

answered through the Rulebook. Moreover, developments following the adoption of the Agreement have also raised new and important issues which are not dealt with in the book, not least the implications of the announced withdrawal by the United States.<sup>7</sup> While the editors' choice of publishing the book in 2017 is understandable considering the unpredictability of progress in the negotiations – as well as undoubtedly publisher pressure – an update in light of these developments would be welcome.

Notwithstanding the small criticisms, *The Paris Agreement on Climate Change* offers an enlightening and comprehensive discussion of every conceivable element of a key milestone in international climate change governance. Although those interested in an introduction to international climate change law are perhaps better served by other recent books,<sup>8</sup> this volume should find its way onto the bookshelves of any scholar or practitioner working on the Paris Agreement and its implementation in practice.

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*The Human Right to a Healthy Environment*, edited by John H. Knox and Ramin Pejan  
Cambridge University Press, 2018, 290 pp, £64.99 hb, £22.99 pb, \$24 e-bk  
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What is the place of the right to a healthy environment in the global human rights protection system? Is this right a mere aspiration – a desire to forge yet another elusive and vague provision within a national constitution or an international treaty, a soft law norm that will never be implemented or enforced? Or is it something that has the potential to resonate within the walls of national and international courts, bend the will of governments, and set out the path for environmental justice? *The Human Right to a Healthy Environment* offers an excellent selection of authoritative and critical contributions from some of the leading experts in environmental and human rights law, which ‘examine many different facets of the right to a healthy environment’ (p. 6) by addressing its recognition, adoption, interpretation and application. The contributions are thematically organized. Following the Introduction, Chapters 2 and 3 examine constitutional environmental rights; Chapters 4 to 6 address the relevant developments in international, regional, and national litigation; Chapters 7 and 8 analyze the role of the right as a norm of international law; Chapters 9 and 10 search for moral and legal

<sup>7</sup> See, e.g., L. Rajamani & J. Brunnée, ‘The Legality of Downgrading Nationally Determined Contributions under the Paris Agreement: Lessons from the US Disengagement’ (2017) 29(3) *Journal of Environmental Law*, pp. 537–51.

<sup>8</sup> Notably Bodansky, Brunnée & Rajamani, n. 2 above; and B. Mayer, *The International Law on Climate Change* (Cambridge University Press, 2018).

justifications for the presence of the right in international law; and Chapters 11 to 14 focus on the aspects of the right with regard to climate change.

In their introduction to the book, editors John Knox and Ramin Pejan provide an overview of the development of the right. This includes their own work for the United Nations (UN), in particular Knox's outstanding contribution to the field as the first UN Special Rapporteur on human rights and the environment.<sup>1</sup> They trace the right back to the 1970s, following the inception of the modern environmental movement and, particularly, the 1972 Stockholm Declaration.<sup>2</sup> Throughout the next several decades, environmental rights built a significant momentum, finding their way into national constitutions, regional human rights agreements, as well as jurisprudence of both national and international courts. While there is still no universally recognized human right to a healthy environment, the book makes a strong argument in favour of such recognition.

The historic development of the right to a healthy environment at the national level is analyzed in detail by David Boyd in Chapter 2. Boyd notes that recognizing this right could yield many benefits, such as the strengthening of domestic environmental laws, improved implementation, enforcement and accountability, as well as the promotion of environmental justice. On the other hand, the chapter dispels concerns that affirming the right to a healthy environment will create an extreme scenario of 'excessive judicial activism' (p. 37) – where courts assume the role of elected politicians – or produce only marginal impacts, and thus somehow degrade the right itself. Boyd posits that marginal outcomes are plausible predominantly in the countries with a failing rule of law as part of pervasive political, legal, economic, and social problems (including poverty, civil wars, and so on). Thus, Boyd asserts, acknowledging the right to a healthy environment could produce many positive results and few downsides.

In Chapter 3, Erin Daly and James May further explore the challenges to the practicality of environmental rights and show that even at a constitutional level 'environmental rights can resist effective enforcement' (p. 54). Furthermore, the enforceability of environmental rights may need to be both immediate (for example, by taking measures to protect citizens from the impact of an extreme weather event) and prolonged (for instance, by developing a climate change mitigation plan); otherwise, the recognition of such rights may be of little practical value. Their chapter serves as

<sup>1</sup> In 2012, the UN Human Rights Council established a mandate on human rights and the environment to study the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, and to promote best practices relating to the use of human rights in environmental policy making. Knox served as the Independent Expert (2012–15) and later as the Special Rapporteur on human rights and the environment (2015–18). In 2018, David Boyd was appointed as the new UN Special Rapporteur on human rights and the environment. See UN Special Rapporteur on Human Rights and the Environment, 'UN Mandate', 2018, available at: <http://www.srenvironment.org/un-mandate>.

