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Human rights, environmental justice, and the North-South Divide

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CDPs there is a great risk of this unless the international community ensures that sufficient funds are made available for adaptation and for the Warsaw Mechanism.²⁰⁰

²⁰⁰ In this regard see R. Lyster, 'A fossil fuel-funded Climate Disaster Response Fund under the UNFCCC loss and damage mechanism' where the author proposes that fossil fuel companies supplement the funds available from governments and insurers <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2346616>.

21. Human rights, environmental justice, and the North-South divide

Carmen G. Gonzalez

1. INTRODUCTION

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.¹

The leading cause of global environmental degradation is the profligate consumption of the planet's resources by its wealthiest inhabitants, most of whom reside in the global North or in the mega-cities of the global South.² The richest 20 per cent of the world's population consumes roughly 80 per cent of the planet's economic output,³ and generates 90 per cent of its hazardous waste.⁴ 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

¹ United Nations Millennium Ecosystem Assessment, *Ecosystems and Human Well-Being: Synthesis* (Island Press 2005) 1–24 <<http://www.unep.org/maweb/documents/document.356.aspx.pdf>>.

² Ibid. This chapter 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. Despite (i) the heterogeneity of the countries that comprise the global South; (ii) 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 (iii) 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'), the global South shares a history of Northern economic and political domination that has prompted Southern nations to join forces as a negotiating bloc (the Groups of 77 plus China) to demand a more just distribution of global wealth. The North-South framework remains a useful tool for mobilizing collective resistance to an international economic order that entrenches poverty, inequality, and widespread environmental degradation.

³ W.E. Rees and L. Westra, 'When Consumption Does Violence: Can There be Sustainability and Environmental Justice in a Resource-Limited World?' in J. Agyeman, R.D. Bullard and B. Evans (eds), *Just Sustainabilities: Development in an Unequal World* (Earthscan 2003) 110–12; World Bank, *2008 World Development Indicators* (2008) 4 <<http://data.worldbank.org/sites/default/files/wdi08.pdf>>.

⁴ D.N. Pellow, *Resisting Global Toxics: Transnational Movements for Environmental Justice* (MIT Press 2007) 8.

producing global environmental problems (such as climate change and biodiversity loss) that will constrain the development options of generations to come.⁵ 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.⁶

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 peoples. 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.⁷

In the United States, the concentration of environmental hazards in low-income communities and communities of colour sparked a vibrant environmental justice movement dedicated to the defence of disparately impacted communities.⁸ Environmental justice activists have been at the forefront of struggles over the siting of hazardous industries in low-income minority communities; 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.⁹

Environmental justice scholars and advocates identify four distinct aspects of environmental injustice. They allege distributive injustice in the form of disproportionate exposure to environmental hazards and limited access to environmental amenities; procedural unfairness due to exclusion of socially and economically subordinated communities from environmental decision-making; corrective injustice in the form of

⁵ C.G. Gonzalez, 'Environmental Justice and International Environmental Law' in S. Alam et al (eds), *Routledge Handbook of International Environmental Law* (Routledge 2013) 78, 80–84.

⁶ Rees and Westra, above n 3, 110; J. Agyeman, et al, 'Joined-up Thinking: Bringing Together Sustainability, Environmental Justice, and Equity' in Agyeman, Bullard and Evans (eds), above n 3, 4.

⁷ United Nations Development Program, *Human Development Report 2011: Sustainability and Equity: A Better Future for All* (Palgrave Macmillan 2011) 4–8, 50–60; Rees and Westra, above n 3, 100.

⁸ L.W. Cole and S.R. Foster, *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement* (New York University Press 2001) 19–33; R.D. Bullard, 'Environmental Justice in the Twenty-First Century' in R.D. Bullard (ed.), *The Quest for Environmental Justice: Human Rights and the Politics of Pollution* (Sierra Club 2005) 18–25.

⁹ C.G. Gonzalez, 'Genetically Modified Organisms and Justice: The International Environmental Justice Implications of Biotechnology' 2007 *Georgetown International Environmental Law Review* 19: 583, 589–90; A.H. Alkon and J. Agyeman, 'Introduction: The Food Movement as Polyculture' in A.H. Alkon and J. Agyeman (eds), *Cultivating Food Justice: Race, Class, and Sustainability* (MIT 2011) 4–10; D.B. Suagee, 'Tribal Self-Determination and Environmental Federalism: Cultural Values as a Force for Sustainability' 1998 *Widener Law Symposium Journal* 3: 229, 236–9.

inadequate enforcement of environmental laws; and social injustice because environmental degradation is inextricably intertwined with deeper structural ills such as poverty and racism.¹⁰

Environmental justice struggles are taking place in both the global North and the global South.¹¹ Among the most prominent are the struggles of the indigenous peoples of the Arctic and of the Pacific Islands for climate justice,¹² the resistance of Nigeria's ethnic minorities to environmentally devastating oil drilling,¹³ and the challenge by transnational agrarian movements (such as La Vía Campesina) to corporate-dominated free trade policies that undermine rural livelihoods, exacerbate poverty and hunger, and degrade the environment.¹⁴

Many scholars and legal practitioners have framed the demands of the environmental justice movements nationally and globally in the language of human rights.¹⁵ Although most human rights treaties do not explicitly recognize the right to a healthy environment, global and regional human rights tribunals have concluded 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.¹⁶ Human rights violations caused by environmental degradation have been found to infringe the International Covenant on Civil and Political Rights (1966); the International Covenant on Economic, Social and Cultural Rights (1966); the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950); and the American Convention on Human Rights (1969) despite the absence of explicit environmental provisions in these treaties.¹⁷ 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 Charter on Human Rights), and the ASEAN Declaration on Human Rights recognize the substantive right to a healthy environment; the 1998 Aarhus Convention on Access to Information,

¹⁰ R.R. Kuehn, 'A Taxonomy of Environmental Justice' 2000 *Environmental Law Reporter* 30: 10681, 10681–2, 10688.

