Privacy and environment: the case of noise", in *Essays in honour of Dean Spielmann,* J. Casadevall, coll, Wolf Legal Publishers, 2015; L.-A. Sicilianos and P. Titiun, "Regards sur la jurisprudence environnementale de la Cour EDH", *Europe des Droits & Libertés*, Sept. 2020/2, pp. 252-260; and H. Keller, et al, "Something ventured, nothing

concluded that many of the Court's landmark judgments – such as *López Ostra*,[3] *Guerra*,[4] *Öneryıldız*,[5] *Tătar*,[6] *Gorraiz Lizarraga*,[7] *Collectif Stop Melox*[8] , *Chassagnou*[9] or *O'Sullivan*[10] – were ahead of their time and, as such, have made important advances in the environmental human rights system, in Europe and beyond.[11] On the other hand, other rulings – such as *Kyrtatos*,[12] *Balmer-Schafroth*,[13] *Hatton*,[14] *Hudorovič*[15] or the recent *Yusufeli* or *Cangi* [16] – demonstrate important limitations of the system.

For example, in accordance with the doctrine of "direct and personal harmful effect",[17] the Court will not consider the merits of any case seeking to defend the environment in general without specifying that it is an individual civil right guaranteed by the ECHR or its Protocols.[18] In several public interest applications concerning urban development or deforestation, the Court has found that there is no right to the peaceful enjoyment of property in pleasant surroundings or to private life in an environment of scenic beauty or wilderness habitats.[19] Applicants are required to prove a personal impact on their property, life, health or well-being.[20] In this context, the ECtHR is not spared from what Katalin Sulyok calls "epistemic arbitrariness" as facts established in the

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gained? Remedies before the ECtHR and Their Potential for Climate Change Cases", *Human Rights Law Review*, Volume 22, Issue 1 March 2022.

3 ECHR, Case of *López Ostra v. Spain*, 9 December 1994 (16798/90).

4 ECHR, Case of *Guerra and Others v. Italy*, 19 February 1998 (14967/89).

5 ECHR, Case of Öneryıldız v. Turkey [GC], 30 November 2004, (48939/99).

6 ECHR, Case of *Tătar v. Romania*, 27 January 2009, (67021/01).

7 ECHR, Case of *Gorraiz Lizarraga and others v. Spain*, 27 April 2004 (62543/00).

8 ECHR, Case of *Collectif national d'information et d'opposition à l'usine Melox – Collectif Stop Melox et Mox v. France (dec.)*, 28 March 2006, (75218/01).

9 ECHR, Case of *Chassagnou and Others v. France* [GC], 29 April 1999, (25088/94).

10 ECHR, Case of *O'Sullivan McCarthy Mussel Development Ltd v Ireland*, 7 June 2018, (44460/16).

11 N. Mileva and M. Fortuna, "Environmental Protection as an Object of and Tool for Evolutionary Interpretation", in *Evolutionary Interpretation and International Law,* G. ABI-SAABl, coll., Hart Publishing, 2019, pp. 8-9. The IAHR Court made numerous references to the case law of the ECtHR in its Advisory Opinion OC-23/17 of 15 November 2017.

12 *Kyrtatos* (n 1).

13 ECHR, Case of *Balmer-Schafroth and others v. Switzerland*, 26 August 1997, (22110/93).

14 ECHR, Case of *Hatton and others v. United Kingdom* [GC], 8 July 2003, (36022/97).

15 ECHR, Case of *Hudorovič and others v. Slovenia*, 10 March 2020, (24816/14).

16 ECHR, Case of *Yusufeli Ilcesini Guzellestirme Yasatma Kultur Varliklarini Koruma Dernegi v. Turkey* (dec.), 7 December 2021, (37857/14). Cangı and Others v. Türkiye, 14 November 2023 (48173/18).

17 ECHR, Case of *Fadeyeva v. Russia*, 9 June 2005, (55723/00), § 68.

18 ECHR, Case of *Klass and Others v. Germany*, 6 September 1978, (5029/71), § 33; ECHR, Case of *Crash 2000 Ood and Others v. Bulgaria* (dec.), 17 December 2013, (49893/07), § 84.

19 *Kyrtatos* (n 1) §§ 46 and 53; ECHR, Cases: Ünver *v. Turkey* (dec.), 26 September 2000, (36209/97); *Valentina Viktorovna Ogloblina v. Russia* (dec.), 26 November 2013, (28852/05), §§ 20-22 and 28.

20 For example, *Ogloblina* (n 19), §§ 20-22; *Kyrtatos* (n 1) §§ 46, 52 and 53; and *Dubetska* (n 1) § 105.

science of ecology are assessed with a non-scientific method, namely common sense.[21] The Court has so far never attached importance to the collective benefits derived by humans from the environment (ecosystem services). Therefore, a significant impairment of ecosystem elements or functions that disrupts or extinguishes these services (ecological damage[22]) to the detriment of nature, but also of local residents, does not confer standing or guarantee the applicability of the ECHR,[23] unless – possibly – the claimants succeed in providing evidence of their significant impairment, i.e. the loss of obvious, direct and immediate benefits.[24]

Strasbourg jurisprudence on environmental human rights is based on the legal paradigm of strong anthropocentrism or extractivism[25]. Only humans are carriers of intrinsic value[26] and endowed with "rights".[27] The conditions of existence of non-humans are generally outside the scope of the ECHR, with the exception of situations where the protection of certain categories of wild animals has, on occasion, been considered a valid "legitimate aim" or "general interest" for member States.[28] For example, the ECtHR has accepted that the reclassification of land into protected nature areas, with the consequent prohibition of building, fishing or tourism, would not violate property rights,

21 K. Sulyok, "Science and Judicial Reasoning: The Legitimacy of International Environmental Adjudication", Cambridge, 2021, pp. 40, 65 et seq; *Kyrtatos* (n 1) §§ 46 and 53, partly dissenting opinion of Judge Zagrebelsky.

