

Prof. Helen KELLER

Former Judge at the European Court of Human Rights, Chair for Public Law and European and Public International Law, University of Zürich / *Ancienne juge à la Cour européenne des droits de l'homme, Chaire de droit public et droit international européen et public, Université de Zürich*

How to Fill Gaps in the Protection of Human Rights and the Environment

Overview

A new environmental right would be very desirable.

In my presentation I will focus on three issues. First, I will argue that the wording of an environmental right has potential to add to the material scope of protection in different ways. Second, I will argue that there is a need to rethink evidentiary rules in light of the complexity underlying environmental harms. Finally, I will argue that there exists a need for providing for NGO standing in environmental matters.

1. A new environmental right in the Additional Protocol

A. *Status quo*

Drafted in 1950 the ECHR makes no provision for a substantive environmental right. The first cases regarding environmental degradation were regarded as inadmissible. Subsequently, despite the support expressed by some ECtHR judges for a more extensive interpretation of Convention rights in favour of the environment,¹ the Court has persistently reiterated that such right cannot be derived from the existing Convention rights. For example, in *Kyrtatos v. Greece* the Court held that 'neither Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such.'²

B. *Constraints of the current framework*

At the same time, the Court has given effect to environmental protection indirectly through its interpretation of the protections accorded to other rights. Environmental integrity is seen as a criterion to measure the negative impact on a given individual's life, property, private and family life.³ This approach has its limits.

The scope of environmental protection is limited. If the case is considered under Article 8, the severity threshold restricts the applicability of this provision. For example, in *Ivan Atanasov v. Bulgaria* the Court established that the entire community was threatened by environmental degradation. The Court, however, held Article 8 to be inapplicable, because the applicant could not demonstrate that the degree of disturbance in and around his home had been such as to considerably affect the quality of his private or family life.⁴

¹ For example, in *Kyrtatos v. Greece* (no. [41666/98](#), 22 May 2003), Judge Zagrebelsky, in his Partly Dissenting Opinion, noted that 'the importance of the quality of the environment and the growing awareness of that issue are factors that should induce the Court to recognise the growing importance of environmental deterioration on people's lives.' Furthermore, in *Hatton v. UK* (no. 36022/97, 8 July 2003) a minority of judges appended a joint dissenting opinion, where they argued that the evolutive interpretation of the ECHR leads to the construction of an environmental human right on the basis of Article 8.

² *Kyrtatos v. Greece*, no. 41666/98, § 52, 22 May 2003.

³ F. Francioni, 'International Human Rights in an Environmental Horizon', *The European Journal of International Law* (2010), p. 50.

⁴ *Ivan Atanasov v. Bulgaria*, no. 12853/03, §§ 76-79, 2 December 2010.

The Court ascribes the environmental protection with less value in comparison with any public interest (for example, economic well-being of the country) when balancing exercise is conducted. Such an approach is exemplified in *Greenpeace V.E. v. Germany* and allows the Court to defer to a great degree the question of curbing pollution to the national authorities and not to engage with an in-depth analysis of such matters.⁵

The Court's power to order meaningful environmental remedies is limited. Having found a violation of individual applicant's rights in the context of a particular environmental matter, the Court usually orders individual *restitutio in integrum* measures in respect of the injured human being and need of redressing harm to the environment remains outside the Court's aim. In cases related to environmental issues the Court has almost always refused to order consequential measures.⁶ For instance, in *Cordella* the Court dismissed the applicant's request to apply the pilot judgment procedure, due to the technical complexity of the measure required.⁷ The enactment of a new right is capable of prompting the necessary change in the Court's approach to meaningful environmental remedies.

C. The added value of a new right

What added value would the new environmental right have? This depends on the wording. The following approaches are possible as to the wording of a new Protocol right:

1. a right to a 'healthy environment;'
2. a right to a 'safe, clean, healthy and sustainable environment;'
3. a right to a 'decent' or 'ecologically viable environment.'

I believe that all of these recommendations have potential to add to the material scope of protection in different ways. Depending on the wording used in the Additional Protocol, the explanatory report to the Protocol would have to clarify the understanding of the new right.

