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# ROOT AND BRANCH: CLIMATE CATASTROPHE, RACIAL CRISES, AND THE HISTORY AND FUTURE OF CLIMATE JUSTICE

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*After all, radical simply means “grasping things at the root.”*  
— Angela Davis<sup>1</sup>

## INTRODUCTION

The disproportionate burdens of climate change borne by the Global South are numerous and increasingly well documented.<sup>2</sup> While the effect of the climate crisis in the South is starting to receive its due coverage in the current moment of heightened awareness,<sup>3</sup> the centuries-long relationship between the two also deserves deeper exploration, particularly to ensure that our solutions seek to grasp at the roots of the crisis while they prune the branches. Indeed, the climate crisis and racial hierarchy have long been inextricably intertwined, explaining in large part the uneven share in cause and consequence of the North and South respectively.<sup>4</sup>

In global efforts to slow or arrest climate change, however, decisionmakers have generally favored low-hanging fruit.<sup>5</sup> Yet at the roots we find both the origins of a dangerously cabined view of the environment and a political economy that has relied on sacrificing land and people in furtherance of myopic understandings of “progress.” Opening with an exploration of critical research on the assumptions about the

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<sup>1</sup> ANGELA Y. DAVIS, WOMEN, CULTURE & POLITICS 14 (1984) (emphasis omitted).

<sup>2</sup> See, e.g., *How Are People in the Global South Responding to Climate Change?*, THE GUARDIAN (Mar. 9, 2012, 12:24 PM), <https://www.theguardian.com/journalismcompetition/how-are-people-in-the-global-south-responding-to-climate-change> [https://perma.cc/H2PK-NLF3].

<sup>3</sup> See, e.g., Noah S. Diffenbaugh & Marshall Burke, *Global Warming Has Increased Global Economic Inequality*, 116 PROC. NAT’L ACAD. SCI. 9808 (2019), <https://www.pnas.org/content/pnas/116/20/9808.full.pdf> [https://perma.cc/B7SJ-3X9C]; Somini Sengupta, *This Is Inequity at the Boiling Point*, N.Y. TIMES (Aug. 7, 2020), <https://www.nytimes.com/interactive/2020/08/06/climate/climate-change-inequality-heat.html> [https://perma.cc/WW66-9WYK]; Hiroko Tabuchi, Michael Corkery & Carlos Mureithi, *Big Oil Is in Trouble. Its Plan: Flood Africa with Plastic*, N.Y. TIMES (Aug. 30, 2020), <https://www.nytimes.com/2020/08/30/climate/oil-kenya-africa-plastics-trade.html> [https://perma.cc/P642-MCTS]; see also Hop Hopkins, *Racism Is Killing the Planet*, SIERRA MAG. (June 8, 2020), <https://www.sierraclub.org/sierra/racism-killing-planet> [https://perma.cc/FE9D-HG76].

<sup>4</sup> See Usha Natarajan, *TWAIL and the Environment: The State of Nature, the Nature of the State, and the Arab Spring*, 14 OR. REV. INT’L L. 177, 179 (2012).

<sup>5</sup> See Nick Sobczyk & George Cahlink, *Next Step for House Dems: “Low-Hanging Fruit,”* E&E NEWS: E&E DAILY (Feb. 7, 2019), <https://www.eenews.net/stories/1060119897> [https://perma.cc/AK22-DNDG].

natural world in the law (and international law in particular), this Commentary explores the dominant worldviews and approaches that have ignored, subsumed, or compartmentalized the natural environment in contemporary legal and social orders. The Commentary then considers the way in which colonialism disseminated and accelerated the impacts of this worldview and effectuated the political economy that has thoroughly destabilized the global environment today. It examines how the colonial project simultaneously created and ossified a racial hierarchy that justified subjugation of black, brown, and indigenous peoples and, over generations, deeply influenced the ability of the Global South to protect against the uneven and inequitable impacts of climate change. An exploration of this history not only clarifies the present but also reveals the deep and comprehensive repair needed to ensure just and equitable futures.

