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# Theorizing a human rights- based approach to biodiversity and its justiciability in domestic and international jurisprudence

## UNA TEORIZACIÓN DE UN ENFOQUE FUNDAMENTADO EN LOS DERECHOS HUMANOS A LA PROTECCIÓN DE LA BIODIVERIDAD Y SU JUSTICIABILIDAD EN LA JURISPRUDENCIA NACIONAL E INTERNACIONAL

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**ABSTRACT**

This paper sets out the results achieved in the framework of a research project dealing with the protection of biodiversity from the perspective of international human rights law. In particular, this study draws inspiration form the environmental case law on the rights of Nature and from a rising climate litigation wave that stands out for several prominent features, namely: the use of human rights and constitutional rights as a standard for assessing States' compliance with their obligations under international human rights law and international environmental law; the narrative of intragenerational and intergenerational equity; a renewed reading of extraterritoriality. In this respect, the most significant domestic and international decisions are analyzed, and some viable ways in which the results achieved by the case law under consideration may benefit the protection of biodiversity and its justiciability are suggested, including multi-level judicial dialogue.

**KEYWORDS**

Biodiversity
Human rights
Intragenerational and intergenerational equity
Extraterritoriality
Climate change
Rights of Nature

**RESUMEN**

El presente artículo expone los resultados conseguidos en el marco de un proyecto de investigación sobre la protección de la biodiversidad desde el punto de vista de los derechos humanos. En particular, el presente estudio se inspira en la jurisprudencia ambiental sobre los derechos de la Naturaleza y en la jurisprudencia climática que se destaca por una serie de rasgos emblemáticos, tales como: el empleo de los derechos humanos y

**PALABRAS CLAVE**

Biodiversidad
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constitucionales para evaluar el cumplimento de las obligaciones estatales que se derivan del derecho internacional de los derechos humanos y del derecho ambiental internacional; el lenguaje de la equidad intrageneracional e intrergeneracional; una novedosa concepción de la extraterritorialidad. A este respecto, el presente estudio analiza las decisiones nacionales e internacionales más significativas, y teoriza que los resultados obtenidos por la jurisprudencia considerada podrían ser beneficiosos para la protección de la biodiversidad y su justiciabilidad, incluso mediante el diálogo judicial multinivel.

## I. Introduction: international law and biodiversity

The international community has not overlooked the importance of tackling biodiversity The Convention on Biological Diversity 1992 and the recently adopted 'Biodiversity Beyond National Jurisdiction' Treaty are clear evidence for that Prominently, in December 2022 the UN Biodiversity Conference (COP 15) adopted the historic Kunming Montreal Global Biodiversity Framework, a landmark agreement which set "measurable goals and targets, with complete monitoring, reporting, and review arrangements to track progress complemented by a robust resource mobilisation package". The restoration of nature for present and future generations and its sustainable use are two key components of the agreement. Nevertheless, tackling the biodiversity loss remains an urgent task for the international community as, for instance, the WWF's Living Planet Report 2022 demonstrates.

Since there is an inherent interconnection between climate change and biodiversity loss, this study theorizes that the results achieved by climate litigation, as the definition of intertemporal and extraterritorial States' obligations under international human rights law and environmental law, as well as under constitutional law, may be helpful for addressing the protection of biodiversity.



In particular, Section II focuses on the innovative results that the rising climate litigation wave has been achieving, and also expands on some significant perspectives developed by environmental case law, such the recognition of the rights of Nature and its legal standing.

Subsequently, in Section III, some viables ways in which the results achieved by the jurisprudence under consideration may be beneficial for the protection of biodiversity and its justiciability are theorized.

Finally, some brief conclusions are formulated.

## II. Climate litigation and its innovative results

An interesting climate litigation trend has been gaining ground at both the domestic and international level. Some prominent features can be identified: first of all, the affirmation of specific States' obligations that rely on a combined reading of international human rights law and constitutional rights, and international environmental law. Human rights and constitutional rights are used as a standard to assess States' compliance with their mitigation obligations under international environmental law, especially under the Paris

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Agreement. *Neubauer*[2], *Urgenda*[3], *Leghari*[4] and *Shrestha*[5] are paradigmatic examples of this approach (also see, significantly, *Torres Strait Islanders*[6]; see: Leijten, 2019; Desierto, 2021; Giménez & Petit de Gabriel, 2022).

