

**IN BETWEEN THE GLOBAL NORTH-SOUTH DIVIDE:
REASSESSING CLIMATE REPARATIONS AS A STATE-
STATE TRANSACTION**

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The demand for climate reparations is a bold and necessary step in addressing the uneven burden of climate change. While the predominant state-centered, North-South formulation of climate reparations has value, this Comment argues that the nation-state cannot be the exclusive recipient of climate reparations by highlighting the work of TWAIL scholars who have shown that the impacts of climate change cannot be severed from the history of European colonization and plunder. I propose a people-centered climate reparations model which provides a theoretical basis for Indigenous peoples and other self-determining people to receive reparations payments directly from the developed nations that have caused the climate crisis. The multidirectional flow of reparations allows accountability for historical emissions, but it also provides resources that will enable people who are often overlooked by international law to take on climate change at the community level.

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I. INTRODUCTION

Our planet faces unprecedented destruction due to climate change.¹ Rising sea levels, rising ocean temperatures, disappearing coastlines, melting polar ice caps, increasing desertification, and intensifying storms reveal the danger of human-

1. See IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability*. Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change 9–19 (2022), https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_FullReport.pdf [hereinafter *Sixth Assessment Report*] (assessing various risks and impacts of human-induced climate change and concluding that some impacts are irreversible and beyond natural and human systems' ability to adapt).

induced climate change.² The loss of lives, livelihoods, and livable spaces further compound the ecological problems that climate change presents.³ Although the existential threat alone is overwhelming, the climate crisis raises significant legal and moral concerns. Chief among these legal and ethical concerns is how to apportion responsibility among polluters and determine appropriate remedies for the ongoing climate change–related harms.⁴

Scholars and climate activists have noted the climate justice paradox which underlines the moral and legal concerns: the countries that contribute the least to climate change and have the fewest resources face the most significant impacts of the climate crisis.⁵ In analyzing this situation, scholars who ground their work in Third World Approaches to International Law (TWAIL) argue that a global racial capitalist framework structures the climate paradox.⁶ Wealthy industrialized countries, the majority of which are former colonizing powers, contribute the most to climate change by emitting the most greenhouse gases (GHG).⁷ At the same time, the formerly colonized countries—whose GHG emissions are inconsequential compared to the major polluters—are facing the worst impacts of the climate crisis.⁸ The disparity in GHG emissions as the primary cause of climate change reflects the asymmetric power relation between the Global North and South, which is fundamentally a consequence of colonialism and racial capitalism.⁹ The link

2. *Id.*

3. *Id.*

4. A growing body of legal scholarship calls attention to the human rights crisis of displaced peoples becoming climate refugees and the need for international law to provide relief to them. *See, e.g.,* Bayes Ahmed, *Who Takes Responsibility for the Climate Refugees?*, 10 INT'L J. CLIMATE CHANGE STRATEGIES & MGMT. 5 (2018) (proposing method for distributing climate refugees among countries that contributed most to climate crisis based on their CO₂ emissions levels); Rebecca Buxton, *Reparative Justice for Climate Refugees*, 94 PHIL. 193 (2019) (developing preliminary account of reparative justice by discussing key actors and methods involved in reparations); Jaya Ramji-Nogales, *Slow-Onset Climate Justice and Human Mobility*, 93 TEMP. L. REV. 671, 680–87 (2021) (calling attention to impact of slow-onset change on smallholder farmers in Guatemala and need for international law to play actionable regulatory role in alleviating migration crisis spawned by climate change).

5. Maxine Burkett, *Climate Reparations*, 10 MELB. J. INT'L L. 509, 510–11 (2009); Ama Ruth Francis, *Global Southerners in the North*, 93 TEMP. L. REV. 689, 707–08 (2021).

6. Francis, *supra* note 5, at 697–704.

7. Jeremy Williams, *Why Climate Change Is Inherently Racist*, BBC (Jan. 26, 2022), <https://www.bbc.com/future/article/20220125-why-climate-change-is-inherently-racist>; *see* Audrey R. Chapman & A. Karim Ahmed, *Climate Justice, Humans Rights, and the Case for Reparations*, 23 HEALTH & HUM. RTS. 81, 83 (2021) (identifying and discussing countries that comprise current top ten atmospheric CO₂ emitters, all of whom are high-income countries).

8. Burkett, *supra* note 5, at 510.

9. *See* Anuradha Varanasi, *How Colonialism Spawned and Continues to Exacerbate the Climate Crisis*, COLUM. CLIMATE SCH. (Sept. 21, 2022), <https://news.climate.columbia.edu/2022/09/21/how-colonialism-spawned-and-continues-to-exacerbate-the-climate-crisis> (reporting on view that colonialism is an historic and ongoing cause of climate change); Keston K. Perry, *The New 'Bond-Age', Climate Crisis and the Case for Climate Reparations: Unpicking Old/New Colonialities of Finance for Development within the SDGs*, 126 GEOFORUM 361, 361, 367 (Sept. 20, 2021) (explicating the colonial histories resulting in asymmetries in global South countries being unable to internalize climate cost, adapt, and build

between the asymmetry in the effects of climate change and colonialism and capitalism is less straightforward partly because the geographic locations and economic situations of countries in the Global South make them less resilient to the impacts of climate change.¹⁰ But biophysical and economic situatedness should not lead to the essentialist conclusion that these climate vulnerable countries are inherently vulnerable nor should it erase the historical reasons for their difficulties in dealing with climate change.¹¹ As this Comment makes clear, colonialism and capitalism are compounding factors, resulting in poorer, formerly colonized nation-states disproportionately bearing the brunt of climate change.

Noting the inadequacy of legal remedies and the unwillingness of developed nations to take responsibility for their role in creating and worsening the climate change crisis, several theorists and activists propose a legal theory of climate reparations.¹² It functions as an organizing principle for the nation-states most vulnerable to the adverse effects of climate change.¹³ Climate reparations typically mean that the Global North should compensate the Global South for the climate change-related harm they cause (or will continue to cause) due to excessive GHG emissions.¹⁴ It is a system of acknowledgment, compensation, and assurance of non-repetition of harm.¹⁵ In this sense, climate reparation is both backward and forward looking.¹⁶ It seeks to promote accountability and equity within the global community insofar as the most responsible nations bear the cost of mitigating and repairing the harms of anthropogenic climate change.¹⁷

resilience); SIXTH ASSESSMENT REPORT, *supra* note 1, at 2322, 2344 (acknowledging colonialism's past and ongoing impact as an inhibiting factor to building climate resilience in climate vulnerable regions).

10. See, e.g., ALICIA BÁRCENA ET AL., THE ECONOMICS OF CLIMATE CHANGE IN LATIN AMERICA AND THE CARIBBEAN: PARADOXES AND CHALLENGES 22–24, (2014), https://repositorio.cepal.org/bitstream/handle/11362/37311/S1420655_en.pdf (discussing increased climate vulnerability of Latin America and Caribbean due to their geography, demographic structure, dependence on natural resources, and limited funding for adaptive processes).

11. See Charlotte Kate Weatherill, *Sinking Paradise? Climate Change Vulnerability and Pacific Island Extinction Narratives*, 145 GEOFORUM, May 31, 2022, at 1, 3 (refuting the narrative of small island vulnerability as an inherent and inevitable problem due to their location and economic vulnerability, instead showing how racial capitalism produces vulnerability through colonial practices, dehumanization, and expendability).

12. 'A Form of Colonialism': Activists Demand Climate Reparations, ALJAZEERA (Sept. 25, 2022), <https://www.aljazeera.com/news/2022/9/25/why-are-climate-activists-calling-for-reparations>; Burkett, *supra* note 5.

13. Burkett, *supra* note 5, at 5.

14. See *id.* at 522–34 (describing flow of reparations from those causing harm to those suffering harm and taking form of compensation and non-repetition).

15. *Id.*

16. *Id.*

17. See Chapman & Ahmed, *supra* note 7 (discussing effects of climate change on low-income countries and arguing for climate reparations from countries that create emissions for sake of equity); Kirk W. Junker et al., *A Question of Trust: Building a Reparative Legal Regime in the Face of Climate-Induced Migration*, 52 ENV'T POL'Y & L. 265, 266 (2022) (applying polluter pay principle in context of climate-induced migration); Keston K. Perry, *Climate Reparations: An Internationalist Approach for the Twenty-First Century*, POLAR: POL. & LEGAL ANTHROPOLOGY

However, like the TWAIL perspectives on international environmental law and climate change, the discourse on climate reparations tends to follow the Global North-South binary.¹⁸ While this traditional geopolitical divide has helped to bring attention to the impact of colonialism and capitalism,¹⁹ it is less helpful in dealing with the interstitial nature of post-colonial realities.²⁰ Centering the climate reparations discourse on the Global North-South framework reinscribes the racial hierarchies of the Westphalian model of international law, which TWAIL theorists seek to problematize in the first place.²¹ The predominant framing of climate reparations as the responsibility of the Global North to the Global South focuses exclusively on nation-states as the most appropriate recipients of climate reparations.²² The assumption that climate reparation under international law is a state-state dialogue tends to foreclose the possibility for Indigenous and other self-determining peoples to have a legitimate seat at the table.

This Comment builds on some recent trajectories in TWAIL scholarship by further complicating the model of Global North and Global South nation-states as the dominant voices in the climate reparations discourse by presenting a people-centered model of climate reparations. A people-centered model incorporates Indigenous peoples and their rights to inform the demand for and implementation of a climate reparations regime. The Comment contends that a more nuanced idea of who is entitled to reparations, and from whom, emerges by shifting attention from the nation-state as the principal actor in climate reparations discourse and transaction. This analytical shift opens the possibility for intra-state transfer of resources, wealth, and technology even *within* countries traditionally regarded as part of the Global South.

Part II provides a brief history of TWAIL and the environment. It examines the traditional assumptions underlying TWAIL scholarship and its criticism of international law's perpetuation of structural hierarchies based on power, capital, and race within the global community. It also outlines the development of TWAIL analysis of international environmental law. Part III discusses the emergence of international climate finance, the limitations of the climate finance framework, and why climate reparations are still relevant to climate action. Part IV outlines a history of reparations in international environmental law and discusses TWAIL's

REV. (2020), <https://polarjournal.org/2020/08/01/climate-reparations-an-internationalist-approach-for-the-twenty-first-century>.

18. The Global North-South divide is a geopolitical representation of inequality between richer and poorer nations. The division follows the Brandt line. Countries north of this imaginary line are considered developed and those that fall below it are considered developing. Nicholas Lees, *The Brandt Line After Forty Years: The More North-South Relations Change, The More They Stay the Same?*, 47 REV. INT'L STUD. 85, 85 (2021).

19. See *infra* Part II.B for a discussion of the use of the North-South binary in TWAIL analyses.

20. In postcolonial jargon, interstitial refers to the spaces that do not neatly fit into either historical category of West or East (now North or South) because they characterize and—to some degree inhabit—both ends of the binary. Falguni A. Sheth, *Interstitiality: Making Space for Migration, Diaspora, and Racial Complexity*, 29 HYPATIA 75, 76–80 (2014).

21. Francis, *supra* note 5, at 693.

22. *Id.*

predominant state-centric model of climate reparations.

Part V discusses practical and epistemic limitations of analyzing the climate crisis and formulating climate reparations within the traditional TWAIL state-centered framework of the North-South divide. It discusses the limits of international law in conceptualizing spaces and peoples that do not fit neatly within the conventional geopolitical categories of the “Global North/South” and the “Third World.” Part VI deals with emerging trends in TWAIL scholarship on climate justice that seek to move beyond the traditional North-South divide. These new trajectories in TWAIL scholarship provide the theoretical basis for conceptualizing a people-centered approach to climate reparations. Finally, Part VII proposes a people-centered approach to climate reparations using the experience of Indigenous communities to illustrate a people-centered climate reparative regime and focusing on vertical and diagonal flows of reparations.²³

II. THEORIZING TWAIL AND THE ENVIRONMENT

This Part discusses the history and development of Third World Approaches to International Law (TWAIL), highlighting the scholarly critique of the hierarchical relationships that international law reproduces based on power, capital, and race. It also outlines the development of TWAIL analysis of environmental justice issues and climate change from the perspective of asymmetrical power relations between the Global North and Global South.

A. *What is TWAIL?*

TWAIL is a political project and analytical framework that emerged after World War II when colonized Black and Brown peoples sought freedom and independence from European colonizers.²⁴ Various scholars describe TWAIL as a “decentralized network,”²⁵ “antihierarchical,”²⁶ and multi-perspectival.²⁷ Professor Makau Mutua famously describes TWAIL as “a broad dialectic of opposition to

23. I borrow the spatial/directional terms from Professor Carmen Gonzalez, who used them to characterize the ways in which human rights claims are often made. See Carmen G. Gonzalez, *Environmental Justice, Human Rights, and the Global South*, 13 SANTA CLARA J. INT'L L. 151, 177–80 (2015) (explaining that human rights law operates vertically when citizens' claims are against their government and operates diagonally when their claims are against foreign governments for the extraterritorial consequences of acts taken by those governments).

24. See Makau Mutua, *What is TWAIL?*, 94 AM. SOC'Y INT'L PROC. 31 (2000) (explaining that TWAIL is not a new analytical project, but one that goes back to post-WWII decolonization movement); see also Antony Anghie, *TWAIL: Past and Future*, 10 INT'L CMTY. L. REV. 479, 480–81 (2008) (arguing that TWAIL should not be thought of as methodology but an analytical perspective); James T. Gathii, *TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography*, 3 TRADE L. & DEV. 26 (2011); cf. Obiora Chinedu Okafor, *Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?* 10 INT'L CMTY. L. REV. 371 (2008) (arguing TWAIL is more than political project, but broad approach constitutive of methodology and a theory. Identifying TWAIL as theory and method pushes back against assumptions that TWAIL is not academically rigorous).

25. Gathii, *supra* note 24, at 27.

26. Mutua, *supra* note 24, at 36–37.

27. Okafor, *supra* note 24, at 374, 377–78.

international law.”²⁸ As a project committed to decolonization, TWAIL challenges international law’s so-called presumptions of neutrality, inherent peacefulness, and universality.²⁹ TWAIL focuses on hierarchies structured by power, capital, and race.³⁰ Scholars argue that international law reinscribes the power disparities between nation-states, thus entrenching a Northern hegemon and a dispossessed South.³¹

Capital is crucial in this system of picking winners and losers.³² TWAIL scholarship is critical of capital accumulation and the influence of capitalism in shaping hierarchical relationships among nation-states.³³ The domination of capital in structuring the international legal order has prompted concerns that the “Third World” is at risk of being recolonized.³⁴ Professor B.S. Chimni observes that international law facilitates and favors “the economic and political interests of transnational elites,”³⁵ thereby perpetuating the Third World’s dependency on the global capitalist class.³⁶ Corporations are the principal actors comprising this global capital class of transnational elites.³⁷ The granting of legal personality to corporations secured their outsized influence in reshaping international law.³⁸ Furthermore, because of globalization and the outsourcing of labor and production to developing nations, governments in these countries often acquiesce to transnational corporate interests to increase their gross domestic product, even when these interests are harmful to their citizens.³⁹ Thus, TWAIL scholarship is equally critical of governments of developing nations for their complicity in allowing capitalist interests to take priority over their citizens’ health, safety, and well-being.⁴⁰

In addition to power and capital, TWAIL criticizes the racial hierarchy that international law perpetuates. More specifically, scholars focus on the intersection

28. Mutua, *supra* note 24, at 31.

29. *Id.*; see also John D. Haskell, *TRAIL-ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law*, 27 CAN. J.L. & JURIS. 383, 391–95 (2014) (outlining TWAIL scholars’ criticism of international law as Eurocentric political project veiled by assumption of objectivity).

30. Mutua, *supra* note 24, at 37–38.

31. B.S. Chimni, *Third World Approaches to International Law: Manifesto*, 8 INT’L CMTY. L. REV. 3 (2006); Francis, *supra* note 5, at 690 (noting structure of international law produces winners and losers).

32. Francis, *supra* note 5, at 694–95.

33. See JOHN SMITH, *IMPERIALISM IN THE TWENTY-FIRST CENTURY: GLOBALIZATION, SUPER-EXPLOITATION, AND CAPITALISM’S FINAL CRISIS* (2016) for a pinpointed discussion of how capitalism produces and reproduces dangerous inequities globally.

34. See Chimni, *supra* note 31, at 3–16 (calling attention to Western neo-imperialism channeled through language of humanitarianism).

35. *Id.* at 15–16, 26.

36. *Id.* at 16.

37. *Id.* at 13.

38. *Id.*

39. See SMITH, *supra* note 33, at 39–46 (analyzing growing trend of outsourcing production to low wage Southern workers); see also Mutua, *supra* note 24, at 35 (detailing exploitative and unjust nature of international economic order).

40. B.S. Chimni, *Capitalism, Imperialism, and International Law in the Twenty-First Century*, 14 OR. REV. INT’L L. 17, 33–36 (2012).

of race and capital, making it evident that the production and accumulation of capital are racialized phenomena.⁴¹ The intricately interwoven nexus of racism and capitalism, termed “racial capitalism,” provides a useful theoretical lens for understanding the history of European exploitation of and violence against non-European peoples in order to gain political and economic control.⁴² Within this racialized order, the countries with majority Black and Brown populations occupy a subordinated position in the international legal and economic order. A notable example is that European powers once colonized all the countries that the United Nations presently classifies as “least developed.”⁴³ Another example is the primacy of the U.N. Security Council (consisting of a few, mostly white developed nations) over the General Assembly, which consists of majority non-white nations.⁴⁴ Racial capitalism thrives on the entrenchment of racial stratification and uneven power relations.⁴⁵

Professors James Thuo Gathii and Ntina Tzouvala explicate this logic by noting “[r]acialized hierarchies can then be understood as ‘deep structures’ of Eurocentric development that produce and reproduce colonial notions such as those of non-European/[I]ndigenous inferiority in order to justify material (dis)advantage.”⁴⁶ The justification for Europe’s material exploitation of non-European peoples also manifested in a progress narrative, which plots Europe’s development as a divine, inevitable, and triumphant march from primitivity to modernity.⁴⁷ Yet this narrative of mythic progress often glosses over the violence against and subjugation of Africans, Asians, and Indigenous peoples.⁴⁸ International law continues to uphold that myth by asserting the sovereign equality of nations while keeping intact the structures that allow powerful developed countries to dictate the direction and reach of international law.⁴⁹

B. TWAIL and the Environment

TWAIL critiques of environmental issues, specifically climate change, also focus on the interaction of power, capital, and race in producing uneven outcomes between the Global North and the Global South. The earliest TWAIL analyses of

41. E.g., E. Tendayi Achiume & Devon W. Carbado, *Critical Race Theory Meets Third World Approaches to International Law*, 67 UCLA L. REV. 1462 (2021).

