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Note on Recent Developments

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The Human Right to a Clean, Healthy and Sustainable Environment

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1 Introduction

A clean, healthy, and sustainable environment is widely regarded as a necessary precondition for the enjoyment of many long-established and universally recognized human rights, including the right to life, the right to enjoy the highest attainable standard of physical and mental health, the right to an adequate standard of living, the right to sufficient food, the right to housing, the right to safe drinking water and sanitation, the right to participate in cultural life, and so on. Negative impacts or damage done to the environment hinder the enjoyment of these and other human rights.

Despite this international consensus about the close link between human rights and a healthy environment, there is still no global agreement about the precise legal place of the environment in the international human rights discourse. The most pressing question is whether there is a distinct individual

human right to enjoy a clean, healthy, and sustainable environment, and a corresponding duty of care for the State to provide such an environment to the individual. In addition, various non-state entities, including oil companies, car manufacturers and other businesses, may have a similar duty of care. Explicit recognition of an individual human right to be provided with a clean, healthy, and sustainable environment is fundamentally different from considering a clean, healthy, and sustainable environment as a necessary precondition for the enjoyment of classical, long recognized and established human rights. Such a 'greening' of existing human rights has been underway for years,¹ albeit that some regions of the world have been more progressive in this development than others.² It would only be truly revolutionary if the right to a healthy environment were recognized as an independent individual human right.³

- 1 See eg James McClymonds, 'The Human Right to a Healthy Environment: An International Legal Perspective' (1992) 37(4) *The New York Law School Law Review* 583–634; Sumudu ATAPATTU, 'The Right to a Healthy Life or the Right to Die Polluted: The Emergence of a Human Right to a Healthy Environment under International Law' (2002) 16(1) *Tulane Environmental Law Journal* 65–126; Burns WESTON and David BOLLIER, *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons*, Cambridge University Press, 2013, 285–336 (addendum on 'The International Legal Status of the Human Right to a Clean and Healthy Environment').
- 2 See eg Brennan VAN DYKE, 'A Proposal to Introduce the Right to A Healthy Environment into the European Convention Regime' (1994) 13(3) *Virginia Environmental Law Journal* 323–373; Lilian CHENWI, 'The Right to a Satisfactory, Healthy, and Sustainable Environment in the African Regional Human Rights System', in John KNOX and Ramin PEJAN (eds) *The Human Right to a Healthy Environment*, Cambridge University Press, 2018, 59–85; Mulesa LUMINA, 'The Right to a Clean, Safe and Healthy Environment under the African Human Rights System', in Michael ADDANEY and Ademola OLUBORODE JEGEDE (eds) *Human Rights and the Environment under African Union Law*, Palgrave, 2020, 25–54; Jean-Pierre MARGUÉNAUD, 'Contrôle Européen et Protection de L'environnement: Un Renforcement Nécessaire', in Katarzyna BLAY-GRABARCZYK and Laure MILANO (eds) *Les Soixante-Dix Ans de L'adoption de La Convention Européenne des Droits de L'homme: Enjeux et Perspectives*, Pedone, 2021; Elinor BUYS and Bridget LEWIS, 'Environmental Protection through European and African Human Rights Frameworks' (2021) *The International Journal of Human Rights*, on line, 12 October 2021 <<https://www.tandfonline.com/doi/full/10.1080/13642987.2021.1986011>>; Ben BOER, 'Environmental Law and Human Rights in the Asia Pacific', in Ben BOER (ed) *Environmental Law Dimensions of Human Rights*, Oxford University Press, 2015, 166–174.
- 3 For a general introduction to these debates, see eg Burns WESTON and David BOLLIER, *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons*, Cambridge University Press, 2013, 27–49 (chapter on 'The Human Right to a Clean and Healthy Environment'); Rebecca BRATSPIES, 'Do We Need a Human Right to a Healthy Environment' (2015) 13(1) *Santa Clara Journal of International Law* 31–70; Rebecca BRATSPIES, 'Claimed Not Granted: Finding a Human Right to a Healthy Environment' (2017) 26(2) *Transnational Law and Contemporary Problems* 263–280; Bridget LEWIS, *Environmental Human Rights and Climate Change: Current Status and Future Prospects*, Springer, 2018, 59–93 (chapter on 'The Human Right to a Good Environment in International Law'); Anna D'AGOSTINO, 'The

The recent adoption by the United Nations Human Rights Council (HRC) of a resolution on the human right to a clean, healthy, and sustainable environment could be a kind of ‘game changer’. Whether the resolution can indeed play this role depends on what happens next: how will the international community react to this resolution?

2 The Human Right to a Clean, Healthy and Sustainable Environment

Let us first describe the resolution itself, before addressing some international reactions. On the final day of the 48th session of the United Nations Human Rights Council (which lasted from 13 September to 8 October of 2021), a resolution was passed on the human right to a clean, healthy, and sustainable environment. This resolution was prepared by a broad coalition, formally supported by the States of Costa Rica, the Maldives, Morocco, Slovenia, and Switzerland.⁴

The resolution recognizes ‘the right to a clean, healthy, and sustainable environment *as a human right* that is important for the enjoyment of human rights.’⁵ This rather curious sentence shows how difficult it was to have this right explicitly recognized as an individual human right. After all, one would expect that the human right to a clean, healthy, and sustainable environment would be considered important of itself, as well as for the enjoyment of *other* human rights, such as the right to life, an adequate standard of living, etc., but that is not what it says. The word ‘other’ is conspicuously missing in the last part of the sentence.

Other parts of the resolution also seem to suggest that a clean, healthy, and sustainable environment is a necessary precondition for the enjoyment of human rights, but that there is no separate human right to enjoy such an environment. For example, the preamble acknowledges the importance of a clean, healthy, and sustainable environment as ‘critical to the enjoyment of all human rights’. Further, two preambular paragraphs, and operative paragraphs 4(b)

Human Right to a Healthy Environment’ (2019) 52(1) New York University Journal of International Law and Politics 315–320; James MAY, ‘The Case for Environmental Human Rights: Recognition, Implementation, and Outcomes’ (2021) 42(3) Cardozo Law Review 983–1038; John KNOX, ‘Human Rights’, in Lavanya RAJAMANI and Jacqueline PEEL (eds) *The Oxford Handbook of International Environmental Law* (2nd ed), Oxford University Press, 2021, 784–800 (Part VII: Interlinkages with Other Regimes, Chapter 45 on Human Rights).

