

## THE DEVELOPMENT, THE LEGAL POTENTIAL, AND THE IMPLEMENTATION OF THE RIGHT TO A HEALTHY ENVIRONMENT

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*Access to safe and sufficient water as part of the right to a healthy environment. © Jacob Kelvin. J via Pexels, May 30th, 2020.*



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# C O N T E N T S

1. INTRODUCTION	3
2. THE DEVELOPMENT OF THE RIGHT TO A HEALTHY ENVIRONMENT	4
3. LEGAL POTENTIAL	6
4. IMPLEMENTATION OF THE RIGHT TO A HEALTHY ENVIRONMENT	8
4.1. CHINA	8
4.1.1. <i>Reasons for abstention</i>	8
4.1.2. <i>Steps taken to address environmental rights</i>	10
4.2. INDIA	13
4.2.1. <i>Reasons for abstention</i>	13
4.2.2. <i>Steps taken to address environmental rights</i>	13
4.3. MONGOLIA	16
4.3.1. <i>Voted in favour of the right to a healthy environment</i>	16
4.3.2. <i>Steps taken to address environmental rights</i>	17
5. CONCLUSION	22

GLOBAL  
HUMAN  
RIGHTS  
DEFENCE

# 1. INTRODUCTION

The human right to a clean, healthy, and sustainable environment (in short, the right to a healthy environment), a relatively new human right, is a fascinating development that encapsulates environmental protection from a human rights perspective. Its recent recognition by the UN Human Rights Council (UNHRC) in October 2021 (HRC/RES/48/13) and by the UN General Assembly (UNGA) in July 2022 (A/RES/76/300) has brought it to the forefront of international discourse. This right, now considered an “internationally recognised human right,” demands our attention and engagement.<sup>1</sup>

This report will explore the development of the right to a healthy environment, its importance, and how it can be established on the international plane. It will then examine its legal potential and how it promotes environmental protection and human health, drawing from its implementation in China, India, and Mongolia. China and India were chosen as examples because they are the biggest States in South and East Asia regions and therefore have the biggest impact on environmental issues. Furthermore, the States under examination hold different relationships to the right at hand and thereby serve a great launching point of assessing the implementation of the right to a healthy environment. Additionally, the UN Special Rapporteur on Human Rights and the Environment conducted a case study on Mongolia, allowing us to see how the UN assesses the implementation of the right.

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<sup>1</sup> OHCHR, UNEP, UNDP, ‘What Is the Right to a Healthy Environment: Information Note’ (5 January 2023) Guidance Note.

## 2. THE DEVELOPMENT OF THE RIGHT TO A HEALTHY ENVIRONMENT

The right to a healthy environment recognises that everyone, everywhere, has the right to live in a clean, healthy, and sustainable environment.<sup>2</sup> As the climate crisis becomes overwhelming and many people are devoid of basic needs, it becomes imperative that the right to access a healthy environment be protected. This right highlights the intersection of the environment and humanity and the fact that human beings cannot survive without a healthy environment.

The development of this right has been slow, with the concept first introduced in the 1972 Stockholm Declaration which stated, “man has the fundamental right to freedom, equality, and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.”<sup>3</sup> In the 1992 Rio Declaration, the description of environmental protection can be considered retrogressive<sup>4</sup> due to the more anthropocentric wording, which allows “the sovereign right to exploit their resources pursuant to their own environmental and development policies.”<sup>5</sup> Nevertheless, Judge Weeramantry, in his separate opinion in the *Gabčíkovo-Nagymaros* case, described the protection of the environment as “the *sine qua non* for numerous human rights such as the right to health and the right to life itself.”<sup>6</sup> Following this international recognition, many countries appeared to follow suit, recognising the right to a healthy environment in their domestic jurisdictions.

While the right to a healthy environment is not yet recognised in any global legally binding instruments, many regional treaties that bind around 120 countries have upheld the right to a healthy environment. It has been noted in the African Charter on Human and People’s Rights,<sup>7</sup> the 1988 Additional Protocol to the American Convention of Human Rights,<sup>8</sup> and the Arab Charter on Human Rights,<sup>9</sup> among others. Additionally, 98 States have implemented the right to a healthy environment into their respective constitutions.<sup>10</sup>

Furthermore, the first UN Special Rapporteur on the human right to a clean, healthy, and sustainable environment appointed by the UNHRC, John H. Knox, presented the

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<sup>2</sup> ‘Special Rapporteur on the Human Right to a Healthy Environment’ (*United Nations Human Rights Office of the High Commissioner*) <<https://www.ohchr.org/en/special-procedures/sr-environment>> accessed 22 May 2024.

<sup>3</sup> Stockholm Declaration on the Human Environment, in Report of the United Nations Conference on the Human Environment (Adopted 1972) UN Doc. A/CONF. 48/14, at 2 and Corr. 1, Principle 1.

<sup>4</sup> Louis J. Kotzé, ‘In Search of a Right to a Healthy Environment in International Law: Jus Cogens Norms’ in John H. Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (Cambridge University Press 2018) 139

<sup>5</sup> UN General Assembly, ‘Report of the United Nations Conference on Environment and Development’ (Adopted 12 August 1992) A/CONF.151/26 (Vol. I) Principle 2.

<sup>6</sup> *Gabčíkovo-Nagymaros (Hungary v Slovakia)* (Separate Opinion of Judge Weeramantry) [1997] ICJ Rep 91, 88.

<sup>7</sup> African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, Article 24.

<sup>8</sup> Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights: Protocol of San Salvador (adopted 17 November 1988, entered into force 16 November 1999) 28 ILM 161, Article 11(1)

<sup>9</sup> Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) 12 IHRR 893, Article 38.

<sup>10</sup> David R. Boyd, ‘The Status of Constitutional Protection for the Environment in Other Nations’

<<https://davidhsuzuki.org/wp-content/uploads/2013/11/status-constitutional-protection-environment-other-nations-SUMMARY.pdf>> accessed 27 May 2024.

Framework Principles on Human Rights and the Environment (“Framework Principles”) in 2018.<sup>11</sup> The Framework Principles set out States’ human rights obligations in relation to the environment. These obligations stem from treaties and binding decisions from human rights tribunals, as well as statements of interpretation (of human rights law) from human rights treaty bodies.<sup>12</sup> The Framework Principles encompass various themes concerning the relationship between humans and the environment, including environmental protection, access to justice, and indigenous peoples’ rights. These principles serve as an accessible guideline for states, organisations, and individuals to help ensure environmental protection for humanity.