In *Neubauer*, the German Constitutional Court 'unanimously declared the Federal Climate Protection Act partly unconstitutional because it does not sufficiently protect people against future infringements and limitations of freedom rights in the wake of gradually intensifying climate change' (Kotzé, 2021, 1424; see Neubauer, especially paras. 183 ff., 195 ff. and 243), especially since it did not provide specific steps for the achievement of Germany's post-2030 goals to reduce GHG and mitigate climate change. The Court found that the indetermination of the measures to be adopted for the post-2030 period amounted to a breach of fundamental rights (Bäumler, 2021, 2).

In mid-2022, the Brazilian Constitutional Court went even further, and said that environmental treaties are human rights treaties[7] (*PBS et al.*[8]; for some comments on the judgment, see: Barroso, 2022; Neumann Ciuffo, 2022).

Reliance on human rights for tackling climate change is not a completely new approach in the landscape of international human rights law (see Voigt, 2022, Mayer, 2021a, 410). In fact, as some commentators have stressed (see Mayer, 2021a, 410), international human rights bodies have elucidated the inherent interconnection between human rights and States' obligation to mitigate climate change. In particular, the CESCR has 'suggested that '[i]n order to act consistently with their human rights



2. *Neubauer, et al. v. Germany*, Bundesverfassungsgericht [BVerfG], 24 March 2021, Case No. BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20.

3. *Staat der Nederlander v. Urgenda*, Hoge Raad 20 December 2019, ECLI:NL:HR:2019:2006. *Urgenda* was the game-changer in the framework of climate litigation, as it was the first case in which a Court ordered a State to reduce its GHG emissions (by at least 25% below 1990 levels before the end of 2020) by relying on a human rights framework and on the European Convention on Human Rights – in particular, Article 2 and Article 8, which imply a positive duty for States to 'to take appropriate steps if there is a real and immediate risk to persons and the state in question is aware of that risk', including mitigation measures, consistently with the precautionary principle (*Urgenda*, para 5.2.2) (Bergkamp, 2020; Leijten, 2019).

4. *Ashgar Leghari v. Federation of Pakistan et al.*, Case No: W.P. No. 25501/2015, a September 2015, paras. 12 ff.

5. *Shrestha v. Office of the Prime Minister et al.*, Supreme Court of Nepal, December 25, 2018, Decision no. 10210, p. 12, para. 5, and p. 13 para. 6.

6. *Billy Daniel et al. v. Australia*, Human Rights Committee, CCPR/C/135/D/3624/2019 (22 September 2022).

7. The *ratio decidendi* of the judgment is emblematic, where the Court said that '[t]he Executive Branch has the constitutional duty to ensure the Climate Fund remain operational, and to annually allocate its resources for the purpose of mitigating climate change. The withholding of such resources is prohibited due to the government's constitutional duty to protect the environment […], to affirm the fundamental right to a healthy environment, and to uphold its international commitments […], as well as the constitutional principle of separation of powers' (Barroso, 2022; Neumann Ciuffo, 2022).

8. *Partido Socialista Brasileiro (PSB), Partido Socialismo e Liberdade (PSOL), Partido dos Trabalhadores (PT) e Rede Sustentabilidade v. União Federal*, ADPF 708, 2020.

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obligations,'[9] States parties should revise the nationally determined contributions (NDCs) to global mitigation action that they have communicated under the Paris Agreement' (Mayer, 2021a, 410) and the CEDAW has clarified that States have an obligation 'to effectively mitigate… climate change in order to reduce the increased disaster risk'[10].