First, if the new Protocol provides for a 'right to a healthy environment,' multiple interpretations could be possible owing to the ambiguity inherent in the adjective 'healthy':

- On the one hand, 'healthy' could be understood as relating to the health and integrity of human beings. Such an interpretation could lead us to the conclusion that the protected environmental consideration relates not merely to human health and integrity at the individual level, but more broadly to the health and integrity of humans as a collective.
- On the other hand, it could be understood as relating to the health of the environment itself. Whereas, if the latter understanding were adopted, it would include concerns of environmental degradation (including nature and species conservation) which are not linked with human health, integrity, or other values protected by existing human rights. Should the purpose of the new Protocol right be to perform this function (*i.e.* enlarge the scope of environmental protection offered by human rights), then it would be prudent to use a more detailed formulation than "right to a healthy environment" that clarifies its eco-centric bent.

Second, as for the right to 'a safe, clean, healthy and sustainable environment.' Its rationale corresponds to the language used in the UN.⁸ The bundling of the adjectives 'safe,' 'clean,' 'healthy' and 'sustainable' in one provision helps indicate that each term has a different meaning and thus concerns a different aspect of environmental protection. Moreover, the use of the term 'sustainable'

⁵ *Greenpeace E.V. and Others v. Germany* (dec.), no. 18215/06, 12 May 2009.

⁶ H. Keller, C. Heri and R. Piskóty, 'Something Ventured, Nothing Gained? – Remedies before the ECtHR and Their Potential for Climate Change Case', *Human Rights Law Review* (2022), p. 17-18.

⁷ *Cordella et Autres c. Italie*, nos. 54414/13 et 54262/15, §§ 180-182, 24 janvier 2019.

⁸ The human right to a clean, healthy and sustainable environment: resolution / adopted by the Human Rights Council, UN doc A/HRC/RES/48/13 (8 October 2021); The human right to a clean, healthy and sustainable environment: resolution / adopted by the General Assembly, UN doc A/RES/76/300 (28 July 2022).

can add a temporal dimension to the right, possibly covering future environmental harms and protection of future generations' interests.

Finally, a right to an 'ecologically viable environment' calls for environmental protection in a manner that prizes the survival of ecological components as worthy even if their beneficial effect on human interests is not forthcoming. However, this approach would mean a radical shift in the understanding of the Convention and is likely to pose difficulties for the Court. As a result the former options would be – at least in my view – preferable.

2. Administration of evidence in environmental cases

I turn to the second issue: the rules on administration of evidence. I argue that there is a need to rethink evidentiary rules in light of the complexity underlying environmental harms. Moreover, in environmental matters, it is usually powerful corporations who are parties to the proceedings on the national level and whose actions cause environmental harm. *Steel and Morris v. UK*⁹ is an example of a case, where the Court acknowledged the unacceptable inequality of arms between two environmental activists and the fast-food giant McDonald's. In particular, the denial of legal aid to the applicants deprived them of the opportunity to present their case effectively before the national court.

A. Components of Proof and evidentiary questions

'Proof' in environmental cases have at their core the following components:

- Proof of the risk/existence of environmental harm of a sufficiently serious level;
- Proof of a causal link between the respondent State's acts or omissions, and the environmental harm in question;
- Proof of a causal relation between the environmental harm and on the applicants' enjoyment of human rights.
The questions relating to evidence that arise in connection with these proofs are:
 - What are 'environmental harms' that merit consideration in the implementation of Convention rights?

• Who bears the burden of proving these components and what is the standard of proof? Two types of environmental harm, actual and potential, should fall within the scope of future environmental applications. Not any environmental harm should be actionable under the new Additional Protocol, but it should exceed certain threshold of significance.¹⁰

⁹ They were part of a grassroots anti-McDonald's campaign in the mid-1980s. The campaign group printed and distributed a leaflet which accused the corporation of environmental destruction. The company started libel proceedings against Helen and David. They applied for legal aid, to cover their costs, but their application was refused because legal aid was not available for libel proceedings in the UK. At the time, Helen was a part-time bar worker and David was a single parent raising a young son. They could not afford to effectively represent themselves throughout the trial and at appeal, despite some public support. McDonald's, on the other hand, had a professional legal team. After a 313-day trial, a judge made an award for damages in favour of McDonald's. An appeal court found some of the leaflet's claims to be true and reduced the total damages (£40,000). The Court found that the UK's denial of legal aid to Helen and David in such complex proceedings meant that they could not present their case effectively before the UK courts. They had an unfair disadvantage, compared with McDonald's, which led to a violation of their rights. *Steel and Morris v. UK*, no. 68416/01, 15 February 2005.

