

Environmental Rights Recognition Project

The Right to a Healthy Environment in the
United Kingdom: Supporting the proposal for
a new Protocol to the European Convention
on Human Rights



About the Environmental Rights Recognition Project

The Environmental Rights Recognition Project (ERRP) was established in 2021 to promote the recognition of the legal right to a healthy environment in the UK and across Europe, through partnership between academics, NGOs, practising lawyers, law-makers and environmentalists. The project is principally a collaboration between the Legal Clinic at the Law School of King's College in London and postgraduate students at New York University School of Law.

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Foreword by Philip Alston, John Norton Pomeroy Professor of Law at New York University School of Law

The global environmental crises that are currently moving to their crescendo threaten the entire body of human rights as we know them. It is certain that there will be a huge impact in terms of the rights to health, housing, and food, as Sir David Attenborough made clear in a 2021 address to the UN Security Council:

“... today there are threats to security of a new and unprecedented kind... They are: rising global temperatures; the despoiling of the ocean, that vast universal larder on which people everywhere depend for their food; changes in the pattern of weather worldwide that pay no regard to national boundaries, but that can turn forests into deserts, drown great cities and lead to the extermination of huge numbers of the other creatures with which we share this planet.

No matter what we do now, some of these threats will assuredly become reality within a few short years. Others could, in the lifetime of today’s young people, destroy entire cities and societies, even altering the stability of the entire world. The heating of our planet has already reached the point that the impacts on the poorest and most vulnerable people are profound. But this is only the beginning of this crisis.”

Equally tragic is the fact that these developments will also have disastrous consequences for civil and political rights. Rights to free speech, freedom of movement, freedom of association, and property rights will be dramatically curtailed by governments responding to unprecedented disasters and mass migration, both internally and across borders. And forms of discrimination on grounds such as race, gender and religion will be hugely exacerbated as society responds to major upheavals at every level.

As global warming, biodiversity loss, and general environmental degradation continue to escalate, it is clear that the time to act is now.

The current proposal of the Parliamentary Assembly of the Council of Europe (PACE) for a new Protocol to the European Convention on Human Rights, recognising the right to a healthy environment, represents an important opportunity to take action. While its focus is European, it comes at a time of unprecedented momentum towards international recognition of the right to a healthy environment. The UN General Assembly is on the verge of approving the recent UN Human Rights Council resolution recognising the right to a clean, healthy and sustainable environment as a universal human right.

This briefing paper provides a compelling and insightful overview of the arguments in favour of a legal right to a healthy environment which applies at a domestic, European and international level. This particular train is leaving the station and there are powerful reasons for the governments of countries like the United Kingdom and Ireland to get on board and help to shape developments. Developments at the European level in this area will have major consequences internationally. Whatever the response of the Council of Europe to the PACE proposal, the right to a safe, clean, healthy and sustainable environment will become an international legal norm and make an indispensable contribution to protecting human rights in times of unprecedented change and uncertainty.

EXECUTIVE SUMMARY

The deepening climate crisis, ever-increasing loss of biodiversity and broad environmental degradation across the world are widely recognised as some of the greatest challenges ever faced by the international community. The recent IPCC Working Group II Report finds that worldwide action on climate resilient development is even more urgent than previously assessed.¹ The Covid-19 pandemic, meanwhile, has highlighted the close link between environmental concerns and global health. Against this backdrop, on 29 September 2021 the Parliamentary Assembly of the Council of Europe (PACE) published a resolution and a recommendation proposing a new Protocol to the European Convention on Human Rights (ECHR) establishing the right to a healthy environment.² PACE's proposal is currently being considered by the Council of Europe's Committee of Ministers (made up of the Ministers for Foreign Affairs of the 46 Council of Europe Member States). The Committee of Ministers will have the final say on whether or not to draft a new Protocol to the ECHR.

Significant global momentum is building towards enshrining the right to a healthy environment in international law. Most notably, the UN General Assembly appears set to recognise a universal right to a clean, healthy and sustainable environment, following a resolution of the UN Human Rights Council recognising the right in October 2021.³ The UN Human Rights Council resolution had the support of over 1,100 civil society, child, youth and indigenous peoples' organisations. It passed with 43 votes in favour, including the UK, and just four abstentions.

This briefing paper outlines the many reasons why the UK Government should support PACE's proposal for a new ECHR right to a healthy environment. The paper recognises that the Government is currently considering reforms to the UK's domestic human rights framework and has proposed a Bill of Rights. Independently of PACE's proposal, the Bill of Rights presents an opportunity for the UK to modernise its approach to human rights by including recognition of a statutory right to a healthy environment alongside any other reforms.

The briefing paper is divided into four sections.

Section 1 provides context to the paper's proposal that the UK Government should support recognition of a new ECHR right to a healthy environment, by emphasising the leadership role that the UK has previously played in international human rights and environmental law.

Section 2 sets out some of the benefits of a new ECHR right to a healthy environment, which include:

- **Symbolic significance** – Creating a legally binding right to a healthy environment through an additional Protocol to the ECHR would be an important political act, demonstrating that European states recognise that the environment, whether from an anthropocentric or rights

¹ Intergovernmental Panel on Climate Change, *Climate Change 2022: Impacts, Adaptation, and Vulnerability* (Cambridge University Press, 2022).

² PACE, 'Anchoring the Right to a Healthy Environment: Need for Enhanced Action by the Council of Europe', Resolution 2396 (2021), available at <<https://pace.coe.int/en/files/29499>>; PACE, 'Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe', Recommendation 2211 (2021), available at <<https://pace.coe.int/en/files/29499>>; PACE's resolution and recommendation also propose an additional Protocol to the European Social Charter on the right to a healthy environment, which would recognise the interrelationship between the protection of social rights and environmental protection.

³ Resolution adopted by the United Nations Human Rights Council on 8 October 2021, UN Doc. A/HRC/RES/48/13, available at <<https://undocs.org/A/HRC/RES/48/13>>.

of nature perspective, is as critically important as other interests recognised as fundamental rights.

- **Public policy impact** – A legally binding right to a healthy environment would ensure that environmental considerations are at the heart of policy-making processes across Europe, at both national and local level.
- **Legislative impact** – A new ECHR right to a healthy environment would impose an overarching obligation on legislators not only to *consider* the environmental impact of any proposed legislation, but actively to legislate in a manner compatible with that right.
- **Increased civic participation** – Studies of the impact of the right to a healthy environment in different legal systems show that, where that right is recognised, it results in greater civic participation in environmental decision-making. The right serves to channel citizens' demands into a framework within which those demands can be discussed and debated in a productive manner. PACE's proposed ECHR right should therefore be of significant appeal to the UK Government, in light of widespread environmental protests in recent years, reflecting public desire to engage in environmental decision-making processes and dissatisfaction with existing channels for engagement with the Government.
- **Filling a constitutional gap and amplifying existing environmental rights** – 13 of the 46 Council of Europe Member States, including the UK, have no existing constitutional or legislative right to a healthy environment. A new ECHR right, and in particular a right incorporated into the proposed modern Bill of Rights, would fill that gap. In those states where some form of right to a healthy environment is already recognised domestically, a new ECHR right would amplify the effects of that right by linking it to the activities of well-established human rights institutions, public authorities and legislative bodies, and by incorporating it into the enforcement infrastructure of the ECHR.
- **A level playing field** – A new ECHR right to a healthy environment would ensure a level playing field across the Council of Europe Member States. While the UK generally leads the way in adopting robust environmental protection standards, its efforts may be undercut by states which take a more retrograde approach, achieving an economic advantage and eroding global efforts in responding to the climate crisis and environmental degradation more generally. A new ECHR right would set a pan-European baseline, with the effect that environmental laws could not be weakened in any Council of Europe Member States where that would infringe on individuals' rights to a safe, clean, healthy and sustainable environment.
- **Jurisprudential impact** – A new ECHR right to a healthy environment would bring greater coherence and clarity to the existing body of environmental human rights case law in the UK and in the European Court of Human Rights (ECtHR). Presently, environmental human rights claims proceed on the basis of violations of non-environmental rights such as the right to respect for private and family life, which creates a degree of uncertainty in the extent of public authorities' environmental human rights obligations. Recognising an ECHR right to a healthy environment would consolidate public authorities' environmental human rights obligations, promoting legal certainty, the effective implementation of Convention rights and effective public administration.
- **Impact on environmental performance** – Each of the above factors would lead to improved overall environmental performance across Europe. The experience of states that have recognised a constitutional or national legislative right to a healthy environment is illustrative. A study conducted by David R. Boyd, the current UN Special Rapporteur on human rights and the environment, found that, by comparison to states that have no right

