

‘The Right to a Clean, Sustainable and Healthy Environment: Nature, Content and Realisation’

The 2023 Blackshield Lecture

Delivered by the Hon. Justice Dr. Brian J Preston FRSN SC FAAL*

Macquarie Law School, Macquarie University, New South Wales

1. Introduction

Today’s lecture marks the confluence of two streams of jurisprudence - constitutional law and environmental law.

Emeritus Professor Tony Blackshield, for whom the eponymous lecture I have the honour of presenting is named, contributed significantly to constitutional law jurisprudence in Australia. Blackshield was a professor of law at Macquarie Law School for 11 years, from 1988 to 1999. Prior to that, he lectured at the University of Sydney, University of New South Wales and La Trobe University for over 25 years. Blackshield has been an Emeritus Professor of Law since 1999. Whilst he was a professor, he also served for a period of time as head of the Macquarie Law School.¹

Blackshield, amongst other notable contributions to constitutional law jurisprudence, has co-authored the classic text, *Australian Constitutional Law and Theory*.² Although constitutional law scholarship is not focused on the environment, the environment has provided the setting for some important constitutional decisions. Litigation concerning world heritage areas is a prime illustration.³ The trifecta of the *Tasmanian Dam* case,⁴ *Tasmanian Forests* case⁵ and the *Tropical Rainforest* case⁶ were influential in the extension of the Commonwealth constitutional power in relation to the environment. The legitimate concern to regulate trade in protected fauna led to constitutional decisions concerning s 92 of the Constitution.⁷

* Chief Judge of the Land and Environment Court of New South Wales. I acknowledge with gratitude the considerable assistance of Lily Morton, Research Officer and Tipstaff to the Chief Judge, in the research and writing of the paper.

¹ For a biographical history of Emeritus Professor Blackshield, see Michael Kirby, ‘A R Blackshield and Realism in Australian Constitutional Law’ (2013) 11 *Macquarie Law Journal* 7.

² George Williams, Sean Brennan and Andrew Lynch, *Blackshield Williams Australian Constitutional Law and Theory* (The Federation Press, 7th ed, 2018).

³ Brian J Preston, ‘Protected Areas in the Courts: An Overview’ (2015) 11 *Resource Management Theory and Practice* 22.

⁴ *The Commonwealth of Australia v State of Tasmania* (1983) 158 CLR 1.

⁵ *Richardson v Forestry Commission of Tasmania* (1988) 164 CLR 261.

⁶ *Queensland v Commonwealth* (1989) 167 CLR 232.

⁷ See *Ackroyd v McKechnie* (1986) 161 CLR 60, and commentary in B J Preston, ‘Section 92 and interstate trade in wildlife: A moral question’ (1987) 4 *Environmental and Planning Law Journal* 175 and *Cole v Whitfield* (1988) 165 CLR 360.

After retiring, Blackshield has continued to contribute to discussion on the intersection of constitutional and environmental issues. An example is his article ‘Green in judgement’⁸ on the High Court’s decision in *Brown v Tasmania*⁹. The High Court struck down as unconstitutional provisions of Tasmania’s *Workplaces (Protection from Protesters) Act 2014*, which were found to have infringed Bob Brown’s and other environmental protestors’ freedom of political communication. As Blackshield observed, the decision marked a point in time where “the environmental history merged with constitutional history”.¹⁰ The High Court’s decision must have resonated with Blackshield, given his own history of protest in support of freedom of expression.¹¹

The Centre for Environmental Law (CEL) at Macquarie Law School has contributed significantly to environmental law jurisprudence. CEL was established in 1983, making it Australia’s oldest, and longest continuously functioning, environmental law centre. CEL has organised a conference on “Pathways to Just Transitions for a Sustainable Common Future” to celebrate its 40th anniversary. CEL’s mission today, just as it was when it was established, is to drive transformative change in environmental law and policy to address global environmental challenges. This year’s Blackshield lecture coincides with CEL’s conference. It is apt that the topic of this lecture recognises this confluence of constitutional law and environmental law by focusing on an aspect of environmental constitutionalism. This aspect is the right to a clean, healthy and sustainable environment, which I will refer to as the right to a healthy environment.

Environmental constitutionalism is an omnibus term. As May and Daly observed: “It embodies the recognition that the environment is a proper subject for protection in constitutional texts and for vindication by constitutional courts worldwide.”¹² Starting in the 1970’s, but increasing in the last two decades, there has been a global trend for the constitutional entrenchment of provisions recognising the environment and environmental values as being worthy of protection. The constitutional entrenchment of environmental provisions takes at least two forms. The first involves conventional rights provisions recognising existing civil and political rights, such as the right to life or the right to privacy, family, home or correspondence, or existing economic, social and cultural rights, such as the right to an adequate standard of living, the right to health, or the right to take part in cultural life. By applying such existing human rights to environmental issues, there has been a “greening” of these human rights by recognising the inseparable connection between environmental issues and the achievement of human

⁸ Tony Blackshield, ‘Green in judgement’ *Inside Story* (Web page, 26 October 2017) <https://insidestory.org.au/green-in-judgement/>

⁹ (2017) 261 CLR 328.

¹⁰ For a discussion on implications of the High Court’s decision for climate change protestors, see Brian J Preston and Nicola Silbert, ‘Trends in Human Rights-Based Climate Litigation: Pathways for Litigation in Australia’ (2023) 49(1) *Monash University Law Review* 39.

¹¹ Kirby (n 1) 6.

¹² James May and Erin Daly, *Global Judicial Handbook on Environmental Constitutionalism* (United Nations Environment Programme, 3rd ed, 2019) 7.

rights. May refers to this first form of entrenchment as implied constitutional recognition.¹³ This process has had some success, creating an extensive jurisprudence on human rights and the environment.¹⁴

The second form of entrenchment involves a constitutional or legislative provision explicitly recognising a right to an environment with one or more described qualities. May terms this form of entrenchment explicit constitutional recognition.¹⁵ David Boyd, the current Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, records that as of 2022, the right to a healthy environment enjoys constitutional protection in 110 states. In more than 100 of those states, the right has been explicitly incorporated in national legislation and, in total, more than 80% of United Nations Member States (156 of 193) legally recognise the right, establishing binding duties for governments.¹⁶ Boyd observes that no other economic, social or cultural human right has been adopted throughout the world's constitutions as quickly.¹⁷ In October 2023, the Australian Capital Territory government introduced the *Human Rights (Healthy Environment) Amendment Bill 2023* to enshrine the right to a healthy environment, becoming the first Australian jurisdiction to commit to express statutory recognition of the right.¹⁸

The subject matter and form of these environmental provisions, and the model for their entrenchment, vary significantly. The surveys by Boyd in 2012,¹⁹ May and Daly in 2014²⁰ and Weis in 2018²¹ reviewed the diversity of environmental subject matter to be protected by the provisions, the form of the provisions and the model of entrenchment of the provisions. Weis identifies the twofold division between conventional rights provisions and provisions embodying directive principles.²² Although all environmental provisions might refer to some right to a healthy environment as a right, most provisions are not conventional rights provisions but rather are provisions that indicate that the institutional

¹³ James May, 'The Case for Environmental Human Rights' (2021) 42(3) *Cardozo Law Review* 983, 995-997.

¹⁴ John Knox, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/HRC/37/59 (24 January 2018) [12].

¹⁵ May (n 13) 989-995.

¹⁶ David Boyd, *The human right to a clean, healthy and sustainable environment: A catalyst for accelerated to achieve Sustainable Development Goals*, UN Doc A/77/284 (10 August 2022) [24]-[26].

¹⁷ David Boyd, 'Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment' in John Knox and Ramin Pejan (eds) *The Human Right to a Healthy Environment* (Cambridge University Press, 2018) 18.

¹⁸ Tara Cheyne, 'Right to healthy environment a step closer' *ACT Government* (Media Release, 26 October 2023)

https://www.cmtedd.act.gov.au/open_government/inform/act_government_media_releases/cheyne/2023/right-to-healthy-environment-a-step-closer#:~:text=Released%2026%2F10%2F2023&text=In%20an%20Australian%20first%2C%20the,environmental%20pollution%20and%20biodiversity%20loss.

¹⁹ David Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press, 2012).

²⁰ James May and Erin Daly, *Global Environmental Constitutionalism* (Cambridge University Press, 2014).

²¹ Lael Weis, 'Environmental Constitutionalism: Aspiration or Transformation?' (2018) 16 *International Journal of Constitutional Law* 836.

²² *Ibid.* See also, Lael Weis, 'Constitutional Directive Principles' (2017) 37 *Oxford Journal of Legal Studies* 920 and Lael Weis, 'The Constitutional Office of the Legislature' (2020) 70 *University of Toronto Law Journal* 214.

responsibility for fundamental environmental values lies with the political branches of government (the legislature and the executive) rather than with the courts.²³ Even where environmental provisions are obligatory in nature, Weis identifies that they are commonly formulated as directive principles, obligations that provide directions to the state, rather than as judicially enforceable rights.²⁴

This diversity in environmental constitutional provisions makes distillation of the nature and content of any right enshrined by the provisions, and the correlative obligations to respect, protect and fulfil the right, difficult. For the purpose of this lecture, I will focus on those provisions that can be characterised as rights provisions.²⁵

I will structure the lecture in four parts. First, I will start with the question of categorisation of the right to a healthy environment. I will ask whether it assists to categorise the right as a civil and political right, or as an economic, social and cultural right, or as a hybrid or other category of right. My answer is that the right to a healthy environment resists categorisation, partly because it is best seen as a cluster of rights, which fall into different categories, and partly because the approach of categorisation of human rights does not assist and indeed can be counterproductive.

Second, I will elaborate on the nature and content of the right to a healthy environment. As to the nature of the right, I will discuss common formulations of the right and the positive and negative natures of the right. As to the content of the right, I will identify and explain three components, being the substantive, procedural and intertemporal components of the right.

Third, I will identify the correlative obligations to respect, protect and fulfil the right to a healthy environment. I will first explain what the three actions to respect, protect and fulfil the right involve. I will then explain that the object of those actions, the content of the obligations, falls into four categories: substantive, procedural, intertemporal obligations and special obligations to the vulnerable.

Fourth, I will explain what is involved in discharging the correlative obligations so as to realise the right to a healthy environment. I explain the four steps for realising the right: first, achieving the inviolable element of the right; second, achieving the minimum core obligations of the right; third, progressively realising the right; and fourth, using maximum available resources.

2. Categorisation of the right to a healthy environment

In 1948, the Universal Declaration of Human Rights²⁶ recognised human rights without distinguishing them as civil and political rights or economic, social and cultural rights. A number of the human rights then recognised can be seen to fall within the ambit of the substantive and procedural rights protected

²³ Ibid 842, 853, 858.

²⁴ Ibid 858.

²⁵ As did Boyd, and May and Daly: see Weis (n 21) 841.

²⁶ Adopted by the United Nations General Assembly resolution 217A (III), 10 December 1948.

under the right to a healthy environment. These rights include the right to life,²⁷ the right to protective remedies for violation of rights,²⁸ the right to be free from interference with privacy, family, home and correspondence,²⁹ the right to freedom of opinion and expression,³⁰ the right to an adequate standard of living³¹ and the right to participate in the cultural life of the community³².

