1

Introduction

John H. Knox and Ramin Pejan

Two of the great achievements of international law have been to define the human rights integral to a life of dignity, freedom, and equality, and to develop rules and institutions that protect the global environment. Because these two areas of the law developed separately and at different times, the relationship between them was at first unclear. In the last two decades, however, it has become more and more evident that human rights and environmental protection have a fundamental interdependence: A healthy environment is necessary for the full enjoyment of human rights and, conversely, the exercise of rights (including rights to information, participation, and remedy) is critical to environmental protection.

This relationship has been recognized at every level of the world's legal systems, from domestic courts to multilateral treaties. Perhaps the highest-profile acknowledgment of the linkage is the Paris Agreement on climate change, adopted in December 2015, which includes in its preamble the statement: "Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity."[1]

Although many aspects of the relationship of human rights and the environment have become clear, some important issues remain unresolved, including the status of a globally recognized human right to a healthy environment.[2] Most countries, and almost all regional human rights systems, have endorsed the right to a healthy environment, but it has never been adopted in a universal human rights treaty

[1] Paris Agreement, December 12, 2015, in force November 4, 2016, UN Doc. FCCC/CP/2015/19.

[2] Throughout this book, unless otherwise indicated, references to the "right to a healthy environment" should be read generally to include alternative versions such as a right to a "satisfactory," or "clean," or "sustainable" environment. Several chapters explore the possible legal consequences of different formulations of the right.

or declaration. Its absence from the seminal human rights instruments can be explained by timing: The modern environmental movement began in the late 1960s, after the adoption of the Universal Declaration of Human Rights and the two International Covenants.[3] It is remarkable, however, that fifty years later, after most of the countries of the world have recognized the right in their national constitutions or regional human rights instruments, or both, the United Nations has still not endorsed it.

The 1972 Stockholm Declaration, adopted by the first UN conference on the environment, came closest, stating in its first principle that "man 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."[4] Over the next several decades, however, as most states have highlighted the importance of environmental protection by including the right in national law and regional treaties, the United Nations has declined invitations to strengthen the Stockholm language. In 1992, the UN Conference on Environment and Development in Rio de Janeiro avoided using "rights" language, instead stating, in the first principle of the Rio Declaration, that human beings "*are entitled to* a healthy and productive life in harmony with nature."[5] Three years later, the UN Commission on Human Rights, then the principal UN human rights body, rejected a proposal by its expert sub-commission to consider a draft declaration on human rights and the environment that recognized the right. Nor was the right mentioned by the later international conferences on sustainable development, in Johannesburg in 2002 and Rio de Janeiro in 2012.

Nevertheless, the absence of a globally recognized right to a healthy environment has not prevented the development of human rights norms relating to the environment. Indeed, one of the most noteworthy aspects of human rights law over the last twenty years is that UN treaty bodies, regional tribunals, special rapporteurs, and other human rights mechanisms have applied human rights law to environmental issues even without a stand-alone, justiciable human right to a healthy environment. They have done so by "greening" other human rights – that is, applying already-recognized rights, such as rights to life and health, to environmental problems. Human rights bodies have identified how environmental harm interferes with the full enjoyment of human rights, and they have concluded that states have obligations under human rights law to protect human rights from environmental harm.

[3] Universal Declaration of Human Rights, General Assembly res. 217A (III), UN Doc. A/810 (1948); International Covenant on Civil and Political Rights, December 16, 1966, in force March 23, 1976, 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights, December 16, 1966, in force January 3, 1976, 993 UNTS 3.

[4] Declaration of the UN Conference on the Human Environment, UN Doc. A/Conf.48/14/Rev.1 (June 5–16, 1972).

[5] Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26/Rev.1, annex I (June 14, 1992) (emphasis added). See Dinah Shelton, "What Happened in Rio to Human Rights?" *Yearbook of International Environmental Law* 3(1) (1993), pp. 75–93.

The editors of this volume have been privileged to witness this blossoming field of human rights law from front-row seats. In 2012, the Human Rights Council – the successor to the Commission on Human Rights – decided to inform itself and the public of the developments in this area by appointing an independent expert to a three-year term to "study the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment," to identify best practices in their use, and to issue public reports to the Council.[6] One of the editors (John Knox) had the honor of being appointed as the independent expert; the other (Ramin Pejan) was the human rights officer at the Office of the High Commissioner for Human Rights (OHCHR) assigned to support the new mandate.

