Oasis or mirage? Assessing the recent ECHR climate decisions through the lens of IACtHR pronouncements

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Abstract: *Oasi o miraggio? Valutare le recenti decisioni della CEDU sul clima attraverso la lente della giurisprudenza della IACtHR* – Reading the European Court of Human Rights decisions related to climate change as compared to Inter-American pronouncements reveals that the former is more formalistic and less prone to protection than the Inter-American counterpart; whereas the latter has recognized an autonomous right to a healthy environment with eco-centric collective dimensions. Altogether, the European decisions do provide some litigation opportunities, but the comparison highlights their limits and those of human rights law when dealing with environmental matters.

Keywords: Right to a healthy environment; Dignified life; Comparative law; Regional human rights courts; Critical analysis of law

1. Introduction

In Plato's Apology, it is told that Socrates mentioned that "the greatest good of man is daily to converse about virtue [...] and that the life which is unexamined is not worth living". These guidelines are quite close to the exhortation in the Oracle of Delphi to 'know thyself'.

In the present text, we intend to apply these maxims to the examination of the recent judgments of the European Court of Human Rights (hereinafter, also the ECHR) in the *Duarte Agostinho and others against Portugal* and *Verein Klimaseniorinnen Schweiz and others v. Switzerland* cases. It is important to assess whether those decisions were groundbreaking, revolutionary, and environmentally responsive.

To carry out a meaningful appraisal, we advance, the best course of action would be to contrast the European Court's position with that of the Inter-American Court of Human Rights (hereinafter, also the IACtHR), which also adopted quite recently an important judgment with environmental components, in the *Case of La Oroya Population v. Peru*; and whose previous advisory opinion OC-23/17 on *The Environment and Human Rights* explored some of the elements examined by the ECHR.

Why do we argue this? Because if one exclusively looks at the ECHR's latest string of decisions pertaining to the environment, then even the slightest progress in terms of the scope of protection vis-à-vis its own previous decisions on that subject matter could appear as milestones worthy of praise. But perhaps when seen through the angle of a comparative

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perspective they might end up paling in comparison, seeming even conservative.

Comparative legal analysis has been found to have as one of its functions and uses that of finding out the gaps and weaknesses of a legal system, which can be better understood and known when compared with others in terms of content, semantic and semiotic emphasis, protected rights, and else.[1] A mere self-referential study that never raises the gaze above the limited universe of a given system may fail to see other possibilities. It is also possible to draw attention to how the binding outcome of each regional judicial institution differs from that of the other in terms of what they currently say and value.

Seeing how each Court's position fares in relation to environmental and humanitarian values can help to spot venues for potential *lex ferenda* reform; *lex lata* identifications of alternative interpretations; and the limits of regional human rights systems when deciding environmental cases.

Perhaps the best way to carry out the comparison between the IACtHR and the ECHR, in a way that permits to meaningfully appraise their recent environmental decisions, is by evaluating how they fare in relation to the goals of human rights-related environmental protection. Law uses and *is* a form of language impacting perceptions,[2] and Courts can frame what is understood as (non-)permissible and possible. Accordingly, a critical look at the expressions and narratives used by each Court can be revealing in terms of performance vis-à-vis environmentally related goals.

We anticipate that, in light of these perspectives, the recent ECHR decisions are not to be seen as groundbreaking[3] and can be seen as even protecting to a certain extent regional and State interests rather than universal humanitarian and environmental considerations. The European decisions certainly do *modestly* promote environmental litigation possibilities, but mostly do so by considering –which is not a mere transposition of—[4] its previous case law on environmental matters when addressing climate change questions. As others have written, while the decision in the case against Switzerland was *moderately* positive, it rehashes old considerations; and the negative outcome in *Agostinho* shows future litigants what and how they can argue to bring claims before the ECHR.[5] The outcomes confirm what some structural and institutional limits of international law to address collective problems as environmental ones are.[6]

While the ECHR acknowledges the gravity of climate change,[7] resort to previous case law is a common ground in both ECHR judgments. Reading the IACtHR one wonders if structural limits found in the European

[1] M. Siems, *Comparative Law*, Cambridge, 2014, 58-60 (Kobo version).
[2] J. Klabbers, *International Law*, Cambridge, 2013, locations 1998, 9587 (Kindle version).
[3] S. Theil, *Substantively orthodox: three takeaways from the ECHR climate change decisions*, in *UK Human Rights Blog*, 2024.
[4] ECHR [GC], *Case of Verein Klimaseniorinnen Schweiz and others versus Switzerland*, Judgment, 9 April 2024, para. 422.
[5] L. Raible, *Priorities for Climate Litigation at the European Court of Human Rights*, in *EJIL: Talk!*, 2024.
[6] M. N. Shaw, *International Law* 7th edn., Cambridge, 2014, 3883-3994 (Kobo version).
[7] ECHR [GC], *Klimaseniorinnen*, cit., para. 410.

decisions are ingrained and unavoidable or rather the result of interpretive choices that willingly or unconsciously favor certain policy agendas.

2. Barriers or tools? Technical legal elements as obstacles or means to (environmental) justice

We will now proceed to contrast the European and Inter-American decisions pertaining to environmental matters in terms of aspects related to competence, jurisdiction, and procedural and technical aspects related to them, which can be interpreted in ways that favor or discourage certain forms of environmental litigation.

2.1 On the interpretive techniques

The decision in the *Agostinho* case is not in tune with the idea that, unlike what is the case with some other regimes of international law, human rights law lends itself quite easily to –and in fact favors and demands— an evolutionary approach in ways that can bring about the most effective protection and acknowledges the latest recognitions in terms of threats against human rights and how the law has been lately understood in terms of meeting those challenges,[8] as the *pro personae* criterion encourages to.[9] The following passage from the aforementioned decision exemplifies this: "This territorial notion of the States Parties' jurisdiction is supported by the *travaux préparatoires* of the Convention".[10] While the Court does recognize the secondary character of historical elements when it comes to legal interpretation,[11] it nonetheless expressly refers to it in order to buttress a construction that the judges are perfectly aware is not in tune with the current understanding on the issue by other international human rights bodies. The following passage of the same decision makes this clear:

> As regards the Inter-American Court's approach in its Advisory Opinion and that of the CRC in Sacchi and Others [...] the Court notes that both are based on a *different notion of jurisdiction*, which, however, has not been recognised in the Court's case-law[12].

