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A Human Rights-Based Approach to Protecting the Environment

Status, Critique and Alternatives

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Abstract

The consequences of human-made climate change are already felt, with more than half of the world's animal population depleted between 1970 and 2014. The effects of humans on every aspect of our natural environment have made scientists consider that we are living in a sixth geological epoch – the Anthropocene, defined as humans being the main factor affecting the geology of our planet. Meanwhile, the legal system has failed to respond properly to the scientific knowledge that illuminates human intervention in the environment.

This thesis focuses on providing an analysis from socio-legal and critical perspectives on a human rights-based approach to protecting the environment. In its first part, it focuses on the current legal status of such a right, its purpose and legal regime, and the benefits it brings as a legal tool, which aims to protect the environment. In its second part, this legal instrument is subjected to critiques regarding its flaws, such as its political character, its weakness as an economic, social or cultural right, the occurrence of conflicts of rights as well as its anthropocentricity. In its final part, the thesis will present two alternative, yet complementary legal instruments to a human rights-based approach – namely, environmental law and rights of nature. The former is the traditional way of protecting the environment; the latter will bring forward the concept that we should detach from our anthropocentric approach and apply an approach that is inclusive to natural objects and respectful of their interests. Both will be analysed in the context of the right to a healthy environment.

Throughout this thesis, I argue that despite its many flaws, a human right to a healthy environment is necessary for the better protection of the environment in the current legal context. Thus, international recognition thereof can bring about many benefits and negate some of the current flaws of this right, such as the vagueness of its meaning and the lack of uniformity of its regime throughout the globe. From a more general perspective, however, I present the idea of attributing rights to natural objects as a way to have more interests represented, strengthen environmental interests and protection, and apply a more holistic approach to understanding how different actors interact with each other. Finally, I argue that all three legal instruments analysed in this thesis should be used together, in a complementary way, in order to maximise their efficiency and take most out of the benefits they bring about.

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Abbreviations

ANT – actor-network theory

AU – African Union

CELDF – Community Environmental Legal Defense Fund

CESCR – Committee on Economic, Social and Cultural Rights

CoE – Council of Europe

COP – Conferences of Parties

COP21 – 2015 United Nations Climate Change Conference

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

EIA – Environmental Impact Assessment

EU – European Union

GHG – greenhouse gas

ICCPR – International Covenant on Civil and Political Rights

ICESCR – International Covenant on Economic, Social and Cultural Rights

ICJ - International Court of Justice

ICJ – International Court of Justice

IPCC – Intergovernmental Panel on Climate Change

IUCN – International Union for Conservation of Nature

MEAs – multilateral agreements

NGO – Non-governmental organisation

OAS – Organisation of American States

OHCHR – Office of the High Commissioner for Human Rights

UN – United Nations

UNCCC – United Nations Climate Change Conferences

UNFCCC – United Nations Framework Convention on Climate Change

WHO – World Health Organization

WWF – World Wide Fund for Nature

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Introduction

Using his burgeoning intelligence, this most successful of all mammals has exploited the environment to produce food for an ever-increasing population. Instead of controlling the environment for the benefit of the population, perhaps it's time we controlled the population to allow the survival of the environment.

Sir David Attenborough

Extreme heat, increased quantity and intensity of natural disasters, acid rain, malaria outbreaks, rising sea levels, floods, climate migration and wars, whole countries under water… These are some of the events we have experienced or will experience due to climate change.[1] There is a rarely seen consensus in the scientific community that climate change is manmade.[2] Further, some scientists agree that we live in a new sixth geological epoch – the Anthropocene (which should not be confused with 'anthropocentric').[3] According to them, humans have become the dominating factor influencing the global environment, affecting the Earth for potentially millions of years into the future.[4] The latest and most comprehensive assessment of its kind suggests that '1 million species already face extinction', based on considering that '25% of species in assessed animal and plant groups' are threatened.[5]

Everyone is going to be affected by climate change, yet not everyone is going to be affected equally. There are groups and countries that are (going to be) affected directly more than others by climate change. Researchers have produced numerous pieces and studies in support of this claim.[6] Moreover, different

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[1] WHO, 'Climate Change and Health' <https://www.who.int/en/news-room/fact-sheets/detail/climate-change-and-health> accessed 23 April 2019; DJ Wuebbles and others (eds), 'Climate Science Special Report: Fourth National Climate Assessment, Volume I' (2017).

[2] John Cook and others, 'Consensus on Consensus: A Synthesis of Consensus Estimates on Human-Caused Global Warming' (2016) 11 Environmental Research Letters; Naomi Oreskes, 'The Scientific Consensus on Climate Change.' (2004) 306 Science (New York, N.Y.); Peter T Doran and Maggie Kendall Zimmerman, 'Examining the Scientific Consensus on Climate Change' (2009) 90 Eos, Transactions American Geophysical Union 22; Neil Stenhouse and others, 'Meteorologists' Views About Global Warming: A Survey of American Meteorological Society Professional Members' (2014) 95 Bulletin of the American Meteorological Society 1029; JS Carlton and others, 'The Climate Change Consensus Extends beyond Climate Scientists' (2015) 10 Environmental Research Letters.

[3] Paul J Crutzen, 'The "Anthropocene"', *Earth System Science in the Anthropocene* (Springer-Verlag 2006); Jan Zalasiewicz and others, 'Are We Now Living in the Anthropocene?' (2008) 18 GSA Today 4.

[4] Simon L Lewis and Mark A Maslin, 'Defining the Anthropocene' (2015) 519 Nature 171; JA Zalasiewicz and Kim Freedman, *The Earth after Us : What Legacy Will Humans Leave in the Rocks?* (Oxford University Press 2009).

[5] Sandra Díaz and others, 'Summary for Policymakers of the Global Assessment Report on Biodiversity and Ecosystem Services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services' (2019).

[6] See eg Hans G Bohle, Thomas E Downing and Michael J Watts, 'Climate Change and Social Vulnerability: Toward a Sociology and Geography of Food Insecurity' (1994) 4 Global Environmental Change 37; W Neil Adger and P Mick Kelly, 'Social Vulnerability to Climate Change and the Architecture of Entitlements' (1999) 4 Mitigation and Adaptation Strategies for Global Change 253.

actors throughout the years have produced different variations of a Climate Change Vulnerability Index,[7] demonstrating that some communities are more vulnerable than others are. Such is the case, *inter alia*, for socially vulnerable groups,[8] island countries or territories[9] etc. The fact that everyone is (going to be) affected, no matter the proportion, entails a negative impact on many, if not all, human rights. Further, it brings about the idea that people have a right to live in a healthy environment, as such may prove to be essential for the satisfaction of many other human rights, such as the rights to life, food, health and more.

This grim, serious and well-known illustration of our environmental reality has been met with somewhat dubious reactions from the international community of states. Despite having the United Nations Climate Change Conferences (UNCCC) within the United Nations Framework Convention on Climate Change (UNFCCC) organised every year since 1995, and despite nearly all UN Member States signed the Paris Agreement (or COP21), projected results are not that optimistic. For example, scientists suggest that the Paris agreement goals should be more aggressive[10] if we are to avoid reaching the 2°C temperature rise threshold relative to preindustrial times set therein.[11] In fact, there are many sceptics questioning whether we can truly reach that goal in the current situation and with this agreement.[12] Unfortunately, instead of setting and reaching goals that are more aggressive, we see that one of the world's major emitters, the United States of America, has declared its intentions to withdraw from the agreement in 2020.[13] What is more disturbing is that scientists have projected a '5% (1%) chance that global temperature increase will be less than 2°C'.[14] Further, the IPCC, in a 2015 report analysing the effects of a 1.5°C on our planet,

[7] See eg Verisk Maplecroft, 'Climate Change Vulnerability Index' <https://reliefweb.int/sites/reliefweb.int/files/resources/verisk index.pdf> accessed 3 May 2019; 'Climate Change Vulnerability Index (CCVI)' (2014) <https://climate-adapt.eea.europa.eu/metadata/tools/climate-change-vulnerability-index-ccvi> accessed 3 May 2019; 'ND-GAIN Country Index' <https://gain-new.crc.nd.edu/ranking> accessed 3 May 2019.
[8] See eg Bohle, Downing and Watts (n 6); Adger and Kelly (n 6).
[9] See eg N Mimura, 'Vulnerability of Island Countries in the South Pacific to Sea Level Rise and Climate Change' (1999) 12 Climate research; Jon Barnett, 'Adapting to Climate Change in Pacific Island Countries: The Problem of Uncertainty' (2001) 29 World Development 977.
[10] Benjamin M Sanderson, Brian C O'Neill and Claudia Tebaldi, 'What Would It Take to Achieve the Paris Temperature Targets?' (2016) 43 Geophysical Research Letters 7133.
[11] Paris Agreement 2015 art2.
[12] Raymond Clémençon, 'The Two Sides of the Paris Climate Agreement' (2016) 25 The Journal of Environment & Development 3; J Rogelj and others, 'Paris Agreement Climate Proposals Need a Boost to Keep Warming Well below 2 C' (2016) 534 Nature 631.
[13] 'Trump Withdrew from the Paris Climate Deal a Year Ago. Here's What Has Changed. - The Washington Post' <https://www.washingtonpost.com/news/energy-environment/wp/2018/06/01/trump-withdrew-from-the-paris-climate-plan-a-year-ago-heres-what-has-changed/?noredirect=on&utm_term=.6df0018f8edd> accessed 24 April 2019.
[14] Adrian E Raftery and others, 'Less than 2 °C Warming by 2100 Unlikely' (2017) 7 Nature Climate Change 637.

estimated that we have 12 years to change our way of living and achieve sustainability before we reach 'the point of no return'.[15]

In this concerning context, advocates, lawyers and experts have tried to use the current legal tools and invent new instruments in order to provide a better protection for the environment. Environmental law provides a more traditional approach to this end, whereas a possible protection of the environment through the framework of human rights could be seen as a more innovative and new approach. Even newer, bolder and extravagant for the legal mind concept is the attribution of legal personality to natural objects, or the so-called 'Rights of Nature'.

The purpose of this thesis will be to focus and critically reflect on the nature, status and regime of the human right to a healthy environment, as well as its aptitude to protect the environment, and put this legal instrument in the context of International Environmental Law and Rights of Nature. Through a critical approach, it will not seek to diminish the value of the right in question, but rather to bring forward its flaws so that they are reflected upon and tackled in a constructive way. Although I will necessarily reflect on the individual existence of the right to a healthy environment, I will also look at it as a complementary tool to the other two instruments – Environmental Law and Rights of Nature.

I will seek to demonstrate that despite its many practical benefits, the right to a healthy environment has many flaws and should not be seen as the *panacea* to our environmental problems. I will argue that there are many conceptual, practical and other issues with a rights-based approach to protecting the environment, yet I will also defend the position that despite these issues, a right to a healthy environment is necessary in the context of our current legal reality. An international recognition of such a right may bring about some valuable benefits to protecting the environment. Notwithstanding this necessity, I will finish by bringing forward the point that we should go beyond our anthropocentric approach to constructing this legal reality and consider attributing legal personality to nature. Such an argument will be based on the idea that agency should not be limited to humans and that non-human objects have intrinsic value and creativity that justifies recognising their agency.

As every human being, I can only strive for objectivity, yet can never truly reach it. Thus, a self-reflection could give the reader some useful context. The underlying driver that guides me, and consequently this

[15] Intergovernmental Panel on Climate Change, 'Global Warming of 1.5°C An IPCC Special Report on the Impacts of Global Warming of 1.5°C above Pre-Industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty'.

thesis, is the desire to assure a better protection for our environment and to come closer to an equilibrium between what humans need and what the Earth needs in order to thrive and sustain themselves, and also each other. Born and raised in one of the most air polluted cities in Europe – Sofia,[16] I am acquainted with the terrible feeling of living in a smog and risking your life by simply breathing. However, I am also well aware that as a white European male I am rather privileged and cannot truly imagine the despicable effects climate change has on more vulnerable people. This too serves as a motivation for me to search for solutions to our global problem and protection for us all when our governments fail to act appropriately. I have doubtlessly been influenced by the young 'green wave' in Europe and beyond.[17]

Throughout my research, I will strive to adopt the socio-legal and the 'critical legal studies' methodologies together, joining them with the Bruno Latour's actor-network theory and, therefore, applying an altogether interdisciplinary approach.

From one perspective, I will avoid looking at the right to a healthy environment from a purely legal perspective, as if it is put in a vacuum and does not connect with other areas of life and research. Instead, I will strive to put the 'legal' into context and analyse the right to a healthy environment from the perspective of its aptitude to provide for a protected, prosperous and safe environment per se, as well as for humans. I will, therefore, take account of the material effects and prospects of this right.[18]

From a second perspective, I will look at the right to a healthy environment (and human rights in general) as one of many legal languages that can be adopted in order to achieve a certain goal. This stance is inspired by the work and theory of Martti Koskenniemi, associated by some to be part of the critical legal studies, to which he seemingly would oppose, as he makes a distinction between the critical legal studies approach that emerged in the United States and his personal approach.[19] Pointing out law's 'formal predictability' and 'substantive indeterminacy', Koskenniemi argues that international law methods are merely styles of looking at something, very much the same as legal languages. One chooses the

[16] Bulgarian National Television News, 'Sofia Ranked among Most Polluted Cities in Europe' <https://www.bnt.bg/en/a/sofia-ranked-among-most-polluted-cities-in-europe> accessed 24 April 2019.
[17] France24, 'Extinction Rebellion: The Green Movement with Global Ambitions' (2019) <https://www.france24.com/en/20190418-extinction-rebellion-green-movement-with-global-ambitions> accessed 29 May 2019.
[18] For more information on the socio-legal methodology, see Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (1st edn, Hart Publishing 2005).
[19] More on his stance and methodological theory could be found in Martti Koskenniemi, 'Letter to the Editors of the Symposium' (1999) 93 The American Journal of International Law 351.

appropriate style for the particular argument that one wants to make based on predominantly subjective factors.

Thus, rights of nature, human rights law and environmental law can all be seen as individual legal languages, through which an argument can be made and an interest can be defended. The interest in the case of the right to a healthy environment case being environmental protection and an environment conducive to a quality and healthy life for humans. One must be aware that political, moral, social, economic and other factors are in play when discussing the protection of a certain interest, as one interest rarely exists on its own. There is often a clash between conflicting interests. In this particular case, one might think of development as an opposing interest. All of this does not contradict, but can even support my stance to look at these aspects of law as mere legal languages and tools.

From a third perspective, I will use Bruno Latour's theory to criticise the way we currently perceive nature as a separate entity from humans (or vice versa) and as being this undisputable and objective entity, while society is described as the subjective and disputable area in which values play the most important role. I will defend the argument that natural objects have interests that should be represented within the legal system by recognising natural objects' actancy, following Bruno Latour's actor-network theory (ANT).[20]

Overall, I will apply an interdisciplinary approach that draws on Martti Koskenniemi's critical approach, Bruno Latour's actor-network theory (ANT), as well as a socio-legal approach.

Seeking to bring forward my arguments in a coherent and structured manner throughout this thesis, I will commence by presenting the right to a healthy environment (I), particularly its legal status, regime, nature and the benefits it brings about (which make it necessary to have), before applying a critical analysis and focusing on the costs of such a right (II). Lastly, I will present the costs and benefits of environmental law and the rights of nature in relation to the right to a healthy environment (III).

[20] Bruno Latour, *Reassembling the Social : An Introduction to Actor-Network-Theory* (Oxford University Press, USA 2007); Bruno Latour, *Politics of Nature : How to Bring the Sciences into Democracy* (Harvard University Press 2004).

I. A Necessary and Beneficial Tool to Protect the Environment

To waste and destroy our natural resources, to skin and exhaust the land instead of using it so as to increase its usefulness, will result in undermining in the days of our children the very prosperity which we ought by right to hand down to them.

Theodore Roosevelt

In this part, I will seek to present the right to a healthy environment's current place in the human rights framework, some of its potential and current benefits and its necessity. I will start by briefly explaining its meaning, purpose and place within the human rights framework (A), followed by its current legal status (B). I will then present the obligations the right entails (C), before concluding by making an argument for the recognition of the right to a healthy environment (D). The first three sections, presenting well-known basic knowledge of the right to a healthy environment, will serve as foundational blocks for a subsequent argument of the right's recognition (in section D) and developing a critique of the right (in Chapter 2).

A. Purpose, Meaning and Place

This section will present the *raison d'être* of the human right to a healthy environment, the social need or interest it aims to fulfil, the meaning of the words "healthy", "environment" and the right itself as well as its place within the human rights framework.

Some scholars argue that a human right to a healthy environment is a *conditio sine qua non*[21] for other human rights.[22] This opinion appears, for instance, in the separate opinion of Judge Weeramantry in the famous *Gabčikovo-Nagymaros* case, where he explicitly argued that the protection of the environment is 'the *sine qua non* for numerous human rights such as the right to health and the right to life itself'.[23]

[21] An essential condition, without which something else cannot exist, be satisfied or respected.
[22] Sueli Giorgetta, 'The Right to a Healthy Environment, Human Rights and Sustainable Development' (2002) 2 International Environmental Agreements 171; John H Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (Cambridge University Press 2018) p268; p290.
[23] *Gabčíkovo-Nagymaros Case (Hungary v Slovakia) Separate Opinion of Vice-President Weeramantry* p91; For more information see also 'Report of the United Nations Conference on the Human Environment - A/CONF.48/14/Rev.1' (1972) paragraph 1.

Others go even further by claiming that the protection of the environment is essential to humans not simply from the perspective of human rights, but from the perspective of the existence of our species.[24]

We have so far failed to find – let alone implement - a real, certain solution to the fatal threat environmental degradation poses. Yet we face an immediate threat to our well-being, materialised by damage to Earth's biodiversity and consequently to whole ecosystems with the benefits they bring to humans.[25] The repercussions of climate change and environmental degradation are felt in different areas, beyond the obvious destruction of ecosystems. For instance, climate change will continue to affect the development potential of countries and the gap between the rich and the poor,[26] thus undermining the number one goal in the United Nations Sustainable Development Goals – eradicating poverty.[27] The examples of environmental degradation affecting human well-being are many, such as land degradation, droughts and floods affecting people's ability to produce food.[28]

It is important to reiterate that some scientists consider humans to be the main cause for this harm, as explained in the introduction.[29] This thesis is based on the premise that the solution could also be found in humans, and more specifically, the way we are organized and the rules we live by.