¹⁰ For example, the ILC's 2001 Articles on the Prevention on Transboundary Harm clarify that harm is 'significant' if it is more than 'detectable', but it need not be 'serious' or 'substantial'; what is significant depends on the circumstances of each case, and may vary over time. It must lead to 'a real detrimental effect on matters, such as, for example, human health, industry, property or agriculture...', and 'such detrimental effects must be susceptible of being measured by factual and objective standards (International Law Commission, *Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries* (2001), comment (4) to Article 2).

B. Precautionary principle

In environmental cases, the precautionary principle should play a much more prominent role. The Court made specific reference to the precautionary principle in *Tătar v. Romania*. In this case the applicants could not prove a causal link between exposure to sodium cyanide and the son's asthma. The ECtHR found nonetheless that the national authorities had failed to assess the risks related to the company's activity and take the necessary measures. The Court applied the precautionary principle to derive the Romanian state's positive obligation to ensure that the continuation of industrial activity after the occurrence of an environmental accident would not pose a risk of serious harm to public health.¹¹ In sum, the *Tătar* case displays an acknowledgement of the application of precautionary principle, but only sporadically. In numerous subsequent cases arising from environmental degradation, the Court has not used the precautionary principle. If a new environmental right is enacted, the precautionary principle should play a much more prominent role in litigating environmental harm before the ECtHR.

Further on, the Court allowed flexibility as regards the burden and standard of proof in the environmental context. In particular, in *Fadeyeva v. Russia*, the Court held:

- that a 'rigorous application' of the principle that the person asserting a claim bears the burden of proof is 'impossible' when 'only the respondent Government has access to information capable of corroborating or refuting the applicant's allegations,'¹² and
- that 'it has been the Court's practice to allow flexibility [as to the standard of proof 'beyond reasonable doubt'], taking into consideration the nature of the substantive right at stake and any evidentiary difficulties involved.'¹³

In the case itself, the Court found that the applicant had produced no evidence that could prove specific causation between her illness and the pollution levels in the area where she resided. However, it found that specific causation was proven based on evidence concerning concentration of pollutants provided by the Government and medical evidence showing a causal relationship between the pollutants and public health (and certain types of illnesses). The Court found: 'the very strong combination of indirect evidence and presumptions makes it possible to conclude that the applicant's health deteriorated as a result of her prolonged exposure to the industrial emissions from the steel plant.'¹⁴ The Court's finding was based on a rebuttable presumption of facts. In other words, if there is some evidence of general causation between environmental harm and certain kinds of illnesses, and the applicant can prove that she suffers from similar illnesses, then specific causation between her illness and the environmental harm shall be presumed. The respondent Government may rebut this presumption by submitting evidence that there is no such specific causal link.

C. Clarity to rules on administration of evidence

The bottom-line of my discussion on this point is that the Additional Protocol must bring clarity to rules on administration of evidence in environmental cases, where difficulties are rife because of the complexity inherent in environmental problems.

This could be through (a) an articulation of principles concerning burden of proof in terms different from the principle of *onus probandi incumbit actori*, or (b) a reduction in the standard of proof expected of claimants where there is scientific uncertainty, but reasonable suspicion of serious or irreversible environmental harm, or (c) clear explanations or illustrations of circumstances where presumptions of facts relating to causation in environmental cases can be drawn, or (d) a combination of the above three as specifically pertaining to the different components of proof in environmental cases.

¹¹ *Tătar v. Romania*, no. 67021/01, §§ 109 and 120, 27 January 2009.

¹² *Fadeyeva v. Russia*, no. 55723/00, § 79, 9 June 2005.