While the Framework Principles are non-binding and not all states have accepted them, coherently interpreting notions from human rights bodies shows great uniformity and certainty in applying human rights law to the environment.<sup>13</sup> However, Mr. Knox acknowledges that the relationship between humans and the environment continuously evolves.<sup>14</sup> This is why the obligations are termed “Framework Principles” – to indicate that they are not the definitive resolution on this matter.<sup>15</sup>

With the right to a healthy environment gaining more attention among the international community, the 2021 UNHRC Resolution is a milestone, by formally recognising the existence of these rights. The operative clause encourages member states to protect the environment and comply with human rights obligations. Out of the 47 members of the UNHRC, 43 voted in favour, 0 voted against, and 4 abstained (China, India, Japan, and Russia). While the adoption of this resolution is considered to be a step in the right direction, it is ultimately quite weak, with language and terms used, such as ‘encourages’, making it difficult to enforce against States in the case of non-compliance due to lack of binding legal force. Within a subsequent section, the implementation of the right to a healthy environment will be assessed within China and India, two of the abstaining states, as well as showcasing the practical issues and matters in case a country is non-compliant to adopting domestic measures to abide by the non-binding Resolution.

The 2022 UNGA Resolution has a similar structure to the 2021 UNHRC Resolution. Costa Rica, the Maldives, Morocco, Slovenia, and Switzerland proposed the UNGA vote, which resulted from years of campaigning from NGOs and environmental justice campaigners.<sup>16</sup> The voting was successful: 161 in favour, 0 against, and 8 abstentions (Belarus, Cambodia, China, Ethiopia, Iran, Kyrgyzstan, Russia, and Syria). The presence and progressive emergence of various resolutions and declarations on the matter of environmental

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<sup>11</sup> ‘FRAMEWORK PRINCIPLES ON HUMAN RIGHTS AND THE ENVIRONMENT: The Main Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment.’ (*United Nations Human Rights Special Procedures*, 2018) <<https://www.ohchr.org/sites/default/files/FrameworkPrinciplesUserFriendlyVersion.pdf>>.

<sup>12</sup> *ibid.*

<sup>13</sup> *ibid.*

<sup>14</sup> *ibid.*

<sup>15</sup> *ibid.*

<sup>16</sup> ‘UNITED NATIONS GENERAL ASSEMBLY RECOGNISES CLEAN, HEALTHY, SUSTAINABLE ENVIRONMENT AS HUMAN RIGHT’ (*Wyeside Consulting Ltd*, 8 August 2022) <<https://www.wyesideconsulting.com/news/united-nations-general-assembly-recognises-clean-healthy-sustainable-environment-as-human-right>> accessed 27 May 2024.

protection and human rights is a possible stepping stone towards the creation of legally binding instruments, which would afford for stronger protection of the right at hand. Thereby the following section will dive into the issue of what kind of possible avenues could be present for the progression of the right from soft law to internationally legally binding commitments on states.

### 3. LEGAL POTENTIAL

The right to a healthy environment is labelled as a fundamental human right, as mentioned on the UN Special Rapporteur website.<sup>17</sup> International recognition as a human right may lead to its codification in international treaties and incorporation into international human rights law. Enforcing environmental protection obligations upon states might be more accessible through international human rights law. As duty-bearers of international human rights law, states must respect the treaties' provisions to protect and fulfil human rights. An international right to a healthy environment would signify a formally recognised moral entitlement to a specific environmental quality that states and their citizens could claim through an international legal framework.<sup>18</sup> This framework would hold states accountable in the international regulatory domain to each other and their citizens.<sup>19</sup>

Introducing the concept of environmental protection in international human rights law is important to ensure that states proceed with the protection regime. International human rights serve as the superior legal mechanisms capable of garnering state and public support and ensuring compliance with minimum guarantees by invoking high moral principles.<sup>20</sup> In this regard, the environment has arguably become one of the most recent and critically significant issues demanding international attention.<sup>21</sup> Instilling the social and morally justified objective of environmental protection as an international right could establish regulatory priorities in global environmental governance.<sup>22</sup>

With environmental protection recognised as a human right, the frameworks between ecological rights and international human rights law slowly converge. The convergence could also lead to interactions with other fields of international law, such as international criminal law, where violating the right to a healthy environment can be used as the basis of culpability. When considering the right to a healthy environment and its connection to other human rights, it could be said that the realisation of all human rights is conditional on a healthy environment.<sup>23</sup> Thus, the right to a healthy environment should be more heavily emphasised as it can be claimed as the foundation of all human rights. However, for the time being, it is hard to elevate the right to a healthy environment into a higher international

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<sup>17</sup> 'Special Rapporteur on the human right to a healthy environment' (*United Nations*) <<https://www.ohchr.org/en/special-procedures/sr-environment>> accessed 18 July 2024.

<sup>18</sup> Louis J. Kotzé (n 4) 137.

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

<sup>20</sup> *ibid* 141.

<sup>21</sup> *ibid* 142.

<sup>22</sup> *ibid.*

<sup>23</sup> *ibid* 144.

juridical order as it has not yet been codified into a binding treaty. Nevertheless, it can do so if it is examined from a down-up approach.

The right to a healthy environment is included in the constitution, domestic laws of states, and regional laws. Additionally, the overwhelming majority from the UNHRC and UNGA voting shows state practice and *opinio juris* (the willingness of a state to be bound by an obligation). With constant state practice and *opinio juris*, an obligation can become customary international law. When a provision crystallises into customary international law, all states are bound by it even if they did not ratify a treaty containing that obligation. Hence, if states maintain state practice and *opinio juris* with the right to a healthy environment, it can eventually become customary international law.