Over the first eighteen months of the mandate, we held consultations in every UN region and, with the help of attorneys and academics working on a *pro bono* basis, examined virtually every statement made by a human rights body on environmental issues, with the goal of "mapping" the human rights norms relating to the environment. Human rights bodies had, by this time, examined hundreds of environmental situations. We described their statements in eleven reports, one for each source or set of sources. For example, individual reports covered the decisions of the Human Rights Committee interpreting the International Covenant on Civil and Political Rights and four other treaty bodies; statements of the General Assembly and the Human Rights Council; reports of UN special rapporteurs; and the regional human rights systems. Another three reports addressed environmental instruments.[7]

The mapping review revealed that this wide variety of bodies had reached very similar conclusions. At a general level, they agreed that environmental harm can and often does interfere with the full enjoyment of many human rights, including rights to life and health, and that states have obligations to protect against such interference. More specifically, they agreed that states have procedural and substantive obligations, as well as obligations relating to the protection of those who are particularly vulnerable to environmental harm. These conclusions were summarized in a report presented to the Human Rights Council in March 2014.[8] Four years

[6] Human Rights Council res. 19/10 (March 12, 2012).

[7] The reports, which total more than 750 pages, are available at http://srenvironment.org/mapping-report-2014–2/ and at www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/MappingReport.aspx.

[8] John H. Knox, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Mapping Report*, UN Doc. A/HRC/25/53 (December 30, 2013). Later reports have identified good practices in the use of these obligations, proposed methods of implementing the obligations, and applied them to specific environmental issues, including climate change and biodiversity. John H. Knox, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Compilation of good practices*, UN Doc. A/HRC/28/61 (February 3, 2015); *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Implementation Report*, UN Doc. A/HRC/31/53 (December 28, 2015); *Report of the Special Rapporteur on the Issue of Human Rights*

later, the final report of John Knox to the Council presented Framework Principles on Human Rights and the Environment that set out these obligations in detail.[9]

The procedural obligations of states include duties: (a) to assess environmental impacts and make environmental information public; (b) to facilitate public participation in environmental decision making, including by protecting the rights of freedom of expression and association; and (c) to provide access to remedies for harm. With respect to substantive obligations, human rights bodies have agreed that states have duties to adopt and implement legal frameworks to protect against environmental harm that may infringe on enjoyment of human rights, and that these laws should regulate private actors as well as government agencies. While states have discretion in deciding the appropriate level of environmental protection in light of their economic situation, they should take into account international and national standards for health and safety, ensure that their environmental standards are non-retrogressive, and implement them effectively.

In adopting and implementing environmental standards, procedural or substantive, states should never discriminate on prohibited grounds. Moreover, human rights bodies have emphasized that states may owe heightened duties to those who are particularly vulnerable to environmental degradation. Although these duties require further elaboration, the norms are already quite detailed in some areas. For example, the rights of indigenous peoples in relation to the environment have been clarified in international instruments and by human rights bodies.[10]

Against this backdrop of an extensive set of human rights obligations relating to the environment, what is, or should be, the role of the human right to a healthy environment? Normally, of course, the international recognition of a right precedes the development of obligations under human rights law. Most famously, the Universal Declaration of Human Rights, which listed fundamental rights recognized by the international community, was followed by treaties that elaborated corresponding obligations on states and established institutions to promote compliance. If the right to a healthy environment were following this template, its international recognition would establish it as a new cornerstone in the human rights framework, on which detailed obligations could be built.

Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Climate Change Report, UN Doc. A/HRC/31/52 (February 1, 2016); *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Biodiversity Report*, UN Doc. A/HRC/34/49 (January 19, 2017).

9 John Knox, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UN Doc. A/HRC/37/59 (January 24, 2018).

10 See, e.g., United Nations Declaration on the Rights of Indigenous Peoples, UN Doc. A/RES/61/295 (September 13, 2007); James Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples: Extractive Industries Operating within or Near Indigenous Territories*, UN Doc. A/HRC/18/35 (July 11, 2011).