22 Article 1247 French Civil Code.

23 *Kyrtatos* (n 1) § 53*; and Ogloblina* (n 19) §§ 21 and 28.

24 *Kyrtatos* (n 1) § 53 *in fine*.

25 Resolution 2396 (2021) of the CoE Parliamentary Assembly, § 6; E. Lambert, Environment and Human Rights. Introductory Report to the High Level Conference on Environmental Protection and Human Rights, Strasbourg, 27 February 2020, pp. 12-15; and Numann (n 2).

26 Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, Part I, Article 5); "Atrato River Case", Centro de Estudios para la Justicia Social 'Tierra Digna' and others v. President of the Republic and others, No.º T-622, Constitutional Court [Colombia] 10 November 2016, para 5.7.; C. Redgwell, 'Life, the Universe and Everything: A Critique of Anthropocentric Rights', in *Human Rights Approaches to Environmental Protection,* A. Boyle, al., Oxford, 1998, pp. 71-72; J. Shestack, 'The Philosophical Foundations of Human Rights', 2000, in *Environmental Protection and Human Rights*, D. Anton and D. Shelton, Cambridge, 2011, p. 189; and C. Sunstein, "Rights and Their Critics", 1995, in Anton and Shelton (ibid), p. 196.

27 ECHR, Cases: *Balluch v. Austria,* (26180/08), *Stibbe v. Austria*, (26188/08), applications by animal protection activists on behalf of a chimpanzee, rejected by a First Chamber Committee for incompatibility *ratione materiae*; *Herrmann v. Germany* [GC], 26 June 2012, (9300/07). Pets have been considered as property, see ECHR, Cases: *Akkum and Others v. Turkey*, 24 March 2005, (21894/93), § 276; and *Chagnon and Fournier v. France*, 15 July 2010, (44174/06), § 36.

28 ECHR, Cases: *Bahia Nova S.A. v. Spain* (dec.), 12 December 2000, (50924/99); *Friend and Others v. the United Kingdom* (dec.), 24 November 2009, (16072/06), § 50 *in fine*; *Matczyński v. Poland*, 15 December 2015, (32794/07), §§ 100-102, *and O'Sullivan* (n 10) § 109; compare with ECHR, Cases: *Matos e Silva, Lda., and Others v. Portugal*, 16 September 1996, (15777/89), § 89; and Z.*A.N.T.E. – Marathonisi A.E. v. Greece*, 6 December 2007, (14216/03), § 54.

essentially, as long as the change was foreseeable and the applicant could claim compensation for pecuniary loss from the State.[29] An obligation may indeed be imposed insofar as natural resources may have to be left unused to ensure their renewal.[30] But the Court has so far implicitly considered humans as having privileged access to natural resources and as being superior to other members of the natural community.[31] The natural environment has thus been protected primarily for its utilitarian value, insofar as it secures conditions or resources immediately and obviously necessary for human life and well-being.[32]

Finally, the fact that some of the judgments of the ECtHR relating to the environment have had a generally positive effect on nature does not call into question their strongly anthropocentric character insofar as such an effect is only incidental. Having found a violation of the ECHR in the context of an environmental issue, the Court usually orders individual *restitutio in integrum* measures for the benefit of the injured party.[33] General measures, which in turn aim to prevent similar violations in the future, may indeed result in an improvement of environmental conditions.[34] However, this is only a ripple effect, as the central object of protection is a human entity.[35]

Another consequence of the "direct and personal harmful effect" doctrine is the requirement that, in order to engage Articles 2, 6 and 8 of the ECHR, there must be a direct and immediate link between the situation at issue and the individual right of a person.[36] Specifically, in the context of Article 2, the Court has held that States must mitigate environmental risks that are imminent and clearly identifiable.[37] Similarly, in the context of Article 6, protection will only be triggered if applicants demonstrate that they are personally exposed to

29 *Bahia Nova* (n 28); *Matczyński* (n 28) §§ 100-102; *O'Sullivan* (n 10) § 109; *Matos e Silva* (n 28) § 89; and *Z.A.N.T.E.* (n 28) § 54.

30 ECHR, Case of *Posti and Rahko v. Finland*, 24 September 2002, (27824/95), §§ 72 and 77.

31 With the sole exception of *O'Sullivan* (n 10) §§ 116-131.

32 P. Taylor, "Ecological Integrity and Human Rights", in *Reconciling Human Existence with Ecological Integrity*, L. Westra, K. Bosselmann, eds, Routledge, 2008, p. 99.

33 The most common individual measure ordered by the ECtHR is the payment of compensation for non-pecuniary damage to individual victims, see, for example, *López Ostra* (n 3) § 65; ECHR, Cases: *Taşkın and Others v. Turkey*, 10 November 2004, (46117/99), § 144; and *Giacomelli v. Italy*, 2 November 2006, (59909/00), § 104. On a few occasions, the ECtHR has also indicated the relocation of the applicant to an environmentally safe area, see *Fadeyeva* (n 17) § 142; and *Dubetska* (n 1) § 162.

34 For a summary of the general measures in the context of the environment, see Kobylarz 2018 (n 2), p. 114.

35 H. M. Osofsky, "Learning from Environmental Justice: A New Model for International Environmental Rights", in Anton and Shelton (n 28), p. 145.

36 With regard to the harm already produced: *Guerra* (n 4), § 57; *Fadeyeva* (n 17) § 68; ECHR, Case of *Băcilă v. Romania*, 30 March 2010, (19234/04), § 64. On risk of harm: *Balmer-Schafroth* (n 13) § 40; ECHR, Cases: *Athanassoglou and Others v. Switzerland* [GC], 6 April 2000, (27644/95), § 51; and *Folkman and Others v. Czech Republic* (dec.), 10 July 2006, (23673/03).

