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# International Environmental Law, Environmental Justice, and the Global South

Carmen G. Gonzalez\* & Sumudu Atapattu†

On October 28, 2016, the student editors of the Journal of Transnational Law & Contemporary Problems (“TLCP”) hosted a symposium to honor the late Professor Burns Weston,<sup>1</sup> to celebrate the publication of *International Environmental Law and the Global South*,<sup>2</sup> and to use the book as the foundation for further scholarly inquiry. The symposium featured an inspiring and enlightening series of panels and keynote addresses on a variety of topics including environmental justice and indigenous peoples, energy poverty and its disparate impact on women, violence against women in resource extractive industries, and North-South fisheries disputes. Because the symposium was a response to *International Environmental Law and the Global South*, we begin our introduction by situating this work in geologic time and reviewing some of the book’s key themes and analytical frameworks.

Humanity’s impact on the planet is now so profound that scientists believe we have entered a new geologic epoch known as the Anthropocene.<sup>3</sup> Human economic activity has exceeded the limits of the planet’s finite ecosystems, transgressing “planetary boundaries” and undermining the Earth’s life support systems.<sup>4</sup> Climate change, species extinction, deforestation, and fertilizer runoff have already exceeded safe thresholds and changed the Earth system in ways that will have devastating impacts on humans and the planet’s biodiversity.<sup>5</sup> In early 2017, for example, scientists announced that 2016 was

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As editors of *International Environmental Law and the Global South*, we would like to extend our deepest gratitude to the student editors of TLCP, Associate Dean Adrien Wing, and Dean Gail B. Agrawal for their warm hospitality. We would also like to thank the symposium participants for their thoughtful presentations and engaging questions and comments.

<sup>1</sup> Burns Weston was the Bessie Dutton Murray Distinguished Professor of Law Emeritus at the University of Iowa College of Law, a luminary in the field of international environmental law, and the founder of TLCP. See *Burns Weston, Obituary*, N.Y. TIMES (Nov. 12, 2015), <http://www.legacy.com/obituaries/nytimes/obituary.aspx?pid=176450676>. He was a champion and supporter of *International Environmental Law and the Global South* and described the book as a “much-needed and thought-provoking corrective to the omissions and falsehoods propagated by the Global North.” *International Environmental Law and the Global South*, CAMBRIDGE UNIV. PRESS, <http://www.cambridge.org/catalogue/catalogue.asp?isbn=131635511X> (last visited Feb. 10, 2017).

<sup>2</sup> INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH (Shawkat Alam, Sumudu Atapattu, Carmen G. Gonzalez, & Jona Razzaque eds., 2015).

<sup>3</sup> See Paul J. Crutzen, *Geology of Mankind*, 415 NATURE 23, 23 (2002).

<sup>4</sup> See generally Will Steffen et al., *Planetary Boundaries: Guiding Human Development on a Changing Planet*, 347 SCIENCE 736 (Feb. 13, 2015).

<sup>5</sup> See *id.* at 737–41.

the hottest year on record, exceeding the historic highs set in 2015 and 2014, and underscoring the urgency of reducing greenhouse gas emissions.<sup>6</sup>

Increasingly sophisticated analyses of socio-economic and Earth system trends confirm that affluent countries are the primary drivers of global environmental degradation—accounting for seventy four percent of global economic activity since 1950, though such nations comprise only eighteen percent of the planet’s population.<sup>7</sup> While affluent countries (the Global North) reap the material benefits of burgeoning economic activity, the environmental consequences are borne disproportionately by developing countries (the Global South) and by the planet’s most vulnerable human beings.<sup>8</sup> Much of the Global South depends on agriculture, fishing, and forestry for its survival and does not have the resources to mitigate damage from floods, hurricanes, droughts, and other disasters.<sup>9</sup>

The fossil fuel-driven industrial development model, pioneered by Europe and the United States, has altered the trajectory of the Earth system while increasing economic inequality.<sup>10</sup> According to a recent study by Oxfam, “eight men own the same wealth as the poorest half of the” world’s population.<sup>11</sup> As of 2015, the wealthiest one percent of humanity controlled as much wealth as the remaining ninety nine percent.<sup>12</sup> Although world leaders now embrace the Sustainable Development Goals, which include reducing economic inequality and combatting environmental degradation,<sup>13</sup> the narrow pursuit of economic growth continues to dominate global and national agendas, exacerbating inequality and threatening irreversible ecological harm.<sup>14</sup>

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<sup>6</sup> See Justin Gillis, *Earth Sets a Temperature Record the Third Straight Year*, N.Y. Times (Jan. 18, 2017).

<sup>7</sup> See Will Steffen, et al., *The Trajectory of the Anthropocene: The Great Acceleration*, 2 ANTHROPOCENE REV. 81, 91 (Apr. 2015).

<sup>8</sup> See UNDP, HUMAN DEVELOPMENT REPORT 2011, SUSTAINABILITY AND EQUITY: A BETTER FUTURE FOR ALL 28–30 (2011), [http://hdr.undp.org/sites/default/files/reports/271/hdr\\_2011\\_en\\_complete.pdf](http://hdr.undp.org/sites/default/files/reports/271/hdr_2011_en_complete.pdf).