## I. CABINING THE “ENVIRONMENT”: UNDERSTANDING THE NATURE OF THE WESTERN WORLDVIEW

### A. *The [Man-Nature] Myth and Global Instability*

The predominate approaches to the environment<sup>6</sup> and its health or degradation belie a fundamental misapprehension of the natural world and the way in which its integrity is imperative for our existence and overall wellbeing. Differing worldviews did not separate the individual from the environment, in some cases sharply contrasting the more reductionist approach of the proximate, dominant culture. Professor Klaus Bosselmann, for example, notes that “there is a wealth of sustainability wisdom in the history of all cultures and European culture is no exception.”<sup>7</sup> By the mid-1800s, “the notion [of] ‘living from the yield, not from the substance’ was widespread among forest academies and indeed science faculties throughout Europe. It was state-of-the-art knowledge!”<sup>8</sup> Looking prior to European Enlightenment is also

<sup>6</sup> Like Professor Usha Natarajan and Kishan Khoday, I also use nature and environment interchangeably, adopting their rationale for collapsing the terms as well as their critique of terms like “environmental law.” Usha Natarajan & Kishan Khoday, *Locating Nature: Making and Unmaking International Law*, 27 LEIDEN J. INT’L L. 573, 575 n.6 (2014) (“We adopt the ordinary usage of these terms in the mainstream discipline to reference our physical surroundings in a general sense. The term ‘environmental law’ to some extent assumes that the environment can be identified, and that problems in the environment ‘out there’ can be addressed by applying law to human activity. Our article argues the impossibility of such an endeavour as law is itself situated within the broader constitutive context of how humans collectively self-organize their relationship with their physical surroundings.”).

<sup>7</sup> Klaus Bosselmann, *Losing the Forest for the Trees: Environmental Reductionism in the Law*, 2 SUSTAINABILITY 2424, 2436 (2010) (footnote omitted).

<sup>8</sup> *Id.* at 2437.

revealing. According to Professor Usha Natarajan and Kishan Khoday:

Before [the European Enlightenment], societal change was assumed to be cyclical, with advances in knowledge, economy, and culture followed by stabilization and eventual decline. Examples include the Aristotelian perception of rising and falling civilizations, or the Augustinian notion of humanity's journey from creation to revelation with the rise of mankind followed by the inevitable descent into the apocalypse.<sup>9</sup>

These worldviews were more consistent with the dynamism of nature and its relationship with humans, a constituent part, and are broadly evident in cultures throughout the Global South as well as indigenous cultures.<sup>10</sup>

The horizon for lawmaking is also inconsistent with the longer arc and complex character of the environment. According to Bosselmann, short-term decisionmaking is hostile to these complexities and often conflates the environment with natural resources, a potentially fatal flaw as it turns out. He argues: "Often, law-makers, rather than thinking of the environment as a whole, refer to 'natural resources' which is, in reality, an economic term."<sup>11</sup> Natarajan and Khoday also note that conceptions of development and economy in international law are equally reductionist, transforming nature into "limitless commodification processes."<sup>12</sup> This approach furthers a disciplinary commitment to "infinite economic growth and technocratic and market-based solutions,"<sup>13</sup> which are severely limited in their ability to curb dynamic and comprehensive ecological calamities like climate change.

In addition to a limiting conception of natural systems within a static envelope, the environment is reduced to its economic utility. It is at once fixed and purely instrumental in value. A more appropriate response to the climate and environment's actual dynamism is to construct regulatory goals and legal mechanisms that center on the concept of change itself.<sup>14</sup> However, as Professor Stephen Humphreys argues: "The law — human rights law, trade law — is not ready made to deliver climate

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<sup>9</sup> Natarajan & Khoday, *supra* note 6, at 588–89.

<sup>10</sup> See generally Maxine Burkett, *Indigenous Environmental Knowledge and Climate Change Adaptation*, in CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES 96 (Randall S. Abate & Elizabeth Ann Kronk eds., 2013) (discussing central principles of indigenous worldviews).

<sup>11</sup> Klaus Bosselmann, *A Vulnerable Environment: Contextualising Law with Sustainability*, 2 J. HUM. RTS. & ENV'T 45, 49 (2011).

<sup>12</sup> Natarajan & Khoday, *supra* note 6, at 576.

<sup>13</sup> *Id.*

<sup>14</sup> See Robin Kundis Craig, "Stationarity Is Dead"—Long Live Transformation: Five Principles for Climate Change Adaptation Law, 34 HARV. ENV'T L. REV. 9, 21 (2010); see also Bosselmann, *supra* note 11, at 47–48.

justice.”<sup>15</sup> Delivering equitable approaches amidst change presents a particular challenge. In other words, the law is not well suited to producing equitable responses based on distributional and corrective justice, among other climate justice principles.<sup>16</sup>

### B. Compartmentalization and Fragmentation in Practice and Worldview

The fundamental misapprehension of nature extends from prevailing Western understandings of the human relationship to the natural world. Many scholars have explored the deep roots of these understandings, as well as their departure from non-Western worldviews and even worldviews indigenous to the West that did not prevail.<sup>17</sup> Exploring the foundations of the law and its approach to the natural environment is critical to understand both its complicity in the current climate crisis and the embedded incapacities it has to respond to the crisis.