In our opinion, things are not exactly the way the ECHR framed them. This is so because we are not truly talking of different standards that are not coincident. Rather, we are speaking of one same concept, i.e., jurisdiction, which the three bodies the ECHR refers to –itself, the IACtHR, and the United Nations Committee on the Rights of the Child— have to interpret and apply. If 'notions' are understood, among others, as 'conceptions, concepts, ideas, thoughts, or constructs', per the Cambridge

[8] A. Remiro *et al.*, *Derecho internacional*, Valencia, 2007, 603-604.
[9] IACtHR, *Case of Habitantes de La Oroya versus Peru*, Judgment, 27 November 2023, paras. 25-26.
[10] ECHR [GC], *Case of Duarte Agostinho and others v. Portugal and 43 others*, App. no. 39371/20, para. 100.
[11] Ibid., where the reference to how the preparatory works "support" conclusions is mentioned.
[12] Ibid., para. 212 (emphasis added).

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dictionary,[13] it is not entirely clear if what differs are merely interpretations or supposedly the concepts handled by the Courts themselves. But in practice *it is the interpretation* which differs. It is thus *not* the legal element that they use, but rather *how* it is understood by each of them that is not coincident. And the ECHR merely resorts to saying, in other words, something along the lines of 'we will keep doing things the way we have even if others have found that the same can be done in more comprehensive or protective ways', sticking to its case law because it has said so. This is not that persuasive, considering how *stare decisis* is not inflexible in international law.[14]

Let us now contrast the previous conservative stance in terms of interpretation with what the same ECHR said in its *Verein Klimaseniorinnen Schweiz* judgment. Therein, the Court opted to openly favor an evolutionary interpretation for reasons that are in tune with the ones we expressed in favor of such an approach. As the Court said in the same judgment:

> [T]he interpretation and application of the rights provided for under the Convention *can and must be influenced both by factual issues and developments affecting the enjoyment of the rights in question* […] the Convention *should be interpreted, as far as possible, in harmony with other rules* of international law […] *a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement*[15].

The Court itself acknowledges that non-evolutionary interpretations can amount to obstacles to human rights protection. What can lie behind the apparent dissonance between its judgments? In the *Agostinho* case, it is revealing how the ECHR argued against an impact-based notion of extraterritorial jurisdiction by deeming that the adoption of such an interpretation "would turn the Convention into a global climate-change treaty".[16] There is thus an underlying political conception of what the treaty the ECHR supervises is supposedly meant to be, as the Court understands it.

Curiously, it may be the case that the ECHR is ultimately favoring a political *possibility* rather than the only way in which it is possible to interpret what it means that the Convention and the Court have a regional nature. Technical criteria such as the *ratione materiae* and *ratione personae* competence could suggest that what is regional is the scope of the *parties* that are *bound by* a given instrument. If they harm those beyond a region, their accountability should not be seen as 'exceptional' and beyond a given 'legal space', which can be even seen as a construction 'barring' justice and human rights protection –what the ECHR itself said shouldn't be pursued!—, and even promoting impunity since agents of States of that region would know that they enjoy almost unfettered liberty when acting overseas beyond some narrow criteria even if they violate rights.

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[13] Source <dictionary.cambridge.org/dictionary/english/notion> (last visit: 13/05/2024).
[14] J. H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law*, Cambridge, 2006, 173-175.
[15] ECHR [GC], *Klimaseniorinnen*, cit., para. 455 (emphasis added).
[16] ECHR [GC], *Duarte*, cit., para. 208.

And this is further at odds with the problems the ECHR is dealing with, namely those of environmental harm, considering how global warming and contamination know nothing of the conventional and social constructs that we call national borders, as the IACtHR itself has acknowledged.[17] Thus, the restrictive position of the ECHR may end up favoring political and economic interests rather than an enhanced protection of human rights, as other bodies have demonstrated can be the case. This is reminiscent of some criticisms levied against certain possible *understandings* of the protection of future generations –which both the ECHR and the IACtHR refer to in their recent decisions—,[18] which hold that when States and others insist on the duties of current generations without highlighting and recognizing the differentiated responsibilities that those industrialized States who have contributed the most to environmental degradation have both legally *and* morally, they can end up doubling down on the unequal and unfair burdens that developing peoples will have in terms of their suffering of the effects of contamination.[19]

While the Court contradicts itself in terms how to interpret instruments and roles in the two judgments –either disfavoring or favoring an evolutionary interpretation, that is—, it does so in ways that ultimately allow its previous understandings to stand almost unchallenged. Thus, the outcomes are similar in that sense.

2.2 Extraterritoriality and competence

Let us see what the IACtHR has said on the subject of extraterritorial jurisdiction, which was exactly the grounds on the basis of which the ECHR decided to declare the complaint against the 23 Council of Europe member States different from Portugal –where the applicants resided—[20] as inadmissible.[21] While the Inter-American Court will adopt an advisory opinion on the effects of the climate emergency on human rights,[22] it already opined on the subject of extraterritorial jurisdiction and obligations in relation to environmental matters in its advisory opinion OC-23/17.

In it, in relation to environmentally-related human rights impacts, and considering that jurisdiction "is more extensive than the territory of a State", the IACtHR argued that there is a causal link between actions effectively controlled within their territory and the production of transboundary harm generating jurisdiction, and said that States are obliged to "take all necessary measures to avoid activities implemented in their

[17] IACtHR, *The Environment and Human Rights*, Advisory Opinion OC-23/17, 15 November 2017, para. 96.
[18] ECHR [GC], *Klimaseniorinnen*, cit., paras. 419-420, 490, 521, 549; IACtHR, *Case of Habitantes de La Oroya*, cit., paras. 128-129, 141, 177, 243.
[19] S. Humphreys, *Against Future Generations*, in *European Journal of International Law*, Vol. 33, 2023, 1068, 1073.
[20] ECHR [GC], *Duarte*, cit., para. 178.
[21] Ibid., para. 214.
[22] Solicitud de Opinión Consultiva sobre Emergencia Climática y Derechos Humanos a la Corte Interamericana de Derechos Humanos de la República de Colombia y la República de Chile, 9 de January 2023.

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territory or under their control affecting the rights of persons within or outside their territory".[23]

This position reflects an impact-based approach to extraterritorial jurisdiction that attributes responsibility for breach of a duty to respect whenever a State causes a violation of human rights. This notion is broader than that handled by the ECHR.[24]

Thus, this is not truly a matter about the "world or regional" nature of the Court or a Convention. That regional character should be understood as referring to *who is* subject to its competence or (can be) bound by it, respectively. Policy reasons, perhaps unconsciously held, perhaps not, makes the ECHR rather see erect jurisdiction as one of those formalistic obstacles it claimed to oppose. Ultimately, it is saying that it seems strange to permit States victimizing individuals in an extraterritorial fashion to be subject to applications.

Given the dynamics of environmental degradation, such a parochial understanding is practically chauvinist and not catching up to the recognition of the dynamics of global warming and contamination. The narrow extraterritorial jurisdictional understanding would often entail the impossibility of victims bringing claims –considering their places of residence and the economic and other hurdles of bringing claims abroad—, favoring impunity.