Despite some criticism was expressed (see, for instance, Fanny Thornton and Lavanya Rajamani), also in scholarship the idea that human rights treaties are a source of mitigation obligations has progressively gained ground and, as such prominent commentators as Michael Burger and Jessica Wentz have said, there is a 'growing consensus that a mitigation obligation does exist under international human rights law' (Burger & Wentz, 2015, 205; again, see Mayer, 2021a). This view seems to even strengthen the hermeneutic importance[11] of the incorporation of the reference to human rights in the Preamble of the Paris Agreement that, as Diane Desierto stressed, 'emphasizes further that these duties form part of the objects and purposes of the treaty, and should be used as part of the interpretation of the Paris Agreement' (Desierto, 2021).

Moreover, the climate jurisprudence under consideration is characterized by the narrative of intragenerational and intergenerational equity, of sustainability, of distributive justice[12], in a fashion that recalls the words of the late Judge Cançado Trindade, who authoritatively said that '[h]uman solidarity manifests itself not only in a spatial dimension [...] but also in a temporal dimension – that is, among the generations who succeed each other in the time, taking the past, present, and future altogether'[13].



The *Neubauer* judgment offers, once again, a paradigmatic view in this respect – that might be successfully applied to the conservation of biodiversity – where the German Constitutional Court clarified that 'one generation must not be allowed to consume large portions of the CO2 budget while bearing a relatively minor share of the reduction effort, if this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to serious losses of freedom' (*Neubauer*, para. 192). This statement also echoes the very core of sustainable development as wells as the principle of distributive environmental justice.

Although to a lesser extent, extraterritoriality is another prominent feature of the innovative climate litigation wave under consideration (for a thorough analysis on the extraterritorial application of multilateral environmental treaties, see Vordermayer, 2018;

9. Mayer (2021a, 410) refers to the Committee on Economic, Social and Cultural Rights (CESCR), Statement: Climate Change and the International Covenant on Economic, Social and Cultural Rights, para. 6, UN Doc. E/C.12/2018/1 (October 31, 2018).

10. Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 37 on the Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change, para. 14, UN Doc. CEDAW/C/GC/37 (March 13, 2018).

11. Consistently with Article 31 of the Vienna Convention on the Law of the Treaties.

12. In this respect, for example, also see: *Sacchi et al.*, para. 10.13, and *Billy Daniel et al.*, para. 8.3.

13. *Bamaca-Velasquez v. Guatemala*, Judgment, Inter-Am. Ct. H.R. (ser. A) No. 11.129, ¶ 23 (2002), (Separate Opinion of Trindade, J.).

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also see Mayer, 2021a). In this regard, this shift of paradigm is the result of the efforts of the Inter-American Court of Human Rights that, in its Advisory Opinion OC-23/17 on the Environment and Human Rights, has adopted the jurisdictional extraterritorial link of effective control[14] – which derives from a broad application of the principle of due diligence (see: Berkes, 2018; Besson, 2020; Voigt, 2022; for a wider analysis, see: Laukkanen & Laukkanen, 2022), and goes beyond the spatial and personal model that, for instance, is commonly found in the case law of the European Court of Human Rights (Oloo & Vandenhole, 2021).

The Committee on the Rights of the Child has taken up this conception in *Sacchi et al.*[15], to affirm that 'when transboundary harm occurs, children are under the jurisdiction of the State on whose territory the emissions originated for the purposes of article 5 (1) [jurisdiction] of the Optional Protocol [to the Convention on the Rights of the Child on a communications procedure (OPCP)] if there is a causal link between the acts or omissions of the State in question and the negative impact on the rights of children located outside its territory, when the State of origin exercises effective control over the sources of the emissions in question' (Sacchi et al., para. 10.7).

Significantly, also an interesting view on the interconnection between human beings, on the one hand, and the Nature as a whole and animals[16], on the other hand, can be observed in some cases in this case law, which seems to incorporate the conception of "one rights" (Stuckl, 2023) and the universal scope of the "global solidarity" inherent to the protection of Nature (*Atrato River* case[17] and *Los Cedros* case[18]; see Wesche, 2021; Prieto, 2021. In the context of environmental litigation an early view of this kind had been adopted by *Minors Oposa,* pp. 7-8, where it recalled the "'rhythm and harmony of nature" [where] [n]ature means the created world in its entirety')[19]. This may be a helpful view to protect biodiversity, even in those cases when the domestic legal order does not specifically recognize Nature as a rights bearer, which has personhood and the legal standing. In this respect, the language of conservation, sometimes with explicit reference to biodiversity,



14. More specifically, this conception is based on the State of origins' exercise of 'effective control over the activities carried out that caused the harm and consequent violation of human rights' (Advisory Opinion n. 23, para. 104(h)).

