

## Recognising a Human Right to Safe, Healthy and Sustainable Environment

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### Abstract

*While the international legal instruments on human rights and environmental protection acknowledge the connection between protection and enjoyment of human rights and the need for conservation and protection of environment, there is yet to be reached a consensus by the main stakeholders at the global level to convince the United Nations to crystalize the human right to a safe, healthy and sustainable environment as an independent right. It is currently treated as a means to an end necessary for the realisation of other human rights instead of being treated as an end in itself. This has continually created enforcement challenges as well as making it difficult to demand accountability from states that violate environmental principles, at the international level as well as in those countries where there is no domestic recognition of the right to clean and healthy environment. This paper makes a case for the need to recognise the human right to safe, healthy and sustainable environment as an independent right capable of being enforced without necessarily making reference to the other human rights, as part of laying the ground for achieving the Sustainable Development agenda.*

### 1. Introduction

Over the years, human activities have posed a major threat to the earth's natural processes which have been strained beyond limits, causing a major environmental crisis.<sup>1</sup> It is worth pointing out that when humans damage the environment, they diminish the quality of life-most immediately for those

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<sup>1</sup> McClymonds JT, 'Human Right to a Healthy Environment: An International Legal Perspective, The' (1992) 37 New York Law School Law Review 583.

directly affected, and in the long term, for everyone.<sup>2</sup> As such, environmental protection and human rights are believed to be interrelated, interconnected, and mutually responsive as both of them are directed towards securing the well-being of humanity, with safe and healthy environment being the pre-condition for the enjoyment of fundamental human rights.<sup>3</sup>

The 1992 United Nations Conference on Development and the Environment was one of the first international efforts towards acknowledging development and environmental protection as complementary objectives.<sup>4</sup> Article 12(2) (b) of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*<sup>5</sup> requires states parties to improve ‘all aspects of environmental and industrial hygiene’. Article 24 of the *African Charter on Human and Peoples’ Rights*<sup>6</sup> provides that ‘all peoples shall have the right to a general satisfactory environment favourable to their development.’ These are just some of the few international and regional legal instruments on human rights that make reference to the need for a clean and healthy environment as a requisite for the achievement of the other human rights.

A new imperative of Sustainable Development demands that environmental considerations become fully integrated into the mainstream of economic decision-making.<sup>7</sup> Over the years, many countries around the world have recognised the right to clean and healthy environment in their national constitutions.<sup>8</sup> Kenya’s Constitution recognises this right under Article 42

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<sup>2</sup> Popovic NA, ‘In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment’ (1995) 27 Colum. Hum. Rts. L. Rev. 487.

<sup>3</sup> Pathak P, ‘Human Rights Approach to Environmental Protection’ (Social Science Research Network 2014) SSRN Scholarly Paper ID 2397197 <<https://papers.ssrn.com/abstract=2397197>> accessed 31 March 2021.

<sup>4</sup> Mink SD, ‘Poverty, Population, and the Environment’ [1993] World Bank discussion papers (USA).

<sup>5</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

<sup>6</sup> Organization of African Unity (OAU), *African Charter on Human and Peoples’ Rights (“Banjul Charter”)*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

<sup>7</sup> Mink SD, ‘Poverty, Population, and the Environment’ [1993] World Bank discussion papers (USA).

<sup>8</sup> Boyd DR, ‘The Effectiveness of Constitutional Environmental Rights’, *Paper for Yale UNITAR Workshop, on April* (2013);

which provides that ‘every person has the right to a clean and healthy environment, which includes the right—to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and to have obligations relating to the environment fulfilled under Article 70’.<sup>9</sup> The constitutionalisation of human right to a clean and healthy environment and the principle of sustainable development under the 2010 Constitution of Kenya has been hailed as an important development in environmental law in Kenya, representing environmental constitutionalism and sustainability constitutionalism, respectively.<sup>10</sup>