to a healthy environment in their constitutions, those states that have such constitutional provisions: have smaller ecological footprints; rank higher on comprehensive indices of environmental performance indicators; and have made faster progress in reducing emissions of sulphur dioxide, nitrogen oxides and greenhouse gases.⁴

Section 3 responds to some of the most commonly raised arguments opposing recognition of a new right to a healthy environment. These include that: the content of the new right would be too uncertain and ambiguous; the right would be redundant in the ECHR framework in light of existing environmental human rights case law; recognising the new right would devalue existing human rights recognised under the ECHR; the new right would draw judges into areas best left to the political sphere; and the ECHR framework is ill-suited to regulating environmental harm. The paper provides compelling answers to each of these arguments.

Finally, Section 4 sets out five recommendations to the UK Government:

- **Recommendation 1 – The Government should support PACE’s proposal for a new Protocol to the ECHR recognising the right to a healthy environment.**
- **Recommendation 2 – The Government should engage with other Council of Europe Member State governments and encourage them to support PACE’s proposal.**
- **Recommendation 3 – Pending formal recognition of a new ECHR right, the Government should include the right to a healthy environment in its upcoming modern Bill of Rights, alongside any other proposed reforms to the UK’s domestic human rights framework.**
- **Recommendation 4 – In order to effectively implement the right to a healthy environment in the UK, the Government should consider establishing a national task force with two purposes:**
 - (i) **to assess Government policy on an ongoing basis in order to ensure that it complies with the right to a healthy environment; and**
 - (ii) **to provide a forum for greater civic participation in national environmental governance.**
- **Recommendation 5 – The Government should propose that Parliament establish a select committee, or else expand the remit of an existing committee, to scrutinise every Bill to ensure that legislation is compatible with the right to a healthy environment.**

PACE’s recommendation includes draft text for their proposed additional Protocol to the ECHR, which notably provides both for a substantive “*right to a safe, clean, healthy and sustainable environment*”, as well as procedural rights relating to access to information, consultation on environmental policies, access to justice and effective remedies. The content of PACE’s detailed proposal is summarised in Appendix 1 of this briefing paper. For the sake of brevity, the proposed Protocol as a whole is referred to throughout this paper simply as “*the right to a healthy environment*”.

⁴ David R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press, 2012), 253-277.

SECTION 1

A brief history of human rights and environmental law in the UK

The UK has an important domestic tradition of human rights and environmental law, stretching back at least to the early 13th century.

a. The development of human rights law in the UK

The UK's contribution to the recognition, codification and protection of human rights has been substantial.

Since its enactment in 1215, the Magna Carta has been foundational to the rule of law and the liberty of the individual in England (and later across the UK), and has influenced high-profile subsequent statements of rights worldwide, including the US Constitution and the French Declaration of the Rights of Man.

The strong tradition of individual rights initiated by the Magna Carta reached a particular high point during the political struggles of the 17th century, which culminated in the settlements of 1688-89 and the Bill of Rights, still cited in modern case law as the foundation of Parliamentary privilege.

It was against that backdrop that the UK played an instrumental role in the formulation of the ECHR in the 20th century. The UK was one of the 10 founding members of the Council of Europe and many of the authors of the ECHR were from the UK. In March 1951, the UK was the first country to ratify the Convention.

The ECHR has been described as being “*framed by British jurists working within a common law legal tradition stretching back... to encompass our own Bill of Rights 1689*”,⁵ in language that “*echoes right down the corridors of history... as far back as Magna Carta*”.⁶ While the UK Government is currently considering reforms to the way the ECHR is incorporated into the UK's domestic legal framework, the Government has repeatedly confirmed its enduring commitment to the ECHR itself and to the “*UK's tradition of human rights leadership abroad*”.⁷

b. The development of environmental law in the UK since the thirteenth century

The UK has played an equally pivotal role in the development of environmental law.

The same disputes and settlements that produced the Magna Carta in 1215 also produced the Charter of the Forest in 1217. The Charter of the Forest codified a wide range of individual rights in respect of the environment,⁸ providing rights for everyone to make use of the land, limiting the rights of the king and certain nobles, and ensuring the existence of a proper dispute

⁵ Jesse Norman and Peter Osborne, *Churchill's Legacy: The Conservative case for the Human Rights Act* (Liberty, 2009), 7.

⁶ Conservative MP Sir Edward Gardner QC in the House of Commons, HC Deb 6 February 1987, vol 109, col 1224.

⁷ Ministry of Justice, ‘Human Rights Act Reform – A Modern Bill Of Rights: A consultation to reform the Human Rights Act 1998’ (December 2021), available at <<https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights>>, 3.

⁸ ‘Forest’ had a broader meaning than the modern word, encompassing varied types of land that covered significant swathes of the country.

resolution process. The Charter of the Forest has come to be recognised as the first statute of environmental law.⁹

The foundations of modern environmental law were developed in the UK in the 19th Century. From the 1850s onwards, the UK courts were proactive in using injunctions to prevent pollution and to encourage industry to find solutions to environmental issues.¹⁰ Parliament followed that lead by passing the Public Health Act 1875, the “*first comprehensive legislation in the field*” and “*the foundation of much of modern environmental law, in the UK and elsewhere*”.¹¹

The UK has continued to play a leading role as environmental law has developed in response to the challenges facing the planet in the 21st Century. The Climate Change Act 2008 set an example for other nations, by putting the UK’s climate commitments into unambiguous and binding legal form. In 2019, the UK became the first major economy to legislate for a 2050 ‘net zero’ target. In 2021, the UK enthusiastically hosted COP26, with the Prime Minister affirming that the UK “*is not afraid to lead the charge towards global net zero*”.¹²

c. The recognition of a new ECHR right to a healthy environment in context

The UK has long been at the forefront of developments in both human rights law and environmental law. The recognition of a new ECHR right to a healthy environment in the UK, building as it does on both traditions, would be a natural next step.

By supporting PACE’s proposal for a new ECHR right to a healthy environment, the UK Government would not only secure the benefits set out in this paper, but would also show that it is conscious of the UK’s historical role and determined to continue the UK’s leadership in the future.