4 See Human Rights Council, *The Human Right to A Clean, Healthy, and Sustainable Environment*, Resolution 48/13, adopted 8 October 2021, UN Doc A/HRC/RES/48/13.

5 *ibid.*, para 1 (emphasis added).

and (d), refer to human rights obligations 'relating to' the enjoyment of a clean, healthy, and sustainable environment, instead of referring to an obligation simply to guarantee enjoyment of and respect for the human right to a clean, healthy, and sustainable environment itself.

In any case, although the rest of the resolution seems to suggest that a healthy environment is a necessary precondition for the enjoyment of already recognized human rights, there is no denying that operative paragraph 1 does in fact begin with an explicit recognition of 'the right to a clean, healthy, and sustainable environment *as a human right*' in and of itself.⁶

The resolution was adopted with forty-three votes in favour and four abstentions (China, India, Japan, and the Russian Federation). No Member State of the Human Rights Council voted against the resolution.

This note now turns to the position of two of the abstainers, the Russian Federation and China, with a more concentrated focus on possible reasons for China's abstention. It then deals with the stated position of the United States, issued after the resolution was passed.

3 The Position of the Russian Federation

The Russian Federation was the most critical of the abstaining Member States. In a speech just before the resolution was adopted by the Human Rights Council, the representative of the Russian Federation explained that his country did not consider the Council to be the appropriate body for the promotion of a healthy environment.⁷ Russia further found that the right was formulated too vaguely, and that it was based on non-binding instruments (soft law). So, concluded the Russian delegate, it was not a 'right' in the literal sense of the term. Based on these critiques, the Russian Federation submitted many proposals for amendment. In their successful effort to rebut the Russian Federation's criticisms, the resolution's sponsors pointed out that recognizing the right to a clean, healthy, and sustainable environment as a human right was precisely the main goal of the resolution. The Russian amendment proposals were all rejected.

⁶ *ibid* (emphasis added).

⁷ On the question of the mandate, see also John H KNOX, 'The United Nations Mandate on Human Rights and the Environment (Note on Recent Developments)' (2018) 2 Chinese Journal of Environmental Law 83–92.

4 The Position of China

In his speech just before the resolution was passed, the representative of China stressed the importance of harmonious coexistence between human beings and nature. He also noted that the concept of ecological conservation was already firmly entrenched in the Chinese Constitution.⁸ He then went on to explain that China believed many things were not settled, including the definition and content of the right to a clean, healthy, and sustainable environment, and its interaction with other human rights. And finally, China was not convinced that the Human Rights Council had the mandate to enact this right formally.⁹

On 11 October 2021, China's Permanent Mission to the United Nations Office at Geneva published a summary of the 48th session of the Human Rights Council at which the resolution on the right to a clean, healthy, and sustainable environment was adopted.¹⁰ The summary briefly listed five of China's recent contributions to the development of international human rights: (1) a focus on poverty alleviation; (2) a balance between global human rights advocacy and respect for national sovereignty; (3) revealing the allegedly poor human rights status in some Western countries by criticizing modern day forms of colonialism, human trafficking, forced labour, and so on; (4) supporting the voices and interests of developing countries; and (5) encouraging international human rights cooperation, which includes supporting a multilateral approach to global development, and an equitable allocation of COVID-19 vaccines. Remarkably, the right to a clean, healthy, and sustainable environment was not mentioned at all in this summary.

We believe that the reasons behind China's abstention from the vote can be explained in part by the fundamental differences between the way China and most Western States understand the human rights discourse. It is thus helpful to briefly revisit some of these differences and explain their relevance for the Chinese approach to the right to a clean, healthy, and sustainable environment.

8 ZHU Xiao, WANG Shenghang, and Eva-Maria EHEMANN, 'Development of Environmental Rights in China: Substantive Environmental Rights or Procedural Environmental Rights' (2017) 12(1) *Frontiers of Law in China*.

9 'Explanatory Statement by the Chinese Delegation at the 48th Session of the Human Rights Council on the Draft Resolution "The Right to a Safe, Clean, Healthy and Sustainable Environment" (AHRC/48/L.23/Rev.1)', 10 October 2021 <http://www.china-un.ch/chn/dbtyw/rqsw/202110/t20211010_9592613.htm>.

10 'China actively participated in the work of the 48th session of the UN Human Rights Council', 11 October 2021 <http://www.china-un.ch/chn/dbdt/202110/t20211012_9555517.htm>.

First, China considers human rights protection as essentially an internal affair, rather than a transnational or global one.¹¹ This means *inter alia* that the Chinese government believes it is to be free from outside pressures and interference when selecting which human rights conventions to sign or ratify. The principal reason why the Chinese government is to be free from outside pressure is that China is a sovereign country. Any State whose existence is recognized by the international community, is 'born' with sovereignty, in the same way as a human being is born with the gift of life and inherent dignity. Therefore, no existing State, person or organization can 'grant' sovereignty to any nation, or take it away, or weaken it. Sovereignty, by its very nature, implies equality between nations.¹² Therefore, no sovereign country enjoys a legal or moral superiority that entitles it to interfere with other nations' internal affairs. This is the position of many governments around the world, including the Chinese government. China's abstention, therefore, reflects the Chinese government's consideration of domestic social needs, on which we will elaborate further when discussing the second and third reason for China's abstention.

Second, the Chinese government places more emphasis on economic, social, and cultural rights than on political and civil rights. This explains why, even though the Chinese government has signed both the International Covenant on Economic, Social, and Cultural Rights (on 27 October 1997) and the International Covenant on Civil and Political Rights (on 5 October 1998), only the former has subsequently been ratified by the National People's Congress (on 27 March 2001). During an interview after the opening of the 48th session of the Human Rights Council, MA Zhaoxu, China's Vice Foreign Minister, explained that the Chinese government regards the right to life and to development as the primary and most fundamental human rights.¹³

This preference is rooted in China's unique historical and cultural background. The evolution of the Western human rights concept followed specific philosophical development and social movement patterns,¹⁴ which China cannot now simply replicate. Furthermore, the idea of human rights is not

11 Cf. 'What are China's Principles and Position in the Field of International Human Rights?', *People's Daily*, 3 April 2006.

