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Climate Lawyers as Movement Lawyers

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WE ARE ALL CLIMATE CHANGE LAWYERS NOW

Carmen G. Gonzalez*

Climate Lawyers as Movement Lawyers (and Vice Versa)

The knowledge, skills, and expertise of lawyers in all practice areas are desperately needed to address the interrelated crises of climate change and racial injustice.

Climate change is occurring at a time of growing economic inequality and intensifying racism and xenophobia. In many parts of the world, authoritarian populists are building power by stoking racism, promoting climate denial, accelerating deforestation, and doubling down on the extraction and combustion of fossil fuels. Social movements are deploying the law in new and innovative ways to challenge these practices, and lawyers are an integral part of these struggles.

I. Climate Change and Racial Justice: Mapping the Linkages

Climate change imposes disproportionate burdens on the states and peoples who contributed least to the problem, including indigenous peoples, the small island states, racial and ethnic minorities, and low-income, agriculture-dependent countries. The United Nations Special Rapporteur on Extreme Poverty and Human Rights used the term “climate apartheid” to describe the growing divide between the affluent (who can protect themselves from climate-related harms) and the majority of humanity (who will be left to suffer and die).¹

The link between climate change and racial injustice is not new. The Industrial Revolution, which launched the age of fossil fuels, was made possible by the mineral wealth of the Americas and the raw materials (such as cotton and food) produced by enslaved Africans on lands stolen from indigenous peoples. Colonization, slavery, and the racist ideologies that justified these enterprises are foundational rather than peripheral to the contemporary fossil fuel-based world economy.

Fossil fuels create sacrifice zones populated by racialized and poor communities who are exposed to toxic pollution from oil drilling, fracking, petroleum refineries, power plants, chemical plants, and oil and gas pipelines. Fossil fuel production is also concentrated in certain regions of the world, such as the Middle East, that have been repeatedly invaded and occupied,

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¹ UNHRC, Climate Change and Poverty, Report of the Special Rapporteur on Extreme Poverty and Human Rights, UN Doc. A/HRC/41/39 (2019), para. 50.

forcing local communities to survive amidst landmines, mortars, explosives, rockets, tear gas, and drones. When these Arab and Muslim populations seek refuge in Europe or the United States, they are racialized -- classified as potential terrorists and denied entry.

Those most susceptible to climate-related disasters reside overwhelmingly in the Global South or in racialized and impoverished neighborhoods in the Global North. They live in areas disproportionately subject to floods, droughts, hurricanes, and rising sea levels, but many have been *rendered* vulnerable to climate change through colonialism and its aftermath – including predatory lending, onerous austerity measures imposed by the International Monetary Fund (IMF) and the World Bank, and economically disadvantageous trade and investment agreements.² These interventions deprived states and peoples of the resources needed for climate change adaptation, disaster risk reduction, and disaster recovery. Finally, racialized persons displaced by climate change who try to cross the militarized borders of the Global North have been criminalized, detained, separated from their children, or simply left to drown at sea or perish in desolate borderlands.

II. The Complicity of International Law

International law has been complicit in these injustices. International law justified the Global North's colonial and post-colonial interventions in the Global South through a variety of doctrines, including the doctrine of discovery, *terra nullius*, the mandate system after World War I, trusteeship after World War II, modernization, development, humanitarian intervention, and preemptive self-defense. International law constructed colonized populations as racially and culturally inferior and asserted a moral duty to “civilize” them through compulsory assimilation to European ways.³

Modern investment law inherited from the colonial era an instrumentalist view of the environment as an object of Northern exploitation with no corresponding obligation to replenish nature, enhance the well-being of local communities, or advance the goals and interest of the host state.⁴ International trade law facilitated the extraction of raw materials and the flow of manufactured products while unloading the social and environmental externalities on local communities with little regard, until very recently, for mounting greenhouse gas emissions.⁵

International environmental law, which emerged in the second half of the 20th century, remains fragmented, possesses weak enforcement tools, and is beholden to market-based mechanisms that prolong the world's dependence on fossil fuels. International economic law treats environmental protection as narrow exceptions to states' primary obligation to maximize economic growth through trade liberalization and to protect the property rights of foreign investors. Moreover, when these bodies of law conflict, states are more likely to comply with international economic law due to its powerful enforcement mechanisms, such as investor-state arbitration and the World Trade Organization's dispute settlement system, which authorize the imposition of economic penalties on non-complying parties. Finally, international law recognizes

² See generally JOHN LINARELLI, MARGOT E. SALOMON & M. SORNARAJAH, *THE MISERY OF INTERNATIONAL LAW* (2018).

³ See generally ANTONY ANGHIE: *IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW* (2005).

⁴ See generally KATE MILES, *THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT, AND THE SAFEGUARDING OF CAPITAL* (2013).