Dominant legal systems emerged from a particular soil. Bosselmann points to “European cosmology” as a root cause and explanatory factor in the emergence of “[e]conomic rationality” over environmental integrity, a pattern that has shaped both capitalist and socialist systems and effected life-threatening results.<sup>18</sup> This parsing has deeply influenced the metastructure of the law, including international law and, by the way, is a significant departure from the conception of the natural world and legal orders in other worldviews. Professor Anna Grear cogently demonstrates how reductionism manifests in the law: “[It] is expressed . . . in a complexly disembodied juridical notion of the human subject and a related juridical objectification of the ‘natural world’. Thus, in law, as in science, the modern ‘rational human subject’ forms the epistemic ‘centre’ surrounded by its ‘environment’, understood as mere ‘matter’ ‘out there.’”<sup>19</sup> The effect of such framing is fundamental to and completely infused throughout the international legal system and is, for example, evinced by the slow and inadequate responses to climate-related displacement and human mobility, among other things. It causes the law to buckle when confronted with the dynamic pace and content of these twenty-first-century ecological crises.

<sup>15</sup> Stephen Humphreys, *Climate Justice: The Claim of the Past*, 5 J. HUM. RTS. & ENV’T (SPECIAL ISSUE) 134, 141 (2014).

<sup>16</sup> See, e.g., Carmen G. Gonzalez, *Global Justice in the Anthropocene*, in ENVIRONMENTAL LAW AND GOVERNANCE FOR THE ANTHROPOCENE 219, 231 (Louis J. Kotzé ed., 2017) (on the four manifestations of environmental inequity).

<sup>17</sup> See Bosselmann, *supra* note 7; Natarajan & Khoday, *supra* note 6, at 588–89.

<sup>18</sup> See Bosselmann, *supra* note 7, at 2430–31.

<sup>19</sup> Anna Grear, *Towards “Climate Justice”? A Critical Reflection on Legal Subjectivity and Climate Injustice: Warning Signals, Patterned Hierarchies, Directions for Future Law and Policy*, 5 J. HUM. RTS. & ENV’T (SPECIAL ISSUE) 102, 112 (2014) (footnotes omitted).

Perhaps the greatest threat to a dynamic approach to law is the compartmentalization of the environment and the fragmentation of it in our “environmental management” regimes, on which there is rich scholarly critique.<sup>20</sup> Consider that the bounded field of environmental law has a uniquely sweeping mandate. Its subject is each person. Its object is the commons, and the space and time it covers is the entire globe — yesterday, today, and the future. Nonetheless, the management domain at the domestic level is compartmentalized in comparatively weak agencies like the Environmental Protection Agency and similarly situated Ministries of the Environment.<sup>21</sup> At the international level, international environmental law, discussed further below, is similarly myopic in scope and constrained in reach. By contrast, departments managing trade, finance, economic growth, or social welfare set sweeping public policy, and international trade law is notable for its unique ability to ensure compliance and accountability consistent with the prevailing political economy.<sup>22</sup>

There is, however, no governing rule or principle running through the law that prohibits a thorough compromise of ecosystems’ fundamental integrity.<sup>23</sup> This absence is noteworthy and peculiar given that functioning ecosystems are necessary to sustain life. In international negotiations on trade in natural resources (read: the environment), for example, “environmental provisions” are a nagging afterthought, if considered at all.<sup>24</sup> Tellingly, the trade and climate regimes developed contemporaneously — and during a critical window for the global community to aggressively combat climate change in the 1990s and 2000s.<sup>25</sup> The weight and enforceability of those commitments through their respective regimes are deeply divergent. On the one hand, private investors can haul the United States into opaque international

<sup>20</sup> See, e.g., Bosselmann, *supra* note 11, at 48–51.

<sup>21</sup> *Id.* at 48–49.

<sup>22</sup> *Id.*; Bosselmann, *supra* note 7, at 2431–32.

<sup>23</sup> See Humphreys, *supra* note 15, at 144 (noting that “[t]he trade regime is a cornerstone of the international system; the climate regime is not” and that “within the [World Trade Organization (WTO)] itself — including its Dispute Settlement Body — there is little sense that climate change requires any rethinking of WTO rules”). Humphreys presumes that the WTO was not intended as a “suicide pact” and wonders “to what extent might we look forward to the evolution of international law (human rights law, trade law, environmental law)?” *Id.*

<sup>24</sup> Here I depart significantly from Bosselmann’s construction of the solution. He states: “Fundamentally, only two solutions are available: either protection of the commons must set a benchmark against which all rights and duties are to be measured or environmental protection will be considered as merely relative to competing concerns such as economic prosperity and social equity.” Bosselmann, *supra* note 7, at 2428. I strenuously disagree with the notion that social equity is a competing concern. Indeed, as discussed in depth below, such inequity and injustice are intimately intertwined with the causes and consequence of environmental degradation, namely the othering and objectification inherent in Cartesian dualism.