If the protection of the environment is of such essential importance to humans, their well-being and their rights, then translating this necessity[30] into the human rights framework seems only natural. It appears that a human right to a healthy environment incorporates the necessity, translating this social interest into a legal tool that can be used for its benefit. This, in my view, is simultaneously the main purpose of this right and the strongest arguments for its existence, which will be discussed further in Section D. The

[24] Giorgetta (n 22); 'Report of the United Nations Conference on the Human Environment - A/CONF.48/14/Rev.1' (n 16) paragraph 6.
[25] Sandra Díaz and others, 'Biodiversity Loss Threatens Human Well-Being' (2006) 4 PLoS Biology e277; FL Toth, *Ecosystems and Human Well-Being: A Framework for Assessment* (Island Press 2003).
[26] Noah S Diffenbaugh and Marshall Burke, 'Global Warming Has Increased Global Economic Inequality' [2019] Proceedings of the National Academy of Sciences 201816020.
[27] United Nations General Assembly, 'Transforming Our World: The 2030 Agenda for Sustainable Development A/RES/70/1' (2015).
[28] See eg Nicolas Gerber, Ephraim Nkonya and Joachim von Braun, 'Land Degradation, Poverty and Marginality', *Marginality* (Springer Netherlands 2014); Cristina Quintas-Soriano and others, 'Impacts of Land Use Change on Ecosystem Services and Implications for Human Well-Being in Spanish Drylands' (2016) 54 Land Use Policy 534; On the subjective measures of well-being and individual environmental attitudes see Ada Ferrer-i-Carbonell and John M Gowdy, 'Environmental Degradation and Happiness' (2007) 60 Ecological Economics 509.
[29] Crutzen (n 3); Lewis and Maslin (n 4).
[30] Rebecca Bratspies, 'Do We Need a Human Right to a Healthy Environment?' (2015) 13 Santa Clara Journal of International Law 4.

purpose of a human right to a healthy environment being clear, we shall move on to the meaning of this right and one of the strongest points for its criticism.

To begin with, there is no single, universal definition of the right to a healthy environment as there is no universal global legal instrument that recognises such a right. Instead, there is a proliferation of legal instruments on national and regional levels.[31] They give different meaning, clarity and legal force to the right they aim to incorporate in their legal system.

In some cases, the right is implicitly derived from the right to life and gets constitutional protection.[32] Its meaning is therefore subjected to the interpretation of courts and how they believe environment affects the right to life. In other cases, the right is explicitly consecrated in the constitution where the environment can be described as "healthy", "clean", "harmonious" etc.[33]

However, these terms are unclear and also susceptible to the interpretation of judges who may find it hard to determine what constitutes a healthy, clean, balanced etc environment. After all, we need an objective yardstick with which to measure such notions, and if we say we have them, then we need to reflect on whether judges, expert-judges or scientists are better suited to make such decisions. Furthermore, such adjectives are predominantly used to describe an environment suitable for humans and their well-being, making them inherently anthropocentric.[34]

Authors have proposed different configurations that would define when an environmental violation becomes a human rights violation,[35] yet there is no legally binding document on international level to decide the matter.

Issues related to meaning will be further elaborated in Chapter 2. For the purposes of this section, it suffices to conclude that there is no strict meaning of the right to a healthy environment partly due to the

[31] David R Boyd, 'Catalyst for Change. Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment' in John H Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (1st edn, Oxford University Press 2018).
[32] David R Boyd, 'The Implicit Constitutional Right to Live in a Healthy Environment' (2011) 20 Review of European Community & International Environmental Law 171.
[33] John H Knox and Ramin Pejan, 'Introduction' in John H Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (1st edn, Oxford University Press 2018).
[34] eg The Constitution of the Democratic Republic of the Congo 2005 art53.
[35] See eg J Lee, 'The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law' (2000) 25 Journal for Environmental Law 283 where he proposes that "an environmental violation becomes significant enough to become a human rights violation when, as a result of a specific course of state action, a degraded envrionment occurs with either serious health consequences for a specific group of people or a disruption of a people's way of life".

lack of a global document recognising it and partly due to the subjective character attached to the elaboration of such a right. As for the word "environment", it refers to the "*natural* environment, including air, water, land, and biodiversity."[36]

The right to a healthy environment's position in the human rights framework, could be placed within the so-called 'third generation' rights.[37] However, human rights being considered as indivisible by some,[38] strong arguments have been made that categorisations of first, second, third, fourth generational civil, political or economic, social and cultural rights has to come to an end.[39] Nonetheless, this categorisation has strong substantial implications, which will be addressed in the next chapter, when we discuss the limitations of social, economic and cultural rights.

The right is considered to be both individual and collective in scope, implying procedural and substantive rights and obligations that could be both positive or negative.[40]

The roots for the lack of clarity of the right to a healthy environment can be found in its lack of global recognition, which brings us onto the legal status of the right.

B. Legal Status

The current legal status of the right is of importance to this thesis insofar as it is concerned with the current overall state of the right to a healthy environment and its development. However, the main focus of this thesis is to critically analyse the right's ideal capabilities to serve its purpose – protecting the (human) environment. For this reason, a discussion on the legal status of the right will take place only to the extent it proves crucial to the main focus of the thesis, which *in concreto* is the discussion on whether the right necessitates, and if it already has, global recognition or not. Otherwise, a mere presentation of facts will suffice to present the current legal status of the right to a healthy environment.

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[36] Lilian Chenwi, 'The Right to a Satisfactory, Healthy, and Sustainable Environment in the African Regional Human Rights System' in John H Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (1st edn, Oxford University Press 2018).
[37] Adrian Vasile Cornescu, 'The Generations of Human's Rights', *Days of Law: the Conference Proceedings* (2009); see also Karel Vašák, 'Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights', 30 UNESCO Courier.
[38] R Kunnemann, 'A Coherent Approach to Human Rights' (1995) 17 Hum. Rts. Q. 323 <https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/hurq17&section=21> accessed 2 May 2019.
[39] Steven LB Jensen, 'Putting to Rest the Three Generations Theory of Human Rights | OpenGlobalRights' (2017) <https://www.openglobalrights.org/putting-to-rest-the-three-generations-theory-of-human-rights/> accessed 2 May 2019.
[40] Erin Daly and James R May, 'Learning from Constitutional Environmental Rights' in John H Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (1st edn, Oxford University Press 2018).

To understand the legal status of a right, one shall look into the sources that establish it on different levels – national, regional and international. Currently, the right to a healthy environment has been enshrined in one of its many forms ("healthy", "clear", "balanced" etc) in 100 countries.[41] The provisions are different from country to country, yet they usually provide for a human right, attributed to all individuals, to an environment that is sustainably exploited and conducive to health for this and future generations.[42] Procedural or other obligations can also be inscribed in the constitutional text, such as in the case of the Norwegian Constitution where the second paragraph of article 112 entitles citizens 'to be informed of the state of the natural environment and of the effects of any encroachments on nature that are planned or commenced.'[43]

In addition, the judiciary have implicitly recognised the right to a healthy environment in at least 12 more countries in which courts have decided that such a right is an "essential element" of the right to life.[44] Thus, the number of countries having recognised a form of the right to a healthy environment on constitutional level explicitly or implicitly raises to 112 out of 193 Member States of the UN – a considerable amount of countries for a right with no international recognition with binding effects.

David R. Boyd, the new Special Rapporteur on human rights and the environment, has produced an illuminating book in which he performs a comparative analysis on the constitutional protection of the right to a healthy environment and its effects.[45] In it, he persuasively argues that when it comes to the environment, constitutional protection through human rights creates a wide range of benefits, such as stronger legislative protection, better performing environment and increased public participation.[46] I share this opinion, yet I believe that scrutiny can be constructive and we should stay critical and take serious account of the costs that come with a certain legal tool. Issues, such as conflicting rights, use of human rights for political reasons and the inability of a certain instrument to effectively and entirely resolve the material consequences of a problem will be analysed in Chapter 2.

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[41] Boyd, 'Catalyst for Change. Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment' (n 31) 41.
[42] eg Constitution of the Argentine Nation, art41; The Constitution of the Kingdom of Norway, art 112.
[43] The Constituton of the Kingdom of Nroway, art 112.
[44] Boyd, 'Catalyst for Change. Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment' (n 31); Boyd, 'The Implicit Constitutional Right to Live in a Healthy Environment' (n 32).
[45] David R Boyd, *The Environmental Rights Revolution A Global Study of Constitutions, Human Rights, and the Environment* (1st edn, University of British Columbia Press 2012).
[46] ibid 7.

Additionally to the wide number of countries providing for a human rights-based protection of the environment in their constitutions, 103 of these or other countries have produced national legislation that incorporates the right to a healthy environment.[47]

The question of a human right to a healthy environment on a national level is important, yet this thesis focuses more on a general understanding of such a right and, therefore, looks at the international scene, as a platform on which the right can be conceptualised in more universal terms.

On regional level, there are few notable documents creating binding obligations for the parties that have ratified them. These are the Aarhus Convention, the African Charter, the San Salvador Protocol and the Arab Charter on Human Rights.[48] The European Convention on Human Rights is a special case as it indirectly provides some protection to the environment through human rights, despite not having a single reference to the environment in its text.[49]

The Aarhus Convention has a limited scope on two fronts – first, it only provides for the recognition of procedural rights,[50] which will be discussed in the next section, and second, all of its 47 member parties are in Europe or Central Asia (cf. United Nations Treaty Collection) which renders it as having a regional scope. Despite that, the convention represents a significant development in terms of establishing these new procedural human rights to be informed and participate in decision-making when it comes to environmental issues.[51]

The African Charter is the only regional legally binding human rights convention that explicitly recognises the collective and individual right to all people to a 'general satisfactory environment favourable to their development'.[52] However, there are issues related to the enforceability that are proper

[47] Boyd, 'Catalyst for Change. Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment' (n 31) 61.
[48] Respectively, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998; African Charter on Human and Peoples Rights 1981 art24; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 'Protocol of San Salvador' 1988 art11; Arab Charter on Human Rights 2004.
[49] Ole W Pedersen, 'The European Court of Human Rights and International Environmental Law' in John H Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (1st edn, Oxford University Press 2018).
[50] Michael Mason, 'Information Disclosure and Environmental Rights: The Aarhus Convention' (2010) 10 Global Environmental Politics 10.
[51] Maria Lee and Carolyn Abbot, 'The Usual Suspects? Public Participation Under the Aarhus Convention' (2003) 66 Modern Law Review 80.
[52] African Charter on Human and Peoples Rights, art 24.

for the African Union's Human Right system in general, such as the limited *locus standi* of individuals and nongovernmental organisations (NGOs) to bring cases before the African Court.[53]

In the Americas, only 16 countries have ratified the San Salvador Protocol while the United States of America and Canada have not even signed it.[54] Nevertheless, the Protocol explicitly recognises the right to a healthy environment to everyone and includes an explicit state obligation to 'promote the protection, preservation, and improvement of the environment'.[55]

Within the Arab Charter of 2004, is referred to a "safe" environment and the right is accessory to the right to an adequate standard of living 'for himself and his family'.[56] Yet, due to the lack of a Court, enforceability cannot be exercised and implementation cannot be controlled. Even when, and if, the necessary seven ratifications of the Statute of the Arab Court of Human Rights are deposited, questions on the effectivity, impartiality and functioning of this Court arise. For instance, Saudi Arabia was the first country to ratify this statute – a country with a worldwide notoriety for human rights violations.[57] Further, the language of the article implies that women cannot benefit directly from that right.

Despite the considerable recognition of a human right to a healthy environment on national level and the presence of some protection on regional level, there is no legally binding convention that explicitly recognises the existence thereof on international level.[58] Landmark documents are the Stockholm Declaration (Declaration of the United Nations Conference on the Human Environment) from 1972 and the Rio Declaration from 1992, yet they are not legally binding. This has implications on the way we derive the meaning of this right, as well as the meaning itself. As previously mentioned, the obligations that the right implies will depend on the particular legal system and such will be the case for the right's scope, justiciabiliy, implementation etc. The lack of conceptual uniformity is an obstacle to analysing what exactly the right means from an academic perspective and creates the risk of discussing the right from a more theoretical than practical perspective.

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[53] Chenwi (n 36).
[54] See the site of the Department of International law to the Organisation of American States available at <http://www.oas.org/juridico/english/sigs/a-52.html>.
[55] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 'Protocol of San Salvador' art 11.
[56] Arab Charter on Human Rights 2004 art 38.
[57] 'Saudi Arabia | Freedom House' <https://freedomhouse.org/report/freedom-world/2018/saudi-arabia> accessed 9 May 2019; Amnesty International, 'Human Rights in the Middle East and North Africa: Review of 2018' (2019) <www.amnesty.org> accessed 9 May 2019.
[58] Louis J Kotzé, 'Healthy Environment in International Law' in John H Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (1st edn, Oxford University Press 2018).

Advocates of the right to a healthy environment have argued for the recognition of the right in an international treaty, yet without success to this moment.[59] This peculiar situation has provoked scholars and advocates to look for other ways to assert the legal status of the right in international law, particularly by trying to attribute it with the status of customary international law[60] or seeing it as a principle of international law.[61]

Despite there being an academic debate on whether the right to a healthy environment is a customary international law, no competent international jurisdiction has pronounced itself on the matter and consequently the latter rests unresolved.

Customary international law has been defined by the Statute of the International Court of Justice as a 'general practice accepted as law'.[62] To determine if the right to a heathy environment qualifies, two cumulative conditions need to be satisfied: the first is 'the general and consistent practice of states followed by them from a sense of legal obligation'.[63] The second element is also known as *opinio juris* and its position is disputed as some reject its importance.[64] Others, on the other hand, argue it has an important function and its existence has been confirmed by international courts.[65] In terms of the first element, the state practice could be relatively new as long as it is general and consistent.[66]

As for what should be considered as evidence for such practice, the International Law Commission (ILC) has listed sources such as treaties, decision of national and international courts, national legislation, opinions of national legal advisors, diplomatic correspondence, and practice of international organizations.[67] The Commission explains that the methodology of the search for evidence requires a look into the overall context in which the practice is put, the nature of the rule in question and different other considerations, such as 'the particular circumstances in which the evidence in question is to be

[59] See eg S Turner, *A Global Environmental Right* (Routledge 2013) p233-68; Horn Laura, 'The Implications of the Concept of Common Concern of a Human Kind on a Human Right to a Healthy Environment' (2004) 1 Macquarie Journal of International and Comparative Environmental Law 233.
[60] See eg Sumudu Atapattu, 'The Right to a Healthy Life or the Right to Die Polluted: The Emergence of a Human Right to a Healthy Environment under International Law' (2002) 16 Tulane Environmental Law Journal; Lee (n 35).
[61] Lee (n 35).
[62] Statute of the International Court of Justice 1945 art38(1)(b).
[63] Restatement (Third) of the Foreign Relations Law of the United States [1987] para 102(2).
[64] Jo Lynn Slama, 'Opinio Juris in Customary International Law' [1990] Oklahoma City University Law Review.
[65] Christian Dahlman, 'The Function of Opinio Juris in Customary International Law' (2012) 81 Nordic Journal of International Law 327; *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) [1986] ICJ*.
[66] *North Sea Continental Shelf Cases [1969] ICJ*.
[67] International Law Commission, 'Ways and Means for Making the Evidence of Customary International Law More Readily Available' (1950).

found.'[68] The *opinio juris* requirement is analysed independently from the practice of states and necessitates that states show that they consider the rule to be a rule of juridical nature that imposes obligations on them on international level.[69]

Proponents of attributing this status to the right to a healthy environment make their arguments on two fronts. Some believe that the implied inclusion of the right in international declarations and conferences[70] that are non-legally binding (or in the case of the legally binding Paris agreement where the reference to human rights is in the non-legally binding preamble), as well as the work of UN special procedures or organs, shows the universal acceptance of the right.[71] Others take a more progressive interpretation of the customary law notion, and focus specifically on the national legislation and court decisions to make the argument that the significant enshrinement of the right in national constitutions is a sufficient prove of a general practice and *opinio juris*.[72]

The second group claims that there is a 'reduced focus on state practice in the modern approach' that is 'explained by its use to create generally binding laws on moral issues'.[73] This way of reasoning is based on the premise that human rights contain an intrinsic ethical importance[74] that justifies their codification. A discussion on this topic is outside the scope of this thesis, yet I will briefly posit two counter arguments.

First, one of the initial reasons for the emergence of human rights in general was to walk away from the arbitrary and make decisions based on objectivity and neutrality.[75] There is an obvious contradiction between that initial aim and the use of moral arguments in order to defend the modernisation of the notion of customary international law to any seemingly political aim. It is understandable that in the realm of international law, an entity that is not a State has few instruments to exploit in order to push forward its interests, yet human rights advocates must be aware that this same tool can be used by their counterparts

[68] International Law Commission, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (2018) 126.
[69] Commission (n 67).
[70] The Rio Declaration on Environment and Development 1992; Paris Agreement under the United Nations Framework Convention on Climate Change.
[71] Lee (n 35).
[72] Rebecca Bratspies, 'Reasoning Up: Environmental Rights as Customary International Law' in John H Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (1st edn, Oxford University Press 2018); César Rodríguez-Garavito, *A Human Right to a Healthy Environment?* (John H Knox and Ramin Pejan eds, 1st edn, Cambridge University Press 2018).
[73] Rodríguez-Garavito (n 72).
[74] Amartya Sen, 'Human Rights and the Limits of the Law' (2006) 27 Cardozo Law Review.
[75] Martti Koskenniemi, 'The Politics of International Law' (1990) 1 European Journal of International Law 4.

with the same intensity. What is moral, ethical or not depends on the eye of the beholder and is naturally a question susceptible to politicisation.

