Climate change and the right to a healthy environment*

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1. Introduction and main argument

Twelve years ago, in 2007, the Intergovernmental Panel on Climate Change, working group II, stressed how, by 2020, between 75 and 250 million people living in Africa would have been exposed to an increase of water stress due to climate change, that glacier melting in Himalaya would have increased flooding and rock avalanches, and that small islands would have been especially vulnerable to the effects of climate change, sea level rise and extreme events (IPCC 2007: 13). 2007 can be considered as a watershed for conceiving climate change no longer as "another environmental issue", quite rather "the" environmental issue with severe implications for the "us", namely the environment, human and non-human beings. In the same year, a petition against the United States was presented to the Inter-American Commission of Human Rights by the Center for international environmental law and Earth Justice on behalf of the Inuit asking for the recognition by the human rights body of the connection between global

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warming and human rights[2]. Even though the petition was dismissed for lack of information, the complaint was one of the first ones ever filed before a human rights body and paved the way for a long series of complaints brought in front of domestic and regional courts[3].

In a Special Report of 2018, the same panel scientifically confirmed that human-induced warming – meaning an increase in combined surface air and sea surface temperatures averaged over the globe and over a 30-year period – reached approximately 1 degree Celsius above pre-industrial level in 2017, increasing at 0,2 degree Celsius per decade (IPCC 2018: 2). The panel also explained why it was necessary and vital to maintain the global temperature increase below 1,5 degree Celsius versus higher level. This is the threshold under which adaptation measures would be less difficult and the world would suffer less negative impacts (IPCC 2018: 8).

On the occasion of the UN Climate Action Summit 2019, held on 23. September, the 195 IPCC Member governments approved a Special Report on the Ocean and Cryosphere in a changing climate, which stressed how the "urgent" reduction of greenhouse gas emissions would limit the scale of ocean and cryosphere changes (IPCC 2019: 42). As pointed out by Hoesung Lee, Chair of the IPCC, «the open sea, the Arctic, the Antarctic and the high mountains may seem far away to many people, but we depend on them and are influenced by them directly and indirectly in many ways – for weather and climate, for food and water, for energy, trade, transport, recreation and tourism, for health and wellbeing, for culture and identity» (https://www.ipcc.ch/2019/). UN experts have stressed, anticipating this international UN conference, that «a safe climate is a vital element of the right to a healthy environment and is absolutely essential to human life and well-being»[4], confirming the main findings of the Special Rapporteur's report A/74/161 of July 2019 .

This contribution starts from the assumption that climate change is a scientifically proven phenomenon. I am therefore not interested in "other" theories that put into question this clear affirmation. Furthermore, in these pages I would not much delve into whether and to what extent climate change law (see, for example, Bodansky *et al*. 2017), starting from the United Nations Framework Convention on Climate Change (hereinafter "UNFCCC") and subsequent agreements including the most recent Paris one, is implemented by States and whether these treaties are effective or not given the vague formulation of their provisions.

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[2] Petition No. P-1413-05.

[3] After dismissing the complaint, the Inter-American Commission on Human Rights held a hearing to "address matters relating to Global Warming and Human Rights" on 1 March 2007.

[4] See at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25003&LangID=E.

My scope here is to support the argument that climate change must be addressed as an international human rights issue and that a shift of paradigm is required from a mere anthropocentric to a more eco-centric approach, through which it is possible to acknowledge the consolidation of a right to healthy environment in the context of the rights of the nature. Healthy environment is meant for the purpose of this article also as "healthy" ecosystems.

2. Environmental law-human rights law or both? Towards the 'Greening' of human rights law through courts

The starting point of the analysis is to understand whether climate change is or might be appropriately addressed as a human rights issue. Mary Robinson, former UN High Commissioner for human rights, emphasised how climate change raises an issue of justice, since poor communities are the ones that suffer the most from the effects of climate change. She was convinced that the human rights framework provided the legal and normative ground for empowering the poor to seek redress (Robinson 2006).