42. CEDRIC J. ROBINSON, *BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION* 10–28 (2000).

43. See *Least Developed Countries: U.N. Classification*, THE WORLD BANK, <https://data.worldbank.org/country/XL> (last visited Nov. 16, 2023) (listing least developed countries and their social and environmental indicators).

44. See Mutua, *supra* note 24, at 34 (noting that European hegemony reconfigured itself in powerful nations taking permanent seats on Security Council where they hold veto power over majority Third World Countries in the General Assembly).

45. Carmen G. Gonzalez & Athena D. Mutua, *Mapping Racial Capitalism: Implications for Law*, 2 J.L. & POL. ECON. 127, 129 (2022).

46. James T. Gathii & Ntina Tzouvala, *Racial Capitalism and International Economic Law: Introduction*, 25 J. INT’L ECON. L. 199, 200 (2022).

47. Mutua, *supra* note 24, at 33–34.

48. *Id.*

49. *Id.*

environmental issues focused on the expropriation of natural resources during the decolonial period.⁵⁰ As many countries gained independence from colonial powers, scholars saw a need for local control of natural resources to fully secure the promises of liberation and sovereignty.⁵¹ European nations conditioned independence and promised to help the industrial development of their former colonies so that they could retain access to the cheap labor and resources in these countries.⁵² Thus, it was contentious when those developing nations gained total control of their natural resources.⁵³ Scholars eventually expanded their analyses in the late 1980s to early 1990s to include specific disproportionate environmental impacts on racial minorities.⁵⁴ For example, extractive industries (such as bauxite and gas production) throughout the Global South cause significant air, water, and land pollution, exposing poorer communities to higher risks of health complications.⁵⁵ Environmental justice activists and scholars in the United States categorized these disparate environmental impacts as instances of environmental racism.⁵⁶

The roots of climate change and climate injustice can be traced to the colonial exploitation of African, Asian, and Indigenous peoples by Europeans. A growing body of TWAIL scholarship on environmental issues identifies climate change and its impact as a disparity based on power, capital, and race. TWAIL scholars and climate justice activists generally agree that climate change cannot be divorced from capitalism, slavery, and colonialism.⁵⁷ Capitalism forms the essential link between the atrocities of labor exploitation and the ongoing climate crisis.⁵⁸ Professor Eric Williams' groundbreaking work, *Capitalism and Slavery*, showed that Europeans' enslavement of Africans and the ecological and economic plunder of the Americas provided the elites with enough capital to finance their industrial revolution.⁵⁹ Industrialization meant the insatiable consumption of fossil fuels (particularly coal).⁶⁰ The production and use of fossil fuels increased GHG emissions and began

50. 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, 182 (2012) (recapping history of TWAIL scholarship and environment).

51. *Id.*

52. See, e.g., Mueni wa Muiu, *Colonial and Postcolonial State and Development in Africa*, 77 SOCIAL RSCH. 1311, 1319–21 (describing how France and other European colonial powers conditioned independence on access to natural resources in former African colonies).

53. Usha Natarajan, *Environmental Justice in the Global South*, in THE CAMBRIDGE HANDBOOK OF ENVIRONMENTAL JUSTICE AND SUSTAINABLE DEVELOPMENT 39, 46 (Sumudu A. Atapattu, et al., eds., 2021).

54. Natarajan, *supra* note 50, at 187.

55. Gonzalez & Mutua, *supra* note 45, at 171; Natarajan, *supra* note 53, at 46–48.

56. Benjamin F. Chavis, Jr., *Foreword* to CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS 3, 3–5 (Robert D. Bullard ed., 1993).

57. Williams, *supra* note 7; Maxine Burkett, *Climate Migration and The Deep Roots of Climate Justice*, 93 TEMP. L. REV. 653, 656–66 (2021).

58. SMITH, *supra* note 33, at 10.

59. See ERIC WILLIAMS, CAPITALISM AND SLAVERY 19, 51–55 (1944) (detailing with archival evidence claim that root of slavery is economic and that British Industrial Revolution, in no small part, is result of slaveholding in West Indies).

60. See Alan Fernihough & Kevin Hjortshøj O'Rourke, *Coal and the European Industrial Revolution*, 131 ECON. J. 1135, 1146 (2020) (conceding that Industrial Revolution was

the acceleration towards climate change.⁶¹

Europe's economic development, which resulted in changes to the global climate system, was built on the dehumanization of Black people and the exploitation of their labor.⁶² Related to the impact of colonization on climate change is the role colonial policies played in increasing the climate vulnerability of former colonies.⁶³ In the Caribbean, many towns and communities were established along coastal and low-lying areas as a result of colonial-era land use and policies, which forced many formerly enslaved peoples to settle along the coast, in swampy areas, and on hillsides.⁶⁴ These areas are now among the most vulnerable to the increasingly frequent landslides and flooding associated with climate change.⁶⁵ Some scholars trace the link between climate change, slavery, and capitalism back to the early sixteenth century when European expansionism resulted in environmental disruption within the Americas.⁶⁶ For example, widespread deforestation for monocultural farming and the building of towns led to the release of more GHG (since deforestation reduces the number of trees available to absorb carbon dioxide (CO₂) and increased temperature.⁶⁷ These trends continued as more Europeans began to "settle" in the Americas, clearing forests and engaging in the timber trade.⁶⁸

Increasingly, the racialized impact of climate change has become a focal point

predominantly technological innovation, but that coal production and consumption were central to technological and economic developments).

61. See R.T. Wadanambi et al., *The Effects of Industrialization on Climate Change*, 1 J. RSCH. TECH. & ENG'G 86, 87 (2020) (discussing general link between industrialization and climate change). Some climate models suggest that anthropogenic activities have had a substantial effect on climate systems before the industrial period. S. Vavrus et al., *Climate Model Tests of the Anthropogenic Influence on Greenhouse-Induced Climate Change: The Role of Early Human Agriculture, Industrialization, and Vegetation Feedbacks*, 27 Q. SCI. REVS. 1410, 1415–22 (2008).

62. HILARY BECKLES, *BRITAIN'S BLACK DEBT: REPARATIONS FOR CARIBBEAN SLAVERY & NATIVE GENOCIDE* 100–08 (2013).

63. 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, 468 (2018) (arguing that Indigenous populations in Oceania lived in highlands where they were protected from flooding and storms before colonialization, but colonial authorities encouraged them to settle on coast, where today they are vulnerable to extreme weather events); Stacy-ann Robinson et al., *The Role of Colonial Pasts in Shaping Climate Futures: Adaptive Capacity in Georgetown, Guyana*, 139 HABITAT INT'L, Aug. 9, 2023, at 2–3 (using Guyana as example to show how colonial policies continue to impact present day response to climate change in way they shaped physical and social structures of country).

64. See, e.g., Robinson et al., *supra* note 63, at 3–5 (describing Guyanese capital's increased climate vulnerability due to coastal location and drainage issues resulting from colonial era structural planning).

65. See, e.g., USAID Data Services, *Climate Risk Profile Eastern and Southern Caribbean*, USAID 5 (Aug. 2021), <https://www.climatelinks.org/sites/default/files/asset/document/2021-10/ESC%20Climate%20Risk%20Profile%20-508.pdf> (describing effects of tropical storms and hurricanes caused by climate change on parts of Caribbean).

66. See Richard Grove, *Climatic Fears: Colonialism and the History of Environmentalism*, 23 HARV. INT'L REV. 50, 50 (2002) (tracing history of colonial environmentalism and impact of capitalist accumulation on colonized spaces).

67. *Id.* at 50–52.

68. *Id.*

of analysis for TWAIL scholars.⁶⁹ Through the theoretical lenses of racial capitalism and coloniality, scholars argue that climate change and efforts to mitigate it disproportionately and negatively impact non-white nations.⁷⁰ From 1850⁷¹ to 2020, the wealthiest countries—including the United States, Canada, Japan, and most of western Europe—accounted for 12% of the global population but produced 50% of GHG emissions from fossil fuels and industrial activities.⁷² The level of GHG emissions from the world’s forty-six poorest countries contrasts significantly, accounting for 1.1% of total emissions from fossil fuels and industrial processes.⁷³

The cost associated with climate-related harms has been significantly higher in the poorest countries than the wealthiest countries, whose disproportionately high carbon-based emissions caused and continue to worsen the climate crisis.⁷⁴ Human-induced increases in extreme heat may have caused the 10 poorest countries to lose about 6.7% of their gross domestic product per capita per year compared to 1.5% loss for the top ten wealthiest countries.⁷⁵ In effect, the disparities in the cause and impact of climate change underscore how racism and capitalism are transforming the countries where Black, Indigenous, and people of color live into “sacrifice zones,”⁷⁶ constantly exposing them to the threats and impacts of anthropogenic climate-related harms.⁷⁷

Accordingly, Barbadian Prime Minister Mia Mottley reminded attendees at the 2021 United Nations Climate Change Conference of the Parties (COP26) that Small

69. Williams, *supra* note 7; Francis, *supra* note 5, at 692.

70. See, e.g., OLUMIDE ABIMBOLA ET AL., RACISM AND CLIMATE (IN)JUSTICE: HOW RACISM AND COLONIALISM SHAPE THE CLIMATE CRISIS AND CLIMATE ACTION 9–16 (2021), <https://us.boell.org/sites/default/files/2021-03/FINAL%20-%20Racism%20and%20Climate%20%28In%29Justice%20Framing%20Paper.pdf> (outlining how history of colonialism and racism shape insufficient and inadequate climate policy and action, creating objectives and strategies that do not meet needs of climate vulnerable nations in Global South).

71. The British Empire, particularly the United Kingdom, was the largest carbon polluter during the early days of the Industrial Revolution. Johannes Friedrich & Thomas Damassa, *The History of Carbon Dioxide Emissions*, WORLD RES. INST. (May 21, 2014), <https://www.wri.org/insights/history-carbon-dioxide-emissions>.

72. Nadja Popovich & Brad Plumer, *Who Has the Most Historical Responsibility for Climate Change?*, N.Y. TIMES (Nov. 12, 2021), <https://www.nytimes.com/interactive/2021/11/12/climate/cop26-emissions-compensation.html>.

73. See *Smallest Footprints, Largest Impacts: Least Developed Countries Need a Just Sustainable Transition*, UNCTAD, <https://unctad.org/topic/least-developed-countries/chart-october-2021> (last visited Sept. 27, 2023) (describing challenges of enabling developing countries to grow sustainably).

74. See, e.g., Noah S. Diffenbaugh & Marshall Burke, *Global Warming Has Increased Global Economic Inequality*, 116 PNAS 9808–13 (finding that global warming has worsened economic inequities by retarding economic growth in low latitude countries by as much as 31% between 1961 and 2010).

75. Christopher W. Callahan & Justin S. Mankin, *Globally Unequal Effect of Extreme Heat on Economic Growth*, 8 SCI. ADVS., Oct. 28, 2022, at 1, 5.

76. Sacrifice zones refer to communities and countries that are on the frontline of the climate change crisis. Carmen G. Gonzalez, *Racial Capitalism, Climate Justice, and Climate Displacement*, 11 OÑATI SOCIO-LEGAL SERIES 108, 115 (2021).

77. *Id.*

Island Developing States (SIDS) are on the front lines of the climate crisis.⁷⁸ Data from the Intergovernmental Panel on Climate Change (IPCC) show that an increase in global temperature above 1.5°C would be catastrophic for SIDS.⁷⁹ SIDS are the most vulnerable to climate change impacts and are the first to sustain massive economic and ecological harm due to their low-lying coastlines, tropical climate, and reliance on coastal-based industries such as tourism and fisheries.⁸⁰

III. INTERNATIONAL CLIMATE NEGOTIATIONS AND FINANCE

Efforts to address the asymmetrical impact of climate change led to international climate negotiations and a framework focused on climate finance for mitigation, adaptation, and other climate action.⁸¹ The international framework and binding commitments on climate action acknowledged the climate paradox and the need for developed countries to provide financial assistance to developing countries to tackle climate change.⁸² However, the treaties and other legal instruments stemming from those climate negotiations have failed to impose legal liability on the countries whose historical GHG emissions led to human-induced climate change. Notwithstanding, the international climate finance framework has provided a launching point for the ongoing struggle for climate reparations. This section explains the history of international climate negotiations, beginning with the United Nations Framework Convention on Climate Change (UNFCCC), the concept of common but differentiated responsibilities (CBDR), and how the UNFCCC set up the Conference of the Parties (COP) procedural framework. It also explains the current loss and damage negotiations at COP meetings under the Paris Agreement. The section ends with a discussion of the limitations of climate finance and why developing countries still consider reparations a critical step in climate action.

A. International Climate Finance Framework Under UNFCCC

The United Nations Framework Convention on Climate Change (UNFCCC or “the Convention”) is the first international framework for climate finance.⁸³ It established a financial mechanism for developed country Parties to provide climate funding to developing country Parties.⁸⁴ The Intergovernmental Negotiating Committee (INC) adopted UNFCCC in 1991, and 154 states signed it in 1992 at the

78. Remarks by Mia Amor Mottley Prime Minister of Barbados (Nov. 1, 2021), https://unfccc.int/sites/default/files/resource/BARBADOS_cop26cmp16cma3_HLS_EN.pdf.

79. SIXTH ASSESSMENT REPORT, *supra* note 1, at 2045–47.

80. Adelle Thomas et al., *Climate Change and Small Island Developing States*, ANN. REV. ENV'T & RES., May 2020, at 1, 5.

81. See ROMAIN WEIKMENS, THE NORMATIVE FOUNDATIONS OF INTERNATIONAL CLIMATE ADAPTATION FINANCE (Frank Biermann et al. eds., Cambridge Univ. Press 2023) (examining different types of aid and perspectives involved in climate adaptation financing).

82. *Id.*

83. *What Is the United Nations Framework Convention on Climate Change?*, UNFCCC, <https://unfccc.int/process-and-meetings/what-is-the-united-nations-framework-convention-on-climate-change> (last visited Sept. 20, 2023).

84. *Funds and Financial Entities*, UNFCCC, <https://unfccc.int/funds-and-financial-entities> (last visited Sept. 20, 2023).

Rio Conference (“Rio Earth Summit”).⁸⁵ Today, with near-universal acceptance,⁸⁶ the Convention’s main objective is to stabilize atmospheric GHG concentrations at a level that would prevent “dangerous anthropogenic interference with the climate system” and avert irreversible ecological and economic damages due to climate change.⁸⁷ Parties to the UNFCCC agreed to take steps to monitor and reduce GHG emissions, formulate national policies on sustainable development, and commit to providing funds to address climate change despite the uncertainty at that time about human-induced causes of climate change.⁸⁸ The terms of the UNFCCC offer a broad, aspirational goal and allow Parties to approach climate action and finance as they deem fit. Subsequent protocols have tailored and operationalized UNFCCC’s goals and core principles.⁸⁹

1. Common but Differentiated Responsibilities Principle

Among UNFCCC’s core principles is the concept of common but differentiated responsibilities and respective capabilities (CBDR).⁹⁰ This principle provides the basis for climate action, finance, and accountability.⁹¹ The CBDR principle speaks to each Party’s shared responsibility for addressing climate change.⁹² It also recognizes that “the developed country Parties should take the lead in combating climate change and the adverse effects thereof.”⁹³ The principle reflects the non-binding acknowledgment in the preamble “that the largest share of historical and current global emissions of [GHG] has originated in developed countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs.”⁹⁴ Thus, CBDR seeks to balance the uneven burden of climate change on developing countries by asking developed countries to commit resources to help developing countries mitigate and adapt to the effects of climate change.⁹⁵ Specifically, the UNFCCC calls for climate finance by binding developed country Parties to *commit to* (a) providing “new and additional financial resources”

85. See UNFCCC, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE: HANDBOOK 18–19 (Daniel Blobel et al. eds., 2006) (listing UNFCCC timeline and signatories).

86. As of July 2023, 198 countries have ratified the Convention. The United Nations Framework Convention on Climate Change, 27 U.N.T.S. 1771 (May 9, 1992).

87. *Id.* art. 2.

88. *Id.* art. 4.

89. The Kyoto Protocol—which has been superseded by the Paris Agreement—specified a GHG emissions target whereas the Convention only offered a generalized aspiration goal. *What Is the Kyoto Protocol?*, UNFCCC, https://unfccc.int/kyoto_protocol (last visited Sept. 20, 2023).

90. Daria Shapovalova, *In Defense of the Principle of Common but Differentiated Responsibilities and Respective Capabilities*, in *DEBATING CLIMATE LAW* 63 (Benoit Mayer & Alexander Zahar eds., 2021); see The United Nations Framework Convention on Climate Change, *supra* note 86, art. 3 (recognizing need for equitable climate action in accordance with the principle of common but differentiated responsibilities and respective capabilities).

91. *Id.*

92. The United Nations Framework Convention on Climate Change, *supra* note 86, art. 3.

93. *Id.*

94. *Id.* art. 1.

95. *Id.* art. 2.

to developing countries to cover the cost involved in climate mitigation and adaptation; and (b) taking steps to transfer knowledge and technologies that can help developing countries boost their capacity to deal with climate change.⁹⁶ CBDR ensures equitable and adequate financial and technology capacity-building among the most climate-vulnerable countries.

2. COP Procedural Framework & Climate Finance for Developing Countries

The UNFCCC established the Conference of the Parties (COP) as the main decision-making body to monitor and review each Party's progress towards GHG emission reduction, climate finance, technology and knowledge transfer to developing countries, and other UNFCCC commitments.⁹⁷ The COP has met annually since 1995.⁹⁸ These yearly sessions became the focal point of intense debates and deliberations about climate finance, the obligation of the Global North to take responsibility for past GHG emissions, and the ongoing adverse impacts of climate change on the Global South.⁹⁹ Developing countries continue to use the COP meetings to raise the issue of climate reparations and press developed country Parties to honor their commitment to reduce GHG emissions and provide financial, scientific, and technological resources for climate change adaptation and mitigation.¹⁰⁰

COP negotiations have resulted in important agreements and commitments impacting climate change mitigation and adaptation funding.¹⁰¹ The COP3 meeting in 1997 adopted the Kyoto Protocol, which required Parties to help countries adapt to the adverse effects of climate change.¹⁰² The Kyoto Protocol focused mainly on emissions reduction and climate adaptation initiatives.¹⁰³ It established three market-based mechanisms to help countries meet their emissions target: (1) International Emissions Trading, (2) Clean Development Mechanism (CDM), and (3) Joint Implementation (JI).¹⁰⁴ Under Kyoto Protocol's funding requirements, 2% of proceeds from activities associated with CDM projects go toward the Adaptation

96. *Id.* art. 4.

97. *Id.*

98. Megan Rowling, *COP27 Debate on Who Should Pay for Climate Loss and Damage Reopens Old Wounds*, REUTERS (Nov. 18, 2022) <https://www.reuters.com/business/cop/cop27-debate-who-should-pay-climate-loss-damage-reopens-old-wounds-2022-11-18> (noting that COP has met twenty-seven times since 1995, an annual basis).

