

GIUSEPPE PALMISANO*

THE RIGHT TO A HEALTHY OR DECENT
ENVIRONMENT AS A SOCIAL RIGHT:
ACQUIS AND FUTURE PROSPECTS
OF THE EUROPEAN SOCIAL CHARTER SYSTEM

ABSTRACT. As emerges from recent trends in international and European human rights law, environmental protection and protection of human rights are complementary and mutually linked. A significant example of the interaction between human rights and protection of environment comes from the European system for the protection of social rights, namely the European Social Charter (ESC) and the practice of the European Committee of Social Rights (ECSR). The present article dwells precisely on the emergence in such system of the right to a healthy environment as an integral part of the right to protection of health, under Article 11 of the ESC, as interpreted and applied by the ECSR. The article then continues to explore further potential and prospects for the protection of environment through the system of the ESC, particularly in the framework of the Charter monitoring procedures (reporting procedure and collective complaints). Lastly, the article proposes some tentative reflections on the possible adoption of a new protocol to the ESC to explicitly incorporate environmental issues into human rights protection. According to the author's view, this would indeed be a positive response to the challenge that environmental issues pose to human rights, and would constitute a step forward to strengthen the legal protection of both environment and social rights.

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* Full Professor in International Law, Department of Law, Roma Tre University.

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1. The interaction between social rights and legal protection of environment

Although at the international legal level the areas of environmental protection, on the one hand, and protection of human rights (and particularly social rights), on the other hand, originated and developed separately, their interdependence and interaction has become more and more evident through the decades.

A pivotal role in such relationship is clearly the link between human dignity and the existence of a decent environment. As the first Principle of the 1972 Stockholm Declaration puts it, “[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations”.¹ Similarly, in its 1997 *Gabčíkovo-Nagymaros* judgment, the International Court of Justice (ICJ) recognised that «the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.”²

Based on these considerations, it is relatively simple to understand that – from a social rights perspective, that is from a “human rights in everyday life” perspective – environmental protection and protection of social rights are indeed complementary, and closely – mutually – linked.

Complementarity and mutual relationship emerge clearly when considering, first, that the deterioration of the environment has an undeniable impact on the

¹ See Principle 1 of the Declaration of the United Nations Conference on the Human Environment (or Stockholm Declaration), 16 June 1972.

² ICJ, *Case concerning the Gabčíkovo-Nagymaros Project*, Judgment of 25 September 1997, § 53 and § 112 where the ICJ refers to its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, pp. 241-242, § 29.

enjoyment of many social rights, such as – for example – the right to health and the right to safe and healthy working conditions, or the right to adequate housing, the right to work, and the right to protection against poverty and social exclusion. Neglecting environmental issues therefore means that States do not comply with their obligation to fulfil such rights; and not taking measures to avoid or reduce deterioration of the environment may even amount, in itself, to infringing in some cases specific social rights. Second, and in a reciprocal way, adequately respecting many social rights obligations may indeed contribute to improving environmental protection by States.

2. Article 11 of the European Social Charter (ESC), and the right to a healthy environment as a part of the right to protection of health, according to the jurisprudence of the European Committee of Social Rights

In spite of the importance of environmental protection for the object and purpose of a human rights treaty covering the area of social and economic rights, the European Social Charter, unfortunately, does not contain – not even in its “revised” version of 1996 – any provisions expressly referring to environmental issues or any specific provision on the right to a healthy or decent environment.³

³ The European Social Charter (ESC) is a legally binding treaty for the protection of social rights, which is embedded in the institutional framework of the Council of Europe. It has been signed in Turin in 1961, but it has progressively changed by virtue of a process of institutional reform started in the late Eighties and continued during the Nineties of the last century. This process took the form of three Protocols, adopted in 1988, 1991 and 1995, and the Revised Social Charter, in 1996. In 1988 the first additional Protocol added new rights. In 1991, the Amending Protocol was adopted, improving the supervisory mechanism; and in 1995 another additional Protocol, providing for a system of collective complaints, was adopted. The culmination of this reform process came in 1996 with the adoption of the Revised Charter, which added a number of new rights, while at the same time incorporating the basic content of the 1961 Charter and its Protocols. To date, 43 out of the 47 member States of the Council of Europe have ratified either the 1961 Charter or the Revised Charter.