¹¹ G. Walker, *Environmental Justice: Concepts, Evidence and Politics* (Routledge 2012) 24–5.

¹² R. Tsosie, 'Indigenous People and Environmental Justice: The Impact of Climate Change' 2007 *University of Colorado Law Review* 78: 1625, 1633–46.

¹³ T. Agbola and M. Alabi, 'Political Economy of Petroleum Development, Environmental Injustice and Selective Victimization: A Case Study of the Niger Delta Region of Nigeria' in Agyeman, Bullard and Evans (eds), above n 3, 269–88.

¹⁴ P. McMichael, 'Peasants Make Their Own History, But Not Just as They Please ...' in S.M. Borras Jr, M. Edleman and C. Kay (eds), *Transnational Agrarian Movements Confronting Globalization* (Wiley 2008) 42–7.

¹⁵ Agyeman et al, above n 6, 10–11.

¹⁶ J.H. Knox, 'Climate Change and Human Rights Law' 2009 *Virginia Journal of International Law* 50: 163, 168–78; D. Shelton, 'The Environmental Jurisprudence of International Human Rights Tribunals' in R. Picoletti and J.D. Taillant (eds), *Linking Human Rights and the Environment* (University of Arizona 2003) 11–12.

¹⁷ S. Kravchenko and J.E. Bonine, *Human Rights and the Environment: Cases, Law and Policy* (Carolina Academic Press 2008) 3–4.

Public Participation in Decision-Making and Access to Justice in Environmental Matters recognizes procedural environmental rights.¹⁸

The protection of environmental human rights by regional and international human rights institutions has prompted the recognition of environmental human rights in national constitutions, legislation, and judicial decisions.¹⁹ Currently, at least 147 national constitutions explicitly reference environmental rights and/or environmental responsibilities.²⁰ Clearly, human rights law has been and continues to be an important weapon in the struggle for environmental justice.

While environmental justice scholars and practitioners have harnessed the power of human rights to advocate for the individuals and communities that have been harmed by environmental degradation, North-South power imbalances pose major challenges to the achievement of environmental justice between as well as within nations. 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 experiences distributive injustice in the form of disparate exposure to environmental hazards due to the vulnerable geographic locations and limited regulatory capabilities of many Southern nations, to the ongoing unsustainable extraction of natural resources to satisfy Northern consumers, and to the transfer of polluting industry and hazardous wastes from North to the South.²¹ 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.²² 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.²³ 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 without internalizing the social and environmental costs.²⁴

¹⁸ D.R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press 2012) 84–8; ASEAN Human Rights Declaration article 28 (19 November 2012) <<http://www.asean.org/news/asean-statement-communiqués/item/asean-human-rights-declaration>>.

¹⁹ Boyd, above n 18, 78, 106–7.

²⁰ Ibid 47.

²¹ R. Anand, *International Environmental Justice: A North-South Dimension* (Ashgate 2004) 128–30; C.G. Gonzalez, 'Beyond Eco-Imperialism: An Environmental Justice Critique of Free Trade' 2001 *Denver University Law Review* 78: 981, 987–1000; Walker, above n 11, 95–8.

²² Anand, above n 21, 132–3; P. Hossay, *Unsustainable: A Primer for Global Environmental and Social Justice* (Zed Books 2006) 191–8; R. Peet, *Unholy Trinity: The IMF, World Bank and WTO* (Zed Books 2003) 200–204.

²³ M. Burkett, 'Climate Reparations' 2009 *Melbourne Journal of International Law* 10: 509, 513–20.

²⁴ Gonzalez, above n 9, 583, 595–602.

A second 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. 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 supersede any conflicting national laws.²⁵ Southern scholars have questioned the universal aspirations of human rights law in a multicultural world and have pointed out that international law (including human rights law) has historically been used by the North to justify the conquest and dispossession of Southern peoples²⁶ and has recently been deployed to legitimate military intervention and economic reconstruction in places as diverse as Somalia, Kosovo, Iraq, and Afghanistan.²⁷ 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.'²⁸

This chapter will critically examine the relationship between environmental justice and human rights by focusing on the North-South dimensions of environmental injustice. Rather than restate and supplement the existing scholarship on the advantages and disadvantages of human rights-based approaches to environmental protection, the chapter will serve as a cautionary note – reminding the reader that the discourse of human rights is embedded in a larger canon and that promoting environmental justice requires grappling with an international economic order that continues to subordinate the global South and to facilitate the pillage of the planet's finite resources.