⁹ Nicholas A. Robinson, ‘The Charter of the Forest: Evolving Human Rights in Nature’ (The Lincoln Charter of the Forest Conference, 22-24 September 2017).

¹⁰ See for example *AG v Birmingham Corporation* (1858) 4 K. & J. 528.

¹¹ Lord Carnwath, ‘Environmental law in a global society’ (2015) 3 *Journal of Planning & Environmental Law* 269, 270.

¹² UK Government, *Net Zero Strategy: Build Back Greener* (October 2021), 8.

SECTION 2

The benefits of a new ECHR right to a healthy environment

a. Symbolic significance

Creating a legally binding right to a healthy environment through an additional Protocol to the ECHR would be an important political act, demonstrating that European states recognise that the environment, whether from an anthropocentric or rights of nature perspective, is as critically important as other interests recognised as fundamental rights.

In the field of human rights, symbolism is extremely important. The symbolic power of the law changes attitudes and behaviour, ensuring respect for individual rights and often obviating the need for enforcement. Beyond enabling individual claims for redress, it is the normative content of human rights that has given the international human rights movement significant authority over the past 70 years. Describing something as a human right is to say that it is a basic human entitlement of fundamental importance.¹³

In the international or European human rights framework, entitlement to a healthy environment is currently recognised peripherally by reference to other non-environmental rights, most notably the rights to life and to respect for private and family life,¹⁴ though other ECHR rights have also been engaged in environmental contexts.¹⁵ Recognising the right to a healthy environment as a freestanding ECHR right would represent a clear and authoritative statement that European states regard a healthy environment as being of fundamental importance.¹⁶

The impact of that statement should not be underestimated. Recognition of other human rights has historically played a key role in affecting the behaviour of both public and private actors. As citizens come to understand that a healthy environment is a basic human entitlement, as opposed to a preference or a privilege, they and their political representatives will demand it with ever-greater force.¹⁷

b. Public policy impact

A legally binding right to a healthy environment would ensure that environmental considerations are at the heart of policy-making processes across Europe, at both national and local level.

The UK Parliament's Joint Committee on Human Rights recently conducted an inquiry in parallel to the Independent Human Rights Act Review established by the UK Government. In their inquiry, the Committee heard evidence from, among others, Dominic Grieve QC PC, who served as Attorney General for England and Wales under Prime Minister David Cameron's

¹³ César Rodríguez-Garavito, 'A Human Right to a Healthy Environment? Moral, Legal, and Empirical Considerations' in John H. Knox and Ramin Pejan (eds.), *The Human Right to a Healthy Environment* (Cambridge University Press, 2018), 157.

¹⁴ ECHR Article 2 (right to life) and Article 8 (right to respect for private and family life and home).

¹⁵ ECHR Article 3 (prohibition of inhuman or degrading treatment), Article 5 (right to liberty and security), Article 6 (right to a fair trial), Article 10 (freedom of expression and freedom to receive and impart information), Article 11 (freedom of assembly and association), Article 13 (right to an effective remedy), and Article 1 of Protocol Number 1 (protection of property).

¹⁶ Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, United Nations General Assembly, UN Doc. A/73/188 (2018), para. 39.

¹⁷ Rodríguez-Garavito (n. 13), 159-160.

Government from 2010 to 2014. The Committee asked Mr Grieve to give his view of the impact of the Human Rights Act 1998, which gives domestic legal effect to the ECHR in the UK. Mr Grieve responded:¹⁸

“... What has happened as a result of enacting the Human Rights Act, and driving through the educational package for public authorities that went with it, is that public authorities had to pay attention to human rights in making decisions that particularly affected the old, the vulnerable, and children. I think it has led to a consistent improvement in the standards that those groups have received as a consequence...”

... Obviously, some quite important issues have gone to court and have probably caught the public eye more, but... the single most important thing is that the way in which people, individuals, have been treated by public authorities has significantly altered.”

As Mr Grieve’s evidence indicates, binding human rights permeate public decision-making. Evidence submitted to the Independent Human Rights Act Review supports Mr Grieve’s submissions, pointing to the Human Rights Act’s *“impact in improving public administration for individuals, through developing a human rights culture.”*¹⁹ Incorporating a legally binding right to a healthy environment into the ECHR will ensure that environmental consciousness sits at the heart of public authorities’ activities across Europe. It will ensure greater consistency with the UK’s own evolving environmental law framework, most recently manifested in the Environment Act 2021.

In the UK, policymakers in various areas of national and local government are subject to obligations relating to the environmental impact of policies.²⁰ The same is true across the Council of Europe Member States. However, an overarching obligation to give effect to the human right to a healthy environment would bolster existing obligations by highlighting that environmental protection ranks equally to other interests that are fundamental to human dignity, equality and freedom.²¹ The right would also fill legislative and regulatory gaps where no environmental obligations currently apply; this has been the experience in states where a domestic constitution recognises the right to a healthy environment and that right is suitably justiciable, as it would be under the ECHR.²²

c. Legislative impact

A new ECHR right to a healthy environment would impose an overarching obligation on legislators not only to consider the environmental impact of any proposed legislation, but actively to legislate in a manner compatible with that right.

¹⁸ Joint Committee on Human Rights, Oral evidence (Virtual Proceeding): The Government’s Independent Human Rights Act Review, HC 1161 (27 January 2021), available at <<https://committees.parliament.uk/oralevidence/1603/pdf>>, 1-2.

¹⁹ ‘The Independent Human Rights Act Review: Full Report’ (December 2021), available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf>, 16.

²⁰ For example: at the national level, the Climate Change Act 2008 created a legally binding duty on the Secretary of State to ensure that the net UK carbon account for the year 2050 is at least 100% lower than the 1990 baseline; at the local level, the Town and Country Planning Regulation 2017 imposes various obligations on local authorities relating to Environmental Impact Assessments in the context of town and country planning in England.

²¹ UN Doc. A/73/188 (n. 16), para. 39.

²² For example, in India, Nepal and Uganda, the constitutional right to a healthy environment has filled legislative and regulatory gaps relating to air pollution, plastic pollution and forest conservation: *ibid*, para. 40.

Across the Council of Europe Member States, legislators explicitly aim to create legislation that is compatible with the ECHR. Many national legislatures have legislative pre-screening mechanisms in place to ensure that proposed laws are consistent with the state's duty to respect, protect, promote and fulfil their human rights obligations. In the UK, this is one of the functions of the Joint Committee on Human Rights. Other examples include the French Constitutional Council. Even where no such formal mechanism exists, the scrutiny of national courts and the ECtHR ensures that legislators across Europe carefully consider ECHR compatibility throughout the legislative process.²³ Pre-screening of legislation can serve to reduce human rights litigation by preventing violations from arising in the first place.