Second, the traditional doctrine is still strong and, in this context, it will be hard to persuasively argue before an international court that the right to a healthy environment satisfies either of the two conditions.[76] Even if there is a majority of states that incorporate the right to a healthy environment on a national level, this does not necessarily constitute a general practice, nor could we infer from it that states accept the existence of an international obligation to promote, respect, fulfil and/or protect such a right. Here, I make a difference between State's general practice in relation to their international obligations and their internal legal systems. A State wanting to incorporate internally a human right to a healthy environment does not necessarily want to externalise this commitment by accepting similar international obligations. On the contrary, the lack of an explicit international recognition of the right, despite the pressure for it, demonstrates that there is no universal agreement on the matter and, possibly, the lack of general acceptance for such a rule.

Although I am of the belief that the right to a healthy environment should have its equal place on international level, I do not agree with forcing such recognition through modernising customary international law.

This section provided information on the current legal status of the right to a healthy environment on national, regional and international levels. The right's dubious meaning, presented in Section A, in conjunction with its lack of global recognition, seen in this section, engender the existence of different legal regimes attached to it in all the different legal systems within which it is incorporated. For the purposes of this thesis, the next section will represent an overview of all main obligations usually associated with the right to a healthy environment without focusing on its regime in any one particular legal system.

C. Obligations Entailed by the Right

In this section, I will seek to present the human rights environmental legal obligations. Particularly, I will look into the work of the Independent Expert - and consequently Special Rapporteur - on human rights and the environment John Knox during his mandate to describe the evolution of the relationship between

[76] For the relevance of the traditional doctrine, one could see the explanations of the ILC in Commission (n 67) dating from 2018.

human rights and the environment.[77] The then Independent Expert John Knox has presented his findings on the matter in 14 individual reports,[78] concluding with the final Mapping Report[79] containing a summarised and comprehensive version of the findings from the individual reports.

The reports I am referring to are all rendered in the context of the UN system through a mandate delegated via the special procedures mechanism of the Human Rights Council. As explained briefly in the previous section, and more thoroughly in the next one, the right to a healthy environment's legal regime strictly depends on the regional and national instrument establishing it. Analysing each and every legal instrument being beyond the scope of this thesis, I will focus on the obligations conceived as being an important part of a global right to a healthy environment. Surely, these may, and perhaps should, evolve so that once the right is recognised it will affect optimally how it is perceived and implemented on regional and national levels.

According to Knox and Ramin Pejan,[80] there are three categories of obligations associated with the right to a healthy environment. Procedural obligations, substantive obligations, and obligations towards the particularly vulnerable of environmental harm.[81] Each of them will be presented separately, despite having the belief that the third category is *de facto* a part of the second.

1. Procedural rights and obligations

The procedural obligations linked to the right to a healthy environment have the strongest global recognition at this moment, yet 'strongest' does not mean strong. These procedural rights have been included in the Aarhus Convention[82] and can be categorised in three groups, also referred to as 'pillars': access to information, public participation; and access to justice.[83] It is worth noting that the Aarhus Convention has 47 parties[84] at the time of writing, one of which is the European Union. Therefore, it

[77] Resolution 19/10 - Human rights and the environment 2008.
[78] Knox and Pejan (n 33) 16.
[79] John H Knox, 'Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (2013).
[80] Ramin Pejan was appointed as an officer from the Office of the High Commissioner for Human Rights (OHCHR) to support John Knox' mandate in his capacity as a Special Rapporteur. They co-edited the book 'The Human Right to a Healthy Environment' in 2018 used throughout this thesis.
[81] Knox and Pejan (n 33) 18.
[82] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 26, 1998, in force October 21, 2001.
[83] Lee and Abbot (n 51).
[84] For fact-check, see 'United Nations Treaty Collection' <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&clang=_en> accessed 5 May 2019.

cannot be seen as a global instrument, yet these obligations can be provided in some way and form in countries that are not parties of the convention. Where and how these obligations are implemented depends on the regional and national instruments that establish their existence and regime.

The Aarhus Convention is considered a big step in elaborating an international human right to a heathy environment[85] and is used by some as a proof of the customary law status of at least a part of the human right to a healthy environment – particularly the procedural element.[86] Conversely, some scholars describe its provisions as sometimes 'vague', wide and non-specific.[87] This debate does not fall within the scope of my analysis. I will focus on the rights themselves and not the source, although the Aarhus Convention will necessarily be a point of reference. The main point of reference will be John Knox's Mapping Report.[88] The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Rio Declaration from 1992 also serve as a basis for all of the pillars to the procedural limb of the right to a healthy environment.[89]

Within 'access to information' rights, duties such as making environmental information public fall on the State. This particular duty is a logical consequence of the freedom of expression, which includes the possibility to "seek, receive and impart information"[90] and can be regarded as of significant importance to many other rights.[91] Making information related to the environment public is crucial for the other procedural rights and for including the society in the dialogue.

However, defining which actors and information fall within the scope of this obligation can pose a difficulty as some would argue that private actors that 'affect' the 'environment' in any way should also be obliged to provide access. According to such an argument, if a private actor's footprint is considerable, transcends their own private interest and affects the interests of the general population or other individuals, then the actions of this actor should be made public as they are of significant importance to the health and well-being of the general population. A conflict between the right to privacy and the right to a healthy environment may arise.

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[85] Kofi Annan, 'Foreword' in S Stec and S Casey-Lefkowitz (eds), *The Aarhus Convention: An Implementation Guide* (United Nations / Economic Comission for Europe 2000).
[86] Rebecca Bratspies, 'Reasoning Up. Environemntal Rights as a Customary International Law' in John H Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (1st edn, Oxford University Press 2018).
[87] Lee and Abbot (n 51).
[88] John H Knox, 'Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Mapping Report' (2013).
[89] ibid.
[90] Universal Declaration of Human Rights 1948 art19; International Covenant on Civil and Political Rights 1966 art19.
[91] Knox (n 33); The Rio Declaration on Environment and Development 1992 principle 10.

In the Aarhus Convention, for example, the obligation falls on private actors only to the extent they provide public services, responsibilities or functions 'related' to the environment rather than 'affecting' the environment.[92] Interpretation also affects what we consider by 'environment', with the Aarhus Convention extending this notion to biodiversity, its components and more.[93]

This right is not absolute. States can refuse a request if disclosure will affect negatively one of the exemptions in article 4(4) of the Aarhus Convention, yet this refusal should be motivated.[94] Possibilities for redress should be provided, as part of the third pillar – 'access to justice'.

Another tool worth considering is the Environmental Impact Assessment (EIA), which necessitates developers of industrial or other projects to provide an environmental statement of the impact the project might have on the environment.[95] Indeed, an EIA informs the public on projects that might concern them, yet a possible technique used by developers that undermines this tool is the use of language that could be understood by experts and not the common people.[96]

Despite the lack of enough empirical data, the positive effects of such a right may be numerous.[97] For instance, private actors could be incited to adopt greener policies so that their public image attracts more clients and avoid negative reactions from environmentalists.[98] Informing the public is a precondition for its effective participation in decision-making, especially on matters such as environmental protection that tend to be technical and therefore creating tension between democratic and technocratic decision-making.[99] Additionally, an informed public increases the chances of individuals adopting environmentally friendly lifestyles and becoming proactive in protecting their own interests related to a healthier environment. NGOs and governmental institutions can use the conclusions of EIAs for raising awareness amongst the local population, provoking a change in lifestyle.

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[92] Lee and Abbot (n 51).
[93] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters art 2(3)(b).
[94] Lee and Abbot (n 51); For more information on the disclosure regime in the Aarhus Convnetion, see: Michael Mason, 'Information Disclosure and Environmental Rights: The Aarhus Convention' (2010) 10 Global Environmental Politics 10.
[95] Lee and Abbot (n 51); Knox (n 88).
[96] Lee and Abbot (n 51).
[97] ibid.
[98] ibid
[99] For more infromationt on the challenge environmental issues pose to democracy, see: Lee and Abbot (n 51); Robert Paehlke, 'Environmental Values for a Sustainable Society: The Democratic Challenge', *Greening Environmental Policy* (Palgrave Macmillan US 1995).

The second pillar is public participation in decision-making. There are three levels of decision-making that the Aarhus Convention deals with that could be found in articles 6, 7 and 8. Article 6 deals with 'public participation in decisions on specific activities', article 7 focuses on 'public participation concerning plans, programmes and policies relating to the environment', and article 8 deals with 'public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments'.[100]

There is also the obligation to make an EIA, although this is essentially a procedural obligation and does not impose any targets or objectives relating to the environment.[101] Public participation is a crucial part in the EIA procedure, as it brings more democracy to the decision-making process.[102] Indeed, CESCR supports the inclusion of all stakeholders within the EIA process, in the context of the right to water.[103] On another hand, if the goal is to give the decision-making capabilities to the public, or at least make that participation effective, EIAs and the other procedural mechanism might seem somehow flawed as they do not impose any duties on States to conform to the public opinion.

Maria Lee and Carolyn Abbot influenced the above-stated opinion.[104] In addition, they see soft-law benefits from the Aarhus Convention as good practices are reinforced despite the lack of formal obligation. On that last point, however, I believe that the increase in good practices by bringing the public more into the decision-making processes is not of much value if practical changes positively affecting decision-making procedures (and, in result, the environment) are not achieved in a significant manner.

The opportunity of each individual to participate in the decision-making processes is also a goal of the Rio Declaration, particularly its 10th principle.

The third pillar is about access to justice. This pillar provides interested actors with the possibility to contest acts or omissions of public or private actors when the latter do not conform to the applicable national legislation on issues relating the environment.[105] States are obliged to provide an 'effective

[100] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.
[101] Lee and Abbot (n 51).
[102] ibid.
[103] Knox (n 88).
[104] Lee and Abbot (n 51).
[105] ibid.

remedy' as well as adequate compensation for the damage of people's environment and for any violations of their right, 'without fear of intimidation'.[106]

When effective, this right can play an important and useful role from many perspectives. For instance, it serves as a guarantee for the protection of the previous two pillars. In addition, it can relieve the government of some burden by increasing the actors that can influence the control over issues related to the environment. Thus, a potential citizen suit against a private or public actor's unlawful behaviour serves a double function – protecting the specific interest of the citizen and bringing forward a case that would have been brought forward by the administration, but was not because of either an omission, lack of resources or another reason.[107]

Unfortunately, the way this component is formulated on an international level in the Aarhus Convention, much like parts of the other two pillars, is unsatisfying - there is no obligation to improve the legal standing of individuals and NGOs.[108] Issues such as the economic and other barriers that make access to justice difficult for some are not tackled. One of the reasons for that could be that giving too much power to judges could result in placing them in a position of deciding on, and thus creating, policies. When substantive rules are not strictly regulated, then judges will have to fill-in the blanks and the separation of the judicial and legislative branch will be in jeopardy.[109] Political factors, such as the lack of will amongst governments to reunite such broad elements of national law and procedure, may have influenced the outcome.

On a separate, yet related note, it is worth mentioning that the importance of all procedural rights and obligations could be crucial for environmental activists as they are one of the groups under highest risk of being killed or exposed to other threats compared to other activist groups.[110] For 2018, 77% of the total number of activists killed, were defending environmental, indigenous peoples' rights or land, according to Front Line Defenders.[111] States are obliged not only to respects the right to participate in the public discussion, but also to protect individuals from any harm that may be caused to them in relation to their participation.[112]

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[106] Knox (n 88).
[107] Some of the thoughts here were inspired by Lee and Abbot (n 51).
[108] ibid.
[109] For more information on the risks of making policy through judges, see: John Ferejohn, 'Judicializing Politics, Politicizing Law' (2002) 65 Law and Contemporary Problems 41.
[110] Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled 'Human Rights Council' 2007.
[111] Front Line Defenders, 'Global Analysis 2018' (2019) <www.thedrawingboard.ie> accessed 5 June 2019.
[112] Knox (n 88).

This subsection gave an overview of the procedural rights of the right to a healthy environment as they are understood and elaborated on international level at the moment of writing. Some of the key elements of all three pillars of these obligations were presented, as well as some of the benefits and critiques they are associated with from a theoretical perspective. In the next subsection, I will focus on the substantive rights and obligations associated with the right to a healthy environment, bearing in mind that discerning such rights and their regime is difficult because of the lack of a global instrument that recognises and establishes them.

2. Substantive rights and obligations

This type of obligations is of utmost significance. In order to judge the capability of a legal tool to achieve a specific non-strictly-legal goal, such as protecting the environment (or the human well-being depending on the environment), one will have to mainly look at what the use of this tool can actually and practically achieve in providing such protection. As described by Marcos Orellana, '…substantive obligations sustain an environmental quality conducive to a life of dignity. This substantive dimension of the right to a healthy environment links directly with the conditions that enable a heathy planet…'[113]

Within the United Nations' system, there are two covenants that set different obligation regimes for rights perceived as being of a different type or generation. These are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both signed in 1966. Some scholars reject the idea of the rights incorporated therein being of different types, basing themselves on the interrelated and interconnected character of human rights.[114]

Nonetheless, these two covenants exist and set up two separate regimes within the UN system. Economic, Social and Cultural rights are linked with less rigid immediate state obligations. The ICESCR talks about taking 'steps' 'to the maximum of' States' 'available resources, with a view to achieving progressively the full realization of the rights…' which implies predominantly non-immediate obligations.[115] However, there are four immediate obligations that are traditionally associated with economic, social and cultural rights. These are: non-discrimination, minimum core obligations, non-retrogression and obligations to take steps, such as adopting a national action plan or incorporating the right in its legal system.[116] A

[113] Knox and Pejan (n 36) 290.
[114] See eg Jensen (n 39).
[115] International Covenant on Economic, Social and Cultural Rights 1966 art 2(1).
[116] Office of the United Nations High Commissioner for Human Rights, 'Frequently Asked Questions on Economic, Social and Cultural Rights: Fact Sheet No.33' <https://www.ohchr.org/Documents/Issues/ESCR/FAQ on ESCR-en.pdf> accessed 19 May 2019.

potential recognition of the right on an international level could be made in a way in which all of these immediate obligations are effectively incorporated.

The right to a healthy environment is not incorporated explicitly in the ICESCR. Article 11 recognizes 'the right of everyone to an adequate standard of living for himself and his family, including … continuous improvement of living conditions'. According to John Knox, the right to a healthy environment can also be derived from other well-established rights, such as *inter alia*, the rights to life and family life, which are enshrined in the ICCPR and thus benefit from its stronger regime.[117] Such an approach has been adopted in the European regional system, where the European Court on Human Rights has interpreted the European Convention on Human Rights in a more extensive way, thus protecting the right to a healthy environment through the right to life, the right to family life and others.[118]

In his Mapping report, Knox has pointed the same thing out, whilst making a reference to other regional systems. In summing up his findings throughout the whole research, he has come up with three different types of substantive obligations – the obligation to adopt and implement legal frameworks that would protect from human rights violations caused by environmental harm, 'the obligation to regulate private actors to protect against such environmental harm', and obligations relating to transboundary environmental harm.[119]

The first type is exactly the one in which different regional systems assure protection from environmental harm on the basis of other, independent rights. For a better illustration of what is meant, one can look *inter alia* into the case-law of the ECtHR or the general comments of the Committee on Economic, Social and Cultural Rights (CESCR). For instance, the ECtHR has found a violation of Article 2 (right to life) in the omission of the State to take the necessary measures to prevent a methane explosion despite the rendition of an expert report recommending preventive measures.[120] Similarly, CESCR has clarified that when it comes to the realization of a right, the steps to be taken 'shall include those necessary for… the

[117] Knox (n 88).
[118] For more information on the European system, see eg Ole W Pedersen, 'The European Court of Human Rights and International Environmental Law' in John H Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (1st edn, Oxford University Press 2018).
[119] Knox (n 88) 13.
[120] Öneryildiz v Turkey App no 48939/99 (ECtHR, 30 November 2004)

improvement of all aspects of environmental and industrial hygiene'.[121] Knox adds that States are obliged to assist victims of natural disasters.[122]

The obligation to protect the environment is not absolute and should be balanced with other interests or rights, such as the right to development.[123]

Non-retrogression and the obligation to 'take steps' by incorporating the right in law are amongst some of the other substantial obligations that are mapped by Knox.[124] The principle of non-retrogression obliges States to not take a step back in their protection of a certain right.[125] The other obligations implies the adoption of policies, laws, national action plans and their actual implementation, 'to the maximum' of States' resources.[126] This is part of the general obligation to fulfil that States bear in international human rights context.

As for the second type, the State has the duty to protect from the wrongdoings of private actors, mostly businesses. Knox demonstrates that States have duties, such as 'taking appropriate steps to prevent, investigate, punish and redress' human rights abuses 'through effective policies, legislation, regulations and adjudication'.[127] Remedies for victims should also be provided.[128]

In case of private actors' wrongdoings, it seems that States' obligations will be satisfied if appropriate preventive or/and punitive measures are taken, and the possibility for citizens to protect themselves or get compensated is assured.

When it comes to obligations relating to transboundary environmental harm, Knox recognizes the technical difficulties of such an approach, yet implies that such obligations have their place. He cites CESCR's general comment No. 15, where paragraph 31 requires states 'to refrain from actions that

[121] Office of the High Commissioner for Human Rights, 'CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)' (2000).
[122] Knox (n 88).
[123] ibid.
[124] ibid.
[125] For more information on the principle, see eg Ben TC Warwick, 'Socio-Economic Rights During Economic Crises: A Changed Approach to Non-Retrogression' (2016) 65 International and Comparative Law Quarterly 249; Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 Human Rights Quarterly 156.
[126] Knox (n 88).
[127] ibid p16. The citation has also been cited by Knox from Human Rights Council report A/HRC/17/31, principle 1.
[128] ibid.

interfere, directly or indirectly, with the enjoyment of the right to water in other countries'.[129] In addition, States should also not let private actors within their territory violate this right in other territories.[130]

In general, the obligation here is to not cause harm beyond your own territories and it does correspond to the extraterritorial characteristics of environmental harm.

