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ENVIRONMENTAL PROTECTION AS A HUMAN RIGHT

ASSESSING THE POTENTIAL OF SUBSTANTIVE HUMAN RIGHTS IN GUARANTEEING EFFECTIVE REMEDIES IN ENVIRONMENTAL-RELATED HUMAN RIGHTS VIOLATIONS

Dissertação no âmbito do Mestrado em Relações Internacionais - Estudos da Paz, Segurança e Desenvolvimento, orientada pela Professora Doutora Raquel Beleza da Silva e apresentada à Faculdade de Economia da Universidade de Coimbra.

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Environmental Protection as a Human Right

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Além-fronteiras e pelas brisas do campo.

Abstrato

A proteção e promoção dos direitos humanos, assim como questões ambientais e climáticas tornaram-se dois dos temas mais proeminentes do nosso tempo. Ambos são discutidos e vividos diariamente, especialmente devido à rápida escalada da urgência climática e do seu impacto na vida humana e animal. O sexto relatório do Painel Intergovernamental sobre Alterações Climáticas veio reforçar o código vermelho relativo ao futuro das próximas gerações de viverem num ambiente saudável e sustentável. Ao mesmo tempo, na Europa, o Conselho da Europa declarava a proteção ambiental enquanto um direito humano. Em paralelo, o Conselho de Direitos humanos das Nações Unidas também passava uma declaração que reconhecia esse direito, indo ao encontro de um debate com mais de 50 anos.

Contudo, um direito humano vinculativo à proteção ambiental não foi ainda consagrado. Além disso, a construção desse direito humano não foi colocado à luz de um exercício prático. Ou seja, o atual quadro legal de direitos humanos relacionados com o ambiente não foi analisado de forma a determinar se este tem a capacidade de proteger direitos humanos substantivos face a problemas ambientais ou se, de forma a colmatar possível falhas, é realmente necessário a implementação de um novo direito humano. É aqui que reside o objetivo desta dissertação: analisar, através de casos práticos, a capacidade do sistema de direitos humanos atual de atuar como agente de proteção de si mesmo. Esta dissertação questiona a eficácia das soluções, ou recursos, em matéria de violações dos direitos humanos relacionados com o ambiente, à luz dos crescentes problemas ambientais e climáticos. Em suma, questiona-se se, na ausência de um direito humano autónomo à proteção ambiental, poderá a "ecologização" dos direitos substantivos existentes promover sua a proteção face a danos ambientais.

Palavras-chave: Direitos humanos; proteção ambiental; recurso efectivo; Convenção Europeia dos Direitos do Homem; direitos ambientais.

Abstract

The protection and promotion of human rights, as well as environmental and climate issues, have become two of the most prominent topics of our time. Both are discussed and lived daily, especially due to the rapidly escalating climate urgency and its impact on human and animal life. The sixth report of the Intergovernmental Panel on Climate Change has reinforced the code red regarding the future of the next generations to live in a healthy and sustainable environment. At the same time, in Europe, the Council of Europe declared environmental protection to be a human right. In parallel, the United Nations Human Rights Council also passed a declaration recognising this right, bringing to fruition a debate with more than 50 years old.

However, a binding human right to environmental protection has not yet been consecrated. Moreover, the construction of such a human right has not been put in the light of a practical exercise. That is, the current legal framework of human rights related to the environment has not been analysed in order to determine whether it has the capacity to protect substantive human rights in the face of environmental problems or whether, in order to address possible gaps, the implementation of a new human right is actually necessary. This is where the aim of this dissertation lies: to analyse, through practical cases, the capacity of the current human rights system to act as an agent of protection of itself. This dissertation questions the effectiveness of remedies, or remedies, for environment-related human rights violations in light of growing environmental and climate problems. In short, it questions whether, in the absence of an autonomous human right to environmental protection, can the 'greening' of existing substantive rights promote their protection in the face of environmental harm.

Key-words: Human rights; environmental protection; effective remedy; European Convention on Human Rights; environmental rights.

Abbreviations

- ACHPR - African Charter on Human and Peoples' Rights
- AmCHR - American Convention on Human Rights
- CoE - Council of Europe
- CJEU - Court of Justice of the European Union
- CRC - Convention on the Rights of the Child
- ECHR - European Convention on Human Rights
- ECtHR – European Court of Human Rights
- EU - European Union
- GHG - greenhouse gases
- ICCPR - International Covenant on Civil and Political Rights
- ICESCR - International Covenant on Economic, Social and Cultural Rights
- ICJ - International Court of Justice
- IPCC - Intergovernmental Panel on Climate Change
- RoN - rights of nature
- UDHR - Universal Declaration on Human Rights
- UN - United Nations
- UNEP- United Nations Environment Program
- UNFCCC - United Nations Framework Convention on Climate Change
- UNHRC - UN Human Rights Council

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Introduction

The protection and promotion of human rights, environmental and climate issues have become two of the most prominent subjects of our time. Both, human rights and environmental issues, are widely discussed by governments when drawing policies, and by media in general. The United Nations (UN) Secretary-General, António Guterres, on its General Assembly Briefing of the 24th February 2021, called for a better action in the field of Human Rights, mentioning "the rights of future generations, including to a safe, clean and healthy environment" as a major focus for the future (United Nations, 2021). The findings of the IPCC Sixth Assessment Report on Climate Change (published in September 2021[1]), came to reinforce the urgency of the climate crisis, with UN Secretary-General calling it "a code red for humanity" (United Nations, 2021a).

The link between environmental problems and their impact on human life - therefore on human rights - seems very clear at first sight: for instance, more droughts will put food security and human lives at risk (McInerney-Lankford *et al*, 2011). But before further developing of this dissertation subject, I would like to make a brief contextualisation regarding my interest in the subject.

During my master's first year, I was asked to choose an article either from the EU Charter of Fundamental Rights (the Charter) or from the ECHR and study its degree of europeanisation. While searching for the article I wanted to work on, I came across one unique article: Article 37 of the Charter, titled "Environmental Protection" that stated "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". My paper on the level of europeanisation of this right raised my interest on the international legal dimension of environmental protection as a human right. I understood that existing legal means - more often than not, - emphasise human relations and responsibility towards the environment, as well as human impact on climate change and environmental pollution; they do not focus on safeguarding human life or human rights from environmental damage or climate change. Another

[1] Available online https://www.ipcc.ch/sr15/ .

surprising thing to find was that the main international human rights treaties[2] do not mention the human right to a clean, sustainable and healthy environment (Atapattu & Schapper, 2019); and the Charter's article 37 gives EU national governments and the EU itself a responsibility of considering the environment when developing (new) policies, meaning that a rights-base approach is still not taken into account here.

Likewise, it was evident that, regarding access to justice on environment-related human rights violations, plaintiffs evoke the right to life (or other substantive rights) when appealing to court. CoE page on Human Rights and the Environment[3] demonstrates that by offering us a glimpse on about 150 judged and still pending cases relating to violations of ECHR provisions thanks to environmental pollution[4]. At EU level, the CJEU[5] has judged cases based on art.37 violation but those cases refer to the non-respect by governments or local authorities of their obligation regarding environmental protection as established by EU law.

Environmental protection is recognised as essential for the fully accomplishment of most human rights (UN General Assembly, A/HRC/37/59, 2018), namely the right to life or the right for the respect for private and family life. The UN itself affirms "human rights and the environment are intertwined; human rights cannot be enjoyed without a safe, clean and healthy environment"[6]. Even though attention regarding the link between human rights and the environment is not new and some work for the "enjoyment of a safe, clean, healthy and sustainable environment" has been done (Atapattu & Schapper, 2019; UN Environment Program, 2015; Lewis, 2018), it was not until October 2021 that a resolution and a declaration regarding the right to a healthy and safe environment were adopted by the CoE and the UNHRC[7], but these acts are of non-binding nature.

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[2] UN treaties include the Universal Declaration on Human Rights (UDHR), the two International Covenants (ICCPR and the ICESCR) and the CRC. Here I take into account two regional human rights systems treaties, the ECHR and the American Convention on Human Rights (McInerney-Lankford, 2011).

[3] https://www.coe.int/en/web/portal/human-rights-environment

[4] For CoE cases see https://www.echr.coe.int/Documents/FS_Environment_ENG.pdf;

[5] EU Fundamental Rights Agency case-law database available here https://fra.europa.eu/en/case-law-database;

[6] *Advancing environmental rights: What is the Environment Rights Initiative*. UN Environment Programme.

[7] The declaration passed by the UN Human Rights Council will still be debated in General Assembly during the Ordinary Session, beginning in September 2022.

A human right to a healthy environment is being discussed since the 70's, with the signature of the Stockholm Declaration[8], where the link between human rights and the environment was done for the first time (Atapattu & Schapper, 2019) and the establishment of the UNEP. In 1992, the debate around human rights and the environment had an impulse with the Rio Declaration[9], where it was adopted the UNFCCC. Later, in 2015, the Paris Agreement preambule reinforced the relations between the environment and human rights (Lewis, 2018). In 2018, the UN special rapporteur on human rights obligations relating to the enjoyment of a healthy and sustainable environment, John H. Knox, presented a report to the UN Human Rights Council where he laid out 16 principles whose goal were to move forward the "evolving relationship between human rights and the environment" (UN General Assembly, A/HRC/37/59, 2018). Likewise, Knox underlined in his 2018 report[10] the mutual beneficial relation between human rights and the environment: one was crucial to the other. A call for greater protection of the environment through a human rights lenses has also been done, frequently, by the UN Secretary-General[11] and by the IPCCC's reports on climate change[12].

Despite the urgency and efforts in addressing the enjoyment of human rights in a healthy environment, the current international human rights legal framework on that matter is based on soft-law non-binding instruments or on the "greening" of existing rights, meaning the interpretation and application of existing rights, by judicial instances, in a way that a healthy environment is included in their sphere (Atapattu, 2016; Atapattu & Schapper, 2019; Knox, 2020). International efforts shed light upon an increasingly will to recognise a human right to a healthy environment, but that recognition continues widely debated. When breaches of human rights provisions happens, due to environmental harm,

[8] More information available at https://www.un.org/en/conferences/environment/stockholm1972 or Anton & Shelton (2011);

[9] More information available at https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf

[10] UN General Assembly, A/HRC/37/59, 2018;

[11] *Secretary-General's General Assembly Briefing on the Call to Action for Human Rights*. UN Secretary-General, United Nations. Available online: https://www.un.org/sg/en/content/sg/statement/2021-02-24/secretary-generals-general-assembly-briefing-the-call-action-for-human-rights-bilingual-delivered-scroll-down-for-all-english-version

[12] *Secretary-General's statement on the IPCC Working Group 1 Report on the Physical Science Basis of the Sixth Assessment.* UN Secretary-General, United Nations. Available online: https://www.un.org/sg/en/content/secretary-generals-statement-the-ipcc-working-group-1-report-the-physical-science-basis-of-the-sixth-assessment

applicants do not have a right to environmental protection *per se* they can invoke, so substantive human rights have to be called upon. It is relevant to mention that at, national level, several constitutions, from all around the world, foresee a right to the environment. But I will be dealing with the international and regional level, not with national human rights provisions.