The highest form of obligation in international law is the *jus cogens* norm, a peremptory norm that is mandatory for each state to follow. It does not permit any derogation and can only be modified by other *jus cogens* norms.<sup>24</sup> The current norms having *jus cogens* status are the prohibitions of the aggressive use of force, genocide, torture, crimes against humanity, slavery, piracy, racial discrimination and apartheid, and hostilities or force directed at a civilian population.<sup>25</sup> Two issues emerge from this list. First, although strongly influenced by natural law principles, the majority of these norms are directly or indirectly related to human rights concerns. Second, it is not a closed list, entailing that such peremptory norms may emerge subsequently in the future, since there exists no clear guidelines or definition for the norms.<sup>26</sup>

The emergence and formation of the *jus cogens* norms explores the idea that they can include environmental concerns to provide an international right to a healthy environment, as the right connects very closely related to human rights. Environmental rights and responsibilities currently possess little chance of upgrading into a *jus cogens* norm since the establishment of peremptory norms must develop from a specific practice for an extended period of time by the general majority of states.<sup>27</sup> Furthermore, it is hard to determine the minimum threshold of transgression for environmental degradation. Since most of the *jus cogens* norms would need to be of “global concerns of humanity as a whole,” the environmental harm must be extremely serious.<sup>28</sup>

Therefore, while the rise of the right to a healthy environment has been slow, it remains steady and garners wide support from States. The right to a healthy environment will continue to escalate as environmental protection becomes a more integral subject on the international agenda. Even though environmental laws have been enacted globally and on the national level, the effective implementation and enforcement of those regulations is lacking.<sup>29</sup>

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<sup>24</sup> *ibid* 145.

<sup>25</sup> *ibid* 147.

<sup>26</sup> *ibid*.

<sup>27</sup> Krista Singleton-Cabbage, ‘International Legal Sources And Global Environmental Crises: The Inadequacy Of Principles, Treaties, And Custom’ (1995) 2 ILSA Journal of International & Comparative Law 185.

<sup>28</sup> Louis J. Kotzé (n 4) 151.

<sup>29</sup> Carl Bruch, Scott Schang, John Pendergrass et al. ‘Environmental Rule of Law: First Global Report’ (*UN Environment Programme*, January 2019), 3.

Such absence of implementation is commonly based on the fact that the enacted environmental rights and responsibilities maintain their nuance and thereby environmental law does not provide robust definitions and thresholds for the regulations to be solid enough to ascend through the juridical order.<sup>30</sup>

## 4. IMPLEMENTATION OF THE RIGHT TO A HEALTHY ENVIRONMENT

Despite the passing of the UN Human Rights Council's Resolution 48/13<sup>31</sup> on the human right to a healthy environment, two of the three countries under assessment within this report, China and India, abstained from voting for the Resolution. However, within the UNGA Resolution 76/300, which also concerns the right to a healthy environment,<sup>32</sup> India voted in favour. That being said, it did not commit to the operative paragraph one, which "recognizes the right to a clean, healthy and sustainable environment as a human right"<sup>33</sup>, while China maintained its position. The following sections will expand on why such abstentions took place and examine other factors which may contribute to the lack of implementation of this right. Additionally, steps taken to address and ensure the implementation by China, India, and Mongolia on the right to a healthy environment will be addressed.<sup>34</sup>

### 4.1. CHINA

#### 4.1.1. *Reasons for abstention*

Before the UNHRC's Resolution on the right to a healthy environment was passed, China delivered a speech outlining several arguments to explain why it abstained from voting. According to China, such reasons and arguments include:<sup>35</sup>

- There is a lack of adequate definitions and content regarding the right to a clean, healthy, and sustainable environment;
- The inadequate explanation of the right to a clean, healthy, and sustainable environment and its interrelation with other human rights;
- The concept of ecological conservation is already embedded within the Chinese Constitution; and

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<sup>30</sup> *ibid.*

<sup>31</sup> UN Human Rights Council, 'The Human Right to a Clean, Healthy and Sustainable Environment' (8 October 2021) UN Doc A/HRC/RES/48/13).

<sup>32</sup> UN General Assembly, 'The Human Right to a Clean, Healthy and Sustainable Environment' (28 July 2022) UN Doc A/RES/76/300.

<sup>33</sup> *ibid.*, para 1.

<sup>34</sup> Ke Tang and Otto Spijkers, 'Human Right to a Clean, Healthy and Sustainable Environment' (2022) 6 Chinese Journal of Environmental Law 87 <[https://brill.com/view/journals/cjel/6/1/article-p87\\_4.xml](https://brill.com/view/journals/cjel/6/1/article-p87_4.xml)> accessed 26 April 2024, 90.

<sup>35</sup> *ibid.* 91.



- The disbelief that the Human Rights Council has the mandate to pass a resolution on the right in question.

In addition, a central contributing factor to China's abstention is that it regards human rights protection and realisation in a fundamentally different way compared to most of the Western countries.<sup>36</sup>

The first difference is that China views human rights protection as an internal affair rather than a global matter.<sup>37</sup> Such a view is based on the fact that China is a sovereign country, and thereby, no other country or countries should interfere with China's internal affairs.<sup>38</sup> Therefore, the Chinese government believes itself to be free from political or outward pressure to sign any human rights conventions. It is not pressured to adapt resolutions such as the Resolution on the right to a clean, healthy, and sustainable environment and has the free will to decide which domestic social needs should be at the forefront of its conduct.<sup>39</sup>

The second aspect relates to China's prioritising the protection of economic, social, and cultural rights over the protection of political and civil rights.<sup>40</sup> Such views link to the fact that the Chinese government holds economic, social, and cultural rights as necessary for human survival and, thus, take priority over civil and political rights.<sup>41</sup> Moreover, according to the government, civil and political rights are affected by the functioning of a political system in a state and the social movements within. Hence, political and civil rights should not be given the same priority as economic, social, and cultural rights.<sup>42</sup> Even though the right to a clean, healthy, and sustainable environment is predominantly economic, social and cultural, it does, however, contain characteristics of civil and political rights, such as the right of the public to participate within environmental matters.<sup>43</sup>

The third difference is that China believes that it has the freedom to choose how the international conventions of human rights, which it has ratified, are embedded into the Chinese domestic legislation and policies.<sup>44</sup> It places emphasis on the protection of human rights within the social needs of the population in connection with the stage of development, such as economic development, present in China and thereby chooses on its own how to interpret the human rights covered by various international treaties.<sup>45</sup> For example, poverty alleviation is at the forefront of Chinese policy. Therefore, human rights that do not directly improve the state of poverty alleviation should not take precedence.<sup>46</sup> Economic matters and the development of the economy in China take priority over environmental issues. This is

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<sup>36</sup> *ibid.*

<sup>37</sup> *ibid.* 92.