99. *See, e.g., id.* (capturing some contentious climate debates about providing funding to Global South from wealthy, developed countries in Global North at COP27).

100. *Conference of the Parties (COP)*, UNFCCC, <https://unfccc.int/process/bodies/supreme-bodies/conference-of-the-parties-cop> (last visited Oct. 1, 2023).

101. *See* Rowling, *supra* note 98 (listing COP session and associated substantive agreements).

102. *The Kyoto Protocol—Status of Ratification*, UNFCCC, <https://unfccc.int/process/the-kyoto-protocol/status-of-ratification#:~:text=Pursuant%20to%20its%20Article%2022,to%20it%20at%20any%20time> (last visited Sept. 20, 2023).

103. *What Is the Kyoto Protocol?*, *supra* note 89.

104. *Id.*

Fund.¹⁰⁵ This Fund was established in 2001 to provide financial assistance to developing countries to undertake climate adaptation initiatives.¹⁰⁶ Since 2019, the Adaptation Fund has served the Paris Agreement, and as of 2022, it has received over \$1 billion, mostly comprised of voluntary contributions.¹⁰⁷ As of 2023, the Adaptation Fund allocated over \$600 million to finance climate adaptation projects.¹⁰⁸

Aside from the climate Adaptation Fund, developed country Parties have also pledged to provide long-term climate finance.¹⁰⁹ At the 2009 COP15 meeting in Copenhagen, developed countries agreed to jointly mobilize \$100 billion yearly by 2020 to developing countries for climate mitigation.¹¹⁰ The Paris Agreement—adopted at COP21 on December 12, 2015 and entered into force on November 4, 2016—extended the \$1 billion annual commitment until 2025.¹¹¹ Despite Parties reaffirming this climate finance commitment at subsequent COP meetings, they consistently fail to meet their obligation.¹¹² Between 2016 and 2020, developed countries provided and mobilized an average of about \$74.74 billion annually for climate action in developing countries.¹¹³ Most of this funding has gone towards climate mitigation in relatively high-emitting countries in Asia.¹¹⁴

3. The State of Loss and Damage Payments

Funding for climate adaptation and mitigation is the core of the UNFCCC climate finance regime. However, developing countries have been advocating for payments due to loss and damage resulting from extreme and slow onset climate events.¹¹⁵ Loss and damage refers to the effects of climate change that are beyond mitigation and adaptation.¹¹⁶ The term first emerged during the 2013 COP19 meeting in Poland and became part of the Warsaw International Mechanism for Loss

105. *Adaptation Fund*, UNFCCC, <https://unfccc.int/Adaptation-Fund> (last visited Sept. 20, 2023).

106. *Id.*

107. *Id.*

108. *Adaptation Fund (AF)*, THE WORLD BANK, <https://fiftrustee.worldbank.org/en/about/unit/dfi/fiftrustee/fund-detail/adapt#3> (last visited Sept. 20, 2023).

109. *What Is Climate Finance?*, UNFCCC, <https://unfccc.int/topics/introduction-to-climate-finance> (last visited Sept. 20, 2023).

110. *Id.*

111. *The Paris Agreement*, UNFCCC, <https://unfccc.int/process-and-meetings/the-paris-agreement> (last visited Sept. 26, 2023).

112. Tina Gerhardt, *COP26: Voices from the Global South Talk Money: Developed Nations Need to Keep Their Commitments and Pay Up*, SIERRA CLUB (Nov. 8, 2021), <https://www.sierraclub.org/sierra/cop-26-voices-global-south-finance-climate-change-environmental-justice>.

113. Organization for Economic Co-Operation and Development [OECD], *Climate Finance Provided and Mobilised by Developed Countries in 2016–2022: Insights From Disaggregated Analysis*, at 5 (2022).

114. *Id.* at 5, 11–15.

115. Gerhardt, *supra* note 112.

116. *Id.*

and Damage Associated with Climate Change (WIM).¹¹⁷ Developing nations intended for the loss and damage to account for irreparable climate harm,¹¹⁸ but political pressure from developed countries have made loss and damage about climate adaptation instead of compensation for climate-related harm.¹¹⁹

Sustained advocacy from climate activists and leaders of climate-vulnerable developing countries finally resulted in the establishment of a loss and damage fund at the 2022 COP27 meeting.¹²⁰ The fund is expected to provide money to climate-vulnerable countries suffering from the impact of climate-related catastrophic events such as hurricanes, tornadoes, wildfires, heat waves, droughts, and crop failure.¹²¹ While this is a historic breakthrough, a transitional committee is still discussing how the fund will be operationalized and whether it will be effective.¹²² The committee is expected to provide recommendations to the Parties at the next COP meeting in 2023.¹²³ Yet wealthy countries like the United States remain wary of loss and damage payment because it could open the door to developing countries taking legal action against them for climate-related harms.¹²⁴

B. Limitations of Climate Finance Under the UNFCCC Framework

Despite money for adaptation, mitigation, and possibly loss and damage payments, there are still gaps in the implementation of the international climate finance framework. First, funds committed to climate finance are insufficient to address the enormity of the climate crisis and its asymmetrical impact on non-white countries.¹²⁵ The 2022 United Nations Environment Programme Adaptation Gap Report estimated that \$160 to \$340 billion will be needed annually by 2030 just for climate adaptation.¹²⁶ This amount is five to ten times more than the current climate finance flowing to developing countries.¹²⁷ The climate finance shortfall highlights

117. *Id.*

118. JULIA KREIENKAMP & LISA VANHALA, CLIMATE CHANGE LOSS AND DAMAGE 5–7 (2017) <https://www.ucl.ac.uk/global-governance/sites/global-governance/files/policy-brief-loss-and-damage.pdf>.

119. Elisa Calliari et al., *The Politics of (and Behind) the UNFCCC's Loss & Damage Mechanism*, in LOSS AND DAMAGE FROM CLIMATE CHANGE: CONCEPTS, METHODS & POLICY OPTIONS 9 (Reinhard Mechler et al., eds., 2009).

120. *What You Need to Know About the COP27 Loss and Damage Fund*, U.N. ENV'T PROG. (Nov. 29, 2022), <https://www.unep.org/news-and-stories/story/what-you-need-know-about-cop27-loss-and-damage-fund>.

121. *Id.*

122. *COP27 Reaches Breakthrough Agreement on New “Loss and Damage” Fund for Vulnerable Countries*, UNFCCC (Nov. 20, 2022), <https://unfccc.int/news/cop27-reaches-breakthrough-agreement-on-new-loss-and-damage-fund-for-vulnerable-countries>.

123. *Id.*

124. Popovich & Plumer, *supra* note 72.

125. See UNEP, *Adaptation Gap Report 2022: Too Little, Too Slow – Climate Adaptation Failure puts World at Risk*, 23–24 (2022), <https://www.unep.org/adaptation-gap-report-2022> (noting flow of climate finance to developing countries is at least \$310 billion short and unable to address increasing risks associated with climate change).

126. *Id.* at 24.

127. *Id.*

the tendency of wealthy nations to treat climate change funding as charity instead of a duty owed to climate-vulnerable developing countries.¹²⁸

In addition to many developed countries not contributing their fair share to climate finance, the UNFCCC framework neither imposes liability on wealthy countries for their historical GHG emissions, nor requires them to make restitution to developing nations for losses suffered due to climate change.¹²⁹ The framework contemplates averting further climate-related harm and adjusting to the climate crisis, but not restitution for past damages.¹³⁰ Some scholars argue that the absence of legal liability places developing nations at the mercy of developed countries, thereby reinforcing the Global North's financial and political supremacy over the Global South.¹³¹

IV. TWAIL AND THE DEMAND FOR CLIMATE REPARATIONS

The Comment now turns to TWAIL's predominant state-centric framing of climate change as the moral and legal responsibility of countries in the Global North to the Global South. TWAIL's framing of climate reparations mirrors *and* informs the Global South's reparations claim. Section A summarizes the history of reparations in international environmental law, paying special attention to the polluter pays principle.¹³² Section B highlights how TWAIL scholars apply international law principles on compensation for transboundary environmental damage to make their case for climate change reparations.

A. Roots of Reparations in International Environmental Law

The roots of climate reparations trace back efforts by the international community to hold nation-states accountable for transboundary environmental damage throughout the early twentieth century.¹³³ Underlying those early efforts was

128. See Ani Dasgupta, *Paying for Climate Damage Isn't Charity*, N.Y. TIMES (Nov. 11, 2022), <https://www.nytimes.com/2022/11/11/opinion/environment/un-climate-change-conference-2022-reparations.html> (contending that, contrary to views of some developed countries, humanitarian aid does not meet needs under concept of loss and damage).

129. *What Is the United Nations Framework Convention on Climate Change?*, *supra* note 83.

130. *Id.*

131. See, e.g., Leon Sealey-Huggins, '1.5°C To Stay Alive': *Climate Change, Imperialism and Justice for the Caribbean*, 38 THIRD WORLD Q. 2444, 2445–46 (2017) (arguing that solutions to climate change operate on social relations structured by historical and contemporary forms of imperialism and colonialism).

132. Polluter pays principle is often described as a backward-looking principle. See Rowena Maguire et al., *Ethical Values and the Global Carbon Integrity System*, in ETHICAL VALUES & THE INTEGRITY OF THE CLIMATE CHANGE REGIME 3, 10 (Hugh Breakey et al. eds., 2016) (defining backward-looking principles of climate justice as those that consider historical carbon emissions as opposed to forward-looking principles which consider present and future emissions).

133. See Ved Nanda, *Global Climate Change and International Law and Institutions*, in WORLD CLIMATE CHANGE: THE ROLE OF INT'L L. & INSTS. 227, 229–34 (Ved Nanda eds., 1983) (providing an overview of developments in international environmental law which provide principles on state responsibility applicable to climate change; noting also that early efforts were overlapping, uncoordinated, and inadequate to address emerging concerns of human-induced climate change).

the application of the classical maxim *sic utere tuo ut alienum non laedas*,¹³⁴ which requires that people refrain from using their property in such a way as to injure another person's property.¹³⁵ The *sic utere* concept is known today as the no-harm principle.¹³⁶ It is the obligation of each state to prevent, reduce, and control potential and actual transboundary environmental harm.¹³⁷ The arbitral tribunal panel in the 1941 *Trail Smelter (U.S.A. v. Canada)* arbitration provided the first iteration of the no-harm principle in the context of international environmental harm when it interpreted the *sic utere* concept as an affirmative duty on each nation-state not to cause environmental harm in another state's jurisdiction.¹³⁸ The *Corfu Channel*¹³⁹ and *Lake Lanoux (France v. Spain)*¹⁴⁰ arbitration decisions subsequently reiterated that states have an obligation to prevent activities within their borders from causing injury in another jurisdiction.

Scholars agree that the no-harm principle limited state territorial sovereignty by balancing the state's "absolute right" over its territory with the need to act "neighborly."¹⁴¹ Most importantly, the outcomes of the arbitrations highlighted the appropriateness of compensatory damages for past and ongoing harms and the obligation to mitigate future injuries.¹⁴² The Stockholm Declaration (1972) is among

134. Literally translated: "use your own property so as not to harm that of another." *Sic utere tuo ut alienum non laedas*, OXFORD DICTIONARY OF LAW (8th ed. 2015).

135. Nanda, *supra* note 133, at 229.

136. VED P. NANDA & GEORGE PRING, INT'L ENV'T L. & POL'Y FOR THE 21ST CENTURY 23, 336 (2013).

137. *Id.* at 23.

138. The 1941 *Trail Smelter (U.S.A. v. Canada)* arbitral decision is said to have first enshrined the Roman maxim in international jurisprudence, translating (and defining) *sic utere tuo ut alienum non laedas* as "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein . . ." Jelena Bäumler, *Rise and Shine: The No Harm Principle's Increasing Relevance for the Global Community*, in THE GLOBAL COMMUNITY YEARBOOK OF INTERNATIONAL LAW AND JURISPRUDENCE 2017, 150, 155 (Giuliana Ziccardi Capaldo ed., 2018).

139. Although *Corfu Channel* did not pertain to compensation for environmental harm, the ICJ's ruling signaled the principle's general applicability, calling it a "settled principle." See Soheil Ghasemi Bojd, *Sic Utere Principle Revisited: State Responsibility for Cross-Border Violence?*, CAMBRIDGE INT'L L.J. (May 6, 2019), <http://cilj.co.uk/2019/05/06/sic-utere-principle-revisited-state-responsibility-for-cross-border-violence/> (noting that *sic utere* can be applied by analogy to cases with different factual issues); see also Bäumler, *supra* note 138, at 153–54 (suggesting that this principle is generally applicable to decisions that require reconciliation between states).

140. *Lake Lanoux (Fr. v. Spain)*, 24 I.L.R. 101 (1957) (emphasizing states have an obligation to prevent activities within its border from causing injury in another jurisdiction).

141. See, e.g., T.R. Subramanya & Shuvro Prosun Sarker, *Emergence of Principle of Sic Utere Tuo Ut Alienum Non-Laedes in Environmental Law and Its Endorsement by International and National Courts: An Assessment*, 6 KATHMANDU SCH. L. REV. 1, 1–2 (2018) (noting this principle balances right of states with duty to act responsibilities within international community); Bäumler, *supra* note 138, at 153 (discussing no-harm principle as reconciling mechanism between state rights and responsibilities within global community).

142. See *U.S.A. v. Canada (Trail Smelter) Arbitral Trib.*, 3 U.N. R.I.A.A. 905 (1941) (awarding monetary damages to U.S. farmers directly and requiring smelter to change its operations to minimize further emission of sulphur dioxide); *Lake Lanoux (Fr. v. Spain)*, 24 I.L.R. 101 (1957).

the earliest international instruments to adopt the no-harm principle.¹⁴³ Although the declaration does not necessarily have the force of law,¹⁴⁴ it laid the foundation for addressing global environmental harm since it included areas beyond the confines of national jurisdiction.¹⁴⁵ Principle 21 of the Stockholm Declaration sought to balance the sovereign right of states to use their resources with their “. . . responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”¹⁴⁶ Principle 22 called for developing an international law regime on liability and compensation issues.¹⁴⁷

As a follow-up to the Stockholm Conference, the 1992 Earth Summit in Rio de Janeiro reaffirmed the no-harm rule (Principle 2) within the context of global environmental sustainability.¹⁴⁸ Like the Stockholm Declaration, the Rio Declaration (Principle 13) required the development of international laws concerning liability and compensation for victims of environmental harm.¹⁴⁹ It also obliged Parties to the declaration to develop national laws addressing environmental liability and compensation.¹⁵⁰

The Rio Declaration enshrined the notion of “polluter pays” as a fundamental principle of international environmental law.¹⁵¹ Principle 16 of the Rio Declaration

143. See Nanda, *supra* note 133, at 96 (“The Stockholm conference was the most successful international meeting on the environment to date, and resulted in the formulation and approval of principles and recommendations to serve as guidelines for the future conduct of states in environmental and developmental matters, both nationally and internationally.”). The U.N. Conference on the Human Environment held in Stockholm, Sweden produced the Stockholm Declaration. It was the first global environmental conference on environmental issues and led to the establishment of the United Nations Environment Programme (UNEP). *Id.* at 232–34. Accordingly, the Stockholm Declaration is the first major international document to address environmental issues as global concerns. Jutta Brunnée, *The Stockholm Declaration and the Structure and Processes of International Environmental Law*, in *THE FUTURE OF OCEAN REGIME BUILDING: ESSAYS IN TRIBUTE TO DOUGLAS M. JOHNSTON* 41, 41–43 (Aldo Chircop & Ted McDorman eds., 2008).

144. While the declaration is not a treaty, there is some debate about the extent to which state practice has led to the Stockholm Declaration attaining the status of *jus cogens*. See Ranee Khooshie Lal Panjabi, *From Stockholm to Rio: A Comparison of the Declaratory Principles of International Environmental Law*, 21 *DENV. J. INT’L L. & POL’Y* 215, 220–22 (1993) (acknowledging that Stockholm declaration has not been categorized as legally binding largely due to politics of North-South divide, which pitted developed countries and developing countries against each other).

145. See Brunnée, *supra* note 143, at 2–3 (noting absence of legal language in Stockholm Declaration).

146. U.N. Conference on the Human Environment, *Report of United Nations Conference on the Human Environment*, at 5, U.N. DOC. A/CONF.48/14/Rev.1 (June 1972).

147. *Id.*

148. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Aug. 12, 1992) [hereinafter Rio Declaration].

149. *Id.* at 3.

150. See generally Günther Handl, *Rio Declaration on Environment and Development: Introductory Notes*, U.N. AUDIOVISUAL LIBRARY INT’L L. (May 2012), <https://legal.un.org/avl/ha/dunche/dunche.html> (comparing Stockholm and Rio Declarations).

151. NANDA & PRING, *supra* note 136, at 43–44.

sets forth the basic tenet that “the polluter should . . . bear the cost of pollution,”¹⁵² seeking to promote sustainable and equitable development by imposing on the polluter the total cost of preventing, mitigating, and compensating for environmental damages caused by its pollution.¹⁵³ While the no-harm and polluter pays principles share some similarities, tribunals usually interpret the no-harm principle as the duty of a state not to transgress the sovereignty of another by causing environmental damage.¹⁵⁴ Courts interpret the polluter pays principle broadly by imposing liability on any polluter (country or corporation) to bear the cost of preventing and paying for environmental harms.¹⁵⁵

B. Situating the Demand for Climate Reparations

TWAIL scholars and climate justice advocates draw upon the history and principles of compensation for transboundary environmental pollution under international law to make a case for climate reparations from the Global North to the Global South. The turn to principles of customary international law to advance a climate reparations regime is primarily due to the absence of applicable substantive laws which impose legal liability for climate change and harms related to climate change.¹⁵⁶ The principles address the historical responsibility and ongoing climate change–related damages, the forms climate reparations should take, and the moral duty to act.

Scholars argue that wealthy countries have transgressed the no-harm principle through their unreasonable and unrestrained emissions of GHG throughout history.¹⁵⁷ A breach of the no-harm rule requires that (1) a state had an opportunity to act or prevent, (2) the harm was foreseeable, and (3) the measures taken to minimize the risk were proportional.¹⁵⁸ Professor Maxine Burkett contends that developed nations have breached this principle because they have known about the effects of excessive GHG emissions on climate change since the early 1990s, but “have failed to take proportionate measures to reduce excess emissions.”¹⁵⁹ Instead, the GHG emissions rates of developed countries have accelerated.¹⁶⁰ Some scholars

152. Rio Declaration, *supra* note 148, at Principle 16.

153. *See* Panjabi, *supra* note 144, at 255 (noting that developing countries added language in Principle 16 because of observed environmental risks associated with trading certain commodities); NANDA & PRING, *supra* note 136, at 45 (observing that Principle 16 as significant step forward to implementing polluter pays principle).

154. *E.g.*, Dutch Supreme Court (Hoge Raad), *Urgenda Foundation v. the Netherlands*, Judgment of 20 December 2019, No. 19/00135, ECLI:NL:HR:2019:2006., para. 5.7.5 (interpreting no-harm principle as responsibility of states not to cause harm to other states).