2.3 A note on domestic remedies and the duty to regulate

The previous considerations bring us to the notion of domestic remedies, the basis on which the case was dismissed regarding the sole remaining defendant, namely Portugal. Here, again, the ECHR and IACtHR stand in stark contrast. This is shown by the outcome of the decisions pertaining to whether the cases were inadmissible as a result of a possible non-exhaustion of those remedies. In the case of the ECHR, the case was dismissed on those grounds against Portugal.[25] It is telling that each of the Courts we are contrasting revealed that they *see and think of* the exhaustion of domestic remedies as fulfilling a very different role. The different narratives and expressions reveal how their mentality in terms of the function of the standards they implement and of themselves are so different.

While the European Court of Human Rights emphasizes the fact that the exhaustion of domestic remedies is a non-expirable burden of applicants meant to benefit the State; the IACtHR sees that defense as a *privilege* of States that can only be invoked within a strict time period, after which it can no longer be raised.

How can one reconcile this with the IACtHR's recognition of the complementarity of its jurisdiction and the chance that States have to be the first ones to solve an alleged violation? We argue that one can do so by recognizing that the Inter-American Court acknowledges that a case that has been fully resolved with protection and remedies having taken place fully

[23] IACtHR, *The Environment and Human Rights*, cit., para. 104.
[24] N. Carrillo Santarelli *et al.*, *El deber extraterritorial de respeto en el sistema interamericano de derechos humanos: Una constante protección de dignidad*, in *Revista Internacional de Derechos Humanos*, Vol. 14, 2024.
[25] ECHR [GC], *Duarte*, cit., para. 227.

and effectively ought not to be examined by a regional body given the cessation of the controversy –to the extent that there are no pending issues.[26] Thus, a State would not be able to invoke the non-exhaustion if it has not constantly been raising it since the moment in which the case was brought before the Inter-American Commission on Human Rights; but nevertheless by resolving the pending issues it will have *done* what is expected and required of it and the contentious proceedings will then have lost their purpose.

Altogether, both Courts show to favor different interests in relation to the non-exhaustion of domestic remedies. Let us look at what each of them said. In *Agostinho*, the ECHR said that "States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right".[27] The ECHR went on to add that applicants have an "obligation" to use domestic remedies "connected with the complaint of a violation", provided that they are "available and sufficient", and therefore accessible and effective or, in other terms, not futile or illusory.[28] One must note how the use of domestic remedies is thus a burden and a solely a duty *of the applicants* per the ECHR case law.

There are noteworthy elements in the European Court's application of the previous considerations to the case it examined, the disappointing outcome from an activist perspective notwithstanding. They include the recognition that remedies might include the application of enforceable environmental constitutional provisions, when available; *actio popularis* actions, which can dispense with the need to demonstrate a "direct interest"; and claims brought against "public and private entities" to demand that they "comply with the duties and obligations to which they are bound in climate matters".[29] This last element recalls that failure to enforce and envisage such duties can engage State responsibility, because as the Court mentioned in the *Klimaseniorinnen* case, States have an obligation to set up and effectively apply a normative framework protecting human beings in terms of environmental matters, which amongst others governs issues of "licensing, setting-up, operation, security, and supervision" of pertinent activities,[30] which can be private and public. While the ECHR deemed that States have a margin of appreciation when deciding which means they will employ to achieve environmental objectives, that margin is *much* narrower when deciding which these goals worthy of protection by them and under their systems are.[31]

In the Oroya case judgment, the IACtHR considered that business and human rights developments require States to protect from harmful environmental impact attributable to corporations, either public or private,[32] which among others obliges them to design and implement a normative framework imposing obligations and responsibilities on corporations and other actors, with public corporations' conduct –unlike what is said in

[26] IACtHR, *Caso Duque versus Colombia*, Judgment, 26 February 2016, para. 127.
[27] ECHR [GC], *Duarte*, cit., para. 70.
[28] Ibid.
[29] Ibid., paras. 219, 220.
[30] European Court of Human Rights [GC], *Klimaseniorinnen* cit., para. 538.
[31] Ibid., paras. 538, 543.
[32] IACtHR, *La Oroya*, cit., paras. 107-114, 125-126, 156.

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ARSIWA—[33] being directly attributable to States,[34] and that of private companies engaging their responsibility if they fail to supervise, regulate, or respond to their negative environmental and other human rights impacts with the required diligence. All of this, in turn, is consistent with the identification of how private entities are large emitters of noxious substances and how, accordingly, environmental regulation must tackle their conduct to have any prospective of effectiveness[35] –expectations of effective protection are required for a remedy to be considered as adequate and necessary to exhaust, which is not the case when such prospects are "obviously futile", per the ECHR's own admission.[36]

Concerning the exhaustion of domestic remedies the IACtHR said that the defense raising its non-exhaustion is a benefit of States, which they can invoke *provided* that they identify adequate and effective resources and indicate to the Commission since the admissibility stage of an application before that non-judicial Inter-American supervisory body that they have not been resorted to by the applicants.[37] For the IACtHR, the fact that remedies resorted to by the applicants at the domestic level identified violations but did not lead to a change in the situation or to their implementation, which could have remedied matters, demonstrated that they had not been *effective in practice*.[38] This confirms the Inter-American consideration that procedural and other technical legal aspects should not be interpreted in a formalistic matter that leads to their becoming barriers to actual justice.[39]

The fact that the invocation of the non-exhaustion of domestic remedies is not primarily a duty of applicants but rather a temporary State privilege makes its dynamics before the IACtHR quite different from those before the ECHR.

2.4 The role of local organizations and defenders

Apart from divides, there are coincidences between the Courts, with some nuances unique to each system. A noteworthy coincidence is related to the representation of victims by groups. The ECHR addressed this under the heading dedicated to the "Standing of associations" in its *Klimaseniorinnen* judgment. It recognized that "collective action through associations or other interest groups may be one of the only means through which the voice of those at a distinct representational disadvantage can be heard and through which they can seek to influence [...] decision-making processes",[40] for instance by means of challenging measures affecting the environment.[41]

[33] International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, para. 6 of the commentary to article 8.
[34] IACtHR, *La Oroya*, cit., para. 155.
[35] J. Klabbers, op. cit., 8003-8014, 8309 (Kindle locations).
[36] ECHR, *Duarte* cit., paras. 215, 225.
[37] IACtHR, *Case of Habitantes de La Oroya*, cit., paras. 32, 33, 35.
[38] Ibid., para. 38.
[39] IACtHR, *Case of Castillo-Petruzzi et al. versus Peru*, Judgment, 4 September 1998, para. 77.
[40] ECHR [GC], *Klimaseniorinnen*, cit., para. 489.
[41] Ibid., para. 492.