In this subsection, I presented the current and prospective substantive obligations that a right to a healthy environment practically benefits from and/or would benefit from, once it is fully recognized. In the next subsection, I will present a brief overview of the specific obligations States have when it comes to vulnerable groups.

3. Rights and obligations for the protection of vulnerable groups

The general obligation of non-discrimination I referred to in the previous subsection is applied in this subsection. Groups that are particularly vulnerable to environmental harm necessitate special treatment so that they will benefit from the equal protection of the right to a healthy environment.[131] The groups included in the Mapping Report are women, children and indigenous people.

Gender stereotypes have long affected the family functions and tasks of both men and women.[132] In many areas, women continue to be tasked with household duties such as retrieving water or disposing of the family wastewater, yet in those same societies, women have a secondary position to men when it comes to decision-making and politics.[133] For this reason and in my view, a right to a healthy environment should consist of a substantive obligation that would tackle this unequal situation by, for example, obliging the State to organise regular campaigns raising the awareness on gender inequality in general context, as well as in the context of environmental issues.

Other substantive obligations relating to women are linked to the collection of sex-segregated data on the effects of environmental harm on women's health and the implementation of policies that are gender sensitive and responsive to the need for differentiated treatment of men and women in some cases.[134] Bearing children, menstruation, breastmilk production and other similar experiences make women

[129] ibid.
[130] ibid.
[131] ibid.
[132] For more information on gender stereotyping, see Judith Butler, 'Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory' (1988) 40 Theatre Journal 519.
[133] Knox (n 88).
[134] ibid.

susceptible to special types of environmental harm, such as the exposure to substances like mercury that pose lesser risks to men.[135] Children too are considered a vulnerable group.

States have to take into account the 'best interest of the child' when deciding on environmental matters that would affect children significantly, as well as to take the necessary actions to fulfil the rights of children to health, food, security, water and sanitation.[136] In general, children's interest and welfare should be central for the environmental protection policies of States, as well as during the implementation thereof.

When it comes to some indigenous communities, the right to a healthy environment offers additional protection due to the special type of relation these people have with nature and their stronger vulnerability to any potential harm on nature. These concerns have to be respected when making decisions on the exploitation of any resources contained on territories occupied by indigenous people and the latter must be included in the decision-making procedure for such issues. Additionally, any development activities on such territories necessitate an EIA, the project must benefit the indigenous people and access to remedies and compensation must be provided.[137]

To better understand the implications of the right to a healthy environment, I have sought to present the obligations the current understanding of such a right brings to States, basing myself on the comprehensive report of the then-Independent Expert on human rights and the environment, John Knox. Although Knox's work is not final and asks for more reflection on the existence of some obligations, the inclusion of new ones or the stronger definition of already existing obligations, his work is a big contribution to the current understanding of the right to a healthy environment. First, we focused on the procedural obligations. Second, substantive obligations were presented and, third, obligations related to vulnerable groups were looked at. Meanwhile, brief reflections on the benefits the right brings were made in this section as well as sections A and B. I will use this understanding of the right to a healthy environment, as well as the information presented in the previous sections concerning the right's meaning, purpose, legal status etc, as a basis for my subsequent reflections on making the argument for recognising the right on the international level.

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[135] ibid; For more information on the children and women vulnerability to environmental harm, see JE Hardoy, D Mitlin and D Satterthwaite, *Environmental Problems in Third World Cities.* (London England Earthscan Publications 1992 1992).
[136] Knox (n 88).
[137] ibid.

D. An argument for the recognition of the right to a healthy environment

Issues related to the environment often transcend imaginary borders. The nation-state system that has long ruled the world order is struggling with finding solutions to global phenomena such as climate change, globalisation, immigration and others.[138] Indeed, global environmental change causes some to argue that the very concepts of 'sovereignty' and 'agency' are required to change in order to cope with the problem.[139]

Naturally, international cooperation is needed in order to tackle international challenges. Yet, as we have already discussed, the human rights language lacks an international recognition of the human right to a healthy environment. On the contrary, national recognitions have resulted in proliferation, illustrating the lack of universal agreement on what the right must look like. These processes have resulted in having the human right to a healthy environment internationally, yet this right is not fully international.

On an international level, a potential recognition of the right to a healthy environment will bring more clarity to its meaning and content. Once clarity is achieved and States get subjected to the same international obligations to the protection of the environment through human rights, then many of the positive effects of providing such protection will be further boosted in a more synchronised way. Thereafter, answers to the extraterritorial application of the right could be found and this logically means that more solutions will be available when it comes to international conflicts caused by environmental harm. Additionally, international recognition means that international human rights courts and tribunals can be used to protect an environmental interest. This is already the case with some regional courts, yet much improvement is needed.[140]

On a national level, the human right to a healthy environment has a positive impact on the adoption, implementation and enforcement of laws and policies protecting the environment. In addition, increase in public participation, better environmental performance, increased accountability and others factors have been argued to improve with the recognition of the right.[141] David R. Boyd, the current Special Rapporteur on human rights and the environment, has concluded from his comprehensive research that

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[138] See eg William I Robinson, 'Beyond Nation-State Paradigms: Globalization, Sociology, and the Challenge of Transnational Studies' (1998) 13 Sociological Forum 561.
[139] Frank Biermann and Klaus Dingwerth, 'Global Environmental Change and the Nation State' (2004) 4 Global Environmental Politics 1.
[140] More information on the impact of an internatnional recognition of the right can be found in Boyd, 'Catalyst for Change. Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment' (n 31).
[141] More information on the positive impact of the right can be found in ibid.

all of these benefits can be observed on national level, 'while the potential drawbacks are not materializing.'[142] However, more empirical research in the area needs to be conducted. At this moment it would be premature and unwise to make final conclusions on the alleged exclusively positive effects of the right to a healthy environment on national level.

The benefits on a national level are a result of the procedural and substantive obligations that arise from the right to a healthy environment. These were presented in the previous section and will differ depending on the legal system. More information on them can be found in Boyd's book 'The Environmental Rights Revolution' as well as in his chapter in Knox's and Pejan's 'The Human Right to a Healthy Environment'.

Among other effects he observed, Boyd links the strengthening of Spain and Argentina's development and environmental legislation with the constitutional recognition of the right; the improved role of the public and NGOs in Brazil where they can provoke an investigation and prosecutions after rendering a report to an independent public ministry; increased accountability due to empowerment of courts and more.[143]

The practical benefits or costs of the human right to a healthy environment brings into play are important. However, there is an additional perspective that seems to be in favour of having such a right and it is more persuasive to me as it is free from the speculative character attached to the previous arguments that lack the backing of enough empirical research. As hinted in the introduction, if one takes a more practical and perhaps technical view of international law, one could perceive human rights law as an instrument – a legal language used to posit and/or protect a certain individual or collective interest within society. We have already defined – in the first section of this chapter, as well as in the introduction – that the specific interest the right to a healthy environment strives to protect is the interest of environmental protection and living in an environment conducive to a life of good quality and health.

Looking from such a stance, there is an individual and/or collective societal interest that opposes the abovementioned one and it is protected via the internationally recognised human right to development.[144] This is the interest for economic, social, cultural and political development. The two interests are opposing each other only in specific circumstances, such as the potential construction of a river dam or

[142] ibid.
[143] ibid.
[144] For more information on the right to development, see Arjun Sengupta, 'The Human Right to Development' (2004) 32 Oxford Development Studies 179.

perhaps a factory that could pollute the nearby water reservoir and others. More on the conflict between these two interests will follow in the next chapter.

Meanwhile, it is a struggle to understand how one can justify that there is a legitimate and valid legal reason for the existence of an internationally recognised right protecting development interests, while such a recognition is absent for the right to a healthy environment, protecting the conflicting interest. Indeed, such a situation is incoherent, inconsistent and produces a rupture in the balance of powers when it comes to protecting one interest over the other through the language of human rights.

The right to development can be monitored specifically by the CESCR, but in order to monitor environment-related issues, the Committee has to look at each particular case from the perspective of one of the other recognised human rights, such as the right to health. Moreover, the right to development has legally binding effects on States,[145] imposing specific legal obligations, which is not the case for the right to a healthy environment. The consequences of this inconsistency reverberate with different intensity throughout different regional systems and countries.

Following this line of reasoning, it is easy to conclude that a right to a healthy environment is coherent with the human rights framework and that the international recognition of such a right is needed to assure a bigger societal balance. Interestingly, Martti Koskenniemi – one of the most prominent critics of human rights – inspired this last argument in favour thereof.[146]

It is worth noting that this whole line of reasoning is based on the current anthropocentric legal system in which we are currently working. It is based on the premise of using human rights to decide conflicts that relate to the environment. However, this is not necessarily the best or most logically coherent way to provide environmental protection.

Despite the many reasons for an international, national and regional recognition of the right, not all states have recognised it, regional protection could be much better and there is no legally binding international

[145] United Nations Human Rights Office of the High Commissioner, 'Frequently Asked Questions on the Right to Development' (2016) <https://www.ohchr.org/Documents/Publications/FSheet37_RtD_EN.pdf> accessed 28 May 2019.
[146] I was specifically inspired by the end of Koskenniemi's 'Human Rights, Politics and Love' in *The Politics of International Law* from 2011. There, Koskenniemi seems to enter a contradiction with himself by perhaps romantically seeking to find a solution to the problem that he so eloquently points out throughout the rest of his piece. One can infer from his reflection on 'Democratic Radicalism' that a possible solution to the problem of the proliferation of human rights language is exactly the creation of rights that would balance each other, if the end goal is to give the same instruments to all members of society. Balancing he criticizes for being too political and placing judges in an unwanted position.

document that recognises it. I have shown that the reason for that void is most likely not legal. In fact, most likely political factors explain this behaviour of the international community.[147]

The first part of this thesis presented what I consider to be the most pertinent information for the right to a healthy environment needed for producing a critical analysis on the capability and compatibility of this tool with the goal to protect the environment for the sake of us as species and our planet as a whole. Thus, it established the foundation of my consequent arguments. First, this part focused on the meaning, purpose and aim of the right to a healthy environment. Second, it reflected on the legal status of this right on national, regional and international levels by pointing out the precarious situation in which the right is positioned on international level. Third, the effects of this precarious situations were partly observed when presenting the content of the right – its procedural and substantive obligations that differ from system to system and cannot be categorically defined without a global recognition. Fourth and last, an argument for the global recognition of the right to a healthy environment was developed via a brief reference to the strong benefits of the right and a legal theory analysis of the inconsistency that the lack of such recognition represents. The next part will focus on the conceptual, theoretic and practical flaws that this instrument brings.

[147] An informative presentation of the political discourse and processes that have affected the current status of the right can be found in Marc Limon, 'The Politics of Human Rights, the Environment, and Climate Change at the Human Rights Council. Toward a Universal Right to a Healthy Environment?' in John H Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (1st edn, Oxford University Press 2018).

II. Protecting the Environment with a Flawed Instrument

All creatures are flawed, but out of the flaw may come the universe.

Marguerite Young

The right to a healthy environment definitely has many benefits, yet it is not a *panacea* to the environmental problems our species fears and causes. If we understand the limitations of this tool, we might consider other options which, when used together or alternatively, could really provide for a more environmentally friendly social structure. Indeed, Boyd, Knox and other prominent advocates of the right to a healthy environment see the right as a complementary instrument that should support and work in conjunction with environmental law or even rights of nature. Even as a complementary tool, though, the right has some flaws and these will be the focus of this chapter.

The chapter will begin with an elaboration on the political characteristic of the right to a healthy environment (A), before reflecting on the secondary position of economic, social and cultural rights (B) within the human rights framework. Subsequently, the issue of conflicts between different rights or interests will be reflected upon (C). Finally, I will challenge the anthropocentricity of protecting the environment through human rights (D).

A. Politics, Morality and the Environment

Human rights have a claim on being 'universal' and 'inherent' to all humans, thus becoming apolitical, value-neutral and simply a fact. They pretend to be declarative in the sense that they are not created, but exist naturally. We merely observe them, then declare their existence and introduce them to our legal systems, thus becoming a part of our positive law. Their incorporation in said legal systems represents a way of bringing 'in' an external standard for behaviour and social organisation to which to conform. These claims have been persuasively criticised by Martti Koskenniemi who demonstrates that human rights can be politicised and are a way of imposing moral values that are rights-translatable over those that are not.[148]

Human rights have historically been used as a 'trump card' over other contradicting interests. Most often it is the individual's 'right' that will trump a social interest and/or the interest of the state.[149] Dworkin's

[148] See eg Martti Koskenniemi, *The Politics of International Law* (Hart 2011).
[149] Ronald Dworkin, *Taking Rights Seriously* (A&C Black 2013); Ronald Dworkin and Jeremy Waldron, 'Rights as Trumps' [1984] Arguing about the Law 335.

idea that rights are 'trumps' and beat opposing values or interests, being they economic, cultural, social or others, has been supported by many rights advocates.[150] There is an appeal to the argument that human rights are absolute, especially if they are providing more protection for one's own interests and moral views.

This extreme absolutistic view of human rights may still be popular with some advocates, yet has generally evolved in reaction to critiques. Although the power of human rights is still important for advocates, nowadays rights are not considered to trump every other interest in all circumstances, and furthermore, some claim this was the way Dworkin actually viewed rights to begin with.[151]

In fact, Knox, Pejan and Boyd argue that the right to a healthy environment is not 'construed to trump all other rights' and has not been used in such a way.[152] Meanwhile, others see the possibility that environmental rights have or can claim to have the status of a peremptory norm, or '*jus cogens*' and thus have or will have the 'trump effect' over other sources of international law.[153] Despite the unconvincing nature of a '*jus* cogens' argument due to, among other reasons, the lack of international agreement on the matter, it is important to reflect upon the risk of advocating for an environmental right as a trump card.

There is a seemingly important distinction to be made between the two abovementioned arguments – one relates to the conflict between rights, and the other between a right and international sources. This distinction is not very relevant, though. Recognizing the right to a healthy environment as an imperative norm of international law (*jus cogens*) will render it more powerful than a right to development, for instance, thus making it a conflict of rights after all, at least partly if not entirely.

This is a problem for two reasons, both of which have been articulated eloquently by Martti Koskenniemi in *The Effect of Rights on Political Culture*. [154] First, human rights are leaving no space for interests that resist the translation into rights-language and thus become of secondary importance. Koskenniemi says there is a liberal principle putting the 'right above the good'.[155] Second, Koskenniemi argues that rights are not value-neutral as they claim to be, thus rendering the rights-rhetoric as being political – contrary to right's initial clam of being apolitical and objective. To support this, he refers to the conflicts that

[150] Brian Orend, *Human Rights: Concept and Context* (Broadview Press 2002).
[151] ibid.
[152] Knox and Pejan (n 33); Boyd, 'Catalyst for Change. Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment' (n 31).
[153] Louis J Kotzé, 'In Search of a Right to a Healthy Environment in International Law. Jus Cogens Norms' in John H Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (1st edn, Oxford University Press 2018).
[154] See Martti Koskenniemi, *The Politics of International Law* (Hart 2011) 133-52.
[155] ibid.

occur between rights and how they are often resolved through establishing a balance within the two opposing rights using the proportionality principle.[156] I will further develop that last aspect in Section C of this chapter.

If rights are not 'universal' and 'absolute' then they must be based on moral views and values, which makes them subjective and susceptible to politicisation. They have this normative function of determining what should and should not be done in a society and are given the authority to impose themselves on other, non-rights-translated interests. Raymond Geuss, for instance, considers the notion of a right as the recognition of a 'power to intervene, restrict discussion and break the political process down.'[157]

I do not seek to propose the meta-normative argument that this should not be the case. I cannot pretend to know how society should optimally be organised. Nonetheless, I see benefits from being more conscious and aware of this conceptual weakness of the human rights discourse and its inherent susceptibility to politicisation.

In fact, in the environmental rights context, this nuance is of utmost importance for policy-makers, advocates and decision-makers. I believe this to be the case because of a certain aspect of environmental isses – scientific data is more and more abundant and can play a big role in arguing for more environmental protection. It may seem that environmental rights have the potential to claim more 'objectivity' than other rights-translatable interests.

I have already argued that there is a scientific consensus on climate change in the introduction.[158] To illustrate better my idea, I will propose a hypothetical situation in which an individual (Mrs X) lives in a highly air-polluted city in which a new gigantic factory is planned for construction. It is alluring to claim that the science-backed argument of air pollution being harmful to humans, and therefore Mrs X's interest to live in healthy environment, should trump the economic interests of potential workers in the factory.

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[156] ibid.
[157] Raymond Geuss interviewed by Lawrence Hamilton, 'Human Rights: A Very Bad Idea. Interview of Raymond Geuss by Lawrence Hamilton for Theoria: A Journal of Social and Political Theory' (2013) 60 Theoria 83; Also see Raymond Geuss, *History and Illusion in Politics* (Cambridge University Press 2001) for a more detailed and elaborate presentation of his view.
[158] Oreskes (n 2).

After all, air pollution kills 7 million people a year worldwide, 90% of people breathe polluted air, it is related to climate change and, overall, degrades our health according to the WHO.[159]

The arguments in which science can play a role are many and the issue is to keep in mind the above-mentioned weaknesses of human rights. They are not foreign to environmental rights. As I will elaborate more in Section D, Science (with a capital 'S', in the context of Bruno Latour's work, which will be subsequently presented) too is susceptible to politicisation and its confusion with values, especially when 'fact' has to be interpreted and applied in a particular non-clear-cut case. In the end, it will be judges and not scientists that make the decision and even if a revolutionary new system is created, science too has its limitations. Scientific conclusions are rarely, if ever, 100% certain, studies take a lot of time and need to be peer-reviewed and a decision still has to be made, with different interests being taken into account and politicisation occurring at some point.