<sup>38</sup> *ibid.*

<sup>39</sup> *ibid.*

<sup>40</sup> *ibid.*

<sup>41</sup> *ibid.* 93.

<sup>42</sup> *ibid.*

<sup>43</sup> *ibid.*

<sup>44</sup> *ibid.*

<sup>45</sup> *ibid.* 94.

<sup>46</sup> *ibid.*

why China has the “treatment-after-pollution” approach to environmental protection.<sup>47</sup> Therefore, economic development in China takes precedence over the right to a clean, healthy, and sustainable environment, and China is unwilling to start addressing the right in the immediate future.<sup>48</sup>

The last aspect relates to the fact that the Chinese government's obligation to protect and respect human rights is derived from legal principles rather than from legal rules. Legal principles are much more flexible allowing for interpretation.<sup>49</sup> Additionally, the judiciary does not have the power to assess whether the domestic legislation aligns with the Chinese Constitution, which holds the only direct reference to protection of human rights in China.<sup>50</sup> Only after the legal principles are turned into legal rules by the Chinese legislature can they be subject to the judiciary's sphere and receive full protection.<sup>51</sup> In case China would have supported the resolution, while non-binding, they hold strong political force and thereby every state is expected to implement the rights contained in their domestic legislation and policies.<sup>52</sup> That would result in a situation where the rights to a clean, healthy, and sustainable environment must be implemented within Chinese domestic law, and legislators would have to face the difficult task of prioritising economic development over the right.<sup>53</sup>

In sum, implementing the right to a clean and healthy environment would provide an individual human right rather than an overall obligation by the State to protect the environment. This could interfere with China's economic development goals, which it is not willing to compromise at the moment.

#### *4.1.2. Steps taken to address environmental rights*

China is the world's largest emitter of greenhouse gases and thereby faces serious air pollution problems. In addition, issues related to water scarcity and soil contamination are present due to carbon-intensive industries. As a result, China faces a major project in addressing environmental matters and ensuring a safe and healthy environment for its peoples.

Even though the Chinese government was reluctant to support the Resolution on a clean, healthy, and sustainable environment, it has taken steps toward environmental protection and recognising its people's environmental rights. According to the Environmental Protection Law of the People's Republic of China, Article 4 (2), the government must balance environmental protection with social and economic development. Additionally, Article 26 of

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<sup>47</sup> *ibid*; Environmental Protection Law of the People's Republic of China, December 26 1989, Article 4 (2).

<sup>48</sup> Ke Tang and Otto Spijkers (n 34). 95

<sup>49</sup> *ibid*.

<sup>50</sup> *ibid*.

<sup>51</sup> *ibid* 97.

<sup>52</sup> 'Follow the Negotiations of UN Human Rights Council Resolutions Relevant for Local and Regional Governments' (*Global Cities Hub*, 17 October 2022)

<<https://globalcitieshub.org/en/follow-the-negotiations-of-relevant-un-human-rights-council-resolutions-to-local-and-regional-governments/>> accessed 10 May 2024.

<sup>53</sup> Ke Tang and Otto Spijkers (n 34) 98-99.

the Chinese Constitution states, “the state shall protect and improve living environments and the ecological environment, and prevent and control pollution and other public hazards.”

In line with the obligations arising from domestic legislation in September 2021, China’s State Council Information Office published China’s Human Rights Action Plan for the years 2021-2025, and its focus rests on three matters: a) the protection of Economic, Social and Cultural rights; b) the protection of Civil and Political rights; and c) protection of Environmental rights.<sup>54</sup> According to the Human Rights Action Plan, the Environmental Rights are considered to be independent fundamental human rights and include:<sup>55</sup>

- **The right to be free from pollution.** This includes the government’s obligation to improve air quality, strengthen the treatment of water and its protection, increase soil conservation, improve the status of treating solid waste and sewage, improve garbage disposal as well as enhance environmental governance which would be based on law.
- **The right to acquire environmental information.** The Chinese government must disclose environmental information to the public by adequate means.
- **The right to participate in environmental decision-making.** The government must allow and support the public's participation in environmental impact evaluations of special plans that can negatively affect the environment and citizens' environmental rights.
- **The right to benefit from self-storing and a stable ecosystem.** The Chinese government has the obligation to carry out projects to protect and preserve critical ecosystems, build systems for natural reserves, and adopt biodiversity protection projects.
- **The right to benefit from a stable climate system.** This includes cutting down greenhouse gas emissions, increasing adaptation to climate change, controlling the use of fossil fuels, monitoring the effects of climate change within vulnerable regions of the country, and implementing the UN Framework on Climate Change and the Paris Agreement.
- **The right to demand compensation on environmental matters.** This is done through environmental public interest litigation and an environmental damage compensation system.

These rights do not yet constitute direct human rights of citizens.<sup>56</sup> However, after the government implements the policy within the domestic legislation, the judiciary can enforce environmental rights in connection with other human rights and thereby provide stronger protection to the realisation of each human right within China.

Some of the rights embedded within the Action Plan, in relation to environmental rights, reflect the rights contained within the individual human right to a clean, healthy, and sustainable environment. These correspond to substantive rights such as a safe climate, clean

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<sup>54</sup> Ke Tang and Otto Spijkers (n 34) 99.

<sup>55</sup> *ibid.*

<sup>56</sup> *ibid* 100.

air, healthy ecosystems and fostering biodiversity, ensuring safe and sufficient water, and indirectly addressing healthy and sustainable food by increasing soil conservation.<sup>57</sup> However, the Action Plan also addressed certain procedural rights, such as access to information and public participation in matters related to the environment. Additionally, the environmental rights contained within the National Action Plan shadow some of the principles set out in the Framework Principles, such as participation in decision-making (Principle 9), disseminating environmental information to the public (Principle 7), and providing for effective remedies of violations on human rights related to the environment (Principle 10).<sup>58</sup> That being said, it fails to acknowledge in complete form the right to a non-toxic environment and access to justice in relation to realisation of the right to a healthy environment.<sup>59</sup>