The ECHR thus favors a robust representative protection, recognizing the standing of entities which in some cases may be the only ones capable or willing to present actions. The Court also insists on how before the Council of Europe's human rights system it is mostly individuals who have rights; and that they are the ones that must be impacted for a claim to be brought, given the absence of "an abstract complaint about a general deterioration of the living conditions of people" due to the absence of an *actio popularis*.[42] Thus, standing is different from having a right.[43] For the Court:

> [I]t is necessary to make […] the distinction between the victim status of individuals and the legal standing of representatives […] an association cannot rely on health considerations or nuisances and problems associated with climate change which can only be encountered by natural persons[44].

The Inter-American Court of Human Rights, in turn, examined a dispute concerning the representation of victims by two associations in the Oroya case, namely AIDA and APRODEH. The Court succinctly mentioned that there was no evidence or indication of a withdrawal of the consent to be represented by them by applicants, reason why it dismissed claims on their lack of standing or legitimacy.[45] Interestingly, though, the Inter-American Court examined another aspect concerning representation and advocacy, which is how human and environmental rights defenders perform an important social role that merits protection from State and non-state threats and acts of harassment and attacks, even when they originate amidst climates of social tension, such as when some perceive that economic activities are threatened by denunciations of environmental harm.

After highlighting the necessity of protecting defenders, given the individual and collective interests at stake,[46] and adequately drawing attention to the worrisome trends of persecution against them in the Americas,[47] the Court indicated that States must ensure that social networks and media do not contain or promote violent incitements or harassing messages[48] and investigate threats in stigmatizing atmospheres to comply with their due diligence duty to protect defenders.[49]

2.5 Evidentiary matters

Regarding evidentiary matters, it is important to observe that the IACtHR has drawn attention to how it may be difficult to fully demonstrate in scientific terms that certain afflictions, for instance, health-related ones, have been directly caused by contamination attributable to or permitted by a State which failed to adequately supervise, regulate, or respond.[50] Moreover, the

[42] Ibid., para. 500.
[43] Ibid., para. 498.
[44] Ibid., para. 496.
[45] IACtHR, *La Oroya*, cit., para. 59.
[46] Ibid., para. 303.
[47] Ibid., para. 306.
[48] Ibid., para. 315.
[49] Ibid., paras. 318, 319.
[50] Ibid., paras. 204-207.

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Oroya judgment indicated that regressive environmental and protective regulations must be stringently justified in ways that look at the full protection of rights and are sufficiently and exceptionally motivated.[51]

The Court wisely notes that even though scientific evidence may be difficult to obtain, the fact that an individual with health problems has been exposed to a hazardous situation and suffers from consequences that have been found to be included amongst those caused by it may be sufficient to identify the right to health as having been threatened by that context.[52] For the IACtHR, the presence of dangerous toxic metals in the air, water, and soil of the Oroya[53] was a relevant factor to consider concerning persons with serious health issues.[54] The fact that there are limitations in terms of medical demonstration of causation in an individual should not bar justice[55] when it has been established that those individuals were at significant risk due to their exposition to the substances and the State breached its environmental human rights duties for a prolonged period, increasing the risk.[56]

The IACtHR deemed that the burden of proof is to be seen dynamically, with the State having the burden of demonstrating that it did meet its obligations or there was no significant risk;[57] and that a significant risk is in itself contrary to the right to health, there being a presumption of its existence when there are elevated contamination levels.[58]

Conversely, despite noting that heatwaves have been recurrent in later years, and that elderly persons such as the applicants[59] can disproportionately suffer from it in terms of related mortality and morbidity[60] and acknowledging that heatwaves affected their quality of life,[61] the ECHR mentioned that since future risks are "only exceptionally admitted by the Court"[62] –a strange thing to say considering that their lives have allegedly been already affected—,findings of environmental degradation are not sufficient to find a violation having taken place, even when an applicant had asthma and could further suffer during the heatwaves, because a doctor had not been seen and correlation "between the applicant's medical condition and her complaints" could thus not be established by the ECHR, *that* is.[63]

Contrasting this with the IACtHR's opinion, in which exposure to environmental degradation shown to cause disruptions to a dignified life and the enjoyment of rights as those that were being suffered can be deemed as sufficient in order to find responsibility and activate a dynamic burden of proof, one can very well consider that the outcome could have been quite

[51] Ibid., paras. 185-187.
[52] Ibid., para. 204.
[53] Ibid., para. 193.
[54] Ibid., para.197.
[55] Ibid., para. 203.
[56] Ibid., para. 204.
[57] ECHR [GC], *La Oroya*, cit., para. 204.
[58] Ibid., para. 207.
[59] ECHR [GC], *Klimaseniorinnen*, cit., para. 531.
[60] Ibid., para. 529.
[61] Ibid., para. 533.
[62] Ibid.
[63] Ibid., para. 534.

different if it had been examined before it. This "luck" of which Court one can apply to is a factor that merits consideration.

3. Substantive aspects of the environmental decisions

There are two salient substantive aspects in the examined decisions, namely if protecting individuals from environmental degradation derives from an entitlement to dignified conditions of life; and what the content of environmental protection in human rights law is.

3.1 The protection of dignified life conditions

Both Courts analyzed how, in order to assess if environmental degradation and exposure to contamination have had an impact –and to what an extent— on the full enjoyment and exercise of rights, they can examine what factors and circumstances would be inimical to their rights. But only one based its decisions on the idea of a *dignified life*.

Both Courts examined the circumstances under which exposure to human-caused environmental problems can be deemed to threaten and violate human rights. But in the case of La Oroya versus Peru, the Inter-American Court explicitly mentioned that States have an *obligation* to ensure that there are no obstacles to having access to conditions that guarantee a dignified life,[64] among which it non-exhaustibly lists the following: access to and quality of water, health and food; and *protection of the environment*.[65] According to the Court, when a State takes action disrupting those factors or fails to diligently strive to protect from disruptions, it is responsible in connection with violations against the rights to life and to have one's integrity respected.[66]

In the *Klimaseniorinnen Schweiz and others* judgment, the ECHR does cite opinions and decisions of other bodies on the affectation of a dignified life by environmental harm.[67] However, when it examined the right to life, it focused on the presence of "serious, genuine, and sufficiently ascertainable threat[s]" to survival, which looks at their physical and temporal proximities.[68] Regarding protection from interference to private or family life or home, the Court mentioned that nuisances must be "serious enough" to affect the enjoyment of the respective right,[69] and that disruptions can consist in different forms of environmental "pollution" beyond a certain level, such as "noise, emissions, [or] smells" that prevent "from enjoying the amenities of" home.[70] But rather than resorting to an examination of the foundation of human rights law that human dignity provides, the European Court satisfied itself with comparing the conditions in which someone lives with those present "in life in every modern city", there being "no arguable claim […] if the detriment […] is negligible in comparison to the

[64] Ibid., para. 136.
[65] Ibid., paras. 136, 221.
[66] Ibid., paras. 138, 223.
[67] ECHR [GC], *Klimaseniorinnen* cit., paras. 169, 172-176, 190-191, 255, 377.
[68] Ibid., para. 512.
[69] Ibid., para. 514.
[70] Ibid., para. 516.