<sup>9</sup> See *id.* at 4–5, 51, 59–61; William E. Rees & Laura Westra, *When Consumption Does Violence: Can There be Sustainability and Environmental Justice in a Resource-Limited World?*, in JUST SUSTAINABILITIES: DEVELOPMENT IN AN UNEQUAL WORLD 99, 102–03 (Julian Agyeman et al. eds., 2003).

<sup>10</sup> See CHRISTOPHE BONNEUIL & JEAN-BAPTISTE FRESSOZ, *THE SHOCK OF THE ANTHROPOCENE* 228 (2016).

<sup>11</sup> See OXFAM, AN ECONOMY FOR THE 99% 1 (Jan. 2017), [https://www.oxfam.org/sites/www.oxfam.org/files/file\\_attachments/bp-economy-for-99-percent-160117-en.pdf](https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp-economy-for-99-percent-160117-en.pdf) [hereinafter Oxfam Int’l].

<sup>12</sup> *Id.* at 2.

<sup>13</sup> See *The Sustainable Development Agenda*, U.N., <http://www.un.org/sustainabledevelopment/development-agenda/> (last visited Jan. 15, 2017); Oxfam Int’l, *supra* note 11, at 8.

<sup>14</sup> BONNEUIL & FRESSOZ, *supra* note 10, at 20–24 (discussing how the Anthropocene challenges the belief in unlimited economic growth).

As wealth becomes concentrated in fewer and fewer hands, billions of people struggle to satisfy the basic necessities of life. Nearly 800 million people are unable to consume enough food to lead a healthy and active life.<sup>15</sup> Approximately 750 million people lack access to clean drinking water and 2.5 billion people do not have adequate sanitation.<sup>16</sup> An additional 2.6 billion people survive without modern sources of energy for cooking, lighting, heating, transportation, or basic mechanical power.<sup>17</sup> As Pope Francis explained in his ground-breaking encyclical, *Laudato Si*, “[t]he exploitation of the planet has already exceeded acceptable limits, and we still have not solved the problem of poverty.”<sup>18</sup>

International environmental law has generally failed to halt or reverse the rapid deterioration of the planet’s ecosystems. One of the reasons for this failure is the North-South divide, which has manifested itself through the persistent conflicts between affluent and poor countries that have resulted in gridlock in environmental treaty negotiations and agreements marred by lack of adequate compliance and enforcement mechanisms.<sup>19</sup> The Global North has generally prioritized the environmental concerns of the affluent, such as nature preservation, while ignoring the environmental problems that disparately burden the Southern poor, thereby generating resistance, suspicion, and ill will.<sup>20</sup>

*International Environmental Law and the Global South* attempts to bridge the North-South divide by examining many of the environmental problems of greatest concern to the Global South, including food security,<sup>21</sup> access to clean

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<sup>15</sup> See FAO, U.N., THE STATE OF FOOD INSECURITY IN THE WORLD, MEETING THE 2015 INTERNATIONAL HUNGER TARGETS: TAKING STOCK OF UNEVEN PROGRESS 8 (2015), <http://www.fao.org/3/a-14646e.pdf>.

<sup>16</sup> See WHO & UNICEF, PROGRESS ON DRINKING WATER AND SANITATION: 2014 UPDATE 8 (2014), [http://www.who.int/water\\_sanitation\\_health/publications/2014/jmp-report/en/](http://www.who.int/water_sanitation_health/publications/2014/jmp-report/en/).

<sup>17</sup> See INTERNATIONAL ENERGY AGENCY, WORLD ENERGY OUTLOOK 2012 51 (2012), [http://www.iea.org/publications/freepublications/publication/WEO2012\\_free.pdf](http://www.iea.org/publications/freepublications/publication/WEO2012_free.pdf).

<sup>18</sup> See ENCYCLICAL LETTER LAUDATO SI’ OF THE HOLY FATHER FRANCIS ON CARE FOR OUR COMMON HOME, para. 27 (May 24, 2015) (on file with the Vatican), [http://w2.vatican.va/content/dam/francesco/pdf/encyclicals/documents/papa-francesco\\_20150524\\_enciclica-laudato-si\\_en.pdf](http://w2.vatican.va/content/dam/francesco/pdf/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si_en.pdf).

<sup>19</sup> See Sumudu Atapattu & Carmen G. Gonzalez, *The North-South Divide in International Environmental Law: Framing the Issues*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 1, 1–2 (Shawkat Alam, Sumudu Atapattu, Carmen G. Gonzalez, & Jona Razzaque eds., 2015).

<sup>20</sup> See *id.* at 10; Carmen G. Gonzalez, *Beyond Eco-Imperialism: An Environmental Justice Critique of Free Trade*, 78 DENV. U. L. REV. 979, 985–86 (2001) [hereinafter *Environmental Justice Critique*]; Karin Mickelson, *The Stockholm Conference and the Creation of the South-North Divide in International Environmental Law and Policy*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 109, 112–13, 115–16 (Shawkat Alam, Sumudu Atapattu, Carmen G. Gonzalez, & Jona Razzaque eds., 2015).