¹³ *Fadeyeva v. Russia*, no. 55723/00, § 79, 9 June 2005.

¹⁴ *Fadeyeva v. Russia*, no. 55723/00, § 88, 9 June 2005.

3. NGOs standing in environmental cases

A. Value of NGOs in environmental justice

I turn to my last point: The potential of NGOs playing a key role in achieving environmental justice is widely recognised. There are several reasons, which are particularly persuasive in the context of the European Convention framework, for providing for NGO standing. Such move would:

- facilitate access to justice for those who are poorly placed to commence litigation, because they lack the time, resources, or expertise;
 - improve procedures in terms of the presentation of evidence;
 - serve a better case management;
 - enable the Court to order more meaningful remedies.
- A review of the Court's practice reveals differences of approach as regards an NGO standing depending on whether it is procedural or substantive rights that are invoked.
- The pertinent developments that nudge the analysis is that in its jurisprudence under Article 6 and 10 ECHR, the Court relies on the Aarhus Convention, which is premised on the idea of environmental protection as a public good and grants a prominent role to NGOs in that respect. The Court puts NGOs in a privileged position when it comes to the exercise of the right to environmental information due to their role as a 'public watchdog'.¹⁵
 - As far as substantive rights under Articles 2, 3 and 8 ECHR are concerned, which are most often invoked in the environmental context, the Court does not allow NGOs standing as direct victims under those provisions, since NGOs as legal persons could not themselves enjoy those rights.¹⁶
 - In turn, NGO is already exceptionally entitled to bring a claim on behalf of its individual members or other individuals – direct victims of violations under environmentally relevant substantive rights of the Convention. However, in carving out such exceptions, the Court has set down standards that are linked to the facts of particular cases, which may explain why such test is very restrictive.

B. Formal regulation of the NGO standing

The knock-on question concerns the representativeness and expertise of various NGOs. Perhaps one of the reasons the Court is so reluctant to recognize the standing of NGOs is that it can be quite difficult to verify who they really represent. Unlike Governments, they do not have legitimacy conferred by elections. But the Court could use a number of legal mechanisms to address these concerns.

The ECtHR may be informed by the approach of other regional human rights bodies, which have adopted more flexible approaches to the standing of NGOs and which have begun to offer guidance in that respect. For example, in the Protocol on the Statute of the African Court of Justice and Human Rights it is a requirement that only those NGOs accredited to the African Union or to its organs may file a complaint with the Court.¹⁷

I suggest that similar formal regulation of the NGOs standing should be addressed in the Additional Protocol.

¹⁵ *Association Burestop 55 and Others v. France*, no. 56176/18 and 5 Others, § 54, 1 July 2021.

¹⁶ *Asselbourg et 78 autres personnes physiques ainsi que l'association Greenpeace-Luxembourg v. Luxembourg* (dec.), no. 29121/95, 29 June 1999; *Aly Bernard et 47 autres personnes physiques ainsi que l'association Greenpeace-Luxembourg, v. Luxembourg* (dec.), no. 29197/95, 29 June 1999; *Greenpeace E.V. and Others v. Germany* (dec.), no. 18215/06, 12 May 2009; *Yusufeli İlçesini Güzelleştirme Yaşatma Kültür Varlıklarını Koruma Derneği v. Turkey* (dec.), no. 37857/14, 7 December 2021.

¹⁷ African Union, *Protocol on the Statute of the African Court of Justice and Human Rights*, 1 July 2008, available at: <https://www.refworld.org/docid/4937f0ac2.html>

First of all, the possibility of NGOs bringing claims in their own name as direct victims in the dispute concerning the right to environment will depend on whether such right is framed as a personal right of individuals or collective right, belonging to a community. This will be of crucial importance leading to make the distinction between the interests pertaining to an NGO *per se* and the interests it claims to be representing on behalf of other people.

