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## The current status of the right to the environment in the global international law

### Obecny status prawa do środowiska w światowym prawie międzynarodowym

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**Abstrakt:** Artykuł skupia się na prawie do zdrowego środowiska, które stało się wyzwaniem dla prawa międzynarodowego, gdyż dopiero niedawno kwestia ta została jednoznacznie podjęta na poziomie globalnym. Instrumenty związane z prawami człowieka, jakie posiada ONZ, nie zawierają postanowień dotyczących środowiska. Jednakże podejście do „zazielenienia” istniejących praw człowieka można zaobserwować w kilku formach, takich jak ogólne komentarze. Międzynarodowe prawo środowiskowe wprowadziło podobną ideę „podejścia praw człowieka”, które łączy kwestie środowiskowe z prawami człowieka. Zakładamy, że te dwa pojęcia ułatwią wypracowanie deklaracji o prawie do zdrowego środowiska. Zarazem jednak skuteczności tych idei nie można porównywać z formalnie przyjętym prawem do zdrowego środowiska. Stawiamy tezę, że uznanie na poziomie światowym prawa do zdrowego środowiska mogłoby połączyć te dwie gałęzie prawa międzynarodowego oraz złagodzić jego fragmentację. Artykuł ma na celu zbadać i ocenić istniejące prawne zaplecze na poziomach regionalnym i globalnym. Działając w tym kierunku, przeanalizujemy prawnie obowiązujące i miękkie instrumenty prawa oraz właściwe orzecznictwo w obszarach praw człowieka na poziomie prawa międzynarodowego i międzynarodowego prawa środowiskowego. Artykuł podkreśla ostatnie dokonania w sferze prawnej, w ślad za przyjęciem w roku 2021 Rezolucji nr 48/13 przez Komitet Praw Człowieka ONZ. Promuje ona prawo do czystego, zdrowego oraz zrównoważonego środowiska. W artykule proponuje się również sugestie co do opracowania tego prawa na poziomie światowym. Zarazem jednak analiza ujawniła,

że międzynarodowe prawo posiada już kilka instrumentów i pojęć, które można uważać za punkt wyjścia dla ww. deklaracji. Jednakże proponujemy, aby nowe innowacyjne podejścia zostały wyrażone w przyszłości, w powiązaniu z prawem do zdrowego środowiska.

**Słowa kluczowe:** prawo do zdrowego środowiska, prawa człowieka na poziomie prawa międzynarodowego, międzynarodowe prawo środowiskowe, ONZ, prawa człowieka na poziomie prawa regionalnego

**Abstract:** This article focuses on the right to a healthy environment, which is a challenging aspect of international law because, until recently, it was not explicitly addressed at the global level. The United Nations' human rights instruments do not contain provisions related to the environment. However, the approach of "greening" the existing human rights can be observed in several forms, such as general comments. International environmental law introduced a similar concept, the "human rights approach", which connects environmental issues with human rights. We assume that these two concepts are likely to facilitate the declaration of the right to a healthy environment; however, their effect cannot be compared to the formally adopted right to a healthy environment. We argue that the global recognition of the right to a healthy environment could connect the two branches of international law and ease its fragmentation. This article aims to examine and evaluate the existing international legal background at the global and regional levels. While doing so, we will analyze the legally binding and soft law instruments and the relevant case law of international human rights law and international environmental law. The article emphasizes the recent legal development, as the United Nations Human Rights Committee adopted Resolution no. 48/13 in 2021, which promotes the right to a clean, healthy and sustainable environment. Here, we also present suggestions for the further global elaboration of the right. On the one hand, the examination reveals that international law already has several instruments and concepts that can be considered a starting point for the declaration. On the other hand, we propose that innovative new approaches should be expressed in the future, related to the right to a healthy environment.

**Keywords:** right to a healthy environment, international human rights law, international environmental law, United Nations, regional human rights law

## 1. Introduction

The right to a healthy environment is a fundamental human right; our generation's environmental crisis underlines its importance. Nevertheless, its status is ambiguous – this will be explained below – at the global level of international law, even though the right has the constitutional status in several states and plays a significant role in the European, African, and Inter-American human rights systems. However, in 2021, the United Nations Human Rights Committee (hereinafter: UNHRC) adopted a breakthrough resolution (48/13), addressing the human right to a clean, healthy and sustainable environment. This article exam-

ines this milestone resolution, taking into account the historical background of the right. It is essential to distinguish between the global and regional human rights systems because the evolution of this right shows a different character at these levels. Our examination primarily focuses on the substantive right to a healthy environment but also considers procedural rights.

Furthermore, we are not just analyzing the existing legal background and the resolution, because we aim to set out the potential consequences of the resolution and propose recommendations for a possible form of a further elaboration of the right. We discuss, from the formal standpoint, the question whether a hard law instrument – like a multilateral international agreement – or a legally non-binding, soft law instrument – for example, a United Nations General Assembly resolution – would be a more practical next step after the above-mentioned declaration. However, we do not restrict our proposal to the formally relevant questions, as we present some considerations of the possible content of the right. We argue that the right to the environment is a fundamental human right that should be addressed globally, represented by the United Nations. Nevertheless, we shall emphasize that without bold provisions and an innovative approach, the declaration would remain only a symbolic gesture and not a significant step in the international human rights law evolution. We also assume that the right to a healthy environment could ease the fragmentation between various branches of the international law, especially the international environmental law and human rights law, and integrate these fields.