<sup>21</sup> See generally Carmen G. Gonzalez, *Food Justice: An Environmental Justice Critique of the Global Food System*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 401

drinking water,<sup>22</sup> the hazardous waste trade,<sup>23</sup> energy poverty,<sup>24</sup> and vulnerability to natural disasters.<sup>25</sup> The book also critiques false solutions to Southern poverty, such as the universalization of the Northern consumption-oriented development model, which has increased economic inequality and brought the planet's ecosystems to the brink of collapse.<sup>26</sup>

Climate change is an excellent example of the North-South conflicts in international environmental law. Due to the current and historic emissions of the Global North,<sup>27</sup> climate change is drastically affecting the world's poorest countries and most vulnerable communities—including indigenous peoples<sup>28</sup> and small island states.<sup>29</sup> The South has demanded the North take responsibility for its historic contribution to climate change based on the principle of common but differentiated responsibility;<sup>30</sup> the North has agreed

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(Shawkat Alam, Sumudu Atapattu, Carmen G. Gonzalez, & Jona Razzaque eds., 2015) (analyzing food insecurity through the framework of food justice).

<sup>22</sup> See generally Carlos Bernal, *The Right to Water: Constitutional Perspectives from the Global South*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 277 (Shawkat Alam, Sumudu Atapattu, Carmen G. Gonzalez, & Jona Razzaque eds., 2015) (examining efforts to enhance access to drinking water by constitutionalizing the right to water); Jackie Dugard & Elisabeth Koek, *Water Wars: Anti-Privatization Struggles in the Global South*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 469 (Shawkat Alam, Sumudu Atapattu, Carmen G. Gonzalez, & Jona Razzaque eds., 2015) (discussing resistance to private sector ownership and management of water resources in the Global South).

<sup>23</sup> See generally Zada Lipman, *Trade in Hazardous Waste*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 256 (Shawkat Alam, Sumudu Atapattu, Carmen G. Gonzalez, & Jona Razzaque eds., 2015) (analyzing North-South conflicts related to the hazardous waste trade).

<sup>24</sup> See Lakshman Guruswamy, *The Contours of Energy Justice*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 529 (Shawkat Alam, Sumudu Atapattu, Carmen G. Gonzalez, & Jona Razzaque eds., 2015) (discussing energy poverty through the framework of international justice and sustainable development).

<sup>25</sup> Paul J. Govind & Robert R.M. Verchick, *Natural Disaster and Climate Change*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 491 (Shawkat Alam, Sumudu Atapattu, Carmen G. Gonzalez, & Jona Razzaque eds., 2015) (discussing climate change adaptation and disaster risk reduction).

<sup>26</sup> See Ruth Gordon, *Unsustainable Development*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 50 (Shawkat Alam, Sumudu Atapattu, Carmen G. Gonzalez, & Jona Razzaque eds., 2015).

<sup>27</sup> See Carmen G. Gonzalez, *Energy Poverty and the Environment*, in INTERNATIONAL ENERGY AND POVERTY: THE EMERGING CONTOURS 113, 116–17 (Lakshman Guruswamy ed., 2016).

<sup>28</sup> See Elizabeth Ann Kronk Warner, *South of South: Examining the International Climate Regime from an Indigenous Perspective*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 451 (Shawkat Alam, Sumudu Atapattu, Carmen G. Gonzalez, & Jona Razzaque eds., 2015).

<sup>29</sup> See generally Maxine Burkett, *A Justice Paradox: Climate Change, Small Island Developing States, and the Absence of International Legal Remedy*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 435 (Shawkat Alam, Sumudu Atapattu, Carmen G. Gonzalez, & Jona Razzaque eds., 2015).

<sup>30</sup> See Rowena Maguire & Xiaoyi Jiang, *Emerging Powerful Southern Voices: Role of BASIC Nations in Shaping Climate Change Mitigation Commitments*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 214, 215–20 (Shawkat Alam, Sumudu Atapattu,

to assume a leadership role that emphasizes its greater technical and financial resources but disavows responsibility for its historic contribution to climate change and other environmental problems.<sup>31</sup>

The thesis of *International Environmental Law and the Global South* is that an ecologically sustainable planet is impossible in a world plagued with significant and growing inequalities. If international environmental law is to succeed, it must overcome the North-South divide by developing policies and frameworks that address the concerns and priorities of the peoples and states of the Global South (including the “South in the North,” environmental justice communities in the United States, Canada, and other affluent countries). This means, among other things, grappling with the inequities in the international economic order and international law that result in the abuse of nature and the exploitation and marginalization of human beings.<sup>32</sup>

The contributors to this symposium and to *International Environmental Law and the Global South* analyze the North-South divide through a variety of frameworks, case studies, and models. One such framework is environmental justice. Environmental justice is both a social movement and a framework through which to evaluate domestic and international laws, policies, and practices that have a disparate impact on vulnerable communities.<sup>33</sup> Although social justice struggles, including environmental

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Carmen G. Gonzalez, & Jona Razzaque eds., 2015) (noting the disparity in emissions reduction obligations in the Kyoto Protocol).

<sup>31</sup> Sumudu Atapattu, *The Significance of International Environmental Law Principles in Reinforcing or Dismantling the North-South Divide*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 74, 91–98 (Shawkat Alam, Sumudu Atapattu, Carmen G. Gonzalez, & Jona Razzaque eds., 2015); *Energy Poverty and the Environment*, *supra* note 27, at 123–24.