This should not be understood as arguing against bringing the sciences into decision-making. I argue that human rights are not objective and that even if science is backing one social interest translated into a right, the process of making a decision is political by nature, and the decision-maker must be aware of that when exercising its function.

Additionally, a human rights-based approach to protecting the 'human' environment (emphasis on 'human' for reasons that will be discussed in section D of this chapter) may not offer protection to all societal interests relating to the environment. An individual or a group of people may believe humans to be a simple component of the environment, equally important as any other species or natural object on Earth. If this group has an interest in creating an equilibrium between all elements constituting our environment, then this group cannot translate that interest into human rights terms. Indeed, they might even consider the construction of a solar energy infrastructure to be 'unhealthy' for the environment because of the materials used in solar panels, the risk that the installation of these solar panels presents on the location etc, yet this same operation may be seen as 'healthy' from those arguing for green energy.

Irrelevant of what we might think of such a societal interest, the point is that human perspectives can be fundamentally different, which necessarily affects what we consider to be healthy for our environment. There could very well be a conflict of two different understandings of what is healthy, yet one

[159] 'How Air Pollution Is Destroying Our Health' <https://www.who.int/air-pollution/news-and-events/how-air-pollution-is-destroying-our-health> accessed 31 May 2019.

understanding can use the authority of the human rights narrative while another cannot. This goes against human rights' claims for objectivity, neutrality and universality.

Some societal interests are marginalised either because they represent the interest of a small and marginal group or because the interest of this group is unsusceptible to translation into human rights terms. This is further enhanced by the ambiguity of the notion of a 'healthy' environment presented in Chapter 1, Section 1 of this thesis. The way the right to a healthy environment is constructed in any of the three levels – international, regional, national – will affect (and affects) which social interests it protects and represents. Therefore, the right will be a tool that uses the authority of human rights to impose one or some social interests, moral values over others.

This weakness is inherent to human rights and must be taken into account when a certain right is being conceptualised and recognised. Proponents of human rights will say that human rights are universal, yet culturally relative, which offers at least a theoretical, if not practical, solution to the issue.[160] The idea of cultural relativity within the universality claim of human rights gives a certain flexibility in the implementation. However, this argument is usually made in a more global context – human rights are criticised to be the emanation of Western values and thus taking a form of neo-colonialism and assertion of Western influence over Asia, Africa or elsewhere. Cultural relativity eases this conflict, yet does not respond effectively to the conflict between societal interests within a single country and does not at all answer the issue with non-rights-translatable interests.

Notwithstanding all the above-stated, there are definite, practical benefits from a human rights-based approach to protecting the environment as I have sought to demonstrate in the previous chapter. When the right to a healthy environment is constructed in a manner conscious of these weaknesses and when the right is used as a complementary tool to other legal instruments assuring a better environment, I believe that the benefits can be significant, and so seems to be the position of David R. Boyd in *The Environmental Rights Revolution*.

This section offered a reflection on some of the general claims of universality and objectivity of human rights and their weaknesses in the context of the environment. I offered a critique on the idea of seeing the right to a healthy environment as a 'trump card' as such an approach cannot be justified once the

[160] For more information on the debate between universality and cultural relativism of human rights, see eg George Ulrich, 'Universal Human Rights: An Unfinished Project' in Kirsten Hastrup (ed), *Human Rights on Common Grounds: The Quest for Universality* (Kluwer Law International 2001); Jack Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6 Human Rights Quarterly 400.

claims for value-neutrality and objectivity of rights are refuted, highlighting its susceptibility to politicisation. In addition, a human rights-based approach to environmental protection cannot respond entirely to all social interests at stake, which should be taken into account when recognising a right as well as when this right is implemented and enforced. The next section will further build on this one, by analysing another issue of the right to a healthy environment related to its status and content.

B. A Second-Tier Right

So far, throughout this thesis, we have discussed the individualistic character of rights, the use of rights as 'trump cards', the right to a healthy environment being considered as both individual and collective. We also looked briefly into the existence of a theory of different generations of rights. Controversially, the otherwise 'interrelated' human rights, were divided into two categories – civil and political rights, and economic, social and cultural rights.[161] The division creates two distinct legal regimes, establishing a strong set of civil and political rights and a toothless set of economic, social and cultural rights.

The right to a healthy environment falls in that second-tier set of economic, social and cultural rights. Supporting that statement is the fact that advocates of the right to a healthy environment, such as Richard Boyd and Ole Pedersen, argue that one way of recognising the right on international level is through an additional protocol to the ICESCR.[162]

Reasons for that division come from how rights falling into the two categories were perceived – civil and political rights were considered 'absolute' and 'immediate', provoking negative obligations on the part of States, which are less costly and easy to implement, whereas economic, social and cultural rights were considered 'programmatic', more expensive and imposing positive state obligations.[163] Many of these differences have been refuted and both positive and negative obligations have been demonstrated to infer from the two types of rights.[164]

Nevertheless, the distinction persists and two distinct regimes operate when it comes to both categories of human rights. This situation hinders any real potential for an internationally recognised human right

[161] This division materialised in the international legal reality with the adoption of two distinct treaties - International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights.
[162] Pedersen (n 49); David R Boyd, 'Catalysy for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment' in John H Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (1st edn, Oxford University Press 2018).
[163] Asbjørn Eide, 'Economic, Social and Cultural Rights as Human Rights' in Martin Scheinin and others (eds), *Economic, Social and Cultural Rights: A Textbook* (Martinius Nijhoff Dordrecht 2001); Alston and Quinn (n 125).
[164] Eide (n 163).

to a healthy environment to become a key instrument and an important tool for actually achieving a healthier environment.

Economic, social and cultural rights have been criticised for their lack of ambition, or simply their inability to assure the materialisation of the goals on which they are premised, by many scholars and experts. Samuel Moyn, for instance, seeks to demonstrate the inability of human rights to achieve economic equality and argues for a change of perception of these rights through the emancipation of human rights from the neo-liberal influences that have affected their evolution.[165] Without hastily dismissing such arguments as being Marxist, as if this is pejorative in itself, we can accept that rights are not doing enough for economic, social and cultural interests and our approach may need to be reconsidered.

We discussed to which substantive obligations states might be subjected once the right is recognised on international level, as well as in case of national or regional recognition. To avoid repetition, I will briefly mention and develop on what I consider to be the key issues with these obligations.

CESCR's General Comment No.3 provides a more detailed interpretation of Article 2, paragraph 1 of the ICESCR, which 'describes the nature of the general legal obligations undertaken by States parties to the Covenant.'

States are obliged 'to take steps' for the progressive realisation of a right. This means, *a priori*, that there are no immediate obligations for states to achieve the right, and this makes sense in cases in which an immediate realisation of the right is impossible due to resource constraints. However, the same general comment establishes four immediate obligations that can infer from some of ICESCR's articles. The immediate obligation here is to 'take steps' but this is not much. The CESCR elaborates that steps taken should be 'deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.' Such steps are the adoption of national legislation as well as a National Action Plan for the realisation of the right. Although the CESRC emphasises that steps should be taken 'by all appropriate means', the appropriateness and the measures depend on the State.

Undeniably, the mere adoption of legislative measures is a step forward, yet also undeniably, a legislative measure on its own, formulated freely by the State, does not assure practical improvements to the

[165] See eg Samuel Moyn, *Not Enough : Human Rights in an Unequal World*; Samuel Moyn, 'Human Rights Are Not Enough.' (2018) 306 *The Nation* 20.

(human) environment. The room for interpretation and the relative weakness of such an obligation are a good illustration of how toothless an economic, social and cultural right is.

Moreover, the whole premise that economic, social and cultural rights can only be achieved progressively and at high cost is false.[166] Obligations to respect or protect, such as to prohibit the construction of, *inter alia*, a risk-posing mine, factory, nuclear power plant, or rather to omit to give an authorisation for the construction thereof, do not require additional resources.[167] Measuring air and water pollution levels, providing a recycle-friendly urban infrastructure and other potential positive obligations do not seem radical, strongly contradicting other social interests or very difficult to implement. At least not significantly more than assuring that people can peacefully assemble, e.g., when in some circumstances roads or even whole city areas have to be blocked and a considerable amount of police force needs to be mobilised in order to assure the safety and protection of people and their rights. Perhaps more research on the cost and difficulties for implementation of positive environmental obligations to fulfil is needed in order to back-up such an argument with numeric data.

Indeed, CESCR states that 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party.'[168] However, it is yet unknown what these minimum essential levels will be in the case of a right to a healthy environment. Abstaining from any speculations on the issue, a more general point on the idea of aiming for 'sufficiency' instead of 'equality' has been made by Samuel Moyn.[169] If we transpose his theory applied in the case of poverty and economic inequality to the context of environmental degradation, then the theory will be that satisfaction with assuring minimum levels of environmental protection does not necessarily mean that we will reach a 'healthy' environment, and, on the contrary, we might even make that final goal further away. Interestingly, Section D offers a perspective that supports such a statement.

There are positive effects of having minimum core obligations. However, if our aim is to assure a healthy environment for our and future generations, we might want to think beyond the 'this is the best we have' mentality and reinvent our system so that we have something better, as this one is simply not enough.

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[166] Asbjørn Eide, *Economic Social and Cultural Rights: A Textbook* (Asbjorn Eide, Catarina Krause and Allan Rosas eds, Second Rev, Martinus Nijhoff Publishers 1993).
[167] ibid 24.
[168] Paccaud, 'CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)' <https://www.refworld.org/pdfid/4538838e10.pdf> accessed 19 May 2019.
[169] See Moyn, *Not Enough : Human Rights in an Unequal World* (n 165).

Another issue with the human-rights based approach to environmental protection is with companies. A 2017 CDP report finds that '25 corporate and state producing entities account for 51% global industrial GHG emissions' and 100 producers account for 71%.[170] Yet companies are not considered to be subjects of international law and the human rights obligations that apply to them, as well as any accountability mechanism and legal regime depends on the national legislation of the particular state.[171] Any international recognition of a right to a healthy environment will be practically impaired to assure real environmental protection if it does not have any material implications on 'juridical' persons such as companies.

Of course, this problem can be resolved on national level, without having to change the way we perceive international law and its subjects. However, this excludes any international accountability mechanism of transnational companies that operate outside their country of establishment and have a transnational effect on the environment.[172]

Related is the problem with the extraterritorial application of the right to a healthy environment where human rights are lagging behind the processes of globalisation and the need to create standards that will guide these processes towards sustainability and respect for human rights.[173]

The lack of strict substantive obligation or internationally recognised high standards make economic, social and cultural rights unambitious, especially when compared with their civil and political counterparts. Furthermore, the monitoring and enforcement mechanism of economic, social and cultural rights is weaker. On a national level, the International Commission of Jurists stated in their guide that not all rights are immediately justiciable.[174] On a regional level, the situation is practically similar, with some differences from one region to the other. As observed, some economic, social and cultural rights

[170] Dr Paul Griffin, 'The Carbon Majors Database CDP Carbon Majors Report 2017: 100 Fossil Fuel Producers and Nearly 1 Trillion Tonnes of Greenhouse Gas Emissions' (2017) <https://b8f65cb373b1b7b15feb-c70d8ead6ced550b4d987d7c03fcdd1d.ssl.cf3.rackcdn.com/cms/reports/documents/000/002/327/original/Carbon-Majors-Report-2017.pdf?1499691240> accessed 10 June 2019.
[171] See eg Eide (n 166); Olivier De Schutter, 'Corporations and Economic, Social, and Cultural Rights' in Eibe Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law* (Oxford University Press 2014).
[172] Olivier de Schutter offers a valuable and useful analysis, as well as solutions, of the main criticisms in regards to international obligations of transnational companies in Schutter (n 171).
[173] For more research and information in this area, see Mark Gibney and Sigrun Skogly (eds), *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press 2010).
[174] Eide (n 166).

have to be indirectly protected as a necessary precondition for the better protection of civil and political rights within the Council of Europe system.

Individual complaints before the CESCR became available in 2013, when the Optional Protocol to the ICESCR, signed in 2008, entered into force.[175] There are only 24 States Parties to the Protocol at the moment of writing. Despite this relative progress, the Committee can only produce non-legally binding recommendations.

In the hypothetical scenario in which the right to a healthy environment is internationally recognised and enshrined in an additional protocol to the ICESCR, an individual who believes to have their right violated will have to go through all domestic remedies.[176] In case, the individual is suing one of the 24 parties to the optional protocol, he will be entitled to make an individual complaint before the Committee on Economic, Social and Cultural Rights, which may then produce a non-binding recommendation. This whole process may take several years and will end up with nothing substantial to oblige the State to change its behaviour.

Asbjørn Eide argued that Articles 2 and 11 of the ICESCR were designed to create obligations of result instead of conduct.[177] However, reality shows that either the aim to reach a result was not set high, or is simply unachievable in time, especially in the environmental context and the imminent danger it represents.

The above-mentioned scenario is more distressing when put in the context of the alarming projection of the Intergovernmental Panel on Climate Change, according to which we have until 2030 to limit climate change before reaching the 'point of no return'.[178] As of the date of writing, we have 11 years and we are still on step one of the scenario – international recognition of a right to a healthy environment. However, due to the political nature of such a recognition, we do not know when the 'political environment' will be favourable.[179]

Some might convincingly argue that the law is merely a tool, the efficiency and effectivity of which depends on those who create and implement it. Thus, my criticism can be directed to the political and judicial bodies, and figures on all levels as the law is simply a reification of their will and decisions. Such

[175] General Assembly, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights 2008.
[176] ibid.
[177] Eide (n 166).
[178] Intergovernmental Panel on Climate Change (n 15).
[179] More on the political aspect of human rights and the environment can be found in Limon (n 147).

an argument does not negate the value of my critique as it is ultimately the law that we follow and adhere to. Thus, all from whom its content is dependent can find value in pointing out its flaws, eventually finding a solution to them.

This section was not developed with the intention to undermine any efforts to push for an international recognition of a human right to a healthy environment. It rather seeks to illustrate how such a recognition will take time and will not end up with the apparition of a global panacea for our environmental problems. A general critique on economic, social and cultural rights was applied in the particular case of a future right to a healthy environment. First, linking previously discussed elements of the right to a healthy environment and human rights in general helped with developing an argument for the differences between two sets of rights – civil and political; and economic, social and cultural. Second, the section focused on specific State obligations that can be problematic in general, as well as *in casu*. Then we briefly tackled the issues with non-state obligations and the extraterritoriality of human rights. Finally, the flaws of these obligations were put in context of the projections for our future and the difficulties of our present. The next section will tackle another problem of the human rights-based approach – the conflict of rights.

C. Conflict of Rights

In Section A of this chapter, we discussed a conflict between social interests within the concept of one single right. This section will elaborate on the political character of a right to a healthy environment in its balancing between opposing rights or public interests.

As Martti Koskenniemi adroitly argues in '*The Effects of Rights on Political Culture*', where there is a conflict of rights, and there always is, no objective, apolitical and clear-cut solution can be found.[180] Instead, a system of balancing is designed that conditions the scope of rights by 'policy choices that seem justifiable only by reference to alternative conceptions of the good society.'[181]

As a reaction to the apparent non-absoluteness of human rights, rights are restricted in the name of what is 'necessary in a democratic society', the general interest, the public order or another value used to restrict a right. At least this is the narrative of the ECtHR, which tries to adopt some kind of a utilitarian test of opposing interests or values in order to reach 'proportionality'.[182]

[180] Koskenniemi, *The Politics of International Law* (n 148).
[181] ibid.
[182] ibid.

The social interest to live in an environment conducive to a good health and quality of life for humans can be opposed, among others, by the social interest to a strong economic development or even matters of national security.

In the geopolitical context in Eastern Europe, seeking energy independence from Russia may lead a State to build a nuclear power plant, for instance – even if the power plant itself may present a threat to national security as in the cases of Chernobyl and Fukushima. Debates over the construction of a new nuclear power plant in Belene, Bulgaria are now in place, with the Bulgarian government indicating that the work will start in 2020-21.[183] Conversely, experts, such as nuclear energy professor Georgi Kaschiev, suggest that Belene has a relatively high seismic activity and the site's infrastructure was heavily compromised in a 2009 flood.[184] The effects of an accident with the nuclear reactor on the environment and the human population could be catastrophic. A decision on the issue, however, remains highly political whether the parliament, the national judiciary or a supra-national court makes it.

Another example of opposing interests is the conflict that emerges between those who would benefit of the construction of a factory or a dam near a river, and those who prioritise living in a safe and healthy environment. If the waste from the factory is going to compromise the river's quality, those living down the stream might prioritise their health over the economic benefits brought by factory. The issue can be extraterritorial as well as within a single country. A dam on the Egyptian parts of the river Nile can affect the quantity and quality of water in Sudan, South Sudan, Uganda and many others.[185] This and the previous examples do not aim to criticise the definite benefits dams and nuclear technology bring about, but rather to show their susceptibility to politicisation and to criticise the act of politicising.

As Koskenniemi rightfully points out 'The resolution of rights-conflicts … presumes a place "beyond" rights, a place that allows the limitation of the scope of the claimed rights' as well as the elaboration of a system of 'human good' to use as a standard to resolve such conflicts.[186]

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[183] Global Construction Review, 'Bulgaria to Press Ahead with Belene Nuclear Power Plant on Tough Terms' (*Global Construction Review*, 2019) <http://www.globalconstructionreview.com/news/bulgaria-press-ahead-belene-nuclear-power-plant-to/> accessed 10 June 2019.
[184] publics.bg, 'Bulgarian Economists Call for the Complete Termination of Belene' (*publics.bg*, 2017) <https://www.publics.bg/en/news/15617/Bulgarian_Economists_Call_for_the_Complete_Termination_of_Belene_NPP_Project.html> accessed 10 June 2019.
[185] For more information on the issue of the Nile, see Thanassis Cambanis, 'Egypt and Thirsty Neighbors Are at Odds Over Nile' (*The New York Times*, 2010) <https://www.nytimes.com/2010/09/26/world/middleeast/26nile.html?_r=1&ref=world> accessed 10 June 2019.
[186] Koskenniemi, *The Politics of International Law* (n 146) 144.