Legal research often requires a combination of different methods to reach the targeted goal. Khushal Vibhute and Filipos Aynalem distinguish between several forms of legal research. On the one hand, the research can be descriptive or analytical. The former describes the existing legal instruments, while the latter critically analyses this legal background. On the other hand, legal research can be applied or fundamental, aspiring to propose a solution to the related practical problems or processes information of the subject and enriches the existing theoretical background. Finally, these authors distinguish between quantitative and qualitative and conceptual and empirical methods (Vibhute and Aynalem 2009: 15–18). In the context of the above-mentioned research types, our article applies a combination of those. We pay particular attention to examining the existing international legal background and the relevant instruments of the issue. However, this analysis is not only descriptive, as we evaluate these instruments and their effect on the evolution of the right to the environment as a global human right. Moreover, this analysis does not focus only on the current status of the rights, but highlights the possible content of the right, as well; therefore, it can be considered a combination of the applied legal research methods and analytical legal research methods.

## **2. The international legal background of the right to the environment before 2021 – at the global level**

While environmental law has become a determining branch of international law and environmental concerns emerged in international human rights law, the global declaration of the right to a healthy environment had not appeared until 2021. However, this does not mean that Resolution 48/13 of the UNHRC came out of nowhere.

On the one hand, greening the existing human rights is getting more popular at the global level of international human rights law.<sup>1</sup> This approach makes it possible to interpret human rights treaties and other documents – even if there is no explicit mention of the environment – in the light of its links with environmental issues. Moreover, the international environmental law's soft and hard law instruments also acknowledge the connection with various factors related to human rights. Nevertheless, neither of these approaches directly recognized the right to the environment.

On the other hand, the regional level of the international human rights law looks somewhat different as several – even legally binding – instruments contain provisions addressing the right as a universal human right or the evolutive interpretation of other provisions which form it.

The following part of this article will briefly overview the global and regional legal background.

### **2.1. Greening the existing human rights**

International recognition of human rights has become more pressing after World War II. This was the era when the United Nations was founded to promote human rights and fundamental freedoms for all without discrimination. The Charter of the United Nations (1945) did not specify these human rights and freedoms; however, the Universal Declaration of Human Rights (hereinafter UDHR) included certain human rights. The UDHR – which was adopted in 1948 – addressed the inherent dignity of humans as the source of their equal and inalienable fundamental rights and freedoms. The UDHR primarily contains civil and political rights and procedural guarantees; nevertheless, economic, social, and cultural rights can be detected there, too. We can conclude that the Declaration did not have any provisions related to the right to the environment or environmental factors. The missing of an environmental-related provision can result from the time of the adoption, when the realization of the

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<sup>1</sup> We will demonstrate this tendency in the next section of this article.

connection between human life, health and environmental factors had only just begun. According to special rapporteur John H. Knox, if the UDHR were adopted today, it would address the right to a healthy environment because of the national constitutional evolution and the regional human rights instruments that declared the right or developed its interpretation in their case law (Knox 2012: 13–14).

The next significant phase of the international human rights law evolution was the adoption of the International Covenant on Civil and Political Rights (hereinafter ICCPR) and the International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR) in 1966. These two legally binding instruments followed the way laid down by the UDHR and divided its provision into two covenants, one related to liberty rights, mainly requiring the states not to interfere, and the other that involved the parties' proactive approach. Karel Vasak identified in his impactful article the former category as the "first generation of human rights" and the latter as the "second generation of human rights". He also established the "third generation rights" or solidarity rights, including the right to a healthy environment (Vasak 1977: 29).

The two Covenants and the UDHR formed the so-called "International Bill of Human Rights" and contained no provisions on the right to environment. However, this does not mean that environmental considerations are altogether left aside from the later interpretation of these instruments. This approach can be illustrated by two examples: the environmentally relevant interpretation of the right to life and health. Nevertheless, it should be mentioned that other human rights show a connection with the environment.

The broad interpretation of the human right to life leads to addressing the vital link between the right and the environmental conditions, highlighted in General Comment No. 6 of the Human Rights Committee (hereinafter CCPR). According to this general comment, the relevant provision (Article 6) of the ICCPR should be interpreted broadly, and the right requires the states to take positive measures, particularly combating child mortality, malnutrition and epidemics (CCPR General Comment No. 6, p. 5). Sumudu Atapattu points out that this wording opens up the possibility of connecting the right to life with the right to health and considering environmental factors. According to Atapattu, this approach can be observed in the Port Hope case (*E.H.P. v. Canada*), in which the CCPR interpreted the right to life in the light of the environmental issues; however, she finds a more detailed explanation would be welcomed (Atapattu 2019: 21–24).

In the Port Hope case, a local environmentalist group lodged a complaint against the Canadian government to the CCPR about radioactive waste adverse effect on human life, health, and the rights of the future generation. The

CCPR accepted the government's arguments that the rights were not violated; however, it acknowledged that environmental degradation could endanger the right to life.

Our other example of the green interpretation of human rights is the area of environmental health. The right to health is included in several international agreements. Article 12 of the ICESCR addresses the enjoyment of the highest attainable standard of physical and mental health and defines the state's duty related to the right, including improving environmental hygiene. The Committee on Economic, Social and Cultural Rights (hereinafter CESCR) explained in its General Comment No. 14 that in the context of the ICESCR, the right to health covers various social and economic factors contributing to people's healthy life, like nutrition, habitat, safe drinking water and access to sanitation, safe working conditions and a healthy environment (CESCR General Comment No. 14, p. 4).

