The Status of the Right to a Clean, Healthy and Sustainable Environment Under Customary International Law

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Is the right to a clean, healthy, and sustainable environment already part of customary international law? While some argue it enjoys near-universal recognition, others insist it does not exist at all. This post dives into the ongoing debate, shedding light on the right's status under customary international law, which needs to be distinguished from its status under treaty law, such as under the European Convention on Human Rights, or its status under regional (European Union) law, or under domestic law. These areas of law are explored in other contributions to this blog symposium.

Customary international law requires a consistent state practice coupled with *opinio juris* (a sense of legal obligation). Resolutions adopted by organs of international organizations, including the Human Rights Council (HRC) and the United Nations General Assembly (UNGA), can, in certain circumstances, provide evidence important for establishing the emergence of an *opinio juris*. As the International Court of Justice (ICJ) noted in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, we need to look at the resolution's content and the conditions of its adoption. In the past, such resolutions have provided fertile ground for emerging customary international law. Think of the Universal Declaration of Human Rights, or the Rio Declaration on Environment and Development, adopted at the 1992 United Nations Conference on Environment and Development. The question is whether the HRC's and UNGA's resolutions on the right to a clean, healthy, and sustainable environment, to be discussed below, have the same effect.

Human Rights Council

On 8 October 2021, the Human Rights Council recognized "the right to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights". This somewhat ambiguous phrase leaves it unclear whether a clean, healthy, and sustainable environment is (1) important for the enjoyment of already existing human rights, or (2) constitutes a new autonomous human right, or perhaps both. The resolution recognising this right passed with 43 votes in favour and four abstentions, with no HRC member state voting against it.

To see if the HRC resolution helped to establish the emergence of an *opinio juris*, we need to look not only at the resolution's content but also at the conditions of its adoption and the reaction to the resolution more generally. Illustrative is the reaction of the United States (US). Not a member of the HRC at the time, the US issued a statement on 13 October 2021, saying:

> *"Recognize[d] 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 environ-*

ment,' either as an independent right or a right derived from existing rights."

UN General Assembly

On 28 July 2022, the UN General Assembly recognized 'the right to a clean, healthy and sustainable environment as a human right'. This straightforward formulation was an improvement, as it eliminated the ambiguity present in the HRC resolution.

The resolution passed with 161 states in favour, none opposed, and eight abstentions. To better understand what these votes mean, the explanations of votes by many countries are very instructive. For some states voting in favour, the right to a healthy environment was not yet part of human rights law, until it was proclaimed in a treaty. The United Kingdom, New Zealand, Norway, India and others therefore saw the UNGA resolution as a political statement only, and did not believe the resolution itself was capable of creating new human rights and corresponding duties for States (see here for explanations of vote).

The US is again a good illustration. It voted in favour and expressed support for the resolution. However, the US also reiterated that

> *"A right to a clean, healthy, and sustainable environment has not yet been established as a matter of customary international law; treaty law does not yet provide for such a right; and there is no legal relationship between such a right and existing international law. And, in voting 'YES' on this resolution the United States does not recognize any change in the current state of conventional or customary international law."*

Is there a right to a clean, healthy and sustainable environment under customary international law?

If the HRC and UNGA resolutions have helped to establish a new right under customary international law, then the focus should now shift from its recognition to its implementation. This is indeed what some institutions have done. Monitoring and encouraging the implementation of this right is one of the key responsibilities of the UN Special Rapporteur on The Human Right to A Clean, Healthy and Sustainable Environment. Established by the HRC in 2012, this mandate initially concentrated on gaining recognition for the right. The first two mandate holders, John Knox and David Boyd, prioritized this goal. However, following the 2022 UNGA resolution, the mandate transitioned to implementation. The current Special Rapporteur, Astrid Puentes Riaño, has emphasized this shift. While her latest report briefly reiterates the universal recognition of the right, it primarily addresses implementation issues.

However, not everyone agrees that the HRC and UNGA resolutions have firmly established a new autonomous right under customary international law. On 2 December 2024, oral hearings began at the Peace Palace in The Hague on the International Court of Justice's advisory opinion regarding state obligations in respect of climate change. In its resolution requesting this advisory opinion, the UNGA referenced its earlier resolution on the human right to a clean, healthy, and sustainable environment, suggesting its legal significance in the crystallization of customary law.

Several states also referenced the right in their pleadings before the ICJ, but mainly to challenge its status. Professor Andreas Zimmermann, Director of the Potsdam Centre of Human Rights, representing Germany, stated:

> *"Let me start by stating the obvious, namely that an individual self-standing right to a clean, healthy and sustainable environment does not yet form part and parcel of current customary international law. The right to a healthy environment has been recognized politically by a General Assembly resolution in 2022, and I note in passing that Germany was an active supporter of this very resolution. The said 2022 General Assembly resolution on the right to a clean, healthy and sustainable environment recognizes that this right 'is related to other rights and existing international law'. Put otherwise, such right was perceived in this legally non-binding instrument as constituting a specific manifestation of other previously established human rights. The right was understood as*

> *deriving from, and inherent in, already existing international human rights obligations. What is more [...] the resolution recognizes [...] the need to interpret environment-related human rights obligations in line with general international environmental law. It affirmed, as you see, 'that the promotion of the human right to a clean, healthy and sustainable environment requires the full implementation of the multilateral environmental agreements'" (see oral pleadings, p. 152).*

Essentially, Zimmermann suggested that the 2022 UNGA resolution encourages us to embrace an environmental perspective on existing human rights rather than introducing a new autonomous human right under customary international law.

Conclusion

To conclude, no one denies that a clean, healthy and sustainable environment is a favourable and even necessary condition for the full enjoyment of human rights. However, differences remain regarding whether the right to a clean, healthy, and sustainable environment has been universally recognized as a new autonomous human right under customary international law or whether it merely calls for a 'green' interpretation of already existing human rights.

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