While this approach has been taken, to differing degrees, in the countries that have adopted a constitutional right to a healthy environment, at the international level the body of norms described earlier has already evolved on the basis of an interlocking web of rights. That does not mean that recognition of the human right to a healthy environment would be meaningless. On the contrary, it could have important advantages: Adoption or endorsement of the right at the global level could raise the visibility of these norms and give them greater coherence and clarity. In this sense, a "new" human right to a healthy environment would be a capstone: a marker that reflects the maturity of this body of law.

At the same time, many believe that the existing international norms on human rights and the environment do not go far enough. For example, the developing international jurisprudence has had little to say about future generations or intrinsic "rights of nature," even though they are addressed in some national constitutions.[11] More prosaically, not all countries recognize the already identified rights-based environmental norms to the same extent, since the norms have been derived from a wide variety of human rights instruments by a wide variety of human rights bodies, none of whose authority is recognized as universally binding. In either respect, the global recognition of a human right to a healthy environment could act as a cornerstone for the development of these obligations, by filling in gaps in the evolving jurisprudence or by providing a basis for entirely new sets of obligations. Whether and how the right could serve this function would depend greatly on how it is recognized, as well as on how it is interpreted going forward.

Of course, these two roles are not mutually exclusive. In law (if not in architecture), a norm may be a capstone and a cornerstone at the same time. Global recognition of the right to a healthy environment could both provide a reference point for the norms as they have developed so far, and help to provide a basis for further development of norms in the future. However, the distinction between capstones and cornerstones does have implications for the method of recognition of the norm. To the degree that the recognition of a right to a healthy environment is treated as a capstone without independent legal effects, formal approval by an intergovernmental body would not be necessary. However, the higher the expectation that the right would provide a foundation for further norm development, the more important some sort of intergovernmental approval would be.

The consideration of these questions led us to invite a diverse set of scholars and practitioners, all of whom have been instrumental in defining the relationship

[11] International tribunals may be starting to break their relative silence on these issues. As this book was being prepared for publication, the Inter-American Court of Human Rights issued a pathbreaking advisory opinion on human rights and the environment that reviews and clarifies their interdependence. Among other things, the opinion relates the human right to a healthy environment to the protection of components of the environment such as forests and rivers, even in the absence of harm to humans. See Inter-American Court of Human Rights, Advisory Opinion OC-23-17 of November 15, 2017, para. 62.

between human rights and the environment, to provide their thoughts on the right to a healthy environment. We are very fortunate that they accepted our invitation to contribute chapters to this book.

Their contributions examine many different facets of the right to a healthy environment, categorized in roughly the following order. (We say "roughly" because many of the authors address more than one of these issues, as well as others not listed here.)

1. Where the right to a healthy environment already exists, at the national and regional levels, how has it been interpreted and applied? What lessons does that experience have for the recognition of the right at the international level?
2. Is the right to a healthy environment already part of customary international law, or even *jus cogens*?
3. Is adoption or recognition of a "new" human right to a healthy environment in an international instrument justified on ethical and/or legal grounds?
4. How could the right be recognized at the international level by the UN General Assembly or the Human Rights Council?
5. What role can the right to a healthy environment and other human rights play in addressing climate change, which has been called both the greatest environmental challenge of our time and the greatest threat to human rights of the twenty-first century?

NATIONAL AND REGIONAL EXPERIENCE WITH THE RIGHT TO A HEALTHY ENVIRONMENT

At the outset of any consideration of the right to a healthy environment at the global level, it is important to bear in mind that the right has already been incorporated into the laws of most of the countries of the world. Chapters 2 and 3, by David Boyd and by Erin Daly and James May, respectively, each draw lessons from the experience with constitutional environmental rights. Boyd notes that the right now enjoys direct constitutional protection in 100 countries, and he points out that this figure actually understates its acceptance, since the courts in at least another dozen countries have interpreted the right as an essential part of the constitutional right to life, and others have ratified regional treaties that include a version of the right to a healthy environment. In all, he finds that the governments of at least 155 nations have recognized the right.