12 Hans KELSEN, 'The Principle of Sovereign Equality of States as a Basis for International Organization' (1944) 53(2) *Yale Law Journal* 207–209.

13 MA Zhaoxu, 'Statement on China's participation in the 48th session of the United Nations Human Rights Council', 25 September 2021, <http://www.gov.cn/xinwen/2021-09/25/content_5639232.htm>.

14 John FINNIS, *Natural Law and Natural Rights* (2nd ed), Oxford University Press, 2011, 81–90; Michael MILGATE, 'Human Rights and Natural Law: From Bracton to Blackstone' (2006) 10 *Legal History* 60–63; Robert GEORGE, 'Natural Law, God, and Human Rights' (2009) 3 (1) *Journal of Law, Philosophy and Culture* 131; Neil STAMMER, 'Social

endogenous to the Chinese social environment. It is an imported product, introduced as part of the modernization process. The Chinese government believes that social, economic, and cultural rights are indispensable for human survival, and must thus be recognized and protected as the top priority. It believes that civil and political rights should not be treated in the same way, because the understanding of these rights is decisively influenced by a State's political system and the existence of social movements within it. Before China's reform and opening up, the political life of the Chinese people focused on class struggle, especially during the Cultural Revolution, as manifested in the political slogan of the Communist Party of China (CPC) of 'taking class struggle as the key link',¹⁵ which was fundamentally different from Western political life, which focused on the liberation of the individual and recognition of the individual's rights and freedoms vis-à-vis the government.¹⁶ This historical difference is important, because in addition to being essentially a social, economic, and cultural right, the right to a clean environment also has civil rights attributes, such as rights to environmental public participation.¹⁷ We believe that these factors may have contributed to China's abstention.

Third, another significant consequence of China's position that human rights are part of the country's own internal affairs, in addition to the Chinese government's preference for economic, social, and cultural rights, is that the government believes it has the freedom to decide how the human rights recognized in international treaties and conventions, ratified by China, are incorporated by the Chinese legislature into domestic policies and legislation.

Movements and the Social Construction of Human Rights' (1999) 21 (4) Human Rights Quarterly 986–990.

- 15 WANG Yeyang, 'A Research on the Theory of Taking Class Struggle as the Key Link' (2011) 181 *Modern Chinese History Studies* 120–121, citing from MAO Zedong, *The Collected Works of Mao Zedong* (Vol.6), People's Publishing House, 1999, 302; Party Literature Research Center of CPC Central Committee, *The Biography of Mao Zedong (1949–1976)*, PANG Xianzhi (editor-in-chief), Central Party Literature Press, 2003, 1769. See also TANG Tsou, 'The Cultural Revolution and the Chinese Political System' (1969) 38 *China Quarterly* 63–91.
- 16 Civil and political rights play a crucial part in China's Human Rights Action Plan (2021–2025), which means such rights will be key to China's future development of human rights protection. The civil and political rights recognized in the international covenants are already covered by the Human Rights Action Plan. 'Human Rights Action Plan of China (2021–2025)', 9 September 2021 <http://english.www.gov.cn/news/topnews/202109/09/content_WS6139a11c6d0df57f98dfeec.html>.
- 17 John KNOX, *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment: Mapping Report*, A/HRC/25/53, paras 22–23 <<http://www.ohchr.org/en/HRBodies/HRC/RegularSessions/Session25/Pages/ListReports.aspx>>.

Apart from common-sense values that have already reached international consensus such as life, health, property, etc., the Chinese government prefers to interpret for itself what the essence is of human dignity and rights, and how best to protect them, in accordance with the needs of present Chinese society. The constant pursuit of the Chinese people's overall happiness is regarded, by the CPC, as the most important way to secure human rights enjoyment of all in China and to achieve the goal of human rights development at the current stage of the country's advancement.¹⁸ The focus herein is on poverty alleviation. Any human right that is not of immediate instrumental value to the alleviation of poverty, is, in view of the Chinese government, not urgently in need of implementation, and should not take precedence over the realization of common prosperity.¹⁹ Since the reform and opening up, the rapid development of China's economy has relied heavily on resource-intensive industries. Ecological imbalance, heavy pollution, and extreme weather events have been considered unfortunate by-products of economic growth, which means environmental protection in China follows a treatment-after-pollution path. Although this path is gradually being replaced by a new one that places more emphasis on the harmonious coexistence of human beings and nature,²⁰ it cannot be completely eradicated because any industrial-based economic development model will bring about a certain degree of pollution to the environment.²¹ It is thus impossible, in view of the Chinese government, for China to maintain the current standard of economic growth if the Chinese government proceeds with deindustrialization at present.²²

Article 4 (2) of the Environmental Protection Law requires the Chinese government to balance environmental protection with social and economic

18 SHU Shaofu, 'Chinese people's overall happiness is the greatest human right', 8 October 2021 <<http://theory.people.com.cn/n1/2021/1008/c40531-32246815.html>>.

19 'Common Prosperity is A General Concept', 1 November 2021 <https://www.ccdi.gov.cn/lsw/hlilun/202111/t20211101_253306.html>.

20 XI Jinping, 'Lucid Water and Lush Mountains are Invaluable Assets', *Zhi Jiang Xin Yu*, Zhejiang People's Publishing House, 2007, 153; Xinhua News Agency, 'Practicing the "Two Mountains Theory" is a Revolution in Development', 14 June 2018 <http://www.china.com.cn/opinion/theory/2018-06/14/content_52190740.htm>; WU Shunze, HUANG Desheng, LIU Zhichao, et al., '40 Years Evolution of the Relationship Between Environmental Protection and Economic Development in China', (2018) 46 (20) *Environmental Protection* 16–17.