155. *E.g.*, *Vellore Citizens Welfare Forum v. Union of India & Ors.* (1996) 5 SCR 241 (India) (holding that polluter pays principle is part of Indian environmental law and expounding on principle as part of its finding for environmental groups against government).

156. *See* Burkett, *supra* note 5, at 521 (noting inadequacy of current legal and political system in dealing with climate change and its uneven impact).

157. *See id.* at 530–31 (explaining that developed countries have had opportunity to act by reducing their emissions but have failed to take proportionate measures).

158. *Id.* at 530.

159. *Id.*

160. *Id.*

argue that the Global North's continued excessive GHG emissions is an internationally wrongful act and a violation of an *erga omnes* obligation for which the violating state should make reparations.¹⁶¹ They base this claim on the fact that countries in the Global North know that their emissions cause climate change and that countries in the Global South are unfairly facing its immediate and severe impacts.¹⁶² The excessive carbon-generating activities within these Global North countries amount to transboundary harm because poorer countries disproportionately experience the effects of climate change caused by wealthy countries.¹⁶³ Thus, TWAIL perspectives on climate reparations require compensation for the climate-related damages in developing countries and the cost these countries bear in recovering from and mitigating those harms.

However, scholars, such as Professor Benoit Mayer, caution against interpreting the no-harm principle as imposing strict liability because it derives from customary international law and has not been widely implemented in jurisdictional decisions.¹⁶⁴ Application of the no-harm principle to reparations for climate change also raises the complex issue of causation because the impact of climate change on individuals and communities is often indirect and delayed.¹⁶⁵ It is also difficult to state with absolute certainty whose emissions caused specific climate harm. But the inability to establish direct causation should not preclude states from taking responsibility for climate change and remedying climate-related harms. Climate scientists and the IPCC have provided sufficient data to show that GHG emissions have caused climate change.¹⁶⁶ It is also undisputed that the wealthiest countries are responsible for 50% of GHG emissions over the last 170 years.¹⁶⁷ Their combined actions in causing climate change made small developing nations more vulnerable to climate impact.¹⁶⁸ Furthermore, developed countries have known about the

161. Junker et al., *supra* note 17, at 266; Perry, *supra* note 17; Sarah Mason-Case & Julia Dehm, *Redressing Historical Responsibility for the Unjust Precarities of Climate Change in the Present*, in DEBATING CLIMATE L. 170, 175, 181, 183 (Benoit Mayer & Alexander Zahar eds., 2021).

162. *See* Mason-Case & Dehm, *supra* note 161, at 183 (suggesting that Global North countries should pay reparations to Global South countries starting from time they knew or it was foreseeable that their actions were causing climate change).

163. *See id.* at 175 (stating international law provides important option for those suffering effects of climate change).

164. *See* Benoit Mayer, *The Relevance of The No-Harm Principle to Climate Change Law and Politics*, 19 ASIA PAC. J. ENV'T. L. 79, 81–85, 93 (2016) (noting limited influence of no-harm principle in context of climate change because of opposition from developed states).

165. *See id.* at 91–92 (arguing that international law usually requires causal link between wrongful act and harm, but in case of climate change, consequences are not only indirect, but remote and consequential); *see also* Junker et al., *supra* note 17, at 269 (stating direct causation often missing in cases of environmental harm).

166. *See* SIXTH ASSESSMENT REPORT, *supra* note 1, at 148 (explaining that their recent studies show convincing links between GHG emissions and extreme weather events).

167. *See* Popovich & Plumer, *supra* note 72 (showing that rich countries are responsible for 50% of all planet-warming greenhouse gases released from fossil fuels and industry over past 170 years).

168. *See* SIXTH ASSESSMENT REPORT, *supra* note 1, at 12 (noting SIDS face threat of climate change due to industrialization and emissions of wealthy countries).

negative impact of their GHG-producing activities since the 1990s but failed to correct their action.¹⁶⁹ Their failure to reduce their carbon emission levels might be sufficient to hold them liable even without establishing a direct causation between emissions and climate change–related harm in another country.¹⁷⁰

In sum, climate activists and scholars have been appealing to these principles of customary international law as reasonable grounds to hold high GHG-emitting countries legally, morally, and financially responsible for the adverse effects of climate change. The Global South's demand for climate reparations from the Global North is an attempt to prompt the international law community to recognize the ongoing harm and existential threat climate change poses for the most disadvantaged and climate-vulnerable countries. However, their framing of climate reparations follows the North-South logic, which predominantly focuses on what nation-states in the Global South want and should get as reparations from the Global North. Section V problematizes this state-centric model by noting that a focus on states tends to overlook communities that are neither strictly North nor South but fall between this divide.

V. LIMITATIONS OF TWAIL ANALYSIS OF CLIMATE REPARATIONS

Despite providing a crucial theoretical intervention in international environmental law and climate change discourse as a human rights and moral issue, TWAIL analyses have several epistemological and practical limitations.¹⁷¹ These limitations necessitate a retheorizing of TWAIL to effectively address the threat and impact of climate change on climate-vulnerable communities. Most notably, scholars have called attention to (A) TWAIL's fealty to the flawed Westphalian model of international law; (B) the forced homogenization of disparate groups of peoples and cultures in service of TWAIL's political strategy of resistance against the Northern/Western imperialism; and (C) the incoherence of the Global South as a conceptual and practical category due to the emergence of Brazil, Russia, India, China, and South Africa (BRICS) as major economies and emitters of GHG.

A. TWAIL's Fealty to the Westphalian Model of the Nation-State

TWAIL's epistemic grounding remains rooted in the Westphalian model of the nation-state, despite TWAIL's criticism of international law's Eurocentrism.¹⁷² The

169. See Maxine Burkett, *A Justice Paradox: On Climate Change, Small Island Developing States, and the Quest for Effective Legal Remedy*, 35 UNIV. HAW. L. REV. 633, 643 (2013) (claiming that highest greenhouse gas emitters were aware of the consequences of their actions since at least 1992).

170. See Calvy Aonima & Shivanal Kumar, *Could Vanuatu Claim Reparations Under International Law for Damages Sustained from Cyclone PAM?*, 17 J.S. PAC. L. A-23, A-31 (2015) (arguing that Vanuatu could seek reparations from any country that breached their obligation to reduce carbon emissions).

171. My purpose for discussing some of the limitations is not to dismiss TWAIL as a formidable intellectual project, but to demonstrate how more nuanced approaches can help further the theoretical and political objectives. Cf. Haskell, *supra* note 29, at 404–14 (suggesting that TWAIL is logically and fundamentally flawed and that it cannot withstand intellectual scrutiny).

172. Shedrack Agbakwa, *A Line in the Sand: International (Dis)Order and the Impunity of*

Westphalian state system recognizes the nation-state as the ultimate sovereign over its territory and domestic affairs.¹⁷³ The nation-state is the primary subject of international law within this system, possessing treaty-making power and conducting international affairs.¹⁷⁴ While TWAIL criticizes the unequal relations of power that emerge from this model of international law,¹⁷⁵ it tacitly acknowledges and accepts the nation-state-centric approach.¹⁷⁶ The acceptance of nation-states is perhaps a convenient way to do international lawmaking and form alliances among nations with similar experiences of colonialism.¹⁷⁷ Underlying the embrace of nation-states is the assumption that their governments speak for and represent the interest of everyone within this political construct.¹⁷⁸ However, ample evidence confirms that decisions made in the “national interest” often benefit the political elites or, at the very least, are not inconvenient to them.¹⁷⁹ The nation-state model also makes it unnecessarily difficult for other voices within the state—such as grassroots activists and self-determining peoples—to have a role in international lawmaking.¹⁸⁰

Because the nation-state paradigm also structures TWAIL’s discourse on climate change and climate reparations, it amplifies the risk of excluding important voices for whom the state does not adequately speak.¹⁸¹ It also assumes that the nation-state is the most suitable recipient of climate reparations, assuming that states

Non-State Corporate Actors in the Developing World 3, in *THE THIRD WORLD AND INTERNATIONAL ORDER LAW, POLITICS AND GLOBALIZATION* (Antony Anghie et al. eds., 2003); see also Valerie Phillips, *Indigenous Peoples and the Role of the Nation-State*, 101 *AM. SOC’Y INT’L L. PROC.* 319, 320 (2007) (stating that nation-states have exclusive power and that territorial integrity is critical).

173. Compare Peter M. R. Stirk, *The Westphalian Model and Sovereign Equality*, 38 *REV. INT’L STUD.* 641, 646 (2012) (arguing against common assumption that Treaty of Westphalia led to sovereign equality), with *Westphalian Model*, *OXFORD DICTIONARY OF HUM. GEO.* (2013) (noting that the treaty formalized a system of sovereign states).

174. See ONUMA YASUAKI, *INTERNATIONAL LAW IN A TRANSCIVILIZATIONAL WORLD* 186 (2017) (noting primacy of nation-state in international law—states are essentially the end all be all).

175. See *supra* Section II.A for an overview of key ideals under TWAIL.

176. See Fozia N. Lone, *Cross-Fertilization of Westphalian Approaches to International Law: Third World Studies and a New Era of International Law Scholarship*, 34 *EMORY INT’L L. REV.* 955, 979 (2020) (acknowledging that nation-states were only subjects of political perspective).

177. Roger Merino, *Reimagining the Nation-State: Indigenous Peoples and the Making of Plurinationalism in Latin America*, 31 *LEIDEN J. INT’L L.* 773, 775–76 (2018).

178. See Srinivas Burra, *TWAIL’s Others: A Caste Critique of TWAILers and Their Field of Analysis*, 33 *WINDSOR Y.B. ACCESS JUST.* 111, 121 (2016) (stating that States impersonate “collective consciousness” of their people).

179. See, e.g., *id.* at 118–19 (illustrating TWAIL’s difficulty dealing with concerns of people marginalized within nation-state by looking at Indian government’s opposition to have caste discrimination included on agenda of World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in 2001).

180. See *id.* at 120 (detailing activists group’s success in momentarily convincing some nation-states to approve message in support of their cause, only to have India ultimately defeat it).

181. See *id.* (emphasizing how NGOs were nearly successful in making a change but India, as a nation-state, was able to push down their efforts and make the ultimate decision to deny their attempt).

will act in the best interest of the people within its borders.¹⁸² However, not all communities within climate-vulnerable nations bear the same level of climate-related risks and harm. Already vulnerable and marginalized people—including women, Indigenous communities, religious and ethnic minorities, indigent people, and those who rely on agriculture and fisheries for their livelihood—face more compounding risks of climate-related harm.¹⁸³ Relatedly, privileging the nation-state in climate reparations also assumes that it is the ideal entity to compensate injured parties for climate-related harms when transnational corporations in the fossil fuel industry have played an outsized role in creating the climate crisis.¹⁸⁴

B. TWAIL's Tendency to Homogenize Disparate Groups of People

The tendency to treat the “Third World” and “Global South” as unitary categories also stems from the impervious nation-state model that TWAIL tacitly adopts.¹⁸⁵ The Third World category initially referred to the countries during the Cold War that had opted not to be allied with capitalism or socialism.¹⁸⁶ It also captured countries in Latin America, the Caribbean, Asia, and Africa, whose economies had been underdeveloped because of colonialism.¹⁸⁷ The concept focused

182. See *Climate Reparations*, *supra* note 5, at 526–30 (implying that states are most suitable by omission of any alternative recipient).

183. See Nitya Rao et al., *Gendered Vulnerabilities to Climate Change: Insights from the Semi-Arid Regions of Africa and Asia*, 11 CLIMATE & DEV. 14 (2019) (discussing particularized impact of climate change on women); see also VINCA LAFLEURET AL., DOUBLE JEOPARDY: WHAT THE CLIMATE CRISIS MEANS FOR THE POOR, BROOKINGS INST. 6–8, (Jan. 2009), https://www.brookings.edu/wp-content/uploads/2016/06/02_climate_change_poverty.pdf (noting Africa may be ground zero for climate warming but lacks resources to adapt to or retreat from impacts of climate change). With increasing temperatures and desertification of arable lands, food production will likely decrease, and cost of food prices will likely increase. It is entirely possible that by 2080, wheat production in Africa may cease. This will have a devastating impact on world's poorest families. *Id.*; see also Rachel Baird, *The Impact of Climate Change on Minorities and Indigenous Peoples*, MINORITY RTS. GRP. INT'L, (Apr. 10, 2008), <https://minorityrights.org/publications/the-impact-of-climate-change-on-minorities-and-indigenous-peoples-april-2008/> (noting that ethnic minorities face disproportionate climate-related risks).

184. See Tess Riley, *Just 100 Companies Responsible For 71% of Global Emissions*, *Study Says*, THE GUARDIAN (Jul. 10, 2017), <https://www.theguardian.com/sustainable-business/2017/jul/10/100-fossil-fuel-companies-investors-responsible-71-global-emissions-cdp-study-climate-change> (listing 100 companies that have been responsible for 71% of greenhouse gas emissions since 1988, most of which are private transnational fossil fuel companies).

185. See Natarajan, *supra* note 50, at 180; see also Dianne Otto, *Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference*, 5 SOC. & LEGAL STUD. 337, 348 (1996) (claiming divide between West and Third World countries remains post-Cold War, is counterproductive, and despite oppositional stance to western domination, many have been uncritical of European framework); see also Karin Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, 16 WIS. INT'L L.J., 353, 357–59 (1998) (describing different understandings of “Third World,” highlighting critiques of the term, and how the term muddles or erases differences within countries).

186. B.R. Tomlinson, *What Was the Third World?*, 38 J. CONTEMP. HIST. 307, 309 (2003).

187. See *id.* at 311 (highlighting that some countries developed through dependency which resulted in underdevelopment).

on how countries undergoing decolonization can impact international law.¹⁸⁸ Professor Chimni contends that the category Third World is “crucial to organizing and offering collective resistance to hegemonic policies” and “can coexist with a plurality of practices of collective resistance.”¹⁸⁹

Though the Third World category is meant to capture the diversity and heterogeneity of its peoples and countries, the term oversimplifies similarities and minimizes differences.¹⁹⁰ For example, throughout their political histories, countries within this Third World category have embraced democracy, socialism, communism, and democratic socialism.¹⁹¹ The political ideology embraced by each country has been consequential in determining diplomatic relations between them and more influential Western countries like the United States.¹⁹² The experience of colonization and Western imperialism—which scholars often suggest are the unifying themes of Third World alliance—also varied among these nation-states and partly determined the economic and political position of the formerly colonized countries in the post-colonial period.¹⁹³ TWAIL’s insistence on binary relations of power (e.g., West/East, Colonizer/Colonized, and North/South) results in the essentializing of the Third World.¹⁹⁴ “Strategic essentialism”¹⁹⁵ has some political

188. See Gathii, *supra* note 24, at 30 (discussing how international law should acknowledge colonial legacy as history, replaced by effect of decolonialization).

189. Chimni, *supra* note 31, at 5.

190. See R.B.J. Walker, *Space/Time/Sovereignty*, in PERSPECTIVES ON THIRD-WORLD SOVEREIGNTY THE POSTMODERN PARADOX 13, 15 (Mark E. Denham & Mark Owen Lombardi eds., 1996) (explaining how Third World label was created as binary distinction to codify inferiority).

191. See Mickelson, *supra* note 185, at 357–58 (acknowledging political diversity which prompted some scholars to speak about “new” and “old” Third World).

192. See *id.* (describing how Third World can refer to political coalitions of states with similar goals represented in forums such as United Nations).

193. See S. Neil MacFarlane, *Taking Stock: The Third World and the End of the Cold War*, in THE THIRD WORLD BEYOND THE COLD WAR: CONTINUITY AND CHANGE 18, 18–22 (Louise Fawcett & Yezid Sayigh eds., 1999) (arguing for more regionally specific approach to analyzing security concerns in formerly colonized regions because use of Third World as heuristic tool obscured specificity for generalizability).

194. See Otto, *supra* note 185, at 347 (explaining that heterogeneity of non-western people should deter binary categorization).

195. Postcolonial feminist scholar and literary theorist Gayatri Chakravorty Spivak coined the term strategic essentialism to hold in tension the impossibility of reducing the Third World woman to a fixed, shared attribute (anti-essentialism) and the need to establish a shared or common quality (essentialism) for the sake of political action. Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in CAN THE SUBALTERN SPEAK?: REFLECTIONS ON THE HISTORY OF AN IDEA 21, 47–48 (Rosalind C. Morris ed., 2010) (presenting strategic essentialism as term and politics of necessity, even though one could argue that it is a politics of convenience); see also GAYATRI CHAKRAVORTY SPIVAK & SARAH HARASYM, THE POST-COLONIAL CRITIC: INTERVIEWS, STRATEGIES, DIALOGUES 10–12 (Sarah Harasym ed., 1990) (discussing universal discourse/essentialist discourse distinction and strategic use of essentialism in anti-sexist work). Spivak noted that she sometimes sees herself as an essentialist. *Id.* But she has since disavowed the concept. See Emily Lee, *The Epistemology of the Question of Authenticity in Place of Strategic Essentialism*, 26 HYPATIA 258, 264 (2011) (summarizing Spivak’s dissatisfaction with way strategic essentialism has become theory instead of strategy, which means that concept got caught in the essentialist trap that Spivak sought to avoid in the first place). However, it continues to inform aspects of TWAIL and feminist

utility in terms of oppressed people's collective resistance.¹⁹⁶ However, it often assumes an equally shared experience among oppressed people without fully teasing out how interlocking modes of oppression place some groups of oppressed people on the extreme fringes of society.¹⁹⁷ Even among the community of Third World nations, risks of climate-related harm and the ability to mitigate and adapt are not equally shared.¹⁹⁸ SIDS and least-developed countries continue to face the brunt of extreme weather events.¹⁹⁹ However, this reality is obscured by the application of meta-categories.

The differing power relations are also evident within the borders of each nation-state. The artificially imposed boundaries (geographic, class, religious, and ethnic) during Europe's colonial project in Africa and other places meant that these post-colonial nations became sites of serious internal contestation between groups privileged by Europeans and those who were not.²⁰⁰ However, TWAIL's emphasis on the solidarity of formerly colonized states tends to obscure this contestation and subsume the experiences of women, Indigenous peoples, and religious and ethnic minorities.²⁰¹ Feminist scholars, for example, have challenged the masculinist assumptions embedded in Third World liberatory discourses.²⁰² These scholars have called attention to the silencing of women's contribution to the anticolonial

legal theories. See, e.g., Balakrishnan Rajagopal, *Locating the Third World in Cultural Geography*, 15 THIRD WORLD LEGAL STUD. 1, 4–5 (1999).

196. See Mohsen al Attar & Rosalie Miller, *Towards an Emancipatory International Law: The Bolivarian Reconstruction*, 31 THIRD WORLD Q. 347, 354 (2010) (using Bolivarian Alliance for the Americas to illustrate how Third World's shared experiences transcend cultural differences and result in collective resistance).