<sup>25</sup> See Hum. Rts. Council, Climate Change and Poverty: Report of the Special Rapporteur on Extreme Poverty and Human Rights, U.N. Doc. A/HRC/41/39, para. 38 (2019).

arbitration, but, on the other hand, other States and harmed individuals cannot hold the United States accountable for its singular and outsized contribution to the cascading effects of global climate change.<sup>26</sup>

Governance of conduct vis-à-vis the natural environment is also hampered by fragmentation. Governance is fragmented in that decisionmakers manage, for the most part, specific aspects of the environment independently rather than as an integrated whole. And a commitment to constructing “legal taxonomies” and “bounded domains” has stymied progress in remedying systemic challenges like climate change as well as, notably and relatedly, intersecting crises related to race, ethnicity, and gender.<sup>27</sup> In many respects, fragmentation is defensible. To be specific and enforceable, laws need to carve out sensible domains, even if roughly demarcated. Indeed, that is perhaps why treaties such as the United Nations Convention on the Law of the Sea<sup>28</sup> and agencies such as the International Maritime Organization that are delimiting boundaries and setting standards are more effective instantiations of international environmental governance.<sup>29</sup> What is missing, however, is a system-wide approach throughout international law that “holds the environment as the foundation of life and the integrity of the ecological systems as non-negotiable.”<sup>30</sup> That is why the individual successes of environmental laws, such as regional air-quality improvements, have not “trickled up and out” to cover the scale and scope of emerging, interrelated crises such as precipitous loss of biodiversity and climate change. Indeed, environmental law is no match for larger economic objectives at the core of the global legal architecture.<sup>31</sup>

## II. ANOTHER “ANTHROPOCENE”: RECOGNIZING NON-WESTERN WORLDVIEWS

The global legal architecture, however, need not operate in this manner. Widely embraced notions of an “Anthropocene” suggest that the imprint humans have made on the geological stratigraphy has been inevitable.<sup>32</sup> In reality, however, the current state of the environment is

<sup>26</sup> On this discrepancy between the “conclusion of a dizzying number of international trade and investment treaties” and the singular and ineffectual climate-related agreement, see *id.*

<sup>27</sup> Grear, *supra* note 19, at 105 (noting that law’s “taxonomical and linear tendencies, if anything, tend to exacerbate law’s inadequate systemic grasp of the challenges”).

<sup>28</sup> United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

<sup>29</sup> Bosselmann, for example, concedes that “the reductionist concept of environmental protection has not been entirely without success.” Bosselmann, *supra* note 11, at 51. The global environment is, nonetheless, swiftly declining. *Id.*

<sup>30</sup> Bosselmann, *supra* note 7, at 2432.

<sup>31</sup> See Greal, *supra* note 19, at 106.

<sup>32</sup> See Maxine Burkett, *Behind the Veil: Climate Migration, Regime Shift, and a New Theory of Justice*, 53 HARV. C.R.-C.L. L. REV. 445, 456 n.53 (2018); Carmen G. Gonzalez, *Racial Capitalism, Climate Justice, and Climate Displacement*, 11 OÑATI SOCIO-LEGAL SERIES 108, 113–14 (2021).

the indelible imprint of the European Enlightenment's force and reach — and the specific legal structures that facilitated that reach.<sup>33</sup> It contrasts starkly with non-Western ontologies that are marked by relationality and complementarities.<sup>34</sup> These held understandings and worldviews on the interdependence of human and ecological systems, notably strong among indigenous peoples and peoples of the Global South, more closely match what Bosselmann, for example, has described.<sup>35</sup>

Without essentializing or suggesting that there were not Western notions of interdependence, indigenous legal systems and philosophies throughout the Global South tend to regard human beings as part of their ecosystems, with ethical and legal rules flowing from that understanding of interconnection.<sup>36</sup> Yet that proximity to nature, in ontology and practice, was not only viewed as distinct from the "civilizing" forces of the Enlightenment but also legitimized transgressions in its name.<sup>37</sup> Assessing the relationship with nature, in fact, was one of the earliest and most consequential points at which racial hierarchy and environmental degradation collided. As Natarajan explains, scholars and philosophers of the Enlightenment viewed societies in the Global South as being "trapped in a state of nature," a designation that justified the subjugation of "savages" and "barbarians," and similarly justified "imperial projects of transformation."<sup>38</sup>

The consequences of this worldview and its global spread through colonialism and neocolonialism, discussed further below, have been devastating by facilitating the overconsumption of global resources but

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For further discussion of this throughline from the start of colonial expansion to today, see *infra* Part III, pp. 333–36.