On the European Social Charter, see *inter alia*: Jean-François Akandji-Kombé and Stéphane Leclerc (eds.), *La Charte Sociale Européenne* (Bruylant 2001); David John Harris and John Darcy, *The European Social Charter* (2nd edition, Hotei Publishing 2001); Andrzej Marian Świątkowski, *The Charter of Social Rights of the Council of Europe* (Kluwer Law International 2007); Olivier De Schutter (ed.), *The European Social Charter: a Social Constitution for Europe* (Bruylant 2010); Matti Mikkola, *Social Human Rights of Europe* (Karelactio 2010), Oliver Dörr, ‘European Social Charter’, in Stefanie Schmahl and Marten Breuer (eds), *The Council of Europe: Its Laws and Policies* (OUP 2017), pp. 507-541. The official documentation of the ESC, as well as the documents of the ECSR (Conclusions, Decisions of Collective Complaints and more) are available on the Council of Europe’s website for the Social Charter: available at <<https://www.coe.int/en/web/european-social-charter>>.

However, the European Committee of Social Rights (ECSR) in its activity of monitoring and interpreting the European Social Charter has been nonetheless able to make an important contribution to clarifying and putting into practice the complementarity and mutual relationship between environmental protection and social rights, to the benefit of both social rights and environmental protection.

This has been possible, in particular, with regard to the application and interpretation of the right to protection of health, which is enshrined in Article 11 of the European Social Charter.⁴

In fact, under Article 11 of the Charter, States are obliged to take appropriate measures to remove as far as possible the causes of ill health, and to prevent epidemic, endemic and other diseases.⁵ This means that health systems must respond appropriately to avoidable health risks, i.e. risks that can be controlled by human action.⁶

Since the beginning of this Century, the ECSR has repeatedly pointed out that avoidable risks include those which result from environmental threats, and that the right to protection of health does therefore include the right to a healthy environment.⁷ Following such an approach, the Committee has clarified that measures should be designed to remove the causes of ill health resulting from environmental threats such as pollution.⁸

For example, the ECSR found a violation of State's obligations with respect to the right to protection of health under the Charter in a situation where the State had

⁴ See ECSR, Conclusions XXI-2 (2017) and Conclusions 2017 on Article 11.

⁵ According to Article 11 of the Charter: "With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures designed inter alia: 1. to remove as far as possible the causes of ill-health; 2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health; 3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents." On the right to protection of health under Article 11 of the ESC, see G. Palmisano, "Il diritto alla protezione della salute nella Carta sociale europea," in L. Pineschi (ed.), *La tutela della salute nel diritto internazionale ed europeo tra interessi globali e interessi particolari integrati* (XXI Convegno SIDI - 2016), Napoli, Editoriale Scientifica, 2017, pp. 189-204.

⁶ Conclusions XV-2 (2001), Denmark.

⁷ Marangopoulos Foundation for Human Rights (MFHR) v. Greece, Complaint No. 30/2005, decision on the merits of 6 December 2006, §§ 194-196.

⁸ Conclusions XV-2 (2001), Poland, Article 11§1; and Marangopoulos Foundation for Human Rights (MFHR) v. Greece, Complaint No. 30/2005, decision on the merits of 6 December 2006, § 202.

not managed “to strike a reasonable balance between the interests of persons living in the lignite mining areas and the general interest,”⁹ or when the authorities had failed to take appropriate measures to remove, as much as possible, the causes of ill-health and to prevent, as far as possible, diseases in view of pollution of a river due to discharge of industrial waste.¹⁰ Other cases concerned the failure of the authorities to take appropriate measures to address the environmental hazards and unhealthy living conditions faced by Roma communities,¹¹ or the lack of protective measures to guarantee clean water in Romani neighbourhoods, as well as inadequacy of measures to ensure public health standards in housing in such neighbourhoods.¹²

Further, according to the Committee’s conclusions concerning Article 11, States are under an obligation to protect their population against nuclear hazards and against the consequences of nuclear accidents¹³ as well as against health risks related to asbestos.¹⁴ And a situation where availability of drinking water represents a problem for a significant proportion of the population is considered to be in breach of Article 11 of the Charter.¹⁵

As regards States’ obligations related to tackling pollution or the protection of the environment more generally, which are clearly obligations of progressive realisation, the Committee also clarified that States must strive to attain this objective within a reasonable time, by showing measurable progress and making best possible use of the resources at their disposal.¹⁶ More specifically, according to the ECSR, in order to

⁹ Marangopoulos Foundation for Human Rights (MFHR) v. Greece, Complaint No. 30/2005, decision on the merits of 6 December 2006, § 221.