Environmental rights are human – and non-human – rights (Daly and May 2018: 43). Nonetheless, despite being aware of the impact climate change might have on human rights, environmental and human rights law have always appeared as two separate fields of law, surely connected, but not really intertwined. The courses that are offered at the university mirror this approach.

A reference to human rights is nonetheless explicit in the preamble (only) to the Paris Agreement, adopted during the Climate Conference (COP 21) in December 2015 and entered into force on 4 November 2016, which has reached a significant number of ratifications (185 at the time of writing), and which addressed the impact of climate change on human rights in the following recital: «Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity».

It is well known that international climate change law has quite a "technical character", being focused on the emission reduction commitments first encapsulated in the United Nations Framework Convention on Climate Change of 1992, then set out as internationally binding emission reduction provisions in the Kyoto Protocol of 1997, later amended in Doha in 2012, and eventual-

ly transformed into the aforementioned Paris Agreement of 2015, which has raised much controversy due to the vagueness of its provisions, but which has convinced the most reluctant States to ratify it[5]. With the adoption of the Paris Agreement in 2015, governments agreed to limit global warming to below 2 degrees Celsius and to pursue efforts to limit it to 1.5 degrees Celsius; to increase the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development; and to make finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development (Article 2 of the Paris Agreement). Human rights were not addressed in Article 2 of the Paris Agreement, despite some States' proposal in that respect (Knox and Pejan 2018: 14).

Yet, if not achieved in treaty law, owing to the reluctance of States in the negotiation process, the interconnection between environmental law and human rights has clearly emerged at the international level, urged by civil society and endorsed by national courts in a growing number of cases. A plurality of cases have been filed with national courts (in some cases regional courts) in which both the interests of human beings *and* of the environment, together, as part of an important evolution in international law, have been taken into account. As it was argued, "faced with inadequate regulatory incentives and a lack of available tort claims, plaintiffs in the US and across the globe have employed a creative new tactic: suing their governments for failing to take sufficient measures to reduce greenhouse gas emissions" (HLR 2019: 2090). The number of cases, combined with a widespread activism, is stunning. According to the *climatecasechart*, a US-based database, the following cases have been filed: 684 federal statutory claims concerning federal acts such as the Clean air and the Clean Water acts; 26 constitutional cases, concerning, among others, the First Amendment clause; and 310 State law claims, including, inter alia environmental lawsuits[6]. As for non-US climate change litigation: 281 applications against governments and 24 against corporations and individuals have been started. Hence, for example, in March 2019 the Massachussets Federal Court declined to dismiss claims proceed against Exxon for allegedly violating a marine terminal's Clean Water Act permit by failing to consider the impacts of climate change. The Court contended that the complaint included new allegations of imminent harm "sufficient to allege standing"[7].

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[5] See, with regard to the United States, Bodansky (2015: 1): «The success of the Paris outcome will depend crucially on the participation of the world's major economies, including the United States».

[6] See http://climatecasechart.com/ (last accessed on 26 September 2019).

[7] See http://climatecasechart.com/case/conservation-law-foundation-v-exxonmobil-corp/.

2.1. *Urgenda v. The State of the Netherlands – what the greening of human rights means in court*

In Europe, *Urgenda v. the State of the Netherlands*, filed with Dutch courts, has been the most famous and debated case. The applicants – the environmental group Urgenda Foundation and 900 Dutch citizens – filed a complaint against the Dutch government to oblige it to do more to prevent global climate change. The District Court in the Hague, which rendered the judgment in 2015, ordered the government «to limit the joint volume of Dutch annual greenhouse gas emissions, or have them limited, so that this volume will have reduced by at least 25 percent at the end of 2020 compared to the level of the year 1990» (Rechtbank Den Haag 2015: 5.1). The Court concluded that the State violated its duty of care under the Dutch civil code, and that it has a duty to take climate change mitigation measures.