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environmental hazards inherent in life" in such cities;[71] unless exposure to a threat is serious enough to be considered as a sufficiently grave.[72]

The ECHR's position, by not looking at the foundations of the regime they are entrusted, studies external elements that may make it lose sight of the full picture, not seeing the forest for the trees. Existence in a dystopian future in which everyone suffers by living in a bleak world could then end up being considered as not detrimental enough when compared to the lives of others doomed to live in it as well. But a look from the perspective of human dignity could easily find that human life is objectively, inherently, and seriously affected in such a context, and that the fact that other fellow human beings –judges included!— live in them by no means erases the affectation of the conditions in which our lives are dignified. The fact that many live badly does not mean that they cease to suffer, even unconsciously in terms of quality of life. This discussion confirms how the theoretical foundations that Courts rely on can have a tremendous impact on their reasoning and decisions.[73]

3.2 The right to a healthy environment: far away, so close?

When it came to cross-examining the more relevant substantive position of the two courts in relation to a right to a healthy environment –emerging in the UN system—[74], the Courts diverged somewhat. The IACtHR has recognized a clean, healthy and functional environment as integral to the enjoyment of the rights to life, human dignity, health, food and others since its Advisory Opinion 23/17[75]. In it, it recognized that the right to a healthy environment has both a collective and an individual dimension[76] and is an autonomous right which, unlike other rights, "protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of certainty or evidence of risk to individuals"[77]. As such, it is directly justiciable and enforceable independently of other rights in the Convention.

The European Court, in turn, asserted that "[i]n environmental cases, the Court has not considered it sufficient for an applicant to complain of

[71] Ibid., para. 517.
[72] Ibid., para. 518.
[73] N. Carrillo Santarelli, *Gender Identity, and Equality and Non-discrimination of Same Sex Couples*, in *American Journal of International Law*, Vol. 112, 2018.
[74] UN Human Rights Council (2021) Resolution 48/13: The human right to a clean, healthy and sustainable environment, UN Doc. A/HRC/RES/48/13, operative paras 1, 2; UN Human Rights Council (2021) Mandate of the Special Rapporteur on the promotion and protection of human rights in the context of climate change, UN Doc. A/HRC/48/L.27; UN Human Rights Council (2021) Resolution 48/14: Mandate of the Special Rapporteur on the promotion and protection of human rights in the context of climate change, UN Doc. A/HRC/RES/48/14.
[75] IACtHR, Advisory Opinion 23/17, Environment and Human Rights, Ser. A No. 23 (IACtHR, November 15, 2017), para. 124. So did the Inter-American Commission on Human Rights in its report on "Business and Human Rights: Inter-American Standards" (IACHR Website, November2019), www.oas.org/en/iachr/reports/pdfs/Business_Human_Rights_Inte_American_Standards.pdf para. 46.
[76] IACtHR, Advisory Opinion 23/17, cit. para. 59.
[77] Ibidem, paras. 62,64 and 182. See also paras. 56-58.

general damage to the environment [...] to claim victim status, the applicant needs to show that he or she is impacted by the environmental damage or risk",[78] which requires looking at the "level and severity of the risk of adverse consequences of climate change affecting the individual(s)",[79] for instance because they are "subject to a high intensity of exposure to the adverse effects" or there is a pressing need given the absence of adequate reasonable measures "to reduce harm.[80]

This permits to look at environmental harm probability and proximity considerations in relation to applicants.[81] As the ECHR itself argued, this is different from claims based on mere suspicions or conjectures.[82] Nevertheless, the logic remains grounded in a human-based identification of victimhood, which recognizes duties towards future generations.[83]

3.2.1 The individual dimension of the right to a healthy environment

If we look at the contentious cases before the Inter-American Court in which the right to a healthy environment has been recognized, when the individual dimension of the right is taken into account (as manifested in its interrelation with other rights), it is not evident that, procedurally, the content of the corresponding State obligations has an independent justiciable legal content as to what can be demanded from the State. It remains to be seen whether a case brought with no human victims would be successful. Substantively speaking, though, that Court does consider that there are duties towards non-human organisms.

The duty of states to "take all appropriate measures" to "progressively achieve the full effectiveness" of the right to a healthy environment[84] was framed in terms of due diligence, which encompasses different main duties: to prevent[85]; to act in accordance with the precautionary principle by taking measures 'in cases where there is no scientific certainty about the effects that an activity may have'[86]; to cooperate in good faith[87]; and duties to respect, protect and fulfil the rights to access to information, public participation, and access to justice in relation to environmental matters[88]. However, when the IACtHR recognized a violation of such a right in relation to indigenous groups in the Lhaka Honat case, by failing to exercise due diligence to prevent third parties from interfering with the indigenous communities' right to a healthy environment, this right was bundled with the rights to food, water and cultural identity[89]. Thus, the application of specific State

[78] ECHR [GC], *Klimaseniorinnen*, cit., para. 472.
[79] Ibid., para. 486
[80] Ibid., para.487.
[81] Ibid., para.488.
[82] Ibid., para.470.
[83] Ibid., paras. 419-420, 521, 549.
[84] IACtHR, Advisory Opinion 23/17, cit. para. 123.
[85] Ibidem, para. 145, para. 174 and 92.
[86] Ibidem, para. 175
[87] Ibidem, para. 185.
[88] Ibidem, para. 212.
[89] IACtHR, Case of Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina, Series C No 400 (6 February 2020), paras. 255–289.

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obligations relating to the effective realization of the right to a healthy environment was not procedurally separable from those arising from the other interrelated but separate rights.

In *La Oroya v. Peru*, which extended the recognition of a violation of the right to a healthy environment beyond the indigenous context, the IACtHR held that states' obligations to ensure access to conditions that guarantee a dignified life encompass access to and quality of water, health and food, and the protection of the environment, which is itself considered to be one of these conditions. Recognizing the environment as an entity with rights could help address the climate crisis by giving the environment, as a victim, some form of legal standing, rather than waiting for damage to occur in the distant future. This is confirmed by considering water as a component of the right to the environment and as a right in its own right, noting that in the former case its scope was defined according to an eco-centric approach. Such an eco-centric approach is not maintained by the ECtHR in so far as the environment is considered in relation to the whole community[90] or a particular natural object. Rather it is simply considered in relation to the well-being of human beings: nevertheless, some elements of contiguity between the Courts in relation to the right to a healthy environment could be detected.