¹⁰ International Federation of Human Rights Leagues (FIDH) v. Greece, Complaint No. 72/2011, decision on the merits of 23 January 2013, §§ 153-154 and §§ 159-160.

¹¹ European Roma Rights Center (ERRC) v. Bulgaria, Complaint No. 46/2007, decision on the merits of 3 December 2008, §§ 49-51, violation of Article 11.

¹² European Roma and Travellers Forum (ERTF) v. Czech Republic, Complaint No. 104/2014, decision on the merits of 17 May 2016, §§ 124 and 127, violation of Article 11 and 16.

¹³ Conclusions XV-2 (2001), France.

¹⁴ Conclusions XVII-2 (2005), Portugal; Conclusions XVII (2005), Latvia.

¹⁵ Conclusions 2017, Georgia, Article 11 § 3: “The Committee concludes that the situation in Georgia is not in conformity with Article 11 § 3 of the Charter on the ground that the measures taken to ensure access to safe drinking water in rural areas have been insufficient.”

¹⁶ Marangopoulos Foundation for Human Rights (MFHR) v. Greece, Complaint No. 30/2005, decision on the

combat air pollution States are required to implement an appropriate strategy which should include the following measures: develop and regularly update sufficiently comprehensive environmental legislation and regulations;¹⁷ take specific steps to prevent air pollution at local level, such as modifying equipment, introducing threshold values for emissions and measuring air quality,¹⁸ and, on a global scale, help or contribute to efforts towards reducing pollution;¹⁹ ensure that environmental standards and rules are properly applied through appropriate supervisory machinery;²⁰ inform and educate the public, including pupils and students at school, about both general and local environmental problems.²¹

The European Committee of Social Rights has also stressed that when a preliminary scientific evaluation indicates that there are reasonable grounds for concern regarding potentially dangerous effects on human health, the State must take precautionary measures consistent with the high level of protection provided for in Article 11 aimed at preventing those potentially dangerous effects.²² In doing so, the ECSR has applied, in the social rights field, one of the most typical principles of environmental protection, namely the precautionary principle.

3. Protecting the environment using the substantial provisions and monitoring procedures of the ESC system: desirable prospects

In light of the above, it is clear that something positive has indeed been done by the European Committee of Social Rights with a view to reinforcing environmental protection through the protection of social rights, and vice versa. And it is worth noting that recently the Committee has explicitly expressed its awareness of the fact that issues

merits of 6 December 2006, § 204.

¹⁷ Conclusions XV-2 (2001), Addendum, Slovak Republic.

¹⁸ Conclusions 2005, Republic of Moldova, Article 11 § 3.

¹⁹ Conclusions XV-2 (2001), Italy, Article 11 § 3.

²⁰ Marangopoulos Foundation for Human Rights (MFHR) v. Greece, Complaint No. 30/2005, decision on the merits of 6 December 2006, §§ 203, 209, 210 and 215.

²¹ Conclusions 2005, Republic of Moldova, Article 11 § 2.

²² International Federation of Human Rights Leagues (FIDH) v. Greece, Complaint No. 72/2011, decision on the merits of 23 January 2013, §§ 150-152.

such as the creation and protection of a healthy environment are central to the Charter's system of guarantees.²³

But, of course, much could still be done by the ECSR in this direction, especially when considering the increasingly worrying environmental situation.

In fact, as our natural habitat is depleted and climate change advances as a result of poor governance, neglect and inaction, many other human rights protected by the European Social Charter will be – and already are – inevitably affected: the right to work and to earn a decent living (Article 1 of the Charter), the right to safe and healthy working conditions (Article 3), the rights of children and women, the protection of the family and older persons (Articles 7, 8, 16, 17, 23 of the Charter). The right to housing may also be compromised: we are already witnessing the dramatic consequences of natural disasters partly caused by climate change on the right to adequate housing, which is protected by Article 31 of the Charter.

And the same can happen in respect of the right to protection against poverty and social exclusion (Article 30 of the Charter). Climate change and deterioration of the environment can be expected to have alarming effects on the labour markets and on employment levels. Global warming related to migration and “climate refugees” will raise a host of additional social rights issues in pace with accelerated demographic change. Many experts and authorities, including Philip Alston, the former UN Special Rapporteur on extreme poverty and human rights, forecasted that climate change would drive, in the best-case scenario, tens of millions of people into poverty.²⁴

Against this worrying background, further exploring and developing the potential for better protection of environment through the mechanism of the European Social Charter is really necessary and urgent, particularly in the framework of the Charter monitoring procedures.