197. See Lee, *supra* note 195, at 271 (providing that one's position in society can alter their cultural experience).

198. See SIXTH ASSESSMENT REPORT, *supra* note 1, at 12 (concluding that West, Central and East Africa, South Asia, Central and South America, SIDS and Arctic are most climate change vulnerable hotspots).

199. *Id.*

200. See ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY & THE MAKING OF INTERNATIONAL LAW* 205–07 (2007) (positing that nationalist struggle did not end with decolonization but continued with Third World state becoming site of conflict especially as various ethnic groups sought to re-establish pre-colonial territories); see also Makau W. Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113, 1114 (1995) (providing historical overview of Africa's balkanization due to colonial boundaries and history of ethnic violence over territory).

201. See Chandra Talpade Mohanty, *Women Workers and Capitalist Scripts: Ideologies of Domination, Common Interests, and the Politics of Solidarity*, in *FEMINIST GENEALOGIES, COLONIAL LEGACIES, DEMOCRATIC FUTURES* 3, 7 (M. Jacqui Alexander & Chandra Talpade Mohanty eds., 1997) (conceding that the term Third World does not adequately capture economic, political, racial and cultural differences within Third World nations).

202. See, e.g., Amina Mire, *In/Through the Bodies of Women: Rethinking Gender in African Politics*, 4 S. AFR. FEMINIST REV. 1, 1–4 (2000) (contending history of African social and political thought is male-centric discourse built on and mediated through (re)presentation of African women's bodies as sites of contestation between male ideas of pre-colonial purity and white patriarchal colonial impositions). More generally, nationalist/anticolonial literature excludes African women as active participants in anticolonialism. *Id.*

struggle.²⁰³ They have also exposed the failure of early TWAIL scholarship to take note of the subordinated position of women living in the Third World and the gendered implications of international lawmaking.²⁰⁴ Third-world theorizing also has historically rendered invisible Indigenous peoples' experiences and perspectives.²⁰⁵ Indigenous peoples' experiences are assumed to be similar to other Third World citizens,²⁰⁶ even though they are often otherized because of their unique ways of being.²⁰⁷ In the climate change context, Indigenous communities in the Americas face a double jeopardy²⁰⁸: on the one hand, the government's failure to guarantee Indigenous rights and equality, and on the other, the loss of ancestral land and erasure of cultural norms tied to that land.²⁰⁹

C. The Conceptual Incoherence of the Global South Due to the Emergence of BRICS

Finally, some TWAIL scholars have questioned the theoretical and practical usefulness of the global North-South divide given the economic and political rise of BRICS.²¹⁰ Except for Russia, each of these countries was once under European

203. *Id.*

204. *See, e.g.*, Mosope Fagbongbe, *The Future of Women's Rights from a TWAIL Perspective*, 10 INT'L CMTY L. REV. 401, 402 (2008) (noting common critique of TWAIL's limited engagement with marginalized groups).

205. *See* Phillips, *supra* note 172 (arguing that while Indigenous people are not new participants in the arena of international law, they have been overlooked); *see also* Hiroshi Fukurai, *Fourth World Approaches to International Law (FWAIL) and Asia's Indigenous Struggles and Quests for Recognition under International Law*, 5 ASIAN J.L. & SOC'Y 221, 227 (2018) (explaining that Fourth World perspectives is not intended to replace TWAIL but add to the discussion by including Indigenous people and communities).

206. *See, e.g.*, Seth Gordon, *Indigenous Rights in Modern International Law from a Critical Third World Perspective*, 31 AM. INDIAN L. REV. 401, 404 n.22 (2006); *see also* Amar Bhatia, *The South of the North: Building on Critical Approaches to International Law with Lessons from the Fourth World*, 14 OR. REV. INT'L L. 131, 158 (2012) (discussing widespread conflation of Third World and Indigenous peoples in TWAIL literature).

207. *See* Phillips, *supra* note 172, at 319–20 (lamenting international law's assumption that Indigenous people can only be "wards" of the nation state); *see also* Michael Fakhri, *Third World Sovereignty, Indigenous Sovereignty, and Food Sovereignty: Living with Sovereignty Despite the Map*, 9 TRANSNAT'L LEGAL THEORY, 218, 235–36 (2018) (critiquing assertions of the nation-state's role as "territorial stewards" over Indigenous communities comprising Arctic Council).

208. *See* U.N. Department of Economic and Social Affairs: Indigenous Peoples, Climate Change, <https://www.un.org/development/desa/indigenouspeoples/climate-change.html> (last visited Nov. 19, 2023) (outlining that Indigenous people are among first to be impacted by negative consequences of climate change because of their relationship to environment). Their politically and economically precarious position heighten effects of climate change on their communities. *Id.*

209. *See id.* (providing examples of legal, institutional barriers Indigenous people face due to climate change); *see also* Terry Williams & Preston Hardison, *Climate Threats to Pacific Northwest Tribes and the Great Ecological Removal: Keeping Traditions Alive*, in ASSERTING NATIVE RESILIENCE: PACIFIC RIM INDIGENOUS NATIONS FACE THE CLIMATE CHANGE 53, 53 (Alan Parker & Zoltan Grossman eds., 2012) (describing risk climate change poses for Indigenous culture, including loss of cultural resources such as certain flora and transmission of native knowledge).

210. *See* Francis, *supra* note 5, at 695–96 (arguing that economic rise of BRICS has eroded divide between Global South and Global North nation-states, which has been TWAIL's primary analytical framework. Thus, TWAIL scholars should adopt a deterritorialized approach in viewing

imperial rule.²¹¹ Notwithstanding the lack of a clear, unified political ideology among the BRICS countries,²¹² they all position themselves as former political victims of the West.²¹³ However, the BRICS countries would hardly fit within the Global South category, since economic and political dispossession are the defining features of the Global South.²¹⁴ BRICS countries account for 41% of the world's population, 24% of global gross domestic product, and 16% of global trade.²¹⁵ The economic success of BRICS countries is a reminder of the transnationalism of the capitalist class and the role of capital in structuring relations among nations.²¹⁶ The economic rise of BRICS countries and their increasing role in international governance also raise questions about their dual self-identity as developing countries and dominant economic and political players on the world stage.²¹⁷

Beyond their economic and political rise, BRICS countries pose a problem for the current framing of climate change and climate accountability as a Global North-South contestation because they are among the top emitters of GHG. As of 2021, they account for 45.42% of annual global CO₂ emissions.²¹⁸ China is currently the world's top emitter of GHG and its cumulative CO₂ emissions (1899–2021) have

Global South.); *see also* Karin Mickelson, *Beyond a Politics of the Possible: South-North Relations and Climate Justice*, 10 MELB. J. INT'L L. 411, 418 (2009) (noting limitations of categories of Global North and South and need to rethink deployment of these categories).

211. *See* Max Fisher, *Map: European Colonialism Conquered Every Country in the World but These Five*, VOX (Feb. 24, 2015), <https://www.vox.com/2014/6/24/5835320/map-in-the-whole-world-only-these-five-countries-escaped-european> (showing all countries once colonized or controlled by Europe).

212. *See* Mohammed Nuruzzaman, *Why BRICS Is No Threat to the Post-War Liberal World Order*, 57 INT'L STUD. 51, 58 (2020) (discussing absence of political and ideological unity among BRICS).

213. *See id.* at 53 (referring to United States' abuse of financial, diplomatic sanctions against most BRICS member states).

214. Tanzania's first Prime Minister, the Hon. Julius K. Nyerere, characterized in his speech at the 1982 Third World Lecture in New Delhi India that the Third World (used interchangeably with Global South) "consists of the victims and the powerless in the inter-national economy." JULIUS K. NYERERE, *THIRD WORLD LECTURE 1982: SOUTH-SOUTH OPTION* (1982), *reprinted in* 7 AFRICA DEVELOPMENT 96, 97 (1982). Economic and political dispossession continues to be used as the defining attribute of the Third World/Global South. M.D. Litonjua, *Third World/Global South: From Modernization, to Dependency/Liberation, to Postdevelopment*, 29 J. THIRD WORLD STUD. 25, 47 (2012).

215. *Evolution of BRICS*, BRICS2021, <https://brics2021.gov.in/about-brics> (last visited Nov. 19, 2023).

216. *See* Chimni, *supra* note 31, at 4 (explaining that it is global capitalism that binds and unites countries).

217. *See* Andrew F. Cooper, *China, India and the Pattern of G20/BRICS Engagement: Differentiated Ambivalence Between 'Rising' Power Status and Solidarity with the Global South*, 42 THIRD WORLD Q. 1945, 1957 (2021) (characterizing India's and China's dualistic self-identities as ambivalent; that is, their attempt to present themselves as aligned with the interests of the Global South as developing countries while projecting themselves onto the world state as powerful economic and political players).

218. Hannah Ritchie & Max Roser, *Brazil: Co₂ Country Profile*, OUR WORLD IN DATA, <https://ourworldindata.org/co2/country/brazil?country=BRA~RUS~IND~CHN~ZAF#citation> (last visited Oct. 2, 2023).

surpassed all other nations except the United States.²¹⁹ Across the BRICS countries, the burning of fossil fuels and industrial production of cement accounts for the highest sources of CO₂ emissions.²²⁰ The economic growth in these countries over the past decade is the primary factor driving their increasing carbon emissions.²²¹

Officials and climate policy experts from China and India have contended that the same level of responsibility for the climate crisis should not be placed on them as the United States and Western Europe because countries in the Global South are recent contributors to global carbon emissions.²²² The argument is valid insofar as it is unfair that the United States and Western Europe's unimpeded development came at the expense of the environment while countries like China and India must now pay for the benefits of their development.²²³ However, this argument is an insufficient basis for BRICS to avoid moral and legal responsibility for climate change, given their vast carbon footprint relative to other developing nations.²²⁴ The rate and quantity of emissions from China, coupled with its economic dominance, brings to the fore the possibility of South-South climate reparations and not just a North-South transaction.²²⁵

The preceding discussion of some of the epistemic challenges with applying TWAIL to climate justice and climate reparations does not render it an ineffective framework for understanding the interplay of coloniality, racial capitalism, and the current climate crisis. Professor Karin Mickelson's insight is instructive: "rethinking

219. Chapman & Ahmed, *supra* note 7, at 84.

220. Ritchie & Roser, *supra* note 218.

221. See Lindsay Maizland, *China's Fight Against Climate Change and Environmental Degradation*, COUNCIL ON FOREIGN RELATIONS (May 19, 2021, 2:20 PM), <https://www.cfr.org/backgroundunder/china-climate-change-policies-environmental-degradation> (analyzing China's response to growing concerns about its contribution to climate change following rapid industrialization).

222. See, e.g., Maxine Joselow et al., *How China, the World's Top Polluter, Avoids Paying for Climate Damage*, WASH. POST (Nov. 23, 2022), <https://www.washingtonpost.com/climate-environment/2022/11/23/china-climate-finance-cop27/> (quoting Liu Pengyu, a spokesman for Chinese Embassy in Washington, saying that developed countries contributed to 95% of CO₂ released from 1850s to 1950s); see also Joe Lo, *Who Should Pay for Loss and Damage? Spoiler: Not China*, CLIMATE HOME NEWS (Nov. 29, 2022), <https://www.climatechangenews.com/2022/11/29/who-should-pay-for-loss-and-damage-spoiler-not-china/> (noting that moral case against China for climate change compensation is weaker than case against U.S. because China is recent contributor to the problem and its per capita emission is lower than most Western nations).

223. See Benoit Mayer, *Climate Change Reparations and the Law and Practice of State Responsibility*, 7 ASIAN J. INT'L L. 185, 201-04 (2017) (allowing room for responsible state's capacity to pay climate change reparations but noting that it should not be defense against compensation).

224. *Carbon Footprint by Country 2022*, WORLD POPULATION REV., <https://worldpopulationreview.com/country-rankings/carbon-footprint-by-country> (providing map of global CO₂ emissions by country) (last visited Nov. 19, 2023).

225. See Valerie Volcovici & Aidan Lewis, *COP27: Island Nations Want China, India to Pay for Climate Damage*, REUTERS (Nov. 8, 2022), <https://www.reuters.com/business/cop/cop27-island-nations-want-china-india-pay-climate-damage-2022-11-08/> (reporting Antigua and Barbuda Prime Minister Gaston Browne's call for China and India to pay SIDS for climate damage).

does not necessarily mean rejecting or abandoning.”²²⁶ The discussion underscores the need to interrogate power relations *within* the Global North and Global South meta-categories. Similarly, discussions of climate harm and reparations must focus on people and communities.²²⁷ The subsequent sections of this Essay deal fully with efforts to move talks about climate change accountability within the TWAIL framework from a nation-state-centric to a people-centered paradigm.

VI. MOVING AWAY FROM THE NORTH-SOUTH DIVIDE IN CLIMATE JUSTICE

Given some of the problems of the traditional analysis of the Third World and Global North-South, scholars are expanding TWAIL’s theoretical scaffolding to include more voices in addressing environmental justice, particularly climate justice. While these approaches do not entirely displace the prominence of the nation-state as the primary subject and analytical category of international law, they provide a way to understand and advance the role of individuals and non-state entities in international lawmaking. They also establish a theoretical basis for a people-centered approach to climate reparations. This section briefly discusses two such related approaches: (A) deterritorializing the Global South and (B) integrating Indigenous or “Fourth World” perspectives.²²⁸ Some scholars analyze Fourth World perspectives as part of the emergence of social movements in the deterritorialization of the Global South.²²⁹ However, this section analyzes Indigenous perspectives separately because Indigenous peoples’ legal claim to nationhood predates the formation of the nation-state,²³⁰ providing important insights into the fraught relationship with the post-colonial state.²³¹ Furthermore, their perspectives show the possibilities for people-centered sovereignty and self-determination in climate action.²³²

A. *Deterritorializing the Global South*

Deterritorialization refers to the decentering and uprooting of the Global South

226. Mickelson, *supra* note 210, at 422.

227. *See supra* Part II; *infra* Part VI.

228. This section uses Indigenous perspective and Fourth World perspective interchangeably. The idea that the Indigenous people comprise the Fourth World comes from the work of Secwepemc leader George Manuel and social justice activist Michael Posluns. GEORGE MANUEL & MICHAEL POSLUNS, *THE FOURTH WORLD: AN INDIAN REALITY* 5 (1974).

229. *E.g.*, Gordon, *supra* note 206.

230. *See* Shawkat Alam & Abdullah Al Faruque, *From Sovereignty to Self-Determination: Emergence of Collective Rights of Indigenous Peoples in Natural Resources Management*, 32 *GEO. ENV'T'L. L. REV.* 59, 63 (2019) (noting that Indigenous peoples’ rights did not come from legal system of state but pre-existed it and that they exist and aspire to remain as distinct societies despite modern nation state asserting political sovereignty over them).

231. *See* Fukurai, *supra* note 205, at 225 (stating that First, Second and Third Worlds continue occupation and exploitation of Fourth World peoples).

232. *See* Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 *U. COLO. L. REV.* 1625, 1674 (2007) (arguing that recognition of Indigenous people’s right to environmental self-determination would place affirmative responsibility on nation-states to implement appropriate mitigation strategies that ensure survival of Indigenous peoples).

from its geographic moorings.²³³ In applying the concept to the Third World, Professor Balakrishnan Rajagopal argues that decentering it from geography enables TWAIL scholars “to focus on issues of class, gender, sexuality, region, language and so on, which have been submerged by the totalizing power of the national allegory.”²³⁴ Moving beyond the strict territoriality of the Third World/Global South focuses TWAIL’s critical gaze on the emergence of “counter-hegemonic discourses and practices” within these nation-states.²³⁵

In Professor Rajagopal’s analysis, the deterritorialized space of the Third World/Global South becomes a site of contestation or struggle between the dispossessed and local hegemony.²³⁶ In this context, he affirms the power of social movements in the Third World to liberate civil society from the state’s colonization and the failures of Marxist and liberalist notions of development.²³⁷ Social movement theory and practice represent a version of lawmaking from below or, as Professor Rajagopal calls it, “a grassroots-oriented praxis of the subalterns.”²³⁸ Historian Vijay Prashad pushes this analysis further by characterizing the Global South as “this concatenation of protests against the theft of the commons, against the theft of human dignity and rights, against the undermining of democratic institutions and the promises of modernity.”²³⁹ Instead of being a fixed political and geographical designation, the Global South links oppressed peoples and their resistance transnationally.²⁴⁰

Building on Professor Rajagopal’s framework, Professor Francis demonstrates how racial capitalism creates dispossession across the North-South divide, thereby rendering the Global South “as deterritorialized political practice.”²⁴¹ The result of that dispossession is the emplacement of “Global Southerners in the North and Global Northerners in the South.”²⁴² Professor Francis’ argument coheres with sociologist Boaventura de Sousa Santos’s claim that “[i]t is a South that also exists

233. Francis, *supra* note 5, at 696. Deterritorialization has multiple and contested meanings. In the Guattarian and Deleuzian philosophical construction, deterritorialization is “the complex movement or process by which something escapes or departs from a given territory, where territory can be a system of any kind, conceptual, linguistic, social, or affective.” PAUL PATTON, *DELEUZIAN CONCEPTS: PHILOSOPHY, COLONIZATION, POLITICS* 52 (2010). Some scholars are critical of the concept because it renders the Global South as *nowhere* and, by implication, flattens the asymmetrical relations of power and global inequities. Matthew Sparke, *Everywhere but Always Somewhere: Critical Geographies of the Global South*, 1 *THE GLOBAL SOUTH* 117, 119–20 (2007).

234. Rajagopal, *supra* note 195, at 20.

235. *Id.* at 3, 20.

236. *Id.*

237. BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE* 241 (2003).

238. *Id.* at 271.

239. VIJAY PRASHAD, *THE POORER NATIONS: A POSSIBLE HISTORY OF THE GLOBAL SOUTH* 9 (2014).

240. *See* Francis, *supra* note 5, at 697 (explaining that by unmooring Global South from geography-based conceptions, transnational linkages among oppressed become more readily apparent).

