

VIEWPOINT

The Right to a Healthy Environment is a Powerful Sword for Climate Justice

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The recent COP26 climate summit in Glasgow took place amid intensifying scrutiny on global leaders for collective failures of ambition and resolve in mobilizing climate action. A pre-COP synthesis report by the United Nations Framework Convention on Climate Change (UNFCCC)

Secretariat on the status of states' nationally determined contributions (NDCs) under the Paris Agreement found that global emissions are on pace to increase 16% by 2030, a trajectory UN Secretary General António Guterres described as “catastrophic.” However, while there remains incongruity between the urgency of the crisis and the incremental progress reflected in the negotiated Glasgow Climate Pact, calls to dismiss international processes on climate “bitterly disappointing” are premature.² Despite the daunting path ahead, recent landmark UN Human Rights Council (HRC) resolutions recognizing the right to a safe, clean, healthy, and sustainable environment and appointing a Special Rapporteur on Human Rights and Climate Change give reason for cautious optimism at this juncture.³ As illustrated throughout the *Health and Human Rights Journal* special section on the climate crisis, rights-based frameworks are among the most effective and promising “swords” for climate litigation, policy-making, and advocacy.⁴ Building on the energy of COP26, we must now fully leverage these tools in pursuit of climate justice at all levels.

Climate change and human rights: The state of play

Even as countries begin to envision post-pandemic economic policies better aligned with the Sustainable Development Goals, climate impacts are rapidly cascading, affecting all aspects of human health and prosperity.⁵ The distribution of such impacts is inherently unjust, with disproportionate loss and damage accruing to low carbon-emitting low- and middle-income countries lacking the capacity and finance to adapt. As devastating projections materialize in the form of extreme weather events, sea level rise, biodiversity loss, and vector-borne disease, the human rights of climate-vulnerable populations and future generations are placed under extraordinary strain.

Alarmingly, if all 191 parties to the Paris Agreement meet their latest NDCs, warming would still reach 2.4°C above pre-industrial levels by 2100, far exceeding the aspirational goal of 1.5°C necessary to guard against the severest of harms, including existential crises for island nations.⁶ Particular responsibility lies with powerful G20 countries, who have been slow to respond to the Intergovernmental Panel on Climate Change calls for “rapid and far-reaching transitions in energy, land, urban infrastructure [...] and industrial systems.”⁷ Recognizing critical gaps in ambition and action, parties committed in Glasgow to accelerating the timeline to 2022 for the submission of new, more ambitious emissions targets, nar-

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rowly keeping open a pathway to 1.5°C. Yet major emitters are already acting with questionable sincerity. China and India, for instance, led efforts to weaken the Glasgow Pact's call for a "phase-out of unabated coal" to merely a "phase-down" while just days following the conclusion of COP26, Australia declared it has no intention of updating its targets by next year.⁸

While the Paris Agreement has brought key actors to the table through its facilitation process, deeper accountability mechanisms interlinked across legal regimes are clearly needed to fully implement the agreement. To this end, rights-based approaches are an invaluable tool capable of converting states' nebulous pledges into tangible outcomes, as leaders must ensure efforts toward mitigation, adaptation, resilience, finance, and capacity building are consistent with human rights principles and obligations.

Twin resolutions could strengthen human rights protections

On October 8th, the HRC passed (unanimously, with four abstentions) Resolution 48/13 recognizing the right to a healthy environment, and calling on all states to build capacities, share good practices, and adopt policy to support this right.⁹ In the same session, the HRC passed (with four abstentions and one objection from Russia) Resolution 48/14 appointing a Special Rapporteur for the "promotion and protection of human rights in the context of climate change."¹⁰ Both resolutions can be seen as the culmination of a decades-long effort to formalize environmental rights at the international level and establish cooperation at the interface of human rights and climate change. Indeed, momentum to declare a new universal right to a healthy environment has been building since the 1972 Stockholm Declaration, while a series of 18 increasingly vehement HRC resolutions on climate change precede the creation of the new Special Rapporteur mandate.¹¹

Although the new HRC resolutions are not legally binding and are merely "soft law" expressions of the will of the international community, they are

intended to instill new norms and principles, which are then shaped by civil society and implemented by states in their domestic policy context. Because of their non-binding nature, however, the extent to which resolutions elicit meaningful change can be questioned on several grounds. For instance, given the complex networks of public and private sector actors involved in the implementation of human rights protections, it may be difficult to determine appropriate indicators for the measurement of progress, especially in states lacking institutional capacity.¹² Further, some resolutions may be adopted only when voting members consider themselves already in compliance with desired practices, such that the HRC process merely reflects the status quo without driving additional change. Finally, certain autocratic states may be resistant to external pressures from the HRC, and continue to act in defiance of resolutions.¹³