Knox (2020, p.87) notices “whatever the right threatened by environmental harm, States are required to protect against that harm and take steps to (…) provide for effective remedies”, in line with his framework principle 10, and defends the “greening" of existing rights by judicial instances has seen positive outcomes. According to Knox, the judiciary has been, so far, able to guarantee States comply with their duty to protect, hence protecting human rights “against gaps in laws”, while developing human rights norms regarding access to justice and the implementation of remedies that aim at "imminent and foreseeable as well as past and current violations” (UN General Assembly, A/HRC/37/59, 2018). On the other hand, the growing importance of environmental matters, namely of climate change, renders it more difficult to attain effective remedies (Addaney & Jegede, 2020). It is sometimes argued, as a way to overcome this obstacle, that a new right could improve access to justice and, therefore, facilitate the implementation of effective remedies (Lewis, 2018).

However, how can one assume that a new right could bridge that mentioned gap without first looking if the current human rights international framework works? Should not the current human rights legal framework be put to test before moving on to a new right? And how can one do it? Rights are framed within obligations of States - duty to fulfil, protect and promote human rights - and thus, in order to evaluate human right’s implementation, it is necessary to assess States compliance with these obligations. This assessment is made through some indicators, amongst them, the deliverance of adequate judicial remedies (Landman & Carvalho, 2009; Wilde, 2020).

This dissertation will focus precisely on the implementation of effective remedies. I am questioning here the efficacy of remedies in environmental-related human rights violations in light of growing environmental and climate problems, as outlined previously. A dynamic approach, that takes into account the emergence of challenges for human rights in the contemporary international order, should be done in order to affirm that judicial

decisions have positive outcomes. In sum, the question here is if, in the absence of a standalone human right to environmental protection, can the "greening" of existing substantive rights (really) deliver effective remedies? Can it foster a future-oriented protection of substantive human rights in the face of environmental harm?

In order to answer to this question, I will, in a first part, detail our human rights framework (chapter 1), then I will justify the choice of a case-study and how the case-studies were chosen (chapter 2). Finally, I will analyse (chapter 3) three case-studies (*Urgenda*, *Klimaatzaak* and *KlimaSeniorinnen Schweiz* cases), framing after the outcomes of that analysis within the concept of "effective remedy", as well as within human rights framework defining concepts. In brief, I will asses if, as Knox defends, human rights judicial instances have been able to deliver effective remedies that can protect human rights from "imminent and foreseeable as well as past and current violations", offering after a glimpse on what is proposed by scholars to better ensure that protection.

For the purposes of simplification and clarity, a "human right to environmental protection" and "right to a healthy environment" will be used as intertwined. Albeit their different formulation, their goal is the same, as it will be explained later. A safeguard relating to the actuality of the present dissertation must also be done: since the topic it deals with is very current, new developments - be they political, theoretical or social - will take place. Thus, regardless efforts to try to be as up-to-date as possible, there will be ideas or arguments that may, at some point, be outdated.

Chapter 1: Literature review

In order to develop the objective of this dissertation, an overview of the main characteristics and fundamental principles of human rights and their legal framework is needed. The theoretical framework informing this dissertation is a human rights legal framework, that provides the accurate and necessary definitions and context for its development. Here, an in-depth regard of the philosophical underpinnings of human rights will not be provided, nor will be done a description of human rights history. The focus of this dissertation is not to question human rights' theoretical basis. A more factual framework will be presented at the beginning, progressively becoming a more critical and analytical framework, conducted through the literature review.

This part will be dedicated to the development of key concepts, essential for a good understanding of the analysis chapter. Among these concepts, the reader will find legal and theoretical characteristics of human rights; an overview of the European human rights regional system; an exploration of the differences between "environmental human rights" and "human right to a healthy environment", that fits within a debate over ecocentrism and anthropocentrism, and a discussion over what is an "effective remedy".

This chapter is structured as follows: firstly, the international human rights framework will be presented by outlining its legal basis, principles and international/ regional dimension. This is followed by an overview of the European human rights regional system; its founding treaty, the ECHR, and relevant rights for the development of this research; and, to conclude this section, a reflection on the "greening" of those rights. Finally, the more critical and analytical sections of this chapter are set forth.

The international human rights framework

Human rights may be seen as 'those rights which the international community recognises as belonging to all individuals' (Ngozi, 2008, p.89) that are "universal, indivisible, interdependent and interrelated" (Atapattu & Schapper, 2019, p.8). The UN OHCHR describes them as "universal legal guarantees protecting individuals and groups against actions and omissions that interfere with fundamental freedoms, entitlements and human dignity" (2012, p.10).

Despite these straightforward definitions, human rights are still very contested on the theoretical level (McInerney-Lankfor, 2011), due to debates asserting what are "rights", their origin, who is a rights-holder and who is a duty-bearer (Anton and Shelton, 2011, p. 120), details that are at the core of human rights law. Pisillo (2021, p.3) and Lewis (2018, p.99) mention human rights may have different underlying connotations according to different philosophical schools: human rights may be seen as "natural rights", closely tied to the simple fact of human existence; they may be seen as a condition that must be accorded with contemporary values; or seen as the minimum threshold without which no human can live with - and in - dignity. These philosophical underpinnings have been useful specially when discussing human rights' pertinence or the emergence of new rights (Lewis, 2018; Leib, 2011). Regardless their importance for the development of human rights field, philosophical debates will not be the anchor of this research; on the contrary, this research will try to distance itself from them. A focus on legal and factual characteristics of human rights, as defined by international human rights law, is presented here.

THE INTERNATIONAL LEGAL FRAMING OF HUMAN RIGHTS

Human rights are enshrined in international treaties. They establish obligations between States or between States and intergovernmental bodies, such as international organisations (Pisillo, 2021). Those treaties form the international human rights law (Scheinin, 2017), as established by article 38 of the statute of the ICJ, which identifies treaties, international conventions, customary international law and general principles of law as sources of international law recognised by nations (Lee, 2000; Anton & Shelton, 2011). Human rights treaties put the individual at the centre of their concerns and provisions, while "laying down obligations which States are bound to respect"[13], giving States the responsibility of guaranteeing those provisions. This "giving of a responsibility" to States creates a system of legal protection relation between duty bearers - the state - and the right holders - the individuals (Pisillo, 2021, p.72; Atapattu & Schapper, 2019, p.41-42). These two last categories will be explained later on.

This liability system is enshrined in enforcement and monitoring mechanisms established in international human rights instruments. They ensure duty-bearers are

[13] United Nations, *The Foundation of International Human Rights Law*. Available at https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law;

fulfilling their responsibilities (Scheinin, 2017), hence framing human rights and providing for "universal legal guarantees protecting individuals and to some extent groups against actions and omissions that interfere with fundamental freedoms, entitlements and human dignity" (McInerney-Lankford, 2011, p.4). Besides creating a system of legal protection, that recognises the justiciability by courts and the liability of duty-bearers (Lee, 2000), human right treaties provide for principles that form the base of human rights law. Pisillo (2021) points two essential principles: the primacy of the individual and the universality of human rights. The first mentioned principle - the primacy of the individual - will be of interest for the conclusion, since it underpins the outcome of judicial procedures and the validity of (new) human rights provisions.

In addition to the above-mentioned principles, human rights count with other core-characteristics. Here, I will mention those of interest for this dissertation, the ones that influence the possibility of having an adequate remedy in environmental related human rights violations, and they are: characteristics regarding rights' nature - procedural or substantive; regarding the type of obligations they impose - negative or positive; and regarding who is the rights holder - the individual or a collective group (Banketas, 2020).

HUMAN RIGHTS PRINCIPLES

The first category relates to how the right is written and formulated in international treaties: procedural rights are process-linked, as in the right to information or to seek redress, while substantive rights are absolute rights provisions that provide positive or negative guarantees, such as the right to life or the prohibition of torture. Procedural environmental rights (this concept will be defined with greater detail in a later section) are found in international treaties, as the Aarhus Convention, while substantive rights are the ones enshrined in core human rights treaties, as is the UDHR or the ECHR.

The second category, regarding the type of obligations, means that duty-bearers, meaning the States, is "obliged to refrain from interfering directly or indirectly with the enjoyment of the right" (Atapattu & Schapper, 2019, p.8), in the case of negative obligations. A state is, on the other hand, obliged to fulfil human rights by promoting and by protecting them from third parties interference. Several ways of fulfilling and promoting human rights may be put in place, such as the developing of adequate laws to prevent human rights violations, or an adequate and functional judicial system where

victims can assess redress measures. Likewise, a state's non-action is considered a violation because it indirectly interfered with the protection of human rights guarantees (Pisillo, 2021). State's respect towards refraining from violating substantive rights, like the right to life, is intrinsically connected to environmental harm. Given that it is up to the state to regulate internal environmental dimension and to contribute to the respect of transnational and cross-border environmental problems, both negative and positive obligations are essential to assess whether a state is fulfilling human rights provisions.

Finally, the last category, of who qualifies as a right holder, either individuals, collective groups or both, touches a discussion in the human rights field. As briefly mentioned, for instance, Pisillo (2021) defends throughout his work the primacy of the individual, while Banketas (2020) mentions collective rights. In what concerns the human right to a healthy environment, it is usually framed as a right of future generations, as a right of indigenous groups (Déjeant-Pons & Pallemaerts, 2002), due to their liaison with nature and historical lands, or as collective interest (Déjeant-Pons & Pallemaerts, 2002). As so, it is framed as a collective right, and that goes against traditional views (Pisillo, 2021) that human rights covers only individuals. This dichotomy, while not being a focus of this research, is found in the analysis chapter as well as it is also found in literature focusing in exploring the current international legal state of a right to a healthy environment (just to cite some examples: Leib, 2011; Anton & Shelton, 2011; Atapattu & Schapper, 2019).

THE INTERNATIONAL AND REGIONAL DIMENSION OF HUMAN RIGHTS

Human Rights are organised in a legal framework defined as the "legally, politically and morally binding set of principles for governments" (Chrichton *et al.*, 2015, p. 3) and as "the set of principles, norms, rules and decisions-making procedures that States and other international actors accept as authoritative within an issue area" (Donnelly, 2013, p.14) when "discussing and applying human rights" (UNICEF, 2019), that is the international human rights system. This set of principles, or body of jurisprudence (Lewis, 2018), forms a system that can be of three different levels: international, regional or national. Regional systems developed after the international system, aligning themselves to the International regime and functioning as complementary mechanism of human rights enforcement (Garcia and Lazari, 2014).