15. *Chiara Sacchi, et al v Argentina, Brazil, France, Germany and Turkey*, Committee on the Rights of the Child, CRC 104/2019-108/2019 (23 September 2020). The excerpts cited in this chapter are taken from *Chiara Sacchi, et al v Argentina*, Committee on the Rights of the Child (CRC/C/88/D/104/2019) (8 October 2021).

16. An in-depth analysis of the concept of the constitutional protection of Nature would go beyond the scope of this study; on this issue, see Wesche, 2021.

17. Corte Constitucional, Sentencia T-622/16, *Acción de Tutela Interpuesta por el Centro de Estudios para la Justicia Social "Tierra Digna" en Representación del Consejo Comunitario Mayor de la Organización Popular Campesina del Alto Atrato (Cocomopoca), el Consejo Comunitario Mayor de la Asociación Campesina Integral del Atrato (Cocomacia), la Asociación de Consejos Comunitarios del Bajo Atrato (Asocoba), el Foro Interétnico Solidaridad Choco´ (FISCH) y otros*, Bogotá, DC, diez (10) de Noviembre de Dosmil Dieciséis (2016).

18. Corte Constitucional del Ecuador, Sentencia No. 1149-19-JP/21, de 10 de Noviembre de 2021, Caso No. 1149-19-JP/20.

19. *Minors Oposa v. DENR*, Supreme Court of the Philippines, 33 I.L.M. 173 (1994).

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was adopted on various occasions, sometimes in relation to the duties of the present generations towards future generations (in scholarship, the views of Brown Weiss, 1992, stand out), in terms of sustainability (*Neubauer*, para. 192, and *Minors Oposa*, pp. 7-8; see Kotzé, 2021; Bäumler, 2021) and intertemporality (e.g. *Atrato River*, *Future Generations*[20], *Sacchi et al.*; see: Wesche, 2021; Sandvig, Dawson, & Tjelmeland, 2023), sometimes with regard to States' mitigation obligations, in light of the threats that climate change poses to biodiversity and the irreversibility of its impact (e.g. *Atrato River*; the *D.G. Khan Cement* case[21] also referred to climate democracy). In this sense, an interesting application of the precautionary principle was made, consistently with a "re-dimensioning of the guiding principles of environmental protection" and, therefore, the application of the criterion of *in dubio pro ambiente* or *in dubio pro nautra* (*Atrato River* case).

Last but not least, this climate case law stands out for its approach to the *locus standi* (see Slobodian, 2020)[22] that, especially with reference to the intertemporality of States' obligations, has interestingly tackled the difficulties related to the non-identity of future generations (as Derek Parfit has defined it; see Parfit, 1984) (see *Future Generations*). In the context of environmental litigation, *Minors Oposa* adopted an interesting concept of 'class', that allowed the Supreme Court of the Philippines to consider '[p]etitioners minors […] [as] represent[atives] [of] their generation as well as generations yet unborn' based on the principle of intergenerational equity (*Minors Oposa*, p. 8; see: *Minors Oposa*, p. 16, Separate Concurring Opinion of Judge Feliciano). This conception could be beneficial from several viewpoints: firstly, because it may help overcome the difficulties related to the non-identity and non-existence of future generations, while also enhancing the legal standing of young generations. Secondly, but not less importantly, the view adopted in *Minors Oposa* may be particular helpful when *actiones populares* are not allowed at the domestic level or when restrictive requirements are provided with respect to environmental class actions.

With respect to the legal standing of future generations, it seems relevant to also recall the public trust doctrine and the planetary trust doctrine, which have provided a particularly effective paradigm for addressing the *locus standi* of future generations.



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20. *Luis Armando Tolosa Villabona*, Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala Civ. 5 de abril de 2018, STC4360-2018, Radicación no. 11001-22-03-000-2018-00319-01 (Colom.).

