Lavanya Rajamani, *'Innovation and Experimentation in the International Climate Change Regime'* (Brill 2020), 320 pages, ISBN 978-90-04-44439-3

Innovation and experimentation are desperately needed in law to address multiple global challenges from catastrophic ecosystem breakdown, global pandemics, and immoral levels of inequity. It is increasingly recognised that international environmental laws are failing to prevent the Earth from rapidly heading towards catastrophic ecosystem degradation.[1] State centric international environmental framework agreements lauded in the early 1990s for addressing atmospheric and terrestrial transboundary problems like climate change, desertification and biodiversity loss now are seen as unwieldy, fragmented and not fit for purpose.[2] Some scholars argue that a completely new legal system is needed to prevent humanity, especially the privileged in the Global North and South, from transgressing all planetary boundaries.[3]

Yet, Lavanja Rajamani, an international legal scholar, assumes a more pragmatic approach. In 'Innovation and Experimentation in the International Climate Change Regime', a contribution to the prestigious Collected Courses of the Hague Academy of International Law, Rajamani argues that the kind of transformative systemic changes needed to avoid catastrophic climate change and related ecosystem breakdowns are already occurring from existing international legal structures. In this monograph, Rajamani traces how, through an often torturous process, international climate change law has opened up opportunities for transformation in law far beyond its remit. The key component in the international climate change law architecture is the 1992 UN Framework Convention on Climate Change's (UNFCCC) Paris Agreement (adopted in 2015) that 'acts as the fulcrum rather than the sole driver of global cooperation on climate change [which] relies on a productive interplay between the facilitative international regimes and strong national policies and actions; between binding procedural obligations and normative expectations, good faith, and due diligence; and between State and non-and sub-State actors and processes' (p. 189).

1 Alice Bleby, Cameron Holley and Ben Milligan, 'Exploring the planetary boundaries and environmental law: historical development, interactions and synergies' in Duncan French and Louis J Kotzé (eds), Research Handbook on Law, Governance and Planetary Boundaries (Edward Elgar Publishing 2021).

2 Harro Van Asselt, 'Managing the Fragmentation of International Environmental Law: Forests at the Intersection of the Climate and Biodiversity Regimes' (2011) 44/4 New York University Journal of International Law and Politics, 1205. 1205–78.

3 Louis J. Kotzé, 'Earth System Law for the Anthropocene: Rethinking Environmental Law alongside the Earth System Metaphor' (2020) 11/1–2 Transnational Legal Theory, 75, 75–104.

In this book, Rajamani argues that evolution in international climate change law within the UN has occurred at a time of increasing 'stagnation in law-making [...] as new powers and political alliances – powers such as China, India, Brazil, South Africa [...] and other political alliances such as G20 – have become consequential [...] challenging traditional consensus led international law-making' (p.187–188). Through the use of innovation and experimentation in negotiation, diplomacy, policy and measures, the international climate change regime in 2020 is a much more sophisticated institutional ecosystem that can foster and support multilevel transboundary initiatives to address the climate emergency. For Rajamani, it is the international climate change regime's 'complexities, limitations, curiosities and even absurdities [that challenges] the conceptual boundaries of international law and enriched the core of treaty law and practice [which] merits serious scholarly attention' (p. 24). Rajamani claims the international climate change law adapted to trends and tendencies in international law [and as such] rather than buckling under their weight' it ended up being 'realistic' (p. 26).

Lavanya Rajamani is an acclaimed climate change lawyer and practitioner. She is widely celebrated for her multiple articles, books, book chapters and papers on developments within the international climate change regime negotiations, especially on the interpretation of the principle of Common but Differentiated Responsibilities and Respective Capabilities (CBDRC). The bibliographical note at the beginning of 'Innovation and Experimentation in the International Climate Change Regime', listing Rajamani's principal publications, is testimony to the extent of her scholarly contribution to the field of international climate change law. The book is shaped by this previous research and draws on a Special Course given by Rajamani on the 'International Climate Change Regime' at The Hague Academy in July 2018.

The content is structured around the four key issues Rajamani identifies as the core competing demands of international climate change negotiations – 'autonomy, legal bindingness, prescriptiveness and differentiation' (p. 30). It is Rajamani's opinion that in seeking to find a balance between these four core competing demands where the climate change regime's experimentation and innovation in international law lies. Rajamani explores the innovations and experimentation in the book sequentially through laying out the issues, instruments, institutions, actors (chapter I); outlining the process and procedures – tools, techniques and tricks (chapter II); determining the legal instruments and obligations – nature, type, spread, functions and interplay (chapter III); clarifying shifts in differentiation (chapter IV) and concluding with questioning the capacity to deliver on the promise of the international climate change regime (chapter V). In each chapter, aspects of the core demands

are interrogated and analysed to see how a workable balance has been agreed upon amongst Parties to the international climate change regime.

