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# Environmental Justice, Human Rights, and the Global South

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# Environmental Justice, Human Rights, and the Global South

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## Introduction

From the Ogoni people devastated by oil drilling in Nigeria to the Inuit and other indigenous populations threatened by climate change, communities disparately burdened by environmental degradation are increasingly framing their demands for environmental justice in the language of human rights. Domestic and international tribunals have concluded that failure to protect the environment may violate a variety of human rights (including the rights to life, health, property, and privacy; the collective rights of indigenous peoples to their ancestral lands and resources; and the right to a healthy environment).

While the advantages and disadvantages of human rights-based approaches to environmental protection continue to be debated in the scholarly literature,<sup>1</sup> there is a dearth of research regarding the impact on North-South power relations of the evolving environmental human rights regime.<sup>2</sup> Some scholars have questioned the utility of the human rights framework given the “diminished governance capacity of Third World states, which is the result of years of intervention by international law and international financial institutions.”<sup>3</sup> They remind us that the lending practices of the International Monetary Fund (IMF) and the World Bank as well as international trade and investment agreements have impaired the ability of Southern states to comply with human rights norms.<sup>4</sup> Other scholars have expressed doubts about the ability of human rights law to adequately articulate and advance the aspirations and resistance strategies of diverse grassroots social justice movements, and

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1. See, e.g., Rebecca Bratspies, *Do We Need a Human Right to a Healthy Environment?*, 13 SANTA CLARA J. INT'L L. 31 (2015); Justice Susan Glazebrook, *Human Rights and the Environment*, 40 VICT. U. WELLINGTON L. REV. 293 (2009); Alan Boyle, *Human Rights or Environmental Rights? A Reassessment*, 18 FORDHAM ENVTL. L. REV. 471 (2007); Michael Burger, *Bi-Polar and Polycentric Approaches to Human Rights and the Environment*, 28 COLUM. J. ENVTL. L. 371 (2003).
  2. This article uses the terms *North* and *South* to distinguish wealthy industrialized nations (including the United States, Canada, Australia, New Zealand, Japan, and the members of the European Union) from the generally less prosperous nations of Asia, Africa, and Latin America. The global South shares a history of Northern economic and political domination that prompted Southern nations to join forces as a negotiating bloc (the Groups of 77 plus China) to demand greater equity in international trade law and international environmental law. The article recognizes the heterogeneity of the countries that comprise the global South; the existence of an elite economic and political class in the South (the North in the South), as well as socially and economically subordinated communities in the North (the South in the North); and the growing South-South economic and environmental conflicts, including disagreements over climate policy and over foreign acquisition of Southern agricultural lands (the so-called “land grabs”). Nevertheless, the North-South framework remains a useful tool for mobilizing collective resistance to an international economic order that perpetuates poverty, inequality, and widespread environmental degradation.
  3. Penelope Simons, *International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights*, 3 J. HUM. RTS. & ENV'T 5, 40 (2012).
  4. *Id.* at 19-29, 40.

have warned about the susceptibility of the human rights discourse to cooptation by powerful states to advance their own economic and political interests.<sup>5</sup> This article attempts to fill the gap in the scholarly literature by examining the promise and the peril of environmental human rights as a means of challenging environmental injustice within nations as well as the North-South dimension of environmental injustice.<sup>6</sup>

The article is divided into four parts. Part I defines the term *environmental justice*, explains its application to environmental inequities within and between nations, and discusses the evolution of environmental human rights. Part II examines the economic roots of environmental injustice from the colonial period to the present. Part III analyzes the role of international law in justifying the conquest of nature and the subordination of non-European peoples. Part IV identifies the limitations of environmental human rights as a means of combating environmental injustice, and proposes ways of remedying these defects. The article concludes that there is a tension between human rights discourse as an instrument of grassroots resistance and its appropriation by Northern states to reinforce North-South economic and political dominance. When human rights are incorporated into international legal instruments and institutions, they become embedded in structures that may constrain their transformative potential and reproduce North-South power imbalances. Scholars and practitioners should be mindful of these tensions in order to maximize the emancipatory potential of environmental human rights and to advocate effectively on behalf of disparately burdened nations and communities.

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5. See generally Balakrishnan Rajagopal, *Counter-Hegemonic International Law: Re-thinking Human Rights and Development as a Third World Strategy*, 27 THIRD WORLD Q. 767 (2006) [hereinafter Rajagopal, *Counter-Hegemonic International Law*]; Balakrishnan Rajagopal, *Culture, Resistance, and the Problems of Translating Human Rights*, 41 TEX. INT'L L.J. 419 (2006) [hereinafter Rajagopal, *Translating Human Rights*].
  6. For an introduction to the North-South dimension of environmental justice and its implications for international environmental law, international economic law, and international human rights law, see Carmen G. Gonzalez, *Environmental Justice and International Environmental Law*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 77, 78 (Shawkat Alam et al. eds., 2012) [hereinafter Gonzalez, *Environmental Justice*]. In examining the utility of environmental human rights as a means of resisting environmental injustice, this article owes an immense debt to the critiques of international law articulated by scholars associated with the Third World Approaches to International Law (TWAIL) movement. See generally Antony Anghie, *What is TWAIL: Comment*, 94 AM. SOC'Y INT'L L. PROC. 39 (2000); James Gathii, *TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography*, 3 TRADE L. & DEV. 26 (2011); Makau Mutua, *What is TWAIL?*, 94 AM. SOC'Y INT'L L. PROC. 31 (2000); Obiora C. Okafor, *Critical Third World Approaches to International Law: Theory, Methodology, or Both?*, 10 INT'L COMMUNITY L. REV. 371 (2008).

## I. Environmental Justice and the North-South Divide

Global economic activity exerts relentless pressure on the planet's ecological systems and threatens the health and well-being of present and future generations. Despite the proliferation of legal instruments to combat environmental degradation, the global economy continues to exploit natural resources at unsustainable rates while intensifying inequality within and among nations.<sup>7</sup>

The leading cause of global environmental degradation is the profligate consumption of the planet's resources by its wealthiest inhabitants, most of who reside in the global North or in the mega-cities of the global South.<sup>8</sup> The richest twenty percent of the world's population consumes roughly eighty percent of the planet's economic output,<sup>9</sup> and generates ninety percent of its hazardous waste.<sup>10</sup> From colonialism to the present, the North's appropriation of the South's natural resources in order to fuel its economic expansion has generated harmful economic and environmental consequences, trapping Southern nations in vicious cycles of poverty and environmental degradation, and producing global environmental problems (such as climate change and biodiversity loss) that will constrain the development options of generations to come.<sup>11</sup> Indeed, much of the ecological harm in the global South is due to export-oriented production rather than domestic consumption and to unsustainable natural resource exploitation by transnational corporations.<sup>12</sup>

The adverse impacts of global environmental degradation are borne disproportionately by the planet's most vulnerable human beings, including the rural and urban poor, racial and ethnic minorities, women, and indigenous

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7. Rep. of the U.N. Millennium Ecosystem Assessment, *Ecosystems and Human Well-Being: Synthesis*, 1-24 (2005), available at <http://www.unep.org/maweb/documents/document.356.aspx.pdf>; see also U. N. Conference on Trade and Dev., *Trade and Development Report 2012*, 31, U.N. Doc. UNCTAD/TDR/2012 (2012) (observing that "economic inequality has re-emerged as a central policy concern due to rising global inequality over the course of the past three decades).
  8. See U.N. Millennium Ecosystem Assessment, *supra* note 7, at 1-24.
  9. See William E. Rees & Laura Westra, *When Consumption Does Violence: Can There be Sustainability and Environmental Justice in a Resource-Limited World?*, in JUST SUSTAINABILITIES: DEVELOPMENT IN AN UNEQUAL WORLD 99, 110-12 (Julian Agyeman et al. eds., 2003); DEVELOPMENT DATA GROUP, THE WORLD BANK, 2008 WORLD DEVELOPMENT INDICATORS 4 (2008), available at <http://data.worldbank.org/sites/default/files/wdi08.pdf> (last visited Jan. 3, 2015).
  10. See DAVID N. PELLOW, RESISTING GLOBAL TOXICS: TRANSNATIONAL MOVEMENTS FOR ENVIRONMENTAL JUSTICE 8 (2007).
  11. See Gonzalez, *Environmental Justice*, *supra* note 6, at 80-84.
  12. See Rees & Westra, *supra* note 9, at 110; Julian Agyeman et al., *Joined-up Thinking: Bringing Together Sustainability, Environmental Justice, and Equity*, in JUST SUSTAINABILITIES: DEVELOPMENT IN AN UNEQUAL WORLD 1, 4.

peoples.<sup>13</sup> In both the North and the South, the communities most burdened by crushing poverty, ill health, political disempowerment, and social exclusion are the ones most exposed to air and water pollution and most affected by climate change and other global environmental problems.<sup>14</sup>

In the United States, the concentration of environmental hazards in low-income communities and communities of color sparked a vibrant environmental justice movement dedicated to the defense of disparately impacted communities.<sup>15</sup> Environmental justice activists have been at the forefront of struggles over the siting of hazardous industries in low-income communities of color; access to parks and open space; farmworker exposure to pesticides; inequities in disaster preparedness and emergency response; workplace health and safety; access to healthy and affordable food; and the enhancement of tribal regulatory authority over indigenous lands.<sup>16</sup>

Environmental justice scholars and advocates identified four distinct aspects of environmental injustice experienced by historically marginalized communities. They alleged (1) distributive injustice arising from disproportionate exposure to environmental hazards and limited access to environmental amenities, (2) procedural unfairness caused by exclusion from environmental decision-making, (3) corrective injustice due to inadequate enforcement of environmental legislation, and (4) social injustice because environmental degradation is inextricably intertwined with deeper structural ills, such as poverty and racism.<sup>17</sup>

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13. See Duncan McLaren, *Environmental Space, Equity and the Ecological Debt*, in JUST SUSTAINABILITIES: DEVELOPMENT IN AN UNEQUAL WORLD 19, 21; Gonzalez, *Environmental Justice*, *supra* note 6, at 78, 83-84, 96.
  14. See U.N. Dev. Program (UNDP), *Human Development Report 2011: Sustainability and Equity: A Better Future for All*, 4-8, 50-60 (2011), available at [http://www.undp.org/content/dam/undp/library/corporate/HDR/2011%20Global%20HDR/English/HDR\\_2011\\_EN\\_Complete.pdf](http://www.undp.org/content/dam/undp/library/corporate/HDR/2011%20Global%20HDR/English/HDR_2011_EN_Complete.pdf); Rees & Westra, *supra* note 9, at 100.
  15. See LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 19-33 (2001); Robert D. Bullard, *Environmental Justice in the Twenty-First Century*, in THE QUEST FOR ENVIRONMENTAL JUSTICE: HUMAN RIGHTS AND THE POLITICS OF POLLUTION 19, 19-25 (Robert D. Bullard ed., 2005).
  16. See Daniel R. Farber & Deborah McCarthy, *Neo-Liberalism, Globalization and the Struggle for Ecological Democracy: Linking Sustainability and Environmental Justice*, in JUST SUSTAINABILITIES: DEVELOPMENT IN AN UNEQUAL WORLD 38, 45-53; Carmen G. Gonzalez, *Genetically Modified Organisms and Justice: The International Environmental Justice Implications of Biotechnology*, 19 GEO. INT'L ENVTL. L. REV. 583, 589-90 (2007) [hereinafter Gonzalez, *Genetically Modified Organisms*]; Alison Hope Alkon & Julian Agyeman, *Introduction: The Food Movement as Polyculture*, in CULTIVATING FOOD JUSTICE: RACE, CLASS AND SUSTAINABILITY 1, 4-10 (Alison Hope Alkon & Julian Agyeman eds., 2011); Dean B. Suagee, *Tribal Self-Determination and Environmental Federalism: Cultural Values as a Force for Sustainability*, 3 WIDENER L. SYMP. J. 229, 236-39 (1998).
  17. See Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENVTL. L. REP. 10681, 10681-82, 10688 (2000).

Environmental justice struggles are taking place in both the global North and global South.<sup>18</sup> Among the most prominent are the struggles of the indigenous peoples of the Arctic and of the Pacific Islands for climate justice,<sup>19</sup> the resistance of local and indigenous communities against environmentally devastating oil drilling,<sup>20</sup> and the challenge by transnational agrarian movements (such as La Vía Campesina) to the corporate-dominated free trade policies that undermine rural livelihoods, exacerbate poverty and hunger, and degrade the environment.<sup>21</sup>

Many scholars and legal practitioners have framed the demands of the environmental justice movements nationally and globally in the language of human rights.<sup>22</sup> Although most human rights treaties do not explicitly recognize the right to a healthy environment, global and regional human rights tribunals have determined that inadequate environmental protection may violate the rights to life, health, food, water, property, privacy, and the collective rights of indigenous peoples to their ancestral lands and resources.<sup>23</sup> Human rights violations caused by environmental degradation have been found to infringe the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the European Convention for the Protection of Human Rights and Fundamental Freedoms; and the American Convention on Human Rights despite the absence of explicit environmental provisions in these treaties.<sup>24</sup> In addition, three regional human rights treaties (the African Charter on Human and Peoples' Rights, the San Salvador Protocol to the American Convention on Human Rights, and the Arab

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18. See GORDON WALKER, ENVIRONMENTAL JUSTICE: CONCEPTS, EVIDENCE, AND POLITICS 24-25 (2012).
  19. See Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1625, 1633-46 (2007).
  20. See generally ANTHONY BEBBINGTON ET AL., SOCIAL CONFLICT, ECONOMIC DEVELOPMENT AND EXTRACTIVE INDUSTRY: EVIDENCE FROM SOUTH AMERICA (Anthony Bebbington ed., 2012); PATRICIA I. VASQUEZ, OIL SPARKS IN THE AMAZON: LOCAL CONFLICTS, INDIGENOUS POPULATIONS, AND NATURAL RESOURCES (2014); Tunde Agbola & Moruf Alabi, *Political Economy of Petroleum Development, Environmental Injustice and Selective Victimization: A Case Study of the Niger Delta Region of Nigeria*, in JUST SUSTAINABILITIES: DEVELOPMENT IN AN UNEQUAL WORLD 269, 269-88.
  21. See Philip McMichael, *Peasants Make Their Own History, But Not Just as They Please*, in TRANSNATIONAL AGRARIAN MOVEMENTS CONFRONTING GLOBALIZATION 37, 42-47 (Saturnino M. Borras Jr. et al. eds., 2008).
  22. See Agyeman et al., *supra* note 12, at 10-11.
  23. See John H. Knox, *Climate Change and Human Rights Law*, 50 VA. J. INT'L L. 163, 168-78 (2009) [hereinafter Knox, *Climate Change*]; Dinah Shelton, *The Environmental Jurisprudence of International Human Rights Tribunals*, in LINKING HUMAN RIGHTS AND THE ENVIRONMENT 1, 11-12 (Romina Picoletti & Jorge Daniel Taillant eds., 2003).
  24. See SVITLANA KRAVCHENKO & JOHN E. BONINE, HUMAN RIGHTS AND THE ENVIRONMENT: CASES, LAW AND POLICY 3-4 (2008).