37 ECHR, Case of *Budayeva and Others v. Russia*, 20 March 2008, (15339/02), § 137.

a serious, specific and imminent danger.[38] Only in exceptional cases may the risk of a future violation confer on an applicant the status of a potential victim, based on reasonable and convincing evidence of the likelihood of harm.[39] This is an important limitation since the main purpose of legal environmental protection is to prevent environmental damage. The central concept is therefore the assessment of risks which operate with the inherent element of uncertainty.

The impacts of climate change or environmental degradation constitute a new ecological reality which, insofar as it affects society, governance and law, shows that current protection is not sufficient. It is incompatible with the general objectives of environmental protection[40] and with the requirements of the environmental rule of law. Citizens are increasingly concerned not only about their own short-term security and prosperity, but also about the long-term well-being of future generations and the living conditions of non-human animals and ecosystems.[41] They want to participate in the decision-making process concerning policies, laws or projects that impact on the environment in the broadest sense of the term. They introduce new human rights-based grievances that explore the limits of the traditional normative parameters of the system. New social understanding and legal circumstances call for a shift away from a strongly anthropocentric legal paradigm, as well as a re-evaluation of legal concepts and terms such as "necessary in a democratic society", "compelling social need", "jurisdiction", "victim", "civil right" or "private life". Civil society is also pushing for broader substantive and procedural guarantees, particularly in the area of positive State obligations.

38 *Balmer-Schafroth* (n 13) § 40; ECHR, Cases: *Tauria and 18 Others v. France* (dec.), 4 December 1995, (28204/95); *Asselbourg and Others v. Luxembourg* (dec.), 29 June 1999, (29121/95) and *Athanassoglou* (n 36) § 51.

39 *Tauria* (n 38); *Asselbourg* (n 38); ECHR, Case of *Legal Resource Centre on behalf of Valentin Câmpeanu v Romania* [GC], 17 July 2014, (47848/08), § 101. The Court has indeed rejected applications on the grounds that the risks invoked were too vague or remote, see ECHR, Cases: *Aly Bernard and 47 Others and Greenpeace – Luxembourg v. Luxembourg* (dec.), 29 June 1999, (29197/95); and *Luginbuhl v. Switzerland* (dec.), 17 January 2006, (42756/02).

40 *Kyrtatos* (n 1) § 52; Baumann (n 2) pp. 441-485; Lambert (n 25); G. Handl, "The Human Rights to a Clean Environment and Rights of Nature. Between Advocacy and Reality", in *The Cambridge Handbook of New Human Rights. Recognition, Novelty, Rhetoric,* A. vos Arnauld, Cambridge, 2020, p. 138.

41 This is evidenced by applications to the ECtHR, for example *Balluch* and *Stibbe* (no. 27); *Ogloblina* (no. 19); *Duarte Agostinho and others v. Portugal and 32 other Member States,* (39371/20); or *Verein KlimaSeniorinnen Schweiz v. Switzerland*, (53600/20); as well as by actions taken by civil society or local authorities for the recognition of the legal personality of various European rivers, e.g., the Rhone River in Switzerland and France or the Meuse in the Netherlands.

3. Could the current system evolve and in what direction?

In order to address new human rights-based claims and normative expectations of European society that take into account the current state of the environment, the Strasbourg system could gradually evolve towards the regime of ecological human rights.[42]

3.1. Developments in the field of environmental human rights

The origins of the term "ecological human rights" can be traced back to Prudence Taylor and Klaus Bosselmann,[43] who, in the late 1990s, argued in favour of subjecting the exercise of human rights to "ecological limitations" that would legally implement "moral responsibilities due to all life on Earth", without recourse to new rights such as those of nature.[44] More recently, Mario Peña Chacón has recorded the process of consolidation of ecological human rights – which may include the rights of nature – in the jurisprudence of some Latin American constitutional courts.[45]

Ecological human rights nowadays operate both in the regime of indirect environmental protection through first and second generation rights, as well as in the regime of direct protection, primarily through the right to a healthy environment, and sometimes also through the rights of nature. With regard to the right to a healthy environment, ecological rights operate independently of whether this right is derived from other human rights – as happened in the case of the Inter-American Court of Human Rights (hereinafter the "IACtHR")[46] – or whether it is enacted into law as an explicit and autonomous third generation right – as has been the case, for example, in several national jurisdictions around the world.

As for the philosophical underpinnings, for Prudence Taylor, ecological rights recognise both "the human interest" and "the intrinsic value of all life".[47] For Elisabeth Lambert, the doctrine combines traditional environmental human

42 Lambert (n 25), pp. 4, 10 *in fine*, 13 and 15 *in fine*; Resolution 2396 (n 25) §§ 4, 6 and 12. See also the separate opinion of Judge Pinto Albuquerque in *Herrmann* (n 27) p. 39.

43 P. Taylor "From Environmental to Ecological Human Rights: A New Dynamic in International Law", HeinOnline, 1998, 10 (2) *Georgetown International Environmental Law Review,* p. 314; K. Bosselmann (ed) Ökologische Grundrechte, Nomos, 1998; K. Bosselmann, "Human Rights and the Environment: Redefining Fundamental Principles?", *Environmental Justice and Legal Process* (online), 2001 and in *Governance for the Environment*, B. Gleeson, ed., Palgrave London, 2001; and taylor (n 32), pp. 89-108.