Afterwards, the deepening cold war tensions between the East and West led to negotiation and adoption of two separate human rights covenants, one on civil and political rights, emphasised by the market economy of the West, and the other on economic, social and cultural rights, emphasised by the centrally planned economies of the East.³³ Adopted in 1966, the International Covenant on Civil and Political Rights (ICCPR)³⁴ recognises a number of rights of relevance to the right to a healthy environment. These include the right to life,³⁵ access to effective remedies for violation of rights and freedoms,³⁶ the right to a fair hearing,³⁷ the right to freedom of opinion and freedom of expression,³⁸ and the right of peaceful assembly³⁹. The International Covenant on Economic, Social and Cultural Rights (ICESCR),⁴⁰ adopted at the same time as the ICCPR, also recognises a number of rights of relevance to the right to a healthy environment. These include the right to an adequate standard of living, which includes the right to adequate food,⁴¹ the right to adequate housing,⁴² the right to water and sanitation,⁴³ the right to health,⁴⁴ and the right to take part in cultural life.⁴⁵

In 1993, the Vienna Declaration on Human Rights (the Vienna Declaration)⁴⁶ returned to the original architecture of the Universal Declaration on Human Rights of not categorising human rights as civil and political rights or economic, social and cultural rights. Article 5 pronounces that: “All human rights are universal, indivisible, and interdependent and interrelated.”⁴⁷ The Vienna Declaration reaffirmed a

²⁷ Ibid art 3.

²⁸ Ibid art 8.

²⁹ Ibid art 12.

³⁰ Ibid art 19.

³¹ Ibid art 25.

³² Ibid art 27.

³³ See Adam McBeth, Justin Nolan and Simon Rice, *The International Law of Human Rights* (Oxford University Press, 2nd ed, 2017) 24-26.

³⁴ Adopted by United Nation General Assembly Resolution 2200A (XXI), 16 December 1966.

³⁵ International Covenant on Civil and Political Rights (ICCPR) art 6(1).

³⁶ Ibid art 2(3).

³⁷ Ibid art 14(1).

³⁸ Ibid art 19(1)(2).

³⁹ Ibid art 21.

⁴⁰ Adopted by United Nation General Assembly Resolution 2200A (XXI), 16 December 1966.

⁴¹ International Covenant on Economic, Social and Cultural Rights (ICESCR) art 11(1). See also McBeth et al (n 33) 127-128.

⁴² McBeth et al (n 33) 128-131.

⁴³ Ibid 131-134.

⁴⁴ ICESCR art 12.

⁴⁵ Ibid art 15.

⁴⁶ Adopted by the World Conference on Human Rights, 25 June 1993 and endorsed by the United Nations General Assembly Resolution 48/121, 20 December 1993.

⁴⁷ Ibid art 5.

number of human rights of relevance to the right to a healthy environment, including those pronounced in the ICCPR and ICESCR. The Vienna Declaration reaffirmed the right to development, as recognised in the Declaration on the Right to Development,⁴⁸ as a universal and inalienable right and an integral part of fundamental human rights.⁴⁹ The Vienna Declaration emphasised, however, that the right was a right to *sustainable* development: “The right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations.”⁵⁰

Action subsequent to the Vienna Declaration has treated human rights as indivisible. In 2006, the UN General Assembly resolution establishing the Human Rights Council reaffirmed “that all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing, and that all human rights must be treated in a fair and equal manner, on the same footing and with the same emphasis.”⁵¹ Collet observed that:⁵²

“The vanishing categorization of human rights leads us to reject any hierarchy in theory insofar as all the rights we include as human rights are fundamental rights, of which none can be held to be intrinsically superior given their pervasive interdependence. The globalization of challenges tends indeed to show clearly that all biological as well as economic processes are interrelated and must be dealt within a single framework.”

At the same time, however, renewed attention has been given to rights that might be categorised as economic, social and cultural rights, particularly in the context of the renewed push for sustainable development. This is manifested in the 2030 Agenda for Sustainable Development, adopted by the United Nations Member States in 2015, which sets the Sustainable Development Goals (SDGs).⁵³ The UN General Assembly declared the importance of protecting not only human rights but also the planet and its natural resources.⁵⁴ The General Assembly committed “to achieving sustainable development in three dimensions – economic, social and environmental – in a balanced and integrated manner”.⁵⁵ The General Assembly declared the SDGs and targets to be “universal” as well as “integrated and indivisible”, which “balance the three dimensions of sustainable development.”⁵⁶ The Special Rapporteur on the right to development, Surya Deva, has noted that the right to development goes “hand in hand” with the right to a healthy environment.⁵⁷ The United Nations Resolution adopting the right to

⁴⁸ Adopted by United Nation General Assembly Resolution 41/128, 4 December 1986.

⁴⁹ Ibid art 10

⁵⁰ Ibid art 11.

⁵¹ United Nation General Assembly, *Resolution adopted by the General Assembly 60/252. Human Rights Council*, UN Doc A/Res/60/251 (3 April 2006), preamble, [3].

⁵² Philippe Cullet, ‘Definition of an environmental right in a human right context’ (1995) 13 *Netherlands Quarterly of Human Rights* 25, 28.

⁵³ United Nations General Assembly, *Resolution adopted by the General Assembly on 25 September 2015*, UN Doc A/RES/70/1 (21 October 2015).

⁵⁴ Ibid [3].

⁵⁵ Ibid [2].

⁵⁶ Ibid [5].

⁵⁷ Surya Deva, *Reinvigorating the right to development: A vision for the future*, UN Doc A/HRC/54/27 (4 August 2023) [65].

a clean, healthy and sustainable environment recognises this interdependence between the right to development and the right to a healthy environment.⁵⁸

Viewed this way, whilst exhibiting characteristics of both groups of rights, the right to a healthy environment is more akin to economic, social and cultural rights than to civil and political rights. That was the observation of Boyle, who said “a right to a decent environment is best envisaged, not as a civil and political right, but within the context of economic and social rights.”⁵⁹

Bringing the threads of this discussion together, we can see that the right to a healthy environment is an omnibus term that includes within its ambit a number of existing human rights, some falling within the category of civil and political rights and some falling within the category of economic, social and cultural rights. The right to a healthy environment is therefore best characterised as a cluster of rights, each right reflecting a different dimension but none intrinsically superior to any other.

However, the right to a healthy environment does not constitute a “shell-right” aimed at enhancing the realisation of other existing human rights.⁶⁰ Each of the rights constituting the right to a healthy environment are interrelated, interdependent, and mutually reinforcing. The rights combine to create a single framework for the right to a healthy environment. Each of the constitutive rights cannot be given effect to selectively. For example, without realisation of the right to an adequate standard of living or the right to life, other economic, social and cultural rights as well as civil and political rights would have little meaning.⁶¹

3. Nature and content of the right to a healthy environment

I have identified that the right to a healthy environment is a cluster of rights. The nature of the right to a healthy environment therefore derives from the nature of the various rights constituting the cluster of rights. Many civil and political rights have the character of freedoms from interference by another, for example, freedoms of opinion and expression,⁶² and the freedom of assembly.⁶³ In Hohfeld’s conception of the term ‘right’, these freedoms are privileges or immunities, or negative rights.⁶⁴ In contrast, many economic, social and cultural rights have the character of positive rights, as they

⁵⁸ United Nations General Assembly, *The human right to a clean, healthy and sustainable environment*, UN Doc A/76/L.75 (26 July 2022) 2.

⁵⁹ Allan Boyle, ‘Human Rights and the Environment: Where next?’ (2012) 23(3) *European Journal of International Law* 613, 628.

⁶⁰ Cullet (n 52) 27.

⁶¹ Peter Bailey, ‘The Right to an Adequate Standard of Living: New Issues for Australian Law’ (1997) 4(1) *Australian Journal of Human Rights* 25. See also George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 4.

⁶² ICCPR art 19.

⁶³ *Ibid* art 21.

⁶⁴ Williams and Hume (n 61) 6. See also Wesley Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913) 23 *Yale Law Journal* 16.

articulate a right to something.⁶⁵ The right to life,⁶⁶ the right to an adequate standard of living,⁶⁷ the right to health,⁶⁸ and the right to take part in cultural life,⁶⁹ are examples.

The nature of the various rights constituting the right to a healthy environment affects the realisation of the rights. Freedoms from interference, being typically civil and political rights, are seen to be amenable to immediate implementation. On the other hand, rights to something, such as economic, social and cultural rights, may only be realised progressively as resources become available. The nature of the right affects the state's obligations. The state is required to immediately refrain from interfering with individual freedoms but can progressively realise positive rights to something.

The content of the various freedoms and rights constituting the right to a healthy environment can be seen to have at least three components: a substantive component, a procedural component and an intertemporal component.⁷⁰

3.1 Substantive component

The substantive component of the right to a healthy environment is its substantive content.⁷¹ The substantive content of the right derives from the substantive content of the constituent rights, such as the right to life. The right to life includes not only the right to be alive but also the right to access and enjoy the necessities of life, the right to access and enjoy those aspects of life that make for a quality life and the right to a healthy, functioning and flourishing biosphere. Boyd has published a series of thematic reports identifying at least six substantive elements of the right to a healthy environment: clean air,⁷² a safe climate,⁷³ healthy ecosystems and biodiversity,⁷⁴ safe and sufficient water,⁷⁵ healthy and sustainable food⁷⁶ and non-toxic environments⁷⁷. These four components of the right to life and Boyd's

⁶⁵ Ibid.

⁶⁶ ICCPR art 6.

⁶⁷ ICESCR art 11.

⁶⁸ Ibid art 12.

⁶⁹ Ibid art 15.

⁷⁰ John Knox, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/HRC/37/59 (24 January 2018).

⁷¹ Brian J Preston, 'The right to a clean, healthy and sustainable environment: how to make it operational and effective' (2023) 42(1) *Journal of Energy & Natural Resources Law* (forthcoming in print, available online: <https://doi.org/10.1080/02646811.2023.2165310>) 2.

⁷² David Boyd, *Issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/HRC/40/55 (8 January 2019).

⁷³ David Boyd, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/74/161 (15 July 2019).

⁷⁴ David Boyd, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/75/161 (15 July 2020).

⁷⁵ David Boyd, *Human rights and the global water crisis: water pollution, water scarcity and water-related disasters*, UN Doc HRC/46/28 (19 January 2021).

⁷⁶ David Boyd, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/76/179 (19 July 2021).

⁷⁷ David Boyd, *The right to a clean, healthy and sustainable environment: non-toxic environment*, UN Doc A/HRC/49/53 (12 January 2022).

six elements of the right to a healthy environment can be used to unpack the substantive component of the right to a healthy environment.

First, the right to life involves the right to be alive.⁷⁸ It involves people not being deprived of their life without due process and according to law.⁷⁹

Second, the right to life involves the right to access and enjoy the necessities of life “free from environmental hazards” - clean water to drink, clean air to breathe, healthy food to eat and adequate sanitation.⁸⁰ The Indian Supreme Court has held that the right to life “encompasses within its ambit the protection and preservation of the environment, ecological balance, freedom from pollution of air and water, and sanitation, without which life cannot be enjoyed”.⁸¹ Four of Boyd’s six substantive elements involve the right to access and enjoy the necessities of life. These elements are clean air, safe and sufficient water, healthy and sustainable food, and non-toxic environments.

The first element is the right to breathe clean air.⁸² Air pollution is the most significant environmental risk globally,⁸³ contributing to 7 million premature deaths annually.⁸⁴ In 2019, 99% of the world’s population was living in regions that exceeded the World Health Organisation’s guidelines for healthy air quality.⁸⁵ Air pollution has severe consequences for the right to life and the right to a healthy environment, as well as the rights to health and the rights of the child.⁸⁶ Courts have recognised violations of the right to life caused by chronic air pollution.⁸⁷ In 2019, the Supreme Court of Chile held that a major air pollution incident in the industrial area of Quintero-Puchuncavi, which caused serious illness to local children, was a violation of the right to a pollution-free environment and ordered the Government to take steps to address the egregious air pollution in the area.⁸⁸

⁷⁸ Human Rights Committee, *General Comment No.36: Article 6: Right to Life*, 124th sess, UN Doc CCPR/C/GC/36 (3 September 2019) [3].