Charter on Human Rights) and one human rights declaration (the ASEAN Declaration on Human Rights) include the substantive right to a healthy environment.<sup>25</sup> Furthermore, the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters recognizes procedural environmental rights.<sup>26</sup> For purposes of this article, the term *environmental human rights* refers collectively to the right to a healthy environment, procedural environmental rights, and the broad range of substantive human rights that may be violated by the failure to protect the environment.<sup>27</sup>

The protection of environmental human rights by regional and international human rights institutions has prompted the incorporation of environmental human rights in national constitutions, legislation, and judicial decisions.<sup>28</sup> Currently, at least 147 national constitutions explicitly reference environmental rights and/or environmental responsibilities.<sup>29</sup> Clearly, human rights law has been and continues to be an important weapon in the struggle for environmental justice.

While environmental law scholars and practitioners have harnessed the power of human rights law to advocate for the individuals and communities that have been harmed by environmental degradation, North-South economic and political disparities pose significant challenges to the achievement of environmental justice within and between nations.<sup>30</sup> North-South environmental inequities, like their domestic counterparts, manifest themselves in the form of distributive, procedural, corrective, and social injustice. Although the North has contributed disproportionately to global environmental degradation and has reaped the associated economic benefits, the South

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25. See DAVID R. BOYD, *THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT* 84-88 (2012); ASEAN Human Rights Declaration, ASSOCIATION OF SOUTHEAST ASIAN NATIONS, art. 28 (Nov. 19, 2012), <http://www.asean.org/news/asean-statement-communiques/item/asean-human-rights-declaration>.

26. See Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 38 I.L.M. 517 (entered into force Oct. 30, 2001).

27. A comprehensive description of the substantive and procedural environmental human rights under existing international law is set forth in the 14 reports submitted to the UN Human Rights Council (UNHRC) by John Knox, the Independent Expert on Human Rights and the Environment. See Independent Expert, *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*, submitted to U.N. Human Rights Council, U.N. Doc. A/HRC/25/53 (Dec. 30, 2013) (by John H. Knox) (summarizing the 14 reports on human rights and the environment).

28. See BOYD, *supra* note 25, at 78, 106-07.

29. *Id.* at 47.

30. See Gonzalez, *Environmental Justice*, *supra* note 6, at 80-84.



experiences distributive injustice in the form of disparate exposure to environmental hazards. This disparity is due to the vulnerable geographic locations and limited regulatory capabilities of many Southern nations, the ongoing unsustainable extraction of the South's natural resources to satisfy Northern consumers, and the transfer of polluting industry and hazardous wastes from the North to the South.<sup>31</sup> North-South relations are also plagued by procedural injustice because the North dominates decision-making in the World Bank, the International Monetary Fund (IMF), the World Trade Organization (WTO), and even in multilateral environmental and human rights treaty negotiations due to its greater economic and political influence.<sup>32</sup> Corrective injustice is perhaps most evident in the inability of small island nations to obtain redress for the imminent annihilation of their lands due to climate-change-induced sea level rise.<sup>33</sup> Finally, North-South environmental conflicts are inextricably intertwined with colonialism and with post-colonial trade, aid, finance, and investment policies that impoverished Southern nations and enabled the North to exploit the South's resources while externalizing the social and environmental costs.<sup>34</sup>

An additional challenge to the achievement of environmental justice is the imperial legacy of international law. From the colonial period to the present, international law has generated a series of doctrines that justified Northern political, economic, and military interventions in the South in order to achieve "civilization" or "development" in accordance with supposedly universal European norms.<sup>35</sup> Human rights law is part of this tradition. Human rights law is based on the natural law notion that human beings possess certain inalienable, permanent, and fundamental rights by virtue of their humanity, and that these universal rights "obtain in all places and at all times regardless of what the positive law provides."<sup>36</sup> Southern scholars have questioned the universal aspirations of human rights law in a multicultural world and have pointed out that international law has historically been used by the North to

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31. See RUCHI ANAND, INTERNATIONAL ENVIRONMENTAL JUSTICE: A NORTH-SOUTH DIMENSION 128-30 (2004); WALKER, *supra* note 18, at 95-98; Carmen G. Gonzalez, *Beyond Eco-Imperialism: An Environmental Justice Critique of Free Trade*, 78 DENV. U. L. REV. 981, 987-1000 (2001) [hereinafter Gonzalez, *Beyond Eco-Imperialism*].
  32. See ANAND, *supra* note 31, at 132-33; PATRICK HOSSAY, UNSUSTAINABLE: A PRIMER FOR GLOBAL ENVIRONMENTAL AND SOCIAL JUSTICE 191-98 (2006); RICHARD PEET, UNHOLY TRINITY: THE IMF, WORLD BANK AND WTO 200-04 (2003).
  33. See Maxine Burkett, *Climate Reparations*, 10 MELB. J. INT'L L. 509, 513-20 (2009).
  34. See Gonzalez, *Genetically Modified Organisms*, *supra* note 16, at 595-602.
  35. See generally ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2004) [hereinafter ANGHIE, IMPERIALISM].
  36. DONALD K. ANTON & DINAH L. SHELTON, ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS 121 (2011).

justify the conquest and dispossession of Southern peoples.<sup>37</sup> Most recently, international law has been deployed to legitimize military intervention and economic reconstruction in places as diverse as Somalia, Kosovo, Iraq, and Afghanistan in furtherance of Northern economic and political interests.<sup>38</sup> In the words of Makau Mutua, “[i]nternational human rights fall within the historical continuum of the European colonial project in which whites pose as the saviors of a benighted and savage non-European world.”<sup>39</sup>

The remainder of this article will examine the economic roots of environmental injustice and the role of international law in the domination of nature and of non-European peoples in order to assess the emancipatory promise of environmental human rights law and discourse. Rather than restate and supplement the existing scholarship on the advantages and disadvantages of human rights-based approaches to environmental protection, the article will serve as a cautionary note—reminding the reader that the discourse of human rights is embedded in a larger canon that has often disserved the interests of the global South and facilitated the pillage of the planet’s finite resources.

## **II. The Colonial and Post-Colonial Origins of Environmental Injustice**

The roots of contemporary environmental injustice lie in colonialism. The European colonization of Asia, Africa, and the Americas devastated indigenous societies and wreaked havoc on the flora and fauna of the colonized territories through logging, mining, and plantation agriculture.<sup>40</sup> European colonization transformed self-sufficient subsistence economies into economic outposts of Europe that produced agricultural commodities, minerals and timber, and purchased manufactured goods.<sup>41</sup> It also paved the way for contemporary social and economic inequality by dispossessing indigenous farmers, uprooting and enslaving millions of Africans, and importing indentured workers to provide cheap labor for their colonial overlords.<sup>42</sup>

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37. See UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* 52 (2006).

38. See Rajagopal, *Counter-Hegemonic International Law*, *supra* note 5, at 770-71; M. Sornarajah, *Power and Justice: Third World Resistance in International Law*, 2006 SING. Y.B. INT’L L. 19, 46-55.

39. Makau Mutua, *The Complexity of Universalism in Human Rights*, in *HUMAN RIGHTS WITH MODESTY* 51, 61 (András Sajó ed., 2004).

40. See CLIVE PONTING, *A GREEN HISTORY OF THE WORLD: THE ENVIRONMENT AND THE COLLAPSE OF GREAT CIVILIZATIONS* 130-36 (1991).

41. See *id.* at 194-212.

42. See *id.* at 130-40, 196-99, 203-12.

The colonial enterprise was justified by notions of European cultural and racial superiority that persist, in one form or another, to the present day. Europeans regarded the native populations as inferior and asserted a moral obligation to “civilize” the “savages” by compelling them to abandon their local cultures and assimilate to European ways.<sup>43</sup> In the post-colonial period, Southern elites, deeply influenced by Eurocentric ideologies, subjugated their own indigenous and minority populations in order to “modernize” and “develop” them.<sup>44</sup> Despite the end of formal colonialism, the dismantling of apartheid, and the adoption of treaties prohibiting racial discrimination, racial hierarchies remain deeply entrenched in both the global North and the global South, as evidenced by, *inter alia*, widespread ethnic conflicts (including the genocide in Rwanda), the social and economic legacy of apartheid in South Africa, hate crimes against people of color and immigrants in Europe and the United States, and the subordination of Afro-descendant and indigenous populations in the Americas.<sup>45</sup>

The achievement of political independence by the Latin American colonies in the 19<sup>th</sup> century and by the African and Asian colonies in the middle of the 20<sup>th</sup> century did not significantly alter the South’s crippling dependence on a world economy dominated by Europe and the United States.<sup>46</sup> Because the terms of trade consistently favored manufactured goods over primary commodities, the nations of the global South found themselves on an economic treadmill that prevented them from obtaining the capital to diversify or industrialize their economies.<sup>47</sup> Efforts to boost national earnings by increasing the production of

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43. See Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, 12 AM. U. J. INT’L L. & POL’Y 903, 930-35 (1997).

44. See ANGHIE, IMPERIALISM, *supra* note 35, at 205-07; Rodolfo Stavenhagen, *Indigenous Peoples and the State in Latin America: An Ongoing Debate*, in MULTICULTURALISM IN LATIN AMERICA: INDIGENOUS RIGHTS, DIVERSITY, AND DEMOCRACY 24-26 (Rachel Sieder ed., 2002); Joel Ngugi, *The Decolonization-Modernization Interface and the Plight of Indigenous Peoples in Post-Colonial Development Discourse in Africa*, 20 WIS. INT’L L.J. 297, 324-26 (2002).

45. See generally RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION (2nd ed. 2012) (providing an introduction to study of racial hierarchies in the United States); TANYA KATERI HERNANDEZ, RACIAL SUBORDINATION IN LATIN AMERICA: THE ROLE OF THE STATE, CUSTOMARY LAW, AND THE NEW CIVIL RIGHTS RESPONSE (2013) (analyzing ethnic violence around the globe); DONALD L. HOROWITZ, THE DEADLY ETHNIC RIOT (2001); PETER WADE, RACE AND ETHNICITY IN LATIN AMERICA (2nd ed. 2010) (examining the changing perspectives on blackness and indigeneity in Latin America); Hope Lewis, *Transnational Dimensions of Racial Identity: Reflecting on Race, the Global Economy, and the Human Rights Movement at 60*, 24 MD. J. INT’L L. 296, 298-99 (2009) (describing the advances and setbacks in the quest for racial justice over the past six decades).

46. See PONTING, *supra* note 40, at 213-14.

47. See Carmen G. Gonzalez, *Deconstructing the Mythology of Free Trade: Critical Reflections on Comparative Advantage*, 17 BERKELEY LA RAZA L.J. 65, 78-80 (2006) [hereinafter Gonzalez, *Deconstructing the Mythology*].

minerals, timber, and agricultural commodities generally created a glut of primary commodities on global markets that depressed prices, reduced Southern export earnings, and only reinforced Southern economic vulnerability.<sup>48</sup> The South's economic dependency enabled the North to exploit Southern resources at prices that did not reflect the social and environmental consequences of export production.<sup>49</sup> As historian Clive Ponting observes:

Political and economic control of a large part of the world's resources enabled the industrialized world to live beyond the constraints of its immediate resource base. Raw materials were readily available for industrial development, food could be imported to supply a rapidly rising population and a vast increase in consumption formed the basis for the highest material standard of living ever achieved in the world. Much of the price of that achievement was paid by the population of the Third World in the form of exploitation, poverty, and human suffering.<sup>50</sup>

In the decades after the Second World War, the nations of the global South formed coalitions to reform the international economic system by passing resolutions at the United Nations General Assembly, where they held a numerical majority.<sup>51</sup> They sought to assert control over their economic destinies by advancing the doctrine of permanent sovereignty over natural resources and the right to nationalize the Northern companies exploiting these resources.<sup>52</sup> They mobilized to secure a New International Economic Order (NIEO) that would enhance Southern participation in global governance and provide debt forgiveness, special trade preferences, and the stabilization of export prices for primary commodities.<sup>53</sup>

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48. PONTING, *supra* note 40, at 223.

49. See JOAN MARTINEZ-ALIER, *THE ENVIRONMENTALISM OF THE POOR: A STUDY OF ECOLOGICAL CONFLICTS AND VALUATION* 214 (2002). Economist Joan Martinez-Alier refers to this trade among rich and poor countries as "ecologically unequal exchange," which he defines as

[T]he fact of exporting products from poor regions and countries at prices that do not take into account local externalities caused by these exports or the exhaustion of natural resources in exchange for goods and services from richer countries. The concept focuses on the poverty and lack of political power of the exporting region, to emphasize the idea of lack of alternative options, in terms of exporting other renewable goods with lower local impacts.

*Id.*

50. PONTING, *supra* note 40, at 223.

51. See LAVANYA RAJAMANI, *DIFFERENTIAL TREATMENT IN INTERNATIONAL LAW* 17-18 (2006).

52. See Ruth Gordon & Jon H. Sylvester, *Deconstructing Development*, 22 WIS. INT'L L.J. 1, 53-56 (2011).

53. See RAJAMANI, *supra* note 51, at 17-18; Ruth Gordon, *The Dawn of a New International Economic Order?*, 72 LAW & CONTEMP. PROBS. 131, 142-45 (2009) [hereinafter Gordon, *The Dawn*]; Gordon & Sylvester, *supra* note 52, at 56-68.