2. 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 Latin America devastated indigenous societies and wreaked havoc on the flora and fauna of the colonized territories through logging, mining, and plantation agriculture.²⁹ European colonization transformed self-sufficient subsistence economies into economic outposts of Europe that produced agricultural commodities, minerals, and timber, and purchased manufactured goods.³⁰ It also paved

²⁵ D.K. Anton and D.L. Shelton, *Environmental Protection and Human Rights* (Cambridge University Press 2011) 121.

²⁶ U. Baxi, *The Future of Human Rights* (Oxford University Press 2006) 52.

²⁷ B. Rajagopal, 'Counter-Hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy' 2006 *Third World Quarterly* 27: 767, 770–71.

²⁸ M. Mutua, 'The Complexity of Universalism in Human Rights' in András Sajó (ed.), *Human Rights with Modesty: The Problem of Universalism* (Brill Academic Publishers 2004) 61.

²⁹ C. Ponting, *A Green History of the World: The Environment and the Collapse of Great Civilizations* (Penguin Books 1991) 130–6.

³⁰ *Ibid* 194–212.

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 labour for their colonial overlords.³¹

The colonial enterprise was justified by notions of European cultural and racial superiority that linger, 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.³² Post-colonial elites would later internalize this ideology and subjugate their own indigenous populations in the name of modernization and development.³³ 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, the genocide in Rwanda, the social and economic legacy of apartheid in South Africa, hate crimes against non-whites and immigrants in Europe and the United States, and the subordination of Afro-descendent and indigenous populations in the Americas.

The achievement of political independence by the Latin American colonies in the nineteenth century and by the African and Asian colonies in the middle of the twentieth century did not significantly alter the South's crippling dependence on a world economy dominated by Europe and the United States.³⁴ Because the terms of trade consistently favoured 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. Efforts to boost national earnings by increasing the production of minerals, timber, and agricultural commodities generally went awry, producing a glut of primary commodities on global markets that depressed prices, reduced Southern export earnings, and only reinforced Southern economic vulnerability.³⁵ 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.³⁶ As historian Clive Ponting observes:

³¹ Ibid 130–40, 196–9, 203–12.

³² R. Gordon, 'Saving Failed States: Sometimes a Neocolonialist Notion' 1997 *American University Journal of International Law and Policy* 19: 903, 930–35.

³³ R. Stavenhagen, 'Indigenous Peoples and the State in Latin America: An Ongoing Debate' in R. Sieder (ed.), *Multiculturalism in Latin America: Indigenous Rights, Diversity and Democracy* (Palgrave Macmillan 2002) 24–6; J. Ngugi, 'The Decolonization-Modernization Interface and the Plight of Indigenous Peoples in Post-Colonial Development Discourse in Africa' 2002 *Wisconsin International Law Journal* 20: 297, 324–6.

³⁴ Ponting, above n 29, 213–14.

³⁵ Ibid 223.

³⁶ J. Martinez-Alier, *The Environmentalism of the Poor: A Study of Ecological Conflicts and Valuation* (Edward Elgar 2002) 214. Economist Joan Martinez-Alier refers to this trade among rich and poor countries as 'ecologically unequal exchange', which he defines as 'the 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'.

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.³⁷

In the aftermath of the Second World War, the nations of the global South formed a coalition known as the Group of 77 (G-77) to reform the international economic system by passing resolutions at the United Nations General Assembly, where they held a numerical majority. 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. 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.³⁸

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.³⁹ 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. 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.⁴⁰

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.⁴¹ Impoverished 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 industry.⁴² Having industrialized by appropriating the

³⁷ Ponting, above n 29.

³⁸ L. Rajamani, *Differential Treatment in International Law* (Oxford University Press 2006) 17–18; R. Gordon and J.H. Sylvester, 'Deconstructing Development' 2004 *Wisconsin International Law Journal* 22: 1, 56–68; R. Gordon, 'The Dawn of a New, New International Economic Order?' 2009 *Law and Contemporary Problems* 72: 131, 142–9.

³⁹ Gordon, above n 38, 145–50.

⁴⁰ Ibid; Gonzalez, above n 5, 82.

⁴¹ Gonzalez, above n 5, 82.

⁴² Pellow, above n 4.

South's resources and by using more than its fair share of the global commons for waste disposal, the North's per capita ecological footprint continues to dwarf that of the South.⁴³

Scholars and activists have argued that the global North owes an ecological debt⁴⁴ to the countries and peoples of the global South for 'resource plundering, unfair trade, environmental damage and the free occupation of environmental space to deposit waste'⁴⁵ and for the displacement of Southern peoples and the destruction of their 'natural heritage, culture and sources of sustenance'.⁴⁶ 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.

3. 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-European peoples. Colonization and conquest were initially authorized by papal edicts from the time of the Crusades concerning the right of Christians to seize the lands of non-Christians.⁴⁷ Under the influence of the sixteenth-century Spanish theological 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.⁴⁸ 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.⁴⁹ 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

⁴³ Rees and Westra, above n 3, 109–12.

⁴⁴ K. Mickelson, 'Leading Toward a Level Playing Field, Repaying Ecological Debt, or Making Environmental Space: Three Stories About International Environmental Cooperation' 2005 *Osgoode Hall Law Journal* 43: 138, 150–54.