44 Taylor (n 32), p. 91.

45 M. Peña Chacón, "Enverdecimiento de las Cortes Latinoamericanas, últimos avances jurisprudenciales", 2020, p. 272 Diario Ambiental (online); M. Peña Chacón, "Del derecho ambiental al derecho ecológico, El caso de Costa Rica" (online); and M. Peña Chacón, "Derechos Humanos y Medio Ambiente", Universidad de Costa Rica, 2021, p. 291.

46 OC-23/17 (n 11) § 57.

47 taylor (n 32), p. 92.

rights with the recognition of a profound interdependence of humans and nature (immersive anthropocentrism) and a duty to respect all forms of life as a fundamental ethical principle (ecocentrism).[48]

Overall, ecological human rights give rise to considerations about a wide range of ecosystem services and the entities that receive those services, from the need to prevent and repair ecological damage beyond the locality, to the long-term benefits of humans and non-human entities.[49]

The evolution of the Strasbourg system towards this regime is possible since it does not contradict the historical human-centred foundations of the ECHR, taking into account the undisputed interconnections between the human being and the natural environment,[50] and the indivisibility and interdependence of all human rights.[51]

3.2. Ways forward for the ECHR system

One way to ensure a transition to ecological human rights would be for member States to enact an autonomous right to a healthy environment, understood as having a subjective (anthropocentric) and an objective (ecocentric) dimension. A political process to this end is underway within the Council of Europe.[52] But there is a risk that, even if the law is successfully adopted (at the end of the process which would necessarily take many years[53]), it will remain effectively inoperative[54] until the ECtHR is conceptually ready and willing to move away from the current legal paradigm.

So, irrespective of the eventual recognition of the right to a healthy environment, the evolution could be triggered by the gradual integration of "minimum ecological standards" into the "fair balance" (proportionality) review of human

48 Lambert (n 25), pp. 3-5, 19 and 22.

49 Kobylarz 2022 (n 2).

50 Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, D. R. Boyd, Human rights depend on a healthy biosphere, 15 July 2020, A/75/161.

51 Vienna Declaration (No. 26) Part I Article 5; and Resolution adopted by the United Nations General Assembly, The Human Right to a Clean, Healthy and Sustainable Environment, A/RES/76/300, 28 July 2022, Preamble.

52 Resolution 2396 (n 25) § 14.3; and Recommendation 2211 of the CoE Parliamentary Assembly, 29 September 2021.

53 For example, in the case of Protocol No. 12, which extended the limited scope of Article 14 of the ECHR by providing for a general prohibition of discrimination, four years elapsed between the date on which the Committee of Ministers first instructed the Steering Committee for Human Rights to examine the desirability and feasibility of the new legal instrument and the date of adoption of the Protocol. It took another five years before the Protocol entered into force. See Explanatory Report on Protocol No. 12 to the ECHR, Rome, 4.XI.2000 and Treaty Details No. 177.

54 K. Morrow, "The ECHR, Environment-Based Human Rights Claims and the Search for Standards", in Turner (n 2), p. 58.

rights interference and victim status. These minimum ecological standards are defined here by reference to a set of notions that emanate from the legal paradigms of immersive anthropocentrism and ecocentrism (3.2.1.);[55] that take due account of the climate and biodiversity emergencies (3.2.2.); and that include the concepts of sustainable development and sustainable use of natural resources; the principles of intergenerational equity (3.2.3.), precaution and *in dubio pro natura* (3.2.4.).[56]

The judicial integration of minimum ecological standards is illustrated by decisions of the IACtHR, the Human Rights Committee (hereafter the "HRC") and constitutional courts in Latin America, known as ecologically progressive.[57] For reasons of space, this article does not describe how minimum ecological standards could concretely be implemented in the ECHR system. This topic is extensively covered by the author in her article: "*Balancing its way out of strong anthropocentrism: Integration of 'ecological minimum standards' in the European Court of Human Rights' 'fair balance' review.*"[58]

3.2.1. The new legal paradigms

Immersive anthropocentrism recognises that, in order to thrive, humans need and have the right to live in harmony with nature (the object of law).[59] The IACtHR has recognised that for indigenous peoples there is a special relationship between the territory and natural resources that are necessary for their physical and cultural survival, and for the development and continuity of their worldview.[60] This special relationship has been protected from the adverse effects of environmentally damaging activities by he right to property.[61] The IACtHR has also incorporated the immersive vision into the right to a dignified life, which encompasses the obligation to "provide the conditions for a full and possible existence" of a community, as a whole, and its individual members.[62] The UNHRC, in turn, has recognised that not only indigenous groups, but also small-scale farmers, have a particular attachment to and dependence on land

55 Resolution 2396 (n 25) § 6 *in fine*.

56 Compare Taylor (n 32), p. 100.

57 Kobylarz 2022 (n 2).

58 Ibid.

59 1982 World Charter for Nature, Annex, *Whereas*: (b).

60 IACtHR, Case of *Yakye Axa Indigenous Community v. Paraguay*, 17 June 2005, § 135.

61 For example, IACtHR, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 31 August 2001; Yakye Axa (n 60); IACtHR, *Sawhoyamaxa Indigenous Community v. Paraguay*, 29 March 2006; IACtHR, *Saramaka People v. Suriname*, 28 November 2007; *Xákmok Kásek Indigenous Community v. Paraguay*, 24 August 2010; IACtHR, Case of the *Kichwa Indigenous People of Sarayaku v. Ecuador*, 27 June 2012; and IACtHR, Case of the *Kaliña and Lokono Peoples v. Suriname*, 25 November 2015. See also E. Grant, "American Convention on Human Rights and Environmental Rights Standards", in Turner (n 2), pp. 67-80.