The debt crisis of the 1980s hastened the demise of the NIEO and facilitated the rise of the free market economic model known as the Washington Consensus.<sup>54</sup> In order to secure debt repayment assistance from the IMF and the World Bank, debtor nations in the global South were required to adopt a one-size-fits-all model of economic development that included deregulation, privatization, trade liberalization, slashing social safety nets, and the intensification of export production to service the foreign debt.<sup>55</sup> These policies increased poverty and inequality; reinforced the South's economically disadvantageous dependence on the export of raw materials; bankrupted small farmers by putting them in direct competition with highly subsidized transnational agribusiness; sharply accelerated rural-to-urban migration; and enabled transnational corporations to dominate many of the newly privatized economic sectors.<sup>56</sup>

The export-driven economic reforms mandated by the IMF and the World Bank accelerated the North's overconsumption of the planet's resources by increasing the supply and driving down the price of agricultural products, minerals, and timber.<sup>57</sup> Indebted, impoverished, and desperate for foreign capital, Southern nations also became a convenient dumping ground for hazardous wastes from the global North and a magnet for polluting industry, including the mining and petroleum extraction industries that had exploited the South's resources for generations.<sup>58</sup> Indeed, former World Bank chief economist Lawrence Summers wrote an infamous memorandum advocating the relocation of polluting industries from the North to the South.<sup>59</sup>

Having industrialized by appropriating the South's resources without regard to the environmental and social costs (including the release of greenhouse gases in the atmosphere), the North maintains an ecological footprint that dwarfs that of the South and has brought the planet's ecosystems to the brink of collapse.<sup>60</sup> A country's ecological footprint is the area of land and water required to produce

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54. See Gordon, *The Dawn*, *supra* note 53, at 145-50.

55. *Id.*; Gonzalez, *Environmental Justice*, *supra* note 6, at 82.

56. See Gonzalez, *Environmental Justice*, *supra* note 6, at 82.

57. *Id.*

58. See generally BRIAN C. BLACK, *CRUDE REALITY: PETROLEUM IN WORLD HISTORY* 43-66, 141-47, 200-06 (2012); PELLOW, *supra* note 10.

59. See *Let Them Eat Pollution*, *THE ECONOMIST*, Feb. 8, 1992, at 66. The memorandum argued that the foregone income due to premature death and illness was less in lower-wage countries; that demand for a clean environment was lower in poor countries with high mortality; and that the marginal, incremental costs of pollution were lower in less contaminated areas (such as African countries) than in more heavily polluted countries. The Summers memorandum generated outraged responses from environmentalists and from Southern governments. See *id.*

60. See Rees & Westra, *supra* note 9, at 109-12; U.N. Millennium Ecosystem Assessment, *supra* note 7, at 1-24.

the resources it consumes and to assimilate the wastes it generates.<sup>61</sup> While the average global per capita ecological footprint is 2.8 hectares, residents of the global North have an average per capita ecological footprint of 5 to 10 hectares.<sup>62</sup> By contrast, the South's average per capita ecological footprint is less than one hectare, and even China has a per capita ecological footprint of only 1.2 hectares.<sup>63</sup> Although the planet possesses approximately 12 billion productive hectares, the human population's total ecological footprint is almost 17 billion hectares.<sup>64</sup> This means that we are exceeding the planet's ecological carrying capacity, confirming that it is biophysically impossible for everyone in the world to enjoy the North's consumption-driven lifestyle. If we are to achieve sustainability and ensure an adequate standard of living for the world's poor, it is essential for the North to scale back its overconsumption of the planet's resources.<sup>65</sup>

Scholars and activists have argued that the global North owes an ecological debt to the countries and peoples of the global South for centuries of economic exploitation, decades of ill-advised "development" programs, and consumption patterns that have devastated the planet's ecosystems.<sup>66</sup> The North incurred this debt through "resource plundering, unfair trade, environmental damage and the free occupation of environmental space to deposit waste"<sup>67</sup> and through the displacement of Southern peoples and the destruction of their "natural heritage, culture and sources of sustenance."<sup>68</sup> Indeed, this ecological debt is one of the key manifestations of North-South environmental injustice. Before examining the role of environmental human rights in addressing these inequities, it is essential to discuss the complicity of international law in the perpetuation of North-South inequality.

### **III. International Law and the Peoples and Territories of the Global South**

International law played a prominent role in the subordination of the global South by providing the legal justification for the conquest of nature and of non-

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61. See Rees & Westra, *supra* note 9, at 109.

62. *Id.* at 110-11.

63. *Id.* at 110.

64. *Id.* at 111.

65. See Gonzalez, *Environmental Justice*, *supra* note 6, at 95-96.

66. See McLaren, *supra* note 13, at 30-32; Karin Mickelson, *Leading Toward a Level Playing Field, Repaying Ecological Debt, or Making Environmental Space: Three Stories About International Environmental Cooperation*, 43 OSGOODE HALL L.J. 137, 150-54 (2005).

67. ERIK PAREDIS ET AL., *THE CONCEPT OF ECOLOGICAL DEBT: ITS MEANING AND APPLICABILITY IN INTERNATIONAL POLICY* 7 (2008).

68. *Id.*

European peoples. Colonization and conquest were initially authorized by papal edicts from the time of the Crusades recognizing the right of Christians to seize the lands of non-Christians.<sup>69</sup> Under the influence of the 16<sup>th</sup> century Spanish theologian and jurist Francisco de Vitoria, the justifications for the conquest shifted to natural law. Vitoria argued that the indigenous peoples of the Americas were rational human beings bound by universal natural law and were therefore entitled to exercise ownership over their lands.<sup>70</sup> However, because the Indians' form of governance was deemed inferior to the universal (*i.e.*, European) standard, it was appropriate for the Spanish to intervene in their affairs as guardians or trustees.<sup>71</sup> Furthermore, if these "uncivilized" Indians violated natural law by refusing to allow the Spanish to travel on Indian lands, engage in commerce with them, or convert them to Christianity, then the Spanish were entitled to wage a "just war" against them, to enslave them, and to seize their lands.<sup>72</sup> Writing a century after Vitoria, Hugo Grotius endorsed Vitoria's conclusions, although he discarded the Christian mission as one of the justifications for a just war.<sup>73</sup>

The emergence of independent nation-states in Europe following the 1648 Treaty of Westphalia (which ended the Thirty Years' War and diminished the power of the Roman Catholic Church) produced new legal justifications for the colonial enterprise.<sup>74</sup> The 18<sup>th</sup> century Swiss diplomat Emmerich de Vattel declared that states represented the highest form of human association and were entitled to territorial integrity, exclusive jurisdiction over their internal affairs, and freedom from external intervention.<sup>75</sup> However, Vattel, like his predecessors, adopted Eurocentric models of the nation-state that excluded indigenous peoples.<sup>76</sup> Vattel proclaimed that peoples organized primarily along tribal or kinship lines without hierarchical, centralized authority and exclusive territorial domains were not entitled to the benefits of statehood and were therefore subject to conquest.<sup>77</sup> Vattel's writings also provided the intellectual justification for the doctrine of *terra nullius*, which was used extensively by the

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69. See ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: DISCOURSES OF CONQUEST* 13, 44-50 (1990).

70. See Francisco de Vitoria, *On the American Indians*, in VITORIA: POLITICAL WRITINGS 250-51 (Anthony Pagden & Jeremy Lawrence eds., 1991); Antony Anghie, *The Evolution of International Law: Colonial and Postcolonial Realities*, 27 *THIRD WORLD Q.* 739, 742-43 (2006) [hereinafter Anghie, *The Evolution of International Law*].

71. See Anghie, *The Evolution of International Law*, *supra* note 70, at 743.

72. *Id.* at 743-44; de Vitoria, *supra* note 70, at 278-86.

73. See S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 19 (2004).

74. *Id.* at 19-20.

75. *Id.* at 20-21.

76. *Id.* at 22-23.

77. *Id.*

European colonizers to dispossess nomadic hunter-gatherer societies on the ground that failure to cultivate the land rendered their territories “vacant” and therefore subject to appropriation by European invaders.<sup>78</sup>

In the 19<sup>th</sup> century, the apogee of colonialism, prominent legal scholars adopted explicitly racial and cultural criteria to designate certain states as civilized and therefore sovereign, and certain other states as uncivilized and therefore non-sovereign.<sup>79</sup> As Antony Anghie explains, “all non-European societies, regardless of whether they were regarded as completely primitive or relatively advanced, were outside the sphere of law, and European society provided the model which all societies had to follow if they were to progress.”<sup>80</sup> Acceptance into the family of nations required non-European states to transform their domestic legal systems and their methods of conducting foreign affairs to comport with European norms.<sup>81</sup>

International law was deeply influenced by scholars and philosophers of the European Enlightenment, who regarded non-European societies as “trapped in a state of nature,” and believed that the conquest of nature and the development of industry were key duties of all civilized nations.<sup>82</sup> John Westlake, a prominent 19<sup>th</sup> century international lawyer, argued that the division of the colonized territories among European nations was necessary to avoid armed conflict among civilized (white) states in their inevitable competition for the resources occupied by uncivilized (non-white) “natives.”<sup>83</sup> His rationale was as follows:

The inflow of the white race cannot be stopped where there is land to cultivate, ore to be mined, commerce to be developed, sport to enjoy, curiosity to be satisfied. If any fanatical admirer of savage life argued that whites ought to be kept out, he would only be driven to the same conclusion by another route, for a government on the spot would be necessary to keep them out. Accordingly, international law has to treat such natives as

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78. See STUART BANNER, *POSSESSING THE PACIFIC: LAND, SETTLERS, AND INDIGENOUS PEOPLE FROM AUSTRALIA TO ALASKA* 13-46, 163-230 (2007); KAREN ENGLE, *THE ELUSIVE PROMISE OF INDIGENOUS DEVELOPMENT: RIGHTS, CULTURE, STRATEGY* 21-24 (2010); EMER DE VATTEL, *THE LAW OF NATIONS* 128-30 (2008).

79. See ANGHIE, *IMPERIALISM*, *supra* note 35, at 52-90; Anghie, *The Evolution of International Law*, *supra* note 70, at 745.

80. ANGHIE, *IMPERIALISM*, *supra* note 35, at 62.

81. *Id.* at 84-86.

82. See Alex Geisinger, *Sustainable Development and the Domination of Nature: Spreading the Seed of the Western Ideology of Nature*, 27 B.C. ENVTL. AFF. L. REV. 43, 52-58 (1999); Usha Natarajan, *TWAIL and the Environment: The State of Nature, the Nature of the State, and the Arab Spring*, 14 OR. REV. INT'L L. 177, 192 (2012).

83. See ANAYA, *supra* note 73, at 27-28; JOHN WESTLAKE, *ARTICLES ON THE PRINCIPLES OF INTERNATIONAL LAW* 142-43 (1834).



uncivilized. It regulates, for the mutual benefit of civilized states, the claims which they make to sovereignty over the region, and leaves the treatment of the natives to the conscience of the state to which sovereignty is awarded, rather than sanction their interest being made an excuse the more for war between civilized claimants, devastating the region and the cause of suffering to the natives themselves.<sup>84</sup>

In short, international law rendered European cultural norms universal and justified European domination of nature and of non-European territories and peoples. In accordance with Westlake's logic, the European powers divided up the African continent after the Berlin Conference of 1884-85 in order to avoid open warfare among European states in their scramble for African colonies.<sup>85</sup> The European practice of drawing territorial boundaries without regard to the complex cultures and political organizations of African societies laid the groundwork for many of the conflicts that plague the African continent to this day.<sup>86</sup>

In the aftermath of the First World War, the League of Nations devised economic criteria to justify the continuation of the colonial enterprise.<sup>87</sup> Instead of relying on racial and cultural criteria, the League distinguished between the "advanced" nations of Europe and the "backward" territories to authorize the ongoing international supervision of the colonies of the defeated Ottoman Empire and Germany.<sup>88</sup> These "backward peoples" were placed under the tutelage of the League's Mandate Powers (generally Britain and France) until they were transformed into modern states capable of self-government.<sup>89</sup> The techniques developed under the Mandate System to supervise, measure, manage, and control the progress of the "backward territories" would later be re-deployed by the IMF and the World Bank to perpetuate systems of Northern domination of the global South in furtherance of yet another iteration of the North's "civilizing mission."<sup>90</sup>

After the Second World War, decolonization movements in the global South significantly altered the composition of the United Nations, and enabled the newly independent states to articulate legal doctrines designed to protect and

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84. WESTLAKE, *supra* note 83, at 142-43.

85. See ANGHIE, IMPERIALISM, *supra* note 35, at 90-91.

86. See generally Makau Mutua, *Why redraw the map of Africa? A moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113 (1995); see also Anghie, *The Evolution of International Law*, *supra* note 70, at 746.

87. See Anghie, *The Evolution of International Law*, *supra* note 70, at 746.

88. *Id.*

89. See *id.* at 746-48; Natsu Taylor Saito, *Decolonization, Development, and Denial*, 6 FLA. A&M U. L. REV. 1, 25-31 (2010).

90. See ANGHIE, IMPERIALISM, *supra* note 35, at 190-95; Saito, *supra* note 89, at 29-30.

enhance their hard-won sovereignty, including the collective right of all peoples to self-determination, the doctrine of permanent sovereignty over natural resources, and the right to development.<sup>91</sup> As North-South struggles shifted to international economic law, the South introduced new legal principles, such as the principle of special but differential treatment in international trade law, designed to reduce North-South economic disparities by providing more favorable treatment to Southern nations.<sup>92</sup> Differential treatment was also incorporated into international environmental law through the principle of common but differentiated responsibility, which imposes asymmetrical obligations on Northern and Southern states in recognition of the North's disproportionate contribution to global environmental degradation and its greater technological and financial resources.<sup>93</sup> The principle was operationalized in several treaties, including the Montreal Protocol on Substances that Deplete the Ozone Layer (which contains differential phase-out schedules for ozone-depleting substances for Northern and Southern countries) and the Kyoto Protocol to the United Nations Framework Convention on Climate Change (which exempts Southern nations from binding emission reduction obligations).<sup>94</sup>

Despite these innovations, Southern aspirations for a more equitable international order were thwarted by the hegemony of Northern economic development models premised on material accumulation, control of nature, unlimited economic growth, and rejection of indigenous knowledge, practices, and beliefs as obstacles to "modernization."<sup>95</sup> Rather than providing reparations for the harm caused by colonialism, the global North, in the decades following the Second World War, ascribed Southern poverty to "underdevelopment," and

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91. Saito, *supra* note 89, at 10-11; Dianne Otto, *Rethinking Universals: Opening Transformative Possibilities in International Human Rights Law*, 18 AUSTRALIAN Y.B. INT'L L. 1, 21 (1997).