The main problem, in my view, is that this political character of the adjudication and the balancing of different interests may compromise the state of the environment and the health and quality of life of those affected by it. It is not a concern of whether I agree with the outcome, but a concern on the concrete and objective negative effects the outcome might have on them. In the case of *Taşkin and Ors. v. Turkey*, the Ministry of Energy and Natural Resources of Turkey issued a permit for a mine in 1992. The case was resolved by the ECtHR after 13 years due to numerous blockages and reinstatements of the mine's operation due to administrative and procedural 'gymnastics' that caused more suffering to the plaintiffs, as well as the relocation of one of them.[187]

Other, yet related problems concern the process of 'balancing' and the role of the judge. Important questions emerge, such as the compatibility of the current ECtHR system of balancing, for instance, with the specific context of environmental issues. Judges of the European Court of Human Rights are *a priori* limited by the fact that considerations relating to the environment are accessory to other rights, such as the right to family life. Additionally, European judges have to respect the subsidiarity principle and leave a 'margin of appreciation' to States and national judiciary in terms of their environmental policies. In turn, national judges must also be careful with not taking the role of policy-makers, which can have a constraining and chilling effect on judges' initiative. This problem can be resolved with the adoption of laws on the matter. Furthermore, judges are not educated in having the role of making grand policy decisions that may affect the life of future generations – they lack the scientific background to fully comprehend the implications of a particular industrial project on a specific site.

Interestingly, a possible solution to some of these issues is to bring sciences into democracy and decision-making, and to partly or wholly detach from the anthropocentric approach to organising the legal reality of our society. This is the focus of the following section.

This section sought to present the inherent to all human rights problem of emerging conflicts between them and the political character of the resolution thereof. This problem has material implications on individuals and communities, and can take various forms – conflicts between the right to a healthy environment and the right to development, or a conflict between the former and interests of national security, *inter alia.*

[187] *Taşkin and Others v Turkey* App no 46117/99 (ECtHR, 30 March 2005)

D. The Anthropocentric Environment

I hope that what has preceded this particular section has served to show and describe how a human rights-based approach to environmental protection is inherently centred on the human experience of said environment. Human rights is an anthropocentric construct influenced by humanism, naturalism, liberalism and more. Humanism has influenced human rights in a way that makes them focused on and centred on humans, emphasising humans' value and agency. Naturalism has played its role insofar as human rights claim that rights are inherent to human beings simply because of their humanity. Liberalism, insofar as human rights strive to assure individual liberties and have become a focal part of the liberal democracy idea.

We are, in fact, humans and it seems perfectly natural that we would organise our legal, economic and other systems in such a way. It seems perfectly natural that when we aim for a healthy environment, we aim for an environment healthy for ourselves. Yet it is interesting to look into what we actually mean when we refer to the 'perfectly natural', how do we define it and what are the consequences of something being defined as 'perfectly natural'.

These are questions we seem to be very preoccupied with, as if once we conclude the naturalness of an idea (behaviour or anything else) it becomes objective and puts an end to any discussion on its adequacy, necessity, usefulness, etc. As prominent French philosopher, anthropologist and sociologist Bruno Latour points out, we use 'nature' as a determinant of that which is objective and an indisputable fact as opposed to the 'social', which is the subjective and disputable value.[188]

As a result, nature has become that entity from which we tend to detach, yet one we politicise in our effort to defend a specific interest we might have. For instance, one of the points of attack on homosexuality is that it is allegedly an 'unnatural' engagement in sexual activity that cannot result in reproduction and therefore puts the existence of our species in danger. There is this confusion of science and the political (which becomes Science),[189] in what is denominated as 'collective experiments' in

[188] Latour, *Politics of Nature : How to Bring the Sciences into Democracy* (n 20).
[189] Science with a capital 'S' in the context of the vocabulary that Latour uses. Latour contrasts Science with sciences. Science is 'the politicization of the sciences by (political) epistemology in order to make public life impotent by bringing to bear on it the threat of salvation by an already unified nature'. As part of deconstructing and reconstructing (or better – composing) our social system, Latour redefines many notions so that they can fit his concept of the 'good common world', which represents the type of world that has to be obtained through 'due process'. Others may refer to it as *utopia,* which does not mean they are the same things, at least for Latour. '*Politics of Nature*' offers a glossary of key notions and words used by the French scholar.

which humans as well as non-humans participate.[190] Global warming is an example of such a collective experiment where we all influence and are influenced by the processes, whose consequences are yet to be fully experienced by both humans and non-humans. Paradoxically, this confusion between the sciences (and their aim to search for facts) and politics (and their aim to deal with values) ends up confusing facts and values, bringing them together and nullifying the initial tendency towards detachment.[191]

In relation to that, Latour would most likely dismiss the suggestion I made in the previous section, that environmental issues offer the opportunity to adjudicate in a more objective manner (by using Science) as being a product of a modernist way of thinking.

Our perception of nature as this separate (from the social) entity, characterised by its indisputability and objectivity, is causing a discrepancy between the goal of protecting the environment and the means to do it.[192] This way of viewing nature has an overarching and multi-dimensional influence over the way we understand reality. For instance, sociology and law focus on human interactions and give agency to humans or their fictitious creations – corporations, institution, etc. Thus, those who are given 'voice' and a mode of expression are people, whereas non-human objects are left aside, as if they do not play any role in society.

As with many other notions, Latour leaves the word 'society' behind and adopts the word 'collective', denominating a network of associations[193] between humans and non-humans, thus giving non-humans a sort of agency – actancy.[194]

This approach is linked with the decades-long work of the scholar on the actor-network theory (ANT) and the heart of the argument I seek to make in this section.[195] ANT offers new lenses to the sociological

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[190] The idea that 'the traditional distinction between scientific laboratories experimenting on theories and phenomena and a political outside where non-experts make do with human values, opinions, and passions' has evaporated is explained and argued in Bruno Latour, 'From Multiculturalism to Multinaturalism: What Rules of Method for the New Socio-Scientific Experiments?' (2011) 6 Nature and Culture 1.

[191] The ideas within this paragraph have been taken from the combined work of Latour in, *inter alia*, Latour, *Politics of Nature : How to Bring the Sciences into Democracy* (n 20); Bruno Latour, 'An Attempt at a "Compositionist Manifesto": A Prologue in the Form of an Avatar', vol 41 (2010).

[192] The history and problems of our perception of Nature have also been tackled eloquently, but in the American context, in Jedediah Purdy, *After Nature: A Politics for the Anthropocene* (Harvard University Press 2015).

[193] 'Instead of making the distinction between subjects and objects, we shall speak of associations between humans and non-humans' in Latour (n186) p 237-8

[194] Latour, *Politics of Nature : How to Bring the Sciences into Democracy* (n 20).

[195] An introduction to this theory can be found in Latour, *Reassembling the Social : An Introduction to Actor-Network-Theory* (n 20).

perspective that tends to understand, describe and explain how society functions. Where traditional sociology only studies human interactions, ANT undertakes a more holistic endeavour, by including non-human entities and by studying the associations between all actors within a network.[196] ANT does take into account the characteristic differences between different actors, yet attributes actancy to all of them, taking into account their influence on each other.[197]

While writing this section. I had an interesting experience. I was eating lunch and enjoying the warmth of the sunrays in a little, yet cosy café on one of Helsinki's many coasts, when a seagull skilfully manoeuvred around the wooden constructions, designed to protect customers both from sun and rain, and 'stole' a piece of bread right from the hand of the person sitting next to me. Sociological theory would tend to focus on the interactions between people at the café, whereas Latour and the ANT would be equally interested in how humans interact with other actors, such as the chairs and tables in the vicinity, the seagulls trying to steal bread from customers, the door entrance, etc.

Perhaps our legal systems could respond better to contemporary threats such as climate change that transcend the capabilities of the traditional nation-state system. By moving from a purely anthropocentric perspective towards one that includes non-human objects and considers their agency (or actancy, in Latour's terms), we may be able to adopt policies and solve problems more effectively. More research needs to be done on this subject, but, at least in this case, research has to succeed change, as otherwise all research will be speculative. I will discuss the newly emerging legal instrument known as Rights of Nature in the following chapter by comparing its cost and benefits as opposed to a human rights-based approach to environmental protection.

Apropos, according to Latour, environmentalists that seek to advocate for environmental protection, but from the same perspective that distinguishes nature from society, are destined to fail as, for him, exactly this mentality is at the heart either of the problem or of our incapability to deal with it so far.[198]

Yet modernists criticise such an approach for anthropomorphising non-human objects – for them inanimate matter cannot have agency, value and produces its effects 'only through the power of its

[196] ibid.
[197] ibid.
[198] This argument can be found in Latour, *Politics of Nature : How to Bring the Sciences into Democracy* (n 20); Latour, 'An Attempt at a "Compositionist Manifesto": A Prologue in the Form of an Avatar' (n 191).

causes', deprived from all creativity. By attributing agency to non-human objects, one is giving human properties to non-human objects, thus anthropomorphising them.[199]

Latour eloquently takes this argument and directs it right back at those that produce it by arguing that what is strange is not the idea of non-human objects' agency, but rather the 'invention of inanimate entities which do nothing more than carry one step further the cause that makes them act'.[200] He points out that in reality, and opposite to modernists' view, there are consequences that influence and add to subsequent causes and there is a gap between the two. Otherwise, as he argues, there will be no possible way to distinguish causes from consequences. Pointing out these gaps between causes and consequences disturbs the notion that nature is preassembled, undisputable, which is why it provokes discomfort to realists and modernists. Rationalists have ignored the 'discontinuity, invention, supplementarity, creativity … between associations of mediators' and for purely anthropocentric reasons, Latour argues, naturalists have created this division between 'subjects and objects, culture and nature…'[201]

At the beginning of the section, I quoted Marguerite Young and her thought that 'out of the flaw may come the universe.' For Latour the word 'uni-verse' suffers from the same deficiency as the word 'nature'. Instead, he speaks of a 'pluriverse' that designates the associations between different actors (propositions) 'that are candidates for common existence before the process of unification in the common world.'[202] Perhaps a human rights-based approach can become part of this pluriverse.

By writing this section, I did not intend to propose that a right to a healthy environment is not the way to go and can even be harmful to protecting the environment. Latour's concept has been criticised for being practically impossible[203] and indeed Latour himself sees his future 'good common world' as an objective than can be achieved slowly.[204] I am of the opinion that it is a good objective to look for and one we should strive to, yet in the context of the current 'Constitution', a right to a healthy environment is indeed necessary.

Another way of answering the possible contradiction between arguing for the use of a legal instrument that is inherently flawed is through the work of Friedrich Kratochwil in, for instance, *The status of law*

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[199] Latour, 'An Attempt at a "Compositionist Manifesto": A Prologue in the Form of an Avatar' (n 191) 481.
[200] ibid 482.
[201] ibid 483.
[202] Latour, *Politics of Nature : How to Bring the Sciences into Democracy* (n 20) 246.
[203] See eg Peter H Denton, 'Review of "Politics of Nature: How to Bring the Sciences into Democracy"' (2005) 6 The Philosophy of Technology Article; Sal Restivo, 'Politics of Latour' (2005) 18 Organization & Environment 111.
[204] Latour, *Politics of Nature : How to Bring the Sciences into Democracy* (n 20).

in world society: mediations on the role and rule of law. There, he argues that if the ideal and best possibility is unattainable, then we should go with what we have, perhaps as a second best option, in order to achieve the result we seek.

This chapter sought to present a constructive critique on undertaking a human rights-based approach to protecting the environment. Despite the many benefits that were presented in Chapter 1, a right to a healthy environment is characterised by some conceptual, as well as practical problems. The first section focused on the political aspect of advocating and using a right to a healthy environment, with the issues such aspect brings to the use of the right as a trump card. The problems with the lack of clarity around the rights meaning and the issue with non-translatable rights were also discussed in that first section. The second section aimed to offer a reflection on the weakness of social, economic and cultural rights within which a potential right to a healthy environment can be recognised on international level. The next section sought to illuminate the political character of adjudicating two conflicting rights and the issues such situations raise. The final section was intended to reflect on the fundamental premises on which a human rights-based approach is built. The anthropocentricity of such an approach may be counterproductive for the aim it is intended to achieve – protecting the environment and assuring a healthy life for humans, as if not stopped – environmental destruction can potentially end the life of humanity altogether. A different way of constructing our society and thus our legal systems was presented – one that attributes actancy to both humans and non-humans.

The next chapter's purpose will be to briefly present the premises on which two alternative instruments to a right to a healthy environment are constructed, and offer a non-exhaustive reflection on some of the costs and benefits between the instruments

III. Alternatives to the Human Right to a Healthy Environment

We abuse land because we regard it as a commodity belonging to us. When we see land as a community to which we belong, we may begin to use it with love and respect.

Aldo Leopold

To make a normative argument of what is the best legal instrument or approach to protecting the environment requires knowledge I do not possess and assume no one does. Thus, in this chapter I will not be offering solutions, as I am wholly incompetent to do otherwise. I do not believe there is a real, absolute solution to environmental degradation that the law can provide. Perhaps the problem is the human mentality and the law can only treat the symptoms or limit the freedom of that mentality. If this is true, only a change of how we think, and perceive 'nature' and ourselves can truly offer a solution to the degradation of Earth's environment.

There are many spheres of law that might have influence over the environment, such as international humanitarian law, trade law or investment law. However, I will focus on two legal instruments whose *raison d'être* is tightly connected with the environment and its protection. By analysing the distinct theoretical foundations on which they lay, I will seek to compare and reflect upon the similarities and differences they might have with the human rights-based approach. First, I will start with the traditional instrument that is International Environmental Law (I). Second, I will analyse the new (and controversial for the legal mind) Rights of Nature (II).

Though these instruments can be used alternatively, they can also be complementary to each other.

A. International Environmental Law

One of the alternatives to a human right to a healthy environment is international environmental law. First, I will seek to present a brief overview of the history and purpose of international environmental law (1) and thereafter, I will focus on its main benefits and costs (2). The aspects discussed in the latter subsection could be further divided in smaller groups. However, for reasons related to clarity, avoidance of over complexification, and for the purposes of this analysis, I will simply present the main benefits and costs together, in the form of a discussion. Comparisons with the right to a healthy environment will occur often, as this is the main context of the analysis. For this reason, a stronger separation between international environmental law and human rights law will be applied in this section, as opposed to the common practice in the academic literature of mixing them up.

1. History and Purpose

International environmental law is the traditional legal instrument to use for the protection of the environment on international level, having a strong implication on national level where environmental law is, too, the traditional way to go about environmental protection.

Starting from the second half of the 19th century, international environmental law has evolved in response to scientific, technological and other developments.[205] Another source dates the birth of international environmental law slightly earlier – the beginning of the 19th century, with the nature conservation treaties, when people started to realise that some species, for instance in Africa, were overexploited in order to satisfy needs from the North, which affected negatively local populations.[206] Slowly, the focus on protecting specific species changed when people observed the transboundary character of environmental issues, such as with the migration of fish and how overfishing in one area, affects fishery in other areas.[207] Exploitation of 'natural resources' needed to be limited.[208]

Perhaps defining flora and fauna, as 'natural resources' gives a hint on the positional perspective of international environmental law, which will be a matter of concern later on.

From transboundary concerns, the next evolution was towards having global concerns and agreements, due to the stronger understanding that every species and habitat shares an interconnectedness within one big ecosystem, which is Earth.[209] Regional and global conventions were adopted and declarations were made, such as the Rio Declaration, in the context of meetings between the leaders of the international community.[210] The last development of international environmental law came about with the emergence of the principle of integration, characterised by the integration of environmental concerns into all other activities.[211]

A detailed analysis of what characterised each stage of the development of international environmental law by is not pertinent for the arguments I seek to make.[212] Nevertheless, what is crucial to emphasise is that international environmental law is a legal instrument that has evolved throughout the years, yet has

[205] Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (Cambridge University Press 2012) 25.
[206] Ellen Hey, *Advanced Introduction to International Environmental Law* (Edward Elgar Publishing 2016) 9.
[207] ibid.
[208] Sands and Peel (n 205).
[209] Hey (n 206).
[210] The COP meetings held within the UNFCCC framework are a good example. See Sands and Peel (n 203).
[211] ibid p 26; Hey (n 204).
[212] For such an analysis, please see eg Hey (n 206); Sands and Peel (n 205).

never really reached a global uniformity and the implementation of which depends primarily on States and their will. I believe this to be the case, based on several facts.

To begin with, there is no universal organisation dealing with issues related to the environment as a whole.[213] This should be considered in conjunction with the fact that conventions have been very specific, each regulating a particular species or theme, such as climate change,[214] or fisheries across the coastal waters of Western Europe,[215] or on a larger scale.[216] Hence, different regimes exist for the different organisation, conventions and the different species or themes that are under protection of international environmental law. Moreover, judicial complaints are inter-state and infrequent, as they can occur only when multiple conditions are met, such as the acceptance of both the obligation and the competency of a court by both sides.[217] In fact, there are other tribunals or courts, apart from the International Court of Justice (ICJ), that can be competent, such as regional courts as well as arbitration by a tribunal chosen by the conflicting parties.[218] Private persons are not accountable on an international level, which further shows the importance of States as main actors in international environmental law.[219] Correspondingly, and despite the influence of many actors (individuals, companies, international organisations, etc) on international environmental law, States remain the most important decision-makers in terms of environmental policy and the functioning of international environmental law.