The proponents of constitutionalisation of environmental rights argue that the potential benefits of constitutional environmental rights include: stronger environmental laws and policies; improved implementation and enforcement; greater citizen participation in environmental decision-making; increased accountability; reduction in environmental injustices; a level playing field with social and economic rights; and better environmental performance.<sup>11</sup> On the other hand, those against the approach argue that constitutional environmental rights are: too vague to be useful; redundant because of existing human rights and environmental laws; a threat to democracy because they shift power from elected legislators to judges; not enforceable; likely to cause a flood of litigation; and likely to be ineffective.<sup>12</sup> Thus, the question is yet to be settled although an impressive number of countries have opted for this approach to environmental rights. It is estimated that since the right's first mention in the Stockholm Declaration in 1972 – a result of the first major environmental conference- more than 100 constitutions across the world have adopted a human right to a healthy environment, often serving as a powerful tool to protect the natural world.<sup>13</sup>

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<sup>9</sup> Article 42, Constitution of Kenya 2010.

<sup>10</sup> Mwanza R, ‘The Relationship between the Principle of Sustainable Development and the Human Right to a Clean and Healthy Environment in Kenya’s Legal Context: An Appraisal’ (2020) 22 *Environmental Law Review* 184.

<sup>11</sup> Boyd DR, ‘The Effectiveness of Constitutional Environmental Rights’, *Paper for Yale UNITAR Workshop, on April* (2013), 5.

<sup>12</sup> *Ibid.*

<sup>13</sup> Zimmer K, ‘The Human Right That Benefits Nature’

<<https://www.bbc.com/future/article/20210316-how-the-human-right-to-a-healthy-environment-helps-nature>> accessed 31 March 2021; Katarina Zimmer, ‘The Human

Despite this initiative by several countries, there is still the contention over the actual status of the right to clean and healthy environment under the international legal framework on human rights.<sup>14</sup> Indeed, few international agreements explicitly refer to environmental human rights.<sup>15</sup>

The lack of explicit language on environmental rights in any international and/or national legal instrument has been associated with possible environmental degradation and lack of accountability as it may create a legal vacuum which allows the State to engage in a variety of forms of environmental mismanagement within a legal context that lack effective avenues for legal recourse.<sup>16</sup> This paper makes a case for the need for express recognition of the human right to a safe, healthy and sustainable environment as an independent right under the international law, without necessarily tying anchoring it to the rest of the human rights, for ease of enforcement and demanding accountability from states for both international community as well as citizens.

## **2. Safe, Healthy and Sustainable Environment: The Elements**

A safe, clean, healthy and sustainable environment is considered to be integral to the full enjoyment of a wide range of human rights, including the rights to life, health, food, water and sanitation.<sup>17</sup> Arguably, the human right to a healthy environment – encompassing clean and balanced ecosystems, rich biodiversity and a stable climate – recognises that nature is a keystone of a dignified human existence, in line with a wealth of scientific evidence linking human welfare and the natural world.<sup>18</sup> Thriving ecosystems are important for

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Right That Benefits Nature’ <<https://www.bbc.com/future/article/20210316-how-the-human-right-to-a-healthy-environment-helps-nature>> accessed 31 March 2021.

<sup>14</sup> ‘Legal Analysis: The Right to a Healthy Environment in Australia’ (*Environmental Defenders Office*, 8 January 2020) <<https://www.edo.org.au/2020/01/09/right-to-healthy-environment-in-australia/>> accessed 31 March 2021.

<sup>15</sup> ‘Appalachia Puts Environmental Human Rights to the Test’ (*YES! Magazine*) <<https://www.yesmagazine.org/environment/2018/01/17/appalachia-puts-environmental-human-rights-to-the-test>> accessed 31 March 2021.

<sup>16</sup> Mwanza R, ‘The Relationship between the Principle of Sustainable Development and the Human Right to a Clean and Healthy Environment in Kenya’s Legal Context: An Appraisal’ (2020) 22 *Environmental Law Review* 184.

<sup>17</sup> ‘Dr. David R. Boyd’ (*UN Special Rapporteur /on Human Rights and the Environment*) <<http://srenvironment.org/node/556>> accessed 30 March 2021.