Starting from the least comprehensive to the broadest system, there is the national level, composed by domestic legal systems, meaning States' constitutional provisions on human-rights. The second level, the regional one, was encouraged by the UN as a way of taking into account cultural, social and economical differences between countries, while ensuring a greater proximity of the rights holders with universal principles (Garcia & Lazari, 2004). As a result, five regional systems are now in force, in a more or less rigorous way: the European, which follows the European Convention on Human Rights (1950); the Inter-American, which acts according to the American Convention on Human Rights (1969); the African, which conforms to the African Charter on Human and Peoples' Rights or Banjul Charter (1981); the Arabic, which subscribes the Arab Charter on Human Rights (2004); and Asian, which follows the ASEAN Human Rights Declaration (2012). Each regional system has its own enforcement and compliance mechanisms (Anton & Shelton, 2011). The European regional system will frame the territorial scope of this research and is developed further below.

Regarding the international scope of a human right to environmental protection/ healthy environment, it is only recognised by the African regional system (Article 24: "all peoples shall have the right to a general satisfactory environment favourable to their development"[14]) and the Inter-American system via the San Salvador Protocol (article 11: "everyone shall have the right to live in a healthy environment (…)"[15]). Neither the UN system - meaning the treaties and declarations under the UN governance, which founded the human rights legal international regime through the UDHR (Ngozi, 2008) - nor the European regional system foresees a convention on environmental protection as a human right or has it proclaimed in a binding way. The human right to a healthy environment in the international system, as of today, does not exist in substance. It can be, nevertheless, understood as *a)* the "notion of an individual entitlement to a certain quality of the environment" (Déjeant-Pons & Pallemaerts, 2002, p.19); *b)* as a "substantive human right to live in a healthy environment as recognised under regional human rights law" (Atapattu, 2016, p.47); and *c)* as the "indirect enforcement of environmental protection through human rights claims" (McInerney-Lankford, 2011, p.29), also known as a procedural right

[14] Addaney & Jegede, 2020, p.13;

[15] *Ibid*, p.33.

(right to information, right to participate in policy-making and right to access to justice and effective remedies) such as the ones enshrined by the 1998 Aarhus Convention (Atapattu & Schapper, 2019). These three ideas of what a human right to a healthy environment is, entail a focus on the protection of human life or of the environment through a human rights approach; in other words, they entail an anthropocentric or an ecocentric focus on the human right to a healthy environment, whereas approaches with a more ecocentric focus lean more towards a definition of environmental human rights, rather than to human rights to the environment. A distinction between these approaches will merit our attention later on, since, at first glance, there is a clash between a basic human right principle - the primacy of the individual (Pisillo, 2021) - and the "enforcement of environmental protection" (McInerney-Lankford, 2011, p.29).

The European Regional System

Having carried a general description on the legal framework around human rights, necessary for the comprehension of basic human rights concepts and that highlighted some of those concepts, it is possible to now focus on a more targeted part of the general framework: the European regional system. To narrow my research into the European regional system is justified by my personal proximity to this system, as well as by the extensive literature and case-law to it associated; and by the ECtHR being esteemed very successful in its monitoring capacity and influencing in the international human rights framework (Mantouvalou, 2011; Banketas, 2020).

The European human rights system was founded by the signature of the ECHR. It counts with the ECtHR as its permanent (article 19 ECHR) regional judicial body, acting under the umbrella of the CoE and whose task is to oversee the appropriate interpretation and respect of the ECHR within national jurisdictions (Donnelly, 2013). It rules over applications from individuals - citizens or not of a State party - or from States regarding a plausible violations, by a State party to the Convention, of a right included in the ECHR. The ECtHR issues binding decisions (article 46) (Donnelly, 2013a), which renders its analysis more substantial for state-parties (Scheinin, 2017); the ECtHR also issues opinions on the interpretation of the Convention if solicited by a State party[16] (article 47).

[16] *European Court of Human Rights*, IJRC. Available online https://ijrcenter.org/european-court-of-human-rights/

The statute of the ECtHR is laid down by the Convention. It conveys on the number of judges that compose the Court (articles 20 to 23), on the overall structural composition of the ECtHR (articles 25 and 26) and on its the powers and decision-making competences (articles 27 to 32). Following this statute, the ECtHR is composed by four different compositions: a Single-Judge, a Committee, a Chamber and a Grand Chamber. Briefly exposing these last two instances is relevant because it will serve the understanding of one of the case-law analysed (*KlimaSeniorinnen Schweiz v. Switzerland*). The former formation "rules on admissibility and merits for cases that raise issues that have not been ruled on repeatedly", while the latter judges cases involving pivotal issues and only after the first chamber having renounced their mandate to them[17].

ECHR SUBSTANTIVE RIGHTS: THE RIGHT TO LIFE, THE RIGHT TO PRIVATE AND FAMILY LIFE AND THE RIGHT TO EFFECTIVE REMEDY

A human right to environmental protection is not provided by the ECHR, as stated by the ECtHR in the *Kyrtatos v. Greece*[18] , but the ECtHR has, on several occasions, linked environmental harm to human rights violations (Lewis, 2018). This has been done through a dynamic interpretation of ECHR provisions, mainly of substantive rights embodied by article 2 and 8 ECHR, and through the right given to individuals to take action before court (article 6 ECHR), meaning to file a complaint before the court (Scheinin, 2017). These articles read as follows (European Court of Human rights, 1950):

Article 2

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; c) in action lawfully taken for the purpose of quelling a riot or insurrection.

And:

Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

[17] IJRC, no date.

[18] "Neither Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such; to that effect, other international instruments and domestic legislation are more pertinent in dealing with this particular aspect" (Pedersen, 2019, p.464).

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

THE "GREENING" OF ECHR SUBSTANTIVE RIGHTS

An overview of the Council of Europe non-extensive factsheet on its case-law regarding environmental degradation (2021a), shows that both article 2 and 8 ECHR were frequently invoked when dealing with human rights interference by environmental damage. The ECtHR established a link between environmental protection, or the lack of it, and human rights violations, hence applicability of these articles regarding environmental harm. The most frequent cited cases, due to their importance in developing the ECtHR jurisprudence in this field, link environmental man-made disasters resulting in deaths (*Öneryıldız v. Turkey*); the impact of pollution from industrial activities (*Lopez Ostra v. Spain; Tătar v. Romania*); or the emission of high levels of gases (*Taşkin v. Turkey*) to the enjoyment of the right to life and the right to private and family life[19]. In addition, ECtHR jurisprudence also anticipates the risk of exposure to harm (Pedersen, 2019) and rules on a state's lack of action *(Budayeva and Others v. Russia[20]*) to fulfil human rights provisions.

The ECHR gives governments the power of choosing what type of judicial measures, as in what type of remedies, are suitable for any given complaint (Knox, 2020), so any complaint brought before the ECtHR has had to go through all internal remedies

This case-law background opens the discussion on the continuing development of the ECtHR jurisprudence on human rights and the environment, in particular when most of the above mentioned cases go back to the 2000's. As so, they do not have into account the contemporary framing mentioned in the introduction, what is demonstrated by pending cases in the ECtHR (Council of Europe, 2021a) - such as the studied *KlimaSeniorinnen Schweiz v. Switzerland* case. Furthermore, new cases filed before the ECtHR (*Duarte Agostinho and Others v. Portugal and 32 Other States*), or filed along national court instances, while evoking ECHR provisions (*Klimaatzaak v. Belgium*), pertain to GHG emissions and climate change. An assessment of the relationship between these two

[19] Council of Europe, 2021b; Pedersen, 2019; Fitzmaurice, 2011; Shelton, 2010;

[20] The applicants argued that the state had failed to take on its positive obligation and act on the consequences of mudslide, that resulted in deaths (Council of Europe, 2021a).

elements and human rights has been made by human rights judicial instances, as it will be possible to understand on the analysis chapter, but it has not been deep-studied by scholars. On the contrary, they have focused on studying core background case-law, as the ones mentioned above.

The human right to a healthy environment and environmental (human) rights, rights of nature and rights to nature: the same but different?

According to Atapattu & Schapper (2019) and Lewis (2018), as well as mentioned previously, environmental rights can be seen through different approaches: they may be seen as procedural rights (access to information or participation in decision-making); as a substantive right to a healthy environment; or as all the rights that are related to environmental issues (such as the right to life, the right to health, right to food and water, the right to privacy and family life, amongst others).

As so, these approaches can be translated into four different ways on how human rights law and environmental protection may relate: a) human rights guarantees may be included in environmental protection; b) human rights may be "greened", meaning they are invoked when their enjoyment is being harmed by environmental issues; c) as relation in the long run with the proclamation of a new treaty, where the human right to a healthy environment would be recognised; and d) their connection may be framed thought the assignment of duties (Atapattu & Schapper, 2019).

This part will interest itself in differentiating environmental (human) rights and RoN from human right to a healthy environment and the rights to nature. Even though some of these concepts are not directly dealt with in this research, they can be found between the lines, being mentioned a few times throughout this work, or in relation with this research. Due to this, this part aims at clarifying these terms in order to avoid confusion between them. In addition, it is the distinction between these concepts that also justifies the originality of this research.

Scholars focus in assessing whether "right to a healthy environment is recognised under international law" (Déjeant-Pons and Pallemaerts, 2002), which is linked to the "human" nature of the right, but end up researching on environmental human rights. These type of rights are more directed to protecting the environment through a human rights

lenses than protecting individuals from environmental harm. A great deal of the difference between these two concepts lies within the spheres of anthropocentrism or ecocentrism (which will be discussed later) and the type of right - procedural or substantive - being dealt with. Researchers usually take on one side, as it will be demonstrated.

The first category of rights - environmental (human) rights and rights of nature - are of ecocentric and procedural nature. They entail, as Darpö (2021, p.11) briefly explain, "a shift in attitudes towards nature, from today's anthropocentric approach to an ecocentric one". While RoN advocate for the rights of non-human nature, such as trees, giving nature a personhood and thus a legal personality, environmental human rights are procedural human rights whose goal is to "include human rights guarantees in environmental protection" (Lewis, 2018, p.5).

Lewis (2018, p.5-6) argues furthermore that environmental rights "extend to rights to compensation or redress for environmental harm", meaning a failure of regulatory systems that directly and negatively impacts the environmental sphere (Nurse, 2020, p.302-303). Despite this being true, Lewis refers here to international conventions, such as the Aarhus Convention (1998) or to other soft-law instruments as the Stockholm (1972) or Rio Declaration (1992), which paved the way to environmental procedural rights (Leib, 2011). These soft-law instruments are connected to environmental democracy, which "brings democratic governance into the realm of ecological sustainability" (Leib, 2011, p.81) and to environmental law. Environmental law aims to protect the environment and ensure that policies implemented will respect international commitments towards environmental objectives, and thus protecting human rights that directly depend on those policies. The importance of environmental law is not being questioned here but analysing them will not be necessarily useful to achieve the objective of this dissertation.