241. *Id.*

242. *Id.* at 696–99, 710–11.

in the global North, in the form of excluded, silenced and marginalised populations, such as undocumented immigrants, the unemployed, ethnic or religious minorities, and victims of sexism, homophobia and racism.”²⁴³

Professor Francis further argues that it is the expendability of particular communities of people (mostly Black, Indigenous and People of Color) that defines the Global South.²⁴⁴ The impacts of and responses to Hurricane Katrina in Louisiana and Hurricanes Maria and Irma in Puerto Rico are grim examples of unacceptable responses to extreme weather and climate events that have impacted populations that the United States treats as expendable.²⁴⁵ The frightening possibility of several Pacific islands completely disappearing due to rising sea levels also highlights this notion of expendability.²⁴⁶ The unmooring of the Global South from its geographic strictures is also evident in the Global South’s creation of its own expendable groups. For example, some social justice activists argue that India’s caste system²⁴⁷ prevents Dalits from accessing needed disaster relief,²⁴⁸ and that general development efforts often come at the expense of displacing the poor from ancestral lands.²⁴⁹

The collaboration of over 300 civil society groups in demanding that COP26 deliver on its promise of climate financing²⁵⁰ further illustrates what Professor Francis terms as “transnational subaltern resistance” beyond the North-South divide.²⁵¹ The campaign included international organizations and grassroots movements from developed and developing countries.²⁵² Several Indigenous Peoples’, faith-based, youth, and women’s organizations signed on to the open letter and participated in the #PayUP4lossandDamage campaign.²⁵³ In addition to the demand for adequate climate financing, the coalition sought restructuring of the

243. Boaventura de Sousa Santos, *Public Sphere and Epistemologies of the South*, 37 AFR. DEV. 43, 51 (2012). Santos goes beyond simply deterritorializing the Global South. He considers it “a metaphor of the human suffering caused by capitalism and colonialism at the global level, and a metaphor as well of the resistance to overcome or minimise such suffering.” *Id.*

244. Francis, *supra* note 5, at 699.

245. See ROBERT D. BULLARD & BEVERLY WRIGHT, *THE WRONG COMPLEXION FOR PROTECTION: HOW THE GOVERNMENT RESPONSE TO DISASTER ENDANGERS AFRICAN AMERICAN COMMUNITIES* (2012) (using racial equity and environmental justice lens to analyze history of bias in responding to climate and environmental calamities within the Black community).

246. Francis, *supra* note 5, at 700.

247. See Burra, *supra* note 178, at 122–28 (discussing TWAIL’s analysis on caste-based discrimination).

248. *How India’s Caste System Keeps Dalits from Accessing Disaster Relief*, THE NEW HUMANITARIAN (Nov. 29, 2022), <https://www.thenewhumanitarian.org/news-feature/2022/11/29/India-Dalits-disaster-relief-aid>.

249. See Natarajan, *supra* note 53, at 48–49 (discussing how movements for modernization and mass industrialization in India disproportionately displaces millions of lower-caste individuals).

250. See *An Open Letter to World Leaders: Cop26 Must Deliver on Loss and Damage Finance* (Oct. 26, 2021), CLIMATE NETWORK INT’L, <https://climatenetwork.org/cop26/cop26-must-deliver-on-loss-and-damage-finance/> (listing 302 signatories including organizations and groups from both Global North and South and Indigenous Peoples organizations).

251. Francis, *supra* note 5, at 706.

252. *An Open Letter to World Leaders*, *supra* note 245.

253. *Id.*

UNFCCC process²⁵⁴ that would (a) remove “big polluters” who deliberately undermine real climate action and (b) prioritize the inclusion of all stakeholders, including people with disabilities.²⁵⁵

Several other climate justice alliances seek to bring diverse voices and perspectives together to create pathways for climate action across geographic and economic boundaries. One of these alliances, the Pan-African Climate Justice Alliance is a consortium of over 1,000 organizations from 48 African countries with “a shared vision to advance a people-centered, right-based, just and inclusive approach to address climate and environmental challenges facing humanity and the planet.”²⁵⁶ Broad-based and inclusive climate justice coalitions underscore the need for and power of people-centered climate action.²⁵⁷ Because the most marginalized people bear the brunt of climate change, their voices and perspectives are needed to shape climate policies and initiatives.²⁵⁸ A broad coalition of environmental justice organizations formulated and advocated the Bali Principles of Climate Justice,²⁵⁹ which increased the visibility of climate justice as a human rights concern within international law.²⁶⁰

Using the heuristic of “climate change from the streets,” environmental policy professor Michael Méndez argues that environmental justice advocates can build broad coalitions that bridge the abstract framing of climate change and the communities’ everyday experience.²⁶¹ This people-centered approach interprets climate change through the history of people’s lived experiences and embodied knowledge and advocates climate policies that address social and economic inequities within each community.²⁶² Social movements’ resistance to state practice

254. The UNFCCC secretariat has granted observer status to several organizations, including NGOs. *Observer Organizations*, UNFCCC, <https://unfccc.int/process-and-meetings/parties-non-party-stakeholders/non-party-stakeholders/overview/observer-organizations> (last visited Nov. 19, 2024). However, the states that are party to the convention hold exclusive voting/decision-making power. The United Nations Framework Convention on Climate Change, Conference of the Parties, Rule 7 (July 19, 1996), https://unfccc.int/sites/default/files/resource/02_0.pdf. For a list of the NGOs admitted as non-party stakeholders, see *Admitted NGOs*, UNFCCC, <https://unfccc.int/process/parties-non-party-stakeholders/non-party-stakeholders/admitted-ngos/list-of-admitted-ngos> (last visited Nov. 19, 2023).

255. *An Open Letter to World Leaders*, *supra* note 250.

256. PAN-AFRICAN CLIMATE JUSTICE ALLIANCE, <https://pacja.org/> (last visited Sept. 24, 2023).

257. See MICHAEL MÉNDEZ, CLIMATE CHANGE FROM THE STREETS: HOW CONFLICT AND COLLABORATION STRENGTHEN THE ENVIRONMENTAL JUSTICE MOVEMENT 14–15, 28 (2020) (using multiscale analysis to argue that coalition-building between environmental justice activists is integral to making relevant climate change concerns to local community).

258. James T. Gathii, *Without Centering Race, Identity, and Indigeneity, Climate Responses Miss the Mark*, WILSON CTR. (Sept. 30, 2020), <https://diplomacy21-adelphi.wilsoncenter.org/article/without-centering-race-identity-and-indigeneity-climate-responses-miss-mark>.

259. CORPWATCH, US ET AL., *Bali Principles of Climate Justice* (Aug. 29, 2002), <https://www.ejnet.org/ej/bali.pdf>.

260. Mickelson, *supra* note 210, at 412.

261. MÉNDEZ, *supra* note 257, at 25, 27–29.

262. *Id.* at 25.

and policies centers the needs and interests of everyday people within and across the North-South divide.²⁶³

B. Integrating Indigenous or Fourth World Perspectives

Integrating Indigenous or Fourth World perspectives is another effort by TWAIL scholars to plug TWAIL's theoretical limitations. Professor Gathii deploys the concept of "multidimensionality" in an attempt to correct the failure of TWAIL's failure to engage fully with Indigenous peoples' perspectives.²⁶⁴ He argues that a multidimensional view of TWAIL exposes the privilege of the post-colonial state as politically independent in contrast to the continued deprivation of Indigenous peoples of their land, freedom, and autonomy.²⁶⁵ TWAIL's engagement with Indigenous perspectives requires a recognition of the post-colonial nation-state's complicity in the dispossession of Indigenous sovereignty.²⁶⁶ This recognition means that TWAIL's critique of asymmetrical power relations must turn inward to address disparities between self-determining communities and the post-colonial state.²⁶⁷ As TWAIL scholar Usha Natarajan argues, recognizing the structural violence of the sovereign state system against Indigenous peoples is crucial to decolonizing international law entirely and removing the vestiges of imperialism in the post-colonial state.²⁶⁸

Drawing upon Fourth World perspectives has led some TWAIL scholars to question traditional notions of sovereignty under international law. Professor Michael Fakhri suggests that, unlike conventional conceptions of sovereignty which require delineated spatial boundaries, the Inuit people embrace sovereignty as "transnational solidarity."²⁶⁹ Professor Fakhri bases his conclusion on the Circumpolar Inuit Declaration on Sovereignty in the Arctic (the Inuit Declaration)²⁷⁰—which the Inuit Circumpolar Council formulated in response to the Ilulissat Declaration.²⁷¹ He argues that "sovereignty is pluralist and relational,

263. RAJAGOPAL, *supra* note 237, at 241–43; Gathii, *supra* note 258.

264. James Thuo Gathii, *Writing Race and Identity in a Global Context: What CRT and TWAIL Can Learn from Each Other*, 67 UCLA L. REV. 1610, 1632 (2021).

265. *Id.* at 1636–37.

266. Usha Natarajan, *Decolonization in Third and Fourth Worlds: Synergy, Solidarity, and Sustainability Through International Law*, in *DECOLONIZING LAW INDIGENOUS: THIRD WORLD AND SETTLER PERSPECTIVES* 60, 70, 83 (Sujith Xavier et al. eds., 2021).

267. *Id.* at 67.

268. *Id.* at 61, 67–68.

269. Fakhri, *supra* note 207, at 222–23, 232–38.

270. *Id.* The Inuit Circumpolar Council formulated the document in 2009 to emphasize the unity and sovereignty of the Inuit people across the USA, Canada, Greenland, and Russia. Inuit Circumpolar Council, *A Circumpolar Inuit Declaration on Sovereignty in the Arctic* (April 2009), <https://iccalaska.org/wp-icc/wp-content/uploads/2016/01/Signed-Inuit-Sovereignty-Declaration-11x17.pdf>.

271. Coming out of the 2008 Arctic Ocean Conference held in Ilulissat, Greenland, the five coastal States bordering on the Arctic Ocean—Canada, Denmark, Norway, the Russian Federation, and the United States of America—adopted the Ilulissat Declaration to address the challenges climate change pose for the Arctic region. Ilulissat Declaration, May 28, 2008, <https://arcticportal.org/images/stories/pdf/Ilulissat-declaration.pdf>. They cited their sovereignty

involves the regular negotiation of authority and jurisdiction, and constitutes a complex relationship to land . . . [It is] a historically contingent concept, but in which the understanding of time is inseparable from a physical, cultural, and spiritual experience of space.”²⁷² Professor Fakhri also cautions against uncritical universalizing because the Inuit people ground their sovereignty in an “ethno-nationalist notion of a single people.”²⁷³ Nevertheless, he beckons to other TWAIL scholars to consider the Inuit approach to sovereignty as an anticolonial tactic that “transforms and debilitates imperial power.”²⁷⁴

Professor Amar Bhatia suggests that the customary international law principle of Permanent Sovereignty over Natural Resources (PSNR) is one potential starting place for addressing the nexus between TWAIL and Indigenous peoples’ perspectives.²⁷⁵ Indigenous peoples’ assertion of sovereignty and self-determination includes their right to control their natural resources²⁷⁶ and land.²⁷⁷ Although the newly independent post-colonial states advocated PSNR in order to gain complete territorial sovereignty,²⁷⁸ their state-centric approach initially excluded Indigenous peoples asserting a similar right.²⁷⁹ Indigenous peoples’ resistance and transnational activism for self-determination helped to expand PSNR from a state- to people-centric principle.²⁸⁰ As a result, several domestic and international legal instruments now recognize and affirm Indigenous rights over natural resources.²⁸¹ Legal recognition empowers Indigenous peoples to bring legal claims against states²⁸² and

and sovereign rights over large areas of the Arctic as the basis for their declaration. *Id.* at ¶ 3.

272. Fakhri, *supra* note 207, at 238. The exclusion of the ICC from the Arctic Ocean Conference angered them and prompted them to write their declaration. Fakhri, *supra* note 207, at 236.

273. *Id.* at 223.

274. *Id.*

275. Bhatia, *The South of the North*, *supra* note 206, at 174.

276. See Gerardo J. Munarriz, *Rhetoric and Reality: The World Bank Development Policies, Mining Corporations, and Indigenous Communities in Latin America*, 10 INT’L CMTY. L. REV. 431, 441–42 (2008) (discussing how World Bank policies infringe upon Indigenous people’s right to control over their resources).

277. See Fakhri, *supra* note 207, at 442 (discussing how international law’s denial of sovereignty to Indigenous peoples disallows them from asserting rights to their land and resources); see also Natarajan, *supra* note 266, at 65 (discussing how result of sovereign state system was dispossession of lands from Indigenous peoples).

278. ANGHIE, *supra* note 200, at 211–13.

279. See Alam & Al Faruque, *supra* note 230, at 63–69 (outlining state-focused emergence of PSNR which failed to consider right of peoples over natural resources).

280. *Id.* at 72–77.

281. See Erica-Irene A. Daes (Special Rapporteur on Sub-Commission on the Promotion and Protection of Human Rights), *Rep. on Indigenous Peoples’ Permanent Sovereignty over Natural Resources*, E/CN.4/Sub.2/2004/30/Add.1 (July 12, 2004) (listing examples of domestic and legal instruments granting PSNR rights to Indigenous peoples).

282. *E.g.*, *The Mayagna (Sumo) Community of Awás Tingni v. Nicaragua*, Inter-Am. Ct. H.R., (ser. C) No. 79 (Aug. 31, 2001) (ruling against Nicaragua for failing to demarcate Indigenous ancestral lands and protect Tingni Community’s or other Indigenous communities’ property rights when it granted logging concession to Indigenous land without their consent). For a recent example of domestic case law, see *Jalacte Village v. Att’y Gen.*, Claim No. 190, S.C. Belize (June 2021), <https://www.belizejudiciary.org/wp-content/uploads/2021/06/Supreme-Court-Claim-No-190-of->

corporations²⁸³ for failing to consult them or “obtain their free, prior informed consent”²⁸⁴ before undertaking projects that affect Indigenous land and natural resources.

Indigenous communities have been organizing around the PSNR principle to address climate change, further expanding the doctrine’s interpretation and applicability.²⁸⁵ They claim that the environmental damage associated with climate change impacts their sovereignty over ancestral land by interfering with their ability to remain on those lands, preserve traditional knowledge, and utilize natural resources.²⁸⁶ While Indigenous communities have yet to successfully litigate cases for harms directly related to climate change,²⁸⁷ they have been able to exercise some

2016-Jose-Ical-and-Estevan-Caal-v-The-AG-and-Minister-of-Agriculture.pdf (declaring that government unconstitutionally deprived community of their ancestral land when it widened the highway, ordering government to return vacant possession of lands, and awarding damages in amount of USD \$6.3 million).

283. *E.g.*, *Indigenous Group Sues Exxon, Energy Majors Over Fracking Waste Contamination in Patagonia*, ECOWATCH (Dec. 18, 2018), <https://www.ecowatch.com/argentina-fracking-indigenous-lawsuit-2623742584.html> (covering Mapuche Confederation of Neuquén’s lawsuit against Total, Exxon, Pan American Energy, Pampa Energia, and the Argentinian government for dumping toxic waste in Patagonia).

284. The Declaration on the Rights of Indigenous Peoples places a legal obligation on parties to engage in good-faith consultation with Indigenous people before interfering with their property rights especially when it involves relocation or removal from ancestral land. United Nations Declaration on the Rights of Indigenous Peoples, art. 10, 19, 29, ¶ 1, A/RES/61/295, (Sept. 13, 2007).

285. *See, e.g., Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of The United States*, INUIT CIRCUMPOLAR (Dec. 7, 2005), <https://www.inuitcircumpolar.com/press-releases/inuit-petition-inter-american-commission-on-human-rights-to-oppose-climate-change-caused-by-the-united-states-of-america/> (accessed Jan. 6, 2023) (asserting claims under international and domestic law for acts and omissions related to climate change) [hereinafter *ICC IACHR Petition*]; *Ecuador: Indigenous Waorani Sue Oil Company for Contributing to Climate Change & Harming The Health Of Indigenous Peoples*, BUS. & HUM. RTS. RES. CTR. (Dec. 10, 2020), <https://www.business-humanrights.org/en/latest-news/148ljazee-indigenous-waorani-sue-fossil-fuel-company-for-contributing-to-climate-change-harming-the-health-of-indigenous-peoples/> (reporting on Waorani’s claim that PetroOriental SA—a subsidiary of Chinese transnational companies China National Petroleum Corporation and China Petrochemical Corporation—contributes to climate change, which causes damage to environment and impacts their right to life).

286. *ICC IACHR Petition*, *supra* note 285.

287. *See* Pedro Cisterna-Gaete and Maria Antonia Tigre, *Inter-American Commission on Human Rights’ First Resolution on the Climate Emergency: Implications for Climate Litigation*, COLUM. CLIMATE SCH. SABIN CTR. CLIMATE CHANGE L. (April 11, 2022), <https://blogs.law.columbia.edu/climatechange/2022/04/11/guest-commentary-inter-american-commission-on-human-rights-first-resolution-on-the-climate-emergency-implications-for-climate-litigation/> (noting that climate litigation in the Americas has been going on for two decades with first major case dismissed, but joint resolution between Inter-American Commission on Human Rights (IACHR) and the Office of the Special Rapporteur on Economic, Social, Cultural and Environmental Rights may impact future climate litigation). Several cases are pending before domestic courts and could possibly result in Indigenous communities’ success against governments for climate-related impacts. The Wayúu Indigenous (petitioner) community’s lawsuit against the Colombian government over the granting of a mining license is pending. The core issue is

control over the location of carbon sinks (atmospheric carbon-absorbing sites).²⁸⁸ Because tropical rainforests are among the most vital carbon sinks,²⁸⁹ Indigenous communities have been able to assert PSNR rights to prevent governments from unilaterally designating their land as part of Deforestation and Forest Degradation (REDD+) programs²⁹⁰ or engaging in deforestation.²⁹¹ Indigenous communities' assertion of PSNR in their climate justice activism is an attempt to push back against climate colonialism.²⁹²

In sum, TWAIL scholars recognize the need to expand TWAIL's theoretical and methodological framework to address climate justice effectively. Several scholars are filling TWAIL's epistemic gaps by adopting people-centered theories, including social movement theory and Indigenous perspectives. Ultimately, these approaches move beyond TWAIL's longstanding commitment to analyzing power relations from the Global North-South state-centric standpoint.²⁹³ TWAIL's increasing embrace of people-centric theorizing needs to extend to the ongoing discussions of climate reparations.

VII. TOWARD A PEOPLE-CENTERED MODEL OF CLIMATE REPARATIONS

This final section draws upon the earlier discussion to show why climate justice activists, political leaders, and scholars should consider a people-centered approach to climate reparations. A people-centered model of climate reparations attempts to move the debate from a strictly North-South discourse that takes for granted the suitability of nation-states as the recipients of climate reparations. The purpose of this section is not to propose applicable laws or legal forums to seek climate reparations but to provide a theoretical intervention that challenges scholars, activists, and political leaders to think about climate reparations beyond a strict

“[w]hether the environmental license of Cerrejón Zona Norte Coal Mining Project violates environmental provisions and human rights to FPIC, health and a healthy environment due to its effects on climate change and GHG emissions.” *Wayúu Indigenous Community and Others v. Ministry of Environment and Others*, CLIMATE CHANGE LITIG. DATABASE, <http://climatecasechart.com/non-us-case/wayuu-indigenous-community-and-others-v-ministry-of-environment-and-others/> (last visited Sept. 24, 2023).

288. Julia Dehm, *Carbon Colonialism or Climate Justice? Interrogating the International Climate Regime from a TWAIL Perspective*, 33 WINDSOR Y.B. ACCESS JUST. 129, 134–36 (2016).