Considering China's stance on collectively enhancing human rights derived from binding international obligations, it might be more inclined to follow and implement the content of the Framework Principles into its practices and domestic legislation as they do not create binding obligations on states, instead acting as a guide to nations on how to achieve the realisation of human rights and respective commitments related to the environment for the people. Additionally, as China takes domestic matters, especially pressing issues, as a priority and considers international obligations to be secondary, it can be expected for China to focus more on the implementation of the right to a healthy environment when its domestic issues are under control, leaving the government with more time and confidence to pursue environmental matters on its domestic agenda.<sup>60</sup> Therefore, even though China did not express its support for the Resolutions, it has been making steps towards implementing and enforcing human rights to a clean, healthy and sustainable environment through its own avenues. This can be considered to be a win for the people of China and the planet to work progressively towards creating a fostering environment where people can enjoy the right to a clean, healthy and sustainable environment. However, it is important to note that considering China's restrictive and narrow stance on the protection of human rights in general, and especially of those related to the environment, which it does not consider to be at the forefront of its policy, the implementation of the right to a healthy environment within the Constitution would most likely not lead to full protection of environmental issues in conjunction with other human rights. As economic development takes precedence over environmental matters, addressing environmental rights could be included into economic development policies by understanding the importance of upholding environmental protection and sustainability issues to ensure the planet can bear the consequences of economic development, as without a healthy environment the societies will slowly cease to function where economic development will also decline as a consequence.

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<sup>57</sup> OHCHR, UNEP, UNDP (n 1) 7.

<sup>58</sup> 'FRAMEWORK PRINCIPLES ON HUMAN RIGHTS AND THE ENVIRONMENT: The Main Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment.' (n 11).

<sup>59</sup> *ibid.*

<sup>60</sup> Taylah Bland, 'Key Factors Shaping China's Engagement with International Environmental Law' (*Asia Society*, 18 April 2024) <<https://asiasociety.org/policy-institute/key-factors-shaping-chinas-engagement-international-environmental-law>> accessed 31 May 2024.

## 4.2. INDIA

### 4.2.1. *Reasons for abstention*

The reasons for India to not commit to the operative paragraph one of the UNGA Resolution on the right to a healthy environment is related to its abstention from voting within the Human Rights Council's Resolution. The reasons coincide partly with the those stated by China, and they include:<sup>61</sup>

- The absence of a clear understanding and agreement on the definition of terms of 'clean', 'healthy,' and 'sustainable'. According to India, the terms are susceptible to subjective interpretation and thereby diluting the main objective of the UNGA resolution;
- The absence of a clear reference to the principle of equity of international environmental law is needed; and
- In India's opinion, more extensive negotiations would have been needed to achieve a better consensus on the contents of the Resolution.

### 4.2.2. *Steps taken to address environmental rights*

India is facing severe environmental problems as air, water, and soil pollution are on the rise. New Delhi is considered to be the most polluted city in the world, and India is ranked as the third most polluted country worldwide.<sup>62</sup> However, in India, environmental matters are not at the forefront of political and domestic agenda. Securing stable livelihoods is the most pressing matter and linking livelihood problems, such as securing water, food and health, with environmental protection is predominantly absent in policy matters within India.<sup>63</sup>

Even though India abstained from voting on the UNHRC Resolution and disassociated itself from the operative paragraph one of the UNGA Resolution, it has taken strides towards environmental protection and providing its people with environmental rights. An example of this is the commitment of India to protect, fulfil, and respect the right to a healthy environment through an international obligation of being a signatory to the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Article 12

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<sup>61</sup> 'India Backs UN Resolution to Recognize Human Right to a Clean, Healthy and Sustainable Environment; Raises Concern over Text' (*Times of India*, 29 July 2022) <<https://timesofindia.indiatimes.com/india/india-backs-un-resolution-to-recognise-human-right-to-clean-healthy-environment-raises-concern-over-text/articleshow/93200909.cms>> accessed 9 April 2024.

<sup>62</sup> 'India Needs to Bring Environment Issues to Political Mainstream' (*The New Indian Express*, 25 March 2024) <<https://www.newindianexpress.com/editorials/2024/Mar/25/india-needs-to-bring-environment-issues-to-political-mainstream>> accessed 31 May 2024..

<sup>63</sup> 'Political Disconnect: Why Environmental Issues Are Not Winning Votes in India' (*Times of India*, 25 March 2024) <<https://timesofindia.indiatimes.com/india/political-disconnect-why-environmental-issues-not-winning-votes-in-india/article-show/108563256.cms>> accessed 31 May 2024..

respectively.<sup>64</sup> However, the right to a healthy environment outlined in the ICESCR is not as comprehensive as an individual human right to a clean, healthy, and sustainable environment would be, as it is an underlying determinant of the right to health and, therefore, does not provide for an individual human right as such.<sup>65</sup>

*“It is our collective and individual responsibility to preserve and tend to the world in which we all live in” - Dalai Lama*

*Textbox.*<sup>66</sup>

India has further expressed its continued willingness and support to enhance environmental protection through various means, as its cultural values and traditions promote the importance of living in harmony with nature.<sup>67</sup> The existence of legislation on a national level provides for the protection of the environment and the rights connected to it. These include:

- **The Constitution of India, article 21.** As part of the right to life, the recognition of the fundamental right to a clean and healthy environment;<sup>68</sup>
- **The Constitution of India, article 48A.** After an amendment in 1976, environmental protection gained constitutional status by obliging the state to endeavour to protect and improve the environment, amongst other matters;<sup>69</sup>
- **Water (Prevention and Control of Pollution) Act 1974.** The act aims to prevent and control water pollution through the promotion of the cleanliness of streams and rivers and prohibits the release of effluents into the waters to protect marine and human life;<sup>70</sup>
- **Air (Prevention and Control of Pollution) Act 1981.** The primary goal is to protect the environment from harmful effects of air pollution, such as possible injury to humans, other living creatures, plants, property, and the environment; and<sup>71</sup>

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<sup>64</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1967) 993 UNTS 3 (ICESCR), article 12 (1) and (2) (b).

<sup>65</sup> CESCR, ‘General Comment No. 14 (2000): The right to the highest attainable standard of health’ UN Doc E/C.12/2000/4, para 4.

<sup>66</sup> ‘Right to a Clean and Healthy Environment under the Constitution of India’ (*Free Law*, 21 April 2023) <<https://www.freelaw.in/legalarticles/Right-to-clean-and-healthy-environment-under-the-Constitution-of-India>> accessed 10 May 2024.

