

## Recognizing the Right to a Healthy Environment at the Council of Europe: Why Does it Matter?

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Between 2021 and 2022, the United Nations Human Rights Council and the General Assembly passed resolutions explicitly acknowledging the 'right to a clean, healthy, and sustainable environment'. These recognitions align with developments in the regional human rights frameworks that already enshrined this right. In the wake of these developments, the Council of Europe stands as an exception: it is the sole regional human rights system which has not yet formally acknowledged this right. This article examines the ongoing efforts to incorporate the right to a clean, healthy, and sustainable environment into the human rights framework established with the European Convention on Human Rights. It provides an overview of the progress made so far and the challenges which continue to obstruct the path toward recognition.

**Keywords:** environmental rights, Council of Europe, European Convention of Human Rights, right to a healthy environment

### 1. Past Recognition Efforts

The Council of Europe (CoE) is the oldest regional human rights system.<sup>2</sup> The human rights instruments adopted under its umbrella include the 1950 European Convention on Human Rights (ECHR),<sup>3</sup> its 16 protocols,<sup>4</sup> and the 1961 European Social Charter.<sup>5</sup> CoE instruments also include environmental treaties on the protection of habitats and species<sup>6</sup> and on the protection of the environment through civil and criminal liability.<sup>7</sup> None of these instruments has so far recognized the right to a clean, healthy safe, and sustainable environment (the right to a healthy environment).<sup>8</sup>

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<sup>2</sup> Statute of the Council of Europe, London, 5 May 1949, ETS No. 001 (in force).

<sup>3</sup> The European Convention on Human Rights, Rome, 4 November 1950, ETS No. 005 (in force), has been amended by a series of protocols. The current text of the Convention - as amended by the provisions of Protocol No. 11 (ETS No. 155) as from its entry into force on 11 May 1994, Protocol No. 15 (ETS No. 213) as from its entry into force on 1 August 2021 and Protocol No. 14 (ETS No. 194) as from its entry into force on 1 June 2010 – may be accessed here: <[https://www.echr.coe.int/documents/d/echr/Convention\\_ENG](https://www.echr.coe.int/documents/d/echr/Convention_ENG)> accessed 19 January 2024.

<sup>4</sup> <[https://www.echr.coe.int/documents/d/echr/Library\\_Collection\\_ProtocolsTable\\_ENG](https://www.echr.coe.int/documents/d/echr/Library_Collection_ProtocolsTable_ENG)> accessed 19 January 2024.

<sup>5</sup> European Social Charter, Turin, 18 October 1961, ETS No. 035 (in force).

<sup>6</sup> See e.g., Convention on the Conservation of European Wildlife and Natural Habitats, Bern, 19 September 1979, ETS No. 104 (in force), Council of Europe Landscape Convention, Florence, 20 October 2000, ETS No. 176 (in force).

<sup>7</sup> See e.g., Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, Lugano, 21 June 1993, ETS No. 150 (not in force), Convention on the Protection of the Environment through Criminal Law, Strasbourg, 4 November 1998, ETS No. 172 (not in force).

<sup>8</sup> See however the protection under the right to health enshrined in the European Social Charter (as interpreted in European Committee of Social Rights, *Marangopoulos Foundation for Human Rights v. Greece*, Complaint no. 30/2005, decision on the merits of 6 December 2006, §§ 194-196).

The ECHR, as the system's most important human rights instrument, does not explicitly address environmental rights. However, its judicial body – the European Court of Human Rights (ECtHR) – has played a crucial role in infusing environmental considerations into the ECHR's framework. This progressive incorporation has been achieved through hundreds of 'environmental judgments', which draw upon the ECHR's provisions on civil and political rights.<sup>9</sup>

These judgments represent a dynamic adaptation of the ECHR to contemporary challenges related to environmental protection. Through this approach, the ECtHR has 'greened' the ECHR by addressing environmental concerns in the absence of explicit environmental rights provisions in the Convention itself. This approach has made significant strides in discrete areas, such as noise pollution,<sup>10</sup> toxic emissions,<sup>11</sup> industrial hazards,<sup>12</sup> and natural disasters.<sup>13</sup> However, it provides only fragmented and indirect protection to environmental interests.<sup>14</sup>

The academic debate about including environmental rights in the ECHR through an additional protocol started as early as 1973.<sup>15</sup> The CoE Parliamentary Assembly (PACE) has unsuccessfully tried to secure the formal recognition of the right to a healthy environment on three occasions.<sup>16</sup> These endeavors did not gain sufficient support from the Committee of Ministers, which is the CoE organ responsible for law-making.