21 Donella MEADOWS, Jorgen RANDERS, Dennis MEADOWS, *Limits to Growth: The 30-Year Update*, Earthscan, 2005, 108–121.

22 The output value of industrial manufacturing accounts for 32.5% of China's GDP of 2021, which far exceeded other industries. See 'Preliminary Accounting Results of Gross Domestic Product (GDP) for the Fourth Quarter and Full Year of 2021', published 18 January 2022 <http://www.stats.gov.cn/tjsj/zxfb/202201/t20220118_1826497.html>.

development. However, the latter normally takes priority over the former because promoting economic growth can bring political benefits to local officials, whereas an emphasis on environmental protection may lead to harsh social criticism. We can take the 'environmental protection storm' in Linyi City, Shandong Province as an example. On 10 March 2015, 57 enterprises were forced to shut down by the environmental protection department of Linyi City, Shandong Province, and 412 other companies were also required to limit their production. This was mainly because the Mayor of Linyi City was summoned by the Ministry of Ecology and Environment several days earlier, and received a verbal warning for Linyi's severe pollution status.²³ After four months of strict control of polluting enterprises, more than 60,000 workers lost their jobs, leading to severe criticism of the Linyi government from local citizens.²⁴ This tense relationship domestically between environmental protection and economic development may explain why the Chinese government does not embrace the right to a clean, healthy and sustainable environment as an individual human right, at least not for the immediate future. We believe this is another underlying reason for China's abstention.

Fourth, the Chinese government's obligation to protect and respect human rights directly originates from legal principles rather than legal rules. Article 33(3) of the Chinese Constitution stipulates that the State must respect and protect human rights. This provision is the only one in the Constitution in which we can find the word 'human rights'. The power to interpret the Constitution is a power that pertains exclusively to the National People's Congress and its Standing Committee. This means that the judicial branch in China is not legally permitted to interpret and apply the Constitution, and to check other Chinese domestic laws and policies on their constitutionality.²⁵ Clearly then, human rights judicial protection is still inadequate in China. It is often assumed – incorrectly – that Article 33(3) of the Chinese Constitution is a legal rule with a definite content.²⁶ The better view is that Article 33(3)

23 XU Jingeng, LIU Chengyou, and BIAN Minde, 'The whole story of Linyi's environmental protection storm', *People's Daily*, 24 June 2016 <<http://env.people.com.cn/m/2016/0624/c1010-28474331.html>>.

24 SUN Lirong, 'Linyi's pollution control took a sharp turn: 57 companies were shut down, causing a debt crisis of 100 billion RMB', *The Paper*, 2 July 2015 <https://www.thepaper.cn/newsDetail_forward_1347676>.

25 Article 67 (1), Constitution of the People's Republic of China (2018 Amendment): 'The Standing Committee of the National People's Congress exercises the following functions and powers: (1) to interpret the Constitution and supervise its enforcement.'

26 ZHAI Yi, 'A New Idea of Proportionality Principle in Chinese Constitution: Based on the 33rd Article of the Chinese Constitution Text' (2012) 180 *Social Sciences in Xinjiang* 92–94.

introduced a legal principle, not a legal rule, which cannot be directly applied.²⁷ Legal principles are regarded as more flexible, and thus less reliable in ensuring predictable and transparent adjudication.²⁸

In China, human rights protection has always been about finding a balance and reaching a compromise-solution.²⁹ The most typical example is the conflict between the pursuit of poverty alleviation by promoting socio-economic development, and the pursuit of climate change mitigation by promoting a reduction of energy-intensive industries. On the issue of global climate change, the Chinese government has always emphasized that the North and South bear common but differentiated responsibilities, given that the historical cumulative amount of greenhouse gas (GHG) emissions of the North far exceeds that of the South. This means that the North cannot now require of the South to implement strict GHG emission standards at the expense of the latter's economic development.³⁰ The contradiction between climate change mitigation and economic development has already emerged in current Chinese society. To meet the GHG emission reduction targets issued by the State Council, many Chinese local governments force lawfully established industrial enterprises to shut down to reduce energy consumption, resulting in significant economic damage.³¹ This shows that the Chinese government has already made considerable compromises on economic development for the sake of protecting the environment.

Even though the human rights principle of Article 33(3) of the Chinese Constitution has its merits, it cannot provide the judge with an inevitable conclusion in specific cases requiring a delicate balancing of interests like the one described just above. Only after the Chinese legislature has concretized the legal principle of human rights protection into legal rules by acknowledging and protecting legal rights, eg, the right to life, health, property, and vote, etc., can human rights be implemented in judicial practice. Otherwise, human rights remain nothing more than a political slogan. Therefore, under the Chinese human rights context, it is the citizen's legal right to the environment

27 ZHANG Qianfan, 'On the Selective Application of the Chinese Constitution' (2014) 2 (1) Peking University Law Journal 23.

28 ZHANG Wenxian (editor-in-chief), *Jurisprudence* (4th ed), Higher Education Press, 2011, 73–77.

29 LI Lin, 'The Marxist View of Human Rights', (2008) 8 (7) Journal of Kunming University of Science and Technology (Social Sciences) 6.

30 'Representatives of China reiterated China's position of active response to climate change in Tokyo', 30 June 2008 <http://www.gov.cn/jrzq/2008-06/30/content_10308u.htm>.

31 'Shutting Down Enterprises and Turning off Street Lights: Beware of the Distortion of Energy Consumption Control by the Local Government', *Outlook Weekly*, 24 May 2021 <http://lw.xinhuanet.com/2021-05/24/c_139965995.htm>.

acknowledged by Chinese domestic law, rather than the general and internationally recognized human right to a clean and healthy environment, which can be implemented. If the Chinese government supports HRC Resolution 48/13 in the future, all the contents of this right must be transformed into and thus be reflected in Chinese domestic law, which will demand of Chinese legislators to confront a tricky theoretical pledge. After all, the content and structure of environmental rights in China are still the subject of much theoretical and conceptual dispute.³²

A fifth and final reason that might explain China's reluctance to recognize the human right to a clean, healthy, and sustainable environment as defined in the resolution of the Human Rights Council is that the Chinese government takes a defensive stance in international human rights negotiations. It seeks to consolidate the present human rights discourse, instead of urging it to develop further into new areas.³³ The international human rights discourse can serve both as a sword and as a shield for a government. Different countries have different preferences, which vary according to their policies and the way they prefer to shape their international relations.³⁴ China has chosen a non-aligned foreign policy. Its focus is on protecting the existing human rights discourse from what it perceives as the adverse impact of Western countries' criticism.