The second category - human right to a healthy environment and the rights to nature - is the one serving the purpose of this dissertation. In a nutshell, they mean the right of humans to live in a healthy[21] environment and their right to a sustainable nature, that covers various dimensions of the ecological realm - water, air, toxic wastes, climate (Addaney & Jegede, 2020) - and as identified by human rights law (Atapattu, 2016). A human right to a healthy environment and rights to nature are of substantive nature and of

[21]Healthy, sustainable or clean are considered synonyms.

a more anthropocentric conceptualisation. A standardised definition of a right to healthy environment is not done by scholars. So the definition followed in this research will embody traits of human rights law - that focus on the primacy of the individual - and of anthropocentrism. This definition is supported by the ecocentric vs anthropocentric debate, explored further down.

Effective Remedy

If the objective of this research is to make a contemporary evaluation of the level of protection of human rights from environmental damage, then there is a need to look at human rights instruments and mechanisms implementation and operationalisation. This study will be conducted by analysing court's conclusions and evaluating them in terms of desired outcomes by plaintiffs, in other words, based on the existence - or not - of effective remedies. The choice of a focus on adequate outcomes is justified by the aim of human rights and their control mechanisms: to ensure that the rights of all individuals are respected and, when they are not, that control mechanisms have the power to act in order to make things right, and eventually prevent new breaches in protection systems.

An analysis of how human rights provisions are mobilised by judicial instances when dealing with alleged human rights violations is needed. If violations of human rights did not exist then one could assume that the enjoyment of human rights is protected from environmental harm, either because of an absence of that harm or by its lack of influence in the enjoyment of those rights. However, it is known this is not true. So, in the face of a violation of one's rights, what can be done to "make it better", what solutions are there? In short, to evaluate the capacity of current human rights provisions - meaning the existence of procedural aspects in substantive rights - in guaranteeing that right-holders are protected from environmental harm, it is necessary to assume, in the first place, that violations can occur. It is then crucial to look at the 'last stage' of the implementation and action of enforcement mechanisms, that is Court instances and their judgments, in order to understand if these provide for the required solutions.

A definition and framing of the concept of "effective remedy", which is found in Court's judgements, is of the upmost importance, since final remarks will be made considering the section below, in parallel to plaintiffs' point of view on the outcomes of the

selected case-law. The given definition of "effective remedy" will be inspired by an objective definition by CoE and by the EU Agency for Fundamental Rights (FRA), as well as by more subjective aspects that are useful for an interpretation of the outcomes of the selected case-law. To combine objective and subjective definitions serves best the attempt to keep a balance between an anthropocentric and ecocentric approach.

In CoE and FRA's "handbook on European law relating to access to justice" (European Union *et al* 2016, p. 93,), an "effective remedy" is defined as stipulated in article 13 ECHR ("Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity") and article 47 of the EU Charter of Fundamental Rights[22].

In brief, to have an effective remedy is to have the right to obtain redress for human rights violations. States have the obligation to "repair the consequences of breaching international law" (Shelton, 2015, p. 16) and to ensure complainants can pursue their claims before independent judicial courts, at the same time these claims are answered in a timely manner and in a satisfactory way (Banketas, 2020).

The scope or form of a remedy is, nonetheless, under the discretion of national authorities, which, in the absence of a standard definition of "effective remedy" (European Union *et al*, 2016), must take into consideration some guiding principles when promulgating the decision of a complaint. These principles are: the remedy must be effective "in practice and in law" (European Union *et al*, 2016, p. 92), accessible, able to deliver relief in regard to the complainant's grievances and it must have a good chance on being successful (European Union *et al*, 2016). Moreover, the remedies must be taken first at national level, until exhaustion of existing domestic procedures. If the victim seeks redress before international bodies, then is it plausible to assume that a domestic effective remedy was not conceivable, thus the capacity of the domestic sphere on delivering a fair trail (Pisillo, 2021) can be questioned. Plus, resorting to international instances allows to evaluate whether national instances correctly delivered their judgments, reinforcing the

[22] "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article". Article 47 of the EU Charter is included as a footnote since this research is framed by the European regional system embodied by the CoE and the ECHR, and not by EU law.

duty of complying with international obligations regarding that deliverance, as Garcia (2004, p. 394 -395) argues.

Remedies can be of pecuniary or non-pecuniary nature, being the effectiveness of non-pecuniary measures difficult to assert "with a sufficient degree of certainty" (European Union *et al*, 2016, p. 98) due to their non-countable nature. These measures can be declarations, restitutions/restorations, compensations, injunctions or a pledge that an equal violation will not take place again in the future (Shelton, 2015).

The concept of "effective remedy" is, both in theory and in practice, followed by a more or less a flexible approach in its content and in each context. This flexibility will be exploited. To follow entirely a rigorous definition would not contribute in a fruitful way to the research, since the right to an effective remedy also seeks to satisfy the aggrieved individual's objectives as to what is sufficient to repair the damage caused. The remedies requested to Courts vary from context to context, either thanks to the right(s) invoked or to the level of harm caused (Shelton, 2015), thus also the utility of this flexibly in defining what is effective and what is not. Another point fostering the choice for a flexible approach is the fact that the case-law used in this research looks more into remedies that can provide certainty in the future and ensure human rights are respected from environmental harm. Remedies, specially when they are forward-looking, on the opposite of retroactive remedies, are harder to measure. Finally, the outcome of proceedings may be effective according to international and domestics law but not in "practice", which can be understood as a failure in delivering redress accordingly to plaintiffs' demands.

Anthropocentrism and ecocentrism: two clashing approaches in the human rights field?

Anthropocentric and ecocentric approaches to human rights and the environment are usually seen as colliding (Wuraola, 2021) and to discuss them is inevitable in a research such as the present one, that brings the concept of "environment" and encompassing spheres to the realm of human rights. In a general way, human rights scholars - independently if they tend to an anthropocentric or ecocentric approach - touch the subject[23]. This part will interest itself in describing a second framework, that will be

[23] An example of a scholar that elaborates on this dichotomy is Darpö (2021), who by considering himself a traditional scholar tends to defend an anthropocentric approach to environmental human rights.

used after the data analysis and in order to justify the arguments given in both the second part of the analysis and when drawing final remarks. I will try to maintain a balance between these two opposite concepts throughout the research, what may not be an easy tasks, due to an "international contestation" (Odote, 2020, p. 382) on which frame to adopt when discussing environmental protection through a human rights lens, or vice-versa.

Anthropocentrism is a view, an approach, or a theory that puts the human-being at the center of all things. It reasons within every sphere of live, including the non-human, assigning to the non-human as much value as it has for the accomplishment and fulfilment of human needs (Kopnina, 2018). For its part, ecocentrism is the view that values all life-forms and ecosystems for their intrinsic value (Wuraola, 2020).

This research recognises that human rights "cannot exist without a conception of the individual" (Verdirame, 2013, p.42), and that human rights have as a clear objective the protection of the human life and of individuals as the highest element in the world. To keep only an anthropocentric framework is to give credits to arguments on the manipulation of the environment solely for human-satisfaction and economic purposes. The environment must have its own value recognised, as well as human rights must have their core value upheld in line with the new challenges, as a way of adapting to new realities.

On the other hand, as a young student experiencing the current climate crisis and the spotlight given to environmental matters in daily discussions and policy-making, one cannot disregard ecocentric arguments, even if they go against traditional legal approaches of human rights law (Darpö, 2021). Nevertheless, building my arguments solely on the basis of an ecocentric view would shift the focus on the "human" dimension of human rights and bring forward a research on the rights of the environment - or rights of nature, as Darpö (2021) distinguishes -, instead of a "right to nature" or "environmental human rights".

An anthropocentric framework would make perfectly good sense in a human rights dissertation. However, environmental problems and their implications to human life, whilst they are human-made problems, create a synergy between these two approaches. As Odote (2020, p. 382) explains, "human beings require the environment for their sustenance (…) at the same time they lead to the destruction of that same environment". To separe them would create gaps in the findings of this project. The goal is to converge both ends into a

position that can satisfy both human rights legal scholars and ecologists, without putting aside the main focus of this research and the general aim of human rights: to protect human dignity and to become a universal value of the contemporary international legal order (Pisillo, 2021). An argumentation in favour of a mixed approach is done, since it is considered to be impossible to include contemporary issues, where environmental questions and issues are intertwined with the human sphere, in the international legal order by taking into account only one these theories. One could note, on the other hand, the existence of theories and principles bringing ecocentric and anthropocentric views together in the human rights field, that could be of use for this dissertation. Regardless the utility of these principles on providing clues on what path follow within the human right to a healthy environment discussion, ultimately these principles aim at protecting the environment, or do not as explained previously.

The first one of those approaches is environmental democracy. It "brings democratic governance into the realm of ecological sustainability" (Leib, 2011, p. 81) and defends the role of public participation as essential to ensure that decisions involving the environment are done in a way that addresses citizens' concerns[24]. Environmental democracy is enshrined in international conventions, such as the Aarhus Convention or the Escazú Agreement (Anton and Shelton, 2011; Knox, 2020), and is composed by three procedural rights: *i)* the right of access to information on environmental matters; *ii)* the right to participate in decision-making; and *iii)* the right to access to justice[25]. In sum, it places ecocentric and anthropocentric views in a fairly balanced position and, as Anton and Shelton (2011) underline, allows to advance in environmental protection thanks to the application of procedural human rights by giving humans the power to act in environmental matters. Environmental democracy is hence linked to the concept of environmental human rights, as explained previously. As so, it does not "strike" the balance looked for in this research, since environmental democracy tends more towards ecocentrism rather than directly ensuring the protection of substantive human rights from environmental harm.

[24] Environmental Democracy Index (https://www.environmentaldemocracyindex.org/node/2728.html)

[25] Center For International Environmental Law (https://www.ciel.org/issue/environmental-democracy-access-rights/ ; Environmental Democracy Index (https://www.environmentaldemocracyindex.org/node/2728.html).

The second principle that could help to meet the goal of this research is the sustainable development principle. This principle takes into consideration the relationship between the human and non-human spheres in a way they both contribute to the preservation of the other (Odote, 2020). Sustainable development is, therefore, a principle entailing a mutual beneficial relation between human rights and the environment, envisaging in a more in-depth way, when compared with environmental democracy, this symbiosis. It is linked to social policy making and economic factors, not being enshrined in a human rights convention - it is, however, stated in a form of an independent human right to sustainable development - despite being largely inspired by the UDHR (UN Women, 2017). This principle comes close to the theme of this dissertation and could, indeed, be used in a significant way for its development. But the fact that it is only a guiding principle makes it fall outside the scope of the proposed topic.