Moreover, the Additional Protocol should define:

- that the Court may receive applications from non-governmental organisation that have acquired participatory status with the Council of Europe, and
- a clear set of criteria for the standing of NGO on ad hoc basis, if NGO does not fall within the latter category. Those may concern (i) an objective standard, i.e. the qualification and experience of an NGO; and (ii) the interest of an NGO in a dispute. Based on these criteria the Court can decide in a particular case the standing of an NGO, requiring it to file evidence which demonstrate whether it fulfils the criteria and passes the legitimacy test.

Conclusion

In conclusion, the potential of the new right to add to the material scope of protection, depends on its wording. The clarification as to the terms used in articulating this right should be provided in the explanatory report to the Protocol.

The Additional Protocol must bring clarity to the rules on the administration of evidence. The precautionary principle should play a much more prominent role in that relation.

How to Fill Gaps in the Protection of Human Rights and the Environment

Prof. Dr. iur. Dr. h.c. Helen Keller

Strasbourg, 13 Sep 2022, Steering Committee for Human Rights (CDDH)

Overview

- I. Wording of a new environmental right in the Additional Protocol
- II. Administration of evidence in environmental cases
- III. NGOs standing in environmental cases

No right to nature preservation

If a tree falls in a forest and no one is around to hear it, does it make a sound?

- **The first environmental case before the Commission**

X and Y v. Federal Republic of Germany, 1976

- **The ECtHR's persistent approach**

Kyrtatos v. Greece

- **Some disagreement within the Court**

Joint Dissenting Opinion of a minority of judges in *Hatton v. UK*



Picture credit: creative commons

Constraints of the current framework

- **Limited scope of protection**
 - The severity threshold restricts the applicability of Article 8
 - Insignificant value of environmental protection
- **Lack of concern with environmental remediation**
 - Narrow approach to remedies
 - Refusal to order consequential measures

Cordella et al v. Italy, ILVA Steel Plant



Picture credit: <https://blog.francetvinfo.fr/bureau-rome/2018/12/05/usine-ilva-la-bombe-ecologique-de-tarente.html>

The added value of a new right



The explanatory report to the Additional Protocol would have to clarify the understanding of the new right.

Possible approaches

- **A right to a 'healthy environment'**
Healthy as relating to human health and integrity
Healthy as relating to environmental integrity
- **A right to a 'safe, clean, healthy and sustainable environment'**
- **A right to a 'decent' or 'ecologically viable environment'**

Administration of evidence in environmental cases

- **Components of Proof**

The risk/existence of environmental harm

A causal link ↔ the State's actions and the environmental harm

A casual link ↔ the environmental harm and the human rights

- **Evidentiary questions**

What are environmental harms

Burden and standard of proof

Steel & Morris v. UK
Helen Steel and David Morris



Picture credit: Council of Europe

Precautionary principle

Tătar v. Romania

The applicants could not prove a causal link between exposure to sodium cyanide and the son's asthma.

The ECtHR found that the national authorities had failed to assess the risks related to the company's activity and take the necessary measures.

Vasile Gheorghe Tătar



Picture credit: Bogdan Iurascu/Jumalul National, <https://jumatul.ro/campaniile-jumatul/tatar-impotriva-romaniei-566187.html>

Clarity to rules on administration of evidence

- Articulation of principles concerning burden of proof
- A reduction of standard of proof expected of applicants
- Presumption of facts
- A combination of the above three

NGOs in environmental justice

Providing for NGO standing in litigating environmental harm would

- greatly facilitate access to justice
- improve presentation of evidence
- serve the better case management
- enable the Court to order more meaningful remedies

Formal regulation of the NGOs standing

- NGOs that have acquired participatory status with the Council of Europe may file a complaint with the ECtHR
- Standing of NGOs on *ad hoc* basis
 - *the qualification and experience of an NGO; and*
 - *the interest of an NGO in a dispute.*

Conclusion

- The potential of the new right to add to the material scope of protection, depends on its wording. The clarification as to the terms used in articulating this right should be provided in the explanatory report to the Protocol.
- The Additional Protocol must bring clarity to the rules on the administration of evidence. The precautionary principle should play a much more prominent role in that relation.
- The recognition of a stand-alone environmental right will broaden the scope of protection against environmental harm. In view of the nature of the new right, there exists a strong need for recognising the standing of NGOs.



Photo credit: Council of Europe