Moreover, China's human rights discourse acknowledges the differences between China and developed countries in the political and economic preconditions for realizing human rights. China always reminds others of these differences when negotiating on international human rights issues, to ease international public pressure on China. Therefore, supporting the right to a healthy environment as a human right might be contradictory to Chinese diplomatic policies. If China were to recognize the right to a healthy environment as a human right, the Chinese government might face a more stressful diplomatic situation.

32 See eg WU Weixing, 'Review, Reflection, and Future Expectation of the Theoretical Research on the Environmental Right in China for Thirty Years' (2014) 187 *Law Review* 184; HU Jing and WANG Huan, 'Criticism of Environmental Rights as the Basis of Claim' (2021) 20 (2) *Journal of Nanjing Tech University (Social Science Edition)* 1.

33 See eg Andrew NATHAN, *Andrew J. Nathan on China*, Bouden House, 2022, 90.; XU Qiqi, 'Promoting the dissemination of China's human rights from a new starting point', 2 March 2022 <http://www.china.com.cn/opinion/2020/2022-03/02/content_78080589.shtml>; Nick CUMMING-BRUCE, 'China's growing discourse in the field of international human rights', 26 March 2018 <<https://cn.nytimes.com/china/20180326/china-human-rights-united-nations/>>.

34 Tom ZWART, 'The Yin-Yang Balance in the International Human Rights Debate', 11 September 2013 <http://www.humanrights.cn/cn/zt/tbbd/43/14/t20130911_1091935.htm>.

XI Jinping, the President of the People's Republic of China, has already restated the relationship between environmental protection and socio-economic development through the 'two mountains theory'.³⁵ This 'two mountains theory' holds that lucid waters and lush mountains are invaluable assets – they are compared to the country's two gold mountains.³⁶ This means that the environment itself is as important as the economy and that people will receive handsome rewards from the environment if they take diligent care of it. If the relationship between humankind and the environment, and the balance between socio-economic advancement and environmental protection, is now approached in a fundamentally different way – ie from the perspective of the human rights discourse – this might lead to considerable uncertainty and economic and political destabilization. Given the tense international political environment China is currently facing, the Chinese government is not enthusiastic about making international commitments detrimental to China's development opportunities.³⁷ This is yet another reason China might not support the proposal to treat the right to a clean, healthy, and sustainable environment as an individual human right.

From the above, we can safely conclude that China's abstention on HRC Resolution 48/13 cannot be attributed to the government's indifference to environmental protection, as clearly, it has made some very solid commitments to environmental protection in recent years. Instead, it is more likely based on China's complex and politically sensitive attitude towards the global human rights discourse. As we will demonstrate immediately below, protecting human rights, and promoting the people's happiness and livelihood has increasingly become the Chinese government's focus.

In September 2021, China's State Council Information Office released China's Human Rights Action Plan (2021–2025), which manifested the trend of human rights protection in China for the next five years. According to the Plan, human rights can be divided into three main categories:

- (1) Economic, social, and cultural rights;
- (2) Civil and political rights; and

35 XI Jinping, 'Lucid Water and Lush Mountains are Invaluable Assets', *Zhi Jiang Xin Yu*, Zhejiang People's Publishing House, 2007, 153.

36 LIU Haixia, WANG Zongli, 'An Analysis of Xi Jinping's Ecological Thought' (2015) 303 *Guizhou Social Sciences*; LU Zhongmei, 'The ecological civilization rule of law theory in Xi Jinping's rule of law thought' (2021) 219 *China Legal Science*.

37 Cf WANG Guangtao, then Head of Chinese delegation to the Parliamentary Forum on Climate Change held by the Inter-Parliamentary Union, 'Representatives of China reiterated China's position of active response to climate change in Tokyo', 30 June 2008 <http://www.gov.cn/jrzq/2008-06/30/content_1030811.htm>.

(3) Environmental rights.

As we can see, not only are environmental rights already recognized as part of the human rights discourse. Their uniqueness, compared to the other two traditional categories of human rights, has been admitted as well, which is undoubtedly noteworthy progress. According to the Plan, the citizen's environmental rights include the following:³⁸

- (1) The right to be free from pollution. The Chinese government's environmental protection department must *inter alia* improve air quality, strengthen water treatment and protection, intensify soil conservation, improve the treatment of sewage and solid waste, improve rubbish disposal in urban and rural areas, and improve law-based environmental governance.
- (2) The right to acquire environmental information. The Chinese government's environmental protection department must promptly disclose environmental information to the public through convenient means.
- (3) The right to participate in environmental decision-making. The Chinese government must support the public to participate in the environmental impact evaluation of special plans that may cause adverse environmental impacts and directly affect the public's environmental rights.
- (4) The right to benefit from a self-restoring and stable ecosystem. The Chinese government must conduct significant projects to protect and restore critical ecosystems, build a system of nature reserves, and implement substantial biodiversity protection projects.
- (5) The right to benefit from a stable climate system. The 'double carbon commitment' compels the Chinese government to reduce greenhouse gas emissions, and increase China's adaptability to climate change, focusing on controlling fossil energy consumption, monitoring, and assessing the impact of climate change on vulnerable regions in the country, as well as implementing the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement, while actively promoting South-South cooperation on climate change.
- (6) The right to demand compensation through environmental public interest litigation and an environmental damage compensation system. Enjoyment of this right must also be facilitated by the Chinese government.

Only after the exact content of the environmental rights has been revealed can such rights be implemented in Chinese domestic judicial practice. China's

38 'Human Rights Action Plan of China (2021–2025)', 9 September 2021 <http://english.www.gov.cn/news/topnews/202109/09/content_WS6139a11c6d0df57f98dfec.html>.