<sup>18</sup> Zimmer K, ‘The Human Right That Benefits Nature’

provision of clean water and air, yield seafood and pollinators, and soaking up greenhouse gases.<sup>19</sup>

The procedural elements of the right to clean, safe and healthy environment are access to information, public participation, and access to justice/effective remedies<sup>20</sup> while the substantive elements include clean air, a safe climate, access to safe water and adequate sanitation, healthy and sustainably produced food, non-toxic environments in which to live, work, study and play, and healthy biodiversity and ecosystems.<sup>21</sup>

The right to clean and healthy environment which is often classified as part of third-generation “solidarity” rights is seen as an important right for protecting people individually—a characteristic shared by all human rights—by imposing more effective obligations on governments and by providing individual remedies for environmental deprivations.<sup>22</sup> Collectively, just like all other ‘third-generation’ rights—the right to clean and healthy environment calls for collective action and cooperation from all persons in taking care of the environment.<sup>23</sup>

The right to a healthy environment has been hailed by some scholars as capable of acting as a crucial legal pathway to protecting the natural world, both by encouraging governments to pass stronger environmental laws and allowing courts to hold violators accountable and this is especially so when installed into constitutions, where such rights are taken seriously by many judicial systems and become hard to undo, creating an enduring force counteracting the interests against protecting nature.<sup>24</sup> Notably, the right to a

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<<https://www.bbc.com/future/article/20210316-how-the-human-right-to-a-healthy-environment-helps-nature>> accessed 31 March 2021.

<sup>19</sup> Ibid.

<sup>20</sup> Knox JH, ‘Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Biodiversity Report’ [2017] United Nations Human Rights Council, A/HRC/34/49.

<sup>21</sup> Ibid.

<sup>22</sup> McClymonds JT, ‘Human Right to a Healthy Environment: An International Legal Perspective, The’ (1992) 37 *New York Law School Law Review* 583.

<sup>23</sup> Ibid, 583.

<sup>24</sup> Katarina Zimmer, ‘The Human Right That Benefits Nature’

healthy environment requires governments to carry out the following obligations: to refrain from interfering directly or indirectly with the enjoyment of the right to a healthy environment; to prevent third parties such as corporations from interfering in any way with the enjoyment of the right to a healthy environment; and, to adopt the necessary measures to achieve the full realisation of the human right to a safe and healthy environment.<sup>25</sup>

### **3. Place of Safe, Healthy and Sustainable Environment in the Sustainable Development Agenda**

Arguably, human rights and the environment are intertwined; human rights cannot be enjoyed without a safe, clean and healthy environment; and sustainable environmental governance cannot exist without the establishment of and respect for human rights.<sup>26</sup>

It has rightly been pointed out that nearly 92 percent of pollution-related deaths occur in low-income and middle-income countries where children face the highest risks because small exposures to chemicals in utero and in early childhood can result in lifelong disease, disability, premature death, as well as reduced learning and earning potential.<sup>27</sup>

Notably, environmental rule of law is indispensable for ensuring just and sustainable development outcomes, and guaranteeing fundamental rights to a healthy environment, where the concept of environmental law includes the following elements: adequate and implementable laws, access to justice and information, inclusion and equity in public participation, accountability,

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<<https://www.bbc.com/future/article/20210316-how-the-human-right-to-a-healthy-environment-helps-nature>> accessed 31 March 2021.

<sup>25</sup> Ruppel, Oliver C., "Third-generation human rights and the protection of the environment in Namibia." *Human rights and the rule of law in Namibia*. Windhoek: Macmillan Education Namibia (2008): 101-120, 103.

<sup>26</sup> Environment UN, 'What Are Environmental Rights?' (*UNEP - UN Environment Programme*, 2 March 2018) <<http://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/what>> accessed 30 March 2021.