These two examples illustrate the tendency of greening the already addressed human rights, like the right to the highest attainable standard of living, the right to water and sanitation, the rights of vulnerable groups, and the rights of indigenous peoples. Of course, recognizing this connection is not a novelty. The Vienna Declaration and Programme of Action of 1993 (hereinafter: Vienna Declaration 1993) clearly stated that "All human rights are universal, indivisible and interdependent and interrelated." Daniel J. Whelan suggests that using the term *interdependent* acknowledges the boundary between human rights but addresses the vital link between them, primarily during the exercise and enjoyment of human rights. According to Whelan, the concept of *interrelated* is also based on the connection of human rights but recognizes the different features of specific rights. (Whelan 2010: 3–6)

We should emphasize that the approach of greening the existing human rights is not the same as the explicit declaration of the right to a healthy environment; it is only suitable to highlight the possible connections. Moreover, greening the existing human rights is anthropocentric, and it is far from being able to recognize the environment's inherent value. A study by Karrie Wolfe notes that this approach can lead to the dependent status of the environment, without respecting its independent value. This can also make the enforcement of the environmental requirements more difficult as the anthropocentric approach does not encourage the "sacrifice" essential to protecting the environment. (Wolfe 2003: 58)

As we have already mentioned, this approach seems to be changed with the UNHRC's resolution no 48/13. Before examining this milestone resolution, it is necessary to consider some other elements of the international environmental law and the regional human rights law.

## 2.2. The human rights approach in the international environmental law

As the international human rights law considers environmental factors related to the protection and guarantee of rights, the international environmental law also considers human rights. This approach can be primarily observed in the leading soft law declarations that also determine the evolution of international law.

The first significant and influential global environmental summit was held in Stockholm between 5-16 July 1972; 113 countries and several international organizations – like the UNESCO, WHO, ILO, FAO – participated in “The United Nations’ Conference on the Human Environment”, whose outcome-document is the “Declaration of the United Nations Conference on the Human Environment” (hereinafter: the Stockholm Declaration). The first principle of the Stockholm Declaration addresses man’s “fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.” It also states the man’s responsibility to protect the environment for the sake of the present and future generations.

Like Jutta Brunnée (2008: 12), several authors consider this formulation an indirect declaration of the right to a healthy environment that developed into a new principle of international customary law. Alexandre Kiss and Dinah Shelton suggest that we can derive environmental law from the common interest of humankind, just like human rights and fundamental freedoms. The first principle strengthens this conception, according to which environmental law has a strong link with several human rights (Kiss and Shelton 1991: 21–31).

David R. Boyd finds the principle the first formal recognition of the rights globally, which influenced several legal areas like environmental law, constitutional law and human rights. He suggests that the international recognition of the right to a healthy environment can have two possible advantageous effects: on the one hand, international courts can consider it; on the other one – influencing the national constitutions, legislation and implementation, as Principle 1 realized this (Boyd, David R. 2018: 17–18, 23–25).

Like Louis B. Sohn, other authors are more critical of the first principle of the Stockholm Declaration. According to him, this formulation is not even an indirect declaration of the right to a healthy environment. However, he points out that during the drafting process, there was strong interest from several states – Columbia, Denmark, Ethiopia, Panama, Singapore and the United Arab Emirates as well as the Holy See – to recognize the right explicitly, but the final version represents the result of a political compromise (Sohn 1973: 452–453).

In the light of the foregoing, we can accept that the first principle of the Stockholm Declaration indirectly represented the right to a healthy environ-



ment, or at least its idea. However, this is not satisfactory, the formulation is vague, and there is no direct mention of the right – despite the intention of several states. Nevertheless, it is an example of recognizing the connection between human rights and the environment. However, it would have been more advantageous to explicitly mention the right to a healthy environment, especially considering the Stockholm Declaration's effect on further legal development.

Twenty years later, the Rio Declaration on Environment and Development (hereinafter: the Rio Declaration) still missed the opportunity to declare the right to a healthy environment, although the Brundtland report – which can be regarded as an essential motivation of the Declaration – made a clear distinction between the concept of sustainable development and the right to a healthy environment and highlighted the synergies between the two concepts (Brundtland report 1987: 81–82).

Principle 1 of the Rio Declaration focused on sustainable development, with human beings in the centre. They are entitled to a healthy and productive life in harmony with nature. This provision is more distant from the right to the environment than the Stockholm Declaration. On the other hand, principle 10 of the Rio Declaration addresses important procedural aspects associated with the right to a healthy environment. The principle states that environmental issues can be most effectively handled at the appropriate level with the participation of all citizens concerned. It also emphasizes the importance of adequate access to environmental information and judicial and administrative proceedings. The soft law instruments and political declarations of the following years – the Johannesburg Declaration, the Future We Want Declaration, the Millennium Declaration as well as the Millennium Development Goals and the Sustainable Development Goals also considered the connection between environmental conditions and the enjoyment of human rights, but did not mention the substantive and/or procedural aspects of a special right to a healthy environment.

Provisions considering human rights can also be found in legally binding environmental acts; for instance, the Paris Agreement explicitly contains provisions related to human rights. The Preamble addresses that climate change is a common concern of humankind. During our fight against it, we ought to respect human rights, including the right to health, indigenous groups' rights, and the right to development. Moreover, the states are obligated to implement gender equality, empowering women, and the requirements of intergenerational equity. Article 7, paragraph 5 is significant in the light of human rights, as it requires the parties to use approaches based on gender equality, which considers the vulnerable groups and benefits indigenous knowledge. Article 12 is based

on procedural rights, and therefore it enhances education on climate change, social awareness, participation and access to relevant information.

All things considered, it seems that international environmental law considers human rights, and the reverse is also true; there is a green interpretation of specific human rights too. Then again, these approaches are not presenting an explicit recognition of the right to a healthy environment. Nevertheless, these two approaches do have significance related to the right to the environment; for instance, the environmental agreements and other – even legally non-binding – instruments set standards and requirements that can facilitate the obligations related to the enforcement of the right to the environment. Furthermore, the existence of these two concepts highlights that there is a correlation between international environmental law and human rights law.