⁷⁹ *Ibid* [12]. See also *McBeth* (n 33) 127.

⁸⁰ *Farooque v Government of Bangladesh* (Supreme Court of Bangladesh, WP No 891 of 1994, 15 July 2001). See also *Waratah Coal Pty Ltd v Youth Verdict Limited and Others (No 6)* [2022] QLC 21 and *Future Generations v Ministry of the Environment and others* (Supreme Court of Colombia, 11001-22-03-000-2018-00319-01, 5 April 2018) (*Future Generations*).

⁸¹ *Virender Gaur v State of Haryana* (1995) 2 SCC 577.

⁸² *Boyd* (n 72).

⁸³ *WHO global air quality guidelines* (World Health Organisation, 2021) 10.

⁸⁴ ‘Burden of disease from the joint effects of household and ambient air pollution for 2016’, *World Health Organisation* (Web page, May 2018) https://cdn.who.int/media/docs/default-source/air-quality-database/aqd-2018/ap_joint_effect_bod_results_may2018.pdf.

⁸⁵ ‘Ambient (outdoor) air pollution’, *World Health Organisation* (Web Page, 19 December 2022) [https://www.who.int/news-room/fact-sheets/detail/ambient-\(outdoor\)-air-quality-and-health](https://www.who.int/news-room/fact-sheets/detail/ambient-(outdoor)-air-quality-and-health). For a further discussion on the adverse impacts of poor air quality see *Boyd* (n 72) [18]-[43].

⁸⁶ *Boyd* (n 72) [44].

⁸⁷ See the discussion in B J Preston, ‘The Evolving Role of Environmental Rights in Climate Change Litigation’ (2018) 2 *Chinese Journal of Environmental Law* 131, 145-148.

⁸⁸ *Francisco Chahuan contra Empresa Nacional de Petroleos, ENAP SA*, Case No. 5888-2019 (28 May 2019, Supreme Court of Chile).

The second element is safe and sufficient water.⁸⁹ The Committee on Economic, Social and Cultural Rights has emphasised that “water is indispensable for leading a life in human dignity”.⁹⁰ However, more than 2 billion people lack access to safely managed drinking water and over 4 billion people lack access to safely managed sanitation.⁹¹ Consequently, waterborne diseases cause nearly 2 million preventable deaths each year.⁹² Water pollution, scarcity and water-related disasters have a direct impact on the right to life and the right to a healthy environment. The human rights to water and sanitation have been recognised by the United Nations General Assembly,⁹³ and are encapsulated in SDG 6.⁹⁴

The third element is healthy and sustainable food.⁹⁵ Boyd emphasises the importance of food as a necessity of life and the severe environmental and health consequences of industrial food systems, unhealthy diets, food waste and pollution.⁹⁶ The Committee on Economic, Social and Cultural Rights has stated that food must be safe and “free from adverse substances”.⁹⁷ In *Portillo Cáceres v Paraguay*,⁹⁸ the United Nations Human Rights Committee determined that the State of Paraguay’s failure to properly regulate the use of toxic pesticides on agricultural crops violated the right to life for members of the local community. The Committee concluded that extensive pesticide spraying “poses a reasonably foreseeable threat to the authors’ lives given that such large-scale fumigation has contaminated the rivers in which the authors fish, the well water they drink and the fruit trees, crops and farm animals that are their source of food.”⁹⁹

The fourth element is a non-toxic environment in which people can safely live, work, study, play and enjoy the necessities of life.¹⁰⁰ Toxic contaminants are ubiquitous today. Boyd identifies that the ongoing toxification of people and the planet is causing unconscionable environmental injustices and creating “sacrifice zones”.¹⁰¹ These are extremely contaminated areas where vulnerable and marginalised groups bear a disproportionate burden of the health, human rights and environmental

⁸⁹ Boyd (n 75).

⁹⁰ Committee on Economic, Social and Cultural Rights, *General Comment No. 15 (2002)*, UN Doc E/C.12/2002/11 (20 January 2003) [1].

⁹¹ Boyd (n 75) [10]-[11].

⁹² WHO, *Safer Water, Better Health* (WHO, 2019).

⁹³ United Nations General Assembly, *Resolution adopted by the General Assembly on 28 July 2010*, UN Doc A/RES/64/292 (3 August 2010) and United Nations Human Rights Council, *Resolution adopted by the Human Rights Council*, UN Doc A/HRC/RES/15/9 (6 October 2010).

⁹⁴ SDG 6 recognises the need to “ensure availability and sustainable management of water and sanitation for all”. See United Nations General Assembly (n 53).

⁹⁵ Boyd (n 76).

⁹⁶ *Ibid.*

⁹⁷ Committee on Economic, Social and Cultural Rights, *General Comment No. 12: The Right to Adequate Food (Art. 11)*, UN Doc E/C.12/1999/5 (12 May 1999) at [10].

⁹⁸ United Nations Human Rights Committee, *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2751/2016*, UN Doc CCPR/C/126/D/2751/2016 (20 September 2019).

⁹⁹ *Ibid* [7.5].

¹⁰⁰ Boyd (n 77).

¹⁰¹ *Ibid* [2].

consequences of exposure to pollution and hazardous substances.¹⁰² In Kabwe, Zambia, for example, 95% of children suffer from elevated blood lead levels caused by local lead mining and smelting.¹⁰³ In La Oroya, Peru, 99% of children have elevated blood lead levels from a nearby lead smelter.¹⁰⁴ An extensive body of international law addresses pollution and toxic substances.¹⁰⁵ Preventing exposure to toxic substances is also vital for fulfilling many of the SDGs, including those relating to health (SDG 3), clean water (SDG 6) and sustainable consumption and production (SDG 12).

Third, the right to life includes having access to and being able to enjoy those aspects of life that make for a quality life as a human being – a life in which each person can flourish and function with dignity. There is a strong linkage between a healthy environment and the fulfilment of these rights to a quality life, as recognised by the High Court of Ireland¹⁰⁶ and the Supreme Court of the Netherlands.¹⁰⁷ This linkage has a special salience for indigenous peoples and their distinct cultural rights, including rights concerning their identity, cultural heritage, and traditional connection to lands.¹⁰⁸ Actions that harm or damage the environment risk limiting indigenous peoples’ distinct cultural rights.¹⁰⁹

Fourth, the right to life depends on there being a healthy, functioning and flourishing biosphere. As Boyd perceptively observes: “All human rights ultimately depend on a healthy biosphere and a safe climate. Without functioning ecosystems which depend on healthy biodiversity there would be no clean air to breath, safe water to drink or nutritious food to eat.”¹¹⁰ This adds the dimension of ecological sustainability to the substantive content of the right to life. The right to a healthy environment refers to an environment that is not only healthy for humans, such as providing clean air and water, but is healthy in itself – a functioning and flourishing Earth system.¹¹¹

¹⁰² Ibid [57].

¹⁰³ Steve Lerner, *Sacrifice Zones: The Front Lines of Toxic Chemical Exposure in the United States* (MIT Press, 2010).

¹⁰⁴ Xulia Fandino Pineiro et al, ‘Heavy metal contamination in Peru: implications on children’s health’, *Scientific Reports*, vol 11, November 2021, art No. 22729.

¹⁰⁵ For example, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, the Stockholm Convention on Persistent Organic Pollutants and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade.

¹⁰⁶ *Friends of the Irish Environment CLG v Fingal County Council* (High Court of Ireland, No 344 JR, 21 November 2007) [264].

¹⁰⁷ *The State of the Netherlands v Urgenda Foundation* ECLI:NL:GHDHA:2018:2610 (The Hague Court of Appeal), *The State of the Netherlands v Urgenda Foundation*, ECLI:NL:HR:2019:2007 (Supreme Court of the Netherlands).

¹⁰⁸ ICESCR art 15.

¹⁰⁹ In *Waratah Coal Pty Ltd v Youth Verdict Limited and Others (No 6)* (n 80), the Land Court of Queensland recognised the profound impact of climate change on cultural rights and the survival of culture for Aboriginal and Torres Strait Islander peoples, at [1565].

¹¹⁰ David R Boyd, ‘The Human Right to a Healthy Environment: Protecting Life on Earth’ (Green Diplomacy, 14 October 2022) [3]. <https://www.greendiplomacy.org/article/the-human-right-to-a-healthy-environment-protecting-life-on-earth/>.

¹¹¹ Preston (n 71) 5-8.

Many of the SDGs call for action to promote ecological sustainability.¹¹² SDG 13 is to “take urgent action to combat climate change.” SDG 14 is to “conserve and sustainably use the oceans, seas and marine resources for sustainable development.” SDG 15 is to “protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss.” At the core of the SDGs is the concept of sustainable development to achieve the needs and human rights of the present, without compromising the ability of future generations to do the same. At the heart of sustainable development, is ecological sustainability and the stability of the Earth system.¹¹³

Two of Boyd’s substantive elements of the right to a healthy environment concern the need for a healthy, functioning and flourishing biosphere. These elements are a safe climate and a healthy ecosystem and biosphere.¹¹⁴

Climate change is already having severe impacts on human health, livelihoods and human rights.¹¹⁵ The Intergovernmental Panel on Climate Change has warned that “warming of 1.5 °C is not considered ‘safe’ for most nations, communities and sectors and poses significant risks to natural and human systems as compared to the current warming of 1 °C.”¹¹⁶ The achievement of all human rights, not least the right to life and the right to a healthy environment, depend on there being a safe climate.¹¹⁷ This was recognised in *Waratah Coal v Youth Verdict (No 6)*,¹¹⁸ where the Queensland Land Court held that approving a large open-cut coal mine would contribute to “foreseeable and preventable life-terminating harm”.¹¹⁹ The Court found that the release of greenhouse gases from the mining and burning of the coal would increase climate change impacts and breach the right to life, the rights of First Nations people, the rights of children, the right to property, the right to privacy and home, and the right to equal enjoyment of human rights.¹²⁰

Healthy ecosystems are vital to regulate the Earth’s climate, filter air and water, recycle nutrients and mitigate the impact of natural disasters. Human damage to the biosphere is having severe impacts on health, livelihoods and the enjoyment of human rights.¹²¹ In 2020, the Inter-American Court of Human Rights held that the degradation of forests and biodiversity in Argentina was a violation of the local

¹¹² United Nations General Assembly (n 53)

¹¹³ Johan Rockström and Will Steffen have developed a ‘planetary boundaries model’ to define ecological sustainability and the factors influencing the stability of the Earth system: Johan Rockström and M Klum, *Big World, Small Planet* (Yale University Press, 2015). For a further discussion see, Preston (n 71) 7-8.

¹¹⁴ Boyd (n 73) and Boyd (n 74).

¹¹⁵ Boyd (n 73) [6].

¹¹⁶ IPCC, *Global Warming of 1.5 °C* (IPCC, 2018).

¹¹⁷ John Knox, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/HRC/31/52 (1 February 2016) [7].

¹¹⁸ *Waratah Coal v Youth Verdict (No 6)* (n 80). See also Sean Ryan and Briana Collins, ‘Waratah Coal Pty Ltd v Youth Verdict & Ors (No 6)’ (2023) 37(7) *Australian Environment Review* 126.