The decision was hence based on Dutch private law (Stein and Castermans 2017: 306). Several legal instruments at both the international and regional level were mentioned, including the Dutch Constitution, the principles of the 1992 UNFCCC, the European Convention on Human Rights (ECHR), and the Treaty on the Functioning of the European Union (TFEU), plus the general no-harm principle in international law. The Court did not argue that these legal instruments directly applied in this case. Nonetheless, it drew from these provisions a framework of analysis and a set of principles (Stein and Castermans 2017: 311). With regard to the European Convention on Human Rights, the Dutch Court argued that Urgenda, as legal person, could not be considered in itself as a victim of human rights abuse within the meaning of the Convention. Nonetheless, it used the Convention as a source of interpretation of private law standards of care. The Court did not specify how the government should meet the reduction mandate, but offered several suggestions, including emissions trading or tax measures. The decision is surely groundbreaking because it «lays the basis for broader recognition of the application of human rights norms to the global climate change crisis» (Stein and Castermans 2017: 318).

The government appealed. The Hague Court of Appeal upheld the judgment but on different grounds, arguing that Articles 2 (right to life) and 8 (right to respect for private and family life) of the European Convention on Human Rights were applicable. The appellate court held that the "victim" requirement of Article 34 of the European Convention did not prevent Urgenda from having access to Dutch courts complaining about the violation of one of the rights enshrined in the Convention itself. The Court contended that the rights recognised in the Convention placed a "positive obligation" on the State «to protect the lives of citizens within its jurisdiction under Article 2 ECHR, while Article 8 ECHR creates

the obligation to protect the right to home and private life», and that this obligation applies to all activities which «could endanger the rights protected in these articles, and certainly in the face of industrial activities which by their very nature are dangerous» (The Hague Court of Appeal 2018: 43). The Court then added that if the government «knows that there is a real and imminent threat», the State must take «precautionary measures to prevent infringement as far as possible» (The Hague Court of Appeal 2018: 43). The Court relied on reports prepared by the IPCC and decisions adopted by the conference of the parties to identify the "real and imminent threat" which would have triggered the obligation the State was abide by. The Court found that the State violated Articles 2 and 8 of the European Convention by not reducing its emissions by at least 25 per cent by the end of 2020.

As it was pointed out by an author, «the judgment seems to replace the duty of care under the Dutch Civil Code with the duty of care under Articles 2 and 8 ECHR, thus essentially turning the Urgenda case into a human rights case» (Verschuuren 2019: 96). The Court of Appeal also rejected the objections of the government claiming that the District Court jeopardised the principle of balance of power and pointed out that the State retained "complete freedom" to determine how to comply with the order. The legal reasoning led the Court to emphasise the role of the precautionary principle in climate change matters and to clarify the issue of casual link. With regard to the latter, the Court explained that the matter of the dispute is not the award of damages, but rather the obligation of States to adopt measures to address the issue of climate change (Verschuuren 2019: 96). The Dutch government filed a further appeal in front of the Netherlands' Supreme Court, which held a hearing on 24 May 2019. On 13 September, independent judicial officers recommended that the Supreme Court uphold the decision. The awaited decision was rendered on 20 December 2019, upholding the decision under Articles 2 and 8 of the European Convention on Human Rights[8].

From a legal point of view, the merits of the judgments of the Court of Appeal and the Supreme Court deserve attention, because human rights instruments played a key role in the Courts' affirmation of the States' positive obligation to protect the individuals' rights to life and to respect for private and family life. These groundbreaking decisions will constitute a model for further judgments on climate change measures.

Would the legal argument be different with the consolidation of a right to a healthy environment at the international level?

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[8] http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20191220__2015-HAZA-C0900456689__judgment.pdf (in Dutch).