### **3. The right to a healthy environment in the regional human rights law**

In order to reveal the current state of the right to a healthy environment in international law, it is essential to examine the regional level, where substantial advances were made, especially in case law. This development can inspire the global level; significantly, the two levels are interacting. For instance, all the following regional human rights instruments refer to the UDHR. The level of this interaction and the synergies are different, depending on the fields of international law. Erik Voeten explains that in the case of finances, development and trade, the global level has an enhanced role as influential international organizations – the World Trade Organization, the World Bank, and the International Monetary Fund – are in the background. On the contrary, the global human rights system is weaker than the regional ones, where more effective judicial mechanisms are available. According to Voeten, global forums like the CCPR play a more political role and are not the most suitable for enforcing human rights (Voeten 2017: 119–121).

This section will examine the regional human rights instruments that declared the right to a healthy environment and the relevant case law. We restrict our examination to three – the African, the Inter-American and the European – systems; however, other regional instruments are declaring the right to a healthy environment. We deal with these instruments only by mentioning their relevant provisions as there is no enforcement mechanism connected to them. The Arab Charter on Human Rights' (2004) Article 38 declares the right to an adequate standard of living, including the right to a healthy environment. The ASEAN Human Rights Declaration – a soft law instrument – follows a similar approach

and considers the right to a healthy environment in Article 28 as part of the right to an adequate standard of living.

### 3.1. The African Charter on Human and Peoples' Rights

We face a diverse picture when analyzing the regional human rights instruments and the right to a healthy environment. Firstly, there are legally binding instruments with an explicit mention of the right; for instance, Article 24 of the African Charter on Human and Peoples' Rights declares all peoples' right to a satisfactory general environment favourable to their development. The African Commission on Human and Peoples' Rights acknowledged in the SERAC case that by guaranteeing this right, the state should meet specific requirements, take all reasonable and necessary steps to prevent pollution and support the ecologically sustainable development and fair use of natural resources. Moreover, to protect the environment and health, the state shall provide science-based supervision on activities that threaten the environment, publish its results, give information to the concerned persons and involve them in the decision-making process (SERAC case, p. 50–54).

The SERAC case has particular importance because the Commission elaborated on the content of Article 24. Justice C. Nwobike finds that the Commission interprets the right generously and flexibly within the existing framework. Having said that, Nwobike referred to the enforcement issues as a negative aspect (2005: 145–146). György Marinkás shares this view about the importance of the case, which illustrates the Commission's evolutive interpretation, in particular, explaining the states' obligations. Similarly to Nwobike, he also found a lack of proper enforcement deficiency. He expressed that addressing the collective aspect of land ownership rights is missing, which would have been beneficial to implementing indigenous groups' rights (Marinkás 2014).

In other cases, there was no exact reference to Article 24, but the Commission took environmental factors into account. In the Endorois case against Kenya, the Commission interpreted the right to property of an indigenous group related to the environment and found out that the state failed to facilitate prior consultation with the local group and failed to carry out prior social and environmental protection assessment. It also connected the environment with the right to cultural identity, as nature plays a spiritual role in the group's life (Endorois case, p. 228, 245.).

In the Ogiek case, the state of Kenya attempted to justify relocating the residents with the argument that this action served the protection of the right to a healthy environment. According to the Court, the environmental pollution of the area cannot be attributed to the Ogiek people, whose traditional way of

life is based on nature's respect. Other actors, especially those who got timber licences from the state, contributed significantly to the harm. Therefore, the state could not justify its actions by relocating the Ogiek people and violating their property rights (Ogiek case, p. 145–146).

### **3.2. The American Convention on Human Rights and the Protocol of San Salvador**

Secondly, other regional human rights instruments have similar provisions, not in the original treaty but in the additional protocol. The American Convention on Human Rights excluded the right to a healthy environment in 1969; however, the Protocol of San Salvador, adopted in 1988, declared the right to a healthy environment in Article 11 and required the states to promote the environment's protection, preservation, and improvement. It is interesting to note that the direct applicability of this provision was ambiguous. Paragraph 6 of Article 19 only identified Article 8 (Trade union rights) and Article 13 (Right to education) as provisions that can be directly claimed before the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

Authors like Oswaldo R. Ruiz-Chiriboga deny that other provisions – except Articles 8 and 13 – could be referred to directly and indicate a procedure before the judicial forums mentioned above. He rejects that conception which suggests that Article 26<sup>2</sup> of the Convention creates an opportunity to base submissions on the other provisions of the Protocol (Ruiz-Chiriboga 2011: 168–170).

This view was overtaken by the advisory opinion of the Court issued in 2017, in which it explained that the right to the environment is part of Article 26's scope, and the Court can enforce it. It also argued that the right has individual and collective aspects; the latter also involves the equity between and within the present and the future generations. The states shall provide this right for all without discrimination, take every appropriate step to realize this, and protect and improve the environment (Advisory Opinion OC-23/17, p. 60). A significant effect of the advisory opinion is that before its adoption, environmental concerns were considered parts of other rights, such as the collective right to property of the indigenous communities. (e.g. *Saramaka peoples v. Suriname case*; *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*). Monica Feria-Tinta and Simon C. Milnes consider the advisory opinion a milestone for the Inter-American regional human right and general international law. Its

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<sup>2</sup> Article 26 of the Convention requires progressive development to fully realize rights implicitly set in the Charter of the Organization of American States.

influence can manifest itself in three forms. Firstly, the advisory opinion can encourage the integration of environmental and human rights considerations into other international legal areas, thus easing the fragmentation of international law. According to Feria-Tinta and Milnes, this fragmentation means that the norms of the several branches of international law develop separately. For example, international investment law lacks connection with international human rights and environmental laws. Secondly, the advisory opinion can play a role in implementing environmental principles, from which several are formulated in soft law instruments. The authors point out that the Advisory Opinion can reinforce the implementation of already existing human rights standards and environmental principles without negotiating new rules. Thirdly, it can guide the framework of effective remedies, especially in the case of cross-border pollution (Feria-Tinta and Milnes 2019: 74–77).