¹¹⁹ *Ibid* [1512].

¹²⁰ *Ibid* [1514]-[1649].

¹²¹ *Ibid* [10].

indigenous peoples' right to a healthy environment.¹²² Earlier, in 2017, the Inter-American Court of Human Rights emphasised the ecocentric element of the right to a healthy environment which, unlike other rights, protects the critical components of the environment, such as forests, rivers and seas, as legal interests in themselves.¹²³

3.2 Procedural component

The procedural component of the right to a healthy environment is the recognition and protection of procedural rights. Principle 10 of the Rio Declaration on the Environment and Development,¹²⁴ the Aarhus Convention,¹²⁵ the Escazú Agreement¹²⁶ and the Maputo Protocol¹²⁷ recognises procedural rights. These procedural rights are threefold: individuals have a right to access information on the environment, to participate in environmental decision-making, and to access the courts to uphold and enforce these procedural and other rights. This procedural component of the right to a healthy environment was identified by the previous Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John Knox, in his Framework Principles on Human Rights and the Environment (Framework Principles).¹²⁸

The procedural right to *access environmental information* is identified as Framework Principle 7: “States should provide public access to environmental information by collecting and disseminating information and by providing affordable, effective and timely access to information to any person upon request.”¹²⁹ Courts have held that the right to life requires publicization and making information on the environment accessible.¹³⁰

The procedural right of *public participation in environmental decision-making* is identified as Framework Principle 9: “States should provide for and facilitate public participation in decision-making related to the environment and take the views of the public into account in the decision-making

¹²² *Indigenous Communities of the Lhaka Honhat Association v Argentina*, Inter-American Court of Human Rights, 6 February 2020.

¹²³ Advisory Opinion OC-23/17 (Inter-American Court of Human Rights, 15 November 2017) [62].

¹²⁴ United Nations General Assembly, *Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992)*, UN Doc A/CONF.151/26 (Vol 1) (12 August 1992).

¹²⁵ *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, opened for signature 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001).

¹²⁶ *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean*, opened for signature 4 March 2018, C.N.195.2018.TREATIES-XXVII.18 (entered into force 22 April 2021).

¹²⁷ *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, opened for signature 11 July 2003, OAU Doc CAB/LEG/66.6 (entered into force 25 November 2005).

¹²⁸ Knox (n 14).

¹²⁹ Ibid [17]-[19]. See also Tiina Palonitty, ‘Review Article: On Cracks, Lights and Environments’ (2023) 35 *Journal of Environmental Law* 319.

¹³⁰ See, for example, *C. Mehta v Union of India* 1992 AIR 382 (22 November 1991, Supreme Court of India). The claim to uphold the right to life in Article 21 of the Indian Constitution was brought under Article 32 of the Constitution, which grants Indian citizens the right to seek a remedy from the Indian Supreme Court if their fundamental rights have been infringed.

process”.¹³¹ The procedural right of public participation has been recognised by the courts as a procedural requirement in the context of environmental issues.¹³² The courts have held there needs to be adequate and meaningful consultation regarding activities likely to harm people and the environment.¹³³ The consultation required in order to enable effective public participation “must be in good faith, through culturally appropriate procedures and with the objective of reaching an agreement.”¹³⁴

The procedural right to *access the courts* is identified as Framework Principle 10: “States should provide for access to effective remedies for violations of human rights and domestic laws relating to the environment.”¹³⁵ That the right to a healthy environment needs to be able to be enforced by the courts is also recognised in SDG 16. Denial of access to the courts to enforce the right to life or the right to a healthy environment is a denial of the right itself. Achieving the procedural right to access the courts is not limited to people having legal standing to sue and being able otherwise to commence proceedings in court. It also extends to people being able to participate in the conduct of the proceedings in meaningful and effective ways.¹³⁶

There is another dimension to the procedural right to access the courts. This involves governments ensuring the effective enforcement of environmental laws and decisions of the courts. This is identified in Framework Principle 12: “States should ensure the effective enforcement of their environmental standards against public and private actors.”¹³⁷ Governmental authorities need to enforce compliance with environmental laws by “preventing, investigating, punishing and redressing violations of the standards by private actors as well as governmental authorities.”¹³⁸ The failure of governmental authorities to enforce court decisions upholding human rights can also be a violation of the right to a fair hearing.¹³⁹

¹³¹ Knox (n 14) [23]-[26].

¹³² See *Re Application of Maui Electric Company* 408 P 3d 1 (Haw Sup Ct, 2017) and discussion in Preston (n 71) 10-11.

¹³³ See *Sustaining the Wild Coast NPC and Ors v Minister of Mineral Resources and Energy and Ors* [2022] ZAECMKHC 55, *Nato and Ors v National Environment Management Authority and Anor* [2022] KENET 699 (KLR), and discussion in Preston (n 71) 10-11.

¹³⁴ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (African Commission on Human and Peoples’ Rights, 4 February 2010) [289].

¹³⁵ Knox (n 14) [27]-[30].

¹³⁶ This was recognised by the Land Court of Queensland in *Waratah Coal Pty Ltd v Youth Verdict and Others (No 5)* [2022] QLC 4

¹³⁷ Knox (n 14) [34]-[35].

¹³⁸ *Ibid* [34].

¹³⁹ This was illustrated in *Okyay v Turkey*, Application No 36220/97, ECHR 2005-VII, where the European Court of Human Rights found that Turkey had violated Article 6 of the European Convention on Human Rights, the right to a fair trial, and awarded the plaintiffs compensation.

3.3 Intertemporal component

The intertemporal component of the right to a healthy environment recognises that the right needs to be enjoyed by both present and future generations.¹⁴⁰ SDG 3 directs states to “ensure healthy lives and promote well-being for all at all ages.” The present generation includes both adults and children. Children, however, are sometimes found not to be able to sue until they come of legal age. But there are instances of enlightened courts upholding the right of children to sue to protect their right to life and right to a healthy environment.¹⁴¹

The present generation also needs to recognise and respect the right of future generations to a healthy environment and take action now to ensure that future generations will be able to enjoy the right. This includes passing on a healthy environment in which future generations can live. This is a key component of sustainable development – development that meets the needs of the present without compromising the ability of future generations to meet their own needs.¹⁴² Deva identifies the principle of intergenerational equity as one of the four overarching principles of the right to development, which is intrinsically linked to the right to a healthy environment.¹⁴³ Courts have recognised this obligation of the present generation of intergenerational equity, to maintain and bequeath to future generations a healthy environment.¹⁴⁴

4. Nature and content of the correlative obligations

4.1 The correlative duty

The correlative of the right to a healthy environment, in Hohfeld’s sense of a claim right, is a duty to respect, protect and fulfil the right. Identification of the correlative duty to respect, protect and fulfil the right to a healthy environment is critical in order for the right to be made operational and effective.¹⁴⁵ Gandhi spoke poetically of the importance of duties for the realisation of rights:¹⁴⁶

¹⁴⁰ See, for example, the Maastricht Principles on the Human Rights of Future Generations, which asserts, at principle 5(b), that future generations are entitled to all human rights.

¹⁴¹ See, for example, *Minors Oposa v Factoran* (1993) 296 Phil 694, *Daniel Billy and others v Australia (Torres Strait Islanders Petition)*, Human Rights Committee, 135th sess, UN Doc CCPR/C/135/D/3624/2019 (22 September 2022, adopted 21 July 2022), and *Held v Montana* CDV-2020-307 (14 August 2023, Montana First Judicial District Court).

¹⁴² See Ian Fry, *Promotion and protection of human rights in the context of climate change*, UN Doc A/78/225 (28 July 2023) [59]-[61] for a discussion on the importance of intergenerational equity and the rights of future generations in the context of climate change justice.

¹⁴³ Deva (n 57) [13].

¹⁴⁴ See, for example, *Neubauer et al v Germany* (2021) 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20 (*Neubauer*) and further cases discussed in Brian J Preston, ‘What’s Equity got to do with the Environment’ (2018) 92 *Australian Law Journal* 257, 265-272.

¹⁴⁵ Preston (n 71) 16.

¹⁴⁶ Mahatma Gandhi quoted in Rene Provost, *International Human Rights and Humanitarian Law* (Cambridge University Press, 2002) 11.

“The true source of rights is a duty. If we all discharge our duties, rights will not be far to seek. If leaving duties unperformed we run after rights, they will escape us like a will-o-the-wisp. The more we pursue them, the further they will fly.”

Similarly, Hohfeld observed that where a right is referred to, it is more commonly the correlative duty that is actually considered.¹⁴⁷

4.2 The tripartite obligation to respect, protect and fulfil

The correlative duty in relation to a human right is the tripartite obligation to respect, protect and fulfil the human right.¹⁴⁸ This is explicitly incorporated in the ICESCR and is now broadly accepted to apply equally to civil and political rights.¹⁴⁹ This typology is also encapsulated in Knox’s Framework Principle 2: “States should respect, protect and fulfil human rights in order to ensure a safe, clean, healthy and sustainable environment”.¹⁵⁰

The *obligation to respect* requires states to refrain from interfering, directly or indirectly, with an individual’s enjoyment of the right to a healthy environment.¹⁵¹ This obligation may be violated if a state takes action that limits or denies an individual’s enjoyment of a healthy environment, such as access to clean air or water.

The *obligation to protect* requires states to prevent any interference with the right to a healthy environment. This includes, for example, ensuring that private entities comply with environmental standards and approval processes and, in doing so, not violate the right to a healthy environment.¹⁵²

The *obligation to fulfil* requires states to take appropriate legislative, administrative, financial, judicial and other measures to ensure the enjoyment of the right to a healthy environment by all.¹⁵³ The obligation to fulfil has three components: to facilitate, to promote and to provide.¹⁵⁴ The obligation to facilitate requires states to undertake positive measures and enabling strategies, such as ensuring that sound environmental policies for reductions of greenhouse gas emissions are enacted and implemented.¹⁵⁵ The obligation to promote requires states to enable and maintain realisation of the right,

¹⁴⁷ Hohfeld (n 64) 31.

¹⁴⁸ Frédéric Mégret, ‘Nature of Obligations’ in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds) *International Human Rights Law* (Oxford University Press, 2017) 130.

¹⁴⁹ McBeth et al (n 33) 139. See also, Office of the United Nations High Commissioner for Human Rights, ‘Frequently Asked Questions on Economic, Social and Cultural Rights’ (Fact Sheet No. 33, United Nations, 1 December 2008) 11.

¹⁵⁰ Knox (n 14) Annex [4]-[6].

¹⁵¹ Ibid.

¹⁵² See, for example, *Waratah Coal v Youth Verdict* (No 6) (n 80) where the Queensland Land Court held that approving the proposed project of a private entity for a large coal mine would violate the right to life and recommended that it be refused.

¹⁵³ Committee on Economic, Social and Cultural Rights, *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)* UN Doc E/C.12/2000/4 (11 August 2000) [33].

¹⁵⁴ Ibid [37].

¹⁵⁵ As was ordered by the Hague District Court and upheld by the Court of Appeal and Supreme Court of the Netherlands in *The State of the Netherlands v Urgenda Foundation* (n 107).

for example, by providing for education and public information on environmental issues and the right to a healthy environment.¹⁵⁶ The obligation to provide requires states to provide the substance of the right directly where an individual or group is unable to enjoy a right through the means at their disposal.¹⁵⁷ The obligations to respect, protect and fulfil the right to a healthy environment for these more vulnerable people are recognised separately as special obligations.