Human Rights Action Plan (2021–2025) has made a significant contribution in this regard by affirming the existence of the right to a clean environment, a thriving eco-system, and a stable climate system at the official level. It has also acknowledged these rights as human rights, and it has clarified the specific content of environmental rights and their relationship with other human rights, which allows the environmental rights to be applied by a judge. The further working direction of the Chinese government is to transform the legal basis of these environmental rights from policy to law and to implement environmental rights in judicial decisions.

In summary, although China's cautious attitude towards international human rights issues appears to have prompted it to adopt a conservative approach to HRC Resolution 48/13, the Chinese government is quite positive and pragmatic on domestic environmental protection, human rights protection, and the establishment of environmental rights. Given the current status, one can expect China to play a more constructive role in the global environment and human rights protection in the future.

5 The Position of the United States

The United States of America, which was itself not a member of the Human Rights Council when the resolution was put to the vote, and thus could not vote for or against, or abstain, published a statement on 13 October 2021, on the website of the US Mission to International Organizations in Geneva, which reads as follows:

The United States is committed to taking ambitious action to address environmental challenges, including continuing our work with international partners to share our experience with concrete domestic actions to protect the environment. We also recognize that climate change and environmental degradation impact the enjoyment of human rights and affirm that when taking action to address environmental challenges and climate change, States should respect their respective human rights obligations. Nevertheless, the United States has consistently reiterated that there are no universally recognized human rights specifically related to the environment, and we do not believe there is a basis in international law to recognize a 'right to a clean, healthy, and sustainable environment', either as an independent right or a right derived from existing rights. Furthermore, we do not consider the resolution introduced in this session recognizing a right to clean, healthy and sustainable

environment to be an appropriate means of attempting to elaborate a new and undefined right, and we do not see this resolution as altering the content of international law or establishing a precedent in other fora.³⁹

This American position corresponds to that of Russia and China, which is somehow striking, because these three superpowers do not often find themselves in the same camp when it comes to human rights issues.⁴⁰

In this respect, we might think of the recent Russian aggression in and against Ukraine, which is already causing major damage to the environment, and thus the human right to a healthy environment is of relevance here. An *Open Letter on the Environmental Dimensions of the Russian Invasion of Ukraine*, prepared by the Environmental Peacebuilding Association, made the relevance of the human right to a healthy environment in the context of the conflict in Ukraine very clear.⁴¹ The letter, signed by more than 900 international law, environment, and peacebuilding experts and more than 155 organizations from more than 75 countries, warned that the invasion of Ukraine poses profound risks not only to the sovereignty and human rights of the Ukrainian people but also to the environment of Ukraine and the wider European region. It further stated:

As citizens and professionals who have dedicated our lives and our careers working to build peace around the world, we are deeply aware of the profound linkages between conflict and the environment, the vital importance of a healthy environment to post-conflict peace and stability, and accordingly, the fundamental importance of addressing the environmental dimensions of war.

The letter also called on all 'relevant authorities – including the International Criminal Court, the Office of the High Commissioner for Human Rights, and the UN Environment Programme – to monitor and investigate potential violations of international law protecting human rights and the environment

39 UN Human Rights Council – 48th Session End-of-Session General Statement of the United States of America, posted 13 October 2021 on the website of the US Mission to International Organizations in Geneva <<https://geneva.usmission.gov/2021/10/13/un-human-rights-council-48th-end-of-session-general-statement/>>.

40 In universities and elsewhere in the United States, there is support for the right. See eg New York City Bar Association, *Support for The Formal Recognition by The United Nations of The Human Right to A Healthy Environment*, September 2020.

41 'Open Letter on the Environmental Dimensions of the Russian Invasion of Ukraine' <<https://www.environmentalpeacebuilding.org/library/show/LibraryItem-6528>>.

during armed conflict'.⁴² This includes breaches of the human right to a clean, healthy, and sustainable environment. Like all human rights, this right is applicable both in times of peace and in times of armed conflict.⁴³

6 What Next?

Much is still unclear about the human right to a clean, healthy, and sustainable environment. Illustrative of this general lack of clarity is that it was decided, at the very last minute, to delete the word 'safe' from the resolution. During the informal negotiations, concerns were raised that the French translation of 'safe' ('*sûr*') was too vague, and that this word could form the legal basis of unexpected obligations for States. The sponsors therefore decided to quickly remove this word from the resolution.

But does such a hasty and last-minute deletion of a controversial adjective solve the problem, or is there something more fundamental going on? It is no trivial matter that we should now speak of a human right to a clean, healthy, and sustainable environment, and not of a human right to a safe, decent, non-polluted, favourable, suitable, adequate, decent, wholesome, etc ... environment.⁴⁴ This choice of adjectives is not a trifle, of course. It is an essential issue. International law, and law in general, is all about the words used.

And that is not the only still outstanding problem. No one will deny that a healthy environment is important, and that it deserves a particularly high legitimacy status from an emotional and moral point of view. But that is not necessarily a reason to label it as a human right. After all, a new human right can only have an impact on reality if it is defined in such a way that it can be

⁴² *ibid.*

⁴³ The Open Letter is not the only statement reminding the world of the urgent need for environmental protection in times of war. A similar point was made in a joint statement on Ukraine issued by global civil society organizations at a recent gathering of the United Nations Environment Assembly (UNEA). *Joint Statement by Global Civil Society Organizations to UNEA 5.2 on Ukraine*, 2 March 2022 <<https://eeb.org/library/joint-statement-by-global-civil-society-organizations-to-unea-5-2-on-ukraine/>>. Similarly, the Executive Vice-President of the European Commission of the European Union, Frans Timmermans, made the point that, in times of armed conflict, promoting a healthy environment is essential and needs to be pursued; see Frans Timmermans, *Remarks on the War in Ukraine and the Impact on EU Climate and Energy Policy*, made at a meeting of the Committee on Environment, Public Health, and Food Safety (ENVI), Strasbourg, 7 March 2022, SPEECH/22/1616.