From the perspective of the correspondents' duties, there was much coincidence. In the case of the IACtHR, in La Oroya, regulatory due diligence standards were established in relation to air quality[91] and water and sanitation[92], emphasizing the fulfilment of the preventive dimension of environmental damage "under a standard of due diligence that must be appropriate and proportional to the degree of risk of environmental damage"[93]. This opens up interesting prospects for action against the climate emergency, given that mining and other industrial processes involving the burning of coal, oil or gas produce greenhouse gases that contribute to climate change[94].

The ECtHR, starting from the different premise that no article of the Convention is specifically designed to provide for general protection of the environment as such,[95] nor does an autonomous right to a 'clean and peaceful environment' exist in the ECHR so far,[96] has held that it is not sufficient for an applicant to complain of general environmental damage[97] but that a direct and serious impact and affectedness of the applicants by environmental damage or risk[98] (the assessment of which depends on all the

[90] Inter-American Commission of Human Rights, 'Report on the Situation of Human Rights in Ecuador', OEA/Ser L/V/II.96 Doc 10Rev 1 (24 April 1997) ch VIII
[91] IACtHR, *La Oroya*, cit.
[92] Ibidem, para. 121.
[93] Ibidem, para 126.
[94] Ibidem, para. 143.
[95] ECHR [GC], *Klimaseniorinnen*, cit., para 445 and before European Court of Human Rights, *Kyrtatos v. Greece*, App. no. 41666/98, para. 52, ECHR 2003 VI (extracts), and *Cordella and Others* v. Italy, Apps. nos 54414/13 54264/15, para, 100, 24 January 2019.
[96] ECHR, *Jugheli and Others v. Georgia*, App. no. 38342/05, para 62, 13 July 2017
[97] See ECHR, *Di Sarno and Others*, App. no. 30765/08, para. 80, 10 January 2012, and *Klimaseniorinnen*, cit., para. 446.
[98] ECHR [GC], *Klimaseniorinnen*, cit., para. 446 referring to "the existence of a harmful effect on a person and not simply the general deterioration of the environment" .

circumstances of the case) is required. It made clear that it was not for it to determine whether the recent international trend towards recognition of the human right to a clean, healthy and sustainable[99] environment gave rise to a specific legal obligation.[100] Rather, it specified that its previous references to "the right of the persons concerned ... to live in a safe and healthy environment"[101] should be understood as referring to the weight of environmental concerns in the assessment of legitimate aims and the balancing of rights and interests.[102]

Nevertheless, the ECtHR's recognition of a potential risk to the environment with an impact on the applicant's "quality of life"[103] as sufficient to constitute a violation of Article 8 ECHR is not exceedingly far removed from the individual dimension of the right to a healthy environment, as recognized in the Inter-American human rights system, and the growing international consensus on the critical impact of climate change on the enjoyment of human rights.[104]

Beyond the dissenting and separate opinions, the ECHR has cautiously molded an emerging right to a healthy environment into the scope of application of rights[105]. A "right of individuals to effective protection by the public authorities against serious adverse effects of climate change on their life, health, well-being and quality of life"[106] was definitely included within the scope of Article 8 of the Convention. Given a high intensity of exposure to the adverse effects of climate change and an urgent need to ensure the individual protection of the applicant due to the absence or inadequacy of reasonable measures to mitigate the harm,[107] positive obligations have

[99] See, in particular, UN General Assembly Resolution 76/300, and Committee of Ministers Recommendation CM/Rec(2022)20.
[100] ECHR [GC], *Klimaseniorinnen*, cit., para 448 in light of paragraph 372 concerning the arguments raised by the intervening Norwegian Government.
[101] ECHR, *Tatar v. Romania*, App. No. 67021/01, Judgment of 27 January 2009 para. 112, and *Di Sarno and Others*, cit. para. 110
[102] see paras 445,447 and 451.
[103] ECHR, *Dzemyuk v. Ukraine*, App no. 42488/02, paras. 82-84, 4 September 2014.
[104] Ibid., para. 436
[105] ECHR, *Hatton and Others v. United Kingdom*, App. No. 36022/97, Judgment of 8 July 2003, para 5; *Taskin and Others v. Turkey*, App. No. 46117/99, Judgment 10 November 2004. 256 Ibid., paras 26, 90, 117, 121, 129, 132, 133 and differently from the traditional anthropocentric perspective, illustrated by *López-Ostra v. Spain*, App. no. 16798/90, 9 December 1994; *Guerra and others v. Italy*, app. no. 14967/89 19 February 1998; *Fadeyeva v. Russia*, App. no. 55723/00, 16 October 2003; *Giacomelli v. Italy*, App. no. 59909/00, 2 November 2006; and *Dubetska and others v. Ukraine*, App. no. 30499/03, 10 February 2011 - where the environment was apprehended in terms of its relation to humans and their rights—namely, the applicants' Article 8 ECHR right to privacy—as their health was affected in their homes or on their property, in *Tatar v. Romania*, cit., the first recognition of a separation between health and the environment (protect people's health and the environment [para 73]) and the identification of a risk of damage to the environment (a risk of serious and irreversible damage to the environment [para. 109]) indicating the Court's willingness to recognize the environment as a new victim deserving of protection in its own right (paras. 106, 109, 112, 122).
[106] Ibid., paras. 519 and 544.
[107] Ibid., paras 427 to 430. See V. Stoyanova, KlimaSeniorinnen and the Question(s) of Causation available at

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consequently been derived from Article 8 in the context of climate change. These have been recognized in terms of reducing the risk of harm to individuals that will be aggravated by a failure of States to fulfil their obligations, and in terms of varying individual exposure to such risks in terms of type, severity and imminence, depending on a range of circumstances.[108]

Drawing on the UNFCCC and the Paris Agreement, it was due diligence standards that were set, again with a preventive aim. In this case, the aim was to prevent an increase in the concentration of greenhouse gases in the Earth's atmosphere and a rise in the average global temperature above levels that would cause serious and irreversible adverse effects on human rights under Article 8.[109] The development of a "human rights-based duty of appropriate and consistent conduct"[110] under the doctrine of harmonious and evolutive interpretation[111] consists of each State Party taking measures to substantially and progressively reduce its respective greenhouse gas emissions with the aim of achieving "net neutrality in principle within the next three decades".[112] This means that states must act "in a timely, appropriate and consistent manner",[113] which would require the Parties to establish a residual CO2 budget or otherwise make their CO2 reduction targets quantifiable, as NDCs alone would not suffice.[114]

Such a regulatory due diligence requirement is consistent with the Tătar minimum requirements to "take regulatory measures, as appropriate, which shall be tailored to the specific characteristics of the activity in question, with particular regard to the level of potential risk to human life involved" and to ensure that these "regulatory measures [...] govern the licensing, establishment, operation, safety and monitoring of the activity and [...] require all parties to take practical measures to ensure the effective protection of citizens whose lives may be endangered by the inherent risks". But it also aligns with the Paris Agreement's standard of care to be applied by states in preparing and interpreting their NDCs: each State Party will increase ('progress') its level of ambition of climate action each time it prepares and communicates a subsequent NDC, reflecting its 'highest

blogs.law.columbia.edu/climatechange/2024/05/07/klimaseniorinnen-and-the-questions-of-causation/ .