Nevertheless, after adopting the advisory opinion, in the *Lhaka Honhat* case against Argentina, the Commission's submission to the Court on 1 February 2018, directly referred to Article 11 of the Protocol. The advisory opinion influenced the Court's arguments about the right to a healthy environment. It stated that the right is a universal value, and addressing it as a human right, serves the whole of humankind. However, it also pointed out that the environment and its element have their significance, independently of humans' interests (*Lhaka Honhat v. Argentina*, p. 202).

### **3.3. The European Convention on Human Rights**

The European human rights system serves as a unique example. In comparison to the instruments mentioned above, there is no provision in the European Convention on Human Rights (hereinafter ECHR) declaring the right to a healthy environment. Moreover, no additional protocol or other legal acts include the right. It should be noted that there were several attempts by the Parliamentary Assembly to incorporate the right to a healthy environment. Recommendation 1614 (2003) suggested adding procedural rights to the ECHR. However, the Committee of Ministers refused this, arguing that an adequate mechanism exists, developed by the European Court of Human Rights (hereinafter ECtHR). Similarly, the Parliamentary Assembly called the Committee of Ministers to consider adopting a protocol with the substantive and procedural aspects of the right to a healthy environment, in Recommendation 1862 (2009). The reply of the Committee of Ministers referred to the ECtHR's case law as it is so detailed that additional protocols are not necessary.

Despite the Committee of Ministers' refusals, the Parliamentary Assembly did not give up and adopted Resolution 2396 (2021). The Assembly expressed

that an additional protocol could provide a 'non-disputable' basis for the Court to rule on environmental cases. (Resolution 2396, p. 7). The Assembly also suggests an additional protocol complementing the European Social Charter. (Resolution 2396, p. 10.). At the end of the resolution, there are recommendations, from which we underline the first, which calls the Member States of the Council of Europe to elaborate a legal framework – at the European and national level – to provide the right to a safe, clean, healthy and sustainable environment, following the UN's guidance. (Resolution 2396, p. 14.3).

Complaints in the environmental cases are primarily based on violation of Article 8, which protects the right to private and family life. Without aiming to give an exhaustive review of the jurisprudence related to Article 8 in an environmental context, we will highlight some landmark decisions and the interpretation of the right to a healthy environment.

In the *López Ostra* case against Spain, the ECtHR found severe environmental pollution can significantly affect the concerned persons' well-being and prevent them from enjoying their private and family life without health damage (*López Ostra* judgment, p. 8). In the *Guerra* case against Italy, the Court emphasized that the states are obligated to take active measures to protect the right from environmental harm; therefore, they can also violate the article with passive behavior (*Guerra* judgment, p. 56–60).

The *Hatton* case, in some respect, was a regression because – in comparison to the *López Ostra* or the *Guerra* case – the ECtHR did not find the violation of Article 8; however, in the "first *Hatton* judgment" in 2001, the violation was acknowledged. Still, the decision of 2003 (the "second *Hatton* judgement") was different. In the final judgment, the ECtHR found that the government took all necessary steps to prevent the residents from the noise of the Heathrow airport and adequately weighted the private and public interest because a state has a major economic interest in international airports (second *Hatton* judgment, p. 85–86).

In contrast to the second *Hatton* judgement, the ECtHR found the violation of Article 8 in the *Moreno Gómez v. Spain* case because the state failed to prevent the applicant's rights from noise pollution. The Court also defined the meaning of "home" in the context of Article 8. According to the reasoning, home is the physically defined place where private and family life develops. Individuals are entitled to respect their rights related to their homes, and the violation can happen with several forms of pollution, like noise, contamination, and smell (*Moreno Gómez v. Spain* judgment, p. 53.) In the *Fadeyeva v. Russia* case, the Court noted that the protection against environmental nuisance should reach a certain minimum level, determined by the case's circumstances (*Fadeyeva* judgment, p. 66–70).

In several cases, the ECtHR paid special attention to procedural environmental rights; for instance, in the *Taşkin* case against Turkey, it recalled principle 10 of the Rio Declaration and Recommendation 1614 (2003) of the Parliamentary Assembly. It also referred to the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (*Taşkin* judgment p. 98–00). In the *Tătar v. Romania* case, the ECtHR underlined the importance of providing adequate information to the citizens about activities that can affect them and the environment, possible dangers, necessary steps in the case of an accident or measures for their prevention. This obligation of the states is complemented by providing the right to participate in the decision-making and the right to judicial review (*Tătar* judgment, p. 118–125).

Another significant aspect of the environmental cases is the jurisprudence on Article 2 of the ECHR, which protects the right to life. In this context, one of the most determining cases is the *Öneryıldız v. Turkey* case. The Court examined the state's responsibility after a methane explosion of a landfill caused a landslide, which accident cost 29 lives. According to the Court, the right to life can also be violated by the state's passivity, which should be particularly cautious in the case of industrial activities that are dangerous given their characteristics, like waste collection. The state is responsible for the permission procedure, facilitation, and operation control and should take all necessary steps to protect the concerned persons. Implementing these requirements by providing the information is essential, and the activities' specific features and technical details should be considered (*Öneryıldız v. Turkey* judgment, p. 69–73, 89–90).