Drawing on his own empirical research, Boyd argues that the adoption of constitutional rights to a healthy environment has led to stronger environmental laws and to judicial decisions requiring environmental protection. Other benefits include increasing the public role in environmental governance, because the right

has been consistently interpreted to include the procedural rights of access to information, public participation, and access to justice. Conversely, he concludes that few of the potential downsides of the right have materialized. Environmental rights have not been construed to trump all other rights; instead, legislators and judges have opted for careful balancing of environmental and other interests. It is true that in some countries, formal adoption of the right has had little effect, often because countries that lack effective legal institutions fail to implement most or all of their human rights commitments, including those related to environmental protection. On the whole, however, he concludes that the effects of the widespread adoption of the right at the national level have been overwhelmingly beneficial, and that it should be recognized as expeditiously as possible at the global level as well.

Daly and May state that domestic environmental constitutionalism provides several lessons for the meaning, scope, and enforcement of a global environmental right. They explain that a very wide variety of formulations are used, including references to the right to a "clean," "harmonious," and "balanced" environment. Some provisions are explicitly anthropocentric, others are ecocentric, and some include both perspectives. The constitution of Ecuador, for example, recognizes both the "right to a healthy and ecologically balanced environment" with a chapter dedicated to rights of nature. Different legal consequences can result from such different legal texts. The authors also show that constitutions differ greatly in how clearly they link the right to other rights, and in the creation of effective enforcement mechanisms. They conclude that the drafters of an instrument recognizing the right at the global level should "clarify as much as possible which elements of the environment should be protected and why," link the right explicitly to other human rights, and create effective mechanisms for vindicating the right.

As noted earlier, the right to a healthy environment has also been adopted in many regional instruments. In most of these instruments, however, the right is nonjusticiable. The San Salvador Protocol to the American Convention on Human Rights, for example, states that "[e]veryone shall have the right to live in a healthy environment," but does not include the right in the short list of economic, social, and cultural rights whose violation may be the subject of a claim to the Inter-American Commission on Human Rights.[12] The Arab Charter on Human Rights and the ASEAN Human Rights Declaration each include the right to a "healthy" (Arab Charter) or "safe, clean and sustainable" (ASEAN Declaration) environment as an element of the right to an adequate standard of living, but neither instrument

[12] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights: Protocol of San Salvador, November 17, 1988, in force November 16, 1999, 28 ILM 161, arts. 11(1), 19(6).

establishes oversight mechanisms that can receive complaints of violation of the right.[13] Similarly, the Aarhus Convention, which was negotiated under the auspices of the UN Economic Commission for Europe, states that its parties are required to guarantee the rights of access to information, public participation in decision making, and access to justice in environmental matters "[i]n order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being,"[14] but its compliance mechanism reviews alleged violations only of the procedural access rights, not of the general environmental right that they support.

Exceptionally, the African Charter not only provides that "[a]ll peoples shall have the right to a general satisfactory environment favourable to their development," but also makes the provision subject to review by both the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights.[15] In Chapter 4, Lilian Chenwi places the Charter's language in its historical and textual context, analyzes its potential tension with the right to development, which the Charter also recognizes, and explains in detail how the right has been interpreted and applied by the African Commission and the African Court. Her contribution includes one of the very first scholarly treatments of the May 2017 decision by the Court on the rights of the indigenous Ogiek people, who face eviction from their ancestral home in the Mau Forest in Kenya.[16] She concludes that the experience of the African human rights bodies "authenticate[s] the view that such a right can be made effective and accentuate[s] the role that indigenous communities play in this regard." Her chapter also highlights the importance of construing the right in light of its linkages with other rights.

The absence of a judiciable right to a healthy environment has not prevented other regional tribunals from contributing to the development of human rights norms relating to the environment. The Inter-American Commission and Court, for example, have issued many important decisions, chiefly on the rights of indigenous and tribal peoples to communal property in the face of rising development pressures.[17]

[13] Arab Charter on Human Rights, May 22, 2004, in force March 15, 2008, 12 IHRR 893 (2005), art. 38; Association of Southeast Asian Nations (ASEAN) Human Rights Declaration, November 18, 2012, art. 28(f).

[14] Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, in force October 21, 2001, 2161 UNTS 447, art. 1.

[15] African Charter on Human and Peoples' Rights, June 27, 1981, in force October 21, 1986, 1520 UNTS 217, art. 24.

[16] *African Commission on Human and Peoples' Rights* v. *Kenya*, *Judgment*, Application 006/2012 (African Court of Human and Peoples' Rights, 2017).