⁴⁵ E. Paredis et al, *The Concept of Ecological Debt: its Meaning and Applicability in International Policy* (Academia Press 2008) 7.

⁴⁶ Ibid.

⁴⁷ R.A. Williams Jr, *The American Indian in Western Legal Thought: Discourses of Conquest* (Oxford University Press 1990) 13, 44–50.

⁴⁸ F. de Vitoria, 'On the American Indians' in A. Pagden and J. Lawrence (eds), *Vitoria: Political Writings* (Cambridge University Press 1991) 250–51; A. Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' 2006 *Third World Quarterly* 27: 739, 742–3.

⁴⁹ Anghie, above n 48, 739, 743.

to wage a 'just war' against them, to hold them as captives, and to seize their lands.⁵⁰ Writing a century after Vitoria, Hugo Grotius endorsed Vitoria's conclusions, although he discarded the Christian mission as one of the justifications for just war.⁵¹

The emergence of independent nation states in Europe following the 1648 Treaty of Westphalia (which ended the Thirty Years' War and the political hegemony of the Roman Catholic Church) produced new legal justifications for the colonial enterprise. The eighteenth-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.⁵² However, Vattel, like his predecessors, adopted Eurocentric models of the nation state that excluded indigenous peoples. 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.⁵³ Vattel's writings also provided the intellectual justification for the doctrine of *terra nullius*, which was used extensively by the British and the French 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.⁵⁴

In the nineteenth 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.⁵⁵ 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.'⁵⁶ 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.⁵⁷

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

⁵⁰ Vitoria, above n 48, 278–86; Anghie, above n 48, 739, 743–4.

⁵¹ S.J. Anaya, *Indigenous Peoples in International Law* (Oxford University Press 2004) 19.

⁵² Ibid 20–21.

⁵³ Ibid 22–3.

⁵⁴ E. de Vattel, *The Law of Nations* (Liberty Fund 2008) 128–30; K. Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Duke University Press 2010) 21–4; S. Banner, *Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska* (Harvard University Press 2007) 13–46, 163–230.

⁵⁵ Anghie, above n 48, 739, 745; A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004) 52–90.

⁵⁶ Anghie, *Imperialism, Sovereignty and the Making of International Law*, above n 55, 62.

⁵⁷ Ibid 84–6.

key duties of all civilized nations.⁵⁸ John Westlake, a prominent nineteenth-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'. His rationale is 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 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.⁵⁹

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 at the Berlin Conference of 1884–1885 in order to avoid open warfare among European states in their scramble for Africa's resources. 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.⁶⁰

In the aftermath of the First World War, the League of Nations devised economic criteria to justify the continuation of the colonial enterprise. 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. These 'backward peoples' were placed under the tutelage of the League's Mandate Powers (most often Britain and France) until they were transformed into modern states capable of self-government.⁶¹ 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

⁵⁸ U. Natarajan, 'TWAIL and the Environment: The State of Nature, the Nature of the State, and the Arab Spring' 2012 *Oregon Review of International Law* 14: 177, 192; A. Geisinger, 'Sustainable Development and the Domination of Nature: Spreading the Seed of the Western Ideology of Nature' 1999 *Boston College Environmental Affairs Law Review* 27: 43, 52–8.

⁵⁹ J. Westlake, *Chapters on the Principles of International Law* (Cambridge University Press 1834) 142–3.

⁶⁰ M. Mutua, 'Why redraw the map of Africa? A moral and legal inquiry' 1995 *Michigan Journal of International Law* 16: 1113.

⁶¹ Anghie, above n 48, 739, 746–8; N.T. Saito, 'Decolonization, Development, and Denial' 2010 *Florida A&M University Law Review* 6: 1, 25–31.

domination of the global South in furtherance of yet another iteration of the North's 'civilizing mission'.⁶²

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 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.⁶³ 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 favourable treatment to Southern nations. Differential treatment was later incorporated into international environmental law (including the United Nations Framework Convention on Climate Change and the Kyoto Protocol) through the principle of common but differentiated responsibility, which imposed asymmetrical obligations on Northern and Southern states in recognition of the North's disproportionate contribution to global environmental degradation and its greater technical and financial resources.⁶⁴

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'.⁶⁵ 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 offered scientific and technical assistance to enable the South to 'catch up'.⁶⁶ 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).⁶⁷ 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. As a condition of debt relief, the IMF and the World Bank required debtor nations to implement structural adjustment programmes that exacerbated poverty and inequality in the global South. These programmes required, inter alia, drastic cuts in government spending that deprived vulnerable populations of access to education, health care, and other social

⁶² Anghie, *Imperialism, Sovereignty and the Making of International Law*, above n 55, 190–95; Saito, above n 61, 1, 29–30.

⁶³ Saito, above n 61, 10–11; D. Otto, 'Rethinking Universals: Opening Transformative Possibilities in International Human Rights Law' 1997 *Australian Year Book of International Law* 18: 1, 21.

⁶⁴ Gonzalez, 'Environmental Justice and International Environmental Law', above n 5, 87–92.

⁶⁵ Natarajan, above n 58, 177, 192–3; Gordon and Sylvester, above n 38, 13–17.

⁶⁶ Gordon and Sylvester, above n 38, 9–18.