Before delving into the affirmation of a right to a healthy environment in customary international law, we will reflect in more detail on another aspect stressed in the preamble of the Paris Agreement: «climate change is a common concern of humankind». This concept mirrors the preamble of the first UNFCCC of 1992 and the previous UN General Assembly Resolution No. 43/53 of 1988, which, for the first time, held unanimously that climate change is a common concern of humankind (mankind at that time in a not very gender-neutral language), since «climate change is an essential condition which sustains life on earth». The loss of biodiversity has also been considered as a common concern of humankind in the UN Convention on Biodiversity of 1992.

The concept of "common concern" has been object of considerable scholarship. It has never been formally defined and focuses on protecting the resources or environmental systems of concern to humankind (Brown Weiss 2013: 71). It means that the necessary action should be taken in order to preserve the variability among living organisms from all sources, in a sustainable way, according to an intra-generational and inter-generational approach (Brunnée 2007). Despite being without normative content, the notion of common concern of humankind legitimises, an author argues, an international interest in the conservation and use of biological resources otherwise within the territorial sovereignty of other State (Boyle 1996: 40). The "common concern of humankind" has been described as a principle of international environmental law (see, extensively, Soltau 2016). More than twenty years ago, an author suggested that certain forms of massive or very hazardous pollution of the atmosphere amount to a violation of a jus cogens norm, producing «international environmental solidarity duties» (Biermann 1996: 472, 480).

The idea of common concern of humankind might seem, at least at first sight, to contradict the well consolidated principle of «permanent sovereignty in classic international law» (Scholtz 2013: 201). Nonetheless, this principle has been eroded since the affirmation of international law itself, because international cooperation presupposes a form of restriction of sovereignty necessary to achieve common goals. The evolution of human rights law has also determined an erosion of the absolute power of States to treat their nationals without constraints. Other principles have gradually consolidated in international environmental law, including good neighbourliness and the obligation to notify cases of pollution to neighbouring countries, following the findings of the award in the *Trail Smelter* arbitration of 1938/1941.

It can be argued that the notion of common concern of humankind determined a first change of paradigm: from the interest of one (or more) neighbour-

ing States to the interests of all States of the international community, to the point of affirming a legal interest of micro-States to challenge measures adopted hundreds of thousands kilometers from them owing to the harmful consequences of climate change for low lying islands (De Vido 2017: 120 f.). As it was interestingly argued, the concept of common concern "changes" the right of the State to freely dispose of the resources to respond to the challenges of the climate change (Scholtz 2013: 205). The notion of common concern goes beyond the obligation for a State not to cause harm in the territory of a neighbouring country, it implies a fair and equitable burden sharing, the protection of the interests of present and future generations, and the affirmation of a new steering element in terms of State cooperation (Scholtz 2013: 207). It means, in other words, to entitle a State of a "custodial element" and consider that it has *due diligence obligations* – which means that these are not obligations of result but obligations of taking steps – even in cases in which it is not an activity of the State – or of one of its *de jure* or *de facto* organs – that has determined the pollution, e.g. a fire in the forest.

This first change of paradigm is far from being far-fetched and has legal consequences in State practice. As posited by the International Court of Justice in the opinion of the legality of the use of nuclear weapons in 1996, there is a "common conviction of the States concerned – is that an international custom? The International Court of Justice is not explicit in that respect – that they have a duty to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States *or of areas beyond the limits of national jurisdiction*" (ICJ 1996: 27). Furthermore, the Court acknowledged in its opinion that the environment «is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognised that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is *now part of the corpus of international law relating to the environment*»(emphasis added; see ICJ 1996: 29).

3.1. *The "Common Concern" of humankind: The response to the fires in the Brazilian Amazon as case study*

The argument elaborated in these pages can be appreciated through the analysis of recent State practice. During and after what happened in Brazil in the summer of 2019, with the Amazon forest being irreversibly damaged by fire, Latin American Countries, including Brazil itself, signed, on 6 September 2019, the