⁵ See OLIVIER DE SCHUTTER, *TRADE IN THE SERVICE OF SUSTAINABLE DEVELOPMENT* 14-25 (2015).

the sovereign right of nations to exclude migrants and provides very limited protection to climate-displaced persons.⁶ The Global South currently hosts eighty-six percent of the world's forcibly displaced persons⁷ even though Northern states frequently bear primary responsibility for the poverty, conflict, and climate-related disasters that fuel this displacement.⁸

Right-wing authoritarian leaders and movements all over the world have weaponized racism in order to create cross-class alliances that prevent people from understanding the drivers of climate crisis because they are so intent on eradicating racialized enemies – including immigrants, foreigners, Indigenous peoples, and members of ethnic, religious, or racial minorities. Racism creates a wedge between people whose vulnerability to climate change should serve as the basis for solidarity and collaboration. It treats as primitive and marginal the world views of peasant and Indigenous communities who offer valuable lessons on how to re-think our relationship to nature and to one another.

III. International Law and Resistance

Racialized communities are the canaries in the coal mine. They are the first to suffer the ravages of climate change, but their plight is a harbinger of the harm that will befall everyone if we do not take prompt action to transform the laws, policies, institutions, and mindsets that produce reckless extraction of the planet's resources.

International law has been used in counterhegemonic ways by social movements.⁹ There is a long history of environmental justice struggles in both the Global North and the Global South.¹⁰ There is also a significant and growing literature on the methodologies used by movement lawyers to support grassroots struggles and an emerging body of scholarship on how legal scholars can work in solidarity with social movements.¹¹

Climate law can no longer be confined to a narrow group of specialists working in national environmental ministries and in UN agencies to mitigate and adapt to climate change. The climate crisis has generated grassroots resistance all over the world informed by an understanding of the relationship between climate change and other forms of injustice, including subordination on the basis of race, gender, poverty, and indigeneity. As the climate crisis

⁶ See Carmen G. Gonzalez, *Racial Capitalism, Climate Justice, and Climate Displacement*, 11 OÑATI SOCIO-LEGAL SERIES 108, 120-128 (2021)

⁷ See UNHCR Refugee Statistics, <https://www.unhcr.org/refugee-statistics/> (last accessed May 25, 2021)

⁸ See Carmen G. Gonzalez, *Migration as Reparation: Climate Change and the Disruption of Borders*, 66 LOYOLA L. REV. 402, 413-421 (2020) (discussing U.S. responsibility for the displacement of Central Americans).

⁹ See, e.g., BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE* (2003).

¹⁰ See generally THE CAMBRIDGE HANDBOOK OF ENVIRONMENTAL JUSTICE AND SUSTAINABLE DEVELOPMENT (Sumudu A. Atapattu, Carmen G. Gonzalez, and Sara L. Seck, eds., 2021) (analyzing environmental justice case studies from both the Global North and the Global South). For an overview of environmental justice movements in the Global South, see Usha Natarajan, *Environmental Justice in the Global South*, in THE CAMBRIDGE HANDBOOK OF ENVIRONMENTAL JUSTICE AND SUSTAINABLE DEVELOPMENT at 39-57. For a concise history of the environmental justice movement in the United States, see Robin Morris Collin & Robert W. Collin, *Environmental Justice and Sustainability: The United States Experience* in THE CAMBRIDGE HANDBOOK OF ENVIRONMENTAL JUSTICE AND SUSTAINABLE DEVELOPMENT at 115-131.

¹¹ See, e.g., Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645 (2017); Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821 (2021).

intensifies, many movement lawyers representing marginalized communities have already or will soon become climate lawyers, and many climate lawyers seeking to forestall climate breakdown will become movement lawyers.

Movements for defense of livelihoods, for the rights of racialized communities, and for the protection of nature are challenging our conceptions of economic development and targeting powerful transnational actors. These movements are using human rights law to defend collective rights, engaging in law reform projects to grant legal personhood to nature, holding Mother Earth summits alongside international environmental law summits, bringing claims against the carbon majors and powerful Northern states, and participating in the creation of legal instruments that recognize the rights of Indigenous peoples and peasants. They are embedding in legislation and constitutions the rights of nature and future generations and the multi-cultural, pluri-national character of the states in which they reside.

They are occupying lands and blocking fossil fuel projects in ways that contravene domestic law but are using the climate emergency – the idea of necessity – as a justification. They are challenging traditional notions of sovereignty and territoriality as climate change threatens to render their lands permanently uninhabitable and compel migration. They are demanding accountability for the deaths of racialized people in ghettos, in reservations, in flimsy boats that try to cross the Mediterranean, in prisons and detention centers, and in never-ending resource wars. They are asserting new rights, including food sovereignty, energy sovereignty, and the collective right to migrate with dignity.

These social movements are resisting large-scale mining, petroleum drilling, and logging as well as projects that treat them and their communities as repositories for waste. They are challenging multiple, intersecting forms of marginalization that magnify environmental risks, including racial and economic inequities. They are shifting public attitudes about the relationship between people and land – and contesting legal techniques that convert communal lands and resources into private property exploited for the material benefit of local elites, transnational corporations, and affluent countries.

Finally, they are inviting international lawyers to go beyond their narrow areas of expertise and see the ways that different bodies of law can be used for mobilization and empowerment. Climate change encourages international lawyers to confront the systemic injustices that have always been faced by frontline communities and to collaborate with social movements that offer alternative ways of viewing the world and of living in relation to other human beings and nature.