A new ECHR right to a healthy environment would therefore lead to a strengthening of environmental laws across Europe, as legislators would ensure all legislation was compatible with that right. Surveys of the legislative impact of recognition of a *constitutional* right to a healthy environment around the world evidence this effect, demonstrating that this right serves to shape, strengthen and unify national environmental laws.²⁴ To take a European example, Spain's recognition of a constitutional right to a healthy environment in 1978 continues to influence the development of environmental laws there. See for instance the provisions of Spain's Environmental Responsibility Law (2007) and its Law on Natural Heritage and Biodiversity (2007), which draw repeatedly on the right to a healthy environment in the Spanish constitution.²⁵

Incorporation of the right to a healthy environment into the ECHR may also prevent the regression of environmental protection standards in the future.²⁶ As the climate crisis deepens and governments are forced to adopt increasingly substantial measures in response, it is reasonable to expect a degree of backlash against those measures. Including the right to a healthy environment under states' international human rights obligations would provide a bulwark against any such backlash, preventing environmental laws from being weakened where that would infringe on individuals' rights to a safe, clean, healthy and sustainable environment.

d. Increased civic participation

Studies of the impact of the right to a healthy environment in different legal systems show that, where that right is recognised, it results in greater civic participation in environmental decision-making.²⁷ The right serves to channel citizens' demands into a framework within which those demands can be discussed and debated in a productive manner. PACE's proposed ECHR right should therefore be of significant appeal to the UK Government, in light of widespread environmental protests in recent years, reflecting public desire to engage in environmental decision-making processes and dissatisfaction with existing channels for engagement with the Government.

From Insulate Britain and Extinction Rebellion to Fridays for Future and Earth Strike, citizens worldwide and from all walks of life are coming together to express their frustrations at governments' failures adequately to address the existential environmental crises facing the planet. It is clear that citizens want to engage with their political leaders on environmental

²³ David R. Boyd, 'Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment' in John H. Knox and Ramin Pejan (eds.), *The Human Right to a Healthy Environment* (Cambridge University Press, 2018), 30.

²⁴ UN Doc. A/73/188 (n. 16), para. 40; Boyd, 'Catalyst for Change' (n. 23), 26-27; Boyd, *The Environmental Rights Revolution* (n. 4), 233-252.

²⁵ Boyd, 'Catalyst for Change' (n. 23), 26.

²⁶ *Ibid.*, 31.

²⁷ UN Doc. A/73/188 (n. 16); Boyd, 'Catalyst for Change' (n. 23), 30; Boyd, *The Environmental Rights Revolution* (n. 4), 233-252.

issues, but many feel that existing formal processes for doing so are inaccessible and ineffective. It is desirable that states channel this dissent into engagement in constructive political and civil processes to promote a healthy environment. As an example, in October 2021, the EU agreed procedural changes to the implementation of the Aarhus Convention in Europe to strengthen the right of members of the public to request the review of administrative acts of EU institutions and bodies and so improve their access to information and justice, as well as their participation in decision-making processes under that Convention.²⁸

An important documented effect of recognition of a legally binding right to a healthy environment is a substantial increase in public involvement in environmental governance.²⁹ This is attributable to the procedural aspects of the right. In PACE's proposed draft for an additional Protocol to the ECHR (see a summary in Appendix 1 below), procedural guarantees include access to information, participation in decision-making through consultation processes and access to justice. Recognition of the proposed right would ensure increased civic participation in environmental decision-making across Europe, helping to redress widespread grievances.

e. Filling a constitutional gap and amplifying existing environmental rights

13 of the 46 Council of Europe Member States, including the UK, have no existing constitutional or legislative right to a healthy environment. A new ECHR right, and in particular a right incorporated into the proposed modern Bill of Rights, would fill that gap. In those states where some form of right to a healthy environment is already recognised domestically, a new ECHR right would amplify the effects of that right by linking it to the activities of well-established human rights institutions, public authorities and legislative bodies, and by incorporating it into the enforcement infrastructure of the ECHR.

In the 13 Council of Europe Member States that lack any constitutional or legislative right to a healthy environment, the benefits of recognition of a new ECHR right set out in this briefing paper are particularly relevant.³⁰ However, even in those states that already recognise some form of right to a healthy environment via their constitution or national legislation, a new right would amplify the beneficial effects of domestically recognised forms of the right.³¹ This is the case for two reasons.

First, it would link the right to a healthy environment to the activities of well-established human rights institutions, public authorities and legislative bodies, including (though not limited to):

- the international institutions that make up the Council of Europe (e.g. PACE, the Committee of Ministers, the Commissioner for Human Rights, etc.);
- public bodies (of both central and local government) that may not currently identify the impact of their activities on the environment;

²⁸ Regulation (EU) 2021/1767 of the European Parliament and of the Council of 6 October 2021 amending Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, PE/63/2021/REV/1, available at <<https://eur-lex.europa.eu/eli/reg/2021/1767/oj>>.

²⁹ UN Doc. A/73/188 (n. 16), para. 42.

³⁰ Those 13 states are: Austria, Cyprus, Denmark, Germany, Ireland, Liechtenstein, Luxembourg, Malta, Monaco, San Marino, Sweden, Switzerland and the UK. For a list of states around the world with and without constitutional or legislative rights to a healthy environment, see Boyd, 'Catalyst for Change' (n. 23), 19-23.

³¹ Rodríguez-Garavito (n. 13), 165.

- National Human Rights Institutions (i.e. in the UK the Equality and Human Rights Commission); and
- groups and bodies within national legislatures (e.g. in the UK the Joint Committee on Human Rights, the Environmental Audit Committee, the APPG on Climate Change).

Second, a new ECHR right to a healthy environment would ensure that the right is effectively enforced across Europe. While constitutional and national legislative forms of the right to a healthy environment have achieved substantial environmental benefits in many states, problems around enforceability are common. In many jurisdictions, the constitutional right to a healthy environment is non-justiciable. Even where it is justiciable, it is common for judges to prefer to enforce environmental protections either by reference to general principles of administrative or planning law, or peripherally via non-environmental constitutional rights.³² Incorporating the right to a healthy environment into the ECHR would bring that right within the enforcement infrastructure of the ECHR framework, which includes national courts giving effect to the Convention and the ECtHR serving as a final court of reference.

f. A level playing field

A new ECHR right to a healthy environment would ensure a level playing field across the Council of Europe Member States. While the UK generally leads the way in adopting robust environmental protection standards, its efforts may be undercut by states which take a more retrograde approach, achieving an economic advantage and eroding global efforts in responding to the climate crisis and environmental degradation more generally. A new ECHR right would set a pan-European baseline, with the effect that environmental laws could not be weakened in any Council of Europe Member States where that would infringe on individuals' rights to a safe, clean, healthy and sustainable environment.

The benefits of a level playing field in a human rights context have been examined extensively in relation to human rights obligations imposed on businesses.³³ As regards a pan-European right to a healthy environment, recognition of the right would prevent European states from undercutting environmental protection standards in other European states. This would alleviate the risk of businesses seeking to establish commercial activities wherever environmental standards were most lax, since states across Europe would have to meet a shared minimum threshold (i.e. all Council of Europe Member States' environmental protection standards would have to be sufficiently robust such that they would not infringe on the rights of individuals to a healthy environment).

g. Jurisprudential impact

A new ECHR right to a healthy environment would bring greater coherence and clarity to the existing body of environmental human rights case law in the UK and in the ECtHR.³⁴ Presently, environmental human rights claims proceed on the basis of violations of non-environmental rights such as the right to respect for private and family life, creating a degree of uncertainty in the extent of public authorities' environmental human rights obligations. Recognising an

³² Erin Daly and James R. May, 'Learning from Constitutional Environmental Rights' in John H. Knox and Ramin Pejan (eds.), *The Human Right to a Healthy Environment* (Cambridge University Press, 2018), 54-57.

³³ United Nations High Commissioner for Human Rights, 'Joint Statement by UN human rights experts – UN human rights experts urge States to create a global level playing field for responsible business conduct' (19 October 2021), available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=27672&LangID=E>.