<sup>32</sup> See Sara L. Seck, *Transnational Corporations and Extractive Industries*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 380–98 (Shawkat Alam, Sumudu Atapattu, Carmen G. Gonzalez, & Jona Razzaque eds., 2015) (highlighting the gaps in international law that result in resource extraction infringing on indigenous peoples’ rights); Shyami Puvimanasinghe, *From a Divided Heritage to a Common Future? International Investment Law, Human Rights, and Sustainable Development*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 317–37 (Shawkat Alam, Sumudu Atapattu, Carmen G. Gonzalez, & Jona Razzaque eds., 2015) (arguing that sustainable development requires regulation focused on public interest).

<sup>33</sup> For an introduction to environmental justice theories and movements, see Carmen G. Gonzalez, *Environmental Justice, Human Rights and the Global South*, 13 SANTA CLARA J. INT’L L. 151 (2015); HENRY SHUE, *CLIMATE JUSTICE: VULNERABILITY AND PROTECTION* (2014); RHUKS AKO, *ENVIRONMENTAL JUSTICE IN DEVELOPING COUNTRIES: PERSPECTIVES FROM AFRICA AND ASIA-PACIFIC* (2013); Carmen G. Gonzalez, *Environmental Justice and International Environmental Law*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 77 (Shawkat Alam et al. eds., 2013); GORDON WALKER, *ENVIRONMENTAL JUSTICE: CONCEPTS, EVIDENCE AND POLITICS* (2012); *ENVIRONMENTAL INEQUALITIES BEYOND BORDERS: LOCAL PERSPECTIVES ON GLOBAL INJUSTICES* (JoAnn Carmin & Julian Agyeman eds., 2011); DAVID SCHLOSBERG, *DEFINING ENVIRONMENTAL JUSTICE: THEORIES, MOVEMENTS, AND NATURE* (2009); *ENVIRONMENTAL LAW AND JUSTICE IN CONTEXT* (Jonas Ebbeson & Phoebe Okowa eds., 2009); *ENVIRONMENTAL JUSTICE IN LATIN AMERICA: PROBLEMS, PROMISE, AND PRACTICE* (David V. Carruthers ed., 2008); *THE QUEST FOR ENVIRONMENTAL JUSTICE: HUMAN RIGHTS AND THE POLITICS OF POLLUTION* (Robert D. Bullard ed., 2005).

justice struggles, have existed since the dawn of industrialization,<sup>34</sup> the environmental justice movement gained prominence in the United States in the 1980s due to organized opposition to the siting of commercial hazardous waste facilities and polluting industries in poor and minority communities.<sup>35</sup> Environmental movements in both the North and the South subsequently adopted the discourse of environmental justice in a variety of grassroots struggles, including efforts to secure equitable access to land, food, water, and energy, and to oppose oil and gas operations, mining, and hydroelectric dams.<sup>36</sup>

Environmental justice scholars and activists have underscored four analytically distinct features of environmental justice: distributive justice, procedural justice, corrective justice, and social justice.<sup>37</sup> First, environmental justice calls for the fair distribution of the benefits and burdens of economic activity, as well as equitable access to environmental goods and services, such as clean air, clean water, and healthy and nutritious food.<sup>38</sup> Second, environmental justice requires procedural equity and inclusiveness, including the right of all communities to participate in governmental decisions related to the environment.<sup>39</sup> Third, environmental justice encompasses corrective justice: the even-handed enforcement of environmental laws and the compensation of those whose rights are violated.<sup>40</sup> Finally, environmental justice is deeply intertwined with other forms of social and economic justice and cannot be achieved without addressing related social problems, such as poverty and racism.<sup>41</sup>

Environmental justice is also a useful paradigm for analyzing North-South environmental conflicts.<sup>42</sup> North-South relations exemplify *distributive injustice* because the most affluent twenty percent of the world's population

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<sup>34</sup> See BONNEUIL & FRESSOZ, *supra* note 10, at 253–87.

<sup>35</sup> See LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 19–33 (2001).

<sup>36</sup> See generally Joan Martinez-Alier et al., *Between Activism and Science: Grassroots Concepts for Sustainability Coined by Environmental Justice Organizations*, 21 J. POL. ECOLOGY 19, 27–42 (2014) (noting a number of grassroots efforts for environmental justice).

<sup>37</sup> See generally Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENVTL. L. REP. 10681 (2000) (devoting sections to analyze each of the four features).

<sup>38</sup> See *id.* at 10683–88; Gonzalez, *supra* note 21, at 403–05; Duncan French, *Sustainable Development and the Instinctive Imperative of Justice in the Global Order*, in GLOBAL JUSTICE AND SUSTAINABLE DEVELOPMENT 3 (Duncan French ed., 2010).

<sup>39</sup> See Kuehn, *supra* note 37, at 10688–92; see also Carmen Gonzalez, *Markets, Monocultures, and Malnutrition: Agricultural Trade Policy Through an Environmental Justice Lens*, 14 MICH. ST. J. INT'L L. 345, 348–49 (2006).

<sup>40</sup> See Kuehn, *supra* note 37, at 10696–98; Gonzalez, *Environmental Justice and International Environmental Law*, *supra* note 33, at 85–87.

<sup>41</sup> See Kuehn, *supra* note 37, at 10698–700.