62 *Yakye Axa* (n 60) § 162; and *Sawhoyamaxa* (n 61), §§ 150-178; see also concurring opinion of Judge García Ramírez, §§ 18-23. See also Grant (n 61), pp. 80-91.

that is not contaminated by agrochemicals. Their crops and the natural resources necessary for their livelihoods are elements of their "way of life" which is protected by the right to privacy, family and home.[63] Moreover, for indigenous peoples, pollution can also have serious intangible impacts, in violation of the right to culture.[64]

The key to immersive anthropocentrism is to "[realise] that human beings are immersed in a set of ecosystems."[65] Ecosystem services can serve as part of a formal legal test for the victim status or legal standing in environmental cases.[66] In a Mexican case concerning the destruction of mangroves during works to convert a wilderness area into a recreational park, the constitutional action (*amparo*) was brought by residents of a ten-kilometre radius who claimed to be personally affected by the loss of services provided directly and indirectly by this ecosystem.[67] The Supreme Court granted standing to a resident of the nearest town under the new principle that the diffuse interest in protecting the environment had to be related to the personal and particular situation that the claimant had with specific ecosystem services in his or her "adjacent environment."[68] Causality does not correspond to the classical legal causality scheme because the elements that produce the environmental impact are diffuse and add up to each other.[69] Moreover, the impacts are not always immediately perceptible to humans.[70] This implies that "the existence of physical evidence cannot be a necessary condition for demonstrating an alteration or damage to an environmental service."[71] But the concept of ecosystem services is not a legal obstacle for judges, as demonstrated by the Costa Rican Supreme Court's ruling on bee contamination. This case arose from a constitutional action brought by individuals who claimed that the rights to a healthy environment and food security were violated by the State's policy of promoting the use of agrochemicals. Based on science, the court recognised that the use of neonicotinoids in agriculture could pose a risk to honey bees and that "the reduction of the pollinator population [was] a threat to food security, the export of agricultural products

63 HRC, *Portillo Cáceres et al. v. Paraguay* (CCPR/C/126/D/2751/2016), §§ 7.2.-7.53, 20 September 2019; and *Oliveira Pereira and Sosa Benega, indigenous community of the Agua'ẽ camp of the Ava Guaraní people v. Paraguay*, no. 2552/2015, 14 July 2021 (CCPR/C/132/D/2552/2015), §§ 8.2.-8.4.

64 Ava Guaraní (n 63) § 8.6.

65 "Carpintero Lagoon Case", Liliana Cristina Cruz Piña et aure v. Mayor de Tampico, estado de Tamaulipas, and others, Supreme Court [Mexico] no. 307/2016, 14 November 2018, § 125.

66 Ibid, §§ 147-173; and "Aquifers Case", Supreme Court [Mexico] no. 649/2019, 11 March 2020, § 32 (p. 20).

67 "Carpintero Lagoon Case" (n 65), §§ 31 and 32.

68 Ibid, §§ 147-173.

69 Ibid, § 98.

70 Ibid, § 131.

71 Ibid, § 131.

and biodiversity."[72] Lastly, the Colombian Supreme Court granted a guardianship action to young non-indigenous urban dwellers who felt affected by massive logging in the Amazon forest as it contributed to global warming. The court, relying on science, concluded that the country faced imminent and serious harm because of the chain of physical effects beyond the region: increased deforestation produced CO2 emissions that caused the greenhouse effect and global warming that destroyed biodiversity and disrupted water cycles.[73] This led to the interdependence between the collective right to a healthy ecosystem and the claimants' individual rights to life, health and human dignity.[74]

Ecocentrism,[75] in turn, promotes the direct protection of nature, based on the intrinsic value of all natural entities, irrespective of their usefulness to humans.[76] In international law, ecocentrism was first introduced by the Council of Europe's 1979 Bern Convention on the Conservation of Wildlife and Natural Habitats in Europe.[77] It was subsequently included in a series of international documents[78] and, importantly for the ECHR system, the 2021 Council of Europe Parliamentary Assembly Resolution No. 2396 on the right to a healthy environment.[79]

Humanity is seen as an integral, but not privileged, part of nature.[80] The relationship between human and non-human beings is based on symbiosis, respect and interspecies solidarity.[81] For the Supreme Court of Argentina, addressing

72 "Honeybees Case", Supreme Court, Constitutional Chamber [Costa Rica] no. 24513 – 2019, 6 December 2019, Considerando VIII.

73 "Amazon Forest Case", Andrea Lozano Barragán, Victoria Alexandra Arenas Sánchez, Jose Daniel and Felix Jeffry Rodríguez Peña and others v. President of the Republic and others, STC4360-2018, Supreme Court [Colombia] 5 April 2018; Consideraciones 4 (p. 15), 5 (p. 16) and 11 (pp. 33-36).

74 Ibid, Consideraciones 2 (p.13).

75 Ecocentrism (derived from the Greek word for 'home') attaches equal importance to the living and non-living elements of the environment.

76 A. Naess, "The Shallow and the Deep, Long Range Ecology Movement", 1972 and J. Nash, "Wilderness and the American Mind", 1967, both in Redgwell (n 26), p. 80; A. Naess, "There is No Point of No Return", *Penguin Books – Green Ideas*, 2021; A. Leopold, "A Sand County Almanac: With Other Essays on Conservation from Round River", Oxford University Press, New York, 1949.

77 Preamble, 1979 Bern Convention Convention on the Conservation of European Wildlife and Natural Habitats.

78 1982 World Charter for Nature, Annex, *Convinced that*: (a)); 1992 Convention on Biological Diversity (Preamble); 2000 International Covenant on Environment and Development of the International Union for Conservation of Nature (Article 2); and 2000 Earth Charter (Article 1).

79 Resolution 2396 (n 25) § 6 *in fine*.

80 1982 World Charter for Nature, Annex, *Convinced that*: (a); "Man Belongs to the Earth: international co-operation in environmental research", *Man and the Biosphere Programme*, UNESCO (1988); See also "Atrato Case" (n 26) §§ 5.9 and 5.10.