³⁴ John H. Knox and Ramin Pejan, 'Introduction' in John H. Knox and Ramin Pejan (eds.), *The Human Right to a Healthy Environment* (Cambridge University Press, 2018), 5.

ECtHR right to a healthy environment would consolidate public authorities' environmental human rights obligations, promoting legal certainty, the effective implementation of Convention rights and effective public administration.

The ECtHR has developed an important and wide-ranging body of environmental human rights jurisprudence.³⁵ However, the Court's environmental case law is divided in its focus across a number of different ECHR rights. A new ECHR right to a healthy environment would bring greater coherence and clarity to the existing body of environmental human rights law. This is particularly the case since PACE's suggested text for a new Protocol to the ECHR so clearly outlines the content of the proposed right: the text defines the right to a healthy environment in precise terms; it outlines both the substantive and procedural aspects of the right; and it provides general principles that would serve as interpretative guidance to the content of the right.³⁶ The greater legal certainty this would provide would benefit both individuals seeking redress and public authorities seeking to comply with their human rights obligations.

Equally importantly, a new ECHR right to a healthy environment could serve as a cornerstone for jurisprudential development on important current and emerging environmental issues. However, while recognition of a new right to a healthy environment would constitute an adjustment of the existing European human rights framework, it would not result in a substantial departure from previous jurisprudential norms; existing procedural hurdles to all claims would remain intact.

A more detailed legal analysis of the jurisprudential impact of a new right to a healthy environment is provided in Appendix 2 of this briefing paper.

h. Impact on environmental performance

Each of the above factors would lead to improved overall environmental performance across Europe.

The experience of states that have recognised a constitutional or national legislative right to a healthy environment is illustrative. A study conducted by David R. Boyd, the current UN Special Rapporteur on human rights and the environment, found that, by comparison to states that have no right to a healthy environment in their constitutions, those states that have such constitutional provisions:³⁷

- have smaller ecological footprints;
- rank higher on comprehensive indices of environmental performance indicators; and
- have made faster progress in reducing emissions of sulphur dioxide, nitrogen oxides and greenhouse gases.

Beyond the obvious benefits of improved environmental performance, it should be noted that there are significant financial costs arising from a failure to ensure respect for the right to a healthy environment. For example, in 71% of UK towns and cities, children are breathing

³⁵ For a summary of the leading ECtHR environmental human rights cases, see Registry of the European Court of Human Rights, 'Guide to the case-law of the European Court of Human Rights: Environment' (31 August 2021), available at https://www.echr.coe.int/Documents/Guide_Environment_ENG.pdf.

³⁶ PACE, Recommendation 2211 (2021) (n. 2).

³⁷ Boyd, *The Environmental Rights Revolution* (n. 4), 253-277.

unsafe levels of air pollution.³⁸ A Public Health England report published in 2018 estimated that the total cost to the NHS and social care of air pollution between 2017 and 2025 would be between £1.6 billion and £5.56 billion.³⁹ By contributing to improved environmental performance, recognition of a new right to a healthy environment will bring significant benefits to public health and the costs associated with it.

³⁸ UNICEF UK, 'A Breath of Toxic Air: How Unsafe Levels of Air Pollution Puts UK Children in Danger' (2018), available at <<https://www.unicef.org.uk/publications/child-health-breath-of-toxic-air/>>, 2.

³⁹ Public Health England, 'Estimation of costs to the NHS and social care due to the health impacts of air pollution: summary report' (2018), available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/708855/Estimation_of_costs_to_the_NHS_and_social_care_due_to_the_health_impacts_of_air_pollution_-_summary_report.pdf>, 6.

SECTION 3

Responding to arguments opposing recognition of a new ECHR right to a healthy environment

PACE's current proposal for a new ECHR right to a healthy environment is not the first time that the Assembly has called for recognition of the right. Similar proposals were put forward in 1999, 2003 and 2009.⁴⁰ However, on all three occasions the Committee of Ministers chose not to take the proposals forward. Various reasons have been given for rejecting proposals to recognise the right to a healthy environment. This section responds to the key arguments that have been advanced against recognition.

a. The right is too 'uncertain' and 'ambiguous'

An argument frequently put forward against recognition of the right to a healthy environment is that the right can only be defined in terms that are uncertain and ambiguous, leaving its enforcement a fruitless endeavour. Indeed, the Committee of Ministers' response to PACE's 1999 recommendation rejected the proposal for recognition of the right on the basis of "*legal and conceptual*" difficulties.⁴¹

The criticism of ambiguity is unwarranted with regard to PACE's currently proposed Protocol, since the proposal includes draft text that: defines the right to a healthy environment in clear terms; outlines both the substantive and procedural aspects of the right; and provides general principles that would serve as interpretative guidance to the content of the right.⁴² A more detailed summary of PACE's proposal is set out in Appendix 1 of this briefing paper.

In any case, the expression of particular human rights in broad terms is an important feature of the international human rights regime, underpinned by an assumption that human rights institutions will take responsibility for developing understandings of the content of each right.⁴³ This approach enables the progressive development of human rights in line with changes in society. Judges at both the international and national levels have proved more than capable of extrapolating the content of broadly defined rights.⁴⁴ This has been the case with respect to civil, political, economic, social and cultural rights. It also holds true for the right to a healthy environment itself. For example, in 2001 in a case concerning the impact of oil operations in the Niger Delta, the African Commission on Human and Peoples' Rights was called upon to

⁴⁰ PACE, 'Future Action to be Taken by the Council of Europe in the Field of Environment Protection', Recommendation 1431 (1999), available at <<https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16731&lang=en>>; PACE, 'Environment and Human Rights', Recommendation 1614 (2003), available at <<https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17131&lang=en>>; PACE, 'Drafting an Additional Protocol to the European Convention on Human Rights Concerning the Right to a Healthy Environment', Recommendation 1885 (2009), available at <<https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17777&lang=en>>.

⁴¹ Committee of Ministers, 'Reply to Recommendation 1431 (1999)', Document 8892 (2000), available at <<https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=91111&lang=EN>>.

⁴² PACE, Recommendation 2211 (2021) (n. 2).

⁴³ Report of the Special Rapporteur on extreme poverty and human rights, United Nations General Assembly, UN Doc. A/HRC/32/31 (2016), para. 28.

⁴⁴ Sumudu Atapattu, 'The Right to a Healthy Environment and Climate Change: Mismatch or Harmony' in John H. Knox and Ramin Pejman (eds.), *The Human Right to a Healthy Environment* (Cambridge University Press, 2018), 265.

elaborate on the content of the right to a “*satisfactory environment*” contained in Article 24 of the African Charter on Human and Peoples’ Rights. They found as follows:⁴⁵

“The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources...”

Government compliance with the spirit of Articles 16 and 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.”

Clearly, the content of the right to a healthy environment need not be uncertain or ambiguous, even if that right is articulated in broad terms.

b. The right would be ‘redundant’ in the ECHR framework

Another common argument against recognition of the new right is that it would be redundant in the ECHR framework. This argument is advanced on the basis that the right is already recognised in a large number of Council of Europe Members States’ constitutions and that the ECtHR already has a wide body of environmental jurisprudence derived from various of the Convention’s existing rights.⁴⁶ This was the position taken by the Committee of Ministers in response to PACE’s 2003 and 2009 recommendations for a new environmental Protocol.⁴⁷

It is certainly true that the ECtHR has developed an important body of environmental jurisprudence. However, as detailed in Appendix 2 below, that jurisprudence could fairly be described as stalling,⁴⁸ and various aspects of the ECtHR’s case law leave it ill-suited to respond to modern environmental challenges.⁴⁹ A new ECHR right to a healthy environment in the form proposed by PACE would help the ECtHR and national courts applying the ECHR to respond more effectively to well-founded environmental human rights claims when they are brought before the courts.