Due to the factores described above, an approach, specific to this dissertation, is proposed. The objective is to balance ecocentric and anthropocentric characteristics in a way that it argues for a mutual beneficial relation between human rights and the environment. Anthropocentric concerns with human welfare when it comes to human rights (Hayward, 1997) will not be disregarded, but it should also be taken into account that a “degree of human activism is a necessary part of environmental protection”, as Kopnina (2018, p.122) affirms, and that adopting a human rights lens may promote environment’s preservation, as Odote (2020, p.382) defends.

Chapter 2: Methodology

This chapter aims at detailing the methodological strategy followed to address the goal of this dissertation, that is to assess whether adequate redress measures are guaranteed in environmental-related human rights violations. The present chapter is structured as follows: firstly, I will focus on justifying the type of research design, which will be three case-studies. Then, I will explain how I collected and analysed the collected data. This section will provide a detailed "check-list" for the case-studies used for conducting this research. Finally, some considerations on the limitation of this type of research will be mentioned.

Research Design: case-study

The methodological communication between the international relations and environmental human rights field "still fails to acknowledge and address" one another (Pereira and Saramago, 2020, p.3). The human rights field is, as Andreassen (2017, p.38) notes, in a qualitative "methodological deficit" that applies specifically to its own research field, hence an adequate qualitative research method that addresses these two spheres is not yet firmly established. Despite this "deficit", human rights legal research is commonly accepted as the key research method in human rights (Andreassen, 2017; Coomans, 2010; Lander, 2020). This type of research pins out human rights legal standards and their scope, interpreting and evaluating their application (Scheinin, 2017; Andreassen, 2017), which is in line with this dissertation's purpose.

To fulfil the goal of this research, I will follow the aforementioned method while recurring to case-study as our analysis tool. The use of case-studies is a common practice among human rights legal scholars, since they provide a way of interpreting human rights implementation in and by judicial instances (Human Rights Center, 2012). Case-studies bestow necessary empirical and informative path for investigating a contemporary issue (Webley, 2012), such as the one followed in this research, that has as main question the following one: **Can the "greening" of existing substantive rights deliver effective remedies?** This main question is followed by three other intertwined questions, that will

help to reach a conclusion. The sub-questions are as follows, being the first one the most substantive one, from which my analysis will depart:

- Can the implementation of remedies foster a future-oriented protection of substantive human rights in the face of environmental harm?
- Do other means, other than procedural rights, promote the protection of human rights against environmental harm?
- To what extent can the proclamation of a standalone human right to a healthy environment fill in gaps in current human rights law, namely in guaranteeing better redress measures?

Wimmer (1996) highlights some characteristics of a case-study: it must be particular; it must describe a concrete situation/phenomenon; it must help to understand in a practical way what is proposed in a theoretical way; and, finally, it should permit the unveiling of new relations between the elements studied. My research fits these parameters in that, first, the cases studied are specific due to the establishment of clear criteria - that are described in the following section - regarding the content of each case, thus allowing the description of a situation, that is a human rights violation and its redress; then, they provide a practical explanation of how human rights judicial enforcement works, thanks to the description of the legal and background frameworks and of each case-law. Finally, through the analysis of the case-studies, an implicit assumption is possible due to similarities or differences it their outcomes.

The way the analysis of the selected case-studies will be conducted is based on a descriptive study (Yin, 2009; Webley, 2012). Descriptive analysis focus on detailed descriptions of a situation in a way that it finds patterns and common or dissident point that, at a later stage, contribute to the formulation of theoretical interpretations (Mills, 2010). The objective is to expose clearly and in a factual way, the phenomenon. Descriptive analysis distinguishes from explanatory and exploratory analysis in the sense that these latter aim at finding a casual relation between the phenomenon and what causes it and at formulating hypotheses in a new field, respectively (Mills, 2010).

In sum, this research will conduct a case-study of three case-law and follow a methodology that is based on description of the cases components. Implicit assumption

from case-law descriptive analysis (Webley, 2012) will be made. This is justified by the fact that whether effective remedies are ensured in environmental-related human rights violations could also be assessed through quantitative analysis, like statics (OHCHR - HR/PUB/12/5, 2012). Here, one could simply look for the number of cases heard and pending in Court instances, and roughly assume that effective remedies are guaranteed - or not - because a number of cases have been heard and some are still pending (Coomans, 2010). Or human rights could be measured by comparing their degree of compliance in each of the case-studies, evaluating where compliance is better or worse, as a standard-based research would do (Landman and Carvalho, 2010).

As mentioned, descriptive analysis contribute to the formulation of theoretical interpretations. This formulation will serve the purpose of answering the second and third sub-question, which require an answer based on theoretical assumptions.

Data collection and analysis

As Mills (2010) underlines, the selection of case-studies is a process of the upmost importance. The choices made regarding the cases studied influence the results and the quality of a research, and should be strategically done, based on well-defined criteria, in order to reach specific and robust conclusions.

Since the followed research method is based on a descriptive case-study, to use a single case would not be fruitful because it would not give enough information for plausible assumptions. As much information as possible is needed in order to conduct a solid descriptive analysis. As so, this research will study three cases.

The data used will be essentially primary data from case-law. Case-law, or jurisprudence, is chosen as the case-study, as case-law follow the human rights law "train of thought", meaning, they act as a "last station" in the compliance and implementation of human rights law, being the "departure" point.

Several online databases, featuring human rights, environmental and climate change legislation and policies all over the world, are used as a search tool for the jurisprudence. These databases are part either of international organisations[26] (such as the

[26] Council of Europe's page dedicated to human rights and the environment: https://www.coe.int/en/web/impact-convention-human-rights/human-rights-and-the-environment ; Factsheet on jurisprudence of the ECtHR regarding the exercise of certain rights and their exposure to environmental risks https://www.echr.coe.int/Documents/FS_Environment_ENG.pdf. (Council of Europe, 2021a).

CoE), universities and think thanks[27] or of international human rights mechanisms[28]. They work in a similar way as regular online search-engine and are updated frequently, allowing a very up-to-the-date research, fitting the "contemporary" purpose of this dissertation. On these databases it is possible to search within several filters: country, human rights, international convention/agreement, type of human right violation or date. For instance, in the *Sabin Center for Climate Change Law* ClimateCaseChart database, the presented path was followed in order to get the relevant jurisprudence: global climate change litigation -> suits against governments -> human rights -> others/right to a healthy environment. It is also possible to search by categories of "law" or of "jurisprudence" in this database. Here, I searched in the "law" tab by "ECHR" and "international human rights law"; in the "jurisprudence" tab, I searched by "ECtHR" and "EU". The remaining databases - referred on footnote 27 and 28 - work basically in the same way, presenting to the investigator several options that help to reduce the search into very specific results and directed to the pretended goal.

On the other hand, CoE's factsheet (Council of Europe, 2021a) gathers all cases judged, and still pending, by the ECtHR from violations of the various human rights provisions of the ECHR, taking place in the 70's and 80's, until the present day. This factsheet is organised by ECHR right, then the type of claim (for example: a violation of article 2 due to dangerous industrial activities or due to GHG emissions), the name of the case, year, a summary of the claim and a summary of the ECtHR findings.

Concerning the selection process, pivotal cases, as *Öneryıldız v. Turkey* (2004), *Budayeva and Others v. Russia* (2008), *Guerra and Others v. Italy* (1998) or *Lopez Ostra v. Spain* (1994)[29], were excluded as potential case-studies considering the amount of analysis already made on theses cases, as explained previously. Adding to that, the case-law selected needed to comply with the following criteria:

- It should be recent, since I aim at making a contemporary assessment. The "recent" criteria translates into searching for cases whose outcomes do not date

[27] The Grantham Research Institute at LSE and the Sabin Center at Columbia Law School database: https://climate-laws.org/ ;
The Sabin Center for Climate Change Law databases of climate change caselaw: http://climatecasechart.com/;

[28] The Aarhus Convention clearinghouse database: https://aarhusclearinghouse.unece.org/;

[29] Council of Europe, 2021a.

before 2015, date of adoption of the Paris Agreement. This time-frame was chosen because of the Paris Agreement role in underlying the urgency of the climate crisis and environmental issues;

- It should be framed by the ECHR (as justified by the theoretical framework) and trigger article 2 and 8 violations. Additional articles triggered, as article 13 ECHR or of other international conventions would be accepted insofar as they could yield further information and strengthen the argumentation;
- The claims should, in their background argument, address concrete environmental issues and expose how those issues affected the allegedly violated rights. The cases should not focus exclusively on a State's lack of compliance with environmental rule of law or international commitments; a clear link between that lack of compliance or of action and how the triggered right exercise was in danger should be made.
- A more anthropocentric focus should be pursued. Without dismissing the importance of a secondary goal of the cases to protect the environment through human rights claims, I am not looking at environmental human rights. Cases simply stating that the State was failing its environmental commitments were dismissed.
- The claim should primarily be lodged with national authorities, being the national level the preferred one since it is the one where the implementation of international human rights agreements must take place. Regional level jurisprudence, meaning claims that exhausted internal proceedings, were also accepted given that the exhaustion of internal procedures can bring another perspective, argument or example to the present discussion.

The application of these criteria resulted in the choice of three cases, found in each search using the below described criteria in the databases just mentioned. They are: the U*rgenda Foundation v. State of the Netherlands* (the proceedings started in 2012, having the Court ruled in 2019); the *Klimaatzaak v. Belgium and its Regions* (the proceedings started in 2015, waiting, as of mid-2022, for the appeal judgment) and the *KlimaSeniorinnen Schweiz and others v. Switzerland* (the proceedings started in 2016,

waiting, at the moment, for the appeal judgment of the ECtHR). Eventually, the methodology conducted, or led, the research through a path of climate-change related cases. Furthermore, the selections process ended up with two still open cases, which was not regarded as an impediment or a counterproductive aspect, since that leaves space for future investigation.

Method's validity and limitations

When doing a case-study, some criteria must be addressed in order for the study to be successful and to be done in a rigorous way. That criteria was set and thus, the risk of not addressing the case-study in an accurate way. In addition, the databases utilised as research tool are credible and no difficulties were encountered in the handling of those databases.

Another point of this dissertation is its up-to-the-date theme. Evolutions of the international system and of its legal scope are imminent, it will not be possible to frame the research with all recent developments. The research will thus focus on data available until May 2022, leaving behind new findings after this period.

Since the data outcomes can easily be manipulated to fit certain arguments, I will be careful to not fall into what Creutzfeldt (2020) calls "confirmation bias". This bias happens when the study is conducted in a way that confirms pre-existing ideas to when it looks to be an "act of advocacy". Finally, case-study also must taken into consideration the researcher itself. Here, one should be aware of the researcher's views and expectations about the outcomes and overall process of conducting a research.