[17] See, e.g., *Kichwa Indigenous People of Sarayaku* v. *Ecuador*, Inter-Am. Ct. H.R. (ser. C) No. 245 (2012); *Saramaka People* v. *Suriname*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172 (2007); *Sawhoyamaxa Indigenous Community* v. *Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 146 (2006). They have also emphasized the importance of protecting the rights of

But the most active regional tribunal in this respect has been the European Court of Human Rights.

In Chapter 5, Ole Pedersen explains that despite the absence of an explicit environmental right in the European Convention on Human Rights, the European Court has managed to develop "an elaborate and extensive body of case law which all but in name provides for a right to a healthy environment." It has constructed this body of jurisprudence primarily on the basis of the rights to life and to respect for private and family life. Pedersen notes that the jurisprudence has a wide scope, ranging from noise pollution through industrial pollution to natural disasters and flooding, and that it addresses the risk of harm, not merely the *ex post* application of human rights norms to materialized harms. At the same time, the jurisprudence includes what Pedersen describes as more restrictive elements, including a focus on procedural protections (such as obligations to provide information and establish regulatory institutions) and on whether the government has followed its own environmental standards. If procedural safeguards are met and the government has met domestic standards, the Court affords states a wide "margin of appreciation," or area of discretion, in deciding what level of environmental protection to adopt.

As explained earlier, the jurisprudence of the African, European, and Inter-American human rights tribunals, similar decisions and statements by other human rights bodies (including UN treaty bodies and special rapporteurs), and decisions by national courts are creating a rights-based environmental jurisprudence. In Chapter 6, Dinah Shelton, who has broken ground in scholarship in this field for over twenty-five years, examines some of the key issues judges must face in cases involving allegations that governmental action or inaction has caused environmental harm that, in turn, infringes or threatens the full enjoyment of human rights. Drawing on cases from the International Court of Justice, regional tribunals, and domestic courts, her chapter addresses a range of overarching issues in cases concerning the environment and human rights, including challenges to the admissibility of claims, the impact of scientific uncertainty, the burden of proof, the degree of deference owed to the government, and the application of legal principles such as the precautionary principle. She makes clear that while there are valid reasons to support judicial deference to legislative decisions in environmental matters, a rights-based perspective emphasizes that judicial oversight is necessary to protect the rights of those in marginalized and minority communities, who often bear a disproportionate burden of environmental harm.

environmentalists to life and to freedom of association. See *Kawas-Fernández* v. *Honduras*, Inter-Am. Ct. H.R. (Ser. C) No. 196 (2009).

THE RIGHT AS A NORM OF CUSTOMARY INTERNATIONAL LAW, OR *JUS COGENS*

The widespread acceptance by so many countries of environmental rights, and of the right to a healthy environment in particular, raises the question whether the rights are already part of customary international law. In Chapter 7, Rebecca Bratspies points out that most inquiries into the existence of customary law either reason inductively to derive custom from the course of state-to-state interactions, or deductively from multilateral instruments. Either way, this analysis is top-down, looking at whether international conduct has crystallized into customary norms. Bratspies takes a different, bottom-up approach, looking at the obligations states have imposed on themselves through their own domestic laws. Focusing on the near-universal adoption of environmental impact assessment laws, she argues that some key components of a human rights-based approach to environmental protection have hardened into customary international law. Her analysis also shows how similar inquiries could be conducted for other elements of the right, including in particular procedural duties relating to public participation and access to remedies for environmental harm, which are reflected in many domestic and regional environmental laws.

In Chapter 8, Louis Kotzé addresses the next logical question: Can the right to a healthy environment be considered a *jus cogens* norm? *Jus cogens* norms are peremptory – that is, they bind all states regardless of their consent, overriding inconsistent international agreements. Kotzé concludes that international environmental instruments such as the Stockholm and Rio Declarations support the right to a healthy environment only as "soft law" that provides non-binding guidance to states. Nevertheless, he argues that it is worthwhile to continue the debate on the emergence of the right in international law for several reasons, including that such a high-level recognition of the right could be critically important to establish regulatory priorities in global environmental governance, and that it could provide a basis for international compliance and enforcement mechanisms to hold states accountable for their environment-related actions. Kotzé also describes the potential allure of *jus cogens* status for establishing a peremptory norm against environmental harm that affects the sustainability of the Earth's ecosystems. While existing law provides only a slim basis for concluding that environmental norms already are *jus cogens*, he argues that the urgency of the present crisis and the recognition of the need for international cooperation support the development of such norms. He suggests that building blocks could include the widely accepted no-harm rule (*sic utere tuo ut alienum non laedas*), as well as fundamental human rights norms such as the prohibition of racial discrimination where such discrimination is directly linked to environmental harm.