92. See Gonzalez, *Environmental Justice*, *supra* note 6, at 87-89.

93. See *id.* at 90-92. Principle 7 of the Rio Declaration on Environment and Development articulates the principle of common but differential responsibility as follows:

States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit to sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. 1) (Aug. 12, 1992).

94. See Gonzalez, *Environmental Justice*, *supra* note 6, at 90-92.

95. See Natarajan, *supra* note 82, at 192-93; Gordon & Sylvester, *supra* note 52, at 13-17.

offered scientific and technical assistance to enable the South to “catch up.”<sup>96</sup> Development was portrayed as a universal aspiration and measured in Northern economic terms—primarily gross national product (GNP), later supplemented by reduction in poverty, hunger, and disease.<sup>97</sup> Encouraged to borrow money from Northern commercial banks to finance development projects, Southern states sought IMF and World Bank assistance when skyrocketing interest rates and spiking oil prices brought these debtor nations to the brink of default.<sup>98</sup> As a condition of debt relief, the IMF and the World Bank required debtor nations to implement structural adjustment programs that exacerbated poverty and inequality in the global South.<sup>99</sup> These programs required, *inter alia*, drastic cuts in government spending that deprived vulnerable populations of access to education, health care, and other social services, and sparked widespread popular protests.<sup>100</sup> Beginning in the 1990s, the World Bank responded to its critics by expanding its intervention in the global South to encompass poverty alleviation, environmental management, and a variety of rule of law programs designed to create a favorable climate for foreign investment.<sup>101</sup> In short, the development discourse justified the North’s continuing intervention in the South and promoted the consumption-oriented lifestyle of the United States as the new standard of civilization to which all should aspire.<sup>102</sup>

Underlying the civilized/uncivilized, advanced/backward, and developed/developing dichotomy was the Eurocentric notion that civilization and humanity are measured by a society’s distance from nature—by its willingness to control nature through science and technology to serve human ends.<sup>103</sup> Communities that engage in subsistence production, resist wage labor, or disdain the accumulation of material wealth were pronounced uncivilized and in need of development.<sup>104</sup> Development was deemed to require the commoditization of nature (private property) and human activity (labor), ever-increasing material consumption, international commerce, and continuous economic growth.<sup>105</sup> Even sustainable development, the centerpiece of

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96. See Gordon & Sylvester, *supra* note 52, at 9-18.

97. *Id.* at 18-49.

98. *Id.* at 38-39.

99. *Id.* at 37-44.

100. *Id.* at 42-44; Gordon, *The Dawn*, *supra* note 53, at 142-49.

101. See Gordon & Sylvester, *supra* note 52, at 44-50.

102. See WOLFGANG SACHS & TILMAN SANTARIUS, FAIR FUTURE: RESOURCE CONFLICTS, SECURITY, AND GLOBAL JUSTICE 30-31 (2007).

103. See Saito, *supra* note 89, at 38-39.

104. See *id.* at 30.

105. See *id.* at 38-41; Natarajan, *supra* note 82, at 193-95.

contemporary global environmental law and policy, was incorporated by the North into the dominant development paradigm by treating environmental protection as a technical problem that could be addressed through better planning and engineering.<sup>106</sup> The Northern ideology of nature as a resource to be dominated for the satisfaction of human needs was exported to the South and often supplanted more complex cultural traditions that viewed humans and nature as inherently interdependent.<sup>107</sup>

Ironically, the IMF and the World Bank used the language of human rights (the promotion of “good governance”) to justify policies designed to further a neoliberal economic agenda.<sup>108</sup> Like “development,” good governance possesses universal appeal rooted in notions of democracy, accountability, transparency, and participation.<sup>109</sup> However, the good governance framework attributed Southern “underdevelopment” to deficiencies in Southern states rather than to the legacy of colonialism or the failure of the economic reforms imposed through structural adjustment, and thereby legitimated the intensification of Northern neoliberal interventions.<sup>110</sup> Barred by their respective Articles of Agreement from interfering in politics, the IMF and the World Bank embraced those human rights compatible with their economic and financial mandates (such as ensuring debt repayment by promoting economic growth through privatization and deregulation).<sup>111</sup> The primary goal of the good governance initiatives became the reform of law, the judiciary, and the public sector in order to promote economic liberalization.<sup>112</sup> Like the free market reforms designed to produce “development,” good governance was deployed as yet another tool to manage and transform Southern nations so as to further Northern economic interests.<sup>113</sup> The human rights framework created to protect the dignity and intrinsic worth of human beings was “steadily supplanted by a trade-friendly, market-friendly, human rights paradigm” that facilitated the enforcement of contracts and the protection of private property for the benefit of global capital.<sup>114</sup> Instead of

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106. See Geisinger, *supra* note 82, at 67-68; see also McLaren, *supra* note 13, at 21 (critiquing the view that “sustainable development is simply a more efficient, better managed process of conventional economic development” that would merely extend “the Anglo-Saxon cultural model of business, markets, indicators and aspirations” without addressing North-South power relations).

107. See Geisinger, *supra* note 82, at 67-68.

108. See James Thuo Gathii, *Good Governance as a Counterinsurgency Agenda to Oppositional and Transformative Social Projects in International Law*, 5 BUFF. HUM. RTS. L. REV. 107, 108-10 (1999).

109. See ANGHIE, IMPERIALISM, *supra* note 35, at 247-48.

110. See Saito, *supra* note 89, at 17.

111. See Gathii, *supra* note 108, at 142-44, 156-58; Gordon & Sylvester, *supra* note 52, at 46-47.

112. See Gathii, *supra* note 108, at 149.

113. See Anghie, *The Evolution of International Law*, *supra* note 70, at 749.

114. Upendra Baxi, *Voices of Suffering and the Future of Human Rights*, 8 TRANSNAT'L.

reforming the fundamental structures of the international economy to empower the global South and reduce inequality, the “good governance” initiatives emphasized the need to reform “backward” developing countries and further entrenched the power of the IMF and the World Bank on terms that were largely disadvantageous to the global South.<sup>115</sup>

The end of the Cold War and the rise of U.S. hegemony in international affairs inaugurated a new role for international human rights law—legitimizing Northern military intervention in Southern nations for ostensibly humanitarian purposes.<sup>116</sup> United States-led interventions in Somalia, Kosovo, Iraq, and Afghanistan were justified as efforts to promote democratic governance, protect human rights, and/or combat terrorism.<sup>117</sup> Like the colonial era civilizing mission to Christianize the “savages,” these interventions were premised on the legitimacy of using military force to discipline “failed” or “rogue” states.<sup>118</sup> The North thereby reproduced the human rights narrative of the white savior “taming” or “civilizing” savage or despotic Southern states in order to rescue “backward” peoples who cannot help themselves.<sup>119</sup> This narrative cloaks Northern foreign policy interests in the language of humanitarianism and demonstrates yet again the tenuous sovereignty of Southern nations.<sup>120</sup>

The legitimacy of these “humanitarian” interventions was called into question by the complicity of the North in the perpetuation of violence and poverty in the global South. As Thomas Pogge points out:

As ordinary citizens of the rich countries, we are deeply implicated in these harms. We authorize our firms to acquire natural resources from tyrants and we protect their property rights in resources so acquired. We purchase what our firms produce out of such resources and thereby encourage them to act as authorized . . . . We also authorize and encourage other firms of ours to sell to the tyrants what they need to stay in power—from aircraft and arms to surveillance and torture equipment.<sup>121</sup>

Critics also emphasized that military interventions “solve little or nothing, and in a remarkable number of cases seem only to increase the instability of a country and a region, as well as the misery of masses of people.”<sup>122</sup> Finally,

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L. & CONTEMP. PROBS. 125, 163–64 (1998).

115. See ANGHIE, *IMPERIALISM*, *supra* note 35, at 247–68.

116. See Rajagopal, *Counter-Hegemonic International Law*, *supra* note 5, at 770.

117. See *id.* at 770–73.

118. *Id.*

119. See Makau Mutua, *Savages, Victims and Saviors: The Metaphor of Human Rights*, 42 HARV. INT’L L.J. 201, 224–33 (2001) [hereinafter Mutua, *Savages, Victims and Saviors*].

120. See ANGHIE, *IMPERIALISM*, *supra* note 35, at 303–09.

121. THOMAS POGGE, *WORLD POVERTY AND HUMAN RIGHTS* 148 (2d ed. 2008).

122. Tom Engelhardt, *Washington’s Militarized Mindset: The Lessons Washington Can’t Draw from the*

some observers pointed out that the ultimate objective of many of these interventions appeared to be economic reconstruction of the invaded states along neoliberal economic lines.<sup>123</sup>

Transnational corporations headquartered in the North and rapacious Southern elites have been the prime beneficiaries of Northern economic, political, and military interventions in the global South in order to impose market-friendly economic reforms.<sup>124</sup> From the oil drilling operations of Chevron/Texaco in Ecuador to the mining activities of Freeport-McMoran in Indonesia, transnational corporations (and their counterparts in certain emerging Southern nations) are frequently embroiled in some of the worst human rights and environmental abuses.<sup>125</sup> Far from defending the rights of their citizens, post-colonial states often pursue socially and environmentally destructive development strategies and ruthlessly repress grassroots resistance movements.<sup>126</sup> Eager to secure foreign investment, Southern governments often strive to create a friendly environment for foreign capital by entering into one-sided bilateral investment treaties (BITs) and host state government agreements (HGAs) that protect the property rights of the foreign investor and restrict the ability of Southern states to regulate in the public interest. These agreements generally do not impose any corresponding duties on the foreign investor to comply with human rights or environmental standards or obligate the investor's home state to regulate the extraterritorial conduct of its corporations.<sup>127</sup> As Upendra Baxi observes:

A progressive state [under contemporary globalization] is one that protects global capital against political instability and market failures. A progressive state is one that represents accountability *not* so much directly to its people, but one that offers itself as a good pupil to the World Bank and International Monetary Fund. A progressive state is one, which instead of promoting world visions of a just international order, learns the

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*Failure of Military Operations*, COMMON DREAMS (July 5, 2012), <https://www.commondreams.org/view/2012/07/05-5> (last visited Oct. 20, 2014).

123. See generally Toby Dodge, *The Ideological Roots of Failure: The Application of Kinetic Neo-liberalism to Iraq*, 86 INT'L AFFAIRS 6 (2010), available at [http://www.chathamhouse.org/sites/default/files/public/International%20Affairs/2010/86\\_6dodge.pdf](http://www.chathamhouse.org/sites/default/files/public/International%20Affairs/2010/86_6dodge.pdf).

124. See POGGE, *supra* note 121, at 148-50 (explaining how the global order imposed by affluent nations perpetuates poverty and tyranny in poor countries); Gonzalez, *Environmental Justice*, *supra* note 6, at 83.

125. See Beth Stephens, *The Amoralism of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 49-53 (2002).

126. See MICHELINE R. ISHAY, *THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO THE GLOBALIZATION ERA* 338-39 (2004); Agbola & Alabi, *supra* note 20, at 281-85 (describing the repression of grassroots environmental movements in Nigeria).

127. See Simons, *supra* note 3, at 15-19; Sornarajah, *supra* note 38, at 29-33.

virtue of debt repayment on schedule. Moreover, a progressive state is now one which is required to garner conceptions of good governance neither from the histories of struggles against colonization and imperialism nor from its internal social and human rights movements but from the shifting prescriptions of the global institutional *gurus* of globalization.<sup>128</sup>

#### IV. Can Environmental Human Rights Promote Environmental Justice?

Environmental human rights hold immense promise for historically subordinated communities as a tool of mobilization against their governments' abuses of nature and of vulnerable populations. The language of human rights is morally compelling, and suggests that human rights should, in theory, trump other, less weighty considerations (such as economic efficiency).<sup>129</sup> Unlike international environmental law, human rights law imposes obligations on states for harms that are purely domestic, and enables victims of substantive and procedural human rights violations to enforce these rights through citizen complaint mechanisms, thereby exposing human rights violations to international scrutiny.<sup>130</sup>

However, environmental human rights must be approached not as an object of veneration, but as one instrument in the pursuit of environmental justice that has both advantages and disadvantages. There is an important distinction between the bottom-up environmental human rights discourse deployed by grassroots environmental justice movements and the top-down incorporation of environmental human rights in treaties and other legal instruments. Once human rights are institutionalized in the international human rights system, they become embedded in pre-existing relations of power that generally favor Northern states and transnational corporations. While institutionalization is necessary for the implementation of environmental human rights, scholars and advocates must identify and challenge practices and policies that compromise their effectiveness. Rather than reiterate the excellent work of other scholars on

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128. BAXI, *supra* note 37, at 291.

129. See LOUIS HENKIN, *THE AGE OF RIGHTS* 4 (1990); BURNS H. WESTON & DAVID BOLLIER, *GREEN GOVERNANCE: ECOLOGICAL SURVIVAL, HUMAN RIGHTS, AND THE LAW OF THE COMMONS* 88-89 (2013); Carmen G. Gonzalez, *An Environmental Justice Critique of Comparative Advantage: Indigenous Peoples, Trade Policy, and the Mexican Neoliberal Economic Reforms*, 32 U. PA. J. INT'L L. 723, 776-78 (2011) [hereinafter Gonzalez, *Critique*].

130. See Gonzalez, *Environmental Justice*, *supra* note 6, at 86; Shelton, *supra* note 23, at 1-2; see also Bratspies, *supra* note 1, at 45-48 (discussing the limitations of environmental treaties as a means of responding to environmental challenges).

the benefits of an environmental human rights framework,<sup>131</sup> this section draws upon Parts II and III of this article to examine its limitations and to consider how it might evolve to realize its emancipatory promise.