<sup>27</sup> 'Dr. David R. Boyd' (*UN Special Rapporteur /on Human Rights and the Environment*) <<http://srenvironment.org/node/556>> accessed 30 March 2021.

transparency and liability for environmental damage, fair and just enforcement, and human rights.<sup>28</sup>

The *United Nations Sustainable Development Goals (SDGs)*<sup>29</sup> are a set of 17 goals with 169 targets that all UN Member States have agreed to work towards achieving by the year 2030.<sup>30</sup> These goals and targets are all designed around ensuring that the environment is not only well protected but also that the resultant ecosystem services are used in meeting the economic and social needs of the human beings, both current and future generations.<sup>31</sup> As such, a safe, healthy and sustainable environment is a central element of the sustainable development agenda. The SDGs framework consists of 17 goals for environmental sustainability, social inclusion, economic development, peace, justice, good governance and partnership.<sup>32</sup> As such, sustainable development is seen as one of the most important aspects and methods used to conserve natural resources, as it recognizes that growth must be both inclusive and environmentally sound to reduce poverty and also build prosperity for the present population in addition to meeting the needs of future generations.<sup>33</sup>

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<sup>28</sup> 'Climate Change - A Comparative Overview of the Rights Based Approach in the Americas | InforMEA' <<https://www.informea.org/en/literature/climate-change-comparative-overview-rights-based-approach-americas>> accessed 1 April 2021.

<sup>29</sup> UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

<sup>30</sup> 'Sustainable Development Goals' <<https://www.who.int/westernpacific/health-topics/sustainable-development-goals>> accessed 1 April 2021.

<sup>31</sup> *Ibid.*

<sup>32</sup> 'Sustainable Development - an Overview | ScienceDirect Topics' <<https://www.sciencedirect.com/topics/earth-and-planetary-sciences/sustainable-development>> accessed 1 April 2021.

<sup>33</sup> Muralikrishna IV and Manickam V, 'Chapter Two - Sustainable Development' in Iyyanki V Muralikrishna and Valli Manickam (eds), *Environmental Management* (Butterworth-Heinemann 2017)

<<https://www.sciencedirect.com/science/article/pii/B9780128119891000026>> accessed 1 April 2021.

#### **4. Human Right to Safe, Healthy and Sustainable Environment: Prospects and Challenges**

The human right to safe, healthy and sustainable environment is generally considered to be part of the environmental rights. Notably, environmental impacts on health are uneven across age and mostly affect the poor.<sup>34</sup>

It has rightly been pointed out that although there is clear scientific consensus on the benefits of nature to people, the evolution of nature as a human right has been remarkably patchy around the world with many Latin American countries forging ahead while Europe and North America lag somewhat behind.<sup>35</sup>

Worth pointing out is the observation that the elements of the right to a healthy environment, such as a safe climate and healthy biodiversity and ecosystems, are facing complex and systemic challenges that affect all people and living beings.<sup>36</sup> While there is no doubt on the important role played by the environment in supporting all life on the earth, progress towards recognising the human right to safe, healthy and sustainable development as a fully-fledged right under the international law has been slow and instead has been replaced with the ‘greening’ of human rights, such as the right to life and right to property, as people increasingly recognise how environmental degradation affects the ability to enjoy these rights.<sup>37</sup>

As things currently stand, the Office of the High Commissioner on Human Rights emphasizes that “while the universal human rights treaties do not refer to a specific right to a safe and healthy environment, the United Nations

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<sup>34</sup> Mink SD, ‘Poverty, Population, and the Environment’ [1993] World Bank discussion papers (USA).

<sup>35</sup> Katarina Zimmer, ‘The Human Right That Benefits Nature’ <<https://www.bbc.com/future/article/20210316-how-the-human-right-to-a-healthy-environment-helps-nature>> accessed 31 March 2021.

<sup>36</sup> Ituarte-Lima C, ‘I Thriving in the Anthropocene: Why the Human Right to a Healthy Environment’, 20 < <https://elearning.rwi.or.id/storage/app/media/uploaded-files/i-ituarte-lima-c-thriving-in-the-anthropocene-why-the-human-right-to-a-healthy-environment-2020.pdf>> 30 March 2021.