289. See Nancy Harris and David Gibbs, *Forests Absorb Twice as Much Carbon as They Emit Each Year*, WORLD RES. INST. (Jan. 21, 2021), <https://www.wri.org/insights/forests-absorb-twice-much-carbon-they-emit-each-year> (noting that between 2001 and 2019, forests absorb 7.6 billion metric tonnes of CO₂ per year, an amount nearly twice as large as the United States annual carbon emissions).

290. Dehm, *supra* note 288, at 152–55; Ayelet Banai, *Sovereignty Over Natural Resources and Its Implications for Climate Justice*, 7 WIRES CLIMATE CHANGE 238, 244 (2016).

291. E.g., *Indigenous Lands Block Deforestation in Brazil, New Study Finds*, ALJAZEERA (April 19, 2022), <https://www.aljazeera.com/news/2022/4/19/indigenous-lands-block-deforestation-in-brazil-new-study-finds>.

292. Heidi Bachram, *Climate Fraud and Carbon Colonialism: The New Trade in Greenhouse Gases*, 15 CAPITALISM NATURE SOCIALISM 7 (2004).

293. See Larissa Ramina, *TWAIL – “Third World Approaches to International Law” and Human Rights: Some Considerations*, 5 J. CONST. RSCH. 261, 263 (2017) (summarizing emergence of people-centric perspectives in TWAIL II scholarship).

North-South framework.

A. Principles of People-Centered Climate Reparations

People-centered paradigms are not entirely new to international law.²⁹⁴ However, international law's preoccupation with relations between nation-states often overshadows any focus on individuals as subjects of international law.²⁹⁵ The rise of international human rights law in the post-World War II period has helped to reposition the individual as a subject of international law and legitimized the use of people-centered approaches.²⁹⁶ The people-centered paradigms that have emerged from international human rights, humanitarian, and development law emphasize the human person as "the central subject of development and should be the active participant and beneficiary of the right to development."²⁹⁷ The people-centered approach tries to achieve equity and inclusiveness by focusing on the needs and rights of the most vulnerable individuals²⁹⁸ and communities by tailoring plans, policies, and programs to fit their local contexts.²⁹⁹ Ultimately, a people-centered paradigm is a perspectival shift from the normative international law structure in which the nation-state is the primary subject and decisionmaker. This ideological shift means prioritizing "the well-being of human beings over the convenience of

294. See Jörg Fisch, *Peoples and Nations*, in THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 27, 28–30 (Bardo Fassbender & Anne Peters eds., 2012) (using etymology of terms denoting concept of international law to argue that during classical Greek period, international law's focus was on relations between people and groups of people).

295. See Claudio Grossman & Daniel D. Bradlow, *Are We Being Propelled Towards a People Centered Transnational Legal Order?*, 9 AM. U.J. INT'L L. & POL'Y 1, 1–2 (1993) (noting international law/domestic law dichotomy, which treat concerns related to people and entities other than state as domestic law concerns).

296. See Fisch, *supra* note 294, at 46–47 (discussing development of human rights in context of decolonization and noting that concepts such as self-determination and sovereignty articulated in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights and of the International Covenant on Economic, Social, and Cultural Rights focused on individuals and not just states); Rashwet Shrinkhal, *Evolution of Indigenous Rights Under International Law: Analysis from TWAIL Perspective*, 19 ORIENTAL ANTHRO. 7, 16 (2019) (noting that U.N. Charter was earliest universal treaty to affirm people's human rights, self-determination, and freedom).

297. G.A. Res. 41/128, art. 2 [hereinafter Declaration on the Right to Development]; *e.g.*, al Attar and Miller, *supra* note 196, at 353–59 (using TWAIL analysis of ALBA movement to demonstrate people-based approach to international law); Alexander Gilder, *Human Security, TWAIL, and the Importance of Self-Reflection in Our Own Scholarship*, 54 N.Y.U. J. INT'L L. & POL. 1, 9 (2021) (describing how human security can empower individuals and communities).

298. See *OECD Criteria for People-Centered Design and Delivery of Legal and Justice Services*, OECD, <https://www.oecd.org/governance/global-roundtables-access-to-justice/oecd-criteria-for-people-centred-design-and-delivery-of-legal-and-justice-services.pdf> (last visited Sept. 24, 2023) (describing equity and inclusion as important values in designing people-centered models for legal services).

299. See, *e.g.*, Helen Mountford et al., Commentary, *Putting People at the Center of Climate Action*, WORLD RES. INST., at 13 (Dec. 2019), https://wriorg.s3.amazonaws.com/s3fs-public/wri-commentary-putting-people-center-climate-action_0.pdf (discussing localization of climate adaption policies by allowing vulnerable populations to participate in planning and designing of those policies).

the state.”³⁰⁰

Accordingly, a people-centered model of climate reparations recognizes that climate change has disparate impacts on particular people and communities and, as such, requires compensation and climate action tailored to the specific needs of those communities.³⁰¹ Rather than a global outlook on how climate change impacts nation-states, the people-centered approach focuses on climate change’s effects on the most vulnerable populations regardless of geopolitical divisions.³⁰² Because modern-day climate vulnerability is partly a consequence of the historical oppression of Black and Indigenous communities,³⁰³ people-centered reparations requires that compensation for climate-related harms also accounts for those historical harms.³⁰⁴ The people-centered model of climate reparations requires cessation of and compensation for the ongoing oppression and violence the state perpetrates against marginalized peoples.³⁰⁵ The experience of Indigenous peoples in the United States makes evident that continuous political dispossession impedes the ability to make meaningful changes to reduce the impact of climate change.³⁰⁶

Analyzing climate reparations from a people-centered perspective changes the dominant discourse on climate reparations from the view that the Global North should pay countries in the Global South. Racial capitalism’s impact on climate change has produced winners and losers across and in between the North-South divide.³⁰⁷ Climate change victims can be found even within wealthy and high carbon-emitting countries in the Global North.³⁰⁸ The transnational effect of racial capitalism means that countries like the United States and Australia should make reparations to marginalized and climate-vulnerable communities within their borders. It also means that developing countries like China and Brazil should not avoid making climate reparations to people within their borders even as those

300. Shrinkhal, *supra* note 296, at 16.

301. See Human Rights Council Res. 10/4 at 1 (Mar. 25, 2009) (noting direct and indirect effects of climate change on human rights and recognizing that most vulnerable parts of population will feel effects of climate change most acutely). Although the resolution was adopted without a vote, its human rights framing of climate change suggests that solutions too must be people focused.

302. *Id.*

303. See *supra* Part II.B for a discussion on racial capitalism, colonialization, and climate change.

304. See, e.g., Keston Perry, *Realising Climate Reparations: Towards a Global Climate Stabilization Fund and Resilience Fund Programme for Loss and Damage in Marginalised and Former Colonised Societies* 4–6 (SSRN PAPER Mar. 1, 2020), <http://dx.doi.org/10.2139/ssrn.3561121> (expounding TWAIL position on climate reparations as system of compensation that ought to account for historical atrocities such as slavery, colonization, and other forms of overexploitation).

305. See Phillips, *supra* note 172, at 322 (highlighting Indigenous people’s continued oppression).

306. See Tsosie, *supra* note 232, at 1647, 1663–64 (noting Indigenous peoples in United States must operate within U.S. policy framework on climate change because they lack standing to join or reject international conventions dealing with this issue).

307. See *supra* Part II.A for an introduction to the concept of Third World Approaches to International Law.

308. See Francis, *supra* note 5, at 698 (analyzing idea of climate expendability across geographic divides).

countries press their climate reparations claim against the “North.”³⁰⁹ The people-centered model would have a broader reach than the state-centric model because it demands climate accountability for all oppressed and vulnerable people regardless of where they live.³¹⁰

The people-centered model would require that climate reparations negotiators consider the historical, per capita, and annual GHG emissions levels for the major emitters when determining the form and extent of climate reparations.³¹¹ These climate reparatory demands would also take into account the nature and severity of the climate-related harm and the value of loss within individual communities. While calculations would be time-consuming, they are not impossible. For example, several national actuarial associations developed the Actuaries Climate Risk Index in 2016, which models and calculates the relationship between climate change-related events and damages.³¹² Similarly, several analytic tools are available to compute the carbon footprint of businesses and households.³¹³ Data from these analytical tools supplement the global findings of the IPCC and can make it easier for climate reparations negotiators to estimate the amount of compensation owed to each climate-vulnerable community, especially Indigenous communities.³¹⁴

The demand for climate reparations also extends to holding multinational corporations—especially those in the fossil fuel industry—responsible for their outsized role in creating the climate crisis.³¹⁵ Although multinational corporations

309. See Volcovici & Lewis, *supra* note 225 (citing Prime Minister of Antigua and Barbuda who said that highly polluting emerging economies ought to pay into climate compensation fund despite not being the major polluters).

310. See, e.g., Susan K. Serrano & Ian Falefuafua Tapu, *Reparative Justice in the U.S. Territories: Reckoning with America's Colonial Climate Crisis*, 110 CAL. L. REV. 1281 (2022) (outlining applicability of climate reparative framework to United States' ongoing “colonization” of U.S. territories).

311. Currently, leaders and activists in developing countries primarily base their demand for reparations on historical carbon emissions. However, this approach puts selective Global North countries on the hook for making reparations. A people-centered approach could make countries in the Global South liable as well. See generally Anita Bhadani, *A Guide to Climate Reparations*, YES! MAGAZINE (Nov. 29, 2021), <https://www.yesmagazine.org/environment/2021/11/29/climate-reparations>.

312. See generally STEVE JACKSON ET AL., ACTUARIES CLIMATE RISK INDEX: PRELIMINARY FINDINGS 12–16, (Jan. 2020), <https://www.actuary.org/sites/default/files/2020-01/ACRI.pdf>.

313. See, e.g., *New Carbon Footprint Calculator to Support Climate Action*, UNCC (Oct. 8, 2020), <https://unfccc.int/news/new-carbon-footprint-calculator-to-support-climate-action> (describing “2030 Calculator” that allows consumers, manufacturers, and brands to visualize climate repercussions of their consumption).

314. *Id.*

315. E.g., Olufémi O. Táiwò & Beba Cibralic, *The Case for Climate Reparations*, FOREIGN POL'Y (Oct. 10, 2020, 6:00 AM), <https://foreignpolicy.com/2020/10/10/case-for-climate-reparations-crisis-migration-refugees-inequality/?fbclid=IwAR3IIqVOabddgq8dlds6EHu3oVMJfi96aNB8BCGs1x58WtPR3L8N2c81TM> (discussing role of multinational corporations in creating climate crisis and need for them to make reparations); Prakash Upadhyay, *Climate Change as Ecological Colonialism: Dilemma of Innocent Victims*, 7 HIMALAYAN J. SOCIO. & ANTHRO. 111, 127 (2016) (arguing that solutions to climate change will not flow from corporations); Mark Hertsgaard, *Fossil Fuel Companies Owe Reparations to Countries They Are Destroying*, THE GUARDIAN (Nov. 12, 2021, 6:00 AM),

can be state-owned, state-affiliated, or state-approved entities, they have distinct legal personalities.³¹⁶ They are separate culpable actors and not lumped as part of the Global North.³¹⁷ Singling out multinational corporations helps to determine their carbon footprint and the impact of their carbon-generating activities on already marginalized communities.³¹⁸ For example, the mining activities of gas and oil companies threaten the lives and culture of Indigenous communities in North America.³¹⁹ The widespread environmental destruction associated with the mining activities of gas and oil companies further compounds the climate risk that they face.³²⁰ From a people-centered perspective, climate reparations would include holding accountable the gas and oil companies whose environmentally destructive operations expose the local community to uneven climate risk.³²¹ It also entails accountability from the governments that allowed these corporations to destroy the environment and jeopardize people's lives.

Additionally, the framing of the reparations discourse must incorporate the voices, values, and visions of the marginalized people who are most acutely impacted by climate change.³²² People-centered reparations is about giving the people and communities most affected by climate change the autonomy to determine the most appropriate action based on how they are experiencing the climate crisis in their local context.³²³ The form that climate reparations take must be tailored to effectively meet the needs of vulnerable communities and reflect the specific demands of those experiencing climate change-related harms.³²⁴ The current

<https://www.theguardian.com/environment/2021/nov/12/climate-crimes-environment-fossil-fuels-cop26> (observing that companies who are most responsible for climate change did not participate in COP26 climate conference); Elliot Hyman, *Who's Really Responsible for Climate Change?* HARV. POL'Y REV. (Jan. 2, 2020), <https://harvardpolitics.com/climate-change-responsibility> (describing manipulation of narrative about climate and ideas to make industry accountable).

316. See generally KEVIN CROW, INTERNATIONAL CORPORATE PERSONHOOD BUSINESS & THE BODYLESS IN INTERNATIONAL LAW (2021).

317. See Hertsgaard, *supra* note 315 (calling for fossil fuel companies to pay loss and damage reparations).

318. See, e.g., Chris J. Cuomo, *Climate Change, Vulnerability, and Responsibility*, 26 HYPATIA 690, 705–06 (2011) (advocating highlighting role of corporations over individuals in climate change).

319. E.g., Nicholas Kusnetz, *Indigenous Groups Say Big Oil's Pollution Threatens Their Existence in Canadian Forest*, NBC NEWS (Nov. 21, 2021), <https://www.nbcnews.com/news/world/indigenous-groups-say-big-oils-pollution-threatens-existence-canadian-rcna5946>.

320. See *id.* (describing effects of companies' tar sands extraction on Indigenous peoples in Canada).

321. See Gonzalez, *supra* note 23, at 177 (underscoring importance of holding transnational corporations accountable for environmental harm).

322. See Upadhyay, *supra* note 315, at 127–29 (arguing that local perspectives are necessary for addressing climate change successfully).

323. See MÉNDEZ, *supra* note 257, at 25, 27–29 (suggesting analysis of aftermath of climate change through history or culture rather than raw data, and partnering with local communities).

324. See Helen Biangalen-Magata, *Impacts of Climate Change: What Will Compensation for Loss and Damage Mean for Indigenous Peoples?*, INT'L WORK GRP. FOR INDIGENOUS AFF. (Nov. 17, 2022), <https://www.iwgia.org/en/news/4958-impacts-of-climate-change-what-will-compensation-for-loss-and-damage-mean-for-indigenous-peoples.html> (discussing some of

framing of climate finance does not necessarily address the people-specific issues of local communities impacted by climate change because the focus is on adaptation, mitigation, and possibly compensation for economic loss due to climate-related events.³²⁵

However, climate-vulnerable communities demand more than loss and damage compensation.³²⁶ They want to see structural changes that would correct the power imbalance between oppressed communities and governments as well as between wealthier and poorer countries.³²⁷ For example, Indigenous climate activists demand that climate reparations include “demilitarization” and “corporations [balancing] power back into the fold of Indigenous mothers and Indigenous peoples.”³²⁸ Their specific vision of climate reparations is for the military-industrial complex to be accountable for the violence perpetrated against Indigenous peoples and for their enormous carbon emissions.³²⁹ These activists also demand the return of their land.³³⁰

B. Illustrating People-Centered Reparations

This Section offers two short case studies to illustrate people-centered reparations. The first case study involves Indigenous communities located in a developing country as the recipient of climate reparations. The payor is a former colonizer and major GHG emitter. The second case study involves an Indigenous community seeking climate reparations from the government that controls where they live. The hypotheticals help to illustrate the idea of vertical and diagonal flows of reparations. Diagonal flow of reparations requires foreign governments or corporations to compensate impacted communities and people for climate change-related harms. Vertical flow of reparations is the compensation from the government to the people most vulnerable to the impacts of climate change or who experience its effects most adversely. The dominant understanding of climate reparations has been the horizontal (state-state) transactional model.³³¹ Using the terms vertical and

reparatory justice demands of Indigenous peoples, such as giving them a seat at the table and control over loss and damage funding, rebalancing human relationship with Mother Nature, and ending criminalization of their right to oppose environmental destruction at hands of extractive industry).

325. See *supra* Part III.B for a description of the limitations of climate finance under the current UNFCCC scheme.

326. See Biangalen-Magata, *supra* note 324 (discussing right of Indigenous Peoples to self-determined development).

327. *Id.*

328. Pangaanga Laura Ikaanuq Pangawyi, *Demilitarization Is Climate Justice*, NATIVE MOVEMENT (Nov. 30, 2022), <https://www.nativemovement.org/nm-blog/2022/11/30/demilitarization-is-climate-justice>.

329. *Id.*

330. *Id.*

331. See, e.g., Richard A. Epstein, *The Upside-Down Logic of Climate Reparations* (Nov. 29, 2022) <https://www.hoover.org/research/upside-down-logic-climate-reparations> (demonstrating state-centric view of climate reparations although critical of logic behind climate reparations); Anoma & Kumar, *supra* note 170, at A-31 (reflecting state-centric view by proposing compensation regime for Vanuatu to recover damages for Cyclone Pam under the general law of State Responsibility); Andrew L. Fanning & Jason Hickel, *Compensation for Atmospheric*

diagonal flow of reparations challenges that state-centric view and offers more nuanced possibilities of how to demand and implement climate reparations.

1. Diagonal Flow of Climate Reparations: From the Netherlands to Indigenous Communities in Suriname

The first case study illustrates a people-centered reparatory demand, which requires the diagonal flow of climate reparations from the Netherlands to Amerindian communities in Suriname. Suriname has a long history of enslavement and colonization.³³² It was a Dutch colony from 1667 until it gained independence in 1975.³³³ During the Transatlantic slave trade, the Dutch enslaved approximately 300,000 Africans, making Suriname a plantation colony.³³⁴ They also wiped out most of the Indigenous population, and those who survived had to take refuge in the savannahs, rainforests, and mountains.³³⁵

Today, Suriname is home to approximately 20,000 Indigenous peoples, making up 3.8% of the total population.³³⁶ However, their condition remains precarious. The post-colonial government has failed to recognize Indigenous rights.³³⁷ The Indigenous peoples do not have land rights,³³⁸ despite the Inter-American Court of Human Rights (IACtHR) ruling in favor of Indigenous sovereignty and communal property rights.³³⁹ In 2007, eight Indigenous communities sued the nation of Suriname for denying them collective property and political rights guaranteed to

Appropriation, NATURE SUSTAINABILITY, June 5, 2023, at 1077, 1082–84 (focusing exclusively on countries as climate reparations payors and payees); *Global South: No Climate Justice Without Climate Reparations*, CLIMATEACTION.AFRICA (Nov. 17, 2022), <https://climateaction.africa/global-south-justice-climate-reparations> (presenting climate reparations as payment from Global North to Global South as way to deal with debt in Global South countries). See also Burkett, *supra* note 5, at 526–31 (describing high emitting countries as those who should pay reparations and climate vulnerable countries as those to whom reparations should be paid).

332. See R.A.J. LIER, FRONTIER SOCIETY A SOCIAL ANALYSIS OF THE HISTORY OF SURINAM (Maria J.L. Yperen trans., Van Loghum Slaterus 2nd ed. 1971) (1949) for a socio-historical account of Dutch colonialism in Suriname.