⁶⁷ *Ibid* 1, 18–49.

services and sparked widespread popular protests.⁶⁸ 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 programmes designed to create a favourable climate for foreign investment.⁶⁹ 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.⁷⁰

Underlying the civilized/un-civilized, 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.⁷¹ Communities that engage in subsistence production, resist wage labour, or disdain the accumulation of material wealth were pronounced uncivilized and in need of development.⁷² Development was deemed to require the commodification of nature (private property) and human activity (labour), ever-increasing material consumption, international commerce, and continuous economic growth.⁷³ Even sustainable development, the centerpiece of 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.⁷⁴ 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 sophisticated cultural traditions that viewed humans and nature as inherently interdependent.⁷⁵

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.⁷⁶ Like 'development', good governance possesses universal appeal rooted in notions of democracy, accountability, transparency, and participation. 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.⁷⁷ Moreover, because the World Bank and the IMF were barred by their respective Articles of Agreement from interfering in politics, these institutions embraced those human rights compatible with

⁶⁸ Gordon, above n 38, 131, 142–9.

⁶⁹ Gordon and Sylvester, above n 38, 1, 44–50.

⁷⁰ W. Sachs and T. Santarius, *Fair Future: Resource Conflicts, Security, and Global Justice* (Zed 2007) 30–31.

⁷¹ Saito, above n 61, 38–9.

⁷² Ibid 30.

⁷³ Ibid 1, 38–41; Natarajan, above n 58, 177, 193–5.

⁷⁴ Geisinger, above n 58, 67–8.

⁷⁵ Ibid.

⁷⁶ J.T. Gathii, 'Good Governance as a Counterinsurgency Agenda to Oppositional and Transformative Social Projects in International Law' 1999 *Buffalo Human Rights Law Review* 5: 107, 108–110.

⁷⁷ Saito, above n 61, 17.

their economic and financial mandates (such as ensuring debt repayment by promoting economic growth through privatization and deregulation).⁷⁸ 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.⁷⁹ 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.⁸⁰ The human rights framework articulated in the Universal Declaration of Human Rights (UDHR), 1948, was 'steadily supplanted by a trade-friendly, market-friendly, human rights paradigm' designed to facilitate the enforcement of contracts and the protection of private property for the benefit of global capital rather than protecting the dignity of the human person.⁸¹ Instead of 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.⁸²

The end of the Cold War and the rise of United States hegemony in international affairs inaugurated a new justification for Northern intrusion in the global South – military intervention for ostensibly humanitarian purposes. 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. 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.⁸³ In so doing, the North re-enacted the human rights narrative of the white saviour 'taming' or 'civilizing' savage or despotic Southern states in order to rescue 'backward' peoples who cannot help themselves⁸⁴ – once again demonstrating the tenuous sovereignty of Southern nations.⁸⁵

Transnational corporations headquartered in the North have been the prime beneficiaries of Northern interventions in the global South in order to impose market-friendly political and economic reforms. From the oil drilling operations of Chevron/Texaco in Ecuador to the mining activities of Freeport-McMoran in Indonesia, these corporations (and their counterparts in certain emerging Southern nations) are frequently embroiled

⁷⁸ Gathii, above n 76, 142–4; 156–8.

⁷⁹ Ibid 149.

⁸⁰ Anghie, above n 48, 739, 749.

⁸¹ U. Baxi, 'Voices of Suffering and the Future of Human Rights' 1998 *Transnational Law and Contemporary Problems* 8: 163–4.

⁸² Anghie, *Imperialism, Sovereignty and the Making of International Law*, above n 55, 247–68.

⁸³ Rajagopal, above n 27, 767, 770–73.

⁸⁴ M. Mutua, 'Savages, Victims and Saviors: The Metaphor of Human Rights' 2001 *Harvard International Law Journal* 42: 201, 224–33.

⁸⁵ Anghie, *Imperialism, Sovereignty and the Making of International Law*, above n 55, 303–9.

in some of the worst human rights and environmental abuses.⁸⁶ 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.⁸⁷ Eager to secure foreign investment, Southern governments may 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 without imposing any corresponding duties on the foreign investor to comply with human rights or environmental standards or on the investor's home state to regulate the extraterritorial conduct of its corporations.⁸⁸ 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 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.⁸⁹

4. CAN ENVIRONMENTAL HUMAN RIGHTS PROMOTE ENVIRONMENTAL JUSTICE?

Environmental human rights discourse holds 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).⁹⁰ Human rights law may thereby serve as an important tool to combat misguided economic policies that harm both the environment and its most vulnerable inhabitants in the North and the South. Unlike international environmental law, human rights law creates substantive and procedural obligations that are enforceable through the citizen complaint mechanism, and thereby

⁸⁶ B. Stephens, 'The Amoralism of Profit: Transnational Corporations and Human Rights' 2002 *Berkeley Journal of International Law* 20: 45, 49–53.

⁸⁷ M.R. Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (University of California Press 2004) 338–9; Agbola and Alabi, above n 13, 281–5 (describing the repression of grassroots environmental movements in Nigeria).

⁸⁸ M. Sornarajah, 'Power and Justice: Third World Resistance in International Law' 2006 *Singapore Year Book of International Law* 10: 19, 29–33; P. Simons, 'International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights' 2012 *Journal of Human Rights and the Environment* 3(2): 15–19.