In this regard, the reporting system under the Charter is very important and must be firstly taken into consideration. This system is currently evolving from a general

²³ ATTAC ry, Globaali sosiaalityö ry and Maan ystävät ry v. Finland, decision on admissibility and on immediate measures, Complaint No. 163/2018, 22 January 2019, para. 12.

²⁴ Report of former UN Special Rapporteur on extreme poverty and human rights, Philip Alston, ‘Climate change and poverty’, 17 July 2019, A/HRC/41/39.

and rather formal reporting by States on each Charter provision (that they have respectively accepted) to a targeted and strategic choice of issues that States are called upon to report on, and that the European Committee of Social Rights will examine. Such a positive swift represents indeed an opportunity to include issues related to the environment and social rights in the procedure.²⁵

This has indeed already started happening with regard to Article 11 of the Charter (the right to protection of health). In fact, within the framework of the Questions to States concerning Article 11, the ECSR proceeds now from the assumption that “insalubrious work or living environments also affect health adversely as does air, water or other forms of environmental pollution, including proximity to active or decommissioned (but not properly isolated or decontaminated) industrial sites with contaminant or toxic emissions, leakages or outflows, including slow releases or transfers to the neighbouring environment.” Based on such assumption, the Committee consequently asks the States parties to “provide information on measures taken to prevent exposure to air, water or other forms of environmental pollution, including proximity to active or decommissioned (but not properly isolated or decontaminated) industrial sites with contaminant or toxic emissions, leakages or outflows, including slow releases or transfers to the neighbouring environment, nuclear sites, mines, as well as measures taken to address health problems of the populations affected;” and to “provide also information about measures taken to inform the public, including pupils and students, about general and local environmental problems.”²⁶

In the nearest future, something similar could – and hopefully will – be done, *mutatis mutandis*, with regard to other environmental issues (like, for example, reduction of CO₂ emissions, green energy production, the production, use and disposal of plastics, deforestation, global warming and climate change) and the impact of mismanagement

²⁵ See, for example, the specific and targeted questions transmitted to the States Parties to the Charter relating to the provisions belonging to the thematic group 2 on health, social security and social protection under the reporting procedure (in view of Conclusions 2021), available at: <<https://rm.coe.int/questions-to-states-parties-of-the-resc-conclusions-2021/16809f05c1>>.

²⁶ See, for example, the targeted questions on Article 11 (the right to protection of health) transmitted to the States Parties to the Charter in view of Conclusions 2021, pp. 4-8, available at: <<https://rm.coe.int/questions-to-states-parties-of-the-resc-conclusions-2021/16809f05c1>>.

of such issues on a number of social rights: not only the right to protection of health, under Article 11, but also – for example, and obviously in different ways – the right to safe and healthy working conditions (Article 3), the right of children and young persons to protection (Article 7, in particular paragraphs 2 and 10, as well as Article 17), the right to housing (Article 31, in particular paragraphs 1 and 2), and the right to protection against poverty and social exclusion (Article 30).

In addition, considering that deterioration of the environment (due also to the mismanagement by States of the abovementioned issues) can undeniably pose significant risks to a number of rights set out under the Charter, the ECSR could strengthen its approach to a targeted and strategic choice of issues that States are called upon to report on, by adopting one or more “statements of interpretation” specifically dedicated to some of the environmental issues mentioned before. The pattern for this could usefully be, *mutatis mutandis*, the “Statement of interpretation on the right to protection of health in times of pandemic” that the Committee timely and appropriately adopted on 21 April 2020.²⁷

4. Collective complaints as a legal instrument to urge States to enact measures of environmental protection

Clarifying and developing the complementarity and mutual relationship between environmental protection and social rights, by way of “statements of interpretation” and targeted questions to States concerning a number of Charter provisions, would also lead to positive developments with regard to the other monitoring arrangement under the Charter system, namely the collective complaints procedure, a mechanism that allows social partners – trade unions and employers organisations – as well as civil society organisations to directly apply to the European Committee of Social Rights for rulings on possible violations of the Charter in the country concerned.²⁸

To date, only two complaints have been lodged with the Committee regarding the right to a healthy environment under Article 11 of the Charter, both concerning

²⁷ See “Statement of interpretation on the right to protection of health in times of pandemic” adopted by the ECSR on 21 of April 2020, available at: <<https://rm.coe.int/statement-of-interpretation-on-the-right-to-protection-of-health-in-ti/16809e3640>>.