4.3 The content of the obligations

The actions of respecting, protecting and fulfilling the right to a healthy environment are directed to the substantive, procedural and intertemporal components of the right. They give rise to four categories of obligations: substantive, procedural and intertemporal obligations and special obligations towards those who are vulnerable.

4.3.1 Substantive obligations

The substantive obligations involve respecting, protecting and fulfilling the substantive component of the right to a healthy environment. States have obligations to respect, protect and fulfil, at a minimum, the six substantive elements of the right to a healthy environment identified by Boyd.

First, states are under an obligation to improve air quality by reducing air pollution.¹⁵⁸ This includes an obligation to respect and not violate the right to clean air through their own actions; protect the right from being violated by third parties; and establish, implement and enforce laws, policies and programmes to fulfil the right to clean air.¹⁵⁹ Courts, particularly in South Asia, have upheld the substantive obligations to ensure clean air by ordering governments to take concrete action to provide this necessity of life free from environmental hazards.¹⁶⁰ Courts have made orders to phase out highly polluting vehicles;¹⁶¹ close highly polluting industries such as brick kilns, tanneries and abattoirs;¹⁶² impose taxes on highly polluting vehicles;¹⁶³ and constitute ad hoc commissions of experts to recommend solutions to reduce air pollution¹⁶⁴.

¹⁵⁶ See Framework Principle 6 in Knox (n 14) Annex [15]-[16].

¹⁵⁷ United Nations Economic and Social Council, *Report of the Office of the High Commissioner for Human Rights, Substantive Session of 2007*, Provisional Agenda Item 14(g), UN Doc E/2007/82 (2007) [10]-[13].

¹⁵⁸ Boyd (n 72).

¹⁵⁹ Ibid [60].

¹⁶⁰ For a further discussion on these cases, see B J Preston, 'The Evolving Role of Environmental Rights in Climate Change Litigation' (2018) 2 *Chinese Journal of Environmental Law* 131, 145-148.

¹⁶¹ *Farooque v Government of Bangladesh* (2002) 22 BLD (HCD) 345 (Supreme Court of Bangladesh).

¹⁶² *Prakash Mani Sharma v HMG Cabinet Secretariat* (Supreme Court of Nepal, WN No 3027/2059, 10 December 2007).

¹⁶³ *MC Mehta v Union of India* (Writ Petition No 13029/1985, 16 April 1999) (Vehicular Pollution Case: Diesel Emissions).

¹⁶⁴ *Vardhaman Kaushik v Union of India* (National Green Tribunal of India, Original Application No 21 of 2014, 4 December 2014).

Second, states must ensure all persons have access to safe and sufficient water and sanitation.¹⁶⁵ The Committee on Economic, Social and Cultural Rights identifies that states should take steps to prevent threats to human health from unsafe and toxic water conditions; ensure that natural water resources are protected from contamination; and combat situations where aquatic ecosystems serve as a habitat for diseases.¹⁶⁶ Boyd recommends that the rights to water and sanitation should be explicitly embedded throughout states' legal frameworks, including in constitutions, legislation, policies and programmes.¹⁶⁷ Examples of violations of states' substantive obligations with respect to water include "pollution and diminution of water resources affecting human health", "failure to adopt or implement a national water policy" and "failure to enact or enforce laws to prevent the contamination and inequitable extraction of water".¹⁶⁸

Third, states must ensure sufficient supplies of healthy and sustainable food by improving industrial agriculture.¹⁶⁹ This obligation extends to ensuring businesses adopt human rights policies, conduct human rights due diligence, establish transparent and effective grievance mechanisms, remedy human rights violations for which they are directly responsible and support laws and policies intended to reduce the environmental and health impacts imposed by industrial food systems.¹⁷⁰ For example, taxes on unhealthy ultra-processed foods have been successful in reducing the consumption and adverse health effects of these products in Chile, Mexico, South Africa and the United Kingdom.¹⁷¹ Courts have recognised states' substantive obligations to ensure sustainable food supplies and determined that unsustainable food production practices violate the right to a healthy environment.¹⁷²

Fourth, states must urgently take steps to detoxify the planet, natural resources and people's bodies.¹⁷³ This requires states and businesses to go beyond merely minimising, reducing and mitigating exposure to toxic hazards and enact legislation and practices to vigorously pursue zero pollution and the elimination of toxic substances.¹⁷⁴ Boyd identifies that "sacrifice zones represent the worst imaginable dereliction of a state's obligation to respect, protect and fulfil the right to a clean, healthy and sustainable environment".¹⁷⁵ Courts have recognised the substantive obligations on states and businesses not to cause pollution or exposure to toxic substances.¹⁷⁶

¹⁶⁵ Boyd (n 75).

¹⁶⁶ Committee on Economic, Social and Cultural Rights (n 90) [8].

¹⁶⁷ Boyd (n 75) [83].

¹⁶⁸ Committee on Economic, Social and Cultural Rights (n 90) [44].

¹⁶⁹ Boyd (n 76).

¹⁷⁰ Ibid [77]-[78].

¹⁷¹ Ibid [82].

¹⁷² Ibid [48]-[56].

¹⁷³ Boyd (n 77).

¹⁷⁴ Ibid [2].

¹⁷⁵ Ibid [46].

¹⁷⁶ See Boyd (n 77) [15]-[16] for a comprehensive list of relevant international law instruments and obligations.

This obligation to provide a non-toxic environment was recently enforced in *National Environment Management Authority v KM & Ors*.¹⁷⁷ Residents of the Owino-Uhuru Village in Kenya claimed that the smelting process of a nearby lead factory, and poor management of waste containing lead particles, caused toxic pollution of the environment and harm to human health, violating their constitutional rights to life and a healthy environment.¹⁷⁸ The residents contended that the state and state authorities were responsible for constitutional infractions by their inadequate regulation of the private entities responsible for the smelting factory.¹⁷⁹ The Environment and Land Court of Kenya held that the petitioners' rights to life, a healthy environment, clean and safe water and highest attainable standard of health had been violated by the actions and omissions of the 17 state and private entity respondents.¹⁸⁰ The Court awarded the payment of 1.3 billion Kenya Shillings to the petitioners for personal injury and loss of life and ordered the respondents to clean up the waste and the state authorities to develop and implement regulations adopted from best practice for lead manufacturing plants.¹⁸¹

The Kenyan Court of Appeal upheld the decision in part, affirming that the claim was one of violation of the right to a clean and healthy environment and that the state and state agencies are not exempt from the application of the polluter pays principle.¹⁸² The Court held that the Constitution places positive obligations upon the state and state agencies to promote the right to a clean and healthy environment by taking "all necessary measures", and that state liability may derive from "an administrative authorisation, an absence of regulation, or from inadequate measures relating to activities of the private actors, which result in harm to the environment".¹⁸³ The Court varied the apportionment of liability by the trial court to increase the liability of the private entities responsible for the factory and remitted the matter for re-determination of the compensation. The Court also directed the National Environmental Management Agency to take specific steps to identify and remove the lead contamination and pollution caused by the factory.¹⁸⁴

Fifth, states must take urgent action to conserve, protect and restore biodiversity on which all species, including humans, depend.¹⁸⁵ Boyd emphasises the vital importance of healthy ecosystems and biodiversity for the right to a healthy environment,¹⁸⁶ and the consequences of the failure of states to

¹⁷⁷ *National Environment Management Authority & Or v KM (Minor suing through Mother and Best friend SKS) & 17 others (Civil Appeal E004 of 2020 & E032 of 2021 (Consolidated))* [2023] KECA 775 (KLR) (23 June 2023) (Court of Appeal at Mombasa) (*National Environment Management Authority v KM*); *KM & 9 Ors v Attorney General & 7 Ors* (Petition No. 1 of 2016) [2020] eKLR (Environment and Land Court at Mombasa) (*KM v Attorney General*).

¹⁷⁸ *National Environment Management Authority v KM* (n 177) [3]-[5].

¹⁷⁹ *Ibid* [6].

¹⁸⁰ *KM v Attorney General* (n 177) [168].

¹⁸¹ *Ibid* [171]-[173].

¹⁸² *National Environment Management Authority v KM* (n 177) [72].

¹⁸³ *Ibid*.

¹⁸⁴ *Ibid* [111].

¹⁸⁵ Boyd (n 74).

¹⁸⁶ *Ibid* [1]-[7].

protect nature¹⁸⁷. This was recognised by the Colombian Supreme Court in *Future Generations v Ministry of the Environment and Others*.¹⁸⁸ The Court held that a direct consequence of deforestation of the Amazon is emissions of carbon dioxide to the atmosphere, producing the greenhouse gas effect, which in turn “transforms and fragments ecosystems, affecting water sources and the water supply for population centres and land degradation”.¹⁸⁹ The Court found that the Amazon is an entity “subject of rights” and that the Colombian government has a positive duty of “protection, conservation, maintenance and restoration” of the Amazon. The Court made orders against all levels of government to enforce compliance with these substantive duties, included the creation of plans to reduce deforestation, with the aim of reaching zero deforestation.¹⁹⁰

Sixth, states must phase out the use of fossil fuels and transition towards renewable energies to ensure a safe climate,¹⁹¹ and comply with the Paris Agreement targets of limiting global warming to 1.5 degrees Celsius and net zero emissions by 2050.¹⁹² Boyd identifies that states should enact framework climate legislation that includes bold targets, timelines and accountability mechanisms.¹⁹³ The Special Rapporteur on the promotion and protection of human rights in the context of climate change, Ian Fry, observes that only 11 jurisdictions have enshrined into their constitution an explicit provision on “climate causes”, and urges all states, particularly developed countries, to amend their constitutions to adopt human rights-based approaches to climate change.¹⁹⁴ Courts have recognised this obligation and enjoined states where the obligation has not been adequately discharged. In *The State of the Netherlands v Urgenda Foundation*, The Hague Court of Appeal and the Supreme Court of the Netherlands held that Article 2 (the right to life) and Article 8 (the right to private life, family life, home and correspondence) of the European Convention on Human Rights impose substantive obligations on the State of the Netherlands to take positive measures to reduce greenhouse gas emissions.¹⁹⁵ The Supreme Court of the Netherlands¹⁹⁶ upheld the Court of Appeal’s order that the state implement more ambitious targets for the reduction of greenhouse gas emissions in the Netherlands.

¹⁸⁷ Ibid [21]-[227].

¹⁸⁸ *Future Generations* (n 80). For a further discussion on the case see Paolo A A Alvarado and Daniel Rivas-Ramirez, ‘A Milestone in Environmental and Future Generations’ Rights Protection: Recent Legal Developments before the Colombian Supreme Court’ (2018) 30 *Journal of Environmental Law* 519.

¹⁸⁹ Ibid 34.

¹⁹⁰ Ibid 46-47.

¹⁹¹ Boyd (n 73).

¹⁹² Ibid [20].

¹⁹³ David Boyd, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/HRC/43/53 (30 December 2019) [51].

¹⁹⁴ Fry (n 142) [5]-[7].

¹⁹⁵ *The State of the Netherlands v Urgenda Foundation* (The Hague Court of Appeal) (n 107) [5.9.1].

¹⁹⁶ *The State of the Netherlands v Urgenda Foundation* (Supreme Court of the Netherlands) (n 107) see in particular [8.2.2]-[8.3.5].

4.3.2 Procedural obligations

States' procedural obligations are correlative to the procedural component of the right to a healthy environment. These obligations are threefold: ensure access to information on the environment; promote and protect public participation in environmental decision-making; and ensure effective access to justice and remedies to uphold and enforce these procedural and other rights.