The book is short (250 pages), and its scope is deliberately limited. The international climate change regime extends far beyond the UNFCCC to include not only other multilateral environmental agreements such as the Convention on Biological Diversity (CBD, 1992) but also other fields of law such as trade and human rights. However, Rajamani acknowledges that the international climate change regime is set within a wider "complex" of regulatory instruments (including many multilateral environmental agreements, human rights instruments, trade agreements and institutional regimes such as International Civil Aviation Organisation (ICAO) and the International Maritime Organisation (IMO). Yet, she specifically chooses to 'train [the book's] lens squarely on the international climate change regime, the principal purpose of which is to address climate change', the UN climate change regime constituted by the UNFCCC, the Kyoto Protocol, the Paris Agreement and Conference of the Parties (COP) decisions (p. 29). Rajamani's choice is a deliberate one. By focusing on the UN climate change regime, she is able to undertake a forensic assessment of the evolutionary developments, especially since the adoption of the Kyoto Protocol in 1997 and make her case that the regime challenges the conceptual boundaries of international law.

In chapter 1, Rajamani lays out the objective, principles, regulation, institutions and actors in a concise, focused manner. Firstly, Rajamani sets out the challenges that the 'super wicked problem', namely climate change, poses to state-based international law by drawing on the latest Intergovernmental Panel on Climate Change reports on climate science. After which, a perfunctory legalistic survey of the objective, principles and institutions is provided. These are foundations that are returned to in the following chapters. The chapter concludes by detailing the different actors involved in the climate change negotiation processes. The section is largely focused on the different negotiating blocs such as the G77 and China, the Least Developed Countries (LDCs), and the Alliance of Small Island States (AOSIS), clearly articulated alongside equity and justice issues. The style of the writing is largely legalistic and neutral. However, when describing the ALBA group (the Bolivarian Alliance for the Peoples of Our Americas) which comprises of ten Latin American countries and three observer states, Rajamani claims the group's members 'believe in a Trotskyite version of communism, and embrace revolution' (p. 38). Yet ALBA's opposition to 'free market capitalism' has been a source for extensive civil society, climate justice and alternative climate political ecology scholarship and

activism. The somewhat out of turn comment about ALBA in the chapter is as surprising as is the lack of attention paid to non-state actors, including international organisations, civil society and business associations, on the process and evolution of the climate change regime. Indeed in the book there are only two references to the significance of non-state actors. Firstly, Rajamani attributes evolution in the contextual framing in the preambular language including a reference to human rights in the Paris Agreement, as being the 'fruit of a concerted decade-long campaign by some Parties, human rights advocacy groups, and international bodies to integrate human rights considerations into the climate change regime' (p. 32). Secondly in the final chapter, Rajamani highlights the influence of non-state actors in shaping climate change law, picking up the opportunities that the international climate change regime provides to craft novel legal solutions to global environmental challenges, especially through strategic litigation (p. 220). Overall, surprisingly the dynamic interplay between state negotiators, diplomats and other non-state actors and the influence on international climate change negotiations receive very limited attention in this book.

In chapter 11, Rajamani turns her focus on the processes and procedures for agenda setting, negotiation management (the various fora and texts) and decision making employed within the 'dysfunctional and toxic politics' of the international climate change fora that have 'led Parties to experiment, innovate and improvise to reach agreement' (p. 46). The chapter is a detailed documentation of the various astute steps taken by those with procedural powers within the negotiation processes to maintain momentum and avoid the derailment by 'proxy wars' (p. 46). Rajamani highlights how some Parties have used the agenda setting process to introduce controversial issues as a delaying tactic citing India's inclusion in the Durban conference agenda of 'multilateral trade measures', 'intellectual property rights' and 'equitable access to sustainable development' (p. 48). She highlights how from setting a negotiating mandate to the establishment of (pre) negotiating bodies and processes spaces are created within which power plays out in multiple forms. Following on Rajamani highlights more recent initiatives by negotiators to maintain momentum when difficulties arise in the negotiations process. These initiatives include 'huddles', which were a preferred replacement for the "Friends of the Chair", a strategy that fell into disrepute after the 2009 Copenhagen COP. A 'huddle' is a 'spontaneous(ly) engineered public group that forms to resolve outstanding issues. One formed at the end of Durban in 2011 and lasted over 30 hours to resolve outstanding issues on the outcomes's legal form. Although 'seemingly

spontaneous, democratic and transparent Rajamani is not a supporter of huddles. She argues they can exclude according to privilege and power but even down to physical strength and height. The implications these undocumented processes have on the negotiations process, which have limited participation, are not critically analysed by Rajamani.

