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SYMPOSIUM ON UN RECOGNITION OF THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT

THE RIGHT TO A HEALTHY ENVIRONMENT AND THE GLOBAL SOUTH

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This essay explores the implications of the right to a healthy environment for the long-standing criticisms of international human rights law as a project and product of the Global North. It examines the Southern origins of the right to a healthy environment and its interpretations in regional human rights tribunals. The essay analyzes the responses offered by this evolving jurisprudence to various objections to human rights-based approaches to environmental protection. These include the human rights-based framework's individualism, anthropocentrism, failure to address transboundary harm, and failure to challenge the economic law instruments that perpetuate environmental degradation.

Mainstream understandings of international human rights law frequently depict the human rights corpus as the culmination of historical processes through which the concerns of the poor and marginalized triumphed over the mighty and powerful, under the leadership of the United Nations, Northern governments, and Northern nongovernmental organizations.[1] Scholars writing from a variety of critical perspectives, most notably Third World Approaches to International Law (TWAIL), have pointed out that this Eurocentric narrative erases the contributions of the Global South and subaltern social movements to international human rights law.[2] It also masks and legitimates the North's hypocritical invocation of human rights (along with democracy and development) to justify historic and ongoing political, economic, and military interventions in the Global South for its own strategic purposes.[3] Some TWAIL-affiliated scholars have called for the radical reformulation of international human rights law to integrate the diverse perspectives and contributions of subaltern states and peoples.[4] Others question whether the master's tools (human rights law) can ever dismantle the master's house and bring about social and environmental justice.[5]

For scholars who write at the intersection of human rights and the environment, these debates crystalized in 2022, when the UN General Assembly adopted Resolution 76/300 recognizing the right to a clean, healthy, and

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[1] *See generally* MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (2002).

[2] *See generally* BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW (2003).

[3] *See, e.g.*, ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2004); Makau Mutua, *Savages, Victims and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201 (2001).

[4] *See generally* MAKAU MUTUA, HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE (2002).

[5] Usha Natarajan, *Human Rights in a Time of Ecological Change*, *in* LOCATING NATURE: MAKING AND UNMAKING INTERNATIONAL LAW 223 (Usha Natarajan & Julia Dehm eds., 2022).

sustainable environment as a human right.[6] Far from being imposed on the Global South by the Global North, the right to a healthy environment has deep roots in the national legal systems and regional human rights treaties and tribunals of the Global South and has historically encountered fierce resistance from the Global North.[7]

The Southern Origins of the Right to a Healthy Environment

While the earliest reference to the link between human rights and the environment in an international legal instrument was Principle 1 of the 1972 Stockholm Declaration,[8] the right to a healthy environment achieved widespread recognition in subsequent decades in national legal systems, particularly those of the Global South. More than 150 member states of the United Nations, primarily in the Global South, have incorporated the right to a healthy environment in national constitutions and legislation and ratified regional treaties that recognize this right.[9] Over one thousand specialized environmental courts and tribunals at the national and subnational level currently enforce and interpret this right, such as the National Green Tribunal in India and the Environmental and Land Courts and National Environmental Tribunal in Kenya.[10] One explanation for the Global South's embrace of the right to a healthy environment is its disproportionate exposure to environmental and human rights abuses from extractive and polluting industries that benefit Northern states, transnational corporations, and national elites. A second explanation, discussed in more detail below, is the influence on national laws and policies of traditional and Indigenous laws, ethics, and world views that regard humans as an integral part of nature.[11]

Despite the absence of the right to a healthy environment in global human rights treaties, several regional human rights instruments have recognized this right for decades. For example, the African Charter on Human and Peoples' Rights stipulates that "all peoples shall have the right to a general satisfactory environment favourable to their development."[12] The 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (the Protocol of San Salvador) provides that "[e]veryone shall have the right to live in a healthy environment."[13] In addition, the right to a healthy environment appears in the Protocol to the African Charter on the Rights of Women in Africa, adopted by the African Union in 2003,[14] the 2004 Arab Charter on Human Rights,[15] and the 2012 Human Rights Declaration of the Association of Southeast Asian

[6] GA Res. 76/300, The Human Right to a Clean, Healthy and Sustainable Environment (July 28, 2022).