THE ETHICAL AND LEGAL JUSTIFICATIONS FOR ADOPTING THE RIGHT IN INTERNATIONAL LAW

César Rodríguez-Garavito, in Chapter 9, analyzes the potential benefits and costs of formally codifying the right to a healthy environment into international positive law. He begins by challenging what might be considered the assumption underlying this issue: That is, that the status of the right to a healthy environment as a human right depends on its incorporation in a legal instrument. He points out first that, as Amartya Sen has argued, human rights are fundamentally *ethical* claims about the intrinsic worth of every human being, which can and typically do precede their legal codification.[18] And he notes that the right to a healthy environment would appear, at least, to meet the threshold conditions Sen has proposed for recognition of a human right, including that it has wide recognition in the public sphere and that its realization depends to a large degree on the decisions of others. Rodríguez-Garavito also continues the analysis of previous chapters on the right as a customary norm, arguing that state practice and *opinio juris* both provide evidence of such a status.

Nevertheless, he acknowledges that the lack of an explicit recognition of the right in positive international law "undoubtedly limits its impact," and he argues that the adoption of the right would have several benefits, including the greater certainty, precision, and coercive power that a new legal instrument would provide to advocates and victims. He notes that formal recognition of the right could have costs as well, such as atomizing demands for justice into individual claims, and strengthening the dominance of professional organizations rather than affected communities – problems that are relevant to human rights generally, not just in the environmental context. He also points out the potential costs of obtaining the recognition of the right in international law, which could demand considerable political and institutional effort.

In Chapter 10, Marcos Orellana continues the consideration of the legal justification for the right to a healthy environment in light of the General Assembly's guidelines for the development of instruments in the field of human rights, which set out substantive standards that the recognition of "new" human rights should meet.[19] He finds that the right to a healthy environment meets these standards. For example, it is "consistent with the existing body of international human rights law," it is "of fundamental character and derive[s] from the inherent dignity and worth of the human person," and it is "sufficiently precise to give rise to identifiable and practicable rights and obligations." In addition to these substantive standards, Orellana distills several procedural safeguards from Philip Alston's 1984 proposal for

[18] See Amartya Sen, "Elements of a Theory of Human Rights," *Philosophy and Public Affairs* 32(4) (2004).
[19] General Assembly res. 41/120 (December 4, 1986).

greater "quality control" with respect to the recognition of new rights.[20] For example, before rights are accepted at the international level, they should go through an "incubation" phase in which they are recognized in national constitutions and legislation; there should be prior discussion and analysis of the implications of international recognition; and governments and other stakeholders should have opportunities to express their opinions on the proposals. Here, too, Orellana shows that these procedural steps have been fulfilled: The right has been widely adopted at the national level, and the relationship between human rights and environmental protection has been widely discussed by governments as well as by judges, scholars, and practitioners.

THE ROLE OF THE GENERAL ASSEMBLY AND THE HUMAN RIGHTS COUNCIL

A right to a healthy environment could be adopted in the form of a new treaty or as a protocol to an existing one. Pedersen states that a logical vehicle could be a protocol to the International Covenant on Economic, Social and Cultural Rights, but he notes that this path would be politically difficult, if not impossible. Boyd suggests that a resolution from the UN General Assembly might be the path of least resistance for maximum reward. Orellana explains that the General Assembly has played the preeminent role, historically, in proclaiming rights, but he argues that the Human Rights Council can do more than simply advise the General Assembly: The Council may itself recognize new rights, at least when the new rights are based on existing rights. Still more clearly, the Council may engage in a fresh debate concerning the right to a healthy environment, as a basis either for proclaiming the right itself or recommending its proclamation to the General Assembly.