International human rights law and institutions were created by a small group of states in the aftermath of the Second World War when most African and Asian nations were under colonial domination.<sup>132</sup> Critics of the international human rights system argue that the human rights canon generally favors civil and political rights over economic, social, and cultural rights; elevates individual rights over collective rights; and implicitly regards Western-style liberal democracy as the only legitimate form of government.<sup>133</sup> In order to avoid universalizing yet another Eurocentric model, it is essential to expose the Northern biases of the human rights corpus, infuse it with Southern conceptions of human dignity, and transform it so as to challenge the inequitable economic order that perpetuates the subordination of the global South and the abuse of nature and of historically marginalized communities. The remainder of this section will identify seven limitations of the human rights canon, discuss the implications for environmental human rights, and propose ways of enhancing the ability of environmental human rights law and advocacy to challenge environmental injustice.

#### ***A. False Universalism that Cloaks Northern Domination***

International human rights law (environmental or otherwise) is problematic to the extent that it presents itself as neutral, universal, apolitical, non-ideological, timeless, and eternal<sup>134</sup>—thereby obscuring the historic inequities that gave rise to anti-colonial struggles, the North-South divide, and environmental injustice within and between nations. By granting humanity formal equality (the same right to life, health, food, water, privacy, a healthy environment), human rights law erases the culpability of the North for poverty and environmental degradation in the South, and cloaks further acts of domination (such as “good governance” initiatives and “humanitarian” interventions) in the benevolent rhetoric of universality and common humanity.

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131. See BOYD, *supra* note 25, at 234-44; WESTON & BOLLIER, *supra* note 129, at 28-29, 87-97.

132. See Makau Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589, 604-07 (1996) [hereinafter Mutua, *Ideology*]. When the Universal Declaration of Human Rights was negotiated, most African and Asian nations were absent from the discussions because they were under colonial rule. *Id.* at 605.

133. See *id.* at 640-46.

134. See BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE 206 (2003) [hereinafter RAJAGOPAL, INTERNATIONAL LAW FROM BELOW]; Mutua, *Ideology*, *supra* note 132, at 607; Otto, *supra* note 91, at 5-7.



As Balakrishnan Rajagopal points out, the global North has gone out of its way to construct human rights as a “post-imperial discourse unsullied by the ugly colonial politics of pre-1948, when the Universal Declaration of Human Rights (UDHR) initiated the modern human rights movement.”<sup>135</sup> Scholars like Mary Ann Glendon portray the UDHR as the culmination of a historical process, whereby the concerns of the poor and marginalized (states as well as peoples) triumphed over the interests of the mighty and powerful.<sup>136</sup> However, on closer examination, the complicity of the human rights project with the colonial enterprise becomes evident:

1) The UDHR did not apply directly to the colonial areas and was subjected to intense maneuvering by Britain at the drafting stage to prevent its application to its colonies despite Soviet pressure; 2) anticolonial struggles were hardly ever taken up for scrutiny at the UN Commission on Human Rights before many Third World states came on board in 1967, when membership was enlarged, and even then remained tangential on the agenda formally; 3) anti-colonial nationalist revolts in places such as Kenya and Malaya were successfully characterized by the British as ‘emergencies’ to be dealt with as law and order issues, thereby avoiding the application of either human rights or humanitarian law to these violent encounters; 4) the main anti-imperial strand of human rights discourse—the critique of apartheid in South Africa and of Israeli policies in Palestinian territories using human rights terms by the Third World during the 1960s to 1980s—remained tangential to the mainstream human rights discourse coming from the West.<sup>137</sup>

Environmental justice scholars and activists must recognize that human rights law is a malleable tool that can be used to obscure and perpetuate Northern domination or to subvert it. In order to promote environmental justice through human rights law and advocacy, it is important to identify and challenge certain grand narratives that maintain Northern hegemony, including the tendency of Northern states and non-governmental organizations (the “saviors”) to target Southern states (the “savages”) for human rights violations without taking into account Northern complicity.<sup>138</sup> For example, the criminal tribunals that prosecute genocide and crimes against humanity do not reach the former colonial powers that stoked ethnic conflict (such as France and Belgium in Rwanda), the states that aided and abetted repressive military regimes (such

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135. Rajagopal, *Counter-Hegemonic International Law*, *supra* note 5, at 769.

136. MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 32-34 (2002).

137. Rajagopal, *Counter-Hegemonic International Law*, *supra* note 5, at 769-70.

138. See Mutua, *Savages, Victims and Saviors*, *supra* note 119, at 224-33.

as U.S. support of the Pinochet dictatorship in Chile), or the states and transnational corporations that benefited from civil wars and resource conflicts (such as the arms merchants and resource extractive industries in the Democratic Republic of the Congo).<sup>139</sup> A critical approach to environmental human rights law must lay bare the contemporary and historic causes of environmental human rights abuses, disrupt the savior-savage narrative, and ensure that the discourse and the practice of human rights address the deeper structural inequities that produce environmental injustice.

Challenging the hegemony of the savior-savage narrative may entail, among other things, revisiting the official history of the human rights canon and exhuming information about the role of Southern countries in the negotiation, drafting, and approval by the UN General Assembly of the Universal Declaration of Human Rights.<sup>140</sup> Despite the popular view of Northern states as the architects of the UDHR, recent scholarship reveals a far more complex picture.<sup>141</sup> Of the fifty-six countries that participated in the very public and highly contentious drafting process, Southern states were active and vocal in the negotiations, and were instrumental in the recognition of socioeconomic rights, women's rights, and racial equality.<sup>142</sup> Notwithstanding Eleanor Roosevelt's leadership role, the U.S. delegation was ambivalent about the provisions forbidding racial discrimination and embracing socioeconomic rights, and the UDHR was unpopular in the United States.<sup>143</sup> European delegates were also profoundly conflicted and divided.<sup>144</sup> "Contrary to a belief that—ironically—has served hegemonic interests, the UDHR was not the brainchild of the great powers. At best it was their stepchild."<sup>145</sup> Retrieving this history is an important step toward decolonizing and re-conceptualizing the human rights project and re-invigorating the economic, social, and cultural rights that were included in the human rights corpus due, in large part, to Southern insistence.

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139. See generally Ibrahim J. Gassama, *A World Made of Violence and Misery: Human Rights as a Failed Project of Liberal Internationalism*, 37 BROOK. J. INT'L L. 407 (2012).

140. See José-Manuel Barreto, *Introduction: Decolonial Strategies and Dialogue in the Human Rights Field*, in HUMAN RIGHTS FROM A THIRD WORLD PERSPECTIVE: CRITIQUE, HISTORY AND INTERNATIONAL LAW 1, 16-18 (José-Manuel Barreto ed., 2013) (discussing the need to decolonize human rights by examining the role of Asian, African, Muslim, communist, and Latin America countries in the development of the UDHR).

141. See Susan Waltz, *Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights*, in HUMAN RIGHTS FROM A THIRD WORLD PERSPECTIVE: CRITIQUE, HISTORY AND INTERNATIONAL LAW 353, 354.

142. See *id.* at 358-61, 372-78, 382.

143. See *id.* at 381-82.

144. See *id.* at 382.

145. *Id.* at 384.

Finally, a critical approach to the human rights canon should acknowledge that the discourse of human rights predates the UDHR and has deep roots in the struggles for liberty, equality, and self-determination of the peoples of Asia, Africa, and the Americas.<sup>146</sup>

In this interpretation, events such as the Conquest of America, the independence gained by colonies throughout America in the Eighteenth and Nineteenth centuries, the Mexican Revolution, the decolonisation of Asia, Africa, the Caribbean and the Middle East in the Twentieth Century, the Civil Rights Movement, the Cold War, the Anti-Apartheid Movement and the emergence of indigenous groups, social movements and entire peoples fighting today in the Global South against the policies of contemporary dictators, empires, transnational corporations and international financial institutions also have a place.<sup>147</sup>

This alternative historical account rejects the Eurocentric framing of the human rights project articulated by both human rights proponents and critics, and recognizes the ways that marginalized communities have used the discourse of human rights to transform their societies. According to the popular Eurocentric view, first generation human rights (civil and political rights) emerged from the French Revolution; second generation human rights (economic, social, and cultural rights) were recognized in the early twentieth century after the Russian Revolution and the implementation of social democracy in Europe; and third generation human rights (including the right to self-determination, the right to development, and the right to a healthy environment) did not emerge until the second half of the twentieth century.<sup>148</sup> This generational framework not only purports to describe the evolution of human rights, but also is often understood to reflect the hierarchical priority of these rights.<sup>149</sup> A narrative that recognizes the co-evolution of these generations of human rights in the course of both North-South anti-imperial struggles and a variety of local and transnational social justice movements breaks down these generational hierarchies, highlights the indivisibility of human rights, and gives Southern states and disenfranchised communities voice and agency in the advancement of the human rights project.<sup>150</sup> De-colonizing the history of the human rights movement reveals that the architects of human rights are communities in

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146. See José-Manuel Barreto, *Imperialism and Decolonization as Scenarios of Human Rights History*, in HUMAN RIGHTS FROM A THIRD WORLD PERSPECTIVE: CRITIQUE, HISTORY AND INTERNATIONAL LAW 140, 140-41, 153-64 (José-Manuel Barreto ed., 2013).

147. *Id.* at 140-41.

148. See *id.* at 166-67.

149. See *id.* at 167.

150. See *id.* at 167-68.

struggle (including peoples struggling against colonial and post-colonial forms of domination), and disavows the savior-savage narrative of human rights as a “gift from the West to the rest of the world.”<sup>151</sup>

***B. Failure to Hold Northern States and Transnational Corporations Responsible for their Complicity in Human Rights Abuses in the South***

International human rights institutions, such as the international criminal tribunals discussed above, have generally failed to hold accountable the Northern states and corporations that are complicit in human rights and environmental abuses. Human rights law generally operates vertically—giving citizens of a state a claim against their government. However, as explained in Parts II and III of this article, nations in the global South are structurally dependent on the global North through international institutions (like the World Bank and the IMF), through the World Trade Organization (in which the South wields limited bargaining power), through international investment law (which often protects the interests of the foreign investor against those of the local citizens and the environment), and through the vast economic power of transnational corporations (TNCs).<sup>152</sup> In order to grapple with environmental injustice both within and among nations, it is necessary to take into account the constellation of national and global actors that come together to produce these inequities. National governments must be held accountable for their environmental human rights abuses, but it is also essential for human rights law to explicitly authorize claims against the actors in the global North (both states and TNCs) that wield vast economic power over these governments and are implicated in these abuses.

One strategy to address this shortcoming is the evolution of human rights law (via treaty/legislation, soft law, litigation, or interpretation by human rights bodies) to explicitly recognize and enforce what John Knox, the United Nations Independent Expert on Human Rights and the Environment, calls diagonal human rights. Diagonal human rights are rights held by individuals against foreign governments for the extraterritorial consequences of actions taken by those governments directly (such as constructing dams or power plants) or indirectly (through the power they wield in international financial institutions

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151. See *id.* at 168; BAXI, *supra* note 37, at 234-35.

152. See VIJAY PRASHAD, *THE POORER NATIONS: A POSSIBLE HISTORY OF THE GLOBAL SOUTH* 256 (2012); Saito, *supra* note 89, at 6.

like the IMF and the World Bank, or through financing or failing to regulate the conduct of TNCs).<sup>153</sup>

The United Nations Charter imposes diagonal or extraterritorial obligations on all states by requiring international cooperation to ensure the realization of human rights. Pursuant to Article 56 of the UN Charter, “[a]ll Members pledge themselves to take joint and separate action in cooperation with the Organization” to achieve the purposes set forth in Article 55 of the Charter.<sup>154</sup> These purposes include “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”<sup>155</sup>

In addition to the obligations imposed by the UN Charter, some human rights treaties, including the International Covenant on Economic, Social, and Cultural Rights (ICESCR), have been interpreted by UN bodies to impose specific extraterritorial obligations.<sup>156</sup> For example, article 2(1) of the ICESCR requires states parties “to take steps, individually and through international assistance and cooperation . . . with a view to achieving progressively the full realization” of the rights recognized in the treaty.<sup>157</sup> The UN Committee on Economic, Social, and Cultural Rights (CESCR), the body responsible for overseeing the ICESCR, has relied on this language to conclude that states parties have extraterritorial obligations with respect to the rights to food, water, and health.<sup>158</sup> This includes the duty to refrain from interfering with the enjoyment of these rights in other countries;<sup>159</sup> the duty to prevent their own citizens and enterprises from violating these rights in other countries;<sup>160</sup> and the obligation to fulfill these rights in other countries by facilitating access or

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153. See John Knox, *Diagonal Environmental Rights*, in UNIVERSAL HUMAN RIGHTS AND EXTRATERRITORIAL OBLIGATIONS 82, 82-83 (Mark Gibney & Sigrun Skogly eds., 2010) [hereinafter Knox, *Diagonal Environmental Rights*]; Gonzalez, *Critique*, *supra* note 129, at 786-89 (discussing the responsibility of Northern states for extraterritorial harms resulting from policies imposed through the IMF, the World Bank, the WTO, and regional trade agreements).

154. See U.N. Charter art. 56.

155. *Id.* at art. 55.

156. See Knox, *Diagonal Environmental Rights*, *supra* note 153, at 88-89.

157. U.N. International Covenant on Economic, Social, and Cultural Rights art. 2(1), Dec. 16, 1966, 993 U.N.T.S. 3. Similarly, Article 23 of the ICESCR calls for “international action for the achievement of the rights recognized in the present Covenant.” *Id.* at art. 23.

158. See Knox, *Diagonal Environmental Rights*, *supra* note 153, at 88.

159. See U.N. Commission on Economic, Social and Cultural Rights (CESCR), *General Comment 12: The Right to Adequate Food*, ¶¶ 15, 36, U.N. Doc. E/C.12/1999/5 (May 12, 1999) [hereinafter *General Comment 12*]; CESCR, *General Comment 14: The Right to the Highest Attainable Standard of Health*, ¶ 39, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [hereinafter *General Comment 14*]; CESCR, *General Comment 15: The Right to Water*, ¶ 31, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003) [hereinafter *General Comment 15*].