<sup>37</sup> Ituarte-Lima C, ‘I Thriving in the Anthropocene: Why the Human Right to a Healthy Environment’, 27 < <https://elearning.rwi.or.id/storage/app/media/uploaded-files/i-ituarte-lima-c-thriving-in-the-anthropocene-why-the-human-right-to-a-healthy-environment-2020.pdf>> 30 March 2021.



human rights treaty bodies all recognize the intrinsic link between the environment and the realization of a range of human rights, such as the right to life, to health, to food, to water, and to housing.”<sup>38</sup>

The main contention between those in support and those against the full recognition of the right to safe and healthy environment as an independent human right lies between anthropocentrism and ecocentrism approaches to conservation, where anthropocentrism means that the whole universe revolves around the interests of human-kind and that all human activities are human-centred, while ecocentrism is a collection of views that is theoretically in contrast with anthropocentrism.<sup>39</sup> The debate between the two groups is informed by three approaches in relation to the relationship between human rights and environmental protection which are as follows: the first approach is one where environmental protection is seen as a possible means of fulfilling human rights standards, that is, the end is fulfilling human rights, and the route is through environmental law; the second approach states that ‘the legal protection of human rights is an effective means to achieving the ends of conservation and environmental protection (greening of existing human rights); and the third approach to the question of ‘human rights and the environment’ is to deny the existence of any formal connection between the two at all, that is, with the growth and development of international environmental law as well as internationalization of domestic environments of states, it is unnecessary to have a separate human right to a decent environment.<sup>40</sup> Thus, the debate is about either ‘greening’ of existing human rights law or the addition of new rights to existing treaties.<sup>41</sup> Some scholars,

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<sup>38</sup> Boyle, Alan, "Human rights and international environmental law: Some current problems," *Электронный ресурс*. –Режим доступа: <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/WorkingGroups/08-03-HumanRights.pdf> (дата обращения: 10.04. 2014 г.) (2011).

<sup>39</sup> Leib LH, ‘Historical and Philosophical Underpinnings of the Environmental Movement’, *Human Rights and the Environment* (Brill 2011), 12 <<https://www.jstor.org/stable/10.1163/j.ctt1w8h1t2.5>> accessed 1 April 2021.

<sup>40</sup> Pathak P, ‘Human Rights Approach to Environmental Protection’ (Social Science Research Network 2014) SSRN Scholarly Paper ID 2397197, 18-19<<https://papers.ssrn.com/abstract=2397197>> accessed 1 April 2021.

<sup>41</sup> *Ibid*, 19.

however, believe that environmental law, in absence of hard law documents, appears to be lagging in dealing with emerging environmental problems.<sup>42</sup>

It is worth pointing out that while there are a number of international legal instruments that recognise the need for clean and healthy environment as a prerequisite for enjoyment of other rights, these references relating to the environment are attached to a particular issue and do not recognise the human right to a quality environment as an independent right.<sup>43</sup> This lack of consensus among the different stakeholders thus means that the world might have to wait a little longer to attain consensus and move the United Nations to finally recognise the right to a safe, healthy and sustainable environment as an independent right capable of being enforced without necessarily treating its importance as inherently linked to the realisation of other rights. That is, recognising the right would move it from being treated as a means to an end to an end in itself.

## **5. Recognising a Human Right to Safe, Healthy and Sustainable Environment**

A safe, clean, healthy and sustainable environment is now treated as an integral element to the full enjoyment of a wide range of human rights, including the rights to life, health, food, water and sanitation.<sup>44</sup> As already pointed out, while countries around the world have continually acknowledged and entrenched environmental rights into their national constitutions, there are few international legal instruments that expressly recognise the right to clean and healthy environment. As a result, there have been a strong call for the recognition of the right to a healthy environment in a global instrument such as a resolution by the General Assembly by various actors including current UN Special Rapporteur on Human Rights and Environment, although this is yet to be acted upon.<sup>45</sup>

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<sup>42</sup> Ibid, 19.