The role of the Human Rights Council in this respect is examined in more detail by Marc Limon, in Chapter 11. Limon notes that its predecessor, the Commission on Human Rights, began to consider the relationship of human rights and the environment in the mid-1990s, but truncated its discussion without reaching agreement on any lasting conclusions or institutional reforms. However, soon after the Council was created in 2006, it began afresh with a different initiative, on human rights and climate change. Prompted by the 2007 Malé Declaration on the Human Dimension of Global Climate Change, the Council adopted a resolution in 2008 stating explicitly for the first time that climate change has implications for the full enjoyment of human rights, and requesting the Office of the High Commission for Human Rights to prepare a study on human rights and climate change.[21] Although that study led to greater attention to the issue in the Council and beyond,

[20] Philip Alston, "Conjuring Up New Human Rights: A Proposal for Quality Control," *American Journal of International Law* 78(3) (1984).
[21] Human Rights Council res. 7/23 (March 28, 2008).

the Council did not agree on whether or how it should continue to examine the relationship between climate change and human rights.

As a result, some countries, led by Costa Rica, the Maldives, and Switzerland, decided to pursue a less politically divisive initiative, seeking to clarify how human rights norms could apply to environmental policy more generally. Although some countries would have preferred to continue to focus on climate change, the eventual result was a resolution adopted by consensus calling for the establishment of "an independent expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment."[22] Limon, who at the time was a diplomat in the mission of the Maldives in Geneva, writes that it was the "unspoken hope" of the main sponsors that this norm-clarifying exercise would not only represent important progress in itself, but that it would also open the door to discussion of the merits of declaring a universal right to a clean and healthy environment. He concludes by describing the resolution on human rights and the environment adopted by the Council in March 2016, which illustrates how far the Council has come in understanding and setting such norms.[23] He points out that much of its text could provide substantive content for a future right to a healthy environment.

HUMAN RIGHTS AND CLIMATE CHANGE

The Malé Declaration, as Limon notes, is a seminal document in the effort to bring human rights to bear on climate change: It was the first international instrument to state explicitly that "climate change has clear and immediate implications for the full enjoyment of human rights," and it called on the UN human rights system to address the issue. The Declaration is also significant for its recognition of the right to a healthy environment, which it describes as "the fundamental right to an environment capable of supporting human society and the full enjoyment of human rights."[24] In Chapter 12, Daniel Magraw and Kristina Wienhöfer place the Malé Declaration in its historical context and analyze its formulation of an overarching environmental right. They emphasize its broad scope: it links to the right to other human rights; it addresses the human being both individually and in society; and it encompasses the entire range of threats to the environment. They point out that the Malé formulation also avoids some of the problems of other terms. References to a "healthy" environment, for example, may be problematic because the natural environment is not always healthy for humans, and because the emphasis on health ignores issues that are of central importance to human rights but do not directly implicate health, such as the right

[22] Human Rights Council res. 19/10 (March 12, 2012).
[23] Human Rights Council res. 31/8 (March 23, 2016).
[24] Malé Declaration on the Human Dimension of Global Climate Change, November 14, 2007.

to enjoy culture. It may also be ambiguous whether the term "healthy" extends beyond human health to include health of ecosystems.

Magraw and Wienhöfer point out that the Declaration was intended to "put a human face on climate change," and that it helped to catalyze action not only in the Human Rights Council, but also in the climate negotiations. In particular, it was the founding document of the Climate Vulnerable Forum, the organization of states that are most vulnerable to climate change, which played an important role in the negotiations culminating in the Paris Agreement adopted in December 2015. As noted at the beginning of this introduction, the Paris Agreement is the first multilateral environmental agreement to include an explicit reference to human rights in its preamble. Lavanya Rajamani, in Chapter 13, explains that the Agreement also recognizes special interests and vulnerabilities, and that it is "implicitly attentive to the need to create enabling socioeconomic conditions for the effective protection of human rights." At the same time, she emphasizes that the Agreement stops short of recognizing a right to a healthy environment or a stable climate.