The environmental cases of the ECtHR show that the Court expanded and 'updated' the provisions of the Convention, which is more than 70 years old. This technique is called evolutive interpretation. The Court elaborated it in several cases, for instance, in the *Tyrer v. United Kingdom* case. The ECtHR declared the ECHR as a living instrument that should be interpreted progressively in the light of the current circumstances. Kanstantsin Dzehtsiarou points out that this interpretation technique is essential to the proper function of the ECHR; moreover, its appliance is welcomed both in literature and international jurisdiction (Dzehtsiarou 2011: 1731–1734). We should mention that the "margin of appreciation" doctrine limits this interpretation method based on the principle of subsidiarity. In the *Handyside v. the United Kingdom* case, the Court expressed that the national authorities – the domestic legislator or other judicial bodies – shall assess if there is a pressing social need that can justify the restriction of human rights. In other words, national authorities shall weigh the public and private interests of the case. This approach is not contrary to European supervision. However, the system is designed to subsidize

the national authorities because their primary obligation is to protect and implement the human rights declared in the Convention (Handyside judgement, para 48–49.)

The ECtHR developed an elaborated case law related to environmental issues, primarily based on Article 8 of the ECHR, even though no environmental provision is included in the Convention or added by an additional protocol. Therefore, this regional human rights system can be considered effective with regard to environmental concerns. Gyula Bándi proposes that this judicial activism reveals the judges' professional competence, and he points out that the literature is entirely consistent with this interpretation technique's advantageous characteristics (Bándi 2021: 188).

The environmental cases before the ECtHR are fundamentally related to a specific, clearly definable plant, facility or other establishments, specific adverse effects, or disasters. Furthermore, there is always at least one concerned person who suffers violations of rights. It seems like there is no way to take action against abstract environmental phenomena like climate change or submit an *actio popularis* complaint. However, during the writing of this article, there is an ongoing case filed by Portuguese youth against 33 states, claiming that climate change is threatening the rights guaranteed in Articles 2 and 8, and the states failed to prevent this violation. It is unique that the complaint has been filed against so many states. Therefore, the applicants could not exhaust all adequate and effective national remedies (Cláudia Duarte Agosthino and others against Portugal and 33 other States). Although there is still no judgment, accepting a complaint like this constitutes an innovation in the environmental case law of the Court. It is worth noting that there are eight supportive third-party interventions, from which we highlight the Council of Europe Commissioner for Human Rights, Dunja Mijatović's intervention. The Commissioner extensively refers to the fact that the Member States of the Council of Europe support the declaration of the right to a healthy environment at the global UN level, which could have a positive effect on the national legal development and could increase the engagement in the international fight against climate change and loss of biodiversity (Third-party intervention by the Council of Europe Commissioner for Human Rights, p. 4–5).

#### **4. A paradigm shift on the global horizon**

Above all, the right to a healthy environment developed differently at the global and regional international law levels. Significantly, while several, even legally binding regional human rights instruments directly or implicitly recognize the right, there was no hard or soft law declaration at the global level.



At least, it was right until 8 October 2021, when the UNHRC adopted the 48/13 resolution (hereinafter: A/HRC/RES/48/13) that explicitly recognized the “human right to a clean, healthy and sustainable environment”. Authors like Marcos Orellana express that the UNHRC plays a significant role in developing standards related to recognizing new human rights in line with the already improved principles (Orellana 2018: 184–187).

Furthermore, it should be noted that the resolution builds on the existing UN background and expresses this commitment in the preamble. We can certainly conclude that there were contemporary voices within the UN advocating the global declaration. In 2017, the IUCN World Commission on Environmental Law (hereinafter: WCEL) and the Environment Commission of the Club des Juristes launched the Global Pact for the Environment. The draft declares the right to an ecologically sound environment (Article 1), adequate for every person’s health, well-being, dignity, culture and fulfilment. It also proposes who is obligated to take care of the environment: every state and international institution, every – natural or legal – person (Article 2). The Pact also highlighted important environmental principles, like integration and sustainable development, intergenerational equity, prevention, and precaution. This initiative was followed by UNGA resolution 72/277 of 2018, which decided on an ad hoc open-ended working group to submit a report to the Secretary-General (A/RES/72/277, p. 3). The resolution also requested that the Secretary-General provide a report and submit it to the UNGA at its seventy-third session (A/RES/72/277, p. 1).

The Secretary-General expressed in the requested report that implementing environmental principles is challenged by the sectoral characteristic of international environmental law. Some principles recognition is much more advanced, like the principle of the environmental impact assessment. In contrast, the elaboration of others is not satisfying; for instance, the right to a healthy environment international recognition is limited, even though other principles – like sustainable development or the common but different responsibilities – could reinforce its improvement. Thus, a comprehensive international instrument can help deal with the resulting problems. (A/73/419\*, p. 100–103).

It is also important to mention David R. Boyd, Special Rapporteur’s report of January 2019 on the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. One of the report’s merits is that the Special Rapporteur identified the elements of the right to a healthy environment: the right to breathe clean air; access to water and sanitation; right to healthy and sustainable food; right to a safe climate, healthy biodiversity and ecosystems (A/HRC/40/55, p. 17).

The next step was UNGA's resolution 73/333 of 5 September 2019. It was a follow-up to the ad hoc open-ended working group's report submitted on 13 June 2019 (A/AC.289/6/Rev.1). Resolution 73/333 proposed various types of recommendations. Among others, it sets the guiding objectives: protecting the environment for present and future generations; upholding the environmental obligations and commitments of the States; promoting the implementation of the Sustainable Development Goals; respecting the relevant, already existing rules, instruments, and bodies (A/RES/73/333, p. 1–4).