<sup>67</sup> ‘India Backs UN Resolution to Recognize Human Right to a Clean, Healthy and Sustainable Environment; Raises Concern over Text’ (n 61).

<sup>68</sup> ‘Right to a Clean and Healthy Environment under the Constitution of India’ (n 66).

<sup>69</sup> Constitution of India, 26 January 1950, article 48A.

<sup>70</sup> ‘Right to a Clean and Healthy Environment under the Constitution of India’ (n 66).

<sup>71</sup> *ibid.*

- **The Environment (Protection) Act 1986.** This act provides for the protection and improvement of the environment by managing hazardous waste, regulating the locations of industries, and protecting public health and welfare.<sup>72</sup>

Additionally, the judiciary of India has played a significant role in ensuring the protection of the environment. The Supreme Court of India has passed several judgments where it has interpreted the Constitutional provision on the right to life in a broad manner and has thereby paved the way for strengthening the right to a healthy environment as a pivotal part of the right to life.<sup>73</sup> A noteworthy case delivered by the Supreme Court is the case of *Virendra Gaur & Ors v State of Haryana and Ors*, in which the Court made the following findings:<sup>74</sup>

## **01 Article 21 of the Constitution protects life as a fundamental right.**

The right to life with human dignity covers protecting and preserving the environment, ecological balance, and being free from air, water and sanitation pollution. Without these guarantees and rights, the right to life cannot be enjoyed. Pollution of the environment, air, and water and thereby negatively impacting the ecological balance are seen as violations of Article 21.

## **02 Importance of ecological balance and atmosphere.**

The environment includes a hygienic atmosphere and ecological balance, and therefore, the State and citizens have a duty to maintain a hygienic environment, which is indispensable for enjoying the right to a healthy environment and to life.

## **03 Environmental protection as a grave concern for human existence.**

Protecting the environment includes ensuring the safeguarding of the environment, and also places a duty on the government to apply adequate measures to promote, protect, and improve the environment.

Even though the domestic legislation of India does not yet provide for the individual human right to a healthy environment, efforts towards protecting the environment for the well-being and health of its population have been taken. The content of the Framework Principles have been partly embedded within the domestic legislation in India. Firstly, India has recognised the importance of ensuring a healthy environment to protect human rights,

<sup>72</sup> *ibid.*

<sup>73</sup> Normawati Hashim, 'Towards New Frontier of Constitutional Recognition of Environmental Protection in Urban Regeneration' (2015) 170 *Procedia -Social and Behavioral Sciences* 415.

<sup>74</sup> *Virendra Gaur & Ors v State of Haryana and Ors* [1994] 6 SCR 78.

including the right life (Principle 1). Secondly, it has ensured there is an effective enforcement mechanism of environmental standards for private and public actors, by setting out that certain acts which harm the environment constitute violations under law (Principle 12). Finally, the State has pursued sustainable development in its actions, taking measures to protect the waters as a resource, safeguard the environment from future harm and apply the polluter pays principle which is set out in India's case law (Principle 16).<sup>75</sup> The polluter pays principle is a core principle within environmental law and according to it the polluter, for example companies or individuals should pay for the costs of pollution rather than those who suffer, such as communities and individuals, the consequences of pollution.<sup>76</sup> As an example, a shipping company who spills oil into the ocean within its operations should pay for the cleaning of the ocean, rather than the society.

Furthermore, some of the rights contained within India's Constitution and the Environmental Acts provide for explicit rights which are linked to the individual human right to a healthy environment, such as the right to clean air and safe water. Considering the traditions within India, of living in harmony with the nature and thereby respecting the environment, and the active efforts of the Supreme Court, India is well on its way to ensuring a stronger protection of the environment and consequently leading to ensuring the human right to a healthy environment for its people, however such progress might take time due to strong political inclination to prioritise the livelihoods of its citizens and only after focus on the issues related to the environment.

## 4.3. MONGOLIA

### 4.3.1. *Voted in favour of the right to a healthy environment*

Mongolia voted in favour of the right to a healthy environment in the UNGA Resolution. Mongolia did not vote in the UNHRC Resolution because it was not a member of the UNHRC at the time of voting. Mongolia's support for the UNGA Resolution stems from its domestic support of environmental protection. Article 16 of the Mongolian Constitution outlines the right to a healthy and safe environment and the right to be protected against environmental pollution and ecological imbalance. Additionally, Mongolia has a wide array of environmental statutes. The Mongolian government also invited Mr. John H. Knox, the Special Rapporteur for human rights and the environment, to examine Mongolia's implementation of human rights related to environmental protection back on September 17th, 2017. Hence, Mongolia is one of the States in the Asian region that displays enthusiasm regarding the right to a healthy environment.

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<sup>75</sup> Citizens' Welfare Forum v. UOI [1996] SC 2715; Framework Principles (n 11).

<sup>76</sup> Katarina Ruthland, 'Explainer: What Is the Polluter Pays Principle and How Can It Be Used in Climate Policy?' (*Earth.org*, 28 March 2024)

<<https://earth.org/explainer-what-is-the-polluter-pays-principle-and-how-can-it-be-used-in-climate-policy/>> accessed 18 July 2024.



### 4.3.2. Steps taken to address environmental rights

Mongolia, like other countries, is facing environmental issues. Climate change threatens the traditional way of life for the Mongolian nomadic herders. The shift in climate brings harsh summers and winters (known as *dzuds* and *gans*) that pose a danger to the nomads and their animals. Other environmental issues Mongolia faces include desertification, biodiversity loss, deforestation, and pollution. As mentioned, Mongolia has several pieces of legislation to protect the environment, namely:

- **Mongolian Constitution, Article 16(2):** The right to a healthy and safe environment and to be protected against environmental pollution and ecological imbalance;<sup>77</sup>
- **The Law on Environmental Protection:** it addresses environmental standards, monitoring, research and information, inspections and the participation of civil society;
- **The Law on Environmental Impact Assessment;**
- **The Law on Air;**
- **The Law on Water;**
- **The Law on Soil Protection and Desertification Prevention;**
- **Laws on Special Protected Areas and on Buffer Zones;** and
- **The Law on Prohibition of Mineral Exploration and Exploitation in Runoff Source Areas, Forested Areas and Protection Zones of Water Bodies.**

In addition to legislation, Mongolia has also adopted a sustainable development framework to guide the implementation of environmental rules. It became the first country to join the Partnership for Action on Green Economy (PAGE) in 2013, a UN programme that promotes the transition to sustainable practices.<sup>78</sup> Mongolia also created the Sustainable Development Vision 2030 to improve the provision of safe drinking water, sanitation and hygiene facilities, specially protected areas, and eliminate air pollution.<sup>79</sup> The Special Rapporteur report acknowledges Mongolia's adoption of strong environmental standards.<sup>80</sup> Below are Mongolian practices examined by the Special Rapporteur in the four areas summarised below.