[7] Marc Limon, *United Nations Recognition of the Universal Right to a Clean, Healthy and Sustainable Environment: An Eyewitness Account*, 31 Rev. Eur., Comp. & Int'l Envtl. L. 155 (2022).

[8] Declaration of the United Nations Conference on the Human Environment, pmbl, UN Doc. A/CONF.48/14 (1972).

[9] Human Rights Council, Report of the Special Rapporteur on Human Rights Obligations Relating to the Enjoyment of Safe, Clean, Healthy, and Sustainable Environment, Right to a Healthy Environment: Good Practices, para. 13, Annex II, UN Doc. A/HRC/43/53 (Dec. 30, 2019).

[10] *Id.*, para. 31.

[11] Louis J. Kotzé, *Human Rights, the Environment, and the Global South*, *in* International Environmental Law and the Global South 178–81 (Shawkat Alam, Sumudu Atapattu, Carmen G. Gonzalez & Jona Razzaque eds., 2015).

[12] African Charter on Human and Peoples' Rights, 21 ILM 158, Art. 24 (*entered into force* Oct. 21, 1986).

[13] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, OAS Treaty Series No. 69, Art. 11(1) (*entered into force* Nov. 16, 1999).

[14] Protocol to the African Charter on Human and Peoples; Rights on the Rights of Women in Africa, Arts. 18–19 (*adopted* July 1, 2003, *entered into force* Nov. 25, 2005).

[15] Arab Charter on Human Rights, *reprinted in* 12 Int'l Hum. Rts. Rep. 893 (2005), Art. 38 (*entered into force* Mar. 15, 2008).

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Nations.[16] By contrast, efforts to incorporate the right to a healthy environment in global human rights instruments have until recently faced formidable Northern resistance.[17]

Interpreting the Right to a Healthy Environment: Lessons from the Global South

National and regional tribunals in the Global South have clarified the meaning of the right to a healthy environment and have addressed many of the objections leveled at human rights-based approaches to environmental protection.[18]

Indigenous peoples and other marginalized communities have often emphasized the impacts of environmental degradation on collective human rights (such as cultural integrity and self-determination) and on future generations. Critics of human rights-based approaches to environmental protection have argued that international human rights law's emphasis on individual rights may be at odds with these communitarian and intergenerational notions of justice. However, the jurisprudence of the African and Inter-American human rights systems has consistently protected collective human rights, particularly the rights of Indigenous and tribal peoples to their lands and territories, and has recognized the rights of future generations.[19]

For example, in *Social and Economic Rights Action Centre (SERAC) v. Nigeria*, the African Commission on Human and Peoples' Rights concluded that the exploitation of oil resources in the Niger Delta violated the collective rights of the Ogoni people to a healthy environment.[20] The recognition that human beings are not isolated, autonomous individuals but social beings deeply connected to their communities and integrated into their natural environments is one of the unique contributions of the African Charter to the evolving corpus of human rights law. This is evidenced by its framing of the right to a satisfactory environment as the right of peoples.[21] Similarly, in *Lhaka Honhat Association v. Argentina*, the Inter-American Court of Human Rights (IACtHR) concluded that Argentina violated Indigenous groups' collective rights, including the right to a healthy environment, by allowing the encroachment of private parties on Indigenous communal lands though livestock farming, installation of fences, and illegal logging.[22] Finally, the IACtHR's 2017 advisory opinion on the environment and human rights emphasized the vulnerability of various social groups to environmental damage, including "indigenous peoples, children, people living in extreme poverty, minorities, and people with disabilities," and the obligation of states to protect these groups "based on the principle of equality and non-discrimination."[23] It also recognized that the right to a healthy environment "has both individual and also collective connotations," including the rights of future generations.[24]

[16] ASEAN Human Rights Declaration, para. 28(f) (*adopted* Nov. 18, 2012).

[17] *See* Limon, *supra* note 7.

[18] *See* Carmen G. Gonzalez, *Environmental Justice, Human Rights, and the Global South*, 13 SANTA CLARA J. INT'L L. 151, 172–93 (2015) (discussing some of the critiques of human rights-based approaches to environmental protection).