<sup>2</sup> Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), UN Doc. A/Conf.48/14/Rev. 1(1973), 16 Jun. 1972, available at: <http://www.unep.org/documents.multilingual/default.asp?documentid=97&articleid=1503>. According to Principle 1 of the Declaration, '[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations'.

a useful reminder that rights must be accompanied by effective enforcement tools to have meaningful impact.

Lilian Chenwi (Chapter 4) further illustrates the essential role of enforcement by examining the right to a healthy environment in the African regional human rights protection system. Paradoxically, while the protection of the environment is ‘an essential part of human rights protection in Africa’ (p. 59), the continent continues to be plagued by numerous environmental problems. Among the major influencing factors is non-compliance by African states with the decisions of the regional human rights protection bodies, although, as Chenwi argues, there are signs of progress. For instance, Chenwi views the accentuation of ‘the duty of states to recognize and protect the right of indigenous groups and vulnerable ethnic communities’ (p. 82), as well as the recognition of the key role of these people in protecting the environment by the African Court of Justice,<sup>3</sup> as useful in the development of environmental rights at the international level. While Chenwi’s chapter offers a hopeful perspective, it has to be acknowledged that indigenous communities form but a small fraction of the world’s population and any potential recognition of their rights would hardly affect countries where such communities are not present.

A different situation is present in the European regional human rights protection system. As observed by Ole Pedersen in Chapter 5, ‘the absence of any reference to the environment’ in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)<sup>4</sup> has not precluded the European Court of Human Rights (ECtHR) from ‘carving out an elaborate and extensive body of case law that all but in name provides for a right to a healthy environment’ (p. 86). There are, however, limits to the Court’s ‘pro-rights’ jurisprudence. Firstly, the Court is less likely to find a breach where a responding state has put in place a developed regulatory system allowing for the participation of those affected. Secondly, although acknowledging it in principle, the Court seems reluctant to give practical effect to the precautionary principle.<sup>5</sup> On the other hand, the Court is willing to make use of external sources, namely international law and European Union (EU) law. Therefore, Pedersen concludes, the recognition of the right to a healthy environment in international law could ‘provide further interpretive background’ or even ‘an impetus to develop the [ECtHR] case law’ (p. 95).

Meanwhile, at the national level, plaintiffs trying to invoke constitutional provisions on environmental protection may also face significant road blocks, most notably justiciability, standing, and separation of powers. Addressing litigation before the United States (US) courts, Dinah Shelton (Chapter 6) illustrates how these obstacles

<sup>3</sup> See the discussion of the *Ogiek* case (African Court on Human and Peoples’ Rights, *African Commission on Human and Peoples’ Rights v. Republic of Kenya*, Appl. No. 006/2012, Judgment, 26 May 2017, pp. 77–83, available at: <http://www.african-court.org/en/index.php/56-pending-cases-details/864-app-no-006-2012-african-commission-on-human-and-peoples-rights-v-republic-of-kenya-details>).

<sup>4</sup> Rome (Italy), 4 Nov. 1950, in force 3 Sept. 1953, available at: <http://www.echr.coe.int/pages/home.aspx?p=basictexts>.

<sup>5</sup> In ECtHR, *Tătar v. Romania*, Appl. No. 67021/01, Judgment, 27 Jan. 2009, the Court stressed the importance of the precautionary principle, which stipulates that in the case of scientific uncertainty, states should not delay the adoption of effective and proportionate measures to prevent the risk of serious and irreversible environmental damage (see paras 109 and 120).

may preclude consideration of environmental concerns. Some of these cases, such as those concerning transboundary environmental harm or those on behalf of future generations, may involve dealing with acts of state, and national courts may thus ‘have good reason to feel that [they] are best left to international tribunals or diplomacy’ (p. 105). However, not all US courts may necessarily follow this line of reasoning.<sup>6</sup>