<b>AIR POLLUTION</b>	<ul style="list-style-type: none"><li>● Air pollution is the most pressing environmental challenge in Mongolia due to the increasing migration of herders, the burning of solid fuel, overgrazing, and loss of land to mining.<sup>81</sup></li><li>● The Mongolian government initially planned to restrict the movement into Ulaanbaatar. However, the</li></ul>
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<sup>77</sup> The Constitution of Mongolia, 13 January 1992, Article 16.

<sup>78</sup> UN General Assembly, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment on his mission to Mongolia' (2018) UN Doc A/HRC/37/58Add.2 para 14.

<sup>79</sup> *ibid* para 15.

<sup>80</sup> *ibid* para 26.

<sup>81</sup> *ibid* para 37.

	<p>restriction of movement would violate Article 12 of the ICCPR.<sup>82</sup></p> <ul style="list-style-type: none"> <li>• To combat this, the Mongolian government passed the National Programme on Reduction of Air and Environmental Pollution for 2017-2025, which includes reducing pollution, establishing better accountability systems, re-establishing the clean air fund, building the capacity for environmental monitoring, and increasing community participation.</li> </ul>
<b>MINING</b>	<ul style="list-style-type: none"> <li>• Mining in Mongolia risks the rights of individuals and communities that directly depend on the ecosystems damaged by mineral resource extraction.<sup>83</sup></li> <li>• Under Mongolian law, an environmental assessment, public consultation, and the approval of the local community are required before a mining licence is issued. The Government also cancelled licences that are within 200 metres of water sources and forests. Nevertheless, the Special Rapporteur noted that some mines are still operating in nominally protected areas.<sup>84</sup></li> <li>• There are also concerns regarding the negative impact of mining projects on herders' human rights, specifically regarding herders' consent when the Government issues mining licences. Hence, the Committee on Economic, Social, and Cultural Rights, in its 2015 Mongolia report, recommended that Mongolia execute human rights and environmental impact assessments before granting mining licences.<sup>85</sup></li> <li>• An example of good practice from the Government regarding this issue is the dispute resolution between herder communities and mining operators in the Gobi Desert and the Oyu Tolgoi (one of the largest copper mines in the world) with the mediation of the Compliance Advisor/Ombudsman. The mining company will construct new wells, improve the monitoring of the effects of the operations, and improve health services to the local communities.<sup>86</sup></li> </ul>
<b>CONSERVATION</b>	<ul style="list-style-type: none"> <li>• Mongolia has developed an extensive system of protected areas since the Rio Conference in 1992,</li> </ul>

<sup>82</sup> ibid para 39.

<sup>83</sup> ibid para 45.

<sup>84</sup> ibid para 51-52.

<sup>85</sup> ibid para 60.

<sup>86</sup> ibid para 61.

	<p>which are vital in conserving the habitats of endangered and threatened species.<sup>87</sup> Unfortunately, these protected areas are under pressure from overgrazing, climate change, mining operations, agriculture, and expansion of urban areas.<sup>88</sup> It was also found that some protected areas have not provided adequate coverage for some ecosystems.<sup>89</sup></p> <ul style="list-style-type: none"> <li>● Regarding conservation and human rights, States should comply with human rights obligations in adopting and implementing conservation measures. Restrictions on hunting and other uses of forests should be imposed only after consultation with local communities.<sup>90</sup></li> <li>● The Special Rapporteur noted that the Government plans to revise the legislation on protected areas, which is a good opportunity to strengthen the laws.<sup>91</sup></li> </ul>
<p><b>RIGHTS OF INFORMATION</b> Framework Principles 7, 9, and 10</p>	<ul style="list-style-type: none"> <li>● Mongolians can access environmental information through an online site, <a href="http://www.eic.mn">www.eic.mn</a>, which the Ministry of Environment and Tourism maintains. The Ministry’s website, <a href="http://www.mne.mn">www.mne.mn</a>, also provides information on its environmental activities. However, neither website is uniform or consistent. The public can also request information, and it is required to be answered within seven working days as per the 2011 Law on Information Transparency and Right to Information.<sup>92</sup></li> <li>● The availability of information varies based on region and topic. The Special Rapporteur was impressed by the accessibility of information about air quality in the capital. Information regarding other areas and other issues (e.g. water quality, mining operations, etc.) is not widely available.<sup>93</sup></li> <li>● Regarding public participation, the Special Rapporteur was pleased by the civil society representatives’ dedication, knowledge, and energy during his visit. However, the Special Rapporteur also</li> </ul>

<sup>87</sup> ibid para 63.

<sup>88</sup> ibid para 65.

<sup>89</sup> ibid para 66.

<sup>90</sup> ibid para 67.

<sup>91</sup> ibid para 68.

<sup>92</sup> ibid para 71.

<sup>93</sup> ibid para 73.

	<p>received complaints about the difficulty in participating in environmental decision-making.<sup>94</sup></p> <ul style="list-style-type: none"> <li>● Regarding access to effective remedies, while Mongolia grants the public the right to challenge the legality of environmental decisions, significant obstacles exist in practice. The requirement to pay stamp duties often makes it too costly to bring these cases forward. Although the 2016 Law on Decision of Administrative Cases allows costs to be waived when the claimant is acting in the public interest, this provision has never been applied due to a lack of resources. Additionally, concerns persist about the courts' technical expertise and their receptiveness to public interest cases brought by environmental organisations.<sup>95</sup></li> </ul>
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These practices show that while Mongolia is enthusiastic about the right to a healthy environment, the right has not been seamlessly practised throughout the nation. As a result, the Special Rapporteur proposed several recommendations for Mongolia to improve its protection of the right to a healthy environment. The recommendations focused mainly on the implementation and enforcement of already existing laws as well as the adoption of several new pieces of legislation within Mongolia's legislature.<sup>96</sup> According to the Special Rapporteur, laws could be enhanced through underscoring the importance of ensuring the participation of the civil society to take into account their perspectives and concerns when amending legislation, pertaining to mining amongst others.<sup>97</sup> Such could be realised through the introduction of an Environmental Ombudsman, who would be responsible for receiving complaints from the civilians as well as provide information concerning environmental matters.<sup>98</sup>