Chapter 3: Data Analysis

Having conducted the necessary methodological steps to reach an appropriate selection of case-studies, I will now present the selected case-law: *Urgenda Foundation v. State of the Netherlands*; *Klimaatzaak v. Belgium and its Regions* and *KlimaSeniorinnen Schweiz and others v. Switzerland*. After having presented the cases, an analysis based on court's ruling and on the overall proceedings of the cases will be done. As outlined in the previous chapter, case-law analysis provides for practical examples and arguments regarding the capacity of enforcement mechanisms to guarantee sates obey their duties and, when do not, redress measures are available.

The main critic done after the analysis is that, even if it is possible to have legally effective remedies in environmental-related human rights violations, the outcome of these complaints has limited impact on protecting human rights from environmental damage, especially when it is related to climate change and from a plaintiffs' point of view (effective in practice). Nevertheless, the potential for future protection is acknowledged and that potential is after complemented with elements of suggested (new) ways to promote the protection of human rights in face of environmental hazard.

This chapter is structured as follows: first the case-law selected for analysis will be summarily deconstructed (claims, legal basis and background, ruling of the court, base of the appeal if an appeal was made), accordingly to the case details while paying attention to not bring into the discussion irrelevant technical or purely legal aspects. Finally, the judgements outcomes will be compared and analysed regarding the sentence, the remedies and international human rights law cited in the judgement. This last part will be the base for answering the research question and will be used as an example/argument for answering this dissertation's sub-research questions.

Urgenda Foundation v. State of the Netherlands

In November 2012, the Urgenda Foundation sent a letter to the Dutch government where this one was asked to take measures and uphold its commitments towards climate goals, in order to contribute to the reduction of GHG emission. One year later, the District

Court in The Hague started hearing the parts[30]. In the application sent to the District Court, Urgenda Foundation defended that their goal was to "protect an issue of public interest, that is the interests of current and future generations" (Urgenda Foundation § 48, summons, 2013) and that the awareness that climate change endangers both biological communities and the enjoyment of human rights should enforce a measurement of GHG emissions in light of human rights treaties provisions (§ 218).

The legal background of the application examined Dutch obligations towards the ECHR, stating that the ECHR obliges its parties to prevent violations of its provisions (§ 223) and asserting the duties laid by the Convention. Regarding the oversight of human rights violations by private entities, it is argued that governments have the responsibility to ensure that non-state entities, inside their jurisdictions, comply with human rights obligations. Concerning the rights invoked, the plaintiffs ascribed to the Dutch State with a violation of article 2 and 8 ECHR as a result of its legal actions aiming at tackling climate change, but also due to the lack of monitoring of third parties' activities in the Dutch territory (§ 233).

The application rested upon a main demand that the Dutch State should "drastically, and no later than 2020, reduce CO_2 emissions, with the aim of preventing the risk of dangerous climate change, or at least of reducing this risk" (§ 280). *Urgenda* demanded, at the same time, a declaration admitting the possible impacts of climate change in the future, but that would not be "the first step toward possible future claims for damage due to climate change". This main demand was supported by the alleged non-respect of the "no harm" principle, impacting directly articles 2 and 8 of the ECHR through the absence of sufficient mitigation measures. In addition, it was argued that the non-admissibility of the case, on grounds that holding the government responsible was not possible, would constitute a violation of article 13 ECHR (§ 292).

The District Court in the Hague judged, in June 2015, in favour of the main demand, ruling that the Dutch government should ensure the reduction of its GHG emissions. However, the Court found that a violation of Urgenda's personal rights to life and to private life was not possible to assess since the association is not a "natural person", despite having recognised the rational of Urgenda's intent to "protect national and

[30] C*limate case explained*, Urgenda foundation. https://www.urgenda.nl/en/themas/climate-case/climate-case-explained/

international society from a violation of Article 2 and 8 ECHR" (§ 4.45, C/09/456689 / HA ZA 13-1396 - 2025). With regard to "the duty of care", the Court argued that assessing the compliance of the Dutch State needed to be determined in line with State's discretionary power, but also if there was an unlawful failure to care on the part of the State. Despite the existence of standard below which the "State's care may not be", to evaluate it is a blurry task (§4.53); even so, the Court settled, based on the principle of fairness, the precautionary and the sustainability principle (§4.56) "the State has a serious duty of care to take measures to prevent high risk of hazardous climate change" (§ 4.65). Finally, on the claim of a declaration, the court stated "it failed to see how the declaratory decisions could add to Urgenda's primary objective" (§4.105), thus rejection the claim even if it could "serve the interest of emotional redress" (§4.104).

An appeal was filled by the Dutch government, in 2019, to the Supreme Court with a view to reverse the District Court's decision of 2015[31]. The Supreme Court upheld the District Court's decision (State of the Netherlands v. Urgenda Foundation, ECLI:NL:GHDHA:2018:2610).

Klimaatzaak v. Belgium and its Regions[32]

Largely inspired by *Urgenda* case[33], this case was presented to Court in April 2015 by the environmental non-profit organisation, *Klimaatzaak*. The french-speaking Court of First Instance, in Brussels, ruled on June 2021, declaring three of the four requests admissible. An appeal was filled by the Flemish region, in 2015, having the Court confirmed the original judgement in 2016, followed by another appeal filled by the Flemish minister to the Court of Cassation, that was dismissed. After having received the demanded communications from the government, *Klimaatzaak* filled an appeal as the federal and Flemish ministers refused to make public their communications. In June 2021, the Court ruled again in favour of *Klimaatzaak*, defending that Belgium's climate policies were insubstantial, thus continuing to violate human rights provisions. Some months after,

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[31] Urgenda Foundation v. State of the Netherlands, [2015] C/09/456689 / HA ZA 13-1396;

[32] *Case Summary posted by the Task Force on Access to Justic*e (2021). UNECE Task force on Access to Justice. Available online: https://unece.org/sites/default/files/2021-07/Be_Climate_Change_BrusselsCourt_2021_Summary.pdf;

[33] "Le tribunal rejoint à cet égard le point de vue de la Cour suprême des Pays-Bas dans l'affaire Urgenda" (Klimaatzaak v. Belgium, 2015/4585/A, p. 61).

the Belgium government and its regions continued without implementing the Court's decision which resulted in a new appeal by *Klimaatzaak*. This last appeal will be heard in 2023[34].

In the initial petition of 2015, the plaintiffs' main allegations were that the Belgium government and its federal regions (Walloon and Flemish regions) were not successful in reducing their total volume of GHG emission, as well as they alleged a violation of articles 2 and 8 ECHR and of article 6 and 24 CRC. *Klimaatzaak* demanded that the Court would condemn Belgium authorities for violating articles 2 and 8 ECHR, as well as 6 and 24 CRC, due to the failure to implement policies whose objective would be to achieve a satisfactory reduction in GHG emissions. Accordingly, they demanded for the necessary measures to achieve that reduction to be taken, until 2020, asking hence a follow-up on in 2025 and 2030. This follow-up will assess whether the defendants have implemented the necessary policies.

In the admissibility analysis of the main request of the case, the Court brought into his analysis the Belgium ratification of the Aarhus Convention, in particular it drawn attention to article 9, that guarantees access to justice in environmental matters, also to environmental organisations. This analysis paved the admissibility of the case against the arguments of the need of a personal and direct interest. On the scope of articles 2 and 8 ECHR, the Court underlined that the government was obliged to "take preventive measures in the event of dangerous activities or natural disasters that threaten the right to life and of which the authorities are aware"[35].

The Court concluded the Belgian government was in breach of its commitments to article 2 and 8 ECHR because of its environmental policies:

> Holds that, in pursuing their climate policy, the defendants infringe the fundamental rights of the plaintiffs, and more specifically Articles 2 and 8 of the ECHR, by failing to take all necessary measures to prevent the effects of climate change on the plaintiffs' life and privacy. (2021; 2015/4585/A, p.80)[36]

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[34] Chronological summary based on the case's website https://www.klimaatzaak.eu/en [consulted on 25 May 2022];

[35] Translation from the original: "l'État doit prendre préventivement des mesures en cas d'activités dangereuses ou de catastrophes naturelles qui menacent le droit à la vie et dont les autorités avaient connaissance" (2021; 2015/4585/A, p.60);

[36] Translation from the original: "dit pour droit que, dans la poursuite de leur politique climatique, les parties défenderesses portent atteinte aux droits fondamentaux des parties demanderesses, et plus précisément aux articles 2 et 8 de la CEDH, en s'abstenant de prendre toutes les mesures nécessaires pour prévenir les effets du changement climatique attentoire à la vie et la vie privée des parties demanderesses."

On the other hand, the court's opinion - regarding the plaintiffs' request for reduction of GHG emissions - was not favourable, being the demand dismissed, as the court does not have the power to decide Belgium's policies and how they are conducted:

> The plaintiffs request the court to order the defendants to take the necessary measures to bring Belgium to reduce the global volume of GHG emissions from the Belgian territory. However, this request for an injunction cannot be granted without infringing the principle of separation of powers. (2021; 2015/4585/A, p.80)[37]

For the plaintiffs, an effective remedy would have concerned the changing, by the Belgium government, of its environmental and climate laws[38]. At the end of 2021, the plaintiffs appealed on the basis that the judgment "wrongly decided to dismiss the plaintiffs 'for the remainder of their claim', including first and foremost the refusal to impose the requested GHG reductions on the defendants" (*Klimaatzaak* appeal request, §3, 2021), hence asking for a partial amendment of the initial judgement. This appeal followed the main request, that asked for a reduction of GHG emissions until 2020, and the submission of a report regarding the implementation of policies aiming at that reduction by the defendants. In these reports, Belgium authorities sustained that their policies were already enough to reach climate targets; in opposition, the plaintiffs argued that the authorities still failed to act and to reach the percentage of GHG emissions reduction demanded. This fact made *Klimaatzaak* appeal on the grounds that not only the main conclusion of the initial petition was not respected, thus not ensuring the protection of articles 2 and 8 ECHR, but also that it now violated the plaintiffs' right to an effective remedy, according to article 13 ECHR. In sum, the appeal looks for an injunction that assures an effective remedy in face of the violation of ECHR (§128) provisions but that essentially succeeds in reducing Belgium's GHG emission:

> Pursuant to Article 13 of the ECHR and Article 9.4 of the Aarhus Convention, this Court must offer on appeal the most adequate protection of the subjective rights at issue before it, and the only way to do so is to impose the injunctions sought and thus to order the respondents to reduce their GHG emissions as developed by the appellants. (*Klimaatzaak* appeal request, §144, 2021)

The case waits for a decision as of June 2022.

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[37] Translation from the original: "Les parties demanderesses demanding au tribunal d'ordonner aux parties défenderesses de prendre les mesures necessaries pour amener la Belgique à diminuer le volume global des emissions de GES à partir du territories beige. Toutefois, cette demande d'injonction ne peut toutefois être accueillie sans qu'il soit porté atteinte au principe de séparation des pouvoirs."