⁴⁵ *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v. Nigeria*, Communication. No. 155/96 (2001), paras. 52-53. For a more detailed discussion of the Communication and other relevant international judicial decisions, and their implications for recognition of the right to a healthy environment, see *ibid*, 253-256.

⁴⁶ Günther Handl, ‘The Human Right to a Clean Environment and Rights of Nature: Between Advocacy and Reality’ in Andreas von Arnould (ed.) *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* (Cambridge University Press, 2020), 146-147.

⁴⁷ Committee of Ministers, ‘Reply to Recommendation 1614 (2003)’, Document 10041 (2004), available at <<https://pace.coe.int/en/files/17131>>, paras. 3-4; Committee of Ministers, ‘Reply to Recommendation 1885 (2009)’, Document 12298 (2010), available at <<https://pace.coe.int/en/files/17777>>, paras. 9-10.

⁴⁸ See discussion in Ole W. Pedersen, ‘The European Court of Human Rights and International Environmental Law’ in John H. Knox and Ramin Pejman (eds.), *The Human Right to a Healthy Environment* (Cambridge University Press, 2018).

⁴⁹ For discussion of the difficulties faced by the ECtHR in responding to cases relating to climate change, see Tim Eicke, ‘Climate Change and the Convention: Beyond Admissibility’ (2022) *European Convention on Human Rights Law Review*, 1 and Helen Keller and Abigail D. Pershing, ‘Climate Change in Court: Overcoming Procedural Hurdles in Transboundary Environmental Cases’ (2021) *European Convention on Human Rights Law Review*, 1.

In any case, the jurisprudential effect of an ECHR right to a healthy environment is only one of the benefits that the right would bring, as outlined in Section 2 above. Those other benefits include the symbolic significance, the public policy impact, the legislative impact, increased civic participation, constitutional gap-filling, the amplification of existing environmental rights, the creation of a pan-European baseline for environmental protection standards and the consequential beneficial impact on environmental performance.

c. Recognition of the right would ‘devalue’ other human rights

A further argument put forward against recognition of the right to a healthy environment is that it would devalue those rights currently protected under the ECHR framework. The suggestion is that the human rights regime will be undermined if it becomes too expansive.

In fact, the inverse is true. Human rights frameworks must be able to respond to environmental harm and, in particular, one of the greatest potential threats to human rights today: climate change. If individuals cannot claim violation of their human rights when the action and/or inaction of states leaves them vulnerable to humanity’s greatest existential threat, that will truly undermine the human rights regime. As recently stated by the United Nations High Commissioner for Human Rights when discussing the climate emergency, “[t]he world has never seen a threat to human rights of this scope.”⁵⁰ It is essential that the institutions that underpin the ECHR are given the tools to respond to that threat. An ECHR right to a healthy environment would be one such tool.

Moreover, as recently recognised by the UN Human Rights Council in its 8 October 2021 resolution, “*environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy human rights, including the right to life*”.⁵¹ Rather than devaluing existing rights, recognition of an ECHR right to a healthy environment would serve to bolster those rights that are already protected under the Convention.⁵²

d. Recognition of the right would draw judges into areas best left to the political sphere

Another argument raised against recognition of the right to a healthy environment is that it would draw judges into questions of policy that are better left to the political sphere. It is argued that the right raises issues of cross-sectoral resource allocation that belong in the hands of policymakers and not judges.⁵³

Recognition of the right to a healthy environment does not necessarily entail judicial control of resource allocation. Indeed, past judicial restraint when determining environmental questions brought before the ECtHR and national courts in the UK suggests that questions of resource allocation will remain firmly in the hands of policymakers. With regard to environmental litigation, the intention underlying recognition of the right to a healthy environment is not to usurp the role of policymakers, but rather to create a backstop to ensure continued action in Europe to respond to environmental degradation and to provide redress to victims where states’ environmental failures result in harm to individuals.

⁵⁰ Michelle Bachelet, ‘Opening Statement at the 42nd Session of the Human Rights Council: Opening Statement by UN High Commissioner for Human Rights Michelle Bachelet’ (9 September 2019), available at <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24956>>.

⁵¹ UN Doc. A/HRC/RES/48/13 (n. 3).

⁵² Atapattu (n. 44), 265.

⁵³ Handl (n. 46), 145-146.

Moreover, a focus solely on the impact on litigation fails to consider the important benefits of recognition of the right to a healthy environment that arise outside of the courtroom. As set out in Section 2 above, those benefits include the symbolic significance, the public policy impact, the legislative impact, increased civic participation, constitutional gap-filling, the amplification of existing environmental rights, the creation of a pan-European baseline for environmental protection standards and the consequential beneficial impact on environmental performance.

e. The right would serve as a poor basis for regulating environmental harm

A final argument often put forward against recognition of the right to a healthy environment is that human rights frameworks are ill-suited to responding to environmental harm. In the context of climate change, it has been argued that the focus should be on regulating corporate actors, not protecting the rights of individuals.⁵⁴

Undoubtedly, the ECHR (and indeed the international human rights regime more broadly) is insufficient on its own to regulate the diverse environmental problems facing the planet today. Yet it is widely accepted that environmental degradation and the climate crisis have enormously detrimental impacts on human rights globally.⁵⁵ It is for this reason that the UN Human Rights Council recently adopted a resolution recognising for the first time that having a clean, healthy and sustainable environment is a human right and calling on UN Member States to cooperate to implement this right.⁵⁶ A human rights approach is no panacea, but it is an important piece of the puzzle.

With regard to the climate crisis, no single strategy can prevail. It is a question of mobilizing all possible resources in the very short timeframe left to take the necessary action.⁵⁷ Recognition of the right to a healthy environment would ensure that the ECHR framework is one such resource.

Beyond the European human rights framework, recognition of the right to a healthy environment will help to normalise international accountability for environmental harm. Recognition of the right need not come at the expense of other forms of accountability. In fact, the development of this form of binding international accountability may serve to support the realisation of other forms, targeting a broader array of actors.

⁵⁴ Fanny Thornton, 'The Absurdity of Relying on Human Rights Law to Go After Emitters' in Benoit Mayer and Alexander Zahar (eds.), *Debating Climate Law* (Cambridge University Press, 2021), 159 – 169.

⁵⁵ UN Doc. A/73/188 (n. 16).

⁵⁶ UN Doc. A/HRC/RES/48/13 (n. 3).

⁵⁷ César Rodríguez-Garavito, 'The eight-year decade that will determine the fate of the planet and human rights' (*Open Global Rights*, 9 December 2021), available at <<https://www.openglobalrights.org/the-eight-year-decade-that-will-determine-the-fate-of-the-planet-and-human-rights/>>.

SECTION 4

Recommendations to the UK Government

The enormously detrimental effect of environmental degradation on human rights is undeniable. The urgency of PACE's proposal is clear. The UK Government should act immediately to voice its support on the international stage for a new ECHR right to a healthy environment. Pending the establishment of the new ECHR right, there are steps that the UK Government can take now in order to realise some of the benefits of the new right.