An additional focus point of improvement would be to strengthen the implementation of already existing policies and legislation, by ensuring proper funding is provided for projects, such as improving air quality within Ulaanbaatar, as well as ensuring human rights of the people are simultaneously protected, including deterring from making decisions of forbidding people to move to Ulaanbaatar to protect them from air pollution as such is in contradiction on the right of freedom of movement.<sup>99</sup> Lastly, the recommendations are linked to the adoption of new legislation. On the international level Mongolia is recommended to join the Aarhus Convention on Access to Information, Public Participation in

<sup>94</sup> *ibid* para 75.

<sup>95</sup> *ibid* para 77.

<sup>96</sup> 'Statement of United Nations Special Rapporteur John H. Knox on the conclusion of his mission to Mongolia' (*UN Human Rights Office of the High Commissioner*, 27 September 2017)

<<https://www.ohchr.org/en/statements/2017/09/statement-united-nations-special-rapporteur-john-h-knox-conclusion-his-mission>> accessed 21 July 2024.

<sup>97</sup> *ibid*.

<sup>98</sup> *ibid*.

<sup>99</sup> *ibid*.

Decision-making, and Access to Justice in Environmental Matters to underscore the importance of abiding by international standards on environmental information, participation and the access to it.<sup>100</sup> As well as on the national level, Mongolia is urged to enact a legislation which protects environmental human rights defenders, as commonly they are posed with threats and violence to life.<sup>101</sup>

As with other developing nations, implementing environmental standards normally faces difficulties due to the lack of proper infrastructure and mechanisms or the overwhelming influence of wealthy corporations. Nevertheless, Mongolia's commitment to the environment and its actions so far signals that environmental protection will advance from this point. Inviting the Special Rapporteur to do an assessment regarding the human rights and environmental protection scene in Mongolia demonstrates the country's willingness to improve. Hopefully, Mongolia will take upon the recommendations posed by the Special Rapporteur and continue to conduct its sustainable development while considering human rights.

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<sup>100</sup> *ibid.*

<sup>101</sup> *ibid.*

## 5. CONCLUSION

01

### The right to a healthy environment

This right encompasses environmental protection from a human rights perspective and affords for an individual human right to live in a clean, healthy, and sustainable environment. The UNHRC (HRC/RES/48/13) and UNGA (A/RES/76/300), both respectively adopted Resolutions relating to the right to a healthy environment.

02

### Development of the right to a healthy environment

The first mention of the concept took place within the 1972 Stockholm Declaration, however it is not recognised in any globally binding instrument to date. Nevertheless, many regional treaties include the right to a healthy environment. Additionally, the Framework Principles on Human Rights and the Environment have been introduced, and while the principles are not legally binding, they act as accessible guidelines for different actors to ensure the interdependence of environmental protection and humanity.

03

### Legal potential of the right to a healthy environment

The right to a healthy environment has definite legal potential, as it is the underscoring right to the existence and realisation of all other human rights. Therefore, developing the right into binding character would be beneficial as environmental matters are at the forefront of the survival of societies today. The right to a healthy environment interlinks environmental rights and international human rights law. As part of international human rights law, states would be more inclined to act toward environmental protection. However, this would require codifying the right in international binding instruments first. Furthermore, there is a possibility for the right to crystallise into customary international law, due to the vast majority of states supporting the right. Categorising the right to a healthy environment as a *jus cogens* norm might be too optimistic for now. Thus, the right to a healthy environment has the potential to upgrade in the higher juridical order in the future, but not for the time being.

## 04

### China

China abstained from voting within the UNHRC and UNGA resolutions on the right to a healthy environment, and underscored the ambiguity of the definitions of the right itself as well as its relationship with other human rights. In addition, China holds fundamentally different views of human rights protection than most of the Western countries, which can further explain why China abstained from voting on the right to a healthy environment. Including matters such as: the belief that human rights protection is an internal matter rather than a global one; economic, social and cultural rights take precedence over civil and political rights; the freedom to choose how the implementation of international human rights obligations to domestic legislation is conducted; and the obligation to protect human rights derives from legal principles rather than legal rules. However, China has been taking steps to ensure the protection of the environment through domestic legislation and through the Human Rights Action Plan, which specifically mentions environmental rights. This partly coincides with the Framework Principles and the individual right to a healthy environment. Nevertheless, there is still progress to be made before the right to a healthy environment is fully recognised for its people.

## 05

### India

India abstained from voting for the UNHRC Resolution and dissociated itself from the UNGA Resolution for operative paragraph one, which mentions the right to a healthy environment. India has expressed its reasoning, which includes the lack of understanding and definition of the terms relating to the right in question, as well as the absence of reference to the principle of equity. However, India has been taking steps towards ensuring the right to a healthy environment, through its national legislation, the Indian Constitution and separate environmental protection acts, as well as through broad interpretive efforts of the judiciary. Therefore some of the rights and/or obligations included within the right to a healthy environment and the Framework Principles are existing already in India, however steps must still be taken to fully realise the right.

## 06

### Mongolia

Contrary to the other countries under assessment, Mongolia voted in favour of the UNGA resolution without reservations as it holds strong enthusiasm for environmental protection and it possesses provisions

within its domestic legislation pertaining to the right to a healthy environment and environmental protection. Mongolia has taken steps towards sustainable development, such as taking part in a UN PAGE programme and setting up a Sustainable Development Vision 2030. The Special Rapporteur on Human Rights and Environment conducted a country visit to Mongolia and has expressed his gratitude towards the actions Mongolia has taken to ensure strong environmental standards within. The Special Rapporteur reviewed Mongolia's activities within four areas, including air pollution, mining, conservation and environmental information, as set out in the Framework Principles and provided recommendations to better the status of human rights in combination with environmental protection. Therefore, Mongolia is actively working towards ensuring the interconnection between human rights and a healthy environment, however certain barriers still exist in enjoyment of the rights in full.



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