As for its purpose, and according to Ellen Hey, international environmental law 'aims to address the negative impacts that humans have on the environment with the objective of protecting and conserving the environment.'[220] This way of defining its aim sets as a goal specifically the protection and conservation of the environment from the negative impacts of humans. Yet, as Hey points out, 'international environmental law reflects an anthropocentric approach to the protection and preservation of the environment, rather than an eco-centric approach.'[221]

Perhaps this is the case as a result of the premises on which international environmental law stands. As it was pointed out above, what needs to be protected is the 'natural resources'. Fish, for example, need

[213] Hey (n 206).
[214] See eg Kyoto Protocol to the United Nations Framework Convention on Climate Change 1997; Paris Agreement under the United Nations Framework Convention on Climate Change.
[215] London Fisheries Convention 1964.
[216] United Nations Convention on the Law of the Sea 1982.
[217] Hey (n 206).
[218] ibid.
[219] ibid.
[220] ibid 1.
[221] ibid 2.

protection so that we exploit them 'sustainably' – i.e. in a way that does not make them extinct so that we can continue using them, primarily for consumption. Climate change can potentially be catastrophic for humans, causing death, migration and possibly war. Without seeking to discuss whether such an approach to protecting fish or battling climate change is ethical, the main goal of the examples is to illustrate that the main driving factor for them all is the human interest. In support of this claim comes the fact that despite the significant number of actors that influence international environmental law, all of them are human.

Indeed, international environmental law's focus has evolved from purely seeking to protect the environment towards an aim to assure sustainable development. [222] Yet, the very concept of 'sustainability' seeks to establish a balance between the human interest and the limits of the environment, without giving 'actancy' to any non-human actors and thus strongly prioritising the human interest over the limits of the environment. Sustainability, as a process of production in a more economically and socially just or equitable way, with a certain degree of environmental consciousness has its benefits, yet it also brings about some risks, such as 'sustaining the unsustainable', e.g. animal agriculture.[223]

International environmental law thus seeks to protect the environment from humans for the sake of humans, although there seems to be a shift in focus towards the goal of attaining 'sustainable development'. Notwithstanding, this legal instrument is well established within international law and has evolved in reaction to technological, social and other advances. This brief overview of the history and purpose of international environmental law serves as an introduction to the stage in which the main benefits and costs as opposed to the right to a healthy environment will be discussed.

2. Main Benefits and Costs

One very important advantage of international environmental law is that it is well established, internationally recognised and thus can be a useful tool for those who fight for environmental protection. As explained in the previous section, international environmental law has strong roots and tradition as the main legal instrument to use for environmental protection in inter-state relationships, as well as when it comes to the influence and capacities of non-state actors in international level.

[222] On the development towards a focus on 'sustainability', please see ibid.
[223] Influenced by Frederick H Buttel, 'Sustaining the Unsustainable: Agro-Food Systems and Environment in the Modern World' in Paul Cloke, Terry Marsden and Patrick Mooney (eds), *Handbook of rural studies* (2006).

There are some strong arguments in support of the statement that international law is the reification of the will and interests of States, thus making it an instrument of States' political expressions or interstate dynamics.[224] Yet, international environmental law has been influenced by non-state actors such as NGOs, international organisations, and individuals.[225] Some notable examples of are the creation of the International Union for Conservation of Nature (IUCN) established in 1956, which in turn established the World Commission on Environmental Law in 1960 and the Environmental Law Center in 1970. These two institutions have been influential in the development of the 1982 World Charter for Nature and the Biodiversity Convention.[226] The World Wide Fund for Nature (WWF) and Greenpeace are other notable examples that have influenced international environmental law.[227] Academics and scientists have influence over the law through their work in, for example, universities, NGOs and research institutes or centres. Companies can also influence international environmental law's development through lobbying for interests opposing or favouring environmental protection. Some of the biggest industries are directly affected by environmental regulations, and often are against it, yet companies can also have a more positive influence through innovation and making technological advancements capable of offering new possibilities for policy makers. Nevertheless, international environmental law keeps being dominated by States when it comes to adopting legally binding conventions or their implementation and enforcement.

Due to the defragmentation of international environmental law, numerous conventions with different efficiency and quality depending on their geographical limitations (e.g. in the case of a transboundary problem affecting limited number of countries), their theme (fishing, forestry etc) and other factors have been adopted. A big number of multilateral agreements (MEAs) have been adopted, which come with their own regime and (often) institutions – with creation of specific bodies for every agreement agencies, committees, expert groups etc. This proliferation of environmental regimes comes with benefits, such as the ability to design a regime specifically for the issue in question, yet issues such as the overlap of jurisdictions, regulation gaps, operational and implementation issues, bureaucracy, and the mere incapacity to respond adequately to global environmental issues in the form of climate change also exist.[228]

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[224] See eg Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (Oxford University Press 2005).
[225] Hey (n 206).
[226] ibid 11.
[227] ibid.
[228] Maria Ivanova and Jennifer Roy, 'The Architecture of Global Environmental Governance: Pros and Cons of Multiplicity' in Lydia Swart and Estelle Perry (eds), *Global Environmental Governance: Perspectives on the Current Debate* (Center for UN Reform Education 2007).

International environmental law, being so political, fails to offer a stable instrument that answers global issues, such as climate change. The Paris Agreement was the first legally binding agreement on the issue on international level, yet many important States such as the US, Russia and China are not respecting it, either because they have not ratified it (Russia),[229] because they decided to leave it (USA)[230] or because of other reasons. In addition, as we discussed in the introduction, the Paris Agreement itself lacks ambition.

On the enforcement side, dispute settlement comes with some drawbacks. As Ellen Hey points out, the procedures are usually *post factum*, as damage needs to have occurred; they tend to be confrontational, whereas cooperation is usually needed in terms of attaining more environmental protection; companies or other private juridical persons are left out, as they cannot participate in inter-state procedures, despite being important stakeholders as well as, in occasions, polluters.[231] In addition, those most affected – the individuals and the groups and societies they form – are not able to benefit from inter-state adjudication directly and thus many actors are left out of the procedures.[232]

Different mechanisms have been developed with the aim of responding to this problem, such as the inclusion of an obligation into MEAs to engage in compulsory conciliation before looking towards arbitration or adjudication, as well the adoption, again in MEAs, of non-confrontational compliance procedures.[233] Additionally, groups and individuals can now submit allegations of non-compliance via several procedures such as the international development banks, the Aarhus Convention Compliance Committee and procedures developed by private actors.[234] However, the Aarhus Convention attributes rights, and is practically regional, as we have discussed in Chapter 1, which renders it more into the 'human rights-based approach' side. Furthermore, the procedures developed by private actors do not often produce a result that is implemented or enforceable on States.[235]

Moreover, when it comes to inter-state judicial procedures, those are often hard to get as they generally necessitate the States' approval of the jurisdiction of the ICJ or another court/tribunal,[236] as well as the

[229] United Nations Treaty Collection, Status as at 22.06.2019 17:29 PM EET
[230] 'Trump Withdrew from the Paris Climate Deal a Year Ago. Here's What Has Changed. - The Washington Post' (n 13).
[231] Hey (n 206) 108.
[232] ibid 109.
[233] ibid.
[234] ibid.
[235] See more about these procedure in ibid pp 119-21.
[236] See eg Statute of the International Court of Justice chapter II.

existence of an obligation that has been violated and can be attributed to a State.[237] The political will to commence the procedure, as States might prefer more diplomatic ways to settle their disputes, also plays an important role.

As a result of all of these factors, international environmental law, at least on international level, is usually hard to elaborate, implement and enforce, which, in turn, affects the effects it has in practice.

In contrast, as discussed above and when looking at the current state of affairs, a human rights-based approach does not yet offer more on the international level, as it is not recognised in any legally binding document.[238] Looked at from that perspective, international environmental law has an edge on all other legal instruments, as at this moment it is the only institutionalised legal instrument aiming for environmental perspective, even if for the 'wrong' reasons.

Notwithstanding, a potential international recognition of a right to a healthy environment can bring about the appearance of a more uniform approach to environmental protection as an alternative to the disjointed and fragmented tool that we are discussing in this section. It could also introduce new angles and procedures from which an environmental interest can be protected, such as making a better use of regional and international human rights monitoring and controlling bodies through a direct protection of a right to a healthy environment, and a more general transformation of the CESCR.

It is worth reiterating that a human rights-based approach does not exclude the application of international environmental law – both tools could be used in a complementary manner so that benefits are maximised.

Related to the use of the ICJ or arbitration, it would be an unpleasant omission not to point out that once a case is actually brought before a court or a tribunal, the latter have issued some important decisions such as the inclusion of an EIA in the *Pulp Mills* case, the protection of resources belonging to the nine dash line from China in the *South China Sea* case, and the protection of the Indus River from India's extensive operations in the *Indus Waters Kishenganga* case.[239] Nevertheless, the adjudication bodies' benefits will improve if they are given the competency to issue provisional measures as well as with the improvement of the conventions' precision, clarity and content.[240]

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[237] International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts 2001 art 1,2.
[238] Please see Chapter 1 of this thesis.
[239] Theodore Okonkwo, 'Adjudicating International Environmental Law Litigation: Recent Development of Case Law' (2017) 08 Beijing Law Review 239.
[240] Tim Stephens, 'The Limits of International Adjudication in International Environmental Law: Another Perspective on the Southern Bluefin Tuna Case' (2004) 19 The International Journal of Marine and Coastal Law 177.

B. Rights of Nature

Another alternative is the unconventional idea of attributing rights to nature. I will adopt a similar structure as the one used in the previous section. First, I will look into the purpose and premises (1) on which this instrument is being constructed, before analysing its benefits and costs (2), again in the main context of a right to a healthy environment. Given the novelty of this legal tool, many unstudied areas exist. Thus, the few examples that do exist will be used in different situations to help illustrate different aspects of the Rights of Nature. These aspects are all susceptible to change as the concept evolves, so a certain degree of speculation may be impossible to avoid.

1. Purpose and Premises

Rights of Nature's purpose seems to be the achievement of an equilibrium between humans and nature through restricting human's destructive behaviour towards the environment it is a part of, and ultimately resulting in an environment that is protected and whose interests are given voice and are juxtaposed with contrasting human interests.

According to David R. Boyd, the current UN Special Rapporteur on human rights and the environment, 'the legal revolution', as he refers to the Rights of Nature, has the potential of achieving three key outcomes – 'reducing the harm suffered by sentient animals, stopping human-caused species extinction, and protecting the planet's life-support systems.'[241]

Boyd argues that in order to achieve the abovementioned objectives, a new set of rights and responsibilities needs to be established.[242] Rights of Nature offers exactly this, according to him.

One key premise on which this legal tool is built are the adoption of an eco-centric approach, instead of the anthropocentric one that has been at the heart of human rights and environmental law. Rights of Nature sees natural objects, sentient or non-sentient, and human or non-human, as a part of an interdependent and interrelated system that ought to function in a way that balances between the interests or needs of each component, rather than prioritise the interest of only one component. From this perspective, environmental law does not offer such a balance. On the contrary, its goal is to decrease the intensity of the destruction, while prioritising the human need to a 'sustainable development'. Thomas Linzey and Mari Margil from the Community Environmental Legal Defense Fund (CELDF) claim that

[241] David R (David Richard) Boyd, *The Rights of Nature : A Legal Revolution That Could Save the World pxxxv*.
[242] ibid.

environmental laws and regulations don't actually protect the environment, but rather decrease the environmental damage 'by requiring corporations to take modest precautions when mining or fracking or polluting' despite the inherently harmful effects of these activities.[243] As discussed previously, this critique is also valid for those who elaborate laws, as the law is merely a reification of their political will.

The mere concept of sustainability, as explained in the previous subsection, is anthropocentric. It will be a sustainable approach to, in example, exploit fisheries in a way that allows fish to reproduce so that continuous, potentially permanent exploitation becomes possible and species do not go extinct. One can contest the ethical and moral aspect of such an approach as well as make the argument that such an approach mainly benefits humans, and only benefits the fish insofar as the exploited species does not become extinct. A fisherman, a person who loves to eat the fish or take Omega 3 pills derived from the oils of said fish, as well as any other party interested in exploiting the fish can reply by saying that humans are on top of the food chain and such a behaviour is purely natural. However, this argument prioritises humans over other species or natural objects, thus being anthropocentric per definition, which is exactly what the Rights of Nature tool aims to criticise. Moreover, such an arguments uses the division between Society and Nature that Bruno Latour criticises for being socially constructed, as analysed in the last section of Chapter II.

More importantly, I am of the opinion that the fisherman's interest must be expressed, represented and protected and this is indeed the case in the way our legal and economic systems are currently organised. However, I also believe that the same opportunity must be given to other actors that are affected by the fisherman's interest, and unfortunately this does not seem to be the case for reasons already discussed throughout this thesis, as well as the objective reality that fisheries are being overexploited due to 'politics of fishery management that favour continued exploitation.'[244] Fisheries, of course, are only one example out of many. Scientists have observed that we are driving species extinct at 100 to 1,000 times the natural rate.[245]

Rights of Nature give legal personhood to non-human objects in an effort to give 'voice to the voiceless' and modify the legal system from a purely anthropocentric one to one that adopts a more holistic, eco-centric perspective. This premise seems to conform to Latour's actor-network theory, explained in the

[243] ibid 110.
[244] Andrew A Rosenberg, 'Managing to the Margins: The Overexploitation of Fisheries' (2003) 1 Frontiers in Ecology and the Environment 102.
[245] Eric Chivian and others, *Sustaining Life : How Human Health Depends on Biodiversity* (Oxford University Press 2008).

Section D of Chapter II as it is a proposition that includes non-human objects into the legal system, which aims to regulate society's relationships (the associations between members of the collective, in Latour terms).

Another key premise of Rights of Nature is the inability of an anthropocentric approach to ensure environmental protection, especially in a capitalist neo-liberal system conducive to (and being dependant on) consumerism. As David R. Boyd rightfully puts it 'Protecting the environment is impossible if we continue to assert human superiority and universal ownership of all land and wildlife to pursue endless economic growth.'[246] Here, Rights of Nature tackle the idea of ownership and property in the Western World in which land is considered as merely the property of humans and is, thus, used for their need. In Rights of Nature's terms, land is not the property of men. If anything, it should be the other way around as land was there long before humans appeared. Rights of Nature, however, consider humans, all other animals, including humans, as well as non-sentient objects to coexist together, on equal footing.

To support such an argument, Boyd uses slavery as an example of attributing rights to humans that were considered as property, as well as suffragettes who fought for women's rights to vote to be recognised instead of women being considered as property of men.[247] For most Europeans and Americans today, it would be an outrageous violation of human rights to consider someone as a property, to have slaves or to deny women their right to vote, yet in the past these ideas were the norm while what was outrageous were their alternatives. Similarly, the conventional legal mind trembles in shock of attributing rights to non-human objects.

In the end, the law is supposed to regulate human relationships and it has been designed in such a manner, opponents might argue. Humans have consciousness, awareness and have built unique civilisations. Some might not consider humans to be animals. The claims for human uniqueness and specialness used as an argument for continuing its brute dominance over other animals and nature fall beyond my analysis. Actually, they are irrelevant, as a similar argument can be made with the same pathos for octopuses, dolphins, forests, whales etc. The argument that the law is constructed in order to regulate social relationships is, however, worth considering.

Indeed, Rights of Nature proposes a disruption of the legal tradition that goes beyond recognising that slaves or women are not property. It infers the attribution of a legal personality, with all the consequences

[246] Boyd, *The Rights of Nature : A Legal Revolution That Could Save the World* (n 241) xxxiv.
[247] ibid 220.

such an action implies, to non-human objects. Boyd talks about 'communities' instead of 'society'. Community is the collective of humans, other animals, forests, mountains etc, whereas society refers to humans. Bruno Latour uses the word 'collective' seemingly to define the same thing as Boyd when he uses the word 'community'. Thus, 'society' understood by the collection of humans is redefined, extended, in a way that includes more actors.

Yet, it is human behaviour that seems to be at the centre of climate change or other environmental issues. If all one needs to fix the problem is to take care of its heart, it is possible to argue seemingly persuasively that law already has the potential of finding a solution by not being subjected to such reformations as it already focuses on the human behaviour. According to such an argument, if humans are the problem, then one needs focusing only on human behaviour in order to cure the problem. Thus, environmental law, or all other mechanisms that we currently have, need merely to be strengthened for ultimately achieving the same result as a possible reformation through Rights of Nature.

From my understanding, however, and basing my opinion on all the theories and data discussed throughout this thesis, protecting the environment and achieving a truly sustainable and environmentally friendly system necessitates a move beyond the anthropocentric approach. The law needs to experience some kind of transformation and, ironically, anthropocentrism can be the answer as it can serve as a driver, a source of motivation, to make the necessary change. If scientific projections cited in this thesis are accurate, it is humans' essential interest to assure drastically better environmental protection and to reorder their priorities by deprioritising economic growth for the benefit of humans' existence achieved through a balanced relationship with Nature. Rights of Nature claim to offer the means for such a transformation.

The link between capitalism and environmental degradation is found in 'capitalism's inherent expansionary tendencies', which promotes technological development, the latter promoting production of commodities, which, on its side, causes the burning of fossil fuels 'to power the machinery of production.'[248] Environmental degradation has also been linked with Judeo-Christian tradition that represents ethical values promoting an 'exploitative attitude towards nature', which too tries to explain the rise of technology.[249]

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[248] Brett Clark and Richard York, 'Carbon Metabolism: Global Capitalism, Climate Change, and the Biospheric Rift' (2005) 34 Theory and Society 391.
[249] William Coleman, 'Providence, Capitalism, and Environmental Degradation: English Apologetics in an Era of Economic Revolution' (1976) 37 Journal of the History of Ideas 27.

Rather than inferring from this that all pursuit of production is 'wrong', I simply seek to argue that the current predominant system we live in is at least partly responsible for the current state of the environment and the risk it poses on our well-being and existence.

This subsection served to briefly present the purpose and premises of the Rights of Nature. This legal tool aims at ensuring a better protection for the environment by changing the way we perceive nature, ourselves and our place within nature. By giving legal personhood to non-human objects, the Rights of Nature give voice to the interests of non-human objects, giving them standing in our legal system and thus a better possibility to be represented and to have their interests protected, rather than being put in a secondary position to the pursuit of economic growth. Rights of Nature aim to do so by changing three of the premises on which the *status quo* stands, according to Boyd. First, the belief that humans are superior to, and even separate from, the rest of nature, which we have named 'anthropocentrism'. Second, the idea that nature in all its forms constitutes human property. Third, the idea that limitless economic growth shall be pursued and represents the most important objective of modern society.