Reasons for opposition include the perceived normative ambiguity of the right to a healthy environment; the risk of involving ECtHR's judges in political matters; and fears about triggering a surge of additional litigation which could strain an already overburdened human rights system. Most saliently, opponents argue that the existing ECHR system already effectively contributes to environmental protection through the ECtHR's environmental judgments mentioned above.<sup>17</sup>

## 2. The Ongoing Recognition Campaign

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<sup>9</sup> CoE, 'Manual on Human Rights and the Environment' (2022) <<https://rm.coe.int/manual-environment-3rd-edition/1680a56197>> accessed 4 February 2022

<sup>10</sup> ECtHR, *Lopez Ostra v. Spain*, no. 16798/90, Judgment of 9 December 1994.

<sup>11</sup> ECtHR, *Cordella v. Italy*, nos. 54414/13 and 54264/15, Judgment of 24 January 2019.

<sup>12</sup> ECtHR, *Öneryıldız v. Turkey*, no. 48939/99, Judgment (Grand Chamber) of 30 November 2004.

<sup>13</sup> ECtHR, *Budayeva and Others v. Russia*, nos. 15339/02 et al., Judgment of 20 March 2008.

<sup>14</sup> *Kyrtatos v Greece* App No 41666/98, Judgment of 22 May 2003, para 52. See also the speech by Rik Daems included in Council of Europe, *Manual on Human Rights and Environment* (2nd edition), 2020, <<https://rm.coe.int/protection-environnementale-en/16809fb087>> accessed 19 January 2024, 14.

<sup>15</sup> See Heinhard Steiger, *Le droit à un environnement humain: proposition pour un protocole additionnel à la convention européenne des droits de l'homme* (Schmidt 1973); Alexandre-Charles Kiss, 'Peut-on définir le droit de l'homme à l'environnement?' 1 *Revue juridique de l'Environnement* (1976), 15-18.

<sup>16</sup> PACE, 'Future Action to be Taken by the Council of Europe in the Field of Environment Protection', Recommendation 1431 (1999); PACE, 'Environment and Human Rights', Recommendation 1614 (2003); PACE, 'Drafting an Additional Protocol to the European Convention on Human Rights Concerning the Right to a Healthy Environment', Recommendation 1885 (2009).

<sup>17</sup> See e.g., H Balfour-Lynn and S Willman, 'The Right to a Healthy Environment in the United Kingdom: Supporting the Proposal for a New Protocol to the European Convention on Human Rights' Environmental Rights Recognition Project (2022) <<https://www.kcl.ac.uk/legal-clinic/assets/briefing-paper-environmental-rights-recognition-project.pdf>> accessed 19 January 2024, 16.

PACE's recognition efforts found renewed impetus in 2021 with a new campaign for including a right to a healthy environment in the ECHR system.<sup>18</sup> Various options are currently being discussed, including binding and non-binding instruments and institutional arrangements.<sup>19</sup> However, from the outset the campaign focused on a draft new protocol to the ECHR,<sup>20</sup> which would impose obligations only on the States ratifying it.<sup>21</sup>

PACE has proposed a text for such a protocol, which encompasses substantive rights as well as general principles. The general principles include transgenerational responsibility, equity, solidarity, prevention, precaution, non-regression, *in dubio pro natura*, and the prohibition of environmental and intergenerational discrimination. The draft protocol explicitly recognizes every individual's right to a healthy environment, which is defined as the right of present and future generations to live in a non-degraded, viable, and decent environment conducive to health, development, and well-being. Drawing on the Aarhus Convention, it also lists procedural rights to access environmental information, consultation rights over projects affecting the environment and biodiversity, and access to justice and effective remedies in environmental matters.<sup>22</sup>

This draft, and the accompanying resolution, were the starting point for the ongoing debate on recognizing the right to a healthy environment at the CoE. Presently, the CoE's Steering Committee for Human Rights (CDDH) – an advisory body providing legal expertise to the Committee of Ministers – is evaluating options for the recognition.<sup>23</sup> The CDDH has tasked a Drafting Group on Human Rights and Environment (CDDH-ENV) to consider the necessity and feasibility of an instrument or instruments on human rights and the environment.<sup>24</sup> The CDDH-ENV has consulted legal experts,<sup>25</sup> participated in conferences,<sup>26</sup> drafted a non-binding instrument,<sup>27</sup> and collected data indicating that most CoE Member States already recognize the right to a healthy environment in their national legal systems.<sup>28</sup>

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<sup>18</sup> PACE Recommendation 2211 (2021), 'Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe', 29 September 2021, 89 votes in favour, 0 votes against, 19 abstentions. On previous attempts.