[19] *See id.* at 184 (discussing the *Awas Tingni* and *Saramaka* cases in the Inter-American human rights system involving Indigenous and Afro-descendant communities); Elsabé Boshoff, *Rethinking the Premises Underlying the Right to Development in African Human Rights Jurisprudence*, 31 REV. EUR., COMP. & INT'L ENVTL. L. 27, 30–31 (2022) (discussing the *Endorois* and *Ogiek* cases in the African human rights system, both of which involved communities with deep cultural and spiritual ties to the land).

[20] *See* Social and Economic Rights Action Centre (SERAC) v. Nigeria, Comm. 155/96, paras. 52–54, 68 (ACHPR/COMM, Oct. 27, 2001).

[21] MUTUA, *supra* note 4, at 77; Boshoff, *supra* note 19, at 33–34.

[22] *See* Indigenous Communities of the Lhaka Honhat (Our Land) Ass'n v. Argentina, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 400 (Feb. 6, 2020).

[23] Advisory Opinion on the Environment and Human Rights, Inter-Am. Ct. H.R. (ser. A) No. 23, para. 67 (Nov. 15, 2017).

[24] *Id.*, para. 59.

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A second critique of human rights-based approaches to environmental protection is that they are inherently anthropocentric and may therefore reinforce the separation between humans and nature derived from Western philosophy that promotes the reckless exploitation of nature. However, Indigenous epistemologies at odds with extractive models of development have been integrated, at least in part, into national law, such as the recognition of the legal personality of nature in Bolivia, Ecuador, Colombia, and New Zealand.[25] Applying these innovations to the American Convention on Human Rights, the IACtHR's 2017 advisory opinion explained that the right to a healthy environment "protects the components of the environment . . . not only because of the benefits they provide to humanity or the effects that their degradation may have on other human rights, such as health, life, or personal integrity, but because of their importance to the other living organisms with which we share the planet that also merit protection in their own right."[26] This breathtakingly non-anthropocentric interpretation of the right to healthy environment bodes well for the legal protection of human and non-human life. Scholars have argued that principles of African environmental ethics, such as the South African concept of *ubuntu*, have likewise influenced interpretations of the African Charter.[27]

A third critique of human rights-based approaches to environmental protection is that human rights law fails to hold powerful Northern states accountable for the transboundary or extraterritorial harms that result from their activities, such as loss and damage caused by climate change. While the Committee on Economic Social and Cultural Rights has interpreted the International Covenant on Economic, Social, and Cultural Rights to impose obligations on states to refrain from violating the rights to food, water, and health in other states,[28] most human rights treaties impose obligations only toward persons in the territory of a state or subject to the state's jurisdiction. However, international tribunals are increasingly construing "jurisdiction" broadly. For example, in its 2017 advisory opinion, the IACtHR concluded that a state has jurisdiction over persons outside its territory whose rights are violated by activities over which such state exercises effective control.[29]

In other words, the IACtHR has apparently recognized what John Knox calls diagonal human rights—rights held by individuals against foreign governments for the transboundary consequences of activities under their effective control.[30] This interpretation of jurisdiction has significant implications for climate litigation in the Inter-American system, and may influence and embolden the International Court of Justice as it prepares a response to the UN General Assembly's request for an advisory opinion on the obligations of states with respect to climate change.[31]

A fourth critique of human rights-based approaches to environmental protection is that they are reactive rather than preventive—that they come into play after the harm has occurred and do not encourage a forward-looking approach to environmental protection. The African and Inter-American human rights tribunals have responded to this concern by interpreting the right to a healthy environment to include the duty to prevent significant environmental harm. For example, in *SERAC v. Nigeria*, the African Commission explained that Article 24 of the African Charter requires states to exercise due diligence to prevent pollution and ecological degradation through various

[25] *See* Mihnea Tănăsescu, *Rights of Nature, Legal Personality, and Indigenous Philosophies*, 9 Transnat'l Envtl. L. 429 (2020).

[26] *Advisory Opinion on the Environment and Human Rights*, *supra* note 23, para. 62.

[27] *See* Boshoff, *supra* note 19, at 34–36.

[28] *See* UN Committee on Economic, Social and Cultural Rights, General Comment 12, UN Doc. E/C.12/1992/5 (May 12, 1999); UN Committee on Economic, Social and Cultural Rights, General Comment 14, E/C.12/2000/4 (Aug. 11, 2000); UN Committee on Economic, Social and Cultural Rights, General Comment 15, E/C.12/2002/11 (Jan. 20, 2003).