First, as identified by Framework Principle 7, states have a procedural obligation to ensure adequate access to information on environmental issues. This was recognised in *Sustaining the Wild Coast NPC and Ors v Minister of Mineral Resources and Energy and Ors*,¹⁹⁷ where the High Court of South Africa held that the consultation process, involving information on oil and gas companies' proposed seismic surveys being published in newspapers outside the local communities and in a language not understood by those communities, was inadequate.¹⁹⁸ The Court held that procedural fairness had not been afforded as matters that the communities would have placed before the Minister to inform the decision-making process in assessing the application for an exploration right were not considered.¹⁹⁹

Framework Principle 6 further directs that: "States should provide for education and public awareness on environmental matters." Such education is a means of providing access to information. Fry also highlights the need for education. He identifies that low levels of climate literacy, a lack of training for the judiciary on climate change and human rights matters and a limited number of environmental lawyers are some of the many barriers to environmental justice.²⁰⁰

Second, states have a procedural obligation to promote and protect public participation in environmental decision-making. Deva identifies that all policies and programmes for achieving human rights should be developed through the "active, free and meaningful participation of people in an inclusive manner".²⁰¹ This requires states to ensure an inclusive and equitable approach to public participation in all actions related to environmental protection and climate change,²⁰² and respect and protect the rights to freedom of expression, association and peaceful assembly²⁰³.

In *Santos NA Barossa Pty Ltd v Tipakalippa*,²⁰⁴ the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) had approved a Drilling Environment Plan (DEP) submitted by Santos for the sinking of gas wells in an area off the coast of the Northern Territory, north

¹⁹⁷ [2022] ZAECMKHC 55.

¹⁹⁸ Ibid [104].

¹⁹⁹ Ibid [104].

²⁰⁰ Fry (n 142) [43].

²⁰¹ Deva (n 57) [65].

²⁰² Knox (n 14) Framework Principle 4.

²⁰³ Ibid Framework Principles 5, 9.

²⁰⁴ *Santos NA Barossa Pty Ltd v Tipakalippa* (2022) 254 LGERA 25 (Full Court of the Federal Court of Australia); *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2022] FCA 1121 (Federal Court of Australia).

of the Tiwi Islands. An elder of the Munupi clan on the Tiwi Islands contended that NOPSEMA was required to consult him and other Indigenous people on the Tiwi Islands prior to approving the DEP. The Federal Court of Australia, and the Full Court of the Federal Court of Australia on appeal, found that the elder was a person whose interests and traditional cultural and spiritual connections with the sea were likely to be affected and who was required by the Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009 (the Regulations) to be consulted before approving the DEP.²⁰⁵ The Court held that the consultation required must be adapted to the interests of the persons to enable adequate participation in the decision-making process.²⁰⁶

Similarly, the Federal Court of Australia in *Cooper v National Offshore Petroleum Safety and Environmental Management Authority*²⁰⁷ held that NOPSEMA did not have statutory power to approve Woodside Scarborough's environmental plan for seismic blasting, off the Western Australian coast, where it could not be reasonably satisfied that the consultation required by the Regulations had been undertaken.²⁰⁸ The Court emphasised:²⁰⁹

“The reason for requiring consultation 'in the course' of preparing the plan is self-evident. It is to enable the contents of the plan to be informed by the information that is provided in the course of the consultation.”

Moreover, the Court emphasised that the requirement for consultation is extensive, and it must be undertaken by the titleholder. Consultation must include each person or organisation who may be affected by the proposed activities and any other person or organisation that the titleholder considers relevant.²¹⁰

In August 2023, Ecuador exercised participatory democracy in fulfilling its obligation to protect the environment by conducting a referendum, in which Ecuadoreans voted against oil-drilling and mining activities to protect two natural areas in the northern Amazon Rainforest.²¹¹ The referendum illustrates the pivotal role of citizen participation and public consultation in protecting the right to a healthy environment.

Third, states have procedural obligations to ensure effective access to justice and remedies for all to uphold and enforce these procedural and other rights. This includes states enabling affordable and timely access to the courts and other alternative dispute resolution processes, and effective remedies to

²⁰⁵ *Santos NA Barossa Pty Ltd v Tipakalippa* (n 204) [64], [67]-[78], [80], [150], [157].

²⁰⁶ *Ibid* [153].

²⁰⁷ *Raelene Cooper v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2023] FCA 1158.

²⁰⁸ *Ibid* [4].

²⁰⁹ *Ibid* [17].

²¹⁰ *Ibid* [17]-[19].

²¹¹ Sebastian Abad-Jara, 'People's Participation as a Safeguard of Green Rights' *Green Diplomacy* (Web Page, 5 October 2023) <https://www.greendiplomacy.org/article/peoples-participation-as-a-safeguard-of-green-rights/>.

enforce compliance with obligations to respect, protect and fulfil the right to a healthy environment;²¹² integrating equality provisions into all laws and policies to empower all individuals in the enjoyment of their rights and protect against discrimination;²¹³ and protecting environmental and human rights defenders from intimidation, criminalisation and violence, diligently investigating, prosecuting and punishing the perpetrators of those crimes, and addressing the root causes of conflict.²¹⁴

Access to the courts needs to be tailored to specific individuals and groups within society. Fry reports that Indigenous Peoples' groups have expressed concerns about the language barriers to accessing the courts. Fry attributes this to the "complex legal language" used by courts and that "proceedings are often conducted in colonial language".²¹⁵ Tailoring access to the courts for indigenous people may include enabling them to give their evidence on lands, territories, waters and seas with which they have cultural connection. In *Waratah Coal Pty Ltd v Youth Verdict and Others (No 5)*,²¹⁶ the Queensland Land Court found that to confine the evidence of Aboriginal and Torres Strait Islander witnesses to their written statements, rather than allow them to speak on Country, would unjustifiably limit their cultural rights. The Court granted the witnesses' request to give their evidence on Country and in accordance with cultural protocols.²¹⁷

4.3.3 Intertemporal obligations

States are under an obligation to fulfil the intertemporal component of the right to a healthy environment. Courts have recognised this obligation of the present generation to ensure intergenerational or intertemporal equity to maintain and bequeath to future generations a healthy environment. In *Future Generations v Minister for Environment*, the Colombian Supreme Court held that "[t]he protection of fundamental rights not only involves the individual, but... includes the unborn, who also deserve to enjoy the same environmental conditions that we have."²¹⁸ In *Neubauer et al v Germany*,²¹⁹ youth claimants successfully challenged the constitutionality of Germany's Climate Protection Act, in setting inadequate greenhouse gas emissions reductions targets. The Federal Constitutional Court held that the German Constitution enshrined a right to future freedoms that protected the complainants against threats to freedoms caused by greenhouse gas emissions reductions

²¹² Knox (n 14) Framework Principle 10.

²¹³ Ibid Framework Principle 3.

²¹⁴ Ibid Framework Principle 4.

²¹⁵ Fry (n 142) [39].

²¹⁶ *Waratah Coal Pty Ltd v Youth Verdict and Others (No 5)* [2022] QLC 4.

²¹⁷ Ibid [19], [22].

²¹⁸ *Future Generations* (n 80) 18.

²¹⁹ *Neubauer* (n 144). See also Petra Minnerop, 'The "Advance Interference-Like Effect" of Climate Targets: Fundamental Rights, Intergenerational Equity and the German Federal Constitutional Court' (2022) 34 *Journal of Environmental Law* 135; Gerd Winter, 'The Intergenerational Effect of Fundamental Rights: A Contribution of the German Federal Constitutional Court to Climate Protection' (2022) 34 *Journal of Environmental Law* 209 and Agnes Hellner and Yaffa Epstein, 'Allocation of Institutional Responsibility for Climate Change Mitigation: Judicial Application of Constitutional Environmental Protections in the European Climate Cases *Artic Oil*, *Neubauer* and *l'Affaire du siecle*' (2023) 35 *Journal of Environmental Law* 207.

burdens being unilaterally offloaded onto future generations. The Court held that the failure of the Climate Protection Act to set emissions reductions targets beyond 2030 limited these intertemporal guarantees of freedom. The Court ordered the federal government to remake the targets for the years beyond 2031 by the end of 2022.²²⁰ In June 2021, the federal government passed an amended Federal Climate Change Act to enshrine a target of achieving greenhouse gas neutrality by 2045.²²¹

4.3.4 Special obligations to the vulnerable

The final category of obligations to respect, protect and fulfil the right to a healthy environment are special obligations to the vulnerable. These are an extension of the substantive obligations and inform how the substantive component of the right to a healthy environment is to be realised for those who are particularly vulnerable to the effects of environmental harms, such as climate change.

Environmental harms are experienced differently by different individuals and groups of people. Some individuals and groups are particularly vulnerable to environmental harms, including children, women, indigenous persons, older persons, persons living in poverty, displaced persons, and persons with disabilities, ethnic, racial or other minorities.²²² The Committee on Economic, Social and Cultural Rights has emphasised the special obligations on states to identify and prioritise the needs of rights-holders who are disadvantaged and vulnerable to systematic and intersectional forms of discrimination.²²³ This obligation extends to identifying the immediate, underlying and structural causes of the non-realisation of the right to a healthy environment for vulnerable groups.²²⁴

Framework Principle 14 directs that “States should take additional measures to protect the rights of those who are most vulnerable to, or at particular risk from, environmental harm, taking into account their needs, risks and capacities.” States should incorporate these additional measures when enacting law and policy, educational programs, research, and legal and institutional frameworks for environmental protection. Framework Principle 15 also requires states to recognise their special obligations to indigenous peoples and members of traditional communities in realising the right to a healthy environment.

²²⁰ Ibid [251]–[255], [261].

²²¹ ‘Federal Climate Change Act 2021’, *International Energy Agency* (Web Page, 25 May 2023) <https://www.iea.org/policies/13518-federal-climate-change-act-2021>.

²²² Boyd (n 77) [21].

²²³ Committee on Economic, Social and Cultural Rights, *The pledge to leave no one behind: the International Covenant on Economic, Social and Cultural Rights and the 2030 Agenda for Sustainable Development*, UN Doc E/C.12/2019/1 (5 April 2019) [7], [14].

²²⁴ Boyd (n 16) [47].

5. Realisation of the right to a healthy environment

The substantive, procedural, intertemporal and special obligations fix the outcomes to be achieved in order to realise the right to a healthy environment. Realisation of these outcomes will not be immediate – it will take time and resources. Four steps are needed to realise these outcomes.

The first step is identifying the inviolable element of the human right. For civil and political rights, the inviolable element is the entire right. The correlative obligation is to ensure immediate realisation of the right in all contexts. Second, for economic, social and cultural rights, the inviolable element is the minimum core obligations. The minimum core entails a substantive and procedural component. The substantive component is the minimum essential levels for realisation of the inviolable element of the right. The procedural component is that states must ‘take steps’ towards realisation of the right, subject to the prohibition of regression and discrimination. Third, the full content of the right to a healthy environment needs to be progressively realised. States are to achieve the right horizontally, to ensure an equitable baseline provision of the right for all, and vertically, to improve the overall levels of provision of the right. Fourth, the obligation of progressive realisation requires resources. States must identify and maximise their available resources. I will explain each step.