81 E. Macpherson and F. Clavijo Ospina, 'The pluralism of river rights in Aotearoa, New Zealand and Colombia', (2018) 25 *Water Law*, 283, 285.

the issue of the exploitation of glacier water reserves, the concept of 'climate justice' invites judges to integrate multiple actors in order to achieve a more systemic protection of ecosystems and biodiversity.[82] The ecocentric approach has also been confirmed in the most recent jurisprudence of the IACtHR, notably in the advisory opinion OC-23/17 and the judgment in the *Lhaka Honhat* case. It was explicitly stated that the right to a healthy environment protects the elements of nature:

> "as legal interests in their own right [...], not only because of the benefits they provide to humanity or the effects their degradation may have on other human rights [...], but because of their importance to the other living organisms with which we share the planet which also deserve full protection." [83]

The most extreme expression of ecocentrism in law has been the attribution of legal personality to nature or its elements.[84] For example, Colombian constitutional judges have recognised that, as legal persons, the Atrato River and the Amazon forest have rights distinct from the rights of the communities living in these ecosystems. These are the rights to protection, conservation, maintenance and restoration of these entities by the State and by ethnic communities.[85]

But ecocentrism can also function without nature being the subject of law, for example through the principle *in dubio pro natura*. What is essential is that nature "has a legally recognised value and dignity".[86] For example, the Colombian Constitutional Court prohibited recreational hunting as contrary to the duty to protect animals from suffering which arose, not from human morality, but from the "higher interest" of protecting wildlife as part of the environment.[87]

The ecocentric approach also implies that citizens or associations, as defenders of the collective interest, can fulfill their ethical and legal duties towards nature.[88] While a law is not required to grant *actio popularis* in its broadest form

82 "Glaciers Case", Barrick Exploraciones Argentina S.A. y v. Estado Nacional, Supreme Court [Argentina], no. CSJ 140/2011 (47-B)/CS1, 4 June 2019, Considerando 21.

83 OC-23/17 (n 11) § 62; and IACtHR, Case of *Indigenous Communities Members of the Lhaka Honhat (Our Land) Association v. Argentina*, 6 February 2020, § 203.

84 C.D. Stone, "Should Trees Have Standing? – Towards Legal Rights for Natural Objects", 1971, 45 *Southern California Law Review*; Redgwell (n 28), p. 83; Taylor (n 32), p. 92; D. Bonilla Maldonado, "The Rights of nature and a new constitutional environmental law", in *Human Rights and the Environment, Legality, Indivisibility, Dignity and Geography*, E. Daly and J. R. May, eds., Elgar, 2019, VII, pp. 310- 322.

85 "Atrato River Case" (n 26) §§ 9.27, 9.32 and 10.2.(1); Amazon case (n 73) Consideraciones 5.1. and 5.2. (pp 18 and 19), 13 (pp 41-45) and 14 (p 45).

86 Stone (n 84), p. 458.

87 "Sport Hunting Case" Constitutional Court [Colombia], Judgment C-045-19, 6 February 2019, § 6.4, p. 60.

88 F. Ost, "La nature hors la loi : l'écologie à l'épreuve du droit", La Découverte, Paris 2003; and Lambert (n 25) pp. 3 and 21; OC-23/17 (n 11) § 62.

(allowing anyone to challenge an environmental decision, act or omission),[89] it cannot effectively exclude all or almost all members of the public from challenging such acts or omissions contrary to national law.[90]

In the event of a favourable ruling, a court orders reparations to nature[91] in order to ensure "the recovery or rehabilitation of the environmental functionality, life cycles [of nature], its structure and evolutionary processes."[92] In the Amazon case, the Colombian court ordered the State and local communities to reduce logging and to enter into an "intergenerational pact for the life of the Amazon."[93] The IACtHR Court, in turn, attempted to give real ecological consequences to the *Lhaka Honhat* case. It ordered – beyond measures aimed at the restitution of ancestral property and the improvement of the quality of life of the claimant communities – the fight against illegal logging in general.[94] This is an important step even if the practical effectiveness of this general measure was inevitably undermined by the fact that the IACtHR excluded it from its judicial review.[95]

3.2.2. Climate and biodiversity emergencies

With regard to the social and economic effects of the climate and biodiversity crises, science will be of unprecedented importance in deciding complex and often novel legal issues concerning, for example, the legal status of actual and potential victims; extraterritoriality; shared State responsibility; or causality. The seriousness and urgency of climate and biodiversity problems are also expected to weigh heavily in the balancing of ecological interests against general economic interests or individual fundamental rights or freedoms.

As for the latter, the Supreme Court of Costa Rica has explicitly held – in the context of water management – that the guarantee of economic gains or freedom of enterprise are secondary to "a favourable evolution of the environment and natural resources."[96] In the same vein, the Mexican Supreme Court declared

89 Article 437 of the Constitution of Ecuador, Article 59 of the Organic Law on Jurisdictional Guarantees and Constitutional Control, and Constitutional Court, no. 166-15-SEP-CC, 20/05/2015; or PIL in India, see Sub hash Kumar v. State of Bihar, (1991) 1 SCR 5 and M.C. Mehta v. Union of India, SCR 86 1991 SCC (2) 353 (1991), Supreme Court of India.

90 Aarhus Implementation Guide, pp. 197-198; and Access to Justice in EU Law. A Legal guide on Access to Justice in environmental matters (Client Earth 2021), p. 38.

91 Stone (n 84), p. 458.

92 "Mangroves Case" Constitutional Court [Ecuador] no. 166-15-SEP-CC, 20 May 2015, pp. 11 and 12; See also the report of the Association des Professionnels du Contentieux Économique et Financier Commission "Préjudice écologique", La réparation du préjudice écologique en pratique, APCEF, 2016, p.27.