<sup>42</sup> See generally Gonzalez, *Environmental Justice and International Environmental Law*, *supra* note 33, at 78–79 (applying the environmental justice framework to North-South conflicts).

consumes roughly eighty percent of global economic output<sup>43</sup> and generates over ninety percent of its hazardous waste, which is in turn often exported to the Global South.<sup>44</sup> While the North reaps the economic benefits of profligate consumption, the resulting environmental burdens are borne disproportionately by the vulnerable communities who contributed least to the problems and who lack the resources to protect themselves from harm, including the least developed states, the poor, racial and ethnic minorities, and indigenous peoples.<sup>45</sup> North-South relations are also characterized by *procedural injustice* because the North usually dominates the decision-making process in international trade and financial institutions (e.g., the International Monetary Fund, the World Bank, and the World Trade Organization) while disregarding the priorities and concerns of poor nations.<sup>46</sup> *Corrective injustice* is perhaps best exemplified by the lack of redress for the harms inflicted on indigenous peoples and small island states due to climate change.<sup>47</sup> Finally, North-South environmental conflicts are part of larger *social justice* struggles, including the South's resistance to the colonial and post-colonial practices that impoverished the Global South and enabled the North to prosper by appropriating the South's resources.<sup>48</sup>

Another framework utilized by many of the contributors to this symposium and to *International Environmental Law and the Global South* to examine North-South environmental conflicts is human rights.<sup>49</sup> Human rights has become one of the dominant discourses for the articulation and adjudication of environmental disputes. Because the environmental legal regime lacks the sophisticated institutional framework and redress mechanisms of the human rights regime, victims of environmental abuse have increasingly resorted to

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<sup>43</sup> See Rees & Westra, *supra* note 9, at 112; World Bank, *2008 World Development Indicators: Poverty Data*, 2–3 (2008), <http://siteresources.worldbank.org/DATASTATISTICS/Resources/WDI08supplement1216.pdf>.

<sup>44</sup> See DAVID NAGUIB PELLOW, RESISTING GLOBAL TOXICS: TRANSNATIONAL MOVEMENTS FOR ENVIRONMENTAL JUSTICE 8 (2007); *Environmental Justice Critique*, *supra* note 20, at 991–92.

<sup>45</sup> See Rees & Westra, *supra* note 9, at 100–03.

<sup>46</sup> See RUCHI ANAND, INTERNATIONAL ENVIRONMENTAL JUSTICE: A NORTH-SOUTH DIMENSION 132–33 (2004); PATRICK HOSSAY, UNSUSTAINABLE: A PRIMER FOR GLOBAL ENVIRONMENTAL AND SOCIAL JUSTICE 191–98 (2006); RICHARD PEET, UNHOLY TRINITY: THE IMF, WORLD BANK AND WTO 200–04 (2003).

<sup>47</sup> See Maxine Burkett, *Climate Reparations*, 10 MELB. J. INT'L L. 509, 513–20 (2009); Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1625, 1633–46 (2007).

<sup>48</sup> See Gonzalez, *Environmental Justice, Human Rights and the Global South*, *supra* note 33, at 159–63.

<sup>49</sup> See, e.g., Louis J. Kotzé, *Human Rights, the Environment, and the Global South*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 171 (Shawkat Alam, Sumudu Atapattu, Carmen G. Gonzalez, Jona Razzaque eds., 2015); Bernal, *supra* note 22, at 277; Puvimanasinghe, *supra* note 32, at 317.



the human rights framework to seek redress.<sup>50</sup> The convergence of human rights and environmental protection is occurring at national, regional, and international levels. The recognition that many of the protected human rights, if not all, could be jeopardized as a result of environmental damage is one of the reasons for this convergence.<sup>51</sup>

Several theories have been articulated as the jurisprudential basis for human rights-based approaches to environmental protection. First, human rights norms are already embedded in legal systems through common law concepts such as nuisance and the principle of good neighborliness. Thus, the right to an environment of a certain quality should be considered a general principle of law under Article 38(1) of the statute of the International Court of Justice (ICJ). Second, a safe and healthy environment is a prerequisite to the enjoyment of other human rights, such as the right to life or the right to property (the greening of existing rights). Third, the right to a healthy environment can be regarded as an emerging customary international law principle due to the increasing number of national constitutions that guarantee environmental rights, as well as, the vast number of environmental treaties. Finally, an argument can be made that given its importance, the right to a healthy environment should be recognized through treaties.<sup>52</sup> Although human rights-based approaches to environmental protection have both advantages and disadvantages,<sup>53</sup> there is no denying that the human rights framework has provided relief to a large number of victims of environmental abuse.<sup>54</sup>

Despite the articulation of environmental rights and the growing body of jurisprudence, international human rights law does not yet recognize a distinct, stand-alone right to a healthy environment. As noted, the significant number of national constitutions that embody this right has prompted some scholars to argue that a general principle or customary principle that recognizes the right to a healthy environment is emerging.<sup>55</sup> The Human Rights Council's appointment of an Independent Expert on Human Rights and

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<sup>50</sup> See DONALD K. ANTON & DINAH L. SHELTON, ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS 281–355 (2011) (explaining human rights institutions and procedures).

<sup>51</sup> See Sumudu Atapattu, *The Role of Human Rights Law in Protecting Environmental Rights in South Asia*, in CLOSING THE RIGHTS GAP: FROM HUMAN RIGHTS TO SOCIAL TRANSFORMATION 105 (LaDawn Haglund & Robin Stryker eds., 2015).

<sup>52</sup> See Michael Burger, *Bi-Polar and Polycentric Approaches to Human Rights and the Environment*, 28 COLUM. J. ENVTL. L. 371, 373 (2003); see also Atapattu, *supra* note 51, at 107.