<sup>33</sup> For a more pointed critique, see Gonzalez, *supra* note 32, at 117 ("The Anthropocene is the epoch under which 'humanity' – but more accurately, petrochemical companies and those invested in and profiting from petrocapitalism and colonialism – have had such a large impact on the planet that radionuclides, coal, plutonium, plastic, concrete, *genocide* and other markers are now visible in the geologic strata[.]") (citing Heather Davis & Zoe Todd, *On the Importance of a Date, or Decolonizing the Anthropocene*, 16 ACME 761, 765 (2017)).

<sup>34</sup> See Burkett, *supra* note 32, at 485–88; Burkett, *supra* note 10, at 105–06, 106 n.59; see also VOLKER BOEGE, TODA PEACE INST., CLIMATE CHANGE AND CONFLICT IN OCEANIA: CHALLENGES, RESPONSES, AND SUGGESTIONS FOR A POLICY-RELEVANT RESEARCH AGENDA 11–12 (2018) (discussing the relationality inherent in Oceanic cosmologies and urging integration of indigenous viewpoints in environmental policy); Carmen G. Gonzalez, *Beyond Eco-Imperialism: An Environmental Justice Critique of Free Trade*, 78 DENV. U. L. REV. 979, 985 n.20 (2001) (noting that environmentalism in the Global South is "frequently grounded in an indigenous ideology of social justice, such as Gandhism in India, Buddhism in Thailand, and liberation theology in Latin America").

<sup>35</sup> See Bosselmann, *supra* note 7, at 2347.

<sup>36</sup> See Gonzalez, *supra* note 16, at 232 (describing the worldview and rules that have facilitated "each group's adaptation to its distinct ecological niche and to protect the ecological systems upon which human and non-human life depend").

<sup>37</sup> *Id.*

<sup>38</sup> Natarajan, *supra* note 4, at 192.

also rendering much of the Global South ill-equipped to adapt to the consequences of that overconsumption.<sup>39</sup> The Western idea of the “modern state,” to take just one example, brought sometimes arbitrary nation-state boundaries to the Global South, with significant consequences for the specter of uncoordinated migration as well as the proliferation of exclusionary policies.<sup>40</sup> It also brought “the assertion of state control over nature as the basis for modernity and progress.”<sup>41</sup> It persisted through to the postcolonial period, as Natarajan explains, at which time postcolonial states were “imbued with a civilizing mission” in which the nation-state was tied to a specific understanding of development, one that equated “developmental progress” with “the degree of state control over nature.”<sup>42</sup> According to Natarajan, the law, particularly property and land use laws, “was a central mechanism through which the non-European world could be civilized, as it was an essential element for allowing industry to thrive.”<sup>43</sup> At the roots of contemporary legal orders, therefore, are the intertwined missions to “civilize” and “modernize” through increasingly sophisticated modes of exploitation of both land and peoples.<sup>44</sup>

### III. A HISTORY OF HIERARCHY: SHARED ROOTS OF CLIMATE CHANGE AND THE GLOBAL NORTH-SOUTH DIVIDE

Racial subjugation is commingled with environmental degradation. A look in the rearview suggests that the two have long been inextricably intertwined. Indeed, the climate crisis might not have been possible without conceptions of peoples and places that could be sacrificed for “wealth” and “progress.” The relationship may be more than five centuries old, at which point European contact appears immediately transformational at the scale of the global climate. Data show that the mini-Ice Age of the 1600s may have been the byproduct of the prior century’s massive genocide of Americas’ indigenous peoples, estimated at over fifty million dead.<sup>45</sup> Native farming collapsed and forests rebounded to the extent that newly forested areas captured enough carbon to spur

<sup>39</sup> See *infra* section III.A, p. 335. Statistics regarding the amount of “natural resources” needed to maintain a Western lifestyle evince the North’s overconsumption over global resources. See, e.g., Gonzalez, *supra* note 16, at 221–22; Mathis Wackernagel et al., *The Ecological Footprint of Cities and Regions: Comparing Resource Availability with Resource Demand*, 18 ENV’T & URBANIZATION 103, 105–08 (2006).

<sup>40</sup> Natarajan, *supra* note 4, at 191–92.

<sup>41</sup> *Id.* at 192.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 193.

<sup>44</sup> See Grear, *supra* note 19.

<sup>45</sup> See Alexander Koch et al., *Earth System Impacts of the European Arrival and Great Dying in the Americas After 1492*, 207 QUATERNARY SCI. REVLS. 13, 13–14, 22 (2019); see also Gonzalez, *supra* note 32, at 117–18.

measurably cooler global temperatures, as forests sequestered significant amounts of carbon dioxide.<sup>46</sup> This section introduces not only the ongoing and disproportionately negative effects of global climate change on the Global South,<sup>47</sup> but it also explores the assertion that colonial and postcolonial legal orders made the climate crisis possible.