Since the right to a healthy environment is recognized at both the national and the regional levels, a question may arise as to whether it can be considered part of customary international law. By taking as an example environmental impact assessment (EIA) – ‘the near-universal environmental obligations states impose on themselves through their own municipal law’ (p. 124) – Rebecca Bratspies, in Chapter 7, suggests that the answer is positive. After all, EIA can be instrumental in preventing transboundary environmental pollution, as required by customary international law. Still, the near-universal requirement to conduct EIA ‘does not answer the question of what customary international law *requires* from EIA’ (p. 134). Thus, it seems that framing the status of the right to a healthy environment as a norm of international law can only go this far. Examining whether this right can claim the status of a *jus cogens* norm, Louis Kotzé (Chapter 8) considers such a possibility quite slim. Yet, Kotzé is convinced that the challenges related to the declaration of an environmental *jus cogens* norm are surmountable – for instance, they could possibly be circumvented by developing ‘peremptory norms from existing customary environmental law’ (p. 151). An example of this might be the widely accepted no-harm rule, which imposes an obligation on states to refrain from causing environmental harm to other states. In Kotzé’s view, a potential environmental *jus cogens* norm could thus prohibit states from causing widespread environmental degradation that would disturb the ecological balance upon which people depend.

Although assessing the role of the right to a healthy environment in the light of customary international law and *jus cogens* norms may be daunting, Chapters 9 and 10 explore the moral foundations of the right. As César Rodríguez-Garavito rightly points out, ‘[this] right has an intrinsic ethical significance’ as it ‘protects basic conditions of individual and communal existence that are increasingly under threat due to growing ecological stress’ (p. 157). At the same time, Rodríguez-Garavito considers the adoption of the right at the international level to be fraught with potential challenges, because it could lead to fragmentation of ‘collective demands for justice ... into individual litigation and claims’, resulting in ‘widely differing outcomes in each case’ (p. 165). Anticipating another issue – the potential tensions between the right to a healthy environment and other protected rights (for example, the right to development) – Marcos Orellana stresses that ‘tensions between rights are not unknown in human rights law’ (p. 173). A more important task, in his view, is to identify the normative content of the right. Orellana proposes to look at the work of the Special Rapporteur on human rights and the environment, mapping the existing rights and obligations concerning the

<sup>6</sup> Thus, e.g., in *Juliana v. United States*, the court emphasized that, although they are of major importance to international policy, issues like climate change and energy and environmental regulation do not automatically preclude national courts from deciding on them: *Juliana v. United States*, F.Supp.3d 1224, 1236 (D. Or. 2016).

environment. Meanwhile, the implementation of the right at the national level could help to reveal its future potential. Considering the existing developments, Orellana suggests that the ‘[UN Human Rights] Council could exercise its powers to proclaim the existence of the right to a healthy environment as an umbrella right that brings together the existing rights and obligations in human rights law pertaining to a clean, safe, healthy, and sustainable environment’ (p. 187).

The role of the Human Rights Council is explored in depth by Marc Limon (Chapter 11), who analyzes the history of the relationship between environmental protection and human rights. This relationship has been rather thorny and drenched in political opposition to the idea of introducing environmental rights at the UN level. It was the concern over climate change that ultimately catalyzed action on environmental rights within the UN and got the Human Rights Council involved in environmental protection discourse, leading to the creation of the mandate of a Special Rapporteur on human rights and the environment. The relevance of political action on climate change for the promotion of environmental rights is further demonstrated by Daniel Magraw and Kristina Wienhöfer (Chapter 12), who examine ‘the formulation of the right to an overarching environmental human right’ (p. 215) in the Malé Declaration on the Human Dimension of Climate Change.<sup>7</sup> This was initiated by the Republic of the Maldives, which is particularly vulnerable to climate change impacts, and Magraw and Wienhöfer question whether an overarching environmental human right can help a nation the very existence of which is threatened by the rising sea. The answer to that, as they see it, lies in the comprehensive approach introduced by the Malé formulation, which ‘encompasses all human rights [and] addresses the entire human being, both individually and at the level of human society’ (p. 225).