21. Supreme Court of Pakistan, *D. G. Khan Cement Company Ltd v. Government of Punjab through its Chief Secretary, Lahore, etc.*, C.P.1290-L/2019.

22. Also *Juliana – Juliana v. United States*, 217 F. Supp. 3d 1224, 1260 (D. Or. 2016) – and, again, *Urgenda* deserve special attention, although the Courts' approach in *Juliana* might have desirably been more incisive where it considered 'unnecessary to address standing of future generations plaintiffs because the youth plaintiffs had adequately alleged current harm' (Juliana, para. 252). In *Urgenda*, the Dutch Supreme Court emphasized the issue of intertemporality by stressing that 'it is without a doubt plausible that the current generation of Dutch nationals, in particular but not limited to the younger individuals in this group, will have to deal with the adverse effects of climate change in their lifetime' (*Urgenda*, para. 37), while in *Future Generations*, the Colombian Supreme Court more prominently tackled the collective dimension of the *acción de tutela*, by recognizing that it 'can be filed as long as it […] shows the connection between the violation of collective and fundamental or individual rights' (pp. 12-13).

In this respect, significantly, in *Robinson Township*[23] the Supreme Court of Pennsylvania said that '[t]he Commonwealth's obligations as trustee to conserve and maintain the public natural resources for the benefit of the people, including generations yet to come, create a right in the people to enforce the obligations' (Slobodian, 2020, 580).

A prominent achievement of environmental case law is the recognition of the personhood and of the *locus standi* of Nature, in particular of rivers, and can be found in various recent important judgments, such as *Atrato River* and *Los Cedros*, consistently with a wider trend (see, e.g., the Mar Menor legislation, and how this doctrine is gaining ground in Courts in such countries as New Zealand, Ecuador and India).

From an historic perspective, Justice Douglas' Dissenting Opinion in *Sierra Club v. Morton*[24] (and the judgment in general with respect to the *locus standi* of legal persons in environmental cases) contained an outstanding and innovative statement, which is still suggestive decades later: 'The ordinary corporation is a "person" for purposes of the adjudicatory processes, whether it represents proprietary, spiritual, aesthetic, or charitable causes. So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life'.

## III. How this approach may benefit the protection of biodiversity

This case law may be beneficial from several viewpoints.

First off, because it can help to develop and to ensure the justiciability of a renewed approach to the interconnection between the human world, on the one hand, and nature – including of course, animals – on the other hand.

In this sense, the view that this case law adopts provides a coherent legal framework for the unity conveyed by the idea of "global bioethics" supported by Van Rensselear Potter and Fritz Jahr (see D'Aloia, 2019), and which is enshrined in the idea of "one rights".

This perspective is of crucial importance for the tackling the biodiversity loss and to provide an effective legal framework for the implementation and the justiciability of the Kunming-Montreal Biodiversity Framework, by also translating it into specific States' obligations, legislation and policies[25].



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23. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 974 (Pa. 2013).
24. *Sierra Club v. Morton*, 405 U.S. 727 (1972).
25. For instance, with regard to States' obligation related to ecosystem and species health, including to halt human-induced species extinction, an interesting statement can be found in *Shresta*, where the Nepali Supreme Court found that State's failure to adopt a climate change law amounted to a breach of the constitutional right to a healthy environment, and affirmed that '[t]o address the effects of climate change through adaptation and mitigation and the high risks seen in the ecology of, *inter alia*, higher mountainous areas and to restore, including but not limited to, its ecology, accommodating following topics, a consolidated law related to climate change Act needs to be necessarily enacted' (*Shresta*, p. 13, para. 6).

What is more, the approach that the case law analyzed adopts may be crucial for the effective promotion of an ecocentric approach, that should overcome and replace the anthropocentric view that, as some commentators have stressed, still affects the international legal perspective, including the Convention on Biodiversity (without underestimating its importance. For an interesting analysis on the Convention, see Brizioli, 2019).

The narrative of intragenerational and intergenerational equity, as understood by this body of jurisprudence, may contribute to rethink our idea of sustainable development – that, as some prominent commentators have stressed, is still focused on an anthropocentric idea of the exploitation of the resources that "our common home", the Earth, offers.