93 "Amazon Forest Case" (n 73), p. 48.

94 *Lhaka Honhat* (n 83) § 333.

95 Ibid, § 336.

96 "Natural Heritage Sites Case" Supreme Court, Constitutional Chamber [Costa Rica], no. 2019-17397, 11 September 2019, Considerando VIII (5).

unconstitutional a regulation leading to the authorisation of an increase in the ethanol content of gasoline, noting that the purely economic benefits that could possibly be generated by its use had to be weighed against the risks that this practice could pose to the environment, as well as the obligations of States to reduce greenhouse gas emissions and thus combat climate change.[97] For the same reasons, in the case concerning the destruction of a coastal mangrove forest, the Mexican judges extended legal protection to an urban area previously degraded by human activity.[98] Based on scientific evidence, the court concluded that protecting and conserving mangrove ecosystems was a national and international priority.[99]

In the doctrine of ecological human rights, the balance of economic and ecological interests could be based, first, on the political consensus around ambitious global and national environmental action; second, on the obligations of States arising from international climate and biodiversity protection mechanisms, and/or national laws derived from them; and third, on the scientific recognition of the climate and biodiversity crises, both as a "reality of the situation complained of" and as a European (and international) consensus. Overall, the crisis situation could justify the expansion of the State's positive obligations – substantive and procedural.

3.2.3. Sustainable development, sustainable use of natural resources and intergenerational equity

The interconnected concepts of sustainable development and the sustainable use of natural resources, as well as the principle of intergenerational equity, imply limits to the exploitation of natural resources, either to allow them to regenerate or to preserve them for future use. These restrictions may be motivated by solidarity with other people (current and/or future generations), or with non-human living elements of nature. Sustainability can also be seen in terms of responsibility towards the environment and the moral duty to preserve it.

In the case concerning the extraction of water for human consumption within natural heritage sites,[100] the constitutional judges of Costa Rica recognised that the environment provides "potential for development", but not to jeopardize the heritage of present and future generations, development must be "rational", "reasonable" and "intelligent."[101] The regenerative capacity of the environment must not be disrupted in order to be available to humans in the long term.[102] Furthermore, the State and citizens have an obligation to

97 "Ethanol Case" Supreme Court [Mexico] no. 610/2019, 15 January 2020, pp. 75-80 (draft).
98 "Carpintero Lagoon Case" (n 65), §§ 217 and 218.
99 "Carpintero Lagoon Case" (n 65) §§ 143 and 146.
100 "Natural Heritage Sites Case" (n 96) Considerando VI.
101 ibid.
102 "Natural Heritage Sites Case" (n 96) Considerando VIII (5).

protect and preserve natural resources.[103] In another case, the same court held that it had a mandate to protect the environment itself, namely animals and their habitat, from "manifestly harmful situations" in particular where the environmental sustainability of a project (here, taking water from a river that was a natural habitat of an endangered species for intensive crop irrigation) had not been determined by means of a comprehensive and rigorous environmental impact assessment.[104] So, while farmers must have access to water, a "perfect balance" must be found between agriculture, food and the environment.[105] The Argentine Supreme Court which does not recognise the rights of nature, perceives the environment as "a collective good, of common and indivisible use." The environment is not "an object intended for the exclusive service of a man, subject to appropriation according to his needs."[106] Natural resources, such as water, must be protected in order for nature to maintain its capacity for regeneration and resilience, as well as its functions as a system that serves humans and biodiversity.[107] Therefore, individual rights to explore and exploit natural resources must go hand in hand with collective rights to ensure the sustainability of the resource.[108] Finally, in the case concerning the contamination of a river and its basin, the Colombian Constitutional Court relied on the concepts of sustainable development and "global solidarity", in order to hold that "the environmental heritage of a country does not belong exclusively to the people who inhabit it, but also to future generations and to humanity in general."[109]

In the doctrine of ecological human rights, environmental sustainability is treated as a legitimate general objective that limits the exercise of individual rights. Furthermore, the use of natural resources is no longer approached through an extractive prism, but rather, with reference to the legal paradigms of immersive anthropocentrism and ecocentrism. The assessment of the proportionality of human rights interference is polycentric in the sense that it takes into account the socio-cultural and natural interests of stakeholders beyond the bilateral legal dispute under litigation.[110]

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103 Ibid, Considerando VIII (5).

104 "Otter Case" Supreme Court, Constitutional Chamber [Costa Rica], no. 08486-2014, 13 June 2014, Considerando VI and X.

105 Ibid, Considerando VIII.

106 ibid.

107 "Atuel Case" La Pampa, Provincia de v/ Mendoza, Provincia de s/uso de aguas, Supreme Court [Argentina], no. CSJ 243/2014 (50-L) ICS1, 1 December 2017, Considerando 11; and "Glaciers Case" (n 82) Considerando 17 and 18.

108 "Glaciers Case" (n 82) Considerando 21.

109 "Atrato River Case" (n 26) § 5.8.

110 "Graciers Case" (n 82) Considerando 17.

3.2.4. Precautionary principle and in dubio pro natura

The precautionary principle and the *in dubio pro natura* principle set minimum ecological standards in the context of precautionary decisions and scientific uncertainty. The precautionary principle is a fundamental principle of environmental law.[111] It generally states that public authorities may be required to anticipate and prevent environmental damage even when the threat is not fully confirmed by science.[112]

Related to the precautionary principle is the *in dubio pro natura* principle, which is considered to be "a general interpretative mandate of environmental justice."[113] According to this principle, in the event of a conflict between environmental and other interests, where environmental damage or risk cannot be established with certainty, all necessary measures must be taken in favour of the environment.[114] Thus, the *in dubio pro natura* principle operates not only in scientific uncertainty but also in legal uncertainty.