⁴⁴ See eg Nabanita SARMA, 'Right to Wholesome Environment under International Environmental Law' (2020) 18 *Supremo Amicus* 1–5.

invoked by an individual person in specific and concrete situations directly affecting their daily life.⁴⁵ Without such a strict and concretely applicable definition, the right to a healthy environment risks remaining a practically irrelevant addition to the category of third-generation human rights.⁴⁶ Of course, this does not mean that the right must be freed from all ambiguities before it can be meaningfully applied in practice. Just like all other human rights, the right to a healthy environment, once adopted, will crystallize further through adjudication and other dispute resolution processes. The same happened to the rights to equality, free expression, and so on, whose formulation is just as vague and ambiguous.

There is yet another reason to give importance to the specific choice of adjectives. Words like 'safe', 'suitable', and 'adequate' suggest that the environment exists for us human beings. We humans have an interest in protecting our environment because of the goods and services it provides. As long as the environment is in good enough shape to do so, some might consider it 'suitable', 'adequate', 'safe', etc. On the other hand, other qualifications, such as 'clean', 'healthy' and 'non-polluted', allow for a less anthropocentric approach. After all, even if there were no people at all in this world, the environment could still be 'clean', 'healthy' and 'non-polluted'. Would it not be better, then, to talk about a right that belongs to nature itself?⁴⁷ Or must we regard a healthy environment as a common concern of humankind rather than exclusively as a right pertaining to individuals?⁴⁸

The adjective 'sustainable' raises particular questions. How can a currently living individual be entitled to a sustainable environment, and what does that

45 See eg Bridget LEWIS, 'Quality Control for New Rights in International Human Rights Law: A Case Study of the Right to a Good Environment' (2015) 33 *Australian Yearbook of International Law* 55–80; John KNOX, 'Constructing the Human Right to a Healthy Environment' (2020) 16 *Annual Review of Law and Social Science* 79–95.

46 Amirouche DEBICHE, 'The Third Generation of Human Rights: The Right to A Healthy Environment' (2021) 4(3) *Economics and Sustainable Development Review* 413–428.

47 See eg Martin WAGNER, 'Human Rights, Rights of the Earth, and Global Change', in Bill FREEDMAN (ed) *Global Environmental Change*, Springer, 2014, 911–924; Shelly HILLER MARGUERAT, *Private Property Rights and the Environment*, Palgrave Macmillan 2019, 153–209 (chapter on 'The International Human Right to a Healthy Environment, Human Right Obligations for Nature and Possible Difficulties of Implementations'); Günther HANDL, 'The Human Right to a Clean Environment and Rights of Nature: Between Advocacy and Reality', in Andreas VON ARNAULD, Kerstin VON DER DECKEN and Mart SUSI (eds) *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric*, Cambridge University Press, 2020, 137–153.

48 Cf Laura HORN, 'The Implications of the Concept of Common Concern of a Humankind on a Human Right to a Healthy Environment' (2004) 1(2) *Macquarie Journal of International and Comparative Environmental Law* 233–268.

mean? The relationship between human rights and the concept of sustainable development – defined as development that meets the needs of the present without compromising the ability of future generations to meet their own needs – is a relationship that has preoccupied academics for many years, but again, no clear consensus in academia exists on how to best understand this relationship. Instead of recognizing a human right to a sustainable environment pertaining to currently living individuals (the present generation), we might also recognize a right to a healthy environment for future generations.⁴⁹ In any case, simply giving individuals an individual human right to a sustainable environment does not solve or settle these issues.⁵⁰

Philosophers and human rights scholars have for decades debated these issues, without reaching any global consensus, compromise, or agreement.⁵¹ It therefore seems pointless to wait for a scientific consensus to emerge before

49 Jochelle Greaves SIEW, 'Facing the Future: The Case for A Right to a Healthy Environment for Future Generations under International Law' (2020) 8(1) *Groningen Journal of International Law* 30–47.

50 See eg SUELI Giorgetta, 'The Right to a Healthy Environment, Human Rights and Sustainable Development' (2002) 2 *International Environmental Agreements: Politics, Law and Economics* 171–192; Gloria Aurora DE LAS FUENTES LACAVEX, 'Environmental Responsibility Regulations: Guarantee the Human Right to a Healthy Environment' (2013) 10(5) *US-China Law Review* 435–446; Marc LIMON, 'The Politics of Human Rights, the Environment, and Climate Change at the Human Rights Council: Toward a Universal Right to a Healthy Environment?', in John KNOX and Ramin PEJAN (eds) *The Human Right to a Healthy Environment*, Cambridge University Press, 2018, 189–214; Chetna MALVIYA and Ricardo Libel WALDMAN, 'Sustainability and Environmental Human Rights', in James MAY and Erin DALY (eds) *Human Rights and the Environment: Legality, Indivisibility, Dignity and Geography*, Elgar Encyclopaedia of Environmental Law Series, Volume VII, Edward Elgar, 2019, 254–265; see also Evelyn Li WANG's review of this book (2021) 10(2) *Transnational Environmental Law* 386–389; Marcos ORELLANA, 'Human Rights and International Environmental Law' in Erika TECHERA, Jade LINDLEY, Karen SCOTT, and Anastasia TELESITSKY (eds) *Routledge Handbook of International Environmental Law* (2nd ed), Routledge, 2021, 341–358.

51 See eg John LEE, 'The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law' (2000) 25(2) *Columbia Journal of Environmental Law* 283–346; Linda Hajjar LEIB, *Human Rights and the Environment: Philosophical, Theoretical and Legal Perspectives*, Queen Mary Studies in International Law, Volume 3, Brill, 2011, 71–108 (chapter on the 'Theorisation of the Various Human Rights Approaches to Environmental Issues'); César RODRÍGUEZ-GARAVITO, 'A Human Right to a Healthy Environment?: Moral, Legal, and Empirical Considerations', in John KNOX and Ramin PEJAN (eds) *The Human Right to a Healthy Environment*, Cambridge University Press, 2018, 155–168; James MAY, 'Making Sense of Environmental Human Rights and Global Environmental Constitutionalism', in Erika TECHERA, Jade LINDLEY, Karen SCOTT and Anastasia TELESITSKY (eds) *Routledge Handbook of International Environmental Law* (2nd ed), Routledge, 2021, 73–86.