⁸⁹ Baxi, above n 26, 291.

⁹⁰ B.H. Weston and D. Bollier, *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons* (Cambridge University Press 2013) 88–9.

exposes to international scrutiny the environmental impacts of domestic economic activities.

However, it is important to approach human rights not as an object of veneration, but as an important tool in the pursuit of environmental justice that has both advantages and disadvantages. Rather than reiterate the excellent work of other scholars on the benefits of an environmental human rights framework (with which I wholeheartedly agree),⁹¹ this section draws upon sections 2 and 3 of this chapter to examine the limitations of this discourse and to consider how it might evolve to achieve more effectively its emancipatory promise.

Environmental human rights are derived from a human rights canon devised by the global North in the aftermath of the Second World War with minimal Southern input. This canon favours 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.⁹² 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 six 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.

First, the discourse of human rights (environmental or otherwise) is problematic to the extent that it presents itself as neutral, universal, apolitical, non-ideological, timeless, and eternal⁹³ – 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 discourse 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. 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.’⁹⁴ Scholars like Mary Ann Glendon

⁹¹ Ibid 28–9, 87–97; Boyd, above n 18, 234–44.

⁹² M. Mutua, ‘The Ideology of Human Rights’ 1996 *Virginia Journal of International Law* 36: 589, 604–7, 640–46. When the UDHR was negotiated, most African and Asian nations were absent from the discussions because they were under colonial rule. Latin American nations were represented by post-colonial elites whose roots and viewpoints were largely European. Ibid 605.

⁹³ B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press 2003) 206; Otto, above n 63, 1, 5–7; Mutua, above n 92, 589, 607.

⁹⁴ Rajagopal, above n 27, 767, 769.

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.⁹⁵ 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 manoeuvring 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.⁹⁶

Environmental justice scholars and activists must recognize that human rights law is a malleable tool – a double-edged sword 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 (NGOs) (the 'saviours') to target Southern states (the 'savages') for human rights violations without taking into account Northern complicity.⁹⁷ 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) or the states and transnational corporations that benefited from the conflict (such as the arms merchants and resource extractive industries in the Democratic Republic of Congo).⁹⁸ A critical approach to environmental human rights law must lay bare the contemporary and historic causes of environmental human rights abuses, disrupt the saviour-savage narrative, and ensure that the discourse and the practice of human rights address the deeper structural inequities that produce environmental injustice.

Second, the environmental human rights framework, like the international criminal tribunals discussed above, is constrained by its inability to hold accountable the

⁹⁵ M.A. Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House 2002) 32–4.

⁹⁶ Rajagopal, above n 27, 767, 769–70.

⁹⁷ Mutua, above n 84, 201, 224–233.

⁹⁸ I.J. Gassama, 'A World Made of Violence and Misery: Human Rights as a Failed Project of Liberal Internationalism' 2012 *Brooklyn Journal of International Law* 37: 407, 430.

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 sections 2 and 3 of this chapter, nations in the global South are not fully sovereign. They are structurally dependent on the global North through international institutions (like the World Bank and the IMF), through the WTO (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).⁹⁹ 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, or interpretation by human rights bodies) to recognize 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 a foreign government 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 like the IMF and the World Bank or through financing, or failing to regulate the conduct of TNCs).¹⁰⁰ While some human rights treaties explicitly limit state obligations to persons within their jurisdiction, other treaties, including the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR), contain no such limitation and have been interpreted by United Nations bodies to impose extraterritorial obligations.¹⁰¹

An example of a diagonal human rights claim is the petition filed by the Inuit against the United States before the Inter-American Commission of Human Rights for human rights violations caused by climate change.¹⁰² While the claim of the Alaskan Inuits

⁹⁹ Saito, above n 61, 1, 6; V. Prashad, *The Poorer Nations: A Possible History of the Global South* (Verso 2012) 256.

¹⁰⁰ J. Knox, 'Diagonal Human Rights' in M. Gibney and S. Skogly (eds), *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press 2010) 83; C.G. Gonzalez, 'An Environmental Justice Critique of Comparative Advantage: Indigenous Peoples, Trade Policy, and the Mexican Neoliberal Economic Reforms' 2011 *University of Pennsylvania Journal of International Law* 32: 723, 786–9 (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).

¹⁰¹ Knox, above n 100, 88–9.

¹⁰² 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 (7 December 2005) <http://www.ciel.org/Publications/ICC_Petition_7Dec05.pdf>.

was vertical (against the state in which they reside), that of the Canadian Inuits was diagonal (against a foreign government). 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, 1948, 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.¹⁰³

Another strategy to promote diagonal human rights is holding governments accountable for failure to regulate the extraterritorial conduct of their corporations. 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.¹⁰⁴ If a state neglects to exercise due diligence to prevent such violations, then it may be liable on that basis.¹⁰⁵ Similarly, capital exporting countries (in the North or the South) that enter into 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.¹⁰⁶

Third, the human rights canon, 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. Indeed, the environmental human rights jurisprudence of the European Court of Human Rights (the Court) may provide cause for alarm. 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 of Human Rights and the European Charter.¹⁰⁷ Adopting a very 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'.¹⁰⁸ Critics of the European approach have argued that the Court's jurisprudence reflects a very individualistic conception of human rights that 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'.¹⁰⁹

However, the case law stemming from the Inter-American human rights system, the African Charter on Human and Peoples' Rights, 1981, and even the International

¹⁰³ Knox, above n 100, 88–9, 90–91.