Pacto de Leticia por la Amazonía, an act of soft law[9]. The meeting was convened in Leticia at the border of Colombia with Peru and Brazil. The heads of States of Bolivia, Colombia, Ecuador and Peru were present, along with the Minister of external relations of Brazil, the vice-President of Suriname and the Minister of the Environment of Guyana. The meeting followed the severe diplomatic crisis caused by the late Brazilian response to the fires in the Amazon, whose gravity shocked the public opinion (we will not delve here into the issue of whether or not coercion would be legal in international law; see in that respect Gilley and Kinsella 2015). The text reproduces several obligations States must abide by according to the Amazon Cooperation Treaty of 1987 and hence does not seem quite innovative in light of what we have called in these pages as "environmental human rights law" (Boeglin 2019). Even though human rights are not explicitly mentioned, the *Pacto* refers to education, participation of and information to civil society, indigenous rights. It encourages new forms of regional cooperation, which indeed might constitute a very practical and effective response to climate change threats. States where the Amazon is present should work on the establishment of a permanent regional mechanism of response to the fires.

4. The need of a new paradigm

What is lacking in the analysis conducted so far, despite the undeniable positive attempts to face current threat through the national jurisprudence and the application of the notion of common concern of humankind is a shift in the paradigm with the affirmation of a human right to a healthy environment in the context of the rights of the nature (Ito and Montini 2019: 231). It means, in other words, to conceive a human right to a healthy environment which, at least but not only in the field of climate change, does not conflict with the rights of the nature. The former cannot exist without the latter. Without the affirmation of the rights of the nature even absent a direct and immediate consequence for the humans, the human right to a healthy environment would be irreparably jeopardised. This conclusion can be reached conceiving the "us" as humans, non-humans and the environment in a holistic and less anthropocentric approach.

Affirming that climate change consists in a common concern of humankind is not devoid of legal consequences as we could appreciate in the precedent paragraph, but it is still a vague and contradictory notion, which is very difficult to bring in front of the court. To the contrary, a human right to a healthy environment could be invoked as justiciable right in front of (mainly regional) human

[9] See the text here: https://www.gob.pe/institucion/rree/noticias/50579-pacto-de-leticia-por-la-amazonia.

rights and domestic courts, with the consequence of being affirmed as self-standing right which does not need to rely on other rights to be indirectly protected. It means, in other words, that individuals or groups – where this is possible according to the system in force – could bring cases in front of courts to have this right recognised. As alternative, as we could see in the *Urgenda* case, the right could be used to interpret the obligation of States to protect the lives of its own citizens under other sources of (mainly national) law. In any case, as stressed by Boyd, a right to a healthy environment leads to «stronger environmental laws» and to «courts decisions defending the rights from the violation» (Boyd 2018: 26).

The consolidation of a right to a healthy environment in international customary law does not seem thus far to be achieved. The Special Rapporteur on human rights and the environment acknowledged, in its most recent report of 2019, that the right to a healthy environment is already recognised by a majority of States in their constitutions, legislations and various regional treaties to which they are parties. He also recognised that, in spite of this, «the right to a healthy environment has not yet been recognised as such at the global level»[10] and elaborated States' obligations with regard to a specific aspect of this right, namely the right to breathe clean air. How to reconcile these two affirmations? If it is true, on the one hand, that States have proved to be extremely reluctant in accepting international legal obligations in the field of climate change measures, on the other hand courts and national parliaments, urged by civil society, have marked significant steps forward.

Outstanding authors have commented on the possibility of conceptualising a right to a decent environment and of locating it within the corpus of economic, social, and cultural rights. According to Boyle, «clarifying the existence of such a right would entail giving greater weight to the global public interest in protecting the environment and promoting sustainable development» and «the further elaboration of procedural rights […] would facilitate the implementation of such a right» (Boyle 2015: 221). Boyle further argued that «a right to a decent environment has to address the environment as a public good, in which form it bears little resemblance to the accepted catalogue of civil and political rights, a catalogue which for good reasons there is great reluctance to expand» (Boyle 2015: 221).