[38] "Greenhouse emission reductions are the only effective remedy for the violation of the rights of the defendants and interveners found, that refusal deprives them of an effective legal remedy." (*Klimaatzaak*: appeal request, 2021)

KlimaSeniorinnen Schweiz and others v. Switzerland[39]

The *KlimaSeniorinnen Schweiz* (Climate Seniors) Association is an association composed by women over 64 years-old "committed to the protection of our fundamental rights, in particular our right to life" and to "the preservation of our vital resources, for ourselves, our grandchildren and all future living beings"[40]. This case concerns a litigation against the Swiss Federal government regarding "failures in climate protection" (*KlimaSeniorinnenSchweiz v. Swiss Government, first instance petition,* 25 October 2016). It is still an ongoing case, with the latest developments taking place in April 2022, before the ECtHR.

The initial petition was presented by the *KlimaSeniorinnen Schweiz* Association, in the end of October 2016, to the Swiss federal government. Pursuant both federal provisions and Article 13 of the ECHR, the applicants requested to different institutional instances (Federal Council, Federal Department of the Environment, Transport, Energy and Communications, Federal Office for the Environment and the Swiss Federal Office for Energy) - hereby, the respondents - for legal remedies to be taken regarding Switzerland climate targets and for the government to "stop omissions in the area of climate protection". These targets did not, according to the petition, comply with international climate targets, thus negatively impacting article 2 and 8 of the ECHR. The applicants requested mitigation measures to reduce GHG emissions to be implemented, and that the respondents should publicly convey those measures. Along the petition, the applicants linked the threats associated to the enjoyment of life posed by climate change ("adverse effects perceived by the Applicants in periods of heatwaves are confirmed by scientific studies"[41]). The measures demanded would guarantee the protection of the applicants' life and health regarding climate change, which, being women over 64 years-old with some suffering from underlying medical conditions (*KlimaSeniorinnenSchweiz v. Swiss*

[39] Official website of the association: https://en.klimaseniorinnen.ch/ (Available in German, English, French and Italian);

[40] Translation from the French version of the KlimaSeniorinnen Schweiz Association website (*À propos, available online* https://ainees-climat.ch/ueber-uns/*);*

[41] *KlimaSeniorinnenSchweiz v. Swiss Government, first instance petition,* § 89 and 127, 2016

Government, first instance petition, § 18, 2016), are members of a group that is especially vulnerable to increasing heatwaves.

This first petition resulted in the dismissal by the Federal Department of the Environment, Transport, Energy and Communications, in a communication issued on the 26th of April 2017. The dismissal was based on grounds that the applications did not have an "interest worthy of protection", since their goal was to make the Swiss government adopt new legal acts, and that their rights were not affected, since their request was not aimed at an individual but to a general group, meaning that the petition was based on an *actio popularis* action[42]. Adding to that, the Federal Department argued that Article 13 of the ECHR, triggered by the applicants, should be aligned with a claimed violation of other(s) provisions(s) of the Convention.

In May 2017[43], *KlimaSeniorinnen Schweiz* Association appealed to the Federal Administrative Court against the Federal Department of the Environment's - hereinafter the first instance - decision on not hearing the case. The appeal was founded on the basis that such decision "did not provide reasonable justification for the rejection and completely failed to address the seniors' valid constitutional and human rights concerns". In November 2018, the Federal Administrative Court also ruled the dismissal of the appeal, confirming the opinion of the Federal Department of the Environment. Furthermore, the Administrative Court argued that:

> 7.4.3 The (…) possible impacts of climate change on Switzerland shows that the group of women older than 75 years of age is not particularly affected by the impacts of climate change. (…) The appellants have no sufficient interest worthy of protection. (*KlimaSeniorinnen Schweiz et al. v. DETEC, second instance judgement* A-2992/2017, 2018).

With respect to human rights provisions embodied by the ECHR, the Administrative Court underlined, under §8.2, the right to an effective remedy before any national instance (article 13 ECHR), in parallel to the right to a fair trial (article 6 ECHR). Despite the recognition of these rights, the Administrative Court found that, since there

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[42] "An application in the name of third parties against a law or government" (Summary of the order by the Federal Department of the Environment, Transport, Energy and Communications, 2017, p.3);

[43] S*wiss authorities refuse to act, so these senior women are taking their climate case to court*. (26 May 2017). Greenpeace International. Available online at https://wayback.archive-it.org/9650/20200403162604/http://p3-raw.greenpeace.org/international/en/press/releases/2017/Swiss-authorities-refuse-to-act-so-these-senior-women-are-taking-their-climate-case-to-court/;

was not a "genuine dispute brought before the authority of first instance", article 6 of the ECHR was not applicable and hence article 13 ECHR was also not relevant:

> 8.4 It cannot be said that a genuine dispute of a serious nature was brought before the authority of first instance. (…) The authority of first instance was therefore not obliged on the basis of Art. 6 (1) ECHR to enter into the matter of the appellants and to issue a material ruling (…). With this outcome, it is not necessary to examine Art. 13 ECHR(…). (*KlimaSeniorinnen Schweiz et al. v. DETEC,* second instance judgement A-2992/2017, 2018).

Following the dismissal by the Administrative Court, the *KlimaSeniorinnen Schweiz* Association filled a new appeal to the Federal Supreme Court, against the judgment of the Administrative Court (*KlimaSeniorinnen Schweiz et al. v. DETEC,* third instance appeal*,* 2019). The appellants requested the re-evaluation of the legal facts and of the admissibility of the case to court, based on the grounds that the Administrative Court had "determined incorrectly (…) the facts of the case" and was "arbitrary" (*KlimaSeniorinnen Schweiz et al. v. DETEC,* third instance appeal*,* § 12 and 15, 2019). It restated that the judgement of the second instance court violated their procedural right to be heard, thus to a fair trial (article 6 ECHR) and to an effective remedy (article 13 ECHR), in addition to, and in conjunction with, the violation of article 2 and 8 ECHR ("45. (…) the population group of 75 to 84 year-old women, to which most of the appellants belong, is particularly affected in terms of their health and their lives.", *KlimaSeniorinnen Schweiz et al. v. DETEC,* third instance appeal*,* §45, 2019). Under the sub-section dedicated to the right to life (article 2 ECHR), §81 and 84 further strengthened the legal background by drawing ECtHR jurisprudence on the obligation to protect the right to life and by pointing out "international human rights law obligates States to take necessary steps with respect to law, policy and institutions to protect people from harm" originating from climate change (*KlimaSeniorinnen Schweiz et al. v. DETEC,* third instance appeal, 2019).

This second appeal also resulted in the dismissal by the Federal Supreme Court, which confirmed that the "previous instance did not violate its duty to state reasons and the appellants' right to be heard" (*KlimaSeniorinnen Schweiz et al. v. DETEC,* third instance rule on the acts, §3.3, 2020). Regarding the appellants' claim that Switzerland's non-compliance with international climate targets was jeopardising their right to life, the Federal Supreme Court argued that "the fact that the mentioned authorities have not taken the actions demanded by the appellants (…) does not in itself mean that the rights invoked by the appellants would be violated" (*KlimaSeniorinnen Schweiz et al. v. DETEC,* third

instance rule on the acts, §5.2, 2020). Besides, the Federal Supreme Court declared that the appellants rights were not sufficiently affected ("art. 2 ECHR does not appear to be threatened by the alleged omissions to such an extent"; "Nor (…) is art. 8 ECHR (…) affected with the intensity required for an appeal (…)" §5.4, *KlimaSeniorinnen Schweiz et al. v. DETEC,* third instance rule on the acts, 2020). Lastly, in answer to article 13 ECHR violation claim, the Federal Supreme Court stated that since the rights invoked during the initial petition were not violated, then there was space to argue about an article 13 ECHR violation (§7).

Having the plaintiffs exhausted all internal remedies (*KlimaSeniorinnen Schweiz v. Switzerland*, application form to the ECtHR, 2020) in November 2020, they submitted an application to the ECtHR. In the application form, the applicants claimed that their "right to an effective remedy was violation since no national authority examined the substance of their complaint", in addition to the refusal of the Swiss courts to consider the alleged breach of articles 2 and 8 ECHR. Moreover, the application states that an effective remedy would only be effective if undertaken in a timely manner, hence reaching the climate targets for 2020 and ensuring that the targets for 2030 would be met. In a press release dating from April 2022[44], the Chamber ECtHR gave the Grand Chamber of the Court (the ECtHR composition was briefly explained previously) a mandate - "relinquished jurisdiction" - to rule on this case. This means the Chamber handed over the case for other superior instance to rule it, since the case in question raises innovative, unconventional or groundbreaking questions. This in line with Article 30 ECHR, that states that the relinquishment of jurisdiction to the Grand Chamber happens when a "serious question affecting the interpretation of the Convention"[45] is brought to Court.

The case waits for a decision as of June 2022.

Discussions of findings

After conducting a descriptive case-study, I can now move on to answer the research question - can the "greening" of existing substantive rights deliver effective remedies in environmental related human rights violations? - by assessing whether the

[44] Available online at *KlimaSeniorinnen Schweiz* website https://ainees-climat.ch/english/ ;

[45] *European Court of Human Rights*. International Justice Resource Center. Available online: https://ijrcenter.org/european-court-of-human-rights/).

"greening" of human rights is able to bestow effectives remedies - meaning to "seek redress for violations of their rights" (European Union, 2016, p. 92-93) - in cases of human right violations originating from failures in guaranteeing environmental protection.

URGENDA FOUNDATION V. STATE OF THE NETHERLANDS

Regarding the Dutch Court's capacity in delivering adequate redress measures in *Urgenda* case, the Court ruled in favour to the plaintiffs, confirming the State inaction regarding climate change was endangering the applicants right to life and to private and family life. The remedy set forth here was effective in law - the applicants saw their right to an effective remedy fulfilled by having their case heard and judged - and in substance - by having their main demand supported, as supported by *Urgenda*'s opinion stating the Court's decision was a "truly historic outcome"[46]. Since *Urgenda* Foundation did not appeal to a second instance Court, nor to an international judicial instance, one can infer that the outcome satisfied the request, which is reinforced by their opinion on the June 2022 Court's decision and the confirmation of the 2015 original decision.

The Hague District Court, following ECtHR's jurisprudence, confirmed that the duty to protect articles 2 and 8 ECHR requires the adoption of mitigation measures regarding climate targets (Meguro, 2020). Besides, this ruling supports how the protection of human rights and the duties underlying them, consequently the redress measures to put forward in case of breach of those duties, must have a dynamic interpretation by taking into account developments of new international challenges, meeting the present and future-looking criteria outlined by Knox in his framework principles. As so, this case is considered "one of the first successful challenges to climate change policy based on a human rights treaty" (Meguro, 2020, p.729). It is argued that it can foster the next generation of rights-based climate litigation, since it was the first case in Europe to apply human rights provisions relating to climate change actions and confirm governments responsibility towards human rights enjoyment in relation to environmental aspects (Ferreira, 2016; Knox, 2019).