¹⁰⁴ R. McCorquodale and P. Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' 2007 *Modern Law Review* 70: 598, 617–19.

¹⁰⁵ Ibid 619–21.

¹⁰⁶ Ibid 621–23.

¹⁰⁷ Council of Europe, *Manual on Human Rights and the Environment* (Council of Europe Publishing 2012) <http://www.coe.int/t/dghl/standardsetting/hrpolicy/Publications/Manual_Env_2012_nocover_Eng.pdf>.

¹⁰⁸ Ibid 7.

¹⁰⁹ F. Francioni, 'International Human Rights in an Environmental Horizon' 2010 *European Journal of International Law* 21: 41, 50.

Covenant on Civil and Political Rights, 1966, 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 Awas Tingni on the basis of collective property rights.¹¹⁰ In *Saramaka People v Suriname*, the Inter-American Court used this rationale to protect the collective property rights of an Afro-descendant community.¹¹¹ 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.¹¹² Finally, in *Lubikon Lake Band v Canada* and in *Francis Hopy and Tepoaitu Bessert v France*, the United Nations 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.¹¹³

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 confirm the emancipatory potential of environmental human rights law and advocacy and the ability of the human rights canon to progress and evolve in response to the demands of grassroots environmental justice movements. Indigenous peoples, in particular, have influenced 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.¹¹⁴

Nevertheless, these legal victories have not always translated into success on the ground due, in part, 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

¹¹⁰ *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Organization of American States, Inter-American Court of Human Rights Judgment of 31 August 2001, Inter-Am Ct HR (Ser C) No 79 (2001) paras 148–9 <http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf>.

¹¹¹ *Saramaka People v Suriname*, Organization of American States, Inter-American Court of Human Rights Judgment of 28 November 2007, paras 88, 93–5, 99–103 <http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf>.

¹¹² *Soc. and Econ. Rights Action Centre v Nigeria* Case No ACHPR/COMM/AO44/1, OAUDoc.CAB/LEG/67/3 (2001) paras 50–53 <http://www.achpr.org/files/sessions/30th/communications/155.96/achpr30_155_96_eng.pdf>.

¹¹³ *Lubikon Lake Band v Canada* Communication No 167/1984 (26 March 1990) UN Doc Supp No 40 (A/45/40) 1; *Francis Hopy and Tepoaitu Bessert v France* Communication No 549/1993. UN Doc CCPR/C/60D/549/1993/Rev 1 (29 December 1997) paras 2.2–10.3.

¹¹⁴ L.A. Miranda, 'Indigenous Peoples as International Lawmakers' 2010 *University of Pennsylvania Journal of International Law* 32: 203, 224–54.

devastating activities (including oil drilling and mining) on indigenous ancestral lands against the express wishes of these communities.¹¹⁵ 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.¹¹⁶

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.

Fourth, 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.¹¹⁷ Human rights law may reinforce this tendency by giving priority to the satisfaction of human needs and ignoring the inherent rights of nature to exist and the interdependence of humans and nature. While a full discussion of anthropocentricity is beyond the scope of this chapter, 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.¹¹⁸ While 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 recognizes the interdependence of humans and nature. 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.¹¹⁹ The existence of this constitutional provision does not obviate the tension between the rights of humans and nature, but it does 'shift

¹¹⁵ Ibid 255–9.

¹¹⁶ Ibid 261.

¹¹⁷ Geisinger, above n 58, 43, 44–6; P. Burdon, 'The Jurisprudence of Thomas Berry' 2011 *Worldview* 15: 151, 152–4.

¹¹⁸ R. Tsosie, 'Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge' 1996 *Vermont Law Review* 21: 225, 276–300. However, it is important not to 'essentialize' indigenous peoples as Noble Savages. 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. Ibid 300–311.

¹¹⁹ Burdon, above n 117, 151, 164; M. Becker, 'Correa, Indigenous Movements, and the Writing of a New Constitution in Ecuador' 2011 *Latin American Perspectives* 38: 47, 50.

individual and collective perceptions of nature, as something with integrity and value',¹²⁰ thereby increasing the likelihood of more thoughtful decisions regarding human activities that impact the environment.

Fifth, human rights law is designed to provide redress for human rights violations with definite, identifiable perpetrators and victims, but is 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'. While the North's over-consumption 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, establish causal links between the conduct and the harm, and do so 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 United Nations 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.¹²¹ 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.¹²²

Furthermore, the human rights framework tends to mitigate the harshness of the global economy without questioning its fundamental premises.¹²³ 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 legitimate the existing distributions of wealth and power 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.

Finally, one of the dangers of human rights discourse is that it may crowd out competing visions of justice and human dignity. In the words of Balakrishnan Rajagopal:

¹²⁰ Burdon, above n 117, 151, 164.

¹²¹ UN Human Rights Council, *Report of the Office of the United Nations Commissioner for Human Rights on the relationship between climate change and human rights* (A/HRC/10/61, 15 January 2009) para. 70. 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 ICESCR to cooperate with one another to respond to the global threats to human rights posed by climate change. Knox, above n 16, 212–9.