Despite these concerns, there is ample reason to be confident in the sweeping potential of Resolutions 48/13 and 48/14. This begins with the impressive record of the HRC's previous sister Resolution 18/1, which in 2010 recognized the human right to clean water and sanitation.¹⁴ Indeed, over the past decade Resolution 18/1 has established a global agenda for water rights, mobilizing states in a virtuous cycle of action that has produced significant improvements in water quality, access, and affordability for underserved populations around the world. For instance, in the wake of the resolution, Costa Rica, Mexico, Slovenia, and Tunisia amended their national constitutions to guarantee rights to water and have since extended clean drinking water to thousands of urban and rural communities, making strides toward attainment of the Sustainable Development Goal on water. This track record of success inspires confidence in the HRC resolution process to concretize environmental rights, then marshal domestic rights protections through legislative channels.

Additionally, new recognition of the right to a healthy environment opens opportunities to hold states to account through litigation, particularly where independent judicial systems are free to shape policy. Indeed, this right is already afforded

constitutional protection in 110 states, where domestic actors have leveraged the courts to demand adequate consideration of climate change risks and impacts in policy, planning, and business practices.¹⁵ For instance, in 2018 Colombia's Supreme Court of Justice sided with youth activists who sought to enforce their right to a healthy environment, in conjunction with related fundamental rights, in response to deforestation of the Amazon rainforest, ordering the government to implement measures to counteract harms to nature and address climate impacts.¹⁶ In 2020, the same court found Isla de Salamanca National Park to be a subject of rights, clarifying that the right to a healthy environment compels the government to adopt measures that conserve the park's unique biodiversity and respect its ecological, health, and cultural value.¹⁷ Now, HRC recognition of right to a healthy environment will surely facilitate a surge in rights-based climate litigation around the world. This is especially important as a mechanism to reinforce notoriously weak enforcement of international environmental law. As emphasized by current UN Special Rapporteur for Human Rights and the Environment Professor David Boyd in remarks delivered at the Climate Law and Governance Day symposium in Glasgow, Resolutions 48/13 and 48/14 will enable human rights courts to continue playing an active role in shaping the contours of international and domestic obligations on climate change.

Finally, it is noteworthy that emerging rights-based approaches serve to endorse and empower civil society advocacy, giving voice to youth and vulnerable groups in climate policy decisions that affect them. It is therefore significant that the HRC's recognition of the right to a healthy environment coincides with unprecedented levels of public participation and engagement, especially led by youth, in support of ambitious climate action alongside COP26. Indeed, over 100,000 people marched peacefully in Glasgow with major concurrent protests occurring in over 100 countries globally.¹⁸ Now, as parties look ahead to the first Global Stocktake scheduled for 2023 to assess collective progress toward Paris goals, public pressure is more important than ever in realizing enhanced

ambition, equity, and justice. Further strengthening of human rights protections at all scales is needed to ensure safe and meaningful participation of the broadest possible array of stakeholders in climate advocacy movements.

Need to scale up legal capacity

Ultimately, the legacy of recent developments through the UNFCCC and HRC will rest on whether new climate commitments and environmental rights can be implemented and enforced through domestic institutions. As civil society applies external pressure, new governance capacity is desperately needed to actualize in law and public policy the vision for this "critical decade" outlined in Glasgow.¹⁹ Indeed, a staggering 169 UNFCCC Parties have explicitly recognized the need for legal and institutional reform in the text of their first-round NDCs, evidence of a "capacity chasm" that remains among the principal obstacles in the path forward.²⁰ In response, institutions of all kinds, including universities, NGOs, law firms, bar associations, and research centers, must urgently scale up collaborations and training, equipping students and practitioners with the skills to implement the Paris Agreement in their home jurisdictions. Indeed, it is by bridging this chasm that the right to a healthy environment can be wielded as a powerful legal sword for justice in all countries, just as the HRC has intended.

The first status report of the new Special Rapporteur on Human Rights and Climate Change is expected at the HRC's 50th session in June 2022. In this narrowing window for action, the world can ill afford a report in which the Special Rapporteur condemns further delay, missed opportunities, and lack of ambition. Instead, leaders must harness current social momentum and willing courts to usher in a new wave of rights-based climate action, so the global environment is increasingly safe, clean, healthy, and sustainable for generations to come.

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