We also want to highlight the joint statement of 15 UN entities, adopted on 15 March 2021. In this statement, the entities starting point was the national recognition of the right to a healthy environment, as 150 UN Member States had already addressed it, despite the lack of a global declaration capable of enhancing the realization of the Sustainable Development Goals in today's environmental crisis which has three components: climate change, loss of biodiversity and environmental pollution.

The UNHRC adopted resolution 48/13 in 2021 and stressed that the right to the environment is essential to the enjoyment of other rights (A/HRC/RES/48/13, p. 1). It is strongly linked to other rights and the existing international law (A/HRC/RES/48/13, p. 2). The resolution further submits that the right to a healthy environment is connected to the international environmental law, and the multilateral environmental agreements full implementation in the light of the international environmental law's principles is crucial to promote the right to a healthy environment (A/HRC/RES/48/13, p. 3).

The UNHRC's resolution is legally not binding; accordingly, it did not express any states' obligations. Nevertheless, this does not mean that the resolution is silent about the states' task but uses a typical soft law wording when it is encouraging the states to build capacities to fulfil environmental and human rights obligations, share good practices, adopt policies to promote the right to a clean, healthy and sustainable environment. Furthermore, it suggests the states consider the Sustainable Development Goals together with the realization of the right (A/HRC/RES/48/13, p. 4 (a)–(d)).

The global declaration of the right to a clean, healthy and sustainable environment is groundbreaking, but the resolution has another merit. Based on the examination above, we can conclude that global international law had two similar paths addressing environmental and human rights issues: the concept of greening the existing human rights and considering human rights in international environmental law. Neither of these approaches proclaimed the right to a healthy environment that could relieve the fragmentation of international law by explicitly addressing the connection between the two branches of international law. As a welcomed development, resolution 48/13 takes this step. For instance, in

the preamble, it recognizes that the adverse effect of environmental degradation, pollution, climate change, loss of biodiversity and other unsustainable factors are barriers to the full implementation of the right to a healthy environment. This concept is even sharper in Paragraph 3, where the resolution declares that promoting the right to a clean, healthy, and sustainable environment requires implementing the existing multilateral environmental agreements.

The follow-up of the resolution is a particularly pressing issue. At the time of writing this paper, we know that the resolution invites in Paragraph 5, the General Assembly (hereinafter: UNGA) to consider the matter, and at the same time, the UNHRC adopted Resolution 48/14 (hereinafter: A/HRC/RES/48/14), which is about to mandate a special rapporteur on the promotion of human rights in the climate crisis. The future special rapporteur – among other tasks – will study the adverse effect of climate change, identify the related challenges, and synthesize knowledge, especially indigenous and local traditional knowledge (A/HRC/RES/48/14, p. 2 (a)–(c)). Furthermore, the special rapporteur will promote best practices that consider climate change in the light of human rights, gender equality, and inclusiveness to reach the targets of the Paris Agreement, Goals 13 and 14 of the Sustainable Development Goals (A/HRC/RES/48/14, p. 2 (d)).

We believe that Resolution 48/13 is a significant step toward the global recognition of the right to the environment and a future UNGA resolution has the potential to define further detail. However, the current form of the HRC resolution can be considered vague, even if this is not uncommon. For instance, Resolution 64/292 adopted by the General Assembly declaring the human right to water and sanitation addressed the right (A/RES/64/292, p. 1), but did not specify its content and recalled prior decisions<sup>3</sup> about expert reports in this subject and to other documents, like General Comment No. 15 (2002) of the CESCR on the right to water (A/RES/64/292, p. 3). It is also welcomed that besides the adoption of Resolution 48/13, Resolution 48/14 was also adopted on mandating a special rapporteur. Furthermore, the resolution recalls other existing significant reports, such as the 2018 report of the special rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (A/HRC/37/59). These expert documents are likely to elaborate on the possible content, particularly states' obligations.

Camila Perusso proposes that Resolution 48/13 could positively impact the international and domestic development of the right to a healthy environment despite its vague wording. First of all, it can have a normative effect based on

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<sup>3</sup> UN Human Rights Council Resolution 7/22. Human rights and access to safe drinking water and sanitation; UN Human Rights Council Resolution 12/8. on Human rights and access to safe drinking water and sanitation. A/HRC/RES/12/8.

the resolution's orientating role and the fact that it can catalyze national law. Moreover, the resolution can contribute to the invention of international custom and influence the regional human rights systems, for instance – the European Council to formally recognize the right. Secondly, it can guide judges' and decision-makers' interpretation of relevant existing laws (Perruso 2021: 7–8).

As we have already mentioned, the resolution is a soft law instrument, and any future UNGA resolution will also be legally non-binding. We think that this form of adoption has several advantages. First of all, the soft law instruments are flexible, and this feature makes them able to quickly handle changing situations, which could be expected in the case of environmental matters. Edith Brown Weiss points out that scientific uncertainty affects environmental law as the current state of science is developing. Therefore, environmental legislation should be flexible enough to provide this, especially in rapidly changing situations, like the climate crisis. Soft law instruments can serve this goal regarding its other advantages (Brown Weiss 1993: 688–690, 708).

Secondly, as Kenneth W. Abbot and Duncan Snidal point out, states appear to be more willing to adopt legally non-binding documents in international areas where their sovereignty is concerned (Abbot and Snidal 2003: 434–450). Therefore, this legally non-binding form does not appear to be inadequate, especially considering the effect of the above-examined soft law instruments, like the Stockholm and Rio Declaration, which were adopted as high-level, symbolic UNGA resolutions.