For instance, this could promote an effective and consistent understanding of the ecosystem and ecosystem services, on which the human survival inherently depends.

What is more the perspective developed by the case law analyzed, through its idea of intertemporality and extraterritoriality of States' obligations under international human rights and law and environmental human rights law – as well as, importantly, constitutional law – may help to reconsider our productive system accordingly (the challenges posed by the energy crisis and energy transition deserve special mention, as well as their exacerbation due to the impact of the conflict in Ukraine and the associated international sanctions imposed on Russia. In this regard, see Sourgens, 2022). The view expressed by the German Constitutional Court in *Neubauer* (para. 192), which was recalled above, is one of the most significant examples. This is crucial for defining an appropriate framework of accountability, that may be successfully used also for addressing the role of corporations, that often operate in a transnational dimension, not only by relying on the paradigm of due diligence but by also using the idea of extraterritoriality of States' obligations as defined by the body of jurisprudence analyzed.



This may help to bridge the gaps that still need to be tackled; indeed, for instance, the theory of *forum necessitatis* and the use of such tools as, for example, the Alien Tort Statute, are not sufficient (as *Kiobel* and *Nestlé* demonstrate).

Last but not least, judicial dialogue could be a powerful tool for the improvement of the results so far achieved by both international and domestic courts.

For example, the idea of extraterritoriality promoted by this innovative climate jurisprudence may help the European Court of Human Rights (ECtHR) to reconsider the limitations of the approach it adopted in the *Banković* judgment (see Milanovic, 2011; Keller & Heri, 2022, 161; Besson, 2021), which relies on a narrower concept of jurisdiction. As was stressed in scholarship, indeed, '[s]ince its judgment in *Banković v Belgium*, it has largely displayed two models of jurisdiction: one based on territorial control, and one based on personal control' (Keller & Heri, 2022, 161; Besson, 2021). Although in *Ilascu v Russia and Moldova*, the ECtHR held that a 'State's responsibility may […] be engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction' (as recalled by Clark, Liston & Kalpouzos, 2020, 4), some major changes in its approach to extraterrioriality would be desirable. The adoption of a conception of the jurisdictional extraterritorial link inspired by the idea of 'effective control' adopted by the IACtHR

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could be crucial for effectively tackling the rising wave of climate cases in Strasbourg, for dealing with such cases as, for instance, *Duarte Agostinho and Oth. v. Portugal and Oth*, *Greenpeace Nordic and Oth. v. Norway*[26] and *Soubeste and Oth. v. Austria and Oth*. (for a broader analysis of these cases, see: Clark, Liston & Kalpouzos, 2020; Nordlander & Monti, 2022) and to pave the way for the protection of biodiversity and its justiciability in human rights terms.

Possibly, it would be desirable that also the Court of Justice of the European Union relied on the results achieved by this innovative climate litigation wave: the need to reconsider the locus standi the Court's environmental litigation may really benefit from reference to the climate case law and its conception of legal standing. It seems particularly true in light of the quite recently unsuccessful *Carvalho* case (despite the appellants had provided an interesting reading of the European Union's mitigation obligation in terms of human rights; see Pagano, 2019), and it would be important in light of the significant normative framework that the European Union has adopted in the field of biodiversity.

## IV. Conclusions

The international community has taken important steps to grapple with biodiversity, in order to prevent its loss and to promote its conservation. Nevertheless, the challenges are still huge, and this study suggests that relying on the results achieved by climate litigation – and, to some extent, those achieved by environmental litigation – may help to develop effective responses. In this respect, justiciability may be an effective way to address some of the major challenges to be met, and multi-level judicial dialogue may be crucial for ensuring a wide and successful protection not only to human rights, but also to Nature and animals' rights when biodiversity is at stake, ensuring a genuine "one rights" approach.



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26. Th ECtHR has the chance to take a different approach than the Norwegian Constitutional Court did at the domestic level when it adopted its decision in *Arctic Oil* – which has been seen by some commentators as a missed opportunity.

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