The Environmental Rights Recognition Project proposes the following recommendations to the UK Government.

Recommendation 1 – The Government should support PACE's proposal for a new Protocol to the ECHR recognising the right to a healthy environment.

The UK Government should publicly announce their support for PACE's proposal for a new ECHR right to a healthy environment. At the upcoming May 2022 Session of the Committee of Ministers, the UK Secretary of State for Foreign, Commonwealth and Development Affairs should vote in favour of the establishment of the new right.

Recommendation 2 – The Government should engage with other Council of Europe Member State governments and encourage them to support PACE's proposal.

In the build-up to, and during, the upcoming May 2022 Session of the Committee of Ministers, the UK Government should engage with other Council of Europe Member State governments and persuade them of the benefits of PACE's proposed ECHR right to a healthy environment, with the aim of securing their support for a new Protocol to the ECHR.

Recommendation 3 – Pending formal recognition of a new ECHR right, the Government should include the right to a healthy environment in its upcoming modern Bill of Rights, alongside any other proposed reforms to the UK's domestic human rights framework.

The Government is currently considering reforms to the UK's domestic human rights framework and has proposed a modern Bill of Rights. Independently of PACE's proposal, this presents an opportunity for the UK to modernise its approach to human rights by including recognition of a statutory right to a healthy environment alongside any other reforms.

Recommendation 4 – In order to effectively implement the right to a healthy environment in the UK, the Government should consider establishing a national task force with two purposes:

- (i) to assess Government policy on an ongoing basis in order to ensure that it complies with the right to a healthy environment; and**
- (ii) to provide a forum for greater civic participation in national environmental governance.**

The national taskforce could assess compliance with the right to a healthy environment by reference to the right as established in upcoming human rights legislation. Equally, the taskforce could have reference to the UN Human Rights Council resolution dated 8 October 2021, which formally recognised "*the right to a clean, healthy and sustainable environment as*

a human right that is important for the enjoyment of human rights".⁵⁸ As a member of the Human Rights Council, the UK Government supported that resolution.⁵⁹

The national taskforce could be established within an existing governmental department, or alternatively as an independent body of experts.

Recommendation 5 – The Government should propose that Parliament establish a select committee, or else expand the remit of an existing committee, to scrutinise every Bill to ensure that legislation is compatible with the right to a healthy environment.

Under the UK's existing domestic human rights framework, the work of the Joint Committee on Human Rights currently includes "*scrutinising every Government Bill for its compatibility with human rights*", as well as "*consideration of whether the Bill presents an opportunity to enhance human rights in the UK*".

The UK Government should propose to Parliament either that a new parliamentary committee be established, or that the remit of an existing committee such as the Environmental Audit Committee be expanded, to scrutinise legislation in order to ensure that it is compatible with the right to a healthy environment.

⁵⁸ UN Doc. A/HRC/RES/48/13 (n. 3).

⁵⁹ Foreign, Commonwealth & Development Office, 'UN Human Rights Council 48: Explanation of Vote on the Right to a Safe, Clean, Healthy and Sustainable Environment' (8 October 2021), available at <<https://www.gov.uk/government/speeches/un-human-rights-council-48-explanation-of-vote-on-the-right-to-a-safe-clean-healthy-and-sustainable-environment>>.

APPENDIX 1

Appendix 1 – PACE’s proposed additional Protocol to the ECHR

PACE’s September 2021 resolution proposing an additional Protocol to the ECHR recognising the right to a healthy environment is accompanied by a recommendation that confirms the proposal is motivated by concern at *“the speed and extent of environmental degradation, the loss of biodiversity and the climate crisis that directly affect human health, dignity and life.”*⁶⁰

PACE makes the case that harmful environmental impacts collectively:⁶¹

“...constitute a compelling case for consolidating and updating the Council of Europe’s legal arsenal, and linking national action with the commitments made under the relevant international treaties, such as the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement.”

The recommendation includes proposed text for the new Protocol. Setting out the substantive content of the right, the text provides as follows:⁶²

“Article 5 – Right to a safe, clean, healthy and sustainable environment

Everyone has the right to a safe, clean, healthy and sustainable environment.

Article 6 – Procedural rights

- a. Everyone is entitled to access information relating to the environment held by public authorities, without having to prove an interest.*
- b. If a project, programme or policy has an impact on the environment and biodiversity, everyone shall be entitled to be consulted in advance in order to be heard by the decision-making bodies regarding the authorisation and development of that project, programme or policy.*
- c. Everyone has the right of access to justice in matters relating to the environment.*
- d. Everyone whose rights as set forth in this Protocol are violated shall have an effective remedy.”*

PACE’s proposed text provides a definition of *“the right to a safe, clean, healthy and sustainable environment”* as *“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.”*⁶³

The text also includes proposed *“General principles”* that would serve as interpretative guidance to the substantive right. Those include the *“principle of transgenerational responsibility, equity and solidarity”*, the *“principle of environmental non-discrimination”* and *“the principles of prevention, precaution, non-regression and in dubio pro natura”*.⁶⁴

⁶⁰ PACE, Recommendation 2211 (2021) (n. 2), para. 1.

⁶¹ Ibid, para. 2.

⁶² Ibid, Appendix, Articles 5 and 6.

⁶³ Ibid, Article 1.

⁶⁴ Ibid, Articles 2, 3 and 4.

APPENDIX 2

Legal analysis of the jurisprudential impact of a new ECHR right to a healthy environment

Recognition of an ECHR right to a healthy environment would provide a clearer basis for individuals to bring environmental human rights claims. It could also pave the way for a more forward-looking approach to environmental harm, enabling courts to depart from the principally reactive approach taken in the past. A new right could also enable the ECtHR's conception of individual victimhood to evolve in response to the changing nature of environmental harm, moving away from a focus on localised harm.

However, the procedural hurdles of jurisdiction and exhaustion of domestic remedies would remain untouched by recognition of a new right to a healthy environment. It should also not be expected that the ECtHR's general aversion to actions brought on behalf of larger sections of the community, as opposed to by individuals, would change.

a. A clearer basis for environmental claims

In the absence of a justiciable right to a healthy environment, one of the principal difficulties faced by applicants bringing environmental ECHR claims is proving that a particular non-environmental right has been violated.

Cases addressing environmental harm under the ECHR typically proceed on the basis of an alleged violation of the right to life and/or the right to respect for private and family life,⁶⁵ though other ECHR rights have also been invoked in environmental claims.⁶⁶ As a result, claims rely on expansive interpretations of existing rights and often turn on complex questions of medical evidence, as applicants seek to demonstrate the causal link between a particular form of environmental degradation and a health condition. As a consequence, environmental human rights litigation is often more expensive than it might otherwise be, both for individuals bringing claims and for governments defending them.

Recognition of the right to a healthy environment under the ECHR would open a more direct avenue for victims of environmental degradation to seek redress, without having to demonstrate that some other right had been violated. Equally, the inclusion of the procedural environmental rights in PACE's proposed text for the new Protocol – rights relating to access to information, consultation on environmental policies, access to justice and effective remedies – would clarify some of the procedural bases on which environmental human rights claims could be brought.

b. A forward-looking approach

The jurisprudence of both the ECtHR and national courts applying the ECHR is overwhelmingly reactive, focusing on determining responsibility for past violations, leaving the framework ill-suited to mitigation-focused environmental litigation. This significantly limits the

⁶⁵ ECHR Article 2 (right to life) and Article 8 (right to respect for private and family life and home).

