



The Human Right to a Healthy Environment

edited by John H Knox and Ramin Pejan, Cambridge University Press, 2018,
290 pp (paperback), GBP 22,99, ISBN 978-1-10843-158-3

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BOOK REVIEW

The Human Right to a Healthy Environment, edited by John H Knox and Ramin Pejan, Cambridge University Press, 2018, 290 pp (paperback), GBP 22,99, ISBN 978-1-10843-158-3

Despite a healthy environment being a pre-condition for the enjoyment of human rights, the environment is not protected in human rights' foundational document – the Universal Declaration of Human Rights (UDHR) – nor the subsequent international treaties. As such, environmental rights have not been sufficiently conceptualised, codified, or protected in international law. It was only in the last dozen years that the right to water was recognised,¹ and just last year that the UN Human Rights Council recognised the right to a clean, healthy, and sustainable environment via a (non-binding) resolution.² While this resolution is a celebrated step, many questions remain regarding the scope, content, and protection of such a right to a healthy environment. Especially when confronted with the current and projected devastating impacts of climate change, the division between human rights and the environment urgently needs to be bridged – both conceptually and practically. The edited volume *The Human Right to a Healthy Environment* by Knox and Pejan makes a substantial contribution to filling these gaps, and is a key resource in any discussion of a right to a healthy environment.

Part of the division can be explained by the development last century of the two separate branches of international human rights and environmental law. While human rights law proliferated after the Second World War with the UDHR, environmental law developed out of the environmental movement starting from the 1960s (2). Especially in the 1990s, efforts were made to bring the branches closer together (189), and in 2008 the UN Human Rights Council requested a report by the Office of the High Commissioner for Human Rights (OHCHR) on the relationship between human rights and climate change.³ However, as Limon notes in chapter 11, even after that report's promulgation, developed states (with high emission levels) like the USA and Canada '... continued to insist that climate change and human rights inhabit two separate and very different bodies of law with no formal connection' (202). As Magraw and Wienhöfer note in chapter 12, achieving political recognition of the human rights/climate change nexus 'was not easy' (217, 237). To this day, despite the invaluable work of *inter alia* the OHCHR and the Special Rapporteurs (see chapters 1 and 2), there remains no international treaty protecting the right to a healthy environment, nor explicit law linking human rights and climate change.

Given these political barriers around formal codification of an international right to a healthy environment, several authors in the book explore whether the right can be considered customary international law. While these chapters are spread out in the book, the thread

¹UN General Assembly (2010) The human right to water and sanitation A/Res/64/292; UN Human Rights Council (2010) Human rights and access to safe drinking water and sanitation A/HRC/Res/15/9; UN Committee on Economic, Social and Cultural Rights (2002) General Comment No 15: The right to water E/C12/2002/11.

²UN Human Rights Council, The human right to a clean, healthy and sustainable environment (8 October 2021) A/HRC/48/L23/Rev1. While this resolution was agreed after the book's 2018 publication, chapter 11 by Marc Limon provides key insights to its development. Regarding the ability of the Council to declare new rights, see also chapter 10 by Marcos Orellana, 184–87.

³See UN Human Rights Council Resolution 7/23 and Report of the OHCHR on the relationship between climate change and human rights (15 January 2009) UN doc A/HRC/10/61.

throughout is that the right to a healthy environment is well on its way to being recognised as custom. In chapter 2, Boyd, the present UN Special Rapporteur on human rights and the environment, reflects on the ‘remarkable extent’ to which the right has already been legally established, including constitutional protection in 100 states (17–18). He states that ‘[n]o other social or economic right has spread as quickly through the world’s constitutions’ (18). His rich chapter examines environmental case law from domestic courts worldwide. Drawing from environmental rights in constitutions around the globe, chapter 3 by Daly and May identifies salient lessons for the international level. ‘Reasoning up’, Bratspies examines whether environmental rights have become custom based on ‘... the ubiquity of environmental provisions in state constitutions’ (124). She notes the ‘... clear signs that a consensus is emerging’ and suggests that procedural environmental rights have already crystallised into custom given the proliferation of laws requiring environmental impact assessments (128).

Not only does the book examine in detail the situation of international law, it also addresses the regional frameworks from Africa and Europe. Pedersen’s chapter 5 sets out the European Court of Human Rights’ jurisprudence on health and the environment over three decades. Despite the European Convention on Human Rights explicitly lacking any reference to the environment, the Court has developed ‘... an elaborate and extensive body of case law that all but in name provides for a right to a healthy environment’ (86).⁴ He explains how the Court’s case law covers *inter alia* noise and industrial pollution, natural disasters, and flooding predominantly under articles 2 right to life and 8 right to respect for private and family life. This practice of ‘greening’ existing human rights protections⁵ has occurred in multiple jurisdictions. Notwithstanding the Court’s progressive interpretations, gaps and uncertainties still exist, which might benefit from a specific amendment to the European Convention on the right to a healthy environment.⁶ In the absence of such an explicit right to date, Court watchers wait (impatiently) to see how the Court deals with the (as of writing) pending petitions on climate change.⁷ Atapattu notes that compared to the discussion on human rights and the environment, its links with climate change has ‘... received attention only recently’ (252).