<sup>19</sup> *ibid.*

<sup>20</sup> *ibid.* Draft additional protocol to the European Convention on Human Rights, concerning the right to a safe, clean, healthy and sustainable environment. Available at <<https://pace.coe.int/en/files/29501/html>> accessed 19 January 2024.

<sup>21</sup> *ibid.* Article 11 says that the protocol would enter into force once five member States have ratified it.

<sup>22</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 20 October 2001) 2161 UNTS 447.

<sup>23</sup> See CoE, 'Terms of reference for the CDDH and the DH-SYSC (2022–2025)', valid from 1 January 2022, <<https://rm.coe.int/mandat-en/1680a4e2f6>> accessed 19 January 2024.

<sup>24</sup> Extract of the decisions taken at the 1416th meeting of the Ministers' Deputies, 3 November 2021, as replicated in CDDH-ENV (2022)01REV, 2.

<sup>25</sup> Exchange of views with independent experts and representatives from the Parliamentary Assembly and the European Committee of Social Rights (13–15 September 2022).

<sup>26</sup> Proceedings of the High-level Conference organised by the Icelandic Presidency of the Committee of Ministers, with the support of the Council of Europe Secretariat, 3 May 2023, <<https://rm.coe.int/the-right-to-a-clean-healthy-and-sustainable-environment-le-droit-a-un/1680aba11e>> accessed 19 January 2024.

<sup>27</sup> Steering Committee for Human Rights, 'Draft Comments of the CDDH on Recommendations of the Parliamentary Assembly' (23 November 2021) CDDH (2021)15rev, para 4.

<sup>28</sup> See on this CDDH-ENV, 'Compilation of Replies Received from Member States on the Questionnaire with a View of the Preparation of a Study on the Need for and Feasibility of a New Instrument on Human Rights and the Environment', CDDH-ENV (2022)09, 10 February 2022, <<https://rm.coe.int/steering-committee-for-human-rights-comite-directeur-pour-les-droits-d/1680aae37d>> accessed 19 January 2024.

These activities have taken place against the backdrop of the explicit recognition of the right to a healthy environment by the United Nations Human Rights Council and United Nations General Assembly (UNGA), mentioned above.<sup>29</sup> Notably, all current CoE Member State voted in favor of the UNGA's recognition of this right.<sup>30</sup>

Both on form and content, the details of the CoE's recognition are yet to be settled. An ECHR protocol has attracted widespread civil society support, but other options are on the table.

One option is incorporating the right to a healthy environment into the European Social Charter. This option would create legally binding obligations for States, but it would not empower the ECtHR to scrutinize their implementation. Instead, only the 16 CoE's Member States which accepted the collective complaints procedure under the European Committee of Social Rights would be covered.<sup>31</sup>

Another option is political recognition, building on the 2022 Recommendation on human rights and the protection of the environment by the CoE's Committee of Ministers.<sup>32</sup> This recommendation suggests that Member States 'reflect' on the right to a healthy environment and 'actively consider' its recognition at the national level. It also advises States to assess their national legislation and practices in line with international environmental law principles, anti-discrimination measures, and human rights, particularly for vulnerable populations. This recommendation does not create legally binding obligations for which States can be held accountable.

Along these lines, the Reykjavik Declaration, adopted at the CoE's Summit of Heads of State and Government in May 2023, launched the so-called 'Reykjavik process'.<sup>33</sup> The process aims to strengthen the CoE's work on human rights and the environment. This process was launched to support the recognition of the right to a healthy environment in national law, and to create a new intergovernmental committee on environment and human rights, the so-called 'Reykjavik Committee'.<sup>34</sup> The exact role of the Reykjavik Committee remains uncertain. At the time of writing, limited steps have been taken to operationalize this institution.

### 3. Why Recognition Matters

As noted above, the CoE is the sole regional human rights system yet to formally acknowledge the right to a healthy environment. The current system does provide some protection against the impact of environmental harms on the enjoyment of human rights. However, its ability to deal with global and systemic environmental issues must be strengthened.