⁶⁶ ECHR Article 3 (prohibition of inhuman or degrading treatment), Article 5 (right to liberty and security), Article 6 (right to a fair trial), Article 10 (freedom of expression and freedom to receive and impart information), Article 11 (freedom of assembly and association), Article 13 (right to an effective remedy), and Article 1 of Protocol Number 1 (protection of property).

scope for cases to be brought before courts which might prevent environmental harm from occurring in the first place.

The ECtHR case of *Tătar v. Romania* suggested that the Court was interested in taking a more forward-looking approach to environmental issues.⁶⁷ In that case, the ECtHR found a breach of the right to respect for private and family life (Article 8) by relying on the “*precautionary principle*”, which holds that states may be under a positive obligation to take preventative measures to counter a risk of environmental harm, even if the materialisation of that risk is uncertain. However, following *Tătar v. Romania*, the ECtHR notably refused to interpret Articles 2 and 8 in light of the precautionary principle in the case of *Hardy and Maile v. United Kingdom*, despite the applicants inviting it to do so.⁶⁸ Since then, the further development of the precautionary principle in the ECtHR’s environmental jurisprudence appears to have stalled.⁶⁹ At the domestic level, in a recent case before the High Court of England and Wales, a “*generalised future risk of harm*” was insufficient to allow the Claimants to be treated as “*victims*” with the right to bring a claim for violation of the right to life (though that was just one of several barriers to the claim’s success).⁷⁰

By contrast, in 2019 the Dutch Supreme Court felt compelled to find violations of both Articles 2 and 8 on the basis that the Dutch government’s policy to reduce greenhouse gas emissions in the Netherlands was insufficiently ambitious, giving rise to “*the risk that the lives and welfare of Dutch residents could be seriously jeopardised*.”⁷¹ In reaching its verdict, the Dutch Supreme Court relied on the precautionary principle.

Inconsistent approaches by national judiciaries to the same set of rights is highly undesirable. It breeds legal uncertainty and undermines the unity of the European human rights framework. However, in the absence of a justiciable ECHR right to a healthy environment, we should not be surprised if judges feel compelled to develop their legal reasoning to respond to the enormous human rights impact of climate change as the crisis deepens.

Recognition of a new ECHR right to a healthy environment could give the ECtHR, as well as national courts applying the ECHR, an appropriate tool to respond to current and emerging environmental human rights issues. In particular, the new right could provide the impetus for a renewed focus on the precautionary principle in environmental cases. In this regard, it is notable that PACE’s proposed text for a new Protocol to the ECHR defines the right to a healthy environment as 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*.”⁷² The proposed text also includes “*General principles*” that would serve as interpretative guidance to the substantive right. Those include the “*principle of transgenerational responsibility, equity and solidarity*” and “*the principles of prevention [and] precaution*”.⁷³ The proposed framing of the new ECHR right clearly envisages courts taking a more forward-looking approach to environmental rights issues in the future.

⁶⁷ *Tătar v. Romania*, No. 67021/01 (2009).

⁶⁸ *Hardy and Maile v. United Kingdom*, No. 31965/07 (2012).

⁶⁹ *Hatton and Others v. United Kingdom*, No. 36022/97, ECHR 2003-VIII; *Hardy and Maile v. United Kingdom*, No. 31965/07 (2012). For a detailed analysis of the ECtHR’s regressive turn away from the precautionary principle, see Pedersen (n. 48).

⁷⁰ *R. (on the application of Plan B Earth) v Prime Minister* [2021] EWHC 3469 (Admin), [78].

⁷¹ HR 20 December 2019, 41 NJ 2020, m.nt. J.S. (Urgenda/Netherlands) (Neth.) at para. 5.6.2.

⁷² PACE, Recommendation 2211 (2021) (n. 2), Appendix, Article 1.

⁷³ *Ibid*, Articles 2 and 4.

c. A less localised conception of harm

Under the ECtHR's environmental jurisprudence, it is incumbent upon an applicant to demonstrate a serious, specific and imminent danger affecting them *personally* in order to prove a rights violation. It is not enough to show a general danger that affects the entire population; *acciones populares* are not permitted.⁷⁴ Consequently, actionable environmental harm is ordinarily understood by the ECtHR as being limited to small geographical areas. Cases found to be admissible by the ECtHR generally concern individuals affected by a localised disaster,⁷⁵ or else some sort of direct exposure to a local source of pollution.⁷⁶

Recognition of a new ECHR right to a healthy environment could serve as a basis for the ECtHR and national courts applying the ECHR to take a more expansive approach on the question of individual victimhood in the context of environmental harm, perhaps moving away from a focus on victims needing to be affected by immediate, localised sources of harm.

However, it is highly unlikely that a new right to a healthy environment would transform the approach to victimhood altogether. The ECtHR and national courts would very likely still require an individual to be impacted personally in some way, so that they are not bringing an *actio popularis* (i.e. so that they are not effectively acting as a representative of the state's entire population).

d. Consistency in the approach to states' jurisdiction

States' jurisdiction under the ECHR is defined narrowly, primarily by reference to their territory. A state's jurisdiction extends beyond the bounds of its geographical territory only where that state either: exercises effective control over a particular area outside its territory; or exercises control through its agents over an individual.⁷⁷ PACE's proposed text for the new Protocol includes nothing to suggest an expansion of states' jurisdiction.

e. Consistency in the requirement of exhaustion of domestic remedies

Under Article 35 ECHR, the ECtHR will only consider a claim after all domestic remedies have been exhausted. This means that ECHR applicants must first attempt to resolve their claim in domestic courts before bringing it before the ECtHR, though the ECtHR adopts a degree of flexibility in exceptional circumstances where necessary in the interests of justice. Nothing in PACE's proposed text for the new Protocol indicates an intention to alter the approach to the exhaustion of domestic remedies.

⁷⁴ *Balmer Schafroth and Others v. Switzerland*, 26 August 1997, *Reports* 1997–IV, para. 40; see also *Fadeyeva v. Russia*, No. 55723/00, ECHR 2005 IV, para. 69. At the domestic level in the UK, see: *Plan B Earth and Others v Secretary of State for Transport* [2019] EWHC 1070 (Admin); *R. (on the application of Plan B Earth) v Prime Minister* [2021] EWHC 3469 (Admin); *R. (on the application of Richards) v Environmental Agency* [2021] EWHC 2501 (Admin); and *Marcic v Thames Water Ltd* [2001] 3 All ER 698.

⁷⁵ See for example *Boudayeva and Others v. Russia*, Nos. 15339/02 and 4 others, ECHR 2008 and *Öneryildiz v. Turkey*, No. 48939/99, 30 November 2004.

⁷⁶ See for example *Cordella and Others v. Italy*, Nos. 54414/13 and 54264/15, 24 January 2019, *Fadeyeva v. Russia*, No. 55723/00, ECHR 2005-IV, *Taşkın and Others v. Turkey*, No. 46117/99, ECHR 2004-X, *López Ostra v. Spain*, 9 December 1994, Series A no. 303-C.

⁷⁷ *Al-Skeini and Others v the United Kingdom* [GC], No. 55721/07, ECHR 2011; *Al-Jedda v the United Kingdom* [GC], No. 27021/08, ECHR 2011.