5.1 The inviolable element of human rights

All human rights, including the right to a healthy environment, are fundamental in nature. They entail an inviolable element which must be guaranteed in all contexts.²²⁵ The nature and content of the inviolable element will differ depending on the right. For civil and political rights, the inviolable element is the entire right. All civil and political rights are to be immediately realised. That is the sense in which Article 6 of the ICCPR refers to the right to life: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” The inviolable element of the right to life in this sense is a complete, and immediate, freedom from interference with the right.²²⁶ States have an obligation to immediately “adopt such laws or other measures as may be necessary to give effect to the rights”.²²⁷

The procedural component of the right to a healthy environment is akin to civil and political rights. Achieving the procedural obligations of access to information on the environment, public participation in environmental decision-making and effective access to justice and remedies is necessary to realise the right to a healthy environment. These procedural obligations are capable of immediate realisation. For example, the obligation to promote and protect public participation in environmental decision-making must be fully realised in order for all persons to enjoy the procedural component of the right.

²²⁵ Committee on Economic, Social and Cultural Rights, *CESCR General Comment No.3: The Nature of States Parties’ Obligations (Art. 2, para 1 of the Covenant)* UN Doc E/1991/23 (14 December 1990) [10].

²²⁶ Human Rights Committee (n 78) [6].

²²⁷ ICCPR art 2(2).

5.2 Minimum core obligations

For economic, social and cultural rights, the inviolable element is the set of minimum core obligations concerning certain levels of the right that are to be immediately realised and maintained by all states.²²⁸

The rights comprising the substantive component of the right to a healthy environment are of this nature. The minimum core obligations comprise a substantive component to achieve the minimum essential levels of the right and a procedural component to take steps towards achieving progressively the full realisation of the right, subject to the prohibition of regression and discrimination.²²⁹

5.2.1 Minimum essential levels

The substantive component of the minimum core obligations requires states immediately to achieve the minimum essential levels of the substantive elements of the right.²³⁰ This obligation is immediate, non-derogable and persists throughout times of conflict, emergency and natural disasters.²³¹ The Special Rapporteur on the human rights to safe drinking water and sanitation, Leo Heller, identifies four requirements for states to comply with their minimum core obligations: availability, accessibility, affordability and safety.²³² These can be used to identify the minimum essential levels of the substantive component of the right to a healthy environment.

First, states must ensure *sufficient availability* of the six substantive elements of the right to a healthy environment. This is the minimum level of each of the six substantive elements that is required for human survival for all individuals and groups in all social, economic and environmental conditions.²³³ For instance, the minimum level of clean air available should be that which avoids sickness from polluted air.²³⁴

Second, states must ensure *physical accessibility* to the necessary facilities or services for the provision of a healthy environment. This includes access to basic environmental services such as clean water, food supplies, sanitation, waste management and public green spaces. Accessibility requires that the necessary services be within a safe and reasonable distance from individuals' households, accounting for all factors that affect physical accessibility and any potential risks associated with such access.²³⁵

²²⁸ Office of the United Nations High Commissioner for Human Rights (n 149) 17.

²²⁹ In its General Comment No.3 (n 223) at [10], the Committee on Economic, Social and Cultural Rights expresses the minimum core obligations, first, as a floor below which the provision of the right cannot fall below and, second, as a house creating an enabling environment for people to enjoy the right and associated entitlements. I identify these as the substantive and procedural components of the minimum core obligations respectively.

²³⁰ See ICESCR art 2(1).

²³¹ Committee on Economic, Social and Cultural Rights (n 223) [10].

²³² Leo Heller, *Report of the Special Rapporteur on the human rights to safe drinking water and sanitation*, UN Doc A/HRC/45/10 (8 July 2020) [34].

²³³ *Ibid* [36].

²³⁴ Boyd (n 77).

²³⁵ Heller (n 232) [37]-[38].

For example, living within safe proximity of clean drinking water or a safe distance from toxic environments, identified by Boyd as “sacrifice zones”.²³⁶

Third, *affordability* requires that facilities and services required for all six elements of the right to a healthy environment be available at an affordable price for all. This includes facilities and services for safe drinking water and sanitation, food supplies and public green spaces. One way to calculate affordability is as a percentage of total household expenditure or income, which is generally set between 2% and 6%.²³⁷ An example of a minimum obligation is the prohibition on disconnecting necessary services where users are unable to pay for those services.²³⁸

Fourth, *safety* requires states to take positive measures for quality control and surveillance to ensure the health and safety of all six elements of the right to a healthy environment provided.²³⁹ This includes establishing a baseline of policies, regulations and interventions for the prevention of transmission of diseases and overall safety of water, sanitation and food services; monitoring of levels of pollution and toxic waste; and reducing those levels to minimum safe levels.

5.2.2 ‘Take steps’ towards full realisation of right to healthy environment

The procedural component of the minimum core obligations requires states to take deliberate, concrete and targeted steps towards “achieving progressively the full realisation of the rights”.²⁴⁰ This is identified in the ICESCR, which directs that all State Parties must:²⁴¹

“take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

These steps must be taken within a reasonably short period of time.²⁴² Examples of concrete steps for realising the right to a healthy environment include collecting and analysing data related to all six substantive elements of the right to a healthy environment;²⁴³ obtaining disaggregated data to identify and prioritise the needs of rights-holders who are disadvantaged, underserved or vulnerable to discrimination;²⁴⁴ formulating strategies and plans to ensure that the right to a healthy environment is recognised and adequately incorporated into legislation, regulations, standards and policies;²⁴⁵ investing

²³⁶ Boyd (n 77) [2].

²³⁷ Henri Smets, ‘Quantifying the affordability standard’ in *The Human Right to Water: Theory, Practice and Prospects*, Malcolm Langford and Anna Russell, eds (Cambridge, Cambridge University Press, 2017) 293-294.

²³⁸ Heller (n 232) [41].

²³⁹ Ibid [42].

²⁴⁰ McBeth et al (n 33) 148.

²⁴¹ ICESCR art 2(2).

²⁴² Office of the United Nations High Commissioner for Human Rights (n 149) 16.

²⁴³ Boyd (n 16) [46].

²⁴⁴ Ibid [47].

²⁴⁵ Ibid [48]-[49].

in human, financial and institutional capacity to ensure that all laws, regulations, standards, policies and plans are properly implemented and enforced;²⁴⁶ incorporating realistic and achievable indicators and time-bound targets to monitor and evaluate progress in the realisation of the right; adopting the necessary laws and policies; and establishing grievance mechanisms for individuals if the state is not meeting its responsibilities.²⁴⁷

5.2.3 Prohibition of retrogression and discrimination

The procedural component of the minimum core obligations to ‘take steps’ towards full realisation of the right to a healthy environment is subject to the prohibition of retrogression and discrimination.

As to retrogression, states are prohibited from taking any measures, directly or indirectly, that would result in any weakening of the realisation and enjoyment of the right. This includes identifying and reducing factors that might increase the risk of any retrogression in the future, for example, the impacts of climate change.²⁴⁸ The only exception to this prohibition is where there is a compelling justification for the retrogressive measure and a demonstration that the measure was only adopted after all options, using maximum available resources, were carefully considered and assessed.²⁴⁹

The prohibition of retrogression was recognised by the Inter-American Commission on Human Rights in *La Oroya*.²⁵⁰ The Commission found that catastrophic pollution from a lead smelter in La Oroya, Peru was responsible for pollution causing almost all children in the local community to have dangerously high levels of lead in their blood. The Commission held that the Government of Peru had deliberately prioritised the economic benefits of the lead smelter over its obligations to enforce domestic environmental regulations and adopt regulatory provisions to respect, protect and fulfil its international human rights obligations.²⁵¹ The Commission held that this was a weakening by Peru of national air quality standards, which was an unjustified retrogression and inconsistent with human rights obligations.²⁵²

The prohibition of retrogression extends to an obligation to prevent human rights violations and abuses.²⁵³ This requires states to enact a robust regulatory framework and a coherent system of supervision and oversight.²⁵⁴ States should enact legislation and policies requiring businesses and

²⁴⁶ Ibid [51].

²⁴⁷ Office of the United Nations High Commissioner for Human Rights (n 149) 16. See also Boyd (n 16) [45]-[55] for a human-rights based approach for taking steps towards realising the right to a healthy environment.

²⁴⁸ Heller (n 232) [47].

²⁴⁹ Office of the United Nations High Commissioner for Human Rights (n 149) 16.

²⁵⁰ *Caso No. 12.718: Comunidad de La Oroya, Peru*, informe No. 330/20 (Inter-American Commission on Human Rights, November 2021) [188] (*La Oroya*).

²⁵¹ Ibid [175].

²⁵² Ibid [188].

²⁵³ Boyd (n 16) [38].

²⁵⁴ See *La Oroya* (n 250) [169] and Human Rights Committee, *Portillo Cáceres and others v Paraguay* (2019) (CCPR/C/126/D/2751/2016).

individuals that contribute to climate change, pollution, biodiversity loss and any other form of environmental harm to conduct rigorous and non-discriminatory, human rights and environmental due diligence.²⁵⁵ In *Neubauer et al v Germany*, the Federal Constitutional Court recognised this obligation to prevent human rights violations and ordered the government to enact legislation requiring earlier and more ambitious greenhouse gas reduction targets.²⁵⁶

As to discrimination, states have an obligation to ensure the equitable distribution of all available facilities and services required for the enjoyment of the right to a healthy environment, without any discrimination as to gender, race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.²⁵⁷ To minimise discrimination, states should obtain disaggregated data to identify vulnerable and marginalised groups,²⁵⁸ and afford greater attention to these groups to ensure the equal enjoyment of the right to a healthy environment.²⁵⁹

The prohibition of discrimination requires states to address the environmental injustices hindering the realisation of the right to a healthy environment for all. This entails, for example, prioritising mitigation, adaptation, clean-up and restoration measures for disadvantaged or vulnerable communities in extremely contaminated “sacrifice zones” that bear a disproportionate burden of the health, human rights and environmental consequences of climate change, biodiversity loss and exposure to pollution and toxic substances.²⁶⁰

5.3 Obligation of progressive realisation

The obligation of progressive realisation reflects the need for states to move beyond the minimum core levels of the right to a healthy environment to progressively achieve full realisation of the right. Progressive realisation is intended to be a pragmatic recognition of the varying levels of social and economic development of states and an accommodation of states’ individual capacities to realise rights over time.²⁶¹ This is the rationale incorporated in the ICESCR:²⁶²

“The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time... Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be

²⁵⁵ See David Boyd, *Essential elements of effective and equitable human rights and environmental due diligence legislation* (Policy Brief No. 3, United Nations Human Rights Special Procedures, June 2022).

²⁵⁶ *Neubauer* (n 144).

²⁵⁷ ICESCR art 2(2) and 3. See also Committee on Economic, Social and Cultural Rights (n 90) [37(e)].

²⁵⁸ Boyd (n 16) [34].

²⁵⁹ *Ibid* [34].

²⁶⁰ *Ibid* [35].

²⁶¹ *McBeth et al* (n 33) 143-144.

²⁶² Committee on Economic, Social and Cultural Rights (n 223) [9].

read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.”

There are two core strategies for progressively realising human rights: horizontal and vertical realisation. I will explain each and how these strategies are to be balanced to progressively realise the right to a healthy environment.

5.3.1 Horizontal realisation

Horizontal realisation requires states to progressively achieve equal enjoyment and access of the right to a healthy environment for all, by targeting the unserved and underserved, or particularly vulnerable and disadvantaged groups in society.²⁶³ A horizontal approach involves devising plans and policies that aim to reduce unequal distribution in access to a healthy environment among individuals and groups. Boyd identifies that states should prioritise the most vulnerable groups in society first and realise the minimum core of the right to a healthy environment for those groups first to equate all persons to a horizontal level of realisation of the right.²⁶⁴ Then the right can be progressively, or ‘vertically’, realised by increasing the levels of provision of the right.