<sup>43</sup> Ibid, 20.

<sup>44</sup> 'Dr. David R. Boyd' (*UN Special Rapporteur on Human Rights and the Environment*) <<http://srenvironment.org/node/556>> accessed 31 March 2021.

<sup>45</sup> 'OHCHR | Right to a Healthy and Sustainable Environment' <<https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/HealthySustainable.aspx>> accessed 1 April 2021.

In order to ensure that the victims of environmental degradation are protected by the laws and mechanisms established to address human rights abuses, it has been suggested that efforts aimed at natural resource preservation should also incorporate measures aimed at addressing human impacts of environmental abuse.<sup>46</sup> In addition, it has been argued that linking human rights with the environment creates a rights-based approach to environmental protection that places the people harmed by environmental degradation at its centre.<sup>47</sup> Furthermore, it has been suggested that articulating the fundamental rights of peoples with respect to the environment creates the opportunity to secure those rights through human rights bodies in an international forum as well as the national tribunals.<sup>48</sup> Kenya has notably made steps in the right direction as far as recognising the justiciable nature of the right to clean and healthy environment is concerned.<sup>49</sup> For now, it seems that the only way to ensure that the right to safe and healthy environment is justiciable is through domestic initiatives, where governments include the right to clean and healthy environment under in their countries' constitutions.<sup>50</sup> There is a need for stakeholders to continually engage and encourage countries to adopt as a human right a safe, healthy and sustainable environment in their constitutions and/or statutes, as a step towards achieving global consensus on the same for the ultimate goal of an international legal instrument on the same.

## 6. Conclusion

Arguably, recognising the human right to a healthy environment will go a long way in protecting people and nature, as well as ensuring that there

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<sup>46</sup> Pathak P, 'Human Rights Approach to Environmental Protection' (Social Science Research Network 2014) SSRN Scholarly Paper ID 2397197, 17 <<https://papers.ssrn.com/abstract=2397197>> accessed 31 March 2021.

<sup>47</sup> *Ibid*, 17.

<sup>48</sup> *Ibid*, 17.

<sup>49</sup> See *Peter K. Waweru v Republic* [2006] eKLR, Mis.Civl Appli.No. 118 OF 2004; *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] eKLR, Petition 22 of 2012; *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & Another*, Tribunal Appeal No. NET 196 of 2016, (2019) eKLR.

<sup>50</sup> Mwanza R, 'The Relationship between the Principle of Sustainable Development and the Human Right to a Clean and Healthy Environment in Kenya's Legal Context: An Appraisal' (2020) 22 *Environmental Law Review* 184; Schiel R, Langford M and Wilson B, 'Does It Matter? Constitutionalisation, Democratic Governance, and the Right to Water' (2020) 12 *Water* 350; Boyd DR, 'The Status of Constitutional Protection for the Environment in Other Nations' [2014] David Suzuki Foundation 4.

are conducive conditions for continued Sustainable Development and prosperity, leaving no one behind.<sup>51</sup> While many countries including Kenya, have made impressive steps towards the recognition and enforcement of the human right to a safe, healthy and sustainable environment, there is still no global consensus on the need to recognise it as an independent right without necessarily anchoring it on the other basic human rights. Such recognition with achieve the dual goal of protecting the environment through ecocentric approaches as well as ensuring that enforcement and accountability of governments and private persons are guaranteed.

Time is ripe for the global environmental community to consider taking this bold step as part of moving towards achieving the SDGs. Recognising the Human Right to a Clean, Healthy and Sustainable Environment is something that should happen now for the sake of the present and future generations.

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<sup>51</sup> Ituarte-Lima C, 'I Thriving in the Anthropocene: Why the Human Right to a Healthy Environment', 18 < <https://elearning.rwi.or.id/storage/app/media/uploaded-files/ituarte-lima-c-thriving-in-the-anthropocene-why-the-human-right-to-a-healthy-environment-2020.pdf>> 30 March 2021.

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