

United Nations General Assembly recognises the human right to a healthy environment

The United Nations General Assembly (the **UNGA**) has issued a resolution recognising the human right to a healthy environment. Whilst the General Assembly lacks the ability to make international law, it is capable of contributing to the creation of law and of declaring what is already existing law by way of its resolutions. Here we look at the General Assembly's resolution and States' reaction to it, with a view to considering what the future might hold for the human right to a healthy environment.

The resolution on the right to a healthy environment

On 28 July 2022, following similar recognition by the Human Rights Council in October 2021, the General Assembly adopted a resolution recognising the right to a clean, healthy and sustainable environment (or more simply for the purposes of this note, **the right to a healthy environment**) as a human right.

The General Assembly also (i) noted that the right to a healthy environment is related to other rights and existing international law, (ii) affirmed that the promotion of the right to a healthy environment requires the full implementation of the multilateral environmental agreements under the principles of international environmental law, and (iii) called upon "States, international organizations, business enterprises and other relevant stakeholders to adopt policies, to enhance international cooperation, strengthen capacity-building and continue to share good practices in order to scale up efforts to ensure a clean, healthy and sustainable environment for all".

Member States voted overwhelmingly in favour of the resolution, with 161 for, 0 against and 8 abstaining (Belarus, Cambodia, China, Ethiopia, Kyrgyzstan, Iran, Russia and Syria). Most States (over 155) already recognise in some form the right to a healthy environment (albeit not necessarily as a human right, nor necessarily (nor likely) fully implementing it). Yet the General Assembly's resolution, together with the Human Rights Council's, marks the first time the human right has been formally recognised at a global level.

Recognition not without concern

Prima facie, the resolution represents a milestone in the modern environmental

movement. It has been hailed as a catalyst for more ambitious climate action and as having the potential to be a "turning point for humanity", according to UN Special Rapporteur on Human Rights and the Environment, David Boyd. Yet to help gauge the impact of the resolution, it is necessary to consider concerns raised by Member States ahead of the vote (shared by both those who abstained, as well as a number who voted in favour of the resolution).

First, there was concern about the (undisputed) non-legally binding nature of the recognition. For some States, this was a matter of lament, while others sought to emphasise it by caveating their vote in favour of recognition as without prejudice to their legal position on the right. The United Kingdom and United States stated their positions that the right to a healthy environment has not yet been established as a matter of customary international law and that, until it was, or until a treaty was adopted, the right had no legal significance under existing international law.

Second, there was lingering concern about the uncertain scope of the right to a healthy environment. Previous UN publications refer to the right as including the rights to clean air, safe and sufficient water, healthy and sustainably-produced food, healthy ecosystems and biodiversity, a safe climate and toxic-free environments. The right is also said to entail procedural elements, such as access to information, participation in decision-making and access to justice with effective remedies, a guarantee to non-discrimination, and the protection of environmental human rights defenders. However, the right remains undefined in the resolution itself and the terms "clean", "healthy" and "unsustainable" are said to not carry a common,

internationally agreed meaning – thereby opening the right to ambiguity and the possibility of being "extremely broad" (although some might not class this as a bad thing).

Third, some States raised concerns about the resolution's lack of reference to the concept of common but differentiated responsibilities (*i.e.* the concept that whilst all States are responsible for environmental issues, this is not equal – States' contributions to and abilities to address the issues must be taken into account).

Finally, some States raised concerns about the third operative paragraph of the resolution, which refers to agreements and principles of international environmental law. The United States suggested that this paragraph inappropriately conflated the contents of other agreements with human rights law. This feeds into an ongoing debate about the appropriateness of courts and tribunals using treaties and principles from one regime of international law as interpretive devices with respect to treaties in another regime of international law (see the piece on the Torres Strait Islanders case elsewhere in this Selection of Commentary).

The above signals that, whilst most States recognise the importance of safeguarding the environment, further work is needed to resolve the content of the right to a healthy environment if it is to develop into a rule of international law. As the customary route appears foreclosed for now (including by the statements of the UK and US mentioned above), proponents of the right may need to take the treaty route to codify the right into international law (whether by way of a new treaty or amendments to an existing one).

Businesses to "ensure" right to a healthy environment?