[108] Ibid., para. 439.

[109] Ibid., paras 544-550.

[110] J. Jahn, The Paris Effect in the debate The Transformation of European Climate Litigation at https://verfassungsblog.de/the-paris-effect/ (25 April 2024) and already C. Voigt, The power of the Paris Agreement in international climate litigation, 32(2) 2023 RECIEL, 237-249.

[111] ECHR, *Tyrer v. the United Kingdom*, App. no. 5856/72, 25 April 1978, para. 31 and see. E. Bjorge, The Convention as a Living Instrument: Rooted in the Past, Looking to the Future, in Human Rights Law Journal, 36, 7-12, 2017, 243 ss.

[112] ECHR [GC], *Klimaseniorinnen*, cit., para. 548.

[113] Ibid. and paras. 551-552.

[114] Ibid., paras. 571-572. Rather, the Paris Agreement targets which "must inform the formulation of domestic policies" are *not* enforced by the Court, nor the Court specifies the required "minimum fair share" of greenhouse gas emission reductions, nor steered clear of determining timetables, long-term objectives, interim targets and pathways, or specific years for reductions (para. 547).

ambition'[115]. The 'appropriateness' of state action according to the ECtHR is in the same direction of 'highest possible ambition', as confirmed by the 'real prospect' causation test:[116] the measure that arguably constitutes the content of the obligation, and that the State should have taken at the relevant time in the past, should have had 'a real prospect of changing the outcome or mitigating the harm'[117].

An analysis of the procedural elements of the individual dimension of the right to a healthy environment also reveals certain similarities between the two Courts. This is evident from the ECtHR's reasoning when it 'abstractly' considered the procedural limb of Article 8 ECHR on the state decision-making process in the context of climate change. The ECtHR held that states must comply with two procedural requirements, namely to provide the public, and in particular those most affected, with adequate information on climate change regulations and measures (or the lack thereof); and to have procedures in place by which their views (in particular the interests of those affected or at risk of being affected by the relevant regulations and measures or the lack thereof) on the regulations and measures can be taken into account in the decision-making process.[118] Disappointingly, however, this remained underdeveloped in the specific case of Switzerland. Thus, while the Court in Klimaseniorinnen considered Article 6 ECHR and access to justice as violated, the profile of access to information necessary to enable effective public participation in the process of devising the necessary policies and regulations and to ensure proper compliance with and enforcement of those policies and regulations, as well as those already undertaken under domestic law, was not considered under the procedural limb of Article 8.[119]

3.2.2 The collective dimension of the right to healthy environment and intergenerational equity

Even if attention is shifted to the collective dimension of the right to a healthy environment, a potentially large gap is mitigated on closer examination. According to the IACtHR, the right to a healthy environment in its collective dimension is owed to both present and future generations.[120]

[115] Article 4(3). 'Highest possible ambition' is not further defined in the Agreement. But the negotiation history of the provision reveals an initial intention to introduce an explicit due diligence obligation in the Agreement by Norway during a UNFCCC meeting in Geneva in February 2015. On the fact that they can imply a due diligence standard, see C. Voigt, 'The Paris Agreement: What Is the Standard of Conduct for Parties?' (2016) 26 Questions of International Law 17. L. Rajamani, 'Due Diligence in International Climate Law' in H. Krieger et al (eds.), Due Diligence in the International Legal Order (Oxford University Press 2020) 169 considers the concept 'a regime-specific marker of due diligence'; see also the first report of the International Law Association (ILA) Study Group on Due Diligence in International Law, 'First Report (7 March 2014).

[116] ECHR [GC], *Klimaseniorinnen*, cit., para 444. See V.Stoyanova op. cit. about any possible modification of the test given the emphasis on risk reduction positive obligations according to Article 8 ECHR and the specific features of climate change.

[117] Ibid.

[118] ECHR [GC], *Klimaseniorinnen*, cit., para. 554.

[119] Ibid., para 68 of *Partly concurring partly dissenting opinion of Judge Eicke*

[120] IACtHR, *La Oroya*, cit., paras. 129, 179 and AO 23/17, para 59.

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Recalling last year's Maastricht principle on the rights of future generations, the Court noted that the rights of future generations impose on States the obligation to respect and ensure the enjoyment of the human rights of girls and boys and to refrain from any conduct that would jeopardize their rights in the future.

However, despite the absence of an autonomous right to a healthy environment as proposed by the Council of Europe, meaning 'the right of present and future generations to live in a non-degraded, viable and decent environment that is conducive to their health, development and well-being',[121] the ECHR did refer in a promising way to the concept of intergenerational burden-sharing in climate change. Such a concept, which is 'of particular importance both in relation to the different generations of the present and in relation to future generations'[122], has essentially been functional in recognizing positive regulatory obligations under Article 8 aimed at 'avoiding a disproportionate burden on future generations'[123]. But it has also been functional, from an environmental rule of law perspective, for both the explicit presentation of the shortcomings and temporal distortions that serve as the basis for judicial intervention,[124] and in particular for the extension of the legal standing of non-profit associations, given the need to ensure that future generations do not suffer from a lack of timely response today.[125]

When compared to the European one, the IACtHR's position is more expansive, not in small part due to the collective dimension. In addition to the anthropocentric dimension, which coincides with that of the ECHR and acknowledges, as they both do, the correlative effects of environmental harm on the (non-full-) enjoyment of rights, the Inter-American body also considers that environmental protection has not only an individual but also a collective one.[126] In addition to protecting future generations,[127] due to this dimension it is possible to recognize the harm caused against nature even when there is no connection with human harm. For the Court, this requires protecting other living organisms, which are worthy of protection in themselves for that Court.[128] Accordingly, it deems that States are obliged to protect a healthy environment even if there is no evidence or certainty of harm affecting humans, regardless of whether "other" human rights are

[121] Proposed text of additional protocol to European Convention on Human Rights concerning the right to a safe, clean, healthy and sustainable environment, Article 1. See Parliamentary Assembly, Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe, Report of Special Rapporteur Simon Moutquin, Doc. 15367, 13 September 2021.
[122] ECHR [GC], *Klimaseniorinnen*, cit., para. 419.
[123] Ibidem, para. 549.
[124] See Opinion 997/220 of the Venice Commission quoted in the 'relevant international materials' section of the decision, para 199; A. Nolan, Protecting the Environment for "the Voiceless": The Role of the Courts in Securing the Rights of Children and Future Generations in Environmental Protection Cases (September 9, 2023). Available at SSRN: ssrn.com/abstract=4566864
[125] ECHR [GC], *Klimaseniorinnen*, cit., paras. 484, 489.
[126] IACtHR, *La Oroya*, cit., paras. 177-179, 263.
[127] Ibid., para. 49.
[128] Ibid.