As seen in Chenwi’s chapter 4, the African regional system on human rights was not required to be creative like the European Court given that the African Charter on Human and People’s Rights includes environmental protections. The 1981 Charter is noteworthy for its combination of traditional civil and political rights alongside economic, social, and cultural rights including so-called ‘third generation’ rights like those to peace and development. Noting that environmental rights are explicit treaty norms on the continent, Chenwi states that protecting the environment ‘... has been an essential part of Africans’ social, cultural, and religious life for many generations’ (59). Stressing the indivisibility of rights, Chenwi highlights linkages between environmental rights and that to life, health, sanitation, education, and religion/culture. The chapter also focuses on particularities of the African context, including issues relating to natural resource extraction and the tensions between environmental protections and economic development. Given this tension, which is felt around the world (and reflected in the Sustainable Development Goals), I would have

⁴See also Dinah Shelton’s chapter 6, which discusses case law from the European Court of Human Rights.

⁵Elina Pirjatanniemi, ‘Greening Human Rights Law: A Focus on the European Convention on Human Rights’, in Gerhard Bos and Marcus Düwell (eds), *Human Rights and Sustainability: Moral Responsibilities for the Future* (Routledge 2016).

⁶See Council of Europe, Parliamentary Assembly, Recommendation 1885 (2009) Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment.

⁷*Duarte Agostinho and Others v Portugal and 32 other States* App No 39371/20; *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* App No 53600/20; *Greenpeace Nordic and Others v Norway* App No 34068/21. Regarding human rights and climate change, see chapters 13 and 14 by Lavanya Rajamani and Sumudu Atapattu respectively.

welcomed a more critical or decolonial approach towards not only sustainable development but also neoliberalism and capitalism.⁸

As chapters 4 and 5 illustrate, the regional human rights systems have been important in developing norms and content regarding the right to a healthy environment. So too, has the Inter-American system. While reference to the jurisprudence of the Inter-American system is made throughout the book by various authors, it does not dedicate a standalone chapter to examining that system's numerous and significant contributions. For example, for the first time in its 2020 *Lhaka Honhat* case,⁹ the Court recognised a justiciable right to a healthy environment derived from Article 26 of the American Convention of Human Rights, which – like its European counterpart – does not specifically mention the environment.¹⁰ This judgment builds upon Court and Commission decisions over many years, including notably the Court's 2017 Advisory Opinion on the environment and human rights.¹¹ As in *Lhaka Honhat*, much of the Court's environmental case law relates to its interpretations of indigenous rights, including to property and cultural life.

While not explicitly stated in the book, a cross-cutting issue is the environment in the context of indigenous peoples and their rights. Much can be learned from indigenous peoples in reconceptualising humanity's relationship with the environment under international law, which is urgently needed. In the Americas, States have sought to protect the rights of nature based on indigenous concepts such as 'Pacha mama' (5, 52, 249) and the two petitions before the Inter-American Commission on climate change were brought by indigenous groups (217–20, 256).¹² The case law addressed in chapter 4 on the African system relates to indigenous peoples, including an analysis of the 2017 landmark decision by the African Court in the *Ogiek* case against Kenya (78–82). As seen from the African and American regional systems, indigenous rights and peoples have played a key role in litigation on environmental protection. Following the book's publication in 2018, international petitions regarding climate change were also raised by indigenous people before UN treaty bodies.¹³ While the petition before the Committee on the Rights of the Child was found inadmissible for non-exhaustion of domestic remedies, the petition by Torres Strait Islanders against Australia regarding sea level rise is still pending before the Human Rights Committee.¹⁴

⁸Critiques have also addressed the anthropocentric nature of a human rights approach to the environment. See e.g. Jan Wilkens and Alvine RC Datchoua-Tirvaudey, 'Researching Climate Justice: A Decolonial Approach to Global Climate Governance' (2022) 98 *International Affairs* 125; Anna Grear, 'Deconstruction Anthropos: A Critical Legal Reflection on "Anthropocentric" Law and Anthropocene "Humanity"' (2015) 26 *Law and Critique* 225.

⁹Inter-American Court of Human Rights *Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina*, Judgment of February 6, 2020 (Merits, reparations, and costs).

¹⁰The environment is, however, protected regionally in art 11 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (Protocol of San Salvador) (adopted 17 November 1988, entered into force 16 November 1999) OAS Treaty Series No 69.