¹²² Gonzalez, above n 5, 33.

¹²³ M. Mutua, 'The Transformation of Africa: A Critique of the Rights Discourse', in F.G. Isa and K. de Feyter (eds), *International Human Rights Law in a Global Context* (Universidad de Deusto 2009) 899, 917–8.

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.¹²⁴

In other words, the discourse of human rights fails adequately to reflect the complex and multi-dimensional forms of violence inflicted on subaltern populations,¹²⁵ to articulate fully the emancipatory aspirations and resistance strategies of diverse grassroots social and environmental justice movements,¹²⁶ 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).¹²⁷ In addition, as noted above, the redress mechanisms of the international human rights system are incapable of providing reparations for systemic injustices such as slavery, colonialism, and the North's ecological debt to the South.

One response to these critiques is to recognize that the human rights framework, despite its limitations, is nevertheless a powerful tool for 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.¹²⁸ 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.

A second response is to highlight the ways that national and regional interpretations of the right to a healthy environment will inevitably be influenced by local conceptions of human dignity rather than Eurocentric 'universal' models. 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.¹²⁹ Similarly, New Zealand granted legal personhood to its

¹²⁴ B. Rajagopal, 'Culture, Resistance, and the Problems of Translating Human Rights' 2006 *Texas International Law Journal* 41: 419, 420.

¹²⁵ Baxi, above n 26, 7–9.

¹²⁶ Rajagopal, above n 93, 249–53 (examining the diverse strategies and goals of grassroots social movements and the difficulty of uniting them under a monolithic human rights umbrella); R. Guha, *Environmentalism: A Global History* (Longman 2000) 98–124 (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).

¹²⁷ Baxi, above n 26, 46–7.

¹²⁸ Boyd, above n 18, 237–8.

¹²⁹ Ibid 70, 126, 139–40; J. Vidal, 'Bolivia Enshrines Natural World's Rights with Equal Status for Mother Earth', *Guardian* (10 April 2011) <<http://www.theguardian.com/environment/2011/apr/10/bolivia-enshrines-natural-worlds-rights>>.

longest navigable river, the Whanganui, in a major step toward the resolution of the historic grievances of Māori peoples.¹³⁰ At the regional level, the African Charter of Human and Peoples' Rights (which recognizes the right to a healthy environment) emphasizes rights as well as duties consistent with African conceptions of human beings as integral members of a larger community.¹³¹ 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.¹³²

A third response to these critiques is to acknowledge that environmental human rights, even if currently incapable of fully capturing the experiences, aspirations, and perspectives of subaltern communities, are nevertheless an important tool in the larger struggle for environmental justice. The discourse of environmental justice provides social movements with a rich vocabulary of resistance whose emancipatory potential has not yet been co-opted by international law-making processes and institutions. This language of resistance can be used to influence the evolution of environmental human rights at the national, regional, and international level, and to devise legal and extra-legal strategies to demand a more just and sustainable economic order, including the strategic use of environmental human rights litigation.

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.¹³³ 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

¹³⁰ *New Zealand's Whanganui River Gets Personhood Status*, Env'tl News Serv, 13 September 2012, <<http://ens-newswire.com/2012/09/13/new-zealands-whanganui-river-gets-personhood-status/>>.

¹³¹ M. Mutua, above n 92, 642–6 (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 M. Mutua, 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties' 1995 *Virginia Journal of International Law* 35: 339.

¹³² J. Church, 'Sustainable Development and the Culture of Ubuntu' 2012 *De Jure* 45(3): 511, 524–31.

¹³³ Friends of the Earth International, *Our Environment, Our Rights: Standing up for People and the Planet* (2004) <http://www.foei.org/en/resources/publications/climate-justice-and-energy/2000-2007/human_rights.pdf/view>.

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. In so doing, 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, 'environmental 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.'¹³⁴

5. CONCLUSION

Human rights law is a double-edged sword that can serve as another 'universalizing' discourse to reinforce environmental injustice within and between nations or as a powerful tool of resistance. Human rights discourse and advocacy opens many possibilities for coordinated local and global resistance to economic paradigms that reinforce North-South inequality, ravage the environment, and inflict unspeakable violence on the planet's most vulnerable communities. However, environmental human rights scholars and activists need to be mindful of the structural inequities that perpetuate environmental injustice and of the historic role of international law in justifying these inequities if they are to avoid reproducing colonial discourses and destructive top-down 'development' strategies. In order to achieve its emancipatory potential, human rights law must not be static and wedded to the past, but constantly changing and open to new influences from grassroots environmental justice struggles. In the words of Upendra Baxi:

[t]he 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.¹³⁵

Human rights law is by no means a panacea for the world's environmental ills, but it is an important tool in the struggle for global environmental justice that complements, but does not replace domestic environmental regulation, the negotiation and implementation of environmental treaties, and extra-legal popular mobilization for a more just, humane, and ecologically sustainable economic order.

¹³⁴ C. Gearty, 'Do human rights help or hinder environmental protection?' 2010 *Journal of Human Rights and the Environment* 1: 7, 14.

¹³⁵ Baxi, above n 6, 184–5.