333. ROGER JANSSEN, IN SEARCH OF A PATH: AN ANALYSIS OF THE FOREIGN POLICY OF SURINAME FROM 1975 TO 1991 24 (2011).

334. *Id.* at 5.

335. See generally ELLEN-ROSE KAMBEL & FERGUS MACKAY, THE RIGHTS OF INDIGENOUS PEOPLES AND MAROONS IN SURINAME 16 (Int'l Work Group for Indigenous Aff. Document No. 96, 1999).

336. THE INDIGENOUS WORLD 2022 at 478 (Dwayne Mamo ed., 2022).

337. MULOKOT FOUND. ET AL., OBSERVATIONS ON THE STATE OF INDIGENOUS HUMAN RIGHTS IN SURINAME 2 (Mar. 2021), https://www.culturalsurvival.org/sites/default/files/UPR%20Suriname%202021_%20CS%20-MF-VIDS%20%281%29.pdf.

338. THE INDIGENOUS WORLD 2022, *supra* note 336, at 479–80 (noting that government operates leasehold agreement with various Indigenous groups but also considering land conversion legislation that would give property titles to leaseholders).

339. MULOKOT FOUND. ET AL., *supra* note 337, at 2 (highlighting Suriname's failure to comply with IACtHR's decisions in *Moiwana Community* (2005), *Saramaka People v. Suriname* (2007), and *Kaliña and Lokono Peoples v. Suriname* (2015)).

them under the American Convention on Human Rights.³⁴⁰ The IACtHR ruled that Suriname's laws do not regard Indigenous peoples as having legal personality and claim to hold communal property title.³⁴¹ The court held that Suriname's action violated the Indigenous peoples' human rights and that the state should make reparations.³⁴² Yet Suriname continues to deny Indigenous peoples their right to land.³⁴³ Instead, the state has allowed their communities to become mining sites for extractive industries (including bauxite and gold), which results in these communities suffering disproportionately from mercury pollution of the land and rivers due to gold mining and deforestation.³⁴⁴

Suriname is a carbon-negative country since its current GHG emissions are lower than the amount absorbed by its rainforests.³⁴⁵ Its annual CO₂ emissions level in 2021 was 2.79 million tons compared to the Netherlands' 141.05 million tons.³⁴⁶ Suriname's total GHG emission is among the lowest in the world because of the massive amount of CO₂ its rainforests absorb.³⁴⁷ The Netherlands' cumulative emissions since 1846 amount to 11.4 billion tons.³⁴⁸ In contrast, Suriname has emitted only 117.28 *million* tons in the same period.³⁴⁹ Most of Suriname's emissions come from oil production, which started in the 1980s.³⁵⁰

Notwithstanding its carbon-negative designation, Suriname faces significant climate risks. The Inter-American Development Bank reports that Suriname is "particularly vulnerable to the effects of climate change [because] it . . . has forests liable to decay, fragile ecosystems, and its low-lying coastal area accounts for 87% of the population and most of the country's economic activity."³⁵¹ The report predicts increased average temperatures, a gradual rise in sea level, droughts, and decreased rainfall and agricultural output in the near future.³⁵² But Suriname has

340. Fergus MacKay, *The Case of the Kaliña and Lokono Peoples v. Suriname and the UN Declaration on the Rights of Indigenous Peoples: Convergence, Divergence and Mutual Reinforcement*, ERASMUS L. REV. 31, 31 (2018).

341. *Id.*

342. *Id.* at 31–32.

343. MULOKOT FOUND. ET AL., *supra* note 337, at 2.

344. *Id.* at 3, 6–7.

345. See *Suriname Gives 'Hope and Inspiration to the World to Save Our Rainforests': UN Chief*, UNITED NATIONS (July 2, 2022), <https://news.un.org/en/story/2022/07/1121892> (discussing preservation of rainforests that cover over 90% of Suriname's land).

346. Hannah Ritchie & Max Roser, *Suriname: CO₂ Country Profile*, OUR WORLD IN DATA, <https://ourworldindata.org/co2/country/suriname?country=SUR~NLD> (last visited Nov. 17, 2023).

347. *Suriname Gives 'Hope and Inspiration to the World to Save Our Rainforests': UN Chief*, *supra* note 345.

348. Ritchie & Roser, *supra* note 346.

349. *Id.*

350. See STAATSOLIE, *Our History*, <https://www.staatsolie.com/en/about-us/history/> (last visited Oct. 14, 2023) (presenting timeline of oil production in Suriname).

351. KEPA SOLAUN ET AL., STATE OF THE CLIMATE REPORT: SURINAME, INTER-AMERICAN DEV. BANK, TECHNICAL NOTE NO. 02204, xxi (July 2021), <https://publications.iadb.org/publications/english/viewer/State-of-the-Climates-Report-Suriname.pdf>.

352. *Id.* at 208–10.

already been experiencing extreme weather events.³⁵³ In 2022, the country suffered from unprecedented rainfall, which caused significant flooding, displacement, and loss of food supplies for nearly 3,000 households.³⁵⁴ This flood is part of the larger pattern of changing climate conditions that is likely exacerbated by anthropogenic activities.³⁵⁵ Reports indicate extreme weather events disproportionately impact Indigenous communities in Suriname.³⁵⁶

Suriname's Indigenous communities have a claim against the Netherlands for their historical GHG emissions and colonial activities, which contributed significantly to the communities' vulnerability to climate change. The Indigenous communities' lack of sovereignty and property rights is a part of the colonial structure that carried over into the post-independence period.³⁵⁷ The Dutch colonial government issued special leaseholds throughout the mid-nineteenth to early twentieth centuries for various companies to mine gold and bauxite, and fell timber on lands where Indigenous peoples lived.³⁵⁸ The disenfranchisement of Indigenous peoples in Suriname has impeded their ability to resist environmentally destructive commercial activities that increase their risk of experiencing climate-related harm.³⁵⁹

Specific demands from the Dutch government could include compensation for harm the communities experienced (e.g., displacement, disruption in productive use of land, and destruction of Indigenous flora and fauna), funding for climate adaptation, and financing and legal support for international Indigenous rights

353. See e.g., *Suriname Gives 'Hope and Inspiration to the World to Save Our Rainforests': UN Chief*, *supra* note 345 (discussing recent climate change induced heavy rainfall, flooding and coastal erosion in Suriname); AGENCE FRANCE-PRESSE, *Dozens of Suriname Villages Await Aid Following Unprecedented Floods*, FRANCE 24 (June 24, 2022), <https://www.france24.com/en/live-news/20220624-dozens-of-suriname-villages-await-aid-following-unprecedented-floods-1> (detailing unprecedented climate change-induced flooding, substantial crop loss, and residents' calls for international aid funds to adapt to changing environment).

354. *Suriname Experiences Flooding in Several Inland Villages*, LOOP NEWS (Mar. 14, 2022, 5:51 PM), <https://caribbean.loopnews.com/content/suriname-experiences-flooding-several-inland-villages>; *Relief Efforts in Suriname: "The Main Supply of Food Has Gone,"* MISSION AVIATION FELLOWSHIP (July 12, 2022), <https://reliefweb.int/report/suriname/relief-efforts-suriname-main-supply-food-has-gone>.

355. See KEPA SOLAUN ET AL., *supra* note 351, at 37–56 (providing data on changing climate patterns in Suriname).

356. See *Suriname Experiences Flooding in Several Inland Villages*, *supra* note 354 (detailing flooding that affected interior Suriname communities where most of Indigenous population live).

357. See KAMBEL & MACKAY, *supra* note 335, at 87 (noting that in spite of changes in Surinamese law, private rights to land still stem from 17th century domain principle).

358. See *id.* at 83, 100–06 (highlighting that Dutch government would routinely add clauses to leases that required companies to respect rights of Indigenous peoples and Maroons to settle and farm the land). The extent to which these rights were respected seems questionable given the hazardous impact of the mining activities on water supply and arable lands. See MULOKOT FOUND. ET AL., *supra* note 337, at 6–9.

359. See VIDS, BASELINE REPORT OF THE SITUATION OF INDIGENOUS PEOPLES IN SURINAME 2020 at 24 (May 2020), https://www.forestpeoples.org/sites/default/files/documents/BaselineReport_ENG_final_10May2021.pdf (discussing increased climate risks facing Indigenous communities due to climate change and activities of multinational corporations on or near Indigenous lands).

advocacy.³⁶⁰ These reparatory demands extend to multinational corporations that have operated in Suriname under the auspices of the colonial and post-colonial governments. The Netherlands could make direct payments to the Surinamese government on behalf of Indigenous communities. Alternatively, the Dutch government could make funds available to individual Indigenous communities or the Association of Indigenous Village Leaders in Suriname. Although a state-state transaction is easier, engaging with climate victims at the grassroots level will ensure that these individuals and communities are empowered to build climate resilience and influence future climate action. The Netherlands has finally acknowledged and apologized for its colonial violence and role in the Transatlantic slave trade.³⁶¹ While acknowledgment and apology are not enough,³⁶² they provide an essential launching pad for climate-vulnerable people in Suriname to press the Dutch government for full compensation by tying climate change to the history of colonial and racialized oppression.

2. Vertical Flow of Climate Reparations: From the United States to Indigenous Communities

The second case study illustrates the vertical flow of reparations—payment from a high-emitting state, the United States, to climate-vulnerable communities living within that country. A people-centered reparations claim in the United States would need to focus on payments for the disparate impact that climate-related disasters have on already dispossessed and climate-vulnerable communities, the government's failure to respond equitably when disasters happen, and the continued high levels of GHG emissions that are very likely to result in the loss of livable spaces for Indigenous peoples.³⁶³ The climate reparations claim is substantially tied to the history of colonization, enslavement, and racialized violence against Indigenous and Black people in the United States.³⁶⁴ This history of oppression along with the continued marginalization and resulting social inequities amplify the

360. VIDS Suriname (Vereniging van Inheemse Dorpshoofden), a collective of Indigenous village leaders in Suriname, root their activism in the belief that Indigenous rights, sustainable development, and environmental protection in Suriname are interrelated. *Association of Indigenous Village Leaders in Suriname (VIDS) - Vereniging van Inheemse Dorpshoofden in Suriname*, FOREST PEOPLES PROGRAMME, <https://www.forestpeoples.org/en/node/50052> (last visited Oct. 14, 2023).

361. See Mark Rutte, Prime Minister of the Neth., *Speech by Prime Minister Mark Rutte About the Role of The Netherlands in the History of Slavery* (Dec. 19, 2022), <https://www.government.nl/documents/speeches/2022/12/19/speech-by-prime-minister-mark-rutte-about-the-role-of-the-netherlands-in-the-history-of-slavery> (describing scale and taking responsibility for role of Dutch State in Transatlantic slave trade).

362. *Statement from Professor Sir Hilary Beckles: Caribbean Response to The Netherlands Apology for Slavery*, CARIBBEAN REPARATIONS COMM'N (Dec. 23, 2022), <https://reparationscomm.org/reparations-news/caribbean-response-to-the-netherlands-apology-for-slavery/> (noting inadequacy of apology and need for financial compensation).

363. See Táiwò & Cibralic, *supra* note 315 (outlining climate reparations framework).

364. See Perry, *supra* note 304, at 4–8 (discussing need for climate reparations to account for disproportionate climate impacts on Indigenous and Black communities in the formally colonized world).

impact of climate change on these communities.³⁶⁵

For Indigenous communities in the United States, increased climate vulnerability is intricately linked to historical land loss and forced migration.³⁶⁶ Federal policies forced Indigenous communities into areas where they are more exposed to the adverse effects of climate change, further risking the loss of native sovereignty and culture.³⁶⁷ Tribal lands experience more excessive heat and reduced rainfall, forcing Indigenous peoples to leave their ancestral lands.³⁶⁸ While the government had offered to provide relocation funding, Indigenous communities typically have a harder time accessing government disaster relief funds.³⁶⁹ Furthermore, federal funds for relocation hardly atone for historical climate-related harm or provide any assurance that the threat of climate-related harms will be reduced. Accordingly, federal, state, and local governments and multinational corporations should be legally and financially liable for their role in creating the climate crisis or failing to take adequate measures to mitigate its worsening effects.

So far, efforts to hold the U.S. federal government, state governments, and the fossil fuel industry legally liable for climate change have failed.³⁷⁰ In 2008, the Inupiat Eskimos from Kivalina, Alaska, brought a lawsuit against twenty-four oil, energy, and utility companies seeking damages for the impact of climate change on their village.³⁷¹ The Northern District of California ultimately dismissed the case for lack of subject matter jurisdiction, reasoning that climate change was a political question and that the plaintiffs lacked standing.³⁷² The District Court also ruled that the plaintiffs could not establish causation.³⁷³ Several climate change-related cases are currently pending in state and federal courts.³⁷⁴ These courts will likely dismiss these cases. However, the increased frequency of these cases may indicate a turning

365. *See id.* (detailing historical injustices faced by Indigenous and Black communities resulting from disproportionate climate impacts).

366. *See* Christopher Flavelle, *Forced Relocation Left Native Americans More Exposed to Climate Threats, Data Show*, N.Y. TIMES (Oct. 28, 2021), <https://www.nytimes.com/2021/10/28/climate/native-americans-climate-change-effects.html> (reporting that Indigenous peoples in United States have lost 99% of their land and this loss increases their vulnerability to effects of climate change).

367. *Id.*

368. *Id.*

369. *See id.* (noting that recent legislative efforts would provide more funding to Indigenous community relocation efforts compared to previous bills).

370. *See* Cisterna-Gaete & Tigre, *supra* note 287 (highlighting takeaways from Inter-American Commission on Human Rights and Office of the Special Rapporteur on Economic, Social, Cultural and Environmental Rights' joint climate resolution and its significance for climate litigation).

371. *Native Vill. of Kivalina v. Exxon Mobil Corp.*, 663 F. Supp. 2d 863, 868 (N.D. Cal. 2009).

372. *Id.* at 870.

373. *Id.* at 877–78.

374. *See* Renee Cho, *Climate Lawsuits Are on the Rise. This Is What They're Based on*, COLUM. CLIMATE SCH. (Aug. 9, 2023), <https://news.climate.columbia.edu/2023/08/09/climate-lawsuits-are-on-the-rise-this-is-what-theyre-based-on> (citing Columbia University's report that found that in last five years number of climate-related cases has risen and examining most common claims).

tide in litigation strategy and climate activism. The unlikelihood of obtaining relief from the U.S. courts should not stop climate-vulnerable communities from seeking reparations through political activism and moral suasion.

C. Implications of People-Centered Climate Reparations

The shift from a state-centered to a people-centered view of climate reparations has some implications for international law and the climate reparations movements. Firstly, climate action and policy require a broader collective framework that incorporates local perspectives. International law's historical structure as the domain of the nation-state as the principal subject creates a top-down approach to international climate action and policy.³⁷⁵ In this state-centric approach, nation-states attempt to find solutions to climate change by dialoguing as sovereign equals, but in reality, the more powerful countries can railroad the process and dictate the limits of climate change policies.³⁷⁶ This approach is also replicated at the national level where the nation-state can ignore or override the demands of its climate-vulnerable people. Because some communities, such as Indigenous peoples, within developed and developing nation-states are more climate-vulnerable than others, they have unique perspectives on climate action and policy that should inform the global conversation.³⁷⁷ While state-state dialogue on climate change can occur faster, local community input in decision-making is crucial to ensure climate policies do not replicate structural inequities that made those communities more vulnerable to the effects of climate change in the first place.³⁷⁸

Additionally, climate reparations must be tailored to meet the needs of climate-vulnerable communities regardless of where they live. They must include accountability for the historical and ongoing racialized exploitation *among and within* nation-states. Theorizing climate reparations beyond the North-South divide makes clear that there are oppressed, climate-vulnerable groups in the Global North and the Global South who should be compensated for the harms they experience because of human-induced climate change. Indigenous peoples and African Americans in North America are examples of those who live in major carbon-emitting countries but should have a claim to climate reparations based on the history of colonialism and environmental racism that place them in this precarious position.³⁷⁹ Similarly, Indigenous peoples in developing countries have a unique

375. E.g., Juan Auz, 'So, This Is Permanence': *The Inter-American Human Rights System as a Liminal Space for Climate Justice*, 22 MELB. J. INT'L L. 187, 206 (2021) (distinguishing top-down and bottom-up approach to climate-related human rights discussions within Inter-American Human Rights system).

376. See Taiwò & Cibralic, *supra* note 315 (citing examples of collusion between state and private entities to deny existence of climate change or worsen conditions).

377. See Tsosie, *supra* note 232, at 1644–46 (discussing importance of native perspectives basing on Alaska and Pacific case studies).

378. See Mason-Case & Dehm, *supra* note 161, at 187–88 (advocating for introducing local voices into discussion about climate reparations and stating that methods to achieve it ought to be tailored to situation).

379. See *supra* Part IV for a discussion of the limitations of TWAIL approach to climate reparations.

climate reparations claim based on their relationship to the environment, ancestral rights to land, and government policies that make them more vulnerable to climate-related harms.³⁸⁰ Changing the discourse from a North-South nation-state dialogue makes it possible to see various configurations for climate reparations.

Finally, responsible states must be willing to relinquish power and allow the meaningful and sustainable solution for climate-vulnerable communities to take priority. The people-centered approach to climate reparations is a call to correct power imbalances not just between wealthier nations and poorer nations but also between marginalized peoples and the nation-state.³⁸¹ The power imbalance that lies at the heart of the climate crisis is evident between the wealthier and poorer countries, but this power imbalance is also evident between the nation-state and its marginalized groups. As discussed above, the decisions of various national governments have caused some communities to be exposed to greater climate change-related harms than others.

VIII. CONCLUSION

The demand for climate reparations is a bold and necessary step in addressing the uneven burden of climate change. The wealthiest countries are the major GHG emitters, but they are the least vulnerable to the devastating impacts of climate change. TWAIL scholars theorize a reparatory demand for climate as the obligation of countries in the Global North to the Global South. They have shown that the impacts of climate change cannot be severed from the history of European colonization and plunder. While the predominant state-centered, North-South formulation of climate reparations has value, this Comment has shown that the nation-state cannot be the exclusive recipient of climate reparations.

Indigenous peoples and other self-determining people within and across nation-states experience a double burden of climate change. Their history of marginalization increases their climate vulnerability. The proposed people-centered climate reparations model provides a theoretical basis for these communities to receive reparations payments directly from the developed nations that have caused the climate crisis. It also allows them to receive climate reparations from the countries in which they live. The multidirectional flow of reparations allows accountability for historical emissions, but it also provides resources that will enable people who are often overlooked by international law to take on climate change at the community level.

380. See *supra* Part V.B for a description of the limitations inherent in the tendency to treat the Global South as a homogenous place.

381. See Mason-Case & Dehm, *supra* note 161, at 187 (noting that since 1950s, lawyers from Global South expressed concerns shared by Indigenous, Caribbean, Pacific, Latinx, and African peoples in United States).