An interesting aspect of the General Assembly's resolution is its call upon "business enterprises" in addition to States, international organizations and other relevant stakeholders, to "scale up efforts to ensure a clean, healthy and sustainable environment for all".

First, whilst not entirely without precedent, General Assembly resolutions rarely address business enterprises directly.¹ They typically address only States and international organisations (in fact, the UN Charter speaks only of the General Assembly making recommendations to the Members of the United Nations or to the Security Council). The General Assembly resolution on the right to a healthy environment also departs from the Human Rights Council resolution, which focused only on States.

Second, businesses are usually called upon to "respect" the human rights of people with whom they are involved, not to "ensure" the enjoyment of human rights by people with whom they may not be involved. The Guiding Principles on Business and Human Rights (the **UNGPs**) provide that States must "protect" human rights, while businesses should "respect" them.² The former entails significant positive action, including taking steps to ensure the fulfilment of rights and protecting against human rights abuse by third parties. The latter is more akin to the notion of "do no harm" (although it nonetheless requires businesses to undertake certain positive

¹ For example, the General Assembly has previously "call[ed] upon non-State actors, including business enterprises, both transnational and others, to comply with their responsibility to respect human rights, including the human rights to safe drinking water and sanitation". In addition, when the General Assembly adopted Agenda 2030 on Sustainable Development, it "call[ed] upon all businesses to apply their creativity and innovation to solving sustainable development challenges" (albeit here the General Assembly was in essence adopting an outcome document of a UN summit).

² Some reports by the UN Special Rapporteur on Human Rights and the Environment refer to "businesses [needing to] work to influence other actors to respect human rights where relationships of leverage exist ... businesses should support, rather than oppose, public policies intended to effectively address climate change." Arguably these statements go beyond what is required by the UNGPs, but they present a far subtler extension than the General Assembly's resolution on the right to a healthy environment.

steps to prevent or mitigate adverse human rights impacts with which they are involved).

There is good reason for this demarcation of responsibilities: beyond the fact that a private business has less leverage (at least in a formal sense) than a State, a business, as an economic actor, fulfils different functions to that of a public interest institution. Moreover, conflating

business and State responsibilities would make it difficult to tell who is responsible for what in practice.

The General Assembly's use of the word "ensure" in paragraph three of the resolution therefore is puzzling. It also differs from the Council resolution as well as the Preamble of the UNGA resolution, both of which refer to the responsibility of businesses to "respect" human rights.

Comment

The recognition of a stand-alone right to a healthy environment at the international level sends a number of clear signals, while leaving other issues for further development. It will not be justiciable at the international level yet, as either a treaty or the emergence of a customary law norm would be needed for that. That is not to say the UN's recognition of the right is without meaning.

First, it serves as a recommendation to States and their judiciaries that they treat the right as a standalone right, as opposed to only a composite or derivative of other human rights. This would inure to the benefit of victims of environmental abuse, who previously have had to rely on existing rights (for example, rights to privacy or to health), but have sometimes struggled to demonstrate a link between the environmental harm and an established right in time to bring a claim that could result in an effective remedy. With a standalone right victims would be able to request local authorities or the courts to intervene to bring a claim for a violation of their rights before a particular issue (for example, their homes have been destroyed or they have contracted cancer) has become irreversible.

Second, it might encourage legislatures to take measures, including passing legislation, establishing institutions, and devising policies and systems,

to protect the right, including from harm by private actors. The 2010 UNGA resolution recognising the human rights to safe and clean drinking water and sanitation has done that.

Third, the General Assembly's recognition may strengthen the application of other rights by courts and tribunals around the world. Alleged violations of the rights to life, culture and home increasingly found environmental disputes (see, for example, our Commentary on the Torres Strait Islanders' Case). Already, the European Court of Human Rights has highlighted the need to take into account the General Assembly's resolution in the context of a case on air pollution and its effects on the applicant's right to respect for their private life (*Case of Pavlov and Others v. Russia*). Interpretation of the right to a healthy environment and these other related rights may help them all achieve further coherence and refinement.

Finally, whilst the language in calling for businesses to "ensure" the standalone right to a healthy environment may have been accidental, a close eye will need to be kept out for possible shifts in policy towards businesses' human rights responsibilities – particularly in the context of the triple planetary crisis of climate change, pollution and biodiversity loss, with respect to which it is said that everyone has a role to play.

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