²⁸ For more details on the collective complaints procedure, see information available at: <<https://www.coe.int/en/web/european-social-charter/collective-complaints-procedure>>.

Greece: *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, No. 30/2005, and *International Federation for Human Rights (FIDH) v. Greece*, No. 72/2011. The former case challenged the Greek Government's failure to take steps to protect workers and local residents from pollution caused by lignite mines,²⁹ while in the latter the complainants alleged that pollution of the water of the river Asopos was having harmful effects on local residents.³⁰

Should the ECSR develop in the next future the relationship between environmental protection and social rights within the framework of the reporting procedure and statements of interpretation, this would most likely determine a significant increase in collective complaints seeking to articulate and plead issues related to the environment and social human rights. And this, in turn, will cause the ECSR to build up an important body of case law, further clarifying the meaning, implications and actual effects of the complementarity and mutual relationship between social rights and environmental protection, with respect to many different subject matters.

However, it has to be recalled that, as regards the collective complaints procedure, only 15 countries have accepted this mechanism, up to now.³¹ Therefore, enlarging States participation to the Additional Protocol of 1995 providing for a system of collective complaints would be really a step forward in the direction of strengthening not only, in general, the European Social Charter and the protection of social rights throughout Europe, but also – more specifically – environmental protection through the European Social Charter system. In this respect, any initiatives to facilitate the achievement of such goal would be very welcomed, and it is worth mentioning the fact that the 15 countries having accepted the collective complaints procedure have recently encouraged others to enrol themselves in the collective complaints system.³²

²⁹ *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, Complaint No. 30/2005, decision on the merits of 6 December 2006.

³⁰ *International Federation of Human Rights Leagues (FIDH) v. Greece*, Complaint No. 72/2011, decision on the merits of 23 January 2013.

³¹ To date, the 15 States Parties to the Charter which have ratified the Additional Protocol of 1995 providing for a system of collective complaints are: Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Slovenia, Sweden.

³² Call to ratify the Additional Protocol providing for a system of collective complaints made by the 15 States which

5. Incorporating environmental issues into human rights protection by means of an additional Protocol to the ESC

But apart from any possible and desirable developments concerning the existing system of substantial provisions and monitoring procedures provided for by the European Social Charter, another crucial step the Council of Europe and the Member States of the Organisation could take in order to respond to the challenge that environmental issues pose to human rights, is to make soon arrangements for drafting a new protocol to the Charter to explicitly incorporate environmental issues into human rights protection.

Adding to the European Social Charter one or more specific provisions recognising the right to a healthy or decent environment as a social right, and regulating the State obligations to respect, protect and fulfil such right, would have the merit not only of updating and upgrading the range of rights and social areas covered by the Charter, but also of strengthening the legal protection of the environment by solidly linking such protection to the most appropriate European human rights instrument.

As regards the first positive aspect (that is updating the range of rights and social areas covered by the ESC), it is hardly necessary to recall that many other regional human rights instruments, dealing with individual and collective rights and societal issues, have already recognised the human right to a healthy environment. This is particularly the case for Article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (San Salvador Protocol) of 17 November 1988, which recognises that “everyone shall have the right to live in a healthy environment.”³³ Likewise, Article 38 of the Arab Charter on Human Rights, which entered into force on 15 March 2008, recognises the right to a “healthy” environment.³⁴ Elsewhere, Article 24 of the African Charter on

have ratified it during the Expert seminar “Reinforcing social rights protection in Europe: to achieve greater unity and equality,” 19 September 2019 (organised under the aegis of the French Presidency of the Committee of Ministers of the CoE).

³³ See Article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (“Protocol of San Salvador”) entered into force on 16 November 1999.

³⁴ See Article 38 of the Arab Charter of Human Rights, League of Arab States, entered into force on 15 March 2008.

Human and Peoples' Rights of 28 June 1981 states that "all peoples shall have the right to a general satisfactory environment favourable to their development,"³⁵ making this a group right. For its part, Article 28(f) of the ASEAN Human Rights Declaration signed on 18 November 2012 proclaims the right to a "safe, clean and sustainable environment" as part of the right to an adequate standard of living.³⁶

Adding a new "environmental article" to the Social Charter would therefore make the European human rights system more in line with other regional human rights instruments dealing with collective rights and societal issues, as well as more current and thorough, as it would be more suited to the contemporary environmental reality. Furthermore, this would also represent an almost natural development of the ESC system, since it would incorporate at the normative "legislative" level of the system the result of an evolutive jurisprudence that has already been consolidated in the last two decades within the framework and practice of the same system (in particular within the scope of application and interpretation of Article 11 of the Charter).