proceeding with legal recognition of the human right to a clean, healthy, and sustainable environment. That is like waiting for St. Juttemis.⁵²

The HRC's resolution recognizing the right to a clean, healthy, and sustainable environment may give rise to cautious optimism. This recognition could potentially enable a further wave of human rights-based climate litigation around the world, such as the world-renowned *Urgenda*⁵³ and *Shell*⁵⁴ cases. It could enable national judges to continue to play an active role in shaping the contours of international and national obligations to protect our environment, which is essential at a time of dangerous climate change.⁵⁵

The resolution may give advocates, conservationists, campaigners, activists, and anyone else who cares about the environment a powerful hook to hang their work on.⁵⁶ They can use the resolution to hold governments and businesses accountable for endangering the health of our planet. In addition, this international recognition of a human right to a clean, healthy, and sustainable environment can stimulate the drafting of legislation at regional, national, and local level. In short, there are ways to make this historic recognition of the human right to a healthy environment actually matter.⁵⁷

We should not exaggerate our enthusiasm. The United Nations General Assembly is currently considering the adoption of a resolution on the human

52 If a Dutch person tells you that you will have to wait for St. Juttemis, it means that you will need to wait forever. Because, unlike other saints who have their own day of the year for commemoration, this saint does not exist, and thus he/she does not have such a day in the year. Hence the notion that you will have to wait forever; or, as, the Chinese might say, you will have to wait until the sun rises in the West (太陽從西邊升起).

53 *State of the Netherlands (Ministry of Infrastructure and the Environment) v Urgenda Foundation*, Netherlands Supreme Court, Judgment of 20 December 2019 <<http://deep link.rechtspraak.nl/uitspraak?id=eclim:hr:2019:2007>>. See eg Otto SPIJKERS, 'The Case Between Urgenda and the State of the Netherlands' (2020) 8(1) *Hungarian Yearbook of International Law and European Law* 192–206.

54 *Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell*, District Court The Hague, Judgment of 26 May 2021 <<http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2021:5339>>. See eg Otto SPIJKERS, 'Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell (Note on Recent Developments)' (2021) 5 *Chinese Journal of Environmental Law* 237–256.

55 See also eg Marc ZEMEL, 'The Rise of Rights-Based Climate Litigation and Germany's Susceptibility to Suit' (2018) 29(3) *Fordham Environmental Law Review* 484–527; Timothy ARVAN, 'The Right to a Healthy Environment is a Powerful Sword for Climate Justice' (2021) *Health and Human Rights Journal*.

56 Djoyimi BAKER, 'The Face of The Environment: Environmental Human Rights on Screen' (2021) *Studies in Documentary Film* <<https://www.tandfonline.com/doi/abs/10.1080/17503280.2021.1940433>>.

57 Kent BUSE and Sofia GRUSKIN, 'The Right to A Healthy Environment: Making It Matter (Opinion)' (2021) *The BMJ* 375, N3076.

right to a clean, healthy, and sustainable environment. Every recognized State in the world is represented in the General Assembly. It will therefore be interesting to see what happens when a resolution, like the one recently passed by the Human Rights Council, is put to the vote there. How many States will then be convinced by the Russian, Chinese and American objections, and abstain, or even vote against it?

It is important to note that there are alternative ways forward, such as inclusion, in a new Global Pact for the Environment, of a (human) right to live in an ecologically sound environment adequate for the individual's health, well-being, dignity, culture and fulfilment (see also the editorial of this issue of the CJEL).⁵⁸ Or perhaps we might witness the emergence of a new international covenant on the rights of human beings relating to the environment.⁵⁹ There is no doubt that this will be a continuing journey.

The first signs are not that encouraging. Most notably, in the political declaration of the special session of the United Nations Environment Assembly to commemorate the fiftieth anniversary of the establishment of the United Nations Environment Programme, which took place in March 2022 in Nairobi, there is only a reference to a clean, healthy, and sustainable environment in the preamble, as follows:

Recognizing that a clean, healthy, and sustainable environment is important for the enjoyment of human rights, taking note of Human Rights Council resolution 48/13 entitled 'The human right to a clean, healthy and sustainable environment', and noting that the General Assembly has been invited to consider the matter.⁶⁰

Interestingly, this paragraph does not refer to a *human right* to a clean, healthy, and sustainable environment at all. Because of protests from the United States and Russia, an operative paragraph recognizing the human right to a healthy environment was downgraded to the preambular paragraph cited just

58 Article 1, Draft Global Pact for The Environment, at <<https://www.iucn.org/commissions/world-commission-environmental-law/resources/important-documentation/global-pact-environment>>.

59 Michel PRIEUR, Mohamed Ali MEKOUAR, and Erin DALY, 'An International Covenant on the Right of Human Beings to the Environment', in James MAY and Erin DALY (eds) *Human Rights and the Environment: Legality, Indivisibility, Dignity and Geography*, Elgar Encyclopedia of Environmental Law Series, Volume VII, Edward Elgar, 2019, 49–67.

60 United Nations Environment Assembly of the United Nations Environment Programme, *Political Declaration of the Special Session of the United Nations Environment Assembly to Commemorate the Fiftieth Anniversary of the Establishment of the United Nations Environment Programme*, 3 March 2022.

above.⁶¹ This meant that the final text no longer refers to a right to a healthy environment, but it merely recognizes that a clean, healthy, and sustainable environment is important for the enjoyment of human rights.

At the same time, in the most recent report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment, consistent reference is made to the right to a clean, healthy, and sustainable environment.⁶² The report referred to the HRC resolution as ‘a turning point in the evolution of human rights’, because the Human Rights Council had adopted ‘an historic resolution recognizing, for the first time at the global level, the human right to a clean, healthy and sustainable environment’.⁶³

The discussion is thus far from over.

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- 61 See eg United States of America, Opening Remarks, 17–19 November 2021, UNGA 73/333.
 - 62 *The Right to a Clean, Healthy and Sustainable Environment: Non-Toxic Environment*, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment, distributed 12 January 2022, UNDoc. A/HRC/49/53.
 - 63 *ibid*, para 1. See also *ibid*, paras 47–49, 54, 62, 64, 77, and 89(i).