violated as a result of environmental harm.[129] For the IACtHR, the aforementioned right to a healthy environment has both eco-centric and anthropocentric components, which are related yet independent.[130]

The Inter-American vision is not devoid of theoretical controversy. It ends up deeming the collective eco-centric protection as another *human* right in the end, even absent any actual human connection, probably in order to retain its nominal competence. But while the European Court of Human Rights' approach pays lip service to the environment and opts for formulas and interpretations that are insufficient to tackle environmental degradation and suffer from the limitations and inadequacies of traditional international law in relation to it, the Inter-American expansive approach may be seen as an overstretch of its actual jurisdiction. Even if this were the case, the IACtHR's approach would confirm the insufficiency and inadequacy of current international legal instruments and the need for winds of change.

One Court panders too much to State interests and does less than what alternative interpretations permit, and the other boldly adopts an expansive interpretation that could expose it to questionings. Its influence on other systems in terms of the reception of its case law is thus uncertain. The IACtHR itself accepts that not every environmental instrument or provision is of human rights law –although they can nevertheless contribute to interpreting the latter.[131] Time will tell. Perhaps the dire state of things will sway other supervisory bodies.

3.2.3 The consequences on reparations

The collective dimension of the right to a healthy environment, as it relates to intergenerational equity, has also had a direct impact on the development of collective reparation measures. This is particularly true for guarantees of non-repetition, insofar as they are capable of reducing the risks for future generations. Specifically, the IACtHR ordered Peru to harmonize legislation on air quality standards, keeping levels of polluting metals within the maximum permitted levels to avoid endangering the environment and human health; to organize the La Oroya alert and air quality monitoring; to ensure that La Oroya residents suffering from exposure to pollutants have access to health care in public facilities; to ensure that La Oroya's mining and metallurgical activities comply with international environmental standards; to train government officials on environmental issues; and to establish an information system on air and water quality in Peru's mining and metallurgical zones. In other cases[132] -La Oroya was a missed opportunity in this regard- it has also ordered additional appropriate non-recurrence guarantees, including mechanisms to prevent, monitor and resolve social conflicts that are common in mining and metallurgical areas, and to further review and reform environmental and related legislation to better address the serious damage caused to the environment and communities.

[129] Ibid., para. 118.
[130] Ibid., paras. 124.
[131] IACtHR, *The Environment and Human Rights*, cit., para. 44.
[132] IACtHR, *Saramaka People v. Suriname*, 28 November 2007, OEA/Ser C/172; and *Case of Indigenous Communities of the Lhaka Honhat* , cit.

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Not surprisingly, given its reactive judicial function,[133] the European Court found the individual applications as inadmissible and, as the Klimaseniorinnen association had not claimed damages under Article 41 of the ECHR, "made no award under this head". As such, the ECtHR neither had to address the issue of climate change-related reparations nor to explain what reparations are owed under the umbrella of lack of or inadequate mitigation or adaptation measures. However, not very far from the IACtHR, the ECtHR addressed 'preventive remedies' under Article 46 of the European Convention of Human Rights, which gives the Court power to order measures to assist States in complying with their obligations to obey the ECHR judgments. It did not order any specific measures to be taken under Article 46, but its conclusions on the merits are quite prescriptive as to the measures it considers Switzerland should take under Article 46(1) to comply with Article 8. In particular, Switzerland could remedy its violation by (i) quantifying its national greenhouse gas emission limits through a carbon budget[134] and (ii) taking "measures to substantially and progressively reduce [its] greenhouse gas emission levels with a view to achieving net neutrality in principle within the next three decades".[135]

This is similar in some ways to the reparations in La Oroya, as far as determining the level of contamination of the air, water and soil and drawing up an environmental remediation plan are concerned; on ensuring the effectiveness of the town's warning system and developing a system for monitoring the quality of the air, water and soil; or on ensuring that the operations of the metallurgical complex comply with international environmental standards, preventing and mitigating damage to the environment and human health. The reparations, however, had not been maximized either regarding the right to a healthy environment or the indigenous rights,[136] taking into account the damage already caused to forests and ecosystems, as well as the possibility of restoring degraded areas and the associated costs as an integral part of the due reparations.[137] There is therefore room for improvement in both regional human rights protection systems.

4. Conclusions

The ECHR's recent decisions confirm that it *is* possible, although within certain margins and with non-negligible limitations, to litigate environmentally related matters before the Council of Europe's human rights Court. However, a comparison with the case law of the IACtHR puts their limitations under the spotlight.

True, knowing what a Court is likely to decide can inform strategic litigants by knowing which kinds of cases can be successfully argued. But this is not enough to transform problematic realities. One could expect the Court to be more receptive to cross-fertilization and to considering

[133] ECHR [GC], *Klimaseniorinnen*, cit., para. 481.
[134] Ibid. para. 573.
[135] Ibid., para. 548.
[136] IACtHR, *Yakye Axa c. Paraguay*, 17 June 2005, OEA/Ser C/125, paras. 207 et 215.
[137] IACtHR, *Saramaka* , cit., para 154.

alternative ways of interpreting standards when the way in which it has done so proves to be inadequate in light of the needs of protection of a dignified life and from extraterritorial harm, as the interpretation of provisions similar to those it uses resorted to by other Courts, such as the Inter-American one, shows is possible. But the reasons behind its unwillingness to do so, explicitly based on the invocation of precedents,[138] which are not immutable under international law, could perhaps be better understood by looking at the expressions and "notions" that the European Court stresses and repeats and what the underlying interests they support are: margin of appreciation, burden *of the applicant*, space of protection, and others, as a contrast with what the Inter-American Court of Human Rights stresses –the latter never loses sight of the foundation of human dignity.

Whether the latter Court has embraced a non-human entity as a subject of protection, and thus ended up deviating from its mission and competence in a possible activist fashion, and if this is in line with its formal powers and necessary to deal with apparent systemic limitations; or whether its competence is actually subverted by well-intentioned desires, is also open to discussion. But what is clear is that it is now accepted that climate change and other environmental concerns *can* be debated before regional human rights Courts, which may change their positions in evolutionary ways. And this is a respite and provides the hope of justice when domestic authorities fail to offer it,[139] which is necessary given the climate degradation that we have caused and must tackle.

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[138] ECHR [GC], *Duarte*, cit., paras. 210, 212.
[139] Concurring Opinion of Judge Cançado Trindade to IACtHR, *Case of Castillo-Petruzzi et al. versus Peru*, Judgment, 4 September 1998, para. 35.

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