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<sup>29</sup> CDDH, Drafting Group on Human Rights and Environment, 6<sup>th</sup> Meeting Report, 8-10 February 2023, CDDH-ENV(2023)R6, <<https://rm.coe.int/steering-committee-for-human-rights-comite-directeur-pour-les-droits-d/1680aa23bd>> accessed 19 January 2024, 11.

<sup>30</sup> United Nations General Assembly, 'The Human Right to a Clean, Healthy and Sustainable Environment', 26 July 2022, A/76/L.75, adopted with 161 votes in favour, no votes against, and 8 abstentions.

<sup>31</sup> By ratifying the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (ETS No. 158), in force since 1 July 1998.

<sup>32</sup> Recommendation CM/Rec (2022) 20 of the Committee of Ministers to member States on human rights and the protection of the environment, 27 September 2022.

<sup>33</sup> 4<sup>th</sup> Summit of Heads of State and Government of the Council of Europe, Reykjavik Declaration: United Around Our Values, 16–17 May 2023, Appendix V: The Council of Europe and the Environment, 6–7.

<sup>34</sup> *ibid*, 21.

The most powerful human rights body within this system is the ECtHR. Historically, the ECtHR's case law has been constrained by the understanding that the ECHR was not designed for environmental protection and, instead, aims to protect individual rights. In the ECtHR's jurisprudence, environmental interests are frequently overshadowed by economic ones. Further, victim status requirements make it difficult to bring environmental cases before the Court. Recognizing the right to a healthy environment could overcome these limitations. It would also elevate environmental interests to the level of other human rights. This would affect balancing exercises and give civil society and environmental human rights defenders new and better tools to protect ecosystems, as well as individuals and communities, from environmental harm.

The debate on the CoE's recognition of the right to a healthy environment is taking place as the ECtHR's Grand Chamber considers its first ever climate cases – namely, *Verein KlimaSeniorinnen and Others v. Switzerland*, *Carême v. France*, and *Duarte Agostinho and Others v. Portugal and 32 Other Member States*.<sup>35</sup> These cases rely on the ECtHR's established 'environmental' case-law, arguing, amongst others, that States' failure to adopt adequate climate change mitigation action violates their obligations under the right to life (Article 2 ECHR) and the right to respect for private and family life (Article 8 ECHR). These cases provide a litmus test for ascertaining the suitability of the ECHR system, as currently designed, to address widespread human rights violations resulting from systemic harm associated with climate change.

Recognizing the right to a healthy environment would bolster the ECtHR's mandate to engage with the human rights implications of environmental harms, and – at least in principle – it could clarify the scope of obligations owed to future generations and empower civil society to bring complaints in the interest of the environment itself. Moreover, explicit recognition would allow the Court to adopt a more holistic approach to environmental protection, as opposed to the piecemeal one it has used to date.

In the face of the triple planetary crisis of pollution, biodiversity loss, and climate change, the CoE should not remain in a state of ambiguity on the explicit recognition of the right to a healthy environment. Of the available options, the binding recognition of this right within the ECHR's context would be the most impactful.

An additional protocol to the ECHR would bolster the ECtHR's environmental jurisprudence. It would endow the CoE's human rights system with greater legal certainty. Recognizing a self-standing human right to a healthy environment is relevant to all types of environmental harms, and it would strengthen the hand of applicants in climate cases, such as the ones described above.<sup>36</sup> Beyond litigation, the recognition would bolster enforcement and implementation action at the domestic level and would reinforce procedural environmental rights already recognized in the Aarhus Convention. Recognition would provide courts in all of the CoE's member States with a clear mandate to address environmental harms; define obligations towards future generations; and enable civil society to litigate for the benefit of the environment. It would furthermore promote consistency in interpreting human rights obligations across the CoE's member States.

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<sup>35</sup> For more on these cases, see the Court's own Factsheet on Climate Change (2023), available at <[https://www.echr.coe.int/documents/d/echr/fs\\_climate\\_change\\_eng](https://www.echr.coe.int/documents/d/echr/fs_climate_change_eng)> accessed 19 January 2024.

<sup>36</sup> Pau de Vilchez and Annalisa Savaresi, 'The Right to a Healthy Environment and Climate Litigation: A Game Changer?' [2023] Yearbook of International Environmental Law yvac064.

In sum, the explicit recognition of the right to a healthy environment is essential for the CoE's continued relevance in the 21<sup>st</sup> century. It would align with the principles of effective protection of human rights and their bearers, the very foundations upon which the CoE was originally established.