5.3.2 Vertical realisation

Vertical realisation entails progressively improving the level of provision of the six substantive elements of the right to a healthy environment to achieve higher levels of enjoyment of the right. These higher levels are determined by progressive realisation of the normative content of the right.²⁶⁵ The steps that states can take towards progressively realising the normative content of the right, being towards availability, accessibility and quality, are reflected in the SDGs.²⁶⁶ For water and sanitation, for example, the Joint Monitoring Programme for Water Supply, Sanitation and Hygiene has adopted a “ladder” for progressive realisation.²⁶⁷ This ladder is in terms of technical specifications of levels of drinking water, incorporating five levels from surface water to the full provision of safely managed water. This ladder indicates the levels of availability, accessibility and quality that are progressively required for vertical realisation.

5.3.3 Balancing horizontal and vertical realisation

A balance needs to be struck between adopting horizontal and vertical approaches to realisation of the right to a healthy environment. For example, a vertical approach towards progressive realisation alone is insufficient to assess progress in respect of all elements of the right to a healthy environment. States

²⁶³ Heller (n 232) [9].

²⁶⁴ Boyd (n 16) [34]-[35].

²⁶⁵ Heller (n 232) [8]-[9].

²⁶⁶ Ibid [9].

²⁶⁷ ‘Drinking water’ *WHO Unicef* (Web Page) <https://washdata.org/monitoring/drinking-water>.

may consider themselves to be making progress in terms of increasing access to services, however, this may only be for specific groups of society and consequently generating greater inequality. For example, in Mozambique, while the government achieved an increase in provision of basic sanitation by 20% between 2000 and 2017 (vertical realisation), the access gap to basic sanitation between the richest and the poorest increased by 30% (regressive horizontal realisation).²⁶⁸ States must therefore appropriately balance horizontal and vertical realisation to achieve adequate and increasing levels of services for all without discrimination.²⁶⁹

In assessing the best strategy, or combination of strategies, for realisation of human rights, Heller urges states to consider the social, economic, political, cultural and environmental contexts.²⁷⁰ This includes a consideration of, amongst other matters, any current inequalities and discriminations and how these are being addressed in decision-making processes; whether the provision of environmental services is available, safe, accessible and affordable to all; and whether the environmental services, and any violations of them, are being adequately managed.²⁷¹

In balancing vertical and horizontal realisation, states should be guided by the obligation of non-discrimination and equality.²⁷² States should move towards increasing quantitative and qualitative coverage of services for the enjoyment of the right to a healthy environment, whilst also eliminating inequality and discrimination. For example, in Cambodia, the government has successfully reduced the access gap to basic sanitation between the richest and poorest by 60% since 2000 (horizontal realisation), whilst also increasing urban coverage of basic sanitation by 50% (vertical realisation).²⁷³ States need to have long-term goals and plan how the improvement of services will progress over time, ensuring that no discrimination takes place in the process, paying special attention to the needs of people in vulnerable situations.²⁷⁴

5.4 The obligation to use maximum available resources

The final step in achieving full realisation of the right to a healthy environment is the obligation to use maximum resources available.²⁷⁵ The full realisation and enjoyment of the right to a healthy environment is contingent on states taking the necessary steps to the maximum of their available resources.²⁷⁶ The use of maximum available resources entails four aspects: first, identifying what

²⁶⁸ ‘Progress on household drinking water, sanitation and hygiene: 2000-2017: Special focus on inequalities’, *United Nations Children’s Fund (UNICEF) and World Health Organisation* (New York, 2019) 35.

²⁶⁹ Heller (n 232) [13]-[14], [49].

²⁷⁰ *Ibid* [15].

²⁷¹ *Ibid*.

²⁷² *Ibid* [51].

²⁷³ UNICEF and WHO (n 268) 35.

²⁷⁴ Heller (n 232) [51].

²⁷⁵ Boyd (n 16) [33]. See also, Heller (n 232).

²⁷⁶ ICESCR art 2(1).

constitutes resources; second, maximising the availability of resources; third, maximising the allocation of resources; and fourth, maximising the usage of resources. I will explain each aspect.

The obligation to use maximum available resources can be seen as a duty of due diligence. Voigt highlights the importance of due diligence for states in setting adequate targets and goals at “the highest level that is not economically disproportionately burdensome or impossible to achieve”.²⁷⁷ Voigt further notes that states need to be explicit about each target and “why it is at the level of highest possible ambition (or not)”. Due diligence can be used as a legal tool for rights-holders to provide a framework for ascertaining effective fulfilment of obligations and hold states accountable for their actions or omissions in realising the right to a healthy environment.²⁷⁸

5.4.1 What constitutes resources?

The obligation to use maximum available resources requires identification of the resources available. What constitutes ‘resources’ should be interpreted broadly to include a range of financial, technological, institutional, informational, natural and human resources.²⁷⁹ Resources include both financial and non-financial resources within a state as well as those available from the international community through international cooperation, aid and assistance.²⁸⁰

Financial resources include revenues collected from services related to the provision of the right to a healthy environment, for example, taxes and other charges from carbon emitting companies, water usage and national park entry fees. Calculation of financial resources also includes accounting for time and financial costs of inefficient governance and management of resources, for instance, debt, tax evasion and corruption.²⁸¹ Reducing inefficiencies increases available resources. Non-financial resources include provision of information platforms and educational services.²⁸² For example, the Government of Finland provides water and sanitation operators access to government-funded risk management software for water and sanitation safety plans.²⁸³

5.4.2 How can states maximise the availability of resources?

States must maximise the availability of both financial and non-financial resources to fully realise the right to a healthy environment. Financial resources can be maximised through public finance, such as government revenue, international development assistance, borrowing of funds, monetary policy and

²⁷⁷ Christina Voigt, ‘The climate change dimension of human rights due diligence and states positive obligations’ (2022) 13 *Journal of Human Rights and the Environment* 152, 160-161.

²⁷⁸ *Ibid* 161.

²⁷⁹ Heller (n 232) [19]-[21].

²⁸⁰ Committee on Economic, Social and Cultural Rights (n 223) [13].

²⁸¹ Heller (n 232) [29].

²⁸² *Ibid* [19]-[20].

²⁸³ *Ibid* [20].

financial regulation.²⁸⁴ States should adopt fair and redistributive taxation and tariff policies, such as cross-subsidization, to increase government revenue without affecting the affordability of services for lower socio-economic people.

Maximising non-financial resources, including natural, institutional, technical and workforce resources,²⁸⁵ is particularly important for people in rural, or underserved communities, who rely on informal provision of services and supplies and do not benefit as much from public financing. An example of maximising non-financial resources is by investing in education and capacity-building to support businesses and informal providers. States must also maximise potential resources available from the international community. Where domestic resources are insufficient, states should seek help from international sources. States that have the capacity to assist may also be regarded as having an obligation to do so as part of their own duty to use maximum available resources to progressively realise the right to a healthy environment.²⁸⁶

5.4.3 What is ‘maximum allocation’?

States must efficiently and effectively budget and allocate current and potential resources available.²⁸⁷ There is no prescribed amount in international law instruments directing how much of a state’s budget should be expended on the progressive realisation of any particular, or all, human rights. Heller suggests that a numerical target is unhelpful in any event, and that states should instead comprehensively assess all the elements pertaining to the allocation of its resources for the realisation of all human rights.²⁸⁸

Efficient resource allocation requires transparent and accountable state budgeting. This is essential for the effective use of both financial and non-financial resources, by decreasing the mismanagement of resources and increasing the provision of services. Effective budget allocation includes ensuring resources are allocated to communities appropriately and on the basis of their needs, and not disproportionately allocating resources without justification to other areas of expenditure, such as defence, bank bailouts or subsidies to airline companies.²⁸⁹

5.4.4 What is ‘maximum usage’?

States must ensure that once maximum available resources are allocated, they are fully and effectively expended on the progressive realisation of the right to a healthy environment. Budget allocations cannot capture the actual spending on resources or any adverse costs of inefficiency and corruption, for

²⁸⁴ Diane Elson et al, ‘Public finance, maximum available resources and human rights’ in *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights*, Aoife Nolan et al (eds) (Hart Publishing, 2013).

²⁸⁵ Heller (n 232) [23].

²⁸⁶ Committee on Economic, Social and Cultural Rights (n 223) [13].

²⁸⁷ Heller (n 232) [25].

²⁸⁸ Ibid [25]-[26].

²⁸⁹ Ibid [27].

example.²⁹⁰ Thus, states must closely monitor and evaluate the usage of their resources. States must consider both current and future costs related to the provision of services, and how they might be impacted by external factors such as climate change and inflation.²⁹¹ Effective maximum usage requires states specifically to consider vulnerable communities and target resources towards people in vulnerable or underserved communities. Using disaggregated spending information, as well as demographic and geographic data, can reveal whether budget spending is effectively meeting communities' needs in the realisation of the right to a healthy environment.²⁹²

5.4.5 Insufficient resources are not a justification for not fulfilling minimum obligations

While the progressive realisation of the right to a healthy environment can be subject to resources, insufficient resources is not a justifiable excuse for a state not fulfilling its minimum core obligations. States must demonstrate, in all circumstances, that every effort has been made to use the maximum resources at their disposal to give effect to the right to a healthy environment to the greatest extent possible.²⁹³ Using resource constraints as an explanation for not achieving minimum core obligations will be assessed in the context of the state's level of development; severity of the alleged breach; the state's current economic environment; the existence of other serious claims on the state's resources; whether the state pursued any low-cost options; and whether the state sought or rejected international assistance or resources.²⁹⁴ Safeguards must be implemented to ensure the principle of maximum available resources is not misused or exploited as a justification for inaction. States should incorporate measures to uphold transparency in relation to budget allocation and spending and monitor the spending of all financial resources.²⁹⁵

6. Conclusion

The right to a healthy environment is increasingly being adopted internationally and nationally in constitutions and statutes. However, the nature and content of the right, and the correlative obligations on states to realise the right, remain largely unclarified. In this lecture, I have proposed a framework for understanding the right, the correlative obligations and realisation of the right.

First, I unpacked the meaning of the right to a healthy environment. Regarding the nature, I advanced that the right is a cluster of rights, including civil and political rights, and economic, social and cultural rights. In respect of content, I explained the three components of the right: a substantive, procedural

²⁹⁰ See Eitan Felner, 'Closing the 'escape hatch': a toolkit to monitor the progressive realization of economic, social and cultural rights', *Journal of Human Rights Practice* (2009) 1(3) 402-435.

²⁹¹ Heller (n 232) [28].

²⁹² Ibid [29], [47].

²⁹³ Committee on Economic, Social and Cultural Rights (n 223) [10] and Heller (n 232) [16].

²⁹⁴ Committee on Economic, Social and Cultural Rights, *An Evaluation on the Obligation to Take Steps to the 'Maximum of Available Resources' under an Optional Protocol to the Covenant*, UN Doc E/c.12/2007/1 (21 September 2007) [10].

²⁹⁵ Heller (n 232) [62].

and intertemporal component. Second, I identified the correlative duty to respect, protect and fulfil the right. That duty involves four types of obligations: substantive, procedural and intertemporal obligations and special obligations to the vulnerable. Third, I identified four steps to realise the right: first, immediate realisation of the inviolable element of the right, being the procedural obligations; second, immediate realisation of the minimum core obligations of the substantive component of the right; third; progressive realisation of the substantive component of the right beyond the minimum core obligations; and fourth, use of maximum available resources in progressively realising the right.

By adopting this framework, states can better identify what are their obligations to respect, protect and fulfil the right to a healthy environment and how these obligations can be discharged to achieve full realisation of the right.