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[46] Urgenda foundation website, https://www.urgenda.nl/en/home-en/). The ruling of the Dutch court also merited the attention of the UN High Commissioner for Human Rights, Michelle Bachelet, who praised the ruling (*Bachelet welcomes top court's landmark decision to protect human rights from climate change*, UN OHCHR, 20 December 2019
https://www.ohchr.org/en/press-releases/2019/12/bachelet-welcomes-top-courts-landmark-decision-protect-human-rights-climate?LangID=E&NewsID=25450);

KLIMAATZAAK V. BELGIUM AND ITS REGIONS

Klimaatzaak case judgement stated that the Belgium government "by failing to take all necessary measures to prevent the effects of climate change on the plaintiffs' life and privacy" was, in fact, in breach of human rights provisions. Two of the three requests were attended by the Court; however, the main redress measure asked "focused on measures to be taken by public authorities"[47], entering into a debate about the capacity of courts and governments to act accordingly to plaintiffs' expectations. As mentioned in the description of the case, *Klimaatzaak* looked for a change in policies, which relates to the separation of powers sphere, where the Court does not have a mandate to act. Here, it is possible to conclude that the cup is either half full or half empty: depending whether an "effective in law" or "effective in substance" view is taken, the Court's decision can be assumed as effective or not. An effective remedy in substance would require an inference from the Court into the State's power, but one can agree an effective remedy "in law" was fulfilled since the main request was accepted by the Court. In addition, *Klimaatzaak* still has space to appeal to an international court, thus having the change to continue to pursue the remedies the applicants find necessary to ensure the future protection of their rights.

KLIMASENIORINNEN SCHWEIZ AND OTHERS V. SWITZERLAND

Finally, the *KlimaSeniorinnen Schweiz* highlights some justiciability issues, linked to climate scientific evidence, to the non-admissibility of the defence of "general interest" - which is considered as a collective appeal, not recognised under the ECHR - and to the fact that the Court found the applicants too old to be harmed by climate change in the future. These justiciability issues are not the point of analysis, but they support the argument that an effective remedy in substance, in this case, was not even possible due to the Court's rejection to rule on the case. The ruling of the first instance court was, likewise, not proven effective "in law", hence the subsequently exhaustion of internal procedures and appeal to the ECtHR, where *KlimaSeniorinnen Schweiz* can argue that Swiss judicial instances not only did not meet the right to an effective remedy provisions (article 13 ECHR), as they violated the right to a fair trial (article 6 ECHR) (Bahr, 2018). Furthermore, the Swiss court

[47] Translation from the original: "portent sur les mesures à prendre par les pouvoirs publics".

failed to ensure the duty to protect and promote human rights provisions by refusing to consider the breach of articles 2 and 8 ECHR.

EFFECTIVE REMEDIES APPLICATION

Concerning the need for a casual link between a State's (in)action in guaranteeing the reduction of GHG emissions, in line with international commitments, that determination is based on scientific evidence, but that evidence was handled differently in each of the cases. This shows the complexity of making the judicial link between human rights obligations and climate change (Lewis, 2018). This complexity reflects on remedies' implementation efficiency because it is challenging to determine if a GHG emission reduction was made or can be made in a timely manner[48], or if there is a standard for considering a violation occurred, measuring remedies accordingly to a violation's degree.

For instance, during *KlimaSeniorinnen Schweiz* trial process, some of the applicants died due to health problems linked to environmental issues. These applicants did not see enforced their demands for *a priori* and *a posteriori* protection of their right to life, regardless having proved their vulnerability to climate change induced heat waves. On the other hand, *Urgenda* case followed an approach where it established a "scientific and international consensus on the existence of climate change and its impacts on human rights" (Heiskanen, 2018, p. 320). This "consensus" can provide the ECtHR with new jurisprudence establishing a more accessible threshold for proving the hazardous effects of environmental degradation and climate change on human rights, facilitating the search for adequate redress measures (*Heiskanen,* 2018). Finally, *Klimaatzaak* request for a follow-up on GHG emissions in 2025 and 2030 may guarantee that both Belgium government and the Court satisfy plaintiffs' right to an effective remedy, while resorting to climate change science (Heiskanen, 2018) to ensure their substantive rights are protected.

From a human rights framework perspective, the studied cases emphasise the role of individual's primacy and of collective rights, the triggering of procedural rights as a way of pursuing redress for violations of substantive rights and how the type of obligations binding a State are carried in practice. *Urgenda* and *KlimaSeniorinnen Schweiz* demonstrates the obstacle posed at national level judicial instances by invoking a

[48] Timely manner here is understood as the duration of trial processes, or the time-frames demanded as part of claims' petitions, as exemplified by *Klimaatzaak*.

individual right in face of a violation that affects all of us; nevertheless, District Court in the Hague ruling on *Urgenda* recognised the "interest of protecting international society from a violation of Article 2 and 8 ECHR" (§ 4.45, C/09/456689 / HA ZA 13-1396 - 2025), as well as the ECtHR recognised the interest of *KlimaSeniorinnen Schweiz* case. The applicants of each case also show how the State failed to comply with its positive obligation to protect human rights thanks to inaction on climate policies. The mobilisation of all these aspects is closely linked to human rights' anthropocentric character, despite an ultimate goal of the application to also guarantee better regulation and enforcement of environmental law and climate policies.

Conclusion

The purpose of this dissertation was to provide a practical stance on the relevance of current human rights legal framework in connection to environmental issues. This was carried by addressing factual aspects of human rights through an approached based on human rights concepts framed by human rights international law, and by defining effectives remedies accordingly to that human rights international law.

The development theoretical framework helped to conduct, at the same time, a literature review where, by a process of exclusion, some factual aspects of human rights law were discarded - not due to their significance for the field but due to their significance for this research - in order to remain with what was relevant for the research, finalising by giving insights on relevant theoretical discourses on the issue. It was possible to postulate that an evaluation of human rights enforcement mechanisms is not common practice in human rights research relating to environmental protection. Consequently, there was a need for the development of a methodology that did not follow standard practices in social sciences. This methodology counted with the setting-up of extensive criteria for the selection of the analysed case-studies and resulted in the selection of three cases lodged within the European human rights regional system, that encompasses national-level jurisdictions.

The cases analysed were mobilised to judicial instances through the “greening” of substantive rights. The case-studies bring about human rights’ characteristics critical for the debate over an emerging right: the need for scientific proofs to establish a clear link between duty-bearers responsibility towards the alleged human right violations; the admissibility of collective rights versus the primacy of the individual or the capacity of enforcement mechanisms to mend in State’s action.

From each case we can draw the following conclusions, answering my main research question on whether the “greening” of existing substantive rights can deliver effective remedies: *Urgenda* confirmed that effective remedies where possible, specially when a Court has an interpretation of the case’s allegations that is flexible; *Klimaatzaak* showed that an access to remedies is possible and it can be “effective” in law, but not in practice; finally, *KlimaSeniorinnen Schweiz* demonstrated how the manipulation, or the

"greening", of human rights provisions does not always guarantee access to justice, therefore it does not guarantee the implementation of effective remedies. These three cases unveil different aspects at stake in human rights litigation and each one of them brings relevant aspects for the development of a human right to a healthy environment.

The three case-studies analysed made it clear that judicial outcomes were diversified and that each court's assessment of the proceedings, the demands and the remedies sought, did not follow a similar legal paths. In general, the case-studies converge that the implementation of remedies, if effective and adequate, can foster, or at least hope to foster, the future protection of substantive human rights in the face of environmental harm. Nevertheless, that assessment needs to be confirmed in the following years, when more data is available.

In parallel, effective remedies are not always seem as "effective" by applicants. Even thought access to justice and thus to effective remedies is possible, the outcome may not always be satisfactory for plaintiffs. The existence of a substantive human right to environmental protection could open doors to a greater imputability of duty bearers (Lewis, 2018). As the *Klimaatzaak* case demonstrated, regardless the support for the protection of the environment because it impacts human life, to manipulate human rights provisions following violations associated to environmental issues is a difficult exercise, dependent of legal criteria and of scientific evidence. That is why the "concept of a right to a good environment" has been recommended by Lewis (2018, p. 240) as a solution to the "limitations of traditional human rights approaches to climate change". This answers the research sub-question "to what extent can the proclamation of a standalone human right to a healthy environment fill in gaps in current human rights law, namely in guaranteeing better redress measures?".

The cases presented can provide some clues on how to frame a new right. One thing should be noted: if violations of human rights did not exist then one could assume that the enjoyment of human rights was protected from environmental harm, either because of an absence of that harm or by its lack of influence in the enjoyment of those rights. To gather the experience of judicial decisions with human rights provisions on the matter could converge into the development of clear criteria for its development. A new human right to a healthy environment can only provide for redress for future violations and

reinforce States' responsibilities towards guaranteeing human rights enjoyment in a clean and healthy environment. Odote (2020, p.408-410) defends that a new right could "empower human beings to be able to claim protection of the environment" and it could underline environmental impacts on human life or health, hence ensuring better policy-making.

Along the same lines, Bahr (2018, p.221) underlines "five valuable lessons" that *KlimaSeniorinnen Schweiz* case can contribute with to successful future litigation cases based on ECHR provisions, or to a possible future human right to a healthy environment: *i)* judicial recognition of climate-related harm to individuals; *ii)* the capacity of courts to also decide on climate-related issues, instead of governments being the only ones with that power; *iii)* a sounder way based on science to ground claims based on environmental-related human rights violations; *iv)* an expansion of transboundary States' responsibility towards preventing human rights harm based on climate change and *v)* the improvement of both individual and collective rights' protection.

Bahr "lessons", drawn from a practical analysis of a case, meet the goal of this research, that looks for fair balance between the ecocentric and anthropocentric when addressing the proper enforcement of remedies and how to improve them, without deviating from human rights provisions. However, although the examples were laid out, the problems linked with human rights legal claims highlighted through litigation processes can persist, as Lewis (2018, p.240), Odote (2020, p.408) or Borràs (2016, p.127) argue when referring to state sovereignty facing a global problem, to the identification of duty-bearers and the possibility of clashing human rights.

This research does not try to be an act of advocacy, as previously stressed; but it provides an opportunity for more research on the topic, namely if a follow-up on the studied cases is carried. A follow-up would, consequently, allow for new arguments to answer another research sub-question if other means, other than procedural rights, can promote the protection of human rights against environmental harm. Throughout this research, no indication on others possible paths was raised, either by the data analysis or by the literature review. But the incessantly debate on environmental issues, climate change and sustainable development will, undoubtedly, make it impossible to not have developments in the human rights field.

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