With respect to the other positive aspect (namely strengthening the legal protection of the environment by linking it to a human rights instrument), the fact of adding to the ESC one or more provisions on the right to a healthy (or decent) environment would clearly give environmental protection what cannot be found in the large majority of sectoral conventions on the protection of the environment and in "purely environmental" treaties. In fact, in such treaties (including those which have been adopted within the institutional framework of the Council of Europe)³⁷ there is usually no recognition of rights conferred on individuals, or groups of individuals, or associations, and there are no effective independent compliance or monitoring mechanisms. As a result, civil society and individuals, both of which play a key role in environmental protection in the international and national arena, very often cannot avail themselves of the provisions included in such treaties, and for this reason their

³⁵ See Article 24 of the African Charter on Human and Peoples' Rights, entered into force on 21 October 1986.

³⁶ See Article 28(f) of the ASEAN Human Rights Declaration, adopted on 18 November 2012.

³⁷ Reference is made, for example, to the Convention on the Conservation of European Wildlife and Natural Habitats, Bern, 1979; the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, Lugano, 1993; or the European Landscape Convention, Florence, 2000.

implementation has proved to be extremely limited, both at the international and domestic legal level.

Conversely, including one or more provisions on the right to a healthy (or decent) environment in a human rights treaty, namely the European Social Charter, would mean providing environmental protection with a binding legal instrument which gives a role to civil society and grants the organised civil society and the world of workers the right to take legal action to make sure that European States comply with their duty to protect the environment more effectively.

6. The ESC, and not the European Convention of Human Rights, as the most appropriate European normative framework to protect the human right to a sustainable environment

Moreover, both from the technical-legal and political perspective, the drafting and adoption of a new Protocol aimed at incorporating into the Charter a right to a healthy (or decent) environment would presumably pose less problems than a “brand new” human rights treaty on the right to environmental protection; in other words a treaty situating itself out of the context of any existing conventional human rights system. From the political standpoint, considering that existing environmental treaties within the framework of the Council of Europe have been ratified by far too few States, it can be assumed that an “environmental Protocol” to the ESC would get more support and ratifications than a “brand new” environmental treaty.

Not least, it is worth highlighting that the Social Charter would be the most suited Council of Europe human rights treaty system where to insert one or more provisions on the right to a healthy (or decent) environment: more suited, in particular, than the European Convention on Human Rights.

This is so for many reasons.

First of all, it is a fact that all the attempts to supplement the European Convention on Human Rights with an additional “environmental protocol” have completely failed,³⁸ and that the European Court of Human Rights has repeatedly

³⁸ As it has been pointed out by Elisabeth Lambert, in her “Introductory Report to the High-Level Conference Environmental Protection and Human Rights,” Strasbourg, 27 February 2020, prepared at the request of the Steering

refused to recognise the right to a healthy environment as an individual right implicitly enshrined in the Convention.³⁹

Second, the Convention – which focuses essentially on civil and political rights – is characterised by an individualistic conception of human rights that does not fit well with collective and so-called solidarity rights, as a large number of rights concerning societal issues and the right to protection of a healthy (or decent) environment undoubtedly are. The European Social Charter (especially in its “revised” version) is, on the contrary, perfectly suited to deal with collective and solidarity rights, as well as with environmental protection (as evidenced, *inter alia*, by the way in which Article 11 of the Charter has been interpreted and applied by the European Committee of Social Rights).⁴⁰

Committee for Human Rights (CDDH), pp. 10-11: “In Recommendation 1431 (1999), for instance, the Assembly asked the Committee of Ministers to: “11.2 instruct the appropriate bodies within the Council of Europe to examine the feasibility of: [...] b. drafting an amendment or an additional protocol to the European Convention on Human Rights concerning the right of individuals to a healthy and viable environment.” In response, the Committee of Ministers stated that “the recognition of the individual and legally enforceable nature of the human right to a healthy and viable environment meets at present certain difficulties, legal and conceptual” (Committee of Ministers, Doc. 8892, Reply to Recommendation 1431 (1999) – Future action to be taken by the Council of Europe in the field of environment protection, 20 November 2000). [...] In its comments on Parliamentary Assembly Recommendation 1614 (2003), the Bureau of the Committee for the Activities of the Council of Europe in the field of Biological and Landscape Diversity (CO-DBP) noted: “the Convention on Human Rights does not make any specific reference to the protection of the environment, an international concern that emerged at a stage ulterior to the coming into force of the Convention. Therefore, the European Court of Human Rights cannot deal effectively with a number of ‘new generation’ human rights, including the right to a sound environment.” The initiative was repeated in 2009 with Recommendation 1885 (2009) entitled “Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment,” with the same reply from the Committee of Ministers (Committee of Ministers, Reply to Recommendation 1883, Doc. 12298, “The challenges posed by climate change,” 19 June 2010).