Chapter III covers a core issue in the UN climate change regime: balancing legal bindingness, prescriptiveness, and normative commitments (soft law). Rajamani argues that the core shift has occurred from an essentially legally binding top-down Kyoto Protocol to a self-determined voluntarist nationally determined contributions under the Paris Agreement. The legal nature of COP outcomes is always a source of great conflict within negotiations. Rajamani documents the processes and procedures often employed to settle the language used in negotiation Mandates for an agreed legal outcome. Usually parties agree to adopt a spectrum of legality between hard law and soft law (p. 104). Rajamani carefully demonstrates how a provision's legal character depends on its location within a text, who it applies to, the underlying normative framing, and the language used, whether it is 'shall' or 'should' for example (p. 111). Procedural obligations such as reporting requirements under the transparency framework are recognised as critical for extending the legally binding reach of the Paris Agreement given the voluntarist nature of the parties Nationally Determined Contributions. There is a dynamic interplay between the harder legally bindingness and the softer normative language, which creates a foundation for due diligence. The due-diligence dimension and its importance for the reach of the international climate change law are taken up in chapter V. Before that, Rajamani turns to address the importance of differentiation as a principle and how it is embedded within the UN international climate change regime.

In chapter IV, Rajamani focuses on differentiation. This is the most standalone chapter in the book. This is largely due to Rajamani being a leading expert on differentiation in international climate change law who has regularly written about the nuanced shifts occurring in decisions adopted at the annual COPs. The chapter begins with an eleven-page analysis of the principle of common but differentiated responsibilities and respective capabilities in light of different national circumstances (CBDRNC). Rajamani identifies a move away from 'prescriptive differentiation based on the categories of Parties, in particular the Annexes, in the Paris Agreement as a major step in the evolution of the UN climate change regime. The move meant that the deeply contentious issue of burden sharing between nations' was side-stepped (p. 182). The prescriptive approach set out in the UNFCCC, and continued in the Kyoto Protcol, had led to tensions, especially between the US and leading emerging economies such

as China and India for years. It was a major achievement to change the nature of differentiation to one which is more flexible. Yet, there remains conventional conditional differentiation for finance, technology transfer, and capacity building within the Paris Agreement. These will be a source of ongoing controversy within subsequent COPs, especially with future efforts to increase the ambition of Nationally Determined Contributions, especially if there is a failure by developed countries to deliver funding, transfer technology and build capacity.

The final chapter (V) focuses on delivering on the promise of the international climate change regime. Particular emphasis is paid to the question of whether the Paris Agreement's procedural mechanisms, the transparency framework, global stocktake and reporting, will create legal due diligence avenues which could be exploited by lawyers. Rajamani quotes the International Tribunal Law of the Sea (ITLOS) Seabed Mining Advisory Opinion stating that 'due diligence is a variable concept. [that] may change over time, as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge. It may also change in relation to the risks involved in the activity' (p. 217). It is due diligence's dynamic nature which leaves the concept open to interpretation, creating space for challenging states and businesses through the courts and lobbying for more ambitious climate change law and policy. For Rajamani this is the Paris Agreement's fulcrum in action. She highlights the point by referring to several recent climate litigation cases at the domestic level as governments are held to account for failing to uphold the Paris Agreement targets in their national policy. In addition, the scope of strategic climate change litigation is now extending to cover business operations, most notably the recent decision in the Netherland's against Royal Dutch Shell, the fossil fuel company.[4]

There is no final chapter in this book that draws together and sets out exactly how the innovation and experimentation in the climate change regime 'has challenged the conceptual boundaries of international law and enriched the core of treaty law and practice' as claimed in the introduction. The book would have benefitted greatly from such a concluding chapter that brought together the core arguments and underscored the main messages of how the international climate change regime enriches treaty law.

4 For a commentary on the case see Harro van Asselt, Kati Kulovesi, Mikko Rajavuori, and Annalisa Savaresi, 'Shell-shocked: a watershed moment for climate litigation against fossil fuel companies', (The Centre for Climate Change, Energy and Environmental Law, 28 May 2021) <https://sites.uef.fi/cceel/shell-shocked-a-watershed-moment-for-climate-litigation-against-fossil-fuel-companies/> last accessed on 09/June/2021.

Nevertheless, Rajamani in this book provides valuable, scholarly contribution to examining the complex, highly politicised negotiation processes that have resulted in today's international climate change regime. It is a book that could only be written by someone with Rajamani's knowledge and expertise from years of following the UN climate change process. The book is clearly intended to be for international legal scholars, practitioners as well as diplomats. However, any university student taking an international climate change law module would benefit from reading the it.

The book is by no means the final word on the legal opportunities that the Paris Agreement and the international climate change regime creates as a whole. Yet, it provides the reader with an appreciation of how processes and procedures can be skillfully used to weave a web of legal obligations and create a non-legal normative framework to balance differentiation in a way that opens opportunities in multilevel, transnational law and policy to drive transformations necessary to address the planetary ecological crises in a multipolar world.

Feja Lesniewska
SOAS University of London