2. Main Benefits and Costs

As opposed to International Environmental Law, Rights of Nature are not well established in International Law. This is a considerable disadvantage of this legal instrument as international recognition is not likely at the moment of writing or in the foreseeable future. Attributing rights to natural objects is merely a concept and does not have any measurable and practical effects as it is not part of the *instrumentarium* of international law at disposal of international lawyers or interested parties.

The situation is not much better on national level for the Rights of Nature. States that have given legal personality to natural objects in one way or another are very few, with notable examples being Ecuador, Bolivia, New Zealand, India and Australia and some local communities in the United States of America.

Ecuador has explicitly recognised the legal personhood of nature and its rights in its 2008 constitution (articles 71-74); Bolivia has passed a 'Law of Mother Earth' two years later, granting broad legal rights to nature; New Zealand passed the 'Te Urewera Act' in 2014, which recognises the intrinsic worth of Te Urewera land (including rivers, mountains, lakes, etc), and court decisions recognised the Ganges and

Yamuna rivers in India as 'living entities', although this ruling was later reversed by the Supreme Court.[250]

In the United States, local communities are recognising Rights of Nature in order to assure better protection for their land, and specifically the water resources on which they depend and that are under the serious threat presented by fracking practices.[251]

In that context, both environmental law and a human right to a healthy environment have the edge on Rights of Nature, as environmental law is institutionalised and has the leading role on both international and national levels, whereas a human rights-based approach is widely recognised on national level, despite lacking full international recognition. Of course, such a comparison does not represent the idea of the complementarity of all three instruments and their use together to achieve better environmental protection.

From another perspective, Rights of Nature, much as human rights, tend to emancipate an entity or a group from the authority and control of the State. This seems as a benefit, as it increases the democratisation of the system and transfers power to otherwise marginalised and vulnerable communities. In this case the communities include non-humans, as well as humans. This is the case because, as pointed out in the previous subsection, humans are considered part of nature and therefore are one of the actors in these communities, that Latour refers to as the 'collective'. Instead of controlling the environment from a standpoint in which its well-being is only important for the well-being of humans, Rights of Nature changes the perspective and thus the standpoint becomes the well-being of the whole community or the specific natural object.

This is related to another aspect of Rights of Nature that might be the cause of some controversies. Rights of Nature claim to give 'voice to the voiceless' by attributing legal personality to non-human objects. This idea can be seen both as a dramatic cost and an essential need for our survival as species and our well-being.

Lawyers with a more traditional approach for the Western World may argue that the mere idea of giving personality to non-human objects constitutes a misunderstanding of the law's purpose and design. It does

[250] Boyd, *The Rights of Nature : A Legal Revolution That Could Save the World* (n 241); Erin L O'Donnell and Julia Talbot-Jones, 'Creating Legal Rights for Rivers: Lessons from Australia, New Zealand, and India' (2018) 23 Ecology and Society art 7.
[251] For more information Boyd, *The Rights of Nature : A Legal Revolution That Could Save the World* (n 239) pp 102-31.

seem preposterous, from this perspective, that lakes or hills could sue, 'seeking a redress of ills' or that 'our brooks will babble in the courts, seeking damages for torts' as put in John Naff's poem published in the American Bar Association Journal in 1973. It was written in the context of Supreme Court Justice Douglas' support for granting legal personhood to nature in the *Sierra Club v. Morton* case.

In addition, critics may argue that Rights of Nature does not truly offer a break from anthropocentrism as nature's interest will continue to be represented by humans, who will also continue to be the decision-makers. To the very least, anthropomorphism, or the attribution of human characteristics to non-human entities persists to be a risk, as the human mind and its understanding of the world always puts a limit to humans' interpretation of a 'fact' or an occurrence. It is therefore subjective, and even science cannot claim absolute objectivity, as observation and experimentation are performed by humans.

Somewhere in the middle of the discussion will also be other scholars that argue that legal personhood depends on consciousness and thus only sentient beings, such as animals like humans, monkeys, dogs, and others, can legitimately claim legal personhood, whereas forests, mountains and lakes cannot.[252]

Opinions vary and they range from absolute disagreement and rejection to passionate advocacy for attributing rights to nature. As every legal tool, this one too has costs and benefits, yet due to the speculative character of most arguments, in the face of the absence of empirical data or long, lasting exemplary cases, a healthy approach to this discussion may be to begin with stating that many of the arguments may not prove to be valid in practice. This has been the case with some critiques against a human rights-based approach to protecting the environment, as shown by Boyd in one of his books on the matter.[253] With others, as discussed in Chapter 2 of this paper, critiques have proven to be valid, or are yet to present themselves as invalid.

My opinion differs from the abovementioned critiques. First, I disagree with the statement that the law's purpose is to focus strictly on human interactions. In the globalised world in which we live, and taking into account all the scientific data showing all natural objects (including humans) affect each other in an interrelated system, it seems rather irresponsible to disregard the interests and inherent value of non-human beings for the benefit of one specific species. It is hard for me to comprehend the rationality behind a human-centred approach to organising life on our planet, as on a fundamental level, a more

[252] See eg Visa AJ Kurki, 'A Theory of Legal Personhood' (Book Manuscript, Oxford University Press, Forthcoming (2019)).
[253] See Boyd, *The Environmental Rights Revolution A Global Study of Constitutions, Human Rights, and the Environment* (n 45).

holistic approach may end up being in mutual benefit to all actors and, furthermore, ensure the existence of our species. Of course, my opinion does not claim absoluteness and is susceptible to being objectively false (if such a thing exists at all), as all other opinions.

Second, Rights of Nature do seem to offer a break from anthropocentrism insofar as there will be a legal instrument that breaks the current model of making decisions that certainly prioritise the interests of the human species. Instead of making an argument for the protection of the quality of life, the health and the well-being of a village, in example, an argument protecting the lake (used as a water reservoir) next to that village may be proposed through the Rights of Nature. This argument will necessarily protect an interest that has been marginalised so far, as it cannot be translated into human rights or environmental law terms. However, there is a certain risk of anthropomorphism to the extent the Rights of Nature is used to push forward a strictly human interest. The problem, in my view, does not necessarily come from the fact that humans will have to represent nature. We have already constructed non-human entities, such as corporations, enterprises, public institutions, and others, who have been attributed a legal personality without being sentient and without existing prior their creation by humans. Furthermore, even people are represented by lawyers, who speak in their name, represent and protect their interests, as Christopher Stone has pointed out in order to answer similar criticism.[254]

The risk of anthropomorphism is interlinked with the political aspect of the use of the law. Rights of Nature, as any other legal instrument, is vulnerable and susceptible to politicisation. Representatives of a certain natural object, be it members of indigenous communities, public officials, lawyers, and even scientists, can use this tool in order to project their own human interest on the natural object, cloaking it as the interest of the lake, forest, etc. I fear we do not yet possess a mechanism that can avoid such politicisation. Advocates of the Rights of Nature must be conscious of this issue and think of ways to negate it, as it is also one of the problems they are criticising the other legal instruments of having. Perhaps a sort of a system of checks and balances within the body or bodies representing a specific natural object may be beneficial.

Third, limiting legal personhood to sentient beings seems arbitrary. Sentiocentrism, similarly to anthropocentrism, recognises the intrinsic values of only one part of living things – in this case, all conscious beings – and puts them at the centre of moral concern.[255] From this perspective, other objects

[254] Christopher D Stone, *Should Trees Have Standing? : Law, Morality, and the Environment* (Oxford University Press 2010).
[255] Marc Bekoff and Carron A Meaney, *Encyclopedia of Animal Rights and Animal Welfare* (Routledge 2013).

only have instrumental value, whereas sentients possess intrinsic value – much like anthropocentrism does when it looks at humans (intrinsic value) and non-humans.[256] Sentientism, holds that those 'who can feel and perceive – are morally important in their own rights', whereas trees, ecosystems and invertebrate nature only exists to 'provide a habitat for sentient creatures.'[257]

Such a view seemingly uses the ability to experience pain and the state of having consciousness as a yardstick to determining who or what has intrinsic value or not. Yet, this is not truly the case, as the yardstick is our human understanding of what pain and consciousness is. We are applying our own biased vision of what we consider to be making us special, searching it in other beings, as this is what we can connect and empathise with, and then we use these characteristics as a condition for having an intrinsic value. It is the perfect example of anthropomorphism in a much more explicit way than with the Rights of Nature.

Science, and the theory of evolution, has determined that trees, planktons, seals, starfish, tigers, monkeys and humans, as well as all other living things have evolved from the same ancestor - this first cell floating in the ocean - and even today, after billions of years of evolution, we share common genetic information with all these non-human objects being part of nature.[258] In the context of interrelatedness and interconnection between all natural objects described so far, it makes little or no sense to attribute intrinsic value, legal personality and rights uniquely to sentients and not to all natural objects. The law's purpose, in my view, must be to regulate these interactions in a way that ensures the continuous and constructive existence of Earth as an ecosystem, with peace and balance being the ideal organisation to aim for. Peace and balance between all living beings, rather than humans alone. Otherwise, if law is only focused on humans, it may be heading towards its own demise, as without humans there will be no need for law's existence.

The discussion about the legal personhood of non-human objects is the most critical one, when it comes to the Rights of Nature doctrine, yet it is also the key benefit that this tool offers. The possibility to change the narrative, to protect interests other than humans' within the legal system is key and will benefit the practical purpose of both a human right to a healthy environment as well as environmental law. These

[256] ibid.
[257] ibid.
[258] For more information, see Madeline C Weiss and others, 'The Last Universal Common Ancestor between Ancient Earth Chemistry and the Onset of Genetics' (2018) 14 PLOS Genetics.

three instruments can provide for more equilibrium within the legal realm of conflict resolution and behaviour regulation.

Rights of Nature again share a similarity with Human Rights – they can be used as a 'trump card', so that the interest of the natural object will dominate over an opposite interest, such as the interest to development that humans have. The same critique as the one made in Section A of Chapter II of this paper applies here. Any absolutist claim may have negative consequence to important goals, such as fighting poverty and assuring a life of dignity to all, including animals that may suffer serious hardships from climate change, for instance. Politicisation may play a huge role in that aspect too and caution will prove very useful when designing exactly how Rights of Nature will be constructed.

Conversely, an instrument such as the Rights of Nature may have a positive effect in the occasions in which there is conflict of interests, as more interests will be represented, which may consequently prove to be favourable to the inclusiveness of democracy. Conflict of rights may also occur within the Rights of Nature, as it has been the case with Human Rights. This seems like a very certain development, as humans are part of the 'communities'/'collective' and may have contrasting interests to those of a valley. Thus, scholars, advocates and lawyers must be aware of the issues that Human Rights have raised and that have been discussed in Section C of Chapter II. This may prove to be a great opportunity to those constructing this legal tool, so that its maximum potential is achieved.

In that context, the examples of Ecuador and Bolivia serve to raise another current cost this approach has – implementation.[259] Although it is foreseeable for a new instrument to face issues of implementation, underestimating this aspect of Rights of Nature may result in reaching a similar fate that of economic, social and cultural human rights discussed in Section B of Chapter II. It will be a major cost to this legal instrument if it does not produce any practical benefits for communities. Issues concerning, *inter alia*, the definition of nature, the content of natural rights and the system of representation of natural objects (which will theoretically all be considered subjects of the law) need to be carefully analysed, discussed and answered, for the whole elaboration of such an instrument will be rendered irrelevant if this is not the case.

This chapter sought to present two alternative legal instruments aiming to protect the environment, other than a human rights-based approach. First, the traditionally used tool – Environmental Law - was analysed, specifically in the international context, as a more detailed focus on the national would have

[259] See Boyd, *The Rights of Nature : A Legal Revolution That Could Save the World* (n 241).

been beyond the scope of this thesis. Concretely, International Environmental Law's purpose and history were briefly discussed, in order to lay down the foundation on the discussion of the main benefits and costs I believe this instrument offers. Second, Rights of Nature were also discussed as a newly emerging tool that has the potential to revolutionise the current legal system, specifically by moving it away from anthropocentrism. The premises and purpose of Rights of Nature were laid down so that its main benefits and costs can too be discussed in the context of a human right to a healthy environment and international environmental law. As it was observed, both tools offer some specific benefits and costs that are different from each other and from a human rights-based approach. Fortunately, these tools can be used together, in a complementary manner, so that their common purpose of protecting the environment can gain more support and be more efficiently achieved.

IV. Conclusion

We, humans, have seemingly dominated Earth since our expansion and appropriation of its land. This has been translated into great technological advances and the ever-growing increase of our population, at the cost of many other genera's existence and well-being. Recently, our own well-being and existence has come under threat of our own behaviour, mentality and focus on exponential growth. In turn, we have begun to understand that Earth is the home of many living organisms, all coexisting within a system functioning beyond our current understanding and perception capabilities. A system characterised by interrelatedness, interdependence and interconnection between all living organisms, humans included.

We have begun to realise that our behaviour is affecting this system in a derogatory way, yet we have failed to apply our full organisational (including legal) tools in order to attain sustainability and to restrict our footprint. Restricting our footprint will necessitate a change in the way we perceive our position in this whole system and consequently a change in our behaviour. However, to change one's behaviour, one must either change one's mentality or impose a specific, different behaviour while having the necessary power and organisation to enforce such an imposition. The complexity of such processes on a global level can be overwhelming.

One of the organisational tools that may prove to be important is the law. Through different legal mechanisms, the law can create rules of behaviour and a system that balances different interests so that our footprint becomes limited and restricted. Human rights, as one of law's languages, represents one of law's approaches to protecting the environment.

Through human rights, the interests of different individuals or social groups can be represented and protected against the arbitrariness of a State, meanwhile scrutinising the latter and producing better environmental protection as such is considered essential for humans' well-being, health and quality of life. Human rights, however, have flaws, such as their susceptibility to politicisation, their inability to represent all societal or individual interests, and most importantly, their anthropocentrism. In addition, a right to a healthy environment suffers from the general weaknesses of economic, social and cultural rights. Pointing out these flaws does not mean to propose that a right to a healthy environment is inadequate to protecting the environment. On the contrary, (and especially taking into account the way the current legal system is constructed) this tool brings about many benefits that could be used to ensure

better environmental protection, while also working forward to finding solutions to the flaws that can further enhance the tool's usefulness.

Anthropocentricity is a major issue as it is the premise that has made us reach this state of environmental crisis. A mentality centred on the interest, importance and uniqueness of humans, naturally tends to prioritise humans' desires, ambitions and interests, such as the desires to expand, progress, and grow. However, anthropocentrism can also prove to be the key. Once we understand the seriousness of the issue, caused by our behaviour, we might understand that it is indeed in our best interest that our behaviour is restrained so that our existence and well-being can be ensured. Such a line of reasoning might give some hope to an optimist, yet a more realistic perspective may question the probability that the entire human population will understand the issue and then choose to modify its behaviour.

International environmental law, despite all the positive effects it might bring through its vision for sustainability, is also suffering from anthropocentricity. Further, it focuses on restricting the damage instead of finding a long-term solution that will benefit the well-being of humans as well as non-humans. Meanwhile, it rests the traditional and better established legal tool to deal with environmental protection.

Perhaps, it is time that we break away from this anthropocentric way of viewing nature and our place in (or apart of) it. Concepts like the actor-network theory and Rights of Nature tend to show a picture bigger than the one consisting entirely of humans, or at least a picture in which humans are not in the centre, but are merely an actor sitting on the round table, amidst other equally important actors. These concepts explain that humans, although characterised by their own specialness, influence, but are also influenced by, a myriad of other organisms or things. These organisms have their own uniqueness and specialness that is neglected once we apply the same yardstick to determining their intrinsic value as the one we apply to ourselves. Experiencing pain and/or having consciousness the way we or other animals do may not be a suitable manner to determine the intrinsic value of a forest and whether it is justified to give it a legal personality and include it into the legal system as an actor.

One might argue that if someone's actions and behaviour are not perceived as harmful and the counter-party feels no suffering, then the law should not limit the behaviour of the first actor. Yet, this line of reasoning is influenced by humans' own perception and understanding of pain and suffering, and links regulation with pain. A behaviour can be restricted when it also causes objective harm, in the form of degradation of the environment, whether the latter is perceived as an independent entity or the instrument of our own well-being.

The three legal tools I presented all offer a different set of benefits and costs and will be best used together, in a complementary way, especially while working in the current traditionally constructed legal framework. For better effectivity, a human right to a healthy environment necessitates international recognition, which will conform to international law and can bring many additional benefits. In addition, strengthening of economic, social and cultural rights within International Human Rights Law will also bring about many benefits for achieving their aims, one of which could be (and indirectly is) protecting the environment.

In any case, law's capabilities to find a solution to the environmental crisis is limited by the political will of those in power to adopt new legislation, to agree on a common international approach and to implement all of these in practice in a rigid and proactive way. No legal mechanism can change the direction towards which we are heading if it is not implemented and if practical actions are not undertaken by States.

Even more importantly, every individual or organisation of individuals, whether with a lucrative, political or other aim, needs to change their mentality and behaviour. We are all responsible for the state of our planet, affecting it through what we eat, buy, produce and through how we live. The way we treat other living organisms, whether sentient or not, reflects the way we perceive our relationship with our environment – whether we live in peace with it or we perceive ourselves as superior to it.

Once change is realised, perhaps we will construct a world in which interactions within the human group as well as between different members of the collective will be more balanced, safe and truly healthy. Perhaps an equilibrium between all actors will be closer once our mentality, the law and even the way we understand democracy is revolutionised so that our perspective becomes more holistic. If such a vision is attainable and does not constitute an impossible utopia, then it can be realised slowly, with a lot of patience and energy for making minor changes along the way.

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