[10] It is possible to find reference to the right to a healthy environment in the 1972 Stockholm Declaration, in the African Charter of human and peoples' rights (Article 24, right to a satisfactory environment), in Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador, Article 11: right to live in a healthy environment), and in the Convention on Access to information, public information, public participation in decision-making and access to justice in environmental matters (preamble, right to a "healthy environment").

The Inter-American Court of Human Rights, in its Advisory opinion of 15 November 2017, recognised the existence of a right to a healthy environment as autonomous right, which presents an individual and a collective dimension. In its collective dimension, it constitutes an "universal interest", which must be granted to both present and future generations. In its individual dimension, its violation might directly or indirectly impact on other rights, such as the rights to health, to personal integrity, to life, among others. The Court acknowledged that the degradation of the environment can cause irreparable damages to all human beings, with the consequence that the right to a healthy environment is fundamental for the existence of humankind (IACHR 2017: 59; Peña Chacón 2019). The opinion is groundbreaking and does constitute State practice. The approach followed by the Inter-American Court of Human Rights drives a further shift of paradigm, from a mere anthropocentric to a more eco-centric approach. If we consider the *human* right to a healthy environment, the lens through which we see it is strictly anthropocentric. It is a right belonging to *human beings*. However, climate change affects the environment, human and non-human beings, to the point that the existence of human beings depends on the existence of the flora and the environment. Even though legal scholarship does not seem ready enough, the shift of paradigm from a mere anthropocentric to a more eco-centric approach would imply the consideration of the so-called "rights of nature", or, in a more practical way at least for the time being, it would lead to the consolidation of a right to a healthy environment *in the context of the rights of the nature*.

Accordingly, we are not interested here in whether and to what extent natural elements or non-human beings are subjects of law. The debate dates back to the 70s when Christopher Stone wrote an article entitled "Should trees have standing?" (Stone 1972: 450)[11] and has developed thanks to the jurisprudence of mainly Latin American courts and the constitutional recognition of the rights of nature (Ecuador being illustrative example)[12]. I will not discuss here whether non-human animals or rivers, seas and oceans should have legal personality, whose rights can be represented in court (see Cano Pecharroman 2018; Gazzola and Turchetto 2015). What we want to stress here is that the reduction of gases in the atmosphere does not only benefit humans, but also the environment itself. Far from being one against the other, the rights of nature and the human right to a healthy environment converge, and they should be conceived as strictly intertwined in order to overcome a pure sterile anthropocentric approach.

[11] See also his book, Stone 1973/2010.

[12] Chapter 7 of the Constitution: «Nature or Pachamama, where life is reproduced and exists, has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution».

As anticipated by Boyle, a right to a satisfactory decent environment «would be less anthropocentric that the present law. It would benefit society as a whole» (Boyle 2007). It would do so because the status of environmental degradation has deteriorated so fast in recent years that the protection of the rights of the nature is fundamental for the respect of human rights, first and foremost the right to life. It is clear that there might be cases in which the interests of the nature conflict with human interest – consider the cases of biodiversity for example, where a human infrastructure might collide with the safeguard of protected areas (De Vido 2016) – but, paraphrasing a decision of a court in Ecuador, the two interests do not collide when the realisation of one interest can be achieved while respecting the other interest[13]. This is the case of the actions against climate change.

Even though international environmental law, at least for the time being, basically remains anthropocentric, there are non-anthropocentric developments that reveal a growing recognition of the environment as a public interest. Anthropocentrism and non-anthropocentrism can be reconciled in environmental ethics, which examines human beings' relationship with the natural environment. The reduction of emissions in the atmosphere has value both inherently and as benefits for present and future generations of human beings. As Stone argued even before environmental law had started to develop at the international level, «because the health and well-being of [human]kind depend upon the health of the environment, these goals will often be so mutually supportive that one can avoid deciding whether our rationale is to advance "us" or a new "us" that includes the environment» (Stone 1972: 489). This was precisely the point caught by the Inter-American Court of Human Rights in the aforementioned opinion, which emphasised how, compared to other human rights, the right to a healthy environment protects nature, even absent evidence of possible risks for human beings, because of its importance for the rest of living beings, deserving protection (IACHR 2017: 180). It is precisely the "us" including the environment envisaged by Stone; an environment which must be conceived as including both flora and fauna. It follows that human beings bear the responsibility to protect this value and, through their actions, to develop an environmental consciousness (Iovino 2008: 83).