<sup>53</sup> See SUMUDU ATAPATTU, HUMAN RIGHTS APPROACHES TO CLIMATE CHANGE: CHALLENGES AND OPPORTUNITIES 291–317 (2016). Gonzalez, *Environmental Justice, Human Rights and the Global South*, *supra* note 33, at 191.

<sup>54</sup> See, e.g., Dinah Shelton, *Whiplash and Backlash – Reflections on a Human Rights Approach to Environmental Protection*, 13 SANTA CLARA J. INT'L L. 11, 13–15 (2015); Gonzalez, *Environmental Justice, Human Rights and the Global South*, *supra* note 33.

<sup>55</sup> Atapattu, *supra* note 51.

the Environment in 2012,<sup>56</sup> whose mandate was later extended and converted to a special rapporteur position, seems to have renewed interest in the U.N. to explore this link further. The mapping report submitted by the independent expert consolidates years of work done by scholars around the world.<sup>57</sup> The report points out that human rights law imposes both *substantive* and *procedural* obligations on states. The substantive obligations require the adoption of legal and institutional frameworks to protect against environmental abuse that interferes with the enjoyment of human rights, including damage caused by private actors. The procedural obligations include carrying out environmental impact assessments and providing access to information, public participation, and remedies. In addition, states must protect *vulnerable groups*. The report identifies women, children, and indigenous peoples as being vulnerable, but notes that more work needs to be done regarding other vulnerable groups. The report concludes that:

Human rights obligations relating to the environment are continuing to be developed in many forums, and the Independent Expert urges States to support their further development and clarification. But the obligations are already clear enough to provide guidance to States and all those interested in promoting and protecting human rights and environmental protection.<sup>58</sup>

The report's main recommendation is that state and non-state actors take these human rights obligations into account as they develop and implement their environmental policies.<sup>59</sup>

Regional human rights bodies have been at the forefront of protecting and articulating environmental rights using existing human rights to do so.<sup>60</sup> The Articles included in this issue draw upon this evolving jurisprudence, and introduce a variety of additional frameworks to analyze and address environmental injustice within and between nations.

Rebecca Bratspies' Article, *Claimed Not Granted: Finding a Human Right to a Healthy Environment*, presents a compelling bottom-up vision of human rights. The Article argues that the human right to a healthy environment emerges not from the pronouncements of treaties and tribunals, but from

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<sup>56</sup> John H. Knox, independent expert on human rights and the environment, was appointed pursuant to Human Rights Council resolution 19/10. Human Rights Council Res. 19/10, A/HRC/19/L.9/Rev.1, at 3 (Mar. 20, 2012).

<sup>57</sup> John H. Knox, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, U.N. Doc. A/HRC/28/61 (Feb. 3, 2015).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> See, e.g., Ole W. Pedersen; *European Environmental Human Rights and Environmental Rights: A Long Time Coming?* 21 GEO. INT'L. ENVTL. L. REV. 73 (2008); see also Shelton, *supra* note 54.

grassroots environmental struggles where “people pit themselves, and their bodies, against what law says is permissible with regard to their environment.”<sup>61</sup> These grassroots struggles enable subordinated communities to speak for themselves and to challenge and transform dominant narratives that treat environmental policy as the exclusive purview of scientific and legal experts. Using as an example the 2005 Inuit petition to the Inter-American Commission on Human Rights and the climate change initiatives of the small island states, the Article demonstrates how human rights claims subsequently recognized and ratified by government officials have their origins in the struggles and demands of vulnerable communities. Professor Bratspies concludes, if we are serious about a human right to a healthy environment, the place to look for it is in “the communities most in need of such a right.”<sup>62</sup>

In *Environmental Racism, American Exceptionalism, and Cold War Human Rights*, Carmen Gonzalez examines the growing recourse to the Inter-American Commission on Human Rights (IACHR) by communities of color in the United States to challenge environmental injustice. In order to evaluate the promise and peril of this litigation strategy, her Article examines how the struggle for racial justice in the United States at the height of the Cold War shaped U.S. attitudes to international human rights law. Vying with the Soviet Union for the hearts and minds of the newly independent states of Asia and Africa, the United States sought to shield state-mandated racial discrimination from international scrutiny in order to present American democracy as worthy of emulation. First, the United States branded as traitors and Kremlin propagandists, U.S. citizens who made use of the United Nations to challenge segregation, lynching, and widespread racial discrimination. Second, the United States ratified very few human rights treaties and developed a series of legal doctrines that limited executive and judicial enforcement of these treaties. Using as a case study the pending IACHR petition in *Mossville Environmental Action Now v. United States*, the Article argues that “international human rights law is far superior to U.S. domestic law as a means of addressing environmental racism. However, its utility is constrained by legal doctrines developed over time but reinforced during the Cold War that restrict the enforcement of international human rights law in U.S. courts.”<sup>63</sup> Professor Gonzalez nevertheless concludes that a victory for the Mossville petitioners before the IACHR would be immensely useful as part of a larger strategy to name and shame the United States, to bridge the gap between international law and domestic law, and to educate government officials and the public at large about the relationship between environmental protection and human rights.

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<sup>61</sup> Rebecca Bratspies, *Claimed Not Granted: Finding a Human Right to a Healthy Environment*, 26 TRANSNAT'L L. & CONTEMP. PROBS. 263, 273 (2017).