Related to the discussion in the prior section, the domination of the environment has produced adverse results for centuries, with the current climate crisis serving as a dangerous denouement. From the beginning, international law has held a similar view of nature, treating it as a “resource for wealth generation” and a singular formulation of “development.”<sup>48</sup> As the disciplinary scaffolding of the international legal order, international law has universalized and normalized that understanding.<sup>49</sup> Further, norms fundamental to international law, such as sovereignty, economy, and development, are modeled on the political economy of the North, which itself is ill-suited “to perceiving or observing ecological limits,” much less correcting for them in a rapid, wholistic, and inclusive manner.<sup>50</sup>

At the same time, international law has also been deeply complicit in the subjugation of peoples, from the doctrine of *terra nullius* driving colonialism through to trusteeship, renewed sovereignty, and structural adjustment in the postcolonial era. Professor Carmen Gonzalez argues that international law paints a very vivid picture, depicting “Southern peoples as so primitive, savage, uncivilized, backward, and underdeveloped that their lives, livelihoods, and cultures are unworthy of protection.”<sup>51</sup> *Terra nullius* is perhaps the clearest example of early norms that justified the colonial project in the territory of nomadic cultures. Nomadic societies were the most distant from conceptions of “sovereignty,” in that they did not exert the requisite degree of control over nature and did not maximize “nature’s productive capacity through consistent agriculture and farming.”<sup>52</sup> In the project of progress, international law thus reflects the notion that levels of domination of nature are the appropriate barometer and that the South, prior to Western contact, had not qualified as sovereign.

<sup>46</sup> See Koch et al., *supra* note 45, at 24–25, 27.

<sup>47</sup> Part IV explores climate change’s impact on the Global North-South divide in greater depth.

<sup>48</sup> Natarajan & Khoday, *supra* note 6, at 574–75.

<sup>49</sup> *Id.* at 575.

<sup>50</sup> *Id.* at 574–75.

<sup>51</sup> Gonzalez, *supra* note 32, at 119–20.

<sup>52</sup> Natarajan & Khoday, *supra* note 6, at 587.

### A. Colonialism and the Domination of People and Place

Colonialism was the period of aggressive and globally exported “progress.” Colonizers commodified and exploited nature as they simultaneously exploited certain humans, almost exclusively in the Global South.<sup>53</sup> Scholars of Third World Approaches to International Law (TWAIL) understand colonialism as “a cultural project of control. Colonized societies were classified and labeled. New distinctions and oppositions came into being between colonizers and colonized, Europe and Asia, modern and primitive, and West and East,”<sup>54</sup> mirroring the dualism discussed above. As Gonzalez explains, colonialism reduced subsistence economies into “economic satellites of Europe,” wreaking havoc on the in-situ people and environments.<sup>55</sup> The South exported massive amounts of raw goods and imported the manufactured end products.<sup>56</sup> The knock-on effect was, among other things, a shift to export production that not only diverted prime agricultural lands but also created poverty and inequality by “concentrating landholding in the hands of local elites, converting farmers into landless peasants, promoting the use of [the labor of the enslaved], and degrading the natural resource base necessary for food production.”<sup>57</sup> Of course, colonizers routinely met resistance with brutal repression, and this kind of repression to maintain control was tolerated if not sanctioned by the governing legal order.<sup>58</sup>

### B. Postcolonialism and Shadows of Hierarchy

This understanding of civilization and the classifying of non-European societies relative to “the civilized” persisted in the waning days of colonialism. The League of Nation’s Mandate Systems, in which “European states would assist non-European territories to evolve toward sovereignty,”<sup>59</sup> is evidence of persisting notions of civilization into the postcolonial period. As before, control and productive use of the natural environment were also, in some respects, key to sovereignty. As Natarajan and Khoday explain: “In their quest to gain equal footing under international law, non-European states had to considerably trans-

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<sup>53</sup> See Gonzalez, *supra* note 16, at 222.

<sup>54</sup> Natarajan, *supra* note 4, at 181.

<sup>55</sup> Carmen G. Gonzalez, *Environmental Justice and International Environmental Law*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 77, 80 (Shawkat Alam et al. eds., 2013).

<sup>56</sup> *Id.* See generally JASON HICKEL, THE DIVIDE: A BRIEF GUIDE TO GLOBAL INEQUALITY AND ITS SOLUTIONS (2017) (examining the colonialist roots of global inequality).

<sup>57</sup> Gonzalez, *supra* note 55, at 80–81.

<sup>58</sup> *Id.* at 81.