Francioni contended that a «more advanced jurisprudence in the field of human rights which recognises the collective dimension of the right to a decent and sustainable environment as an indispensable condition of human security and human welfare» is necessary, and that «it does not make much sense to engage human rights language to combat environmental degradation only when

[13] Ruling by the Ecuadorian Sala Penal de la Corte Provincial. Protection Action. Ruling Number No. 11121-2011-0010. Casillero N0. 826. 30 March 2011. Available at http://consultas.funcionjudicial.gob.ec/informacionjudicial/public/informacion.jsf.

such degradation affects the rights to life, property, and the privacy of certain directly affected individuals» (Francioni 2010: 44, 55). The affirmation of a right to a healthy environment opening to the "rights of the nature" – which might in the future lead to the *locus standi* of elements of the nature – is the response to the limited political commitments of States, and could be reached through the jurisprudence of regional and domestic courts, that have already started to pave the way. This consideration is valid for climate change as well as for biodiversity loss. As stressed by the Special Rapporteur Boyd, «the loss of global biodiversity is having and will continue to have devastating effects on a wide range of human rights for decades to come. This report is a stark reminder that we can simply not enjoy our basic human rights to life, health, food and safe water without a healthy environment»[14]. Michele Carducci posited that legal scholarship should open to the concept of "rights of nature" in order not to be tempted to compare human balances on one hand, and ecological balances on the other, and to overcome "systemic blindness" which is no longer sustainable by the entire human species (Carducci 2017: 521).

It is not an easy task, we are all aware of this. The lack of political will towards the protection of the environment is striking (some declarations made by heads of State over 2019 questioning climate change demonstrate this trend). Nonetheless, we are experiencing a moment in which citizens and NGOs are pushing courts to recognise States' obligations for the protection of the environment and for countering climate change. Individuals and groups cannot produce State practice useful to consolidate an international custom[15] recognising the right to a healthy environment, but national and regional jurisprudence, stimulated by individual or collective complaints, surely can.

5. The future: the need for a change of paradigm starting from regional organisations

As demonstrated by the "activism" in the jurisprudence and the legislation of Latin American countries, the paradigm can more easily change working within regional contexts.

In the European Union, the action to protect biodiversity has been remarkable (for a reflection on the Habitat Directive and the Natura 2000 network, see De Vido 2016), as it will be the action to reduce and partly eliminate single-use

[14] See https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24738&LangID=E.

[15] An international custom is composed, as it is well known, of State practice and *opinio juris sive necessitatis*.

plastics. With regard to the latter, the European Strategy for Plastics was adopted by the European Commission in January 2018 (see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A European Strategy for Plastics in a Circular Economy* {SWD(2018) 16 final}), followed by Directive No. 2019/904 on the reduction of the impact of certain plastic products on the environment, also known as "Single-Use Plastics Directive", which was adopted on 5 June 2019 and published one week later (Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment, OJ L 155, 12.6.2019, 1-19).