<sup>62</sup> *Id.* at 278.

<sup>63</sup> Carmen G. Gonzalez, *Environmental Racism, American Exceptionalism, and Cold War Human Rights*, 26 TRANSNAT'L L. & CONTEMP. PROBS. 281, 285 (2017).

Penelope Simons' Article, *Unsustainable International Law: Transnational Resource Extraction and Violence Against Women*, examines the failure of international law to address the complicity of transnational resource extractive companies in sexual violence against women. The Article describes widespread sexual violence by public and private security forces in the operations of Canadian mining companies. It also examines the impacts of this violence, and discusses the failure of states to comply with their treaty obligations to eliminate such violence. The Article argues two distinct features of international law contribute to these violations: the failure of international human rights law to impose direct human rights obligations on transnational corporations and the absence of a clear state duty to require transnational corporate groups, headquartered in their jurisdictions, to respect human rights in their overseas operations. These omissions create a governance gap where human rights violations flourish—particularly because many of the states in the Global South that host these corporations may be unable to regulate them effectively. Professor Simons argues that these governance gaps are deliberate rather than accidental and are deeply gendered. International law protects the economic interests of Northern corporations while restricting the ability of Southern states to regulate foreign investors. International law also marginalizes women's rights by incorporating them in "soft law" instruments, such as corporate codes of conducts and non-binding principles. The Article concludes by discussing international initiatives, domestic legislation, and corporate efforts to address violence against women.

Elizabeth Ann Kronk Warner's Article, *Environmental Justice: A Necessary Lens to Effectively View Environmental Threats to Indigenous Survival*, explores the similarities and differences between tribal environmental justice communities and other environmental justice communities. After considering how tribal communities function as environmental justice communities, the Article explains that tribal environmental justice struggles are different from those of other communities due to tribal sovereignty, the federal trust relationship with tribes, the unique connection many tribes have with their environment, and the application of international law to tribes. With these differences in mind, the Article then examines two current threats to tribal communities: the Dakota Access Pipeline in the United States and climate change globally. The Article complements the other articles published in this Issue.

Sara Seck's Article, *Revisiting Transnational Corporations and Extractive Industries: Climate Justice, Feminism, and State Sovereignty*, examines the relationship among climate justice, gender, and transnational fossil fuel extractive industries. The Article discusses the disparate impact of climate change on women and analyzes the climate petition currently pending before the Human Rights Commission of the Philippines. Filed in 2015, the Philippine climate petition seeks accountability for climate change from the investor-owned oil, coal, natural gas, and cement enterprises that emitted the bulk of greenhouse gases since the Industrial Revolution. Professor Seck argues that

insights from feminist legal theory might enrich the claims raised in the petition. Specifically, feminist international law scholarship offers strategies to address some of the legal conundrums that have bedeviled the efforts of communities to obtain environmental justice, including the artificial boundary between national and transnational application of human rights norms, the distinction between investor-owned (private) and state-owned (public) enterprises, and the notion that corporations do not have direct human rights obligations.

In *Sacrifice Zones in the Green Economy: The “New” Climate Refugees*, Dayna Nadine Scott and Adrian Smith examine the plight of communities displaced by “green energy” projects designed to address climate change, such as solar, wind, nuclear, and hydroelectric projects. Despite these projects’ devastating human rights impacts (such as loss of land, forced migration, and destruction of subsistence livelihoods), many are proceeding full steam ahead, buoyed by growing enthusiasm for green energy. In addition, planned relocation strategies developed for those fleeing the destruction of their homes by climate change are being proposed as solutions for communities displaced by green energy. The Article critiques the tendency of migration management strategies to treat places as fungible and to ignore the meaningful connections that people develop with specific lands, species, and ecosystems. As the authors point out, “[f]or all of its emphasis on human rights and dignity, planned relocation obscures the actual ‘loss and damage’ that transpires when real, material, and ecological relations that ground people’s connections with land are severed.”<sup>64</sup> The Article reinforces the warnings of many of the contributors to *International Environmental Law and the Global South* that the power dynamics of the green economy may reproduce the “sacrifice zones” of the fossil fuel economy.<sup>65</sup>

In *Climate Change, International Environmental Law Principles, and the North-South Divide*, Sumudu Atapattu extends her discussion of principles in *International Environmental Law and the Global South*,<sup>66</sup> specifically to climate change. She discusses international law principles specifically included in the United Nations Framework on Climate Change (“UNFCCC”) through a North-South lens. She discusses how the North-South split has also influenced the adoption and application of principles in the climate regime. In this context, she discusses common but differentiated responsibility,

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<sup>64</sup> Dayna Nadine Scott & Adrian A. Smith, *Sacrifice Zones in the Green Energy Economy: The “New” Climate Refugees*, 26 TRANSNAT’L L. & CONTEMP. PROBS. 371, 381 (2017).

<sup>65</sup> See Shalanda H. Baker, *Project Finance and Sustainable Development in the Global South*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 338, 338–55 (Shawkat Alam, Sumudu Atapattu, Carmen G. Gonzalez, Jona Razzaque eds., 2015); Elizabeth Ann Kronk Warner, *South of South: Examining the International Climate Regime from an Indigenous Perspective*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 451, 451–68 (Shawkat Alam, Sumudu Atapattu, Carmen G. Gonzalez, Jona Razzaque eds., 2015); see also Carmen G. Gonzalez, *The Environmental Justice Implications of Biofuels*, 20 UCLA J. INT’L L. & FOREIGN AFF. 229 (2016).