¹¹Inter-American Court of Human Rights, *Environment and Human Rights*, Advisory Opinion OC-23/17, Series A No 23 (15 November 2017).

¹²The 2005 petition against Canada by Inuit groups (Sheila Watt-Cloutier *et al* Petition No P-1413-05) is discussed in the book, 217–20. Regarding the 2013 petition against the USA by the Athabaskan Peoples (23 April 2013), see Agnieszka Szpak, 'Arctic Athabaskan Council's Petition to the Inter-American Commission on Human Rights and Climate Change: Business As Usual Or A Breakthrough?' (2020) 162 *Climatic Change* 1575.

¹³UN Committee on the Rights of the Child, *Sacchi et al v Argentina et al* (8 October 2021) CRC/C/88/D/104/2019; Petition of Torres Strait Islanders to the United Nations Human Rights Committee Alleging Violations Stemming from Australia's Inaction on Climate Change (2019) <<http://climatecasechart.com/climate-change-litigation/non-us-case/petition-of-torres-strait-islanders-to-the-united-nations-human-rights-committee-alleging-violations-stemming-from-australias-inaction-on-climate-change/>> accessed 13 March 2022.


¹⁴See Dinah Shelton's chapter 6 in the book. Regarding how decision-makers and lawyers should approach such cases see Julie Fraser and Laura Henderson, 'The Human Rights Turn in Climate Change Litigation and Responsibilities of Legal Professionals' (2022) 40(1) *Netherlands Quarterly of Human Rights* 3. <https://doi.org/10.1177/09240519221085342>.

Despite its broad scope, the book does not devote dedicated space to the experience of women and/or children as marginalised groups *vis-à-vis* the environment. While environmental degradation and the impacts of climate change will impact everyone, women and children are disproportionately affected due to inequalities (240, 247, 262). For example, women and girls are at greater risk due to higher levels of poverty, lack of education, and limited mobility.¹⁵ Given the projected future impacts of climate change, ‘... no group is more vulnerable to environmental harm than children’.¹⁶ As such, scholarship has begun to address the position of children,¹⁷ and the UN Committee on the Rights of the Child is currently preparing a draft General Comment on children’s rights and the environment with a special focus on climate change.¹⁸ However, not enough attention has been paid ‘... to how and why environment protection is a gendered issue’.¹⁹ As such, the book missed an opportunity to elevate this issue.

The many developments noted above regarding the right to a healthy environment since the book’s publication in 2018 demonstrate just how rapidly this area of law is developing. These achievements are the result of the work of many people over many years, including the Special Rapporteurs, politicians (particularly from the small island states), courts (domestically and regionally), civil society, academia, etc. Rapid change is indeed necessary, as ‘[w]e are now at the point where planetary boundaries are being crossed’ (122). The legal developments since 2018 do not, however, date the book. It remains a pre-eminent resource that not only explains how the right to a healthy environment has developed over time, but also looks forward to propose good practices from around the world and address future challenges. Despite the multiple crises facing the world today, protecting our environment and combatting climate change is the challenge of our times. The human right to a healthy environment ‘... is indeed an idea whose time has come’ (168).

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¹⁵See e.g. UN Committee on the Elimination of Discrimination against Women, General Recommendation No 37 on Gender-related dimensions of disaster risk reduction in the context of climate change (7 February 2018) UN Doc CEDAW/C/GC/37.

¹⁶UN Human Rights Council, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/37/58 (24 January 2018) para 15.

¹⁷See e.g. Karin Arts, ‘Children’s Rights and Climate Change’ in Claire Fenton-Glynn (ed), *Children’s Rights and Sustainable Development: Interpreting the UNCRC for Future Generations* (Cambridge University Press 2019); Elizabeth D Gibbons, ‘Climate Change, Children’s Rights, and the Pursuit of Intergenerational Climate Justice’ (2014) 16 *Health and Human Rights Journal* 19; Joni Pegram, ‘Overlooked and Undermined: Child Rights and Climate Change’ in Sébastien Duyck, Sébastien Jodoin, and Alyssa Johl (eds), *Routledge Handbook of Human Rights and Climate Governance* (Routledge 2018); Bridget Lewis, ‘Children’s Human Rights-Based Climate Litigation at the Frontiers of Environmental and Children’s Rights’ (2021) 39(2) *Nordic Journal of Human Rights* 180.

¹⁸See UN Committee on the Rights of the Child, Draft general comment No 26 on children’s rights and the environment with a special focus on climate change, <www.ohchr.org/EN/HRBodies/CRC/Pages/GC26-Environment.aspx> accessed 13 March 2022.

¹⁹Christine Chinkin and Keina Yoshida, ‘Women’s Human Rights and Climate Change: State Obligations and Standards’ (July 2020) LSE Policy Briefing 43.