The new strategy and Directive on single-use plastics have no precedent in the world (De Vido 2020). The Directive was approved during the first reading by both the European Parliament and the Council. The Council approved it by unanimity with the only abstention of Hungary. In the preamble, it is recalled that single-use plastic products and fishing gear containing plastic are «a particularly serious problem in the context of marine litter and pose a severe risk to marine ecosystems, biodiversity and, potentially, to human health and are damaging activities such as tourism, fisheries and shipping» (Directive 2019/904, preamble, recital no. 5). This is the closest reference we can find in the Directive on human rights concerns related to the pollution of the environment through plastics and to the precautionary principle (the adverb "potentially"). The preamble also acknowledges that «marine litter is transboundary in nature and is recognised as a growing global problem» (*ivi*, recital no. 3), and that the legal instrument locates into the more general debate on circular economy. The Directive clearly responds to a necessity, which consists in the reduction of single-use plastics found on beaches in the Union: «To focus efforts where they are most needed, this Directive should cover only those single-use plastic products that are found the most on beaches in the Union as well as fishing gear containing plastic and products made from oxo-degradable plastic. The single-use plastic products covered by measures under this Directive are estimated to represent around 86 % of the single-use plastics found, in counts, on beaches in the Union. Glass and metal beverage containers should not be covered by this Directive as they are not among the single-use plastic products that are found the most on beaches in the Union» (*ivi*, recital no. 7).

However, the approach of the Commission with regard to environmental matters has been oriented by economic interests. The Directive is based on the five Rs: Reduction, Restrictions, Requirements, Responsibility, Recycling (De Vido 2020). Despite the innovative approach embraced by the Strategy and the Directive, the European Union was not capable of advancing its environmental governance to the point of overcoming the limited anthropocentric approach

of its legislation. As we argued, the approach should be guided by the right to a healthy environment as conceived in these pages: a right that, despite having consolidated as "human" right should be open to the "rights of the nature" which are not in opposition but rather reinforce each other. Unfortunately, the words human rights are completely absent from the text of the Directive on single use plastics[16], and even the right to participation was removed from the final text[17].

In March 2019, plaintiffs from five European Member States, including Romania, Ireland, Slovakia, France and Estonia, plus from the United States, filed a complaint in front of the Court of Justice of the European Union, arguing that the European Union's 2018 Renewable Energy Directive (RED II) would devastate forests and increase greenhouse gas emissions by promoting burning forest wood as renewable and carbon neutral (http://eubiomasscase.org/the-case/). The applicants contend that the inclusion of forest biomass as a potential fuel violates Article 191 of the Treaty on the Functioning of the European Union and several rights under the Charter of Fundamental Rights of the European Union. This lawsuit proves our argument on the need to conceive the "us" as including the environment, human and non-human beings and encourages an action by the courts which would constitute important State practice.

6. What's next?

We are experiencing an evolution in international law, which is determined in particular by courts in response to the civil society's increasing interest in environmental matters. Courts are organs of the State, and their action is therefore State practice, capable of consolidating a right to a healthy environment in cus-

[16] In the preamble and in Article 1, the Directive contradicts, to a certain extent, its innovative environmental vision, by only mentioning the impact of plastics on "human health". It should be stressed that the language used is precisely "health" and not "human right to health", which is far from being a mere technicality. Health is a status, whereas a right can be invoked by individuals in front of courts.

[17] It is interesting to note that in the proposal presented by the European Commission, there was a reference to access to justice. According to Article 12 of the proposal: «Member States shall ensure that natural or legal persons or their associations, organisations or groups, in accordance with national legislation or practice, have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, actions or omissions related to the implementation of Articles 5, 6, 7 and 8 when one of the following conditions is fulfilled: (a) they have a sufficient interest; (b) they maintain the impairment of a right, where the administrative procedural law of the relevant Member State requires this as a precondition». This article, as explained by the Commission, was aimed at «implement[ing] the Aarhus Convention with regard to access to justice and [wa]s in line with Article 47 of the Charter of Fundamental Rights».

tomary international law, a right that, as we argued, combines the "human" right to live in a healthy environment with the interests of the nature that States must protect. The State as subject of international law does not prove to be a monolith, but rather experiences a fracture between the judiciary (sometimes along with the legislative) on the one hand and the executive power on the other. The push coming from civil society cannot be disregarded and the hundreds of cases that started to appear at the international level demonstrates that not only climate change is a common concern of humankind, but that a human right to a healthy environment is gradually emerging, combined and not conflicting with the rights of the nature. The devasting effects of climate change should make the environment and the "us" – meaning human and non-human beings – at the centre of any political debate.

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