<sup>59</sup> Natarajan & Khoday, *supra* note 6, at 587.

form their domestic spheres to enable the increasingly efficient exploitation of nature through instituting appropriate European systems of land tenure, private property, contracts, torts, and so on.”<sup>60</sup> Notions of European racial and cultural superiority were also imprinted and later exploited by postcolonial elites, who justified exploiting indigenous peoples and places, among others, within their sovereign boundaries.<sup>61</sup>

Modern investment law exemplifies the strength and durability of these precepts in the fabric of international law. It adopts the colonial-era “instrumentalist view of the environment” and facilitates the North’s overuse of ecosystem services, without creating a parallel obligation to protect healthy ecosystems and local communities.<sup>62</sup> Indeed, such gestures at protection are not merely frowned upon in favor of “stable legal and business” environments; they are verboten.<sup>63</sup> Gonzalez explains that instruments like bilateral and regional investment agreements have sought “to provide foreign investors with unfettered access to natural resources by restricting the ability of host states to adopt health and safety, environmental, labour and human rights standards.”<sup>64</sup> These arrangements may even stymie a country’s ability to adapt to climate change in the Global South as a result of requirements to compensate investors when measures to respond to drought-induced water shortages, for example, “depress the value of foreign investment.”<sup>65</sup> Indeed, the progeny of the Washington Consensus was an international trade regime that uncritically and unabashedly facilitated the Global North’s overconsumption and offshored much of the waste byproduct and environmental degradation to the Global South.<sup>66</sup> Of course, climate change has enhanced the scale and scope of that degradation, which now has an irrefutably global reach of the kind that even the North cannot outsource. Nonetheless, these underlying legal structures remain.

#### IV. LOOKING TO TWENTY-FIRST CENTURY GOVERNANCE AMIDST GLOBAL CHANGE: THE LIMITS OF INTERNATIONAL ENVIRONMENTAL LAW

Even efforts that are facially meant to address ecological collapse entrench Western notions of development and attend to “regulating” the Global South, ignoring the more destructive impacts of the boundary-indifferent actions of the Global North. This is the inherent challenge for international environmental law as a branch of international law,

<sup>60</sup> *Id.*

<sup>61</sup> Gonzalez, *supra* note 55, at 81.

<sup>62</sup> Gonzalez, *supra* note 16, at 224.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Gonzalez, *supra* note 55, at 82.

itself an instantiation of worldviews that exalt dualism and rationality at its roots. Sustainable development initiatives are a helpful example. In its compelling work to detail critical shifts in the global environment and advance sustainable development, the Brundtland Commission both “extolled the benefits of international trade”<sup>67</sup> and simultaneously noted the implausibility of modeling development on the prodigal habits of the North.<sup>68</sup> On the efficacy and sensibility of this approach, climate justice and TWAIL scholars note: “Far from questioning the dominant development model that subordinated the global South and sparked a socio-ecological crisis of epic proportions, sustainable development ‘naturalizes and obfuscates the process whereby some people systematically under-develop others.’”<sup>69</sup> Scholars and practitioners alike can level the same critique against the field of international environmental law generally, which, despite its best intentions, remains limited in its reach and impact, painfully demonstrated by the fits and starts of the United Nations Framework Convention on Climate Change.<sup>70</sup>

Rather than amending the more powerful doctrines and modalities of international law for agreement with the needs of a livable environment,<sup>71</sup> efforts to “save the planet” and all the human beings, present and future, fall to the circumscribed field of international environmental law (IEL). To say that it is not up to the task is a painful understatement. It also elides the way in which IEL, like international law at large, “fail[s] to deliver on its promise to stem ecological harm.”<sup>72</sup> The immediate origins of IEL are based on Northern scientific assessments of global ecological risk, and accordingly the solutions crafted are technocratic and engineered<sup>73</sup> — a posture that is neither wholistic in approach nor sensitive to inequity and corrective justice. As Natarajan and Khoday explain:

The logic of environmentalism as it exists today ensures that the power to define meaning in the world remains in the same hands that oversaw the degradation of global ecosystems. IEL reconfirms the position of the global

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<sup>67</sup> Gonzalez, *supra* note 16, at 229.

<sup>68</sup> *Id.* at 228–29.

<sup>69</sup> *Id.* at 229 (citing Natarajan & Khoday, *supra* note 6, at 589).

<sup>70</sup> United Nations Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849 [hereinafter U.N. Framework Convention]; see Brady Dennis, *United Nations: Countries’ Pledges to Cut Emissions Are Far Too Meager to Halt Climate Change*, WASH. POST (Feb. 26, 2021, 9:10 AM), <https://www.washingtonpost.com/climate-environment/2021/02/26/un-climate-emissions> [<https://perma.cc/D89F-MF7A>].