We would suggest addressing several issues concerning the future UNGA resolution's substance. Firstly, it would be welcomed to overcome the anthropocentric approach, which still prevails in international law. This does not necessarily mean an ecocentric approach, or at least non-exclusively. From the anthropocentric point of view, guaranteeing the right to a healthy environment could prevent pollution and environmental degradation. However, this is happening just in cases where are concerned persons whose rights are violated or threatened. This approach is unsuitable for protecting wildlife and preventing biodiversity loss if there are no concerned persons. Therefore, Sumudu Atapattu argues that the anthropocentric approach should be combined with an ecocentric approach, and the two should be complementary (2002: 111–112). From this perspective, the Inter-American Court of Human Rights' advisory opinion of 2017 – which recognized the own value of the environment – can serve as an example to follow in this regard. Addressing content like this could reinforce considering environmental factors in the human rights framework. Elena Cima points out that this would be advantageous for civil society to enforce important environmental principles, and its positive effect would be beneficial for enjoying other human rights (Cima 2022: 48).

Secondly, the possible declaration should address the collective aspect of the right to a healthy environment, providing exceptional protection to the vulnerable groups like women, children, elderly persons, people living with disability, indigenous peoples and other minorities. Furthermore, it should also promote the protection of future generations' interests.

Thirdly, the scope of those responsible for implementing the right should be set out broadly, including responsibilities of the major multinational companies, international organizations, individuals and their local groups. It would also be beneficial to integrate fundamental environmental principles – like the precaution principle, or the polluter pays principle – and the existing international environmental norms into the content of the obligations, connecting the two branches of international law.

Finally, a short mention to the effect of Resolution 48/13 should be included. The European Parliament and the Council adopted the 8<sup>th</sup> Environment Action Programme (hereinafter: 8<sup>th</sup> EAP),<sup>4</sup> which includes a reference to Resolution 48/13, identifying the right to a clean, healthy and sustainable environment as a priority objective of the 8<sup>th</sup> EAP.

## 5. Conclusion

This article argued that the right to the environment should be recognized as a universal human right globally, connecting the international human rights law with the international environmental law. A high-level, globally accepted international declaration could serve as a reference point for environmental and human rights law-making and implementation. Protecting and improving the environment and developing and implementing environmental law could promote several human rights linked to the right to a healthy environment, like life, health, water and sanitation, food, and even economic rights, while the other way round – guaranteeing the human right to a healthy environment could improve environmental protection. Therefore, the concept proposed above, in which the anthropocentric approach is combined with the ecocentric by recognizing the inherent value of the environment, would be welcomed.

Before adopting Resolution 48/13, global international law lacked the explicit recognition of the right to a healthy environment. However, considering environmental factors related to human rights law and including human rights aspects in environmental instruments could be noticed in several previous in-

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<sup>4</sup> These strategic EU documents – now in the adoption form of a decision – influence the EU's environmental policy for a specific period, identifying the main challenges and objectives.

ternational documents, like the Stockholm or the Rio Declarations, the above-mentioned general comments or the Paris Agreement.

This article examined three regional human rights systems, which led to different results from the global level. First of all, some regional human rights instruments initially declared the right to a healthy environment, like the African Charter. We highlight the SERAC case, in which the Commission proclaimed a flexible interpretation of the right. Furthermore, even though the American Convention on Human Rights does not contain an explicit right to a healthy environment, the Additional Protocol of San Salvador added the right to the system. However, the actual application only happened after the environmentally-conscious advisory opinion of the Court in 2017.

The European system is different because the European Convention on Human Rights and even its Additional Protocols do not contain the right to a healthy environment. Nonetheless, the European Court of Human Rights developed an evolutive interpretation – primarily of Articles 8 or 2 – concerning environmental factors and indirectly explaining the right to a healthy environment. Claiming that the right to a healthy environment is recognized indirectly in this system, we do not deny that jurisprudence can be considered entirely derived. Nevertheless, it should be emphasized that there is no additional protocol directly recognizing the right, as the Parliamentary Assembly's several attempts also prove this. The ECtHR's environmental jurisprudence is now at a turning point because the Court accepted six young Portuguese people's action popularis complaint against 33 countries because of climate change.

Evaluation of the existing and evolving global and regional legal background leads us to the latest development, URHRC's Resolution 48/13, which has, for the first time, explicitly addressed the right to a clean, healthy and sustainable environment as an autonomous human right at the global level. The resolution also directly connects the branch of human rights with environmental law by mentioning the implementation of multilateral environmental agreements. Notwithstanding, the resolution's wording can be considered vague; this is a historical moment fueled by the UN's entities' engagements and has taken into account the existing global and regional international law and domestic constitutional legislation.

Nevertheless, there are still unanswered questions regarding the possible legal development started by this declaration. We propose that a UNGA's high-level declaration could have a significant effect like the Stockholm or Rio Declaration had. Moreover, the possible content, obligations and entitlements, and defining approaches are still unknown. As a final remark, we recommend in this article that bold and innovative provisions are essential because, without them, the declaration would be only a symbolic gesture which is not enough in

today's environmental crisis. For instance, as we have explained above, recognizing the own value of the environment could complete other human rights' enjoyment, on the one hand, and contribute to protecting inhabited areas or combat phenomena like climate change or biodiversity loss, on the other one. Promoting protection of future generations' interests would be welcomed as well, which also serves implementation of the future human rights, but requires us to leave the Earth at least in the same state as that in which we inherited it. The declaration shall not miss addressing particular needs of specific vulnerable groups, and the scope of this special attention should be broad and flexible. Lastly, it would be a model if the declaration addressed the various aspects of related responsibilities, like the responsibility of multinational companies and individuals, and stressed – which might concern the existing environmental law – the states' obligations.

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