Rajamani describes the history of the reference to human rights in the Paris Agreement, highlighting the statement in the 2010 Cancun decisions by the Conference of the Parties that parties should "fully respect human rights" in all climate-related actions. She notes that in the negotiation leading up to Paris, many parties and NGOs argued for the inclusion of references to human rights to life, food, shelter, and health, which would be adversely affected by climate impacts. In February 2015, eighteen countries voluntarily pledged to enable meaningful collaboration between their human rights representatives and their climate negotiators, and many states pushed for an explicit human reference in what became Article 2 of the Paris Agreement, which identifies the purpose of the agreement. As Rajamani explains, however, this effort met with resistance from other states, and in the end, the reference was only included in the preamble in carefully limited language that focuses on the human rights aspects of response measures rather than climate change itself. Nevertheless, she concludes that the inclusion of an explicit reference signals greater receptivity to rights concerns, which may suggest that the right to a healthy environment is closer to acknowledgment at the international level.

In the final chapter, Sumudu Atapattu examines whether the right to a healthy environment would help or hinder action in relation to climate change. She reviews the development of detailed jurisprudence applying human rights norms to environmental issues generally, and explains that some aspects of that jurisprudence apply to climate change without difficulty – in particular, it is no longer seriously debated that climate change will lead to the infringement of many protected rights. The nature of states' climate obligations under human rights law, however, remains controversial. While the Paris Agreement's preambular reference to human rights, as well as its support for procedural rights such as education and transparency, is an important step forward, much remains to be done to bring human rights norms to bear on mitigation and adaptation. In particular, the disastrous effects of climate

change on the most vulnerable communities, who have contributed little or nothing to the problem, raise profound issues of justice.

She argues that even if adopted, the right to a healthy environment would not be a panacea. It would continue to be constrained by the limitations inherent in the human rights framework, especially the difficulties in applying human rights extra-territorially. Still, she states that "the recognition of a stand-alone right to a healthy environment would send a clear signal to the international community that environmental rights are important, that such rights are justiciable, and that other protected rights could be jeopardized if a right to a healthy environment is not respected." Above all, the right would give additional avenues to victims of environmental abuses to seek redress through international as well as national mechanisms. Finally, she concludes with reference to a theme emphasized throughout the book: Even in the absence of a clear, stand-alone right, states still have human rights obligations that they are required to fulfill in taking action in relation to environmental issues.

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This review of the contributions to this book makes clear that recognition of a global right to a healthy environment would have real benefits, both as a capstone symbolizing the growing maturity of this area of the law, and as a cornerstone for further legal developments. As a capstone, it would provide a more coherent framework for human rights norms related to environmental protection. In Orellana's words: "The normative content of human rights in respect of the environment would thus no longer be dispersed or fragmented across a range of rights, but would come together under a single normative frame." May and Daly further explain that a stand-alone right "would confirm the interdependence and the indivisibility of human and environmental rights."

At the same time, the right could lead to the greater acceptance and further development of the norms in this area. As several of the contributors point out, global recognition of the right to a healthy environment could push countries that have not yet recognized a constitutional right to do so, and it might open new legal remedies at the national as well as the international level. Global recognition of the right would also strengthen regional efforts, and Pedersen says that it could have that effect even in the regional tribunal that has been the most active in linking human rights and the environment: the European Court of Human Rights. Rajamani and Atapattu each highlight ways that the growing receptivity to rights concerns in the climate context is leading to development of more specific obligations.

One of the simplest and most compelling arguments for recognition of the right is that it would make clear that environmental concerns are on the same level as other fundamental human interests recognized as human rights. Boyd states that a human right to a healthy environment would level the playing field with competing social and economic rights. Rodríguez-Garavito agrees that the right could serve as a

"source of countervailing arguments and power vis-à-vis other legally protected goals, such as the exigencies of economic development." Perhaps because human dependence on the environment is so fundamental, it has often been taken for granted, and even ignored, as we have pursued other goals of economic and social development. But if we have learned anything about the environment over the last forty years, it is that a healthy environment cannot be assumed, and that unsustainable development puts all of our rights at risk. It seems clear that it is past time to codify this recognition in the form of a human right to a healthy environment, on the same level as the other rights that are integral to human lives of dignity, freedom, and equality.

We close this introduction by thanking our contributors again for their thoughtful, thought-provoking analyses. The following chapters shed light on many of the questions concerning the right to a healthy environment, but we do not pretend that they are, or should be, the final word. In the continuing conversation on the relationship between human rights and the environment, this volume is not a capstone but, perhaps, a cornerstone that can provide a basis for the further exploration and development of these fundamentally important issues.