[29] *See Advisory Opinion on the Environment and Human Rights*, *supra* note 23, para. 104(h).

[30] *See* John Knox, *Diagonal Environmental Rights*, *in* Universal Human Rights and Extraterritorial Obligations 82–83 (Mark Gibney & Sigrun Skogly eds., 2010).

[31] UN Doc A/77/L.58 (Mar. 29, 2023).

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means, including "permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities."[32] Similarly, the IACtHR's 2017 advisory opinion emphasized the duty of states to exercise due diligence to prevent significant damage to the environment within and outside their territories, and enumerated steps that states might take to fulfill that duty, including regulating and monitoring the activities of public and private entities, requiring environmental impact assessments, preparing contingency plans to respond to environmental emergencies and disasters, and mitigating environmental damage.[33]

A final critique of human rights-based approaches to environmental protection is that they may perpetuate the silos in international law that relegate human rights and the environment to tribunals with "soft" enforcement mechanisms and fail to challenge the economic law instruments with "hard" enforcement mechanisms. The environmental jurisprudence of Africa's international courts offers valuable lessons on how economic tribunals might interpret the law in holistic ways that overcome this fragmentation. Although the East African Court of Justice, the Court of Justice of the Economic Community of West African States, and the Southern African Community Development Tribunal were initially designed to interpret trade agreements without explicit jurisdiction over human rights and environmental matters, these tribunals have by statute or judicial interpretation asserted jurisdiction over significant human rights and environmental cases.[34] For example, in *Africa Network for Animal Welfare v. Attorney General of the United Republic of Tanzania*, the East African Court of Justice prohibited the government of Tanzania from constructing a road through the Serengeti National Park.[35] In *Socio-Economic Rights and Accountability Project v. Nigeria*, the Court of Justice of the Economic Community of West African States concluded that the government of Nigeria had violated the right to a healthy environment under Article 24 of the African Charter through its failure to protect human rights and the environment in the Niger Delta, and required the state to provide reparations to the victims of these collective human rights violations in the form of environmental restoration.[36] By "seeing the environment as an integral part of the international legal framework rather than treating the environment as a specialized or self-contained regime disconnected from the rest of international law,"[37] these African tribunals are modeling the jurisprudential flexibility necessary to break down the silos of international law and enforce the right to a healthy environment.

Conclusion

The right to a healthy environment is a product of the leadership and innovation of the Global South in the development of international law. It demonstrates that the Global South is not a passive imitator and recipient of international law but an important epistemic site of production of international legal knowledge.

The right to a healthy environment is one of many legal doctrines that illustrate the influential role of the Global South in international environmental governance. Other examples include permanent sovereignty over natural

[32] *SERAC v. Nigeria*, *supra* note 20, para. 53.

[33] *Advisory Opinion on the Environment and Human Rights*, *supra* note 23, paras 127–74.

[34] *See* James Gathii, *The Promise of International Law: A Third World View*, 36 Am. U. Int'l L. Rev. 377, 389–94 (2021).

[35] African Network for Animal Welfare v. Attorney General of the United Republic of Tanzania, No. 9/2010, Judgment, para. 86 (E. Afr. Ct. Just. June 20, 2014).

[36] Socio-Economic Rights and Accountability Project (SERAP) v. Nigeria, Judgment, ECW/CCJ/APP/08/09, paras. 112–21 (Dec. 14, 2012).

[37] Gathii, *supra* note 34, at 392.

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resources, sustainable development, and common but differentiated responsibility.[38] However, the ultimate test of the right to a healthy environment is not its intellectual pedigree, its theoretical sophistication, or even its interpretation by legal experts, but its effectiveness on the ground as a tool of resistance and transformation. The UN General Assembly's recognition of the right to a healthy environment is an exciting legal development that lays the groundwork for further contestation of the larger systemic causes of contemporary socio-ecological crises.

[38] *See* 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 80–82, 87–98 (Shawkat Alam, Sumudu Atapattu, Carmen G. Gonzalez & Jona Razzaque eds., 2015).

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