160. See *General Comment 12*, *supra* note 159, at ¶¶ 15, 36; *General Comment 14*, *supra* note 159, at ¶ 39; *General Comment 15*, *supra* note 159, at ¶ 33.

providing the necessary aid.<sup>161</sup> States parties must also ensure that the rights to food, water, and health are “given due attention in the negotiation of international agreements,” and should consider the development of additional legal instruments for this purpose.<sup>162</sup> Finally, the CESCR, in its interpretation of the rights to water and health, has explicitly determined that states parties should ensure that international and regional agreements (including trade liberalization agreements) and the practices of international financial institutions (such as the World Bank and the IMF) do not adversely impact the realization of these rights.<sup>163</sup>

In 2011, an eminent group of human rights experts (including former and current Special Rapporteurs of the UN Human Rights Council) adopted a series of principles, known as the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social, and Cultural Rights, that enumerate and explain the extraterritorial obligations of states under existing international law.<sup>164</sup> These extraterritorial obligations include the duty to ensure that international organizations to which a state belongs (such as the IMF and the World Bank) act in accordance with pre-existing human rights obligations;<sup>165</sup> the duty to elaborate, interpret, and apply international agreements (including free trade agreements and bilateral investment treaties) in a manner consistent with human rights obligations;<sup>166</sup> and the duty to ensure that non-state actors (such as TNCs) do not impair human rights in other countries.<sup>167</sup>

An example of a diagonal or extraterritorial human rights claim is the petition filed by the Inuit against the United States before the Inter-American Commission on Human Rights for human rights violations caused by climate

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161. See *General Comment 12*, *supra* note 159, at ¶¶ 15, 36; *General Comment 14*, *supra* note 159, at ¶ 39; *General Comment 15*, *supra* note 159, at ¶ 34.

162. See *General Comment 12*, *supra* note 159, at ¶ 36; *General Comment 14*, *supra* note 159, at ¶ 39; *General Comment 15*, *supra* note 159, at ¶ 35.

163. See *General Comment 14*, *supra* note 159, at ¶ 39; *General Comment 15*, *supra* note 159, at ¶¶ 35, 36.

164. See The ETO Consortium, *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* (Jan. 2013), available at <http://www.etoconsortium.org/en/library/maastricht-principles/> [hereinafter *Maastricht Principles*]; see also Olivier de Schutter et al., *Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, 34 HUM. RTS. Q. 1084 (2012) [hereinafter *Commentary to the Maastricht Principles*].

165. See *Maastricht Principles*, *supra* note 164, at Principle 15; *Commentary to the Maastricht Principles*, *supra* note 164, at 1118-20.

166. See *Maastricht Principles*, *supra* note 164, at Principle 17; *Commentary to the Maastricht Principles*, *supra* note 164, at 1122-24.

167. See *Maastricht Principles*, *supra* note 164, at Principle 24; *Commentary to the Maastricht Principles*, *supra* note 164, at 1134-37.

change.<sup>168</sup> The petition alleged that the United States, by failing to take meaningful action to curtail its greenhouse gas emissions, had violated the human rights of the Inuit in both Canada and the United States under the American Declaration of the Rights and Duties of Man, including the rights to life, health, property, culture, physical integrity, security, residence, and movement; the right to use and enjoy their ancestral lands; and the right to subsistence.<sup>169</sup> While the claims of the Inuit residing in the United States were vertical (against the state in which they reside), those of the Canadian Inuit were diagonal (against a foreign government).<sup>170</sup> Because the Commission refused to process the claim on the grounds that it could not determine whether the alleged facts were sufficient to constitute a violation of the American Declaration of the Rights and Duties of Man, the jurisdiction of the Inter-American Commission over diagonal human rights claim was not resolved—leaving the door open to future claims of this nature.<sup>171</sup>

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168. See Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (Dec. 7, 2005), available at [http://www.ciel.org/Publications/ICC\\_Petition\\_7Dec05.pdf](http://www.ciel.org/Publications/ICC_Petition_7Dec05.pdf) [hereinafter Inuit Petition].
169. See *id.* at 74-95; Sara C. Arminzadeh, *A Moral Imperative: The Human Rights Implications of Climate Change*, 30 HASTINGS INT'L & COMP. L. REV. 231, 238-58 (2007) (analyzing the impacts of climate change on the human rights of the Inuit and on small island developing states); Marguerite E. Middaugh, *Linking Global Warming to Inuit Human Rights*, 8 SAN DIEGO INT'L L. J. 179, 182-208 (2006) (examining the Inuit's human rights claims under the American Declaration of the Rights and Duties of Man); Sarah Nuffer, *Human Rights Violations and Climate Change: The Last Days of the Inuit People?*, 37 RUTGERS L. REC. 182, 189-91 (2010) (discussing the claims in the Inuit petition).
170. Although the Inuit residing in Greenland and Russia were also affected by climate change, the Inuit petition was limited to Inuit residing in the United States and Canada because the jurisdiction of the Inter-American Commission on Human Rights is limited to the Americas. Furthermore, the petition relied on the American Declaration of the Rights and Duties of Man rather than the American Convention on Human Rights because the United States is not a party to the American Convention. See generally Inuit Petition, *supra* note 168; Hari M. Osofsky, *Complexities of Addressing the Impacts of Climate Change on Indigenous Peoples Through International Law Petitions: A Case Study of the Inuit Petition to the Inter-American Commission on Human Rights*, in CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES 313, 313-38 (Randall Abate & Elizabeth Ann Kronk eds., 2013). Both the Inter-American Commission and the Inter-American Court of Human Rights have held that the American Declaration, although adopted as a declaration rather than a binding treaty, nevertheless creates international obligations for members of the Organization of American States. Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶¶ 35, 45 (July 14, 1989).
171. See Letter from the Inter-American Commission on Human Rights, Organization of the American States, to Paul Crowley regarding the Inuit Petition (Nov. 16, 2006), available at <http://graphics8.nytimes.com/packages/pdf/science/16commissionletter.pdf> (last visited Oct. 20, 2014) ("The information provided does not enable us to determine whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration."); Knox, *Diagonal Environmental Rights*, *supra* note 153, at 88-89, 90-91.

An important strategy to promote diagonal human rights is holding governments accountable for failure to regulate the conduct of their corporations abroad. Under the ICESCR, states have an obligation to ensure that corporations under their jurisdiction and control do not violate economic, social, and cultural rights in other countries.<sup>172</sup> If a state neglects to exercise due diligence to prevent such violations, then it may be liable on that basis.<sup>173</sup> Similarly, capital exporting countries (in the North or the South) that enter into bilateral investment treaties (BITs) with capital importing countries may be liable for the human rights violations of their TNCs to the extent that the BITs restrict the ability of the capital importing country to regulate the foreign investor in a manner that protects environmental human rights.<sup>174</sup> Indeed, these BITs as well as the host state agreements (HGAs) between the foreign investor and the Southern state should contain legally binding human rights and environmental obligations and provide for the enforcement of these provisions in both the home state and the host state (including civil actions by persons injured due to the acts or decisions of the foreign investor).<sup>175</sup>

Finally, efforts to promote environmental human rights must address the accountability of corporations for human rights violations. While a complete discussion of the legal strategies that might be pursued to achieve corporate accountability is beyond the scope of this article, possible approaches include

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172. See Robert McCorquodale & Penelope Simons, *Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law*, 70 MOD. L. REV. 598, 617-19 (2007); Maastricht Principles, *supra* note 164, at Principles 23-27; *Commentary to the Maastricht Principles*, *supra* note 164, at 1133-45.

173. See McCorquodale & Simons, *supra* note 172, at 619-21. Northern states sometimes justify their failure to regulate the conduct of their corporations abroad on the ground that such regulation would constitute “an imperialistic infringement of host state sovereignty.” See Sara L. Seck, *Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?*, 46 OSGOODE HALL L.J. 565, 566 (2008). Given the history of Northern intervention in Southern nations for the benefit of Northern transnational corporations, this rationale, as Sara Seck acknowledges, amounts to a cruel hoax—“a denial of responsibility.” *Id.* at 585. Nevertheless, an environmental justice approach to home state regulation must be cognizant of the North’s imperial interventions in the South and advocate extraterritorial regulation only to “facilitate the coexistence between states and their cooperation in addressing situations that are of concern to more than one or . . . to the international community as a whole.” See *Commentary to the Maastricht Principles*, *supra* note 164, at 1138-39. In other words, extraterritorial regulation is appropriate to protect the human rights of the local communities affected by the conduct of foreign corporations in the host state, and must not be used to intervene in the domestic affairs of other states in violation of the UN Charter or other international law instruments or principles. See *id.* at 1134-42.

174. McCorquodale & Simons, *supra* note 172, at 621-23; Maastricht Principles, *supra* note 164, at Principle 17; *Commentary to the Maastricht Principles*, *supra* note 164, at 1122-24.

175. See KATE MILES, *THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL* 348-70 (2013) (describing the provisions of model Bilateral Investment Treaties designed to promote human rights and sustainable development); Simons, *supra* note 3, at 18, 43.



enhancing the human rights enforcement capacity of Southern countries, strengthening the mechanisms available in the home state to adjudicate human rights violations abroad, and developing treaties that impose human rights obligations directly on corporations.

In 2003, the United Nations draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights proposed the direct imposition of human rights obligations on TNCs.<sup>176</sup> However, under intense pressure from corporate interests, the state members of the former UN Human Rights Commission rejected this approach.<sup>177</sup> Several years later, the United Nations Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises (Professor John G. Ruggie) developed a governance framework and a set of Guiding Principles on Business and Human Rights that focused on building the capacity of states to regulate TNCs and included only non-binding norms for corporations (except the binding obligation to comply with international criminal law).<sup>178</sup> Critics of the Ruggie framework described this approach as “the abandonment . . . of an international legal approach to the problem of corporate impunity in favour of soft norms and private self-regulation.”<sup>179</sup>

Given the difficulties encountered by Northern and Southern states in regulating the conduct of TNCs (including the diminished governance capacity of Southern states due to the Northern interventions described in Parts II and III of this article),<sup>180</sup> it is essential to continue to advocate for enforceable human rights obligations against corporate actors. From the colonial period to

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176. See U.N. Sub-Comm’n on the Promotion and Protection of Hum. Rts., 55th Sess., Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (May 30, 2003); U.N. Sub-Comm’n on the Promotion and Protection of Hum. Rts., 55th Sess., Commentary on the Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2 (2003).

177. See PENELOPE SIMONS & AUDREY MACKLIN, *THE GOVERNANCE GAP: EXTRACTIVE INDUSTRIES, HUMAN RIGHTS, AND THE HOME STATE ADVANTAGE* 3 (2014).

178. See U.N. Human Rights Council, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, Rep. of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Entities, 8th Sess., U.N. Doc. A/HRC/8/5 (April 7, 2008); U.N. Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, Rep. of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, 17th Sess., U.N. Doc. A/HRC/17/31 (Mar. 21, 2011), available at <http://www.businesshumanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>.

179. See SIMONS & MACKLIN, *supra* note 177, at 3.

180. See *id.* at 7-8

the present, international law and domestic law have been deployed to promote foreign trade and investment and to limit the ability of states to regulate transnational corporations.<sup>181</sup> Because the rights and protections available to corporate actors were created by law, it is only appropriate to address the impunity of transnational corporations for their extraterritorial environmental human rights violations by negotiating multilateral treaties imposing human rights obligations on these enterprises.<sup>182</sup> In June 2014, the UN Human Rights Council approved a resolution establishing an intergovernmental working group to develop a legally binding instrument imposing human rights obligations on corporations.<sup>183</sup> While powerful Northern states will undoubtedly resist and reject such a treaty, the resolution represents an important step toward a legal framework that will “begin to shift the balance of power between transnational corporate actors on the one hand, and Third World host states and victims of corporate human rights abuses on the other.”<sup>184</sup>

### ***C. The Challenge of Collective Human Rights***

One of the hallmarks of environmental justice movements is their emphasis on communitarian notions of justice.<sup>185</sup> Human rights law, with its emphasis on individual rights, may be ill-suited to the task of advancing the collective rights of indigenous peoples, racial and ethnic minorities, and other subordinated communities disparately burdened by environmental degradation. For example, the European Court of Human Rights (the Court) has generally adopted an individualistic approach to environmental human rights rather than viewing the environment as a public good that affects the collective well-being of groups of people residing in a particular location.<sup>186</sup> In the case of *Kyrtatos v. Greece*, which involved the illegal draining of a wetland, the Court held that the crucial element in determining whether the conduct in question violated the applicants’ rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention) “is the existence of a harmful effect on a person’s private or family sphere, and not simply the general

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181. Simons, *supra* note 3, at 35; SIMONS & MACKLIN, *supra* note 175, at 8.

182. See Simons, *supra* note 3, at 40-43; MILES, *supra* note 175, at 368-70.

183. See U.N. Hum. Rts. Council, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, 26th Sess., UN Doc. A/HRC/L.22/Rev.1 (June 25, 2014).

184. Simons, *supra* note 3, at 41.

185. See David Schlosberg, *Theorising Environmental Justice: the Expanding Sphere of a Discourse*, 22 ENVTL. POL. 37, 42-43 (2013).