<sup>71</sup> See Tiffany Challe, *Global Perspectives on a Global Pact for the Environment*, CLIMATE L. BLOG (Sept. 20, 2018), <http://blogs.law.columbia.edu/climatechange/2018/09/20/global-perspectives-on-a-global-pact-for-the-environment/#Maxine%20Burkett> [<https://perma.cc/4A23-75LH>] (proposing a “Green Audit” of all international law).

<sup>72</sup> Natarajan & Khoday, *supra* note 6, at 575.

<sup>73</sup> Examples of measures advanced by international lawyers include “enhanced financing, market-based instruments, and technology transfer.” *Id.* at 574.

north as the source of all acceptable meaning, giving it the ability to construct the environment and environmentality in particular ways.<sup>74</sup>

IEL does not call for less development, less consumption, and limits to the fiction of perpetual growth. Amidst the byproducts of the global political economy and the international economic order, IEL is necessarily impotent. At the same time, as noted above, the international law fields that absolutely and consequentially engage with nature — “such as economic, trade, and investment law or law and development” — fail to consider the integrity of the very environment on which they rely.<sup>75</sup> IEL both reflects and reinforces the faulty conceptual separation of the economy and the environment, and the compartmentalization of key management levers.

To be fair, IEL has held notions of equity at its conception. A number of legal principles reflect the need for differentiated treatment to address gaps in cause and consequence between the North and South, the principle of common but differentiated responsibility chief among them.<sup>76</sup> The corresponding obligations and actions of the North to meet the mandates of those principles have not, however, manifested. The absence of parallel corresponding duties has been critiqued by prominent IEL scholars and remains a profound hurdle.<sup>77</sup> The failure to address the Global North’s overconsumption is a glaring absence in IEL’s four-decade history.<sup>78</sup> Additionally, tech transfers and green finance that have predominated in more recent instruments are limited in their capacity to curb climate change (or, for that matter, most environmental maladies well short of cascading catastrophes).<sup>79</sup> Worse for the Global South, IEL’s purview does not extend to some of the greatest threats posed by environmental change — namely food, water, and energy, which a number of disparate legal instruments and private arrangements, many falling within economic law, manage.<sup>80</sup> Viable pathways forward may exist, but understanding the source of international law’s limits in worldview, scope, and efficacy is a critical initial step.

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<sup>74</sup> *Id.* at 585.

<sup>75</sup> *Id.* at 576 (“While few would deny that the natural environment is fundamental to economic development, or that natural resources are a form of capital, this has not translated into lawyers (or economists) engaging with the role of nature in their work.”).

<sup>76</sup> See, e.g., U.N. Framework Convention, *supra* note 70, at art. 3, para. 1.

<sup>77</sup> See, e.g., Maxine Burkett, *Justice and Climate Migration: The Importance of Nomenclature in the Discourse on Twenty-First-Century Mobility*, in “CLIMATE REFUGEES”: BEYOND THE LEGAL IMPASSE? 73, 78 (Simon Behrman & Avidan Kent eds., 2018); Marcus Hedahl, *Directional Climate Justice: The Normative Relationship Between Moral Claim Rights and Directed Obligations*, 5 J. HUM. RTS. & ENV’T (SPECIAL ISSUE) 35, 35 (2014); Christina Voigt & Eavadne Grant, Editorial, *The Legitimacy of Human Rights Courts in Environmental Disputes*, 6 J. HUM. RTS. & ENV’T 131, 135 (2015).

<sup>78</sup> See Natarajan & Khoday, *supra* note 6, at 576–78.

<sup>79</sup> See *id.* at 574.

<sup>80</sup> Gonzalez, *supra* note 16, at 234.

### CONCLUSION

As the window to avoid the most catastrophic impacts of climate change rapidly closes, the effort to pick low-hanging fruit may give way to quick fixes and blunt cuts. The grave concern, then, is that we may be searching for ways to prune the branches when the disorder can only be cured at the roots. There is, finally and measurably, increasing awareness of the tangible and intangible costs of unmitigated change and the limits of adaptation — in the North. These costs and vulnerabilities have long been a feature of the Global South's experience of environmental crisis interwoven with hierarchy. The simultaneous subjugation and elision of those who suffer from crisis and hierarchy have been features of dominant notions of progress and allowed for the acceleration of environmental decline. By failing to grasp at the roots, therefore, we risk the continued inequitable exposure of the South to the devastating consequences of the North's excesses. And, while the South may be at the frontlines, the North will rapidly and inevitably follow. We also risk the very hopeful possibilities of other cosmologies taking hold and thriving. Just and enduring solutions, therefore, will emerge if they start with a deconstruction of prevailing worldviews — worldviews that have been to date normalized and extended through space and time by the fiber optics of the law.