<sup>66</sup> See Atapattu, *supra* note 31, at 74.

sustainable development, inter- and intra-generational equity, and the precautionary principle, all of which gave rise to intense debate along North-South lines. In addition to the broad North-South split, other coalitions such as the “BASIC” countries (Brazil, South Africa, India and China) have begun to play an increasingly important role in climate negotiations. She concludes the North-South divide will continue to play a pivotal role in shaping negotiations relating to environmental issues at the international level particularly in relation to climate change, which Southern countries have called “an act of aggression” committed against them by their counterparts in the Global North.

Tracy-Lynn Humby’s Article, *Evaluating the Value of TWAIL, Environmental Justice, and Decolonization Discourses as Framing Lenses for International Environmental Law*, compares and contrasts three distinct frameworks to critique and reform international law and international environmental law and then applies these frameworks to the challenge of South Africa’s renewable energy transition. The Article outlines the critiques of international law offered by scholars affiliated with Third World Approaches to International Law (“TWAIL”) movement and examines environmental justice as a social movement and as a paradigm through which to analyze both domestic and international law. The Article then introduces a third framework, decolonization/Fallism, which emerges from the #FeesMustFall Movement in South Africa. Grounded in the discourse of decolonization and drawing upon black consciousness and African nationalism, the decolonization/Fallism framework “can be outlined with reference to five thematic areas: intersectionality, whiteness and black pain, disruption and the use of violence, the radical restructuring of institutions and curricula of higher learning, and social responsiveness and re-centering.”<sup>67</sup> Professor Humby points out the decolonization/Fallism framework focuses on a wider range of intersectional forms of oppression than TWAIL or environmental justice, including gender, homophobia, xenophobia, race, and class. It also places greater emphasis on black agency, forms of resistance, and on “local knowledge, scholars, cultural traditions, practices, and histories” and the manner in which they have been erased by “a dominant western, neoliberal paradigm.”<sup>68</sup> The author applies all three conceptual frameworks to the energy policy in South Africa and concludes the three frameworks offer overlapping and yet distinct and complementary insights for the study of international law and international environmental law.

Finally, in *The Global North, the Global South, and the Challenges of Ensuring Due Diligence for Sustainable Fishing Governance*, Anastasia Telesetsky examines both North-South and South-South conflicts over the

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<sup>67</sup> Tracy-Lynn Humby, *Evaluating the Value of TWAIL, Environmental Justice, and Decolonization Discourses as Framing Lenses for International Environmental Law*, 26 TRANSNAT’L L. & CONTEMP. PROBS. 317, 330 (2017).

<sup>68</sup> *Id.* at 333–34.

sustainable management of fisheries. As the fisheries of the Global North become depleted, global fishing fleets are rapidly relocating to the Global South and introducing more efficient industrial ways of harvesting fish. In addition, there has been a surge in illegal, unreported, and unregulated (IUU) fishing. These activities inflict severe economic losses on countries of the Global South (which lose millions of dollars in potential fishing revenues) and on vulnerable coastal communities that depend on fishing for their subsistence. Countries in the Global South, such as China, are replicating this dynamic in the South China Sea and across the globe. The Article discusses the due diligence obligations of states under treaty and customary international law to ensure that vessels and nationals comply with coastal state fisheries laws and do not engage in IUU fishing. Professor Telesetsky concludes that “[i]n the absence of concerted action by States to enforce good fishery management practices by their vessels or nationals, additional initiatives are required to protect food security and livelihoods.”<sup>69</sup> She suggests that it is essential to strengthen fisheries improvement programs facilitated by industry and non-governmental organizations as well as transparency initiatives that provide sustainability information to both governments and consumers—thereby enabling conscientious consumers to collectively influence the sustainability of the fishing industry.

This special volume is a remarkable collection of Articles by renowned scholars in the field. In a single volume, it expertly weaves together seemingly disparate topics and issues such as fisheries governance, environmental justice and the rights of indigenous peoples, sacrifice zones and climate refugees, climate change and international environmental law principles, environmental racism and the quest for legal remedies, resource extraction and violence against women, energy poverty and women, and extractive industries and feminist legal theory. It does so through several lenses: the North-South framework, environmental justice, intersectionality, TWAIL, decolonization, and human rights. Each contributor provides a rich analysis of issues and provides the reader with food for thought. The Articles highlight the intersections of gender, poverty, rurality, indigeneity, and race, and explore how structural inequalities interact, overlap, and produce differentiated experiences of advantage and disadvantage. The contributors urge countries in the Global South not to emulate the destructive development path followed by the Global North that caused many of the environmental problems discussed in the volume, most notably climate change. Even where states have transitioned to renewable sources of energy to combat climate change, old problems have emerged in new forms, such as the displacement of communities caused by green energy projects. Unless we learn from past mistakes and adopt solutions that disrupt existing power dynamics, we run the risk of simply pouring old wine in new bottles and reinforcing environmental injustice.

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<sup>69</sup> Anastasia Telesetsky, *The Global North, the Global South, and the Challenges of Ensuring Due Diligence for Sustainable Fishing Governance*, 26 TRANSNAT'L L. & CONTEMP. PROBS. 435, 446 (2017).