According to Mexican jurisprudence, the absence of knowledge or scientific consensus is not synonymous with the absence of risk or the existence of an acceptable risk. Risk analysis must be supported by studies reflecting reliable data.[115] The precautionary principle imposes a duty on the public administration to warn, regulate, control, monitor or restrict certain activities that pose a risk to the environment. In this sense, this principle justifies decisions that would otherwise be contrary to the principle of legal certainty.[116] The absence of prior environmental assessment may in itself endanger the ecosystem, in direct violation of the precautionary principle and the principle *in dubio pro natura*. It is therefore irrelevant whether or not ecological damage has actually occurred.[117] Precautionary measures may not be delayed or superficial either.[118]

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111 1992 Rio Declaration on Environment and Development, Principle 15; International Court of Justice, Gabčíkovo-Nagymaros (Slovakia v. Hungary), 25 September 1997; and Pulp Mills on the River Uruguay (Argentina v. Uruguay), 20 April 2010; 1992 Framework Convention on Climate Change, Article 3(3); Treaty on the Functioning of the European Union, Article 191(2).

112 Rio Declaration (n 111).

113 "Carpintero Lagoon Case" (n 65) § 107.

114 2016 IUCN World Declaration on the Environmental Rule of Law, Principle 5; see also Majul, Julio Jesús v/ Municipalidad de Pueblo General Belgrano y otros s/ acción de amparo ambiental, Supreme Court [Argentina], 19 July 2019, §§ 11-13; "Carpintero Lagoon Case" (n 65) § 105; and "Atrato Case" (n 26) §§ 7.39-7.41.

115 A. Rabasa et al, "Contenido y alcance del derecho humano a un medio ambiente sano", *Cuaderno de jurisprudencia no. 3*, Centro de Estudios Constitucionales de SCJN, July 2020, pp. 14-19, cases n^{os} 921/2016 and 923/2016.

116 "Carpintero Lagoon Case" (n 65) § 93.

117 Ibid, §§ 257-262.

118 "Los Cedros Forest Case", Constitutional Court [Ecuador] no. 1149-19-JP/21, 10 November 2021, §§ 66, 132-137 and 146.

In its procedural aspect, the precautionary principle requires that, when the cause of the alleged harm is an activity under the responsibility of a public authority, it is incumbent upon the State to produce convincing evidence that there is no harm to the rights of the alleged victim.[119] As expressed by the Constitutional Court of Ecuador in the Los Cedros Forest decision, the claimant's allegation of environmental risk must be presumed true when the defendant public entity has failed to refute the allegation of environmental risk or provide relevant information in response.[120] In the same context, the Mexican Supreme Court has affirmed that the reversal of the burden of proof is a tool by which the judge can obtain all the evidence necessary to identify the risk or reality of environmental harm,[121] and to examine the case on the basis of evidentiary standards such as "best available information" and "serious, precise and concordant facts."[122] The Mexican judges considered, for example, that the authorities had not properly assessed the risks of ethanol-enriched gasoline on the basis of a pluralistic, detailed and participatory scientific and social assessment.[123] Above all, the judges adopted a fully ecocentric perspective, considering that "in view of the need to protect both the population and various animal and plant species," it would have been essential to ensure adequate consultation of all relevant stakeholders.[124]

In their substantive part, the precautionary principle and the *in dubio pro natura* principle require that public authorities and individuals refrain from taking, or actively mitigate, the risk of serious and irreversible environmental damage, even when this risk is not fully proven by currently available scientific data. While these cannot be hypothetical effects or imaginary risks, the environmental damage need not be immediately and materially perceptible to humans.[125]

In accordance with the doctrine of ecological human rights, where there is uncertainty, the environmental dispute must be regulated by law and resolved in court in a manner most conducive to the protection and preservation of natural resources and related ecosystems.[126] In order to properly understand the risks, judges are required to "seek, on a case-by-case basis, the tools or methods necessary to understand the functioning of an ecosystem, as well

119 1998 Wingspread Declaration.

120 "Los Cedros Forest Case" (n 118) § 129.

121 "Carpintero Lagoon Case" (n 65) §§ 102, 242 and 243.

122 Ibid, § 244. See also, Rabasa (n 115) and Communication from the European Union Commission on the precautionary principle, COM/2000/0001, 2 February 2000.

123 "Ethanol Case" (n 97) § 73.

124 Ibid, § 74.

125 "Carpintero Lagoon Case" (n 65) § 131; The Future Brief, "Science for Environment Policy. The precautionary principle: decision-making under uncertainty", European Commission, September 2017, page 5; Pfizer Animal Health SA v. Council of the European Union, Court of First Instance, T-13/99, 11 September 2002, ECR II-03305.

126 "Carpintero Lagoon Case" (n 65) §§ 132 and 133; Majul (n 114), § 13.

as the environmental services it provides, always with a view to ensuring its conservation."[127]

4. Conclusion

It is not suggested that international human rights law alone can solve environmental problems, nor is it submitted that in the absence of more appropriate mechanisms, the ECtHR should act as a "European environmental court." Instead, it is argued that the adverse social and economic effects of the environmental crisis are the new reality in which the ECtHR must find a pragmatic way to operate. The proposed minimum ecological standards, while far from exhaustive, are appropriate to guide the interaction between the environmental concerns of today's society and human rights. Ultimately, they are likely to lead to better environmental protection. Judicial incorporation of these standards would, in itself, be an important step towards ecological human rights, but it would also prepare the necessary conceptual basis for the ultimate addition of a right to a healthy environment, whether as a result of the ongoing political process or an explicit judicial decision.

127 "Carpintero Lagoon Case" (n 65) § 134.