186. See Francesco Francioni, *International Human Rights in an Environmental Horizon*, 21 EUR. J. INT’L L. 41, 50-51 (2010).

deterioration of the environment. Neither Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such.”<sup>187</sup> In 2012, the Council of Europe produced a manual that provides practical guidance on the evolving environmental jurisprudence of the Court under the European Convention and the European Charter.<sup>188</sup> Confirming the Court’s restrictive view of environmental human rights, the manual states that “[n]either the Convention nor the Charter are designed to provide a general protection of the environment as such and do not expressly guarantee a right to a sound, quiet and healthy environment.”<sup>189</sup> Critics of the European approach have argued that the Court’s jurisprudence fails to value environmental integrity for society as a whole, “but only as a criterion to measure the negative impact on a given individual’s life, property, private and family life.”<sup>190</sup>

However, the case law emerging from the Inter-American human rights system, the African Charter on Human and Peoples’ Rights, and even the International Covenant on Civil and Political Rights adopts a much more collective approach to environmental human rights. For example, in *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the Inter-American Court of Human Rights invalidated logging concessions awarded by Nicaragua to foreign investors in the ancestral lands of the indigenous Awas Tingni community on the basis of collective property rights.<sup>191</sup> In *Saramaka People v. Suriname*, the Inter-American Court used this rationale to protect the collective property rights of an Afro-descendant community.<sup>192</sup> In *Social and Economic Rights Action Centre v. Nigeria* (the *Ogoniland* case), the African Commission on Human and Peoples’ Rights concluded that the devastation wrought by petroleum extraction violated the Ogoni people’s collective right to a healthy environment.<sup>193</sup> Finally, in *Lubikon Lake Band v. Canada* and in *Francis Hopy*

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187. See *Kyrtatos v. Greece*, 2003-VI Eur. Ct. H.R. 257, ¶ 52, available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61099#{"itemid":\["001-61099"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61099#{).

188. See generally COUNCIL OF EUROPE PUBLISHING, MANUAL ON HUMAN RIGHTS AND THE ENVIRONMENT (2nd ed. 2012), available at [http://www.coe.int/t/dghl/standadsetting/hrpolicy/Publications/Manual\\_Env\\_2012\\_nocover\\_Eng.pdf](http://www.coe.int/t/dghl/standadsetting/hrpolicy/Publications/Manual_Env_2012_nocover_Eng.pdf).

189. See *id.* at 7.

190. Francioni, *supra* note 186, at 50.

191. See *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶¶ 148-49 (Aug. 31, 2001), available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_79\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf).

192. See *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 88, 93-95, 99-103 (Nov. 28, 2007), available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_172\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf).

193. See *Soc. and Econ. Rights Action Centre v. Nigeria*, Case No. ACHPR/COMM/AO44/1, OAUDoc.CAB/LEG/67/3, ¶¶ 50-53 (2001), available at <http://www.achpr.org/files/sessions/30th/>

and *Tepoaitu Bessert v. France*, the UN Human Rights Committee upheld the petitioners' contention that the challenged development projects (oil and gas extraction and tourist development, respectively) imposed an unacceptable burden on traditional lands and subsistence systems of indigenous communities as a whole (and not just individual members of the group) in violation of Articles 27 (minority rights) and 17 (protection of family and private life) of the International Covenant on Civil and Political Rights.<sup>194</sup>

In short, historically marginalized communities in the global South and the global North have successfully vindicated collective human rights in regional human rights bodies. These victories illustrate the emancipatory potential of environmental human rights law and advocacy and the ability of the human rights system to progress and evolve in response to the demands of grassroots environmental justice movements.

#### ***D. Anthropocentrism, the Domination of Nature, and the Rights of Future Generations***

Human rights law is, by definition, anthropocentric, and may therefore universalize the Northern development model based on the domination of nature. Many scholars have argued that the root of the present environmental crisis is the globalization of the Western ideology that separates humans from nature and regards nature in purely instrumental terms.<sup>195</sup> Human rights law has also tended to focus on present generations and to neglect the rights of future generations.<sup>196</sup> While a full discussion of anthropocentrism and future generations is beyond the scope of this article, it is important to recognize that many of the indigenous peoples who were constructed as "uncivilized" and in need of "development" possess legal systems based on a sophisticated understanding of the relationship between humans and nature and a concern for the impact of present economic activity on future generations.<sup>197</sup> While

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communications/155.96/achpr30\_155\_96\_eng.pdf.

194. See Francis Hopy and Tepoaitu Bessert v. France Communication No. 549/1993 at ¶¶ 2.2-10.3, U.N. Doc. CCPR/C/60D/549/1993/Rev 1 (Dec. 29, 1997); Lubikon Lake Band v. Canada Communication, No. 167/1984 at 1, U.N. Doc. Supp. No. 40 (A/45/40) (Mar. 26, 1990).

195. See WALTER D. MIGNOLO, *THE DARKER SIDE OF WESTERN MODERNITY: GLOBAL FUTURES, DECOLONIAL OPTIONS* 12-13 (2011); Peter Burdon, *The Jurisprudence of Thomas Berry*, 15 *WORLDVIEW* 151, 152-54 (2011); Geisinger, *supra* note 82, at 44-46; WESTON & BOLLIER, *supra* note 129, at 49, 78; see generally CAROLYN MERCHANT, *THE DEATH OF NATURE: WOMEN, ECOLOGY AND THE SCIENTIFIC REVOLUTION* (1990) (discussing the feminization and domination of indigenous peoples and nature).

196. See WESTON & BOLLIER, *supra* note 129, at 54.

197. See Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 *VT. L. REV.* 225, 276-300 (1996). Judge Christopher Weeramantry, in his separate opinion in the *Gabčíkovo-Nagymaros* case,

people do not always behave in accordance with their values and traditions, these indigenous legal systems can nevertheless provide the foundation for a more robust conception of human rights that acknowledges the interdependence of humans and nature and promotes intergenerational equity. For example, Ecuador's 2008 Constitution became the first national constitution to provide for the rights of nature, based on the principle of *sumac kawsay*, the Kichwa concept of living in harmony with others and with nature (known in Spanish as *el buen vivir*, or living well).<sup>198</sup> In 2012, Bolivia promulgated the *Law of Mother Earth and Integral Development for Living Well*, which likewise recognizes the rights of nature.<sup>199</sup> That same year, New Zealand granted legal personhood to its longest navigable river, the Whanganui, in a major step toward the resolution of the historic grievances of Māori peoples.<sup>200</sup> Several countries, including Bolivia, Ecuador, Germany, Norway, Kenya, and South Africa, have recognized the rights of future generations in their constitutions.<sup>201</sup> These legal reforms do not obviate the tension between the rights of humans and nature, but they do "shift individual and collective perceptions of nature, as something with integrity and value,"<sup>202</sup> thereby increasing the likelihood of more thoughtful decisions regarding human activities that impact the environment and the well-being of generations to come.

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endorses the rights of future generations and discusses the ways that indigenous cultures all over the world respect these rights. See Gabčíkovo-Nagymaros Project (Hung. V. Slovak), 1997 I.C.J. 7, 107 (Sep. Op. Weeramantry), available at <http://www.icj-cij.org/docket/index.php?p1=3&k=8d&case=92&code=hs&p3=4>. It is important to recognize, however, that poverty, loss of cultural values through forced assimilation, lack of economic alternatives, and external economic pressures may cause indigenous peoples to undertake economic activities that conflict with traditional values. See Tsosie, *supra* note 197, at 300-11.

198. Marc Becker, *Correa, Indigenous Movements, and the Writing of a New Constitution in Ecuador*, 38 LATIN AMERICAN PERSPECTIVES 47, 50 (2011); Burdon, *supra* note 195, at 164; see also Juliet Pinto, *Legislating "Right for Nature" in Ecuador: The Mediated Social Construction of Human/Nature Dualisms*, in ENVIRONMENT AND CITIZENSHIP IN LATIN AMERICA: NATURE, SUBJECTS AND STRUGGLES 227, 236-37 (Alex Latta & Hannah Wittman eds., 2012) (explaining the concept of *el buen vivir*).
199. See Emily Achtenberg, *Earth First? Bolivia's Mother Earth Law Meets the Neo-Extractivist Economy*, REBEL CURRENT BLOG (Nov. 16, 2012), <http://nacla.org/blog/2012/11/16/earth-first-bolivia%E2%80%99s-mother-earth-law-meets-neo-extractivist-economy>.
200. See *New Zealand's Whanganui River Gets Personhood Status*, ENVTL. NEWS SERV. (Sept. 13, 2012), <http://ens-newswire.com/2012/09/13/new-zealands-whanganui-river-gets-personhood-status> [hereinafter *New Zealand's Whanganui River*].
201. See U.N. Secretary-General, *Intergenerational Solidarity and the Needs of Future Generations*, 26, U.N. Doc. A/68/x (5 August 2013), available at <http://uncsd.iisd.org/news/unsg-issues-report-on-intergenerational-solidarity/>.
202. See Burdon, *supra* note 195, at 164.

### ***E. Lack of Redress for Systemic Harms***

Human rights law is generally designed to provide redress for human rights violations with definite, identifiable perpetrators and victims, but may be ill-equipped to handle the North's ecological debt to the South for centuries of colonial exploitation (including slavery) and decades of "modernization" and "development."<sup>203</sup> While the North's overconsumption of the planet's resources and externalization of the social and environmental costs of economic activity have undoubtedly violated the environmental human rights of billions of human beings, proving these human rights violations would be challenging in a highly globalized economy with complex supply chains. It would be difficult to identify specific perpetrators and establish causal links between the conduct and the harm in a manner that takes into account historic and current responsibility as well as historic, current, and future impacts of the offending conduct. Indeed, the UN Human Rights Council, in its 2009 report on human rights and climate change, made similar observations about the difficulty of establishing liability for climate change.<sup>204</sup> The North's refusal to accept responsibility for its historic greenhouse gas emissions continues to be one of the major stumbling blocks in the climate change negotiations.<sup>205</sup>

Rather than forsaking claims for systemic harm based on human rights law or other applicable bodies of international law, environmental justice advocates should carefully parse the existing legal frameworks and identify cracks in the edifice that would allow these claims to proceed. For example, Maxine Burkett, in her contribution to this symposium, argues that certain provisions in the climate change adaptation framework support the creation of a compensation mechanism for the rehabilitation of small island states harmed by unavoidable, irreversible, and slow-onset events such as sea level rise, ocean acidification, and drought.<sup>206</sup> Similarly, in March 2014, a group of Caribbean nations

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203. For an insightful discussion of some of the challenges associated with imposing liability for historic injustice, see IRIS MARION YOUNG, *RESPONSIBILITY FOR JUSTICE* 171–87 (2011).

204. See U.N. Hum. Rts. Council, Rep. of the Office of the U.N. High Comm'r for Hum. Rts. on the relationship between climate change and human rights, ¶ 70, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009); see also Luciano Butti, *The Tortuous Road to Liability: A Critical Survey on Climate Change Litigation in Europe and North America*, 11 SUSTAINABLE DEV. L. & POL'Y 32-36 (2011) (discussing the difficulty of establishing causation in climate change cases). Even if human rights law is unable to impose liability for climate change, John Knox points out that nations are nevertheless obliged under the UN Charter and the International Covenant on Economic, Social, and Cultural Rights to cooperate with one another to respond to the global threats to human rights posed by climate change. See Knox, *Climate Change*, *supra* note 23, at 212-19.

205. Gonzalez, *Environmental Justice*, *supra* note 6, at 33.

206. See Maxine Burkett, *Rehabilitation: A Proposal for a Climate Compensation Mechanism for Small Island States*, 13 SANTA CLARA J. INT'L L. 81 (2015).

announced that they had hired a British human rights law firm to sue several European states (including Britain, France, and the Netherlands) in order to obtain reparations for slavery, such as a formal apology, cancellation of the foreign debt, and monetary compensation.<sup>207</sup> Whether or not these strategies are ultimately successful, they will influence public perceptions of historic and contemporary inequities, clarify extremely significant areas of international law, and create political momentum for redress to the victims of systemic injustice.

An example of an innovative (and ultimately successful) claim for environmental harm caused by a former colonial power is the case brought in 1989 by the Pacific island nation of Nauru before the International Court of Justice. Nauru sought reparations from Australia for environmental damage caused by phosphate mining during Australia's administration of Nauru pursuant to the League of Nations Mandate System and its successor Trusteeship System of the United Nations.<sup>208</sup> Nauru alleged that Australia violated the trusteeship provisions and several principles of international law, including self-determination and permanent sovereignty over natural resources.<sup>209</sup> In 1993, Nauru and Australia settled the claim for \$107 million under an agreement designed to rehabilitate the damaged lands.<sup>210</sup> The Nauru case illustrates the importance of creative use of existing legal doctrines to address environmental injustice.

#### ***F. Treating Symptoms Rather than Root Causes***

The human rights framework tends to mitigate the harshness of the global economy without questioning its fundamental premises.<sup>211</sup> It protects the rights of specific individuals and communities on a case-by-case basis rather than challenging paradigms of economic development that impose disproportionate burdens on the planet's most vulnerable communities. The case-by-case approach can implicitly legitimize the existing distributions of wealth and power

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207. See Duggie Joseph & David McFadden, *Caribbean Adopts Plan to Seek Slavery Reparations*, THE BIG STORY (Mar. 10, 2014), <http://bigstory.ap.org/article/caribbean-adopts-plan-seek-slavery-reparations>.

208. See generally Antony Anghie, *"The Heart of My Home:" Colonialism, Environmental Damage, and the Nauru Case*, 34 HARV. INT'L L.J. 445 (1993) [hereinafter Anghie, *"The Heart of My Home"*]; M. Rafiqul Islam, *The Dispute between Nauru and Australia over Rehabilitation: A Test Case for Economic Self-Determination*, 8 QUEENSL. U. OF TECH. L. J. 147 (1992).

209. See Anghie, *"The Heart of My Home,"* *supra* note 208, at 465-491 (analyzing Nauru's theories of recovery).

210. *Id.* at 506.

211. See Makau Mutua, *The Transformation of Africa: A Critique of the Rights Discourse*, in INTERNATIONAL HUMAN RIGHTS LAW IN A GLOBAL CONTEXT 899, 917-18 (Feliipe Gomez Isa & Koen de Feyter eds., 2009).

by dealing with environmental injustice as aberrant rather than recognizing it as systemic. Tinkering with the discrete manifestations of injustice may divert attention from efforts to challenge a failed development model based on the myth of unlimited economic growth and externalization of environmental and social costs.