³⁹ Although the European Court of Human Rights held that severe environmental degradation may give rise to violations of the right to life (Article 2 of the ECHR), the right to respect for private and family life (Article 8 of the ECHR) and the right to protection of property (Article 1 of Protocol 1 to the ECHR), it has noted on various occasions that the Convention does not expressly recognise the right to a healthy environment (*Apanasewicz v. Poland*, No. 6854/07, 3 May 2011, para. 94; *Flamenbaum and Others v. France*, Nos. 3675/04 and 23264/04, 13 December 2012, para. 133; *Lars and Astrid Fågerskiöld v. Sweden*, decision as to admissibility, No. 37664/04, 26 February 2008; *Chiş v. Romania*, decision as to admissibility, No. 55396/07, 9 September 2014, para. 29; *Frankowski and Others v. Poland*, decision as to admissibility, No. 25002/09, 20 September 2011; *Aydin and Others v. Turkey*, decision, No. 40806/07, 15 May 2012, para. 24; *Otgon v. the Republic of Moldova*, judgment, No. 22743/07, 25 October 2016, para. 15; *Fieroiu and Others v. Romania*, decision, No. 65175/10, 23 May 2017, para. 18.63), which has not therefore become an autonomous right in the case-law of the Court.

⁴⁰ See ECSR, Conclusions XXI-2 (2017) and Conclusions 2017 on Article 11.

In this respect it has also to be noted that the large majority of the ESC provisions are drawn up in terms of positive legal obligations of States to take measures or elaborate and implement policies,⁴¹ rather than in terms of subjective rights of individuals, which is particularly suitable for possible human rights provisions concerning environmental protection.

Third, unlike the ECHR system – which is distinguished by a judicial mechanism devised and well-organised to handle individual cases of human rights violation, as well as to restore the rights and situation, and satisfy individual interests of victims of specific violations (most of the time by means of a pecuniary compensation) –, the ESC system provides two mechanisms: the reporting procedure and the collective complaints procedure. Such mechanisms are much better suited to monitoring State compliance with obligations concerning areas relating to collective human interests and shared damage, like social rights and, even more, environmental protection. This is particularly true for the collective complaints mechanism: in fact, the purpose of such procedure is precisely to obtain the legal assessment not of an individual case, but rather of alleged violations characterized by elements of “collective importance” for many subjects. For this reason, it allows NGOs (including “environmental” NGOs) and social partners to bring claims⁴² without requiring neither standing as victims nor previous exhaustion of domestic remedies.

7. Possible structure and contents of new environmental provisions to be incorporated into the ESC system

Incorporating into the ESC system, by means of an additional Protocol, one or more provisions specifically concerning environmental protection obviously requires identifying the object and contents of such provisions, as well as harmonising them with the typical features of the other substantial provisions of the Charter.

With a view to meeting both such requirements, it is necessary to consider not only the right to a healthy environment as it has been spelled out by the ECSR in its

⁴¹ See for example the content of Charter’s provisions such as Articles 3, 11, 16, 17, 30 and 31.

⁴² See information on who is entitled to lodge complaints and requirements to be fulfilled by NGOs and social partners, available at: <<https://www.coe.int/en/web/european-social-charter/collective-complaints-procedure1>>.

interpretation and application of Article 11 of the Charter, but also a number of other elements. Such elements include *inter alia*: the definition and regulation of the right to a healthy (or decent) environment in other human rights treaties (in particular treaties covering the area of social and economic rights); the recognition of such right as a fundamental right in national constitutions; the jurisprudence of international courts, monitoring bodies and constitutional courts concerning such right; the recognition and regulation of the human right to a healthy (or decent) environment in sectoral conventional systems (and other international legal instruments) on the environment; the most authoritative studies of the last twenty years concerning cases involving the intersection between human rights and the environment.

It is hardly possible to make here an in-depth analysis, or even an overview, of all such elements. However, some preliminary ideas may perhaps be tentatively drawn from them.