Ironically, while the discussion of human rights within the context of climate change has been instrumental in developing environmental rights, the main pillar of international climate action – the UN climate change regime – has been traditionally characterized by its avoidance of the rights language. In Chapter 13, Lavanya Rajamani looks at how this language has expanded from ‘minimal’ (p. 238) in the UN Framework Convention on Climate Change (UNFCCC)<sup>8</sup> and its Kyoto Protocol,<sup>9</sup> to an ‘explicit reference’ (p. 245) in the Preamble to the Paris Agreement.<sup>10</sup> At the same time, Rajamani points out the key limitations of the latter: the reference concerns only human rights aspects of response measures; its language is rather vague; and it creates no new human rights obligations for states. Similarly, Sumudu Atapattu

<sup>7</sup> Malé (Maldives), 14 Nov. 2007, available at: [http://www.ciel.org/Publications/Male\\_Declaration\\_Nov07.pdf](http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf).

<sup>8</sup> New York, NY (US), 9 May 1992, in force 21 Mar. 1994, available at: <https://unfccc.int/resource/docs/convkp/conveng.pdf>.

<sup>9</sup> Kyoto (Japan), 11 Dec. 1997, in force 16 Feb. 2005, available at: <http://unfccc.int/resource/docs/convkp/kpeng.pdf>.

<sup>10</sup> Paris (France), 12 Dec. 2015, in force 4 Nov. 2016, available at: [http://unfccc.int/paris\\_agreement/items/9485.php](http://unfccc.int/paris_agreement/items/9485.php). See also the Symposium Collection on Human Rights-Based Approaches to Climate Change in the post-Paris climate regime in (2018) 7(1) *Transnational Environmental Law*, and, in particular, S. Adelman & B. Lewis, ‘Symposium Foreword: Rights-Based Approaches to Climate Change’ (2018) 7(1) *Transnational Environmental Law*, pp. 9–15.

(Chapter 14) considers the use of the rights language in the Paris Agreement to be both lamentable, because of the ‘dilution of obligations in the context of climate change’, and laudable, ‘as it is the first time that a reference to human rights was explicitly included in a global environmental treaty’ (p. 258). In Atapattu’s view, while the current provisions do little ‘to establish the responsibility of states for damage caused by climate change ... , it is possible to hold states accountable under international human rights law for human rights violations associated with mitigation measures’ (p. 260). Indeed, as Atapattu contends, the potential recognition of the right to a healthy environment ‘could strengthen the application of other related rights such as rights to life, health, water, food, privacy, housing and sanitation’ and, most importantly, allow climate change victims ‘to request local authorities or the courts to intervene before a particular issue becomes irreversible’ (pp. 265–6).

Overall, *The Human Right to a Healthy Environment* provides an essential understanding of how the right has developed, how it is currently applied, and its potential future trajectory. As Knox and Pejan rightly observe in the introduction, the book makes it clear that recognition of the right at the international level would be beneficial (p. 15). While it is still early to predict whether or how such recognition could happen, the growing role of courts and tribunals in framing environmental human rights and ongoing efforts of civil society could help to solidify the right. A good example of this is the recent advisory opinion issued by the Inter-American Court of Human Rights, finding that the right to a healthy environment is a human right and specifically recognizing the adverse effects of climate change on human rights.<sup>11</sup> Another example is the Global Pact for the Environment – an initiative to create a legally binding international instrument under the UN that would unify the existing principles of international environmental law and create a universal human right to a clean and healthy environment<sup>12</sup> – which, notably, has received recognition at the UN General Assembly level.<sup>13</sup> Although these developments may not necessarily lead to any breakthrough in the near future, they are fully in line with the contributors’ expectation to further ‘witness this blossoming field of human rights law’ (p. 3).

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<sup>11</sup> *State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights*, Advisory Opinion OC-23/18, Inter-AmCtHR, (Ser. A) No. 23 (15 Nov. 2017), available at: [http://www.corteidh.or.cr/docs/opiniones/seriea\\_23\\_esp.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf) (in Spanish).

<sup>12</sup> UN Environment, ‘Towards a Global Pact for the Environment’, available at: <https://globalpact.informea.org>. See also L. Kotzé, ‘A Global Environmental Constitution for the Anthropocene?’ (2019) 8(1) *Transnational Environmental Law*, pp. 11–33; See also the Special Issue on The Global Pact for the Environment and Gaps in International Environmental Law in (2019) 28(1) *Review of European, Comparative and International Environmental Law*.

<sup>13</sup> UN General Assembly Resolution 72/277, ‘Towards a Global Pact for the Environment’ (10 May 2018), UN Doc A/RES/72/277, available at: <https://undocs.org/en/A/RES/72/277>.