For example, indigenous peoples have been particularly successful in influencing the substantive content of international law through their participation in both formal and informal decision-making and norm-creating processes in regional and global law-making institutions.<sup>212</sup> However, these human rights victories have not always translated into success on the ground due to the fragmented nature of international law and the failure of international economic law to incorporate human rights norms. States and TNCs continue to violate the rights of indigenous peoples by engaging in environmentally devastating activities (including oil drilling and mining) on indigenous ancestral lands against the express wishes of these communities.<sup>213</sup> As one observer points out:

[I]ndigenous peoples' human rights over their ancestral lands and resources often collide with pre-existing international law norms and other norms that continuously evolve under international trade and investment law. Indigenous peoples' rights over ancestral lands and resources exist outside of, and arguably in subordination to, other norms of international law such as state sovereignty over natural resources and states' right to development. Moreover, corporate actors that benefit from state-granted concessions may be considered to have more rights over lands and resources than indigenous peoples that occupy such lands.<sup>214</sup>

Thus, while continuing to advance environmental human rights in national, regional, and international human rights bodies, environmental justice movements in the North and the South must also engage vigorously with international economic law and institutions if the triumphs achieved in the human rights regime are to be more than pyrrhic victories.<sup>215</sup> Environmental justice advocates must question the dominant economic paradigms and propose

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212. See Lillian Aponte Miranda, *Indigenous Peoples as International Lawmakers*, 32 U. PA. J. INT'L L. 203, 224-54 (2010).

213. See *id.* at 255-59.

214. *Id.* at 261.

215. See, e.g., MILES, *supra* note 175, at 212-385 (discussing strategies for the reform of international investment law); Gonzalez, *Critique*, *supra* note 129, at 773-802 (discussing strategies for the reform of international trade law).



alternatives that will place the interdependence of humans and nature at the core and will promote environmental justice within and between nations.

### ***G. Displacement of Local Conceptions of Human Dignity***

Finally, one of the dangers of invoking international human rights law is that it may crowd out competing visions of justice and human dignity.<sup>216</sup> As Balakrishnan Rajagopal explains:

The epistemological problem is the sheer assertion of power over, and the elimination of, other discourses which may or may not come from the same source as the Western liberal human rights paradigm . . . . The empirical problem relates to the wide gap that exists between the legal instantiations of rights to the lived experience of rights, where one encounters the complex reality that there are multiple sources of resistance, emancipation, flourishing, protest and rights-making practices on the ground that are competing and coexisting, and that the human rights discourse is only one language of justice and emancipation.<sup>217</sup>

In other words, human rights norms often fail to adequately reflect the complex and multi-dimensional forms of violence inflicted on subaltern populations,<sup>218</sup> to fully articulate the emancipatory aspirations and resistance strategies of diverse grassroots social and environmental justice movements,<sup>219</sup> and to represent the world views of non-Western legal and cultural traditions (including Islamic, African, Buddhist, Confucian, Hindu, and indigenous notions of what it means to be human).<sup>220</sup> In addition, as noted above, the redress mechanisms of the international human rights system may be unwilling or unable to provide reparations for systemic injustices such as slavery, colonialism, and the North's ecological debt to the South.

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216. See David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101, 108-09 (2002).

217. Rajagopal, *Translating Human Rights*, *supra* note 5, at 419-20.

218. See BAXI, *supra* note 37, at 7-9. For example, despite the indivisibility of human rights and the recognition that environmental justice includes access to basic needs such as housing and sanitation, the distinction in many national constitutions between environmental rights and socioeconomic rights encourages the separation of these claims, and may promote a vision of environmental protection divorced from social and economic justice. See Tracy-Lynn Humby, *Environmental Justice and Human Rights on the Mining Wastelands of the Witwatersrand Gold Fields*, 43 REVUE GÉNÉRALE DE DROIT 65, 105-109 (2013).

219. See RAMACHANDRA GUHA, ENVIRONMENTALISM: A GLOBAL HISTORY 98-124 (2000) (explaining that environmental justice movements in the global South subscribe to a variety of ideologies and utilize a wide range of legal and extra-legal forms of social action); RAJAGOPAL, INTERNATIONAL LAW FROM BELOW, *supra* note 134, at 249-53 (examining the diverse strategies and goals of grassroots social movements and the difficulty of uniting them under a monolithic human rights umbrella).

220. See BAXI, *supra* note 37, at 46-47.

One response to these critiques is to recognize that the human rights framework, despite its limitations, has nevertheless empowered vulnerable populations disparately burdened by environmental degradation. Poor communities in places as diverse as Russia, Colombia, Costa Rica, Argentina, Chile, Romania, Turkey, Peru, and South Africa have deployed environmental human rights to obtain access to clean drinking water or to address health risks posed by industrial pollution.<sup>221</sup> It is important for legal scholars to supplement theoretical critiques of environmental human rights with empirical studies of environmental justice struggles in order to evaluate the actual operation of human rights norms and institutions and their ability to fulfill the aspirations of subordinated communities.<sup>222</sup>

A second response is to highlight the ways that national and regional interpretations of environmental human rights will inevitably be influenced by local conceptions of human dignity that will supplement or perhaps replace Eurocentric “universal” models.<sup>223</sup> For example, both the Ecuadoran Constitution and Bolivia’s Law of Mother Earth recognize the rights of nature due, in part, to the incorporation of indigenous values and traditions into the domestic legal system.<sup>224</sup> Similarly, New Zealand’s decision to grant legal personhood to the Whanganui River reflects a rapprochement between Western and indigenous legal philosophies.<sup>225</sup> At the regional level, the African Charter of Human and Peoples’ Rights (which recognizes the right to a healthy environment) emphasizes both the rights and duties of individuals consistent with African conceptions of human beings as integral members of a larger

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221. See BOYD, *supra* note 25, at 237-38.

222. See *id.* at 233-77 (evaluating the empirical data on advantages and disadvantages of constitutionalizing the right to a healthy environment based on the experiences of over one hundred nations); César A. Rodríguez-Garavito & Luis Carlos Arenas, *Indigenous Rights, Transnational Activism, and Legal Mobilization: The Struggle of the U'wa People in Colombia*, in LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY 241, 241-66 (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., 2005) (presenting a case study of indigenous mobilization against oil drilling in Colombia); Daniel Bonilla Maldonado, *International Law, Cultural Diversity, and the Environment: The Case of the General Forestry Law in Colombia*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH (Shawkat Alam, Sumudu Atapattu, Carmen G. Gonzalez, and Jona Razzaque eds., forthcoming 2015) (explaining how indigenous and Black communities and their allies used international human rights law to mount a successful challenge to Colombia’s General Forestry Law).

223. See Frédéric Mégret, *International Human Rights and Global Legal Pluralism: A Research Agenda*, in DIALOGUES ON HUMAN RIGHTS AND LEGAL PLURALISM 69, 70-71, 77-80, 82-83 (René Provost & Colleen Sheppard eds., 2013) (discussing how “universal” human rights are reinterpreted by regional human rights bodies and local non-state actors).

224. See BOYD, *supra* note 25, at 70, 126, 139-40; John Vidal, *Bolivia Enshrines Natural World’s Rights with Equal Status for Mother Earth*, THE GUARDIAN, Apr. 10, 2011, available at <http://www.theguardian.com/environment/2011/apr/10/bolivia-enshrines-natural-worlds-rights>.

225. See *New Zealand’s Whanganui River*, *supra* note 200.

community.<sup>226</sup> This group-centered view of humanity is also evident in national legal systems. Thus, South African public law, private law, and constitutional interpretation have all been influenced by the indigenous concept of *ubuntu*, a holistic view of human identity as interconnected with the environment and with other persons.<sup>227</sup>

A third response is to acknowledge that environmental human rights, if they are to fulfill their emancipatory potential, must evolve under pressure from social movements that genuinely reflect the experiences, aspirations, and perspectives of subaltern communities. The discourse of environmental justice, understood not as a universal language, but as one inflected with local accents, values, and vocabularies, can provide social movements with a language of resistance that has not been coopted by international law-making processes and institutions.<sup>228</sup> For example, environmental justice can be invoked to demand corrective justice in the form of reparations for historic injustice and systemic violations of human rights (including reparations for slavery, colonialism, and the North's ecological debt to the South) in order to stimulate the development of legal theories that will provide this relief.<sup>229</sup> Similarly, environmental justice can be deployed to demand not just the minimum entitlements necessary for a decent life (as currently envisioned by the dominant interpretation of economic, social and cultural rights),<sup>230</sup> but distributional justice in the form of an equal per capita entitlement to the planet's resources consistent with ecological limits.<sup>231</sup> The end product of this approach would be convergence in the ecological footprint of persons in the North and the South—and also within each nation.<sup>232</sup> Environmental justice can be used to devise legal and extra-legal strategies to demand a more just and sustainable economic order and to

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226. See Mutua, *Ideology*, *supra* note 132, at 642-46 (explaining that the human rights corpus' emphasis on the atomistic individual runs counter to African conceptions of humans as part of a larger community and suggesting that the African Charter could serve as an example of an alternative group-centered human rights paradigm). For a more extensive discussion of the concept of duties in the African Charter, see Makau Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 VA. J. INT'L L. 339 (1995).

227. See Jacqueline Church, *Sustainable Development and the Culture of Ubuntu*, 45(3) DE JURE 511, 524-31 (2012).

228. See GUHA, *supra* note 219, at 107 (describing the indigenous social justice ideologies that fueled grassroots environmental justice movements in the global South, including Buddhism, liberation theology, and Ghandism).

229. See generally ELAZAR BARKAN, *THE GUILT OF NATIONS* (2000) (discussing the circumstances under which nations have agreed to provide reparations for historic injustices).

230. See PAREDIS ET AL., *supra* note 67, at 115-16; PETER UVIN, *HUMAN RIGHTS AND DEVELOPMENT* 39, 39 (2004).

231. See McLaren, *supra* note 13, at 22-25; Mickelson, *supra* note 66, at 158-60.

232. Mickelson, *supra* note 66, at 163-64.

influence the development of environmental human rights at the national, regional, and international level.

In sum, far from casting doubt on the utility of the environmental human rights framework, the limitations discussed in this section only highlight the importance of political mobilization to create new rights and obligations and to deploy existing rights in novel and creative ways. Human rights law and discourse must be regarded as a tool to challenge environmental injustice rather than an ossified and unchanging body of law. Thus, in its 2004 report on environmental human rights, Friends of the Earth International unabashedly calls for reparations for the ecological debt caused by the North's depletion and destruction of the South's natural resources and highlights the plight of communities affected by environmental degradation.<sup>233</sup> Human rights law puts a human face on environmental harm and empowers subordinated communities to speak for themselves in domestic or international tribunals and in the court of public opinion, as a means of naming and shaming human rights abusers and drawing international attention to their own plight and that of similarly situated communities.<sup>234</sup> In doing so, it serves as a powerful tool to educate the public about environmental injustice (current and historic), to build political momentum for reparations, and to create a public dialogue about alternatives to the current growth-at-any-cost economic model. As one commentator points out,

[E]nvironmental activists see human rights as fluid and (in a good way) volatile and unstable. Unlike the lawyers they roam beyond the documentation to find new rights. Unlike the philosophers they do not pass their projects through a test rooted in historical or rational consistency. What matters is what works and what can be achieved.<sup>235</sup>

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233. See *Our Environment, Our Rights: Standing up for People and the Planet*, FRIENDS OF THE EARTH INTERNATIONAL 4-6, 48-49 (Aug. 2004), available at <http://www.foei.org/wp-content/uploads/2014/07/our-environment-our-rights.pdf>.

234. The Inuit petition illustrates the ability of the international human rights system to empower subordinated communities to tell their stories and influence public opinion. "The petition constituted an innovative attempt to link human rights law, traditional knowledge, and climate justice. It used interviews with Inuit hunters and elders to articulate a legal basis for making carbon emission a justiciable violation of human rights." Sam Adelman, *Rio+20: Sustainable Injustice in a Time of Crises*, 4 J. OF HUM. RTS. & THE ENV'T 6, 24 (2013). Through the petition, the Inuit presented a morally compelling account of the devastating impacts of climate change and highlighted the central role of the United States in their predicament. In so doing, the Inuit educated the public about the causes and consequences of climate change, engaged the United States on the need to reduce its greenhouse gas emissions, and prompted the Inter-American Commission on Human Rights to hold hearings on the link between climate change and human rights. For an analysis of the impact of the Inuit petition, see generally Osofsky, *supra* note 170, at 313-38.

235. See Conor Gearty, *Do Human Rights Help or Hinder Environmental Protection?*, 1 J. OF HUM. RTS. & THE ENV'T 7, 14 (2010).

## Conclusion

This article has highlighted what one observer calls “the paradox of institutionalization.”<sup>236</sup> On the one hand, the discourse of human rights possesses tremendous emancipatory potential when deployed by grassroots environmental justice movements to advocate for a more equitable and sustainable society. On the other hand, human rights law and institutions are embedded in power relations that replicate colonial discourses (such as the savior-savage narrative) and enable Northern states and transnational corporations to evade responsibility for their abuse of nature and of vulnerable states and peoples. In order to realize the emancipatory potential of environmental human rights, scholars and practitioners should develop a non-Eurocentric account of the human rights project, amplify the voices of grassroots environmental justice activists to influence the interpretation of environmental human rights law, and develop legal theories that challenge the systemic human rights violations of the global economic order rather than merely ameliorating its most egregious manifestations. Environmental human rights litigation must target not only Southern states, but also the Northern states and TNCs that wield enormous power over the policies and practices of Southern governments. Human rights law must recognize and vigorously enforce collective human rights, the rights of nature, and the rights of future generations. It must evolve in response to the needs and aspirations of grassroots social justice movements, and incorporate local and indigenous concepts of human dignity. In the words of Upendra Baxi:

The summons for the destruction of ‘narrative monopolies’ in human rights theory and practice is of enormous importance, as it enables us to recognize that the authorship of human rights rests with communities in struggle against illegitimate power formations and the politics of cruelty. The local, not the global, it needs to be emphasized, remains the crucial site of struggle for the enunciation, implementation, and enjoyment and exercise of human rights. The pre-history of almost every global institutionalization of human rights is furnished everywhere by the local.<sup>237</sup>

Human rights law is by no means a panacea for the world’s environmental ills, but it is an important tool in a broader campaign for global environmental justice that complements but does not replace domestic environmental regulation, the negotiation and implementation of environmental treaties, and

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236. See NEIL STAMMERS, HUMAN RIGHTS AND SOCIAL MOVEMENT 102-30 (2009).

237. BAXI, *supra* note 37, at 184-85.

extra-legal popular mobilization for a more just, humane, and ecologically sustainable economic order.