First, as regards the name of the right and title of the provision(s) to be incorporated into the Charter, even though the ECSR understandably referred to the “right to a healthy environment» in considering this as a part of the right to protection of health under Article 11 of the Charter, it would be probably more appropriate to use a wider and more “ecological” expression, such as – for example – the “right to a decent environment,” or the “right to live in a healthy, sustainable and decent environment.”⁴³ Such expressions would indeed make clear that the purpose of the provision is not only protecting against any environmental damage which is likely to affect human health, but also legally ensuring that protection against any environmental degradation is essential to the preservation of human well-being and dignity, also for future generations.

⁴³ As it has been noted by E. LAMBERT, in the “Introductory Report to the High-Level Conference Environmental Protection and Human Rights,” cit. *supra* footnote 37, p. 16: “The right to a ‘decent’ environment adopted by the Committee of Ministers in 2004 [Committee of Ministers, Doc. 10041, ‘Environment and human rights,’ 24 January 2004] was a formulation already used by the OECD since 1984. A ‘decent’ environment means understanding the link between fundamental rights, our environment and sustainable development, and it also covers protection of the natural environment in line with today’s ecological outlook. In its celebrated advisory opinion of 2017, the Inter-American Court of Human Rights held that this right protected the components of the natural environment, such as forests, rivers and other natural elements [Inter-American Court of Human Rights, Advisory opinion, OC-23/17, 15 November 2017, para. 62].”

Therefore, along the lines of all substantive articles of the ESC, the opening narrative of a new “environmental provision” could be the following: “With a view to ensuring the [effective] exercise of the right to live in a healthy, sustainable and decent environment [or, the right to a decent environment], the Parties undertake: [...]”

Moving to the potential object of the various legal engagements to be undertaken by the States Parties, under a new “environmental article,” some basic elements could be the following:

- Recognising in national domestic legal orders the right to live in a healthy, decent and sustainable environment.
- Taking measures, within the framework of an overall and coordinated approach, aimed at preserving the quality and integrity of the environment, and ensuring that future generations are not exposed to pollution or environmental conditions which may endanger their health or their existence itself.
- Such measures should relate to a number of fields, such as living in a pollution-free environment, access to clean water and adequate sanitation, healthy biodiversity and ecosystems, safe climate, ecological productive activities, energy production; and they should include: monitoring air and water quality and impacts on human health, assessing sources of air and water pollution, establishing environment quality legislation, regulations, standards and policies; developing action plans at the national and local levels; implementing such action plans and enforcing the standards; evaluating progress and, if necessary, strengthening the plans to ensure that the standards are met.
- Ensuring that enterprises and business activities introduce a system of environmental management covering environmental impacts, and ensuring the effective enforcement of the environmental standards against private actors (including redressing violations of the standards by private actors, as well as compensating the victims of environmental damage caused by national and multinational enterprises).
- Ensuring that information concerning environmental issues that is held by public authorities is widely and effectively available.

- Promoting and facilitating environmental education.
- Promoting and developing international cooperation on environmental protection, by the conclusions of appropriate bilateral or multilateral agreements or by other means, as well as through exchanges and dissemination of scientific knowledge and technologies respectful of the environment.

Lastly, as regards the supervision mechanism, with a view to facilitating the achievement of the most effective monitoring of the States' environmental obligations under the Charter, the new Protocol could provide the possibility for States parties to accept the collective complaints procedure, limited to the substantial environmental provisions enshrined in the Protocol itself (and not with respect to all the accepted provisions of the Charter, as established by the 1995 Additional Protocol providing for a system of collective complaints). And, in such a case, it could also “automatically” extend the right to lodge complaints against the State party having accepted the procedure to representative national non-governmental organisations which have particular competence in the matters governed by the “environmental” Protocol (without requiring to this effect an *ad hoc* declaration, as provided for by Article 2 of the 1995 Additional Protocol).

This would indeed open the door of the Social Charter system to the civil society and environmental activists. This would really mean opening the European system for the protection of the right to a decent and sustainable environment to the best guardians – so to say – of such right, that is to those who are, more than States and governments, genuinely and strongly interested in its implementation and enjoyment.

In conclusion, making arrangements for incorporating into the European Social Charter system, by means of an additional Protocol, a right to a healthy or decent environment would be the natural response to the challenge that environmental issues pose to human rights. It would also constitute a step forward in order to strengthen the protection of the environment, on the one hand, and the protection of social rights, on the other hand, which are closely interlinked. As shown above, the European Social Charter would be the best suited human rights treaty of the Council of Europe to do that and the monitoring system of the Charter is perfectly equipped for that purpose.