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Islands and the South: Framing the Relationship between International Law and Environmental Crisis

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Jenny Grote Stoutenburg. ***Disappearing Island States in International Law***. Leiden, Boston: Brill Nijhoff, 2015. Pp. 487. $240. ISBN: 9789004303010.

Shawkat Alam, Sumudu Atapattu, Carmen G. Gonzalez and Jona Razzaque (eds). ***International Environmental Law and the Global South***. Cambridge: Cambridge University Press, 2015. Pp. 656. $155. ISBN: 9781107055698.

Abstract

International law has thus far proven limited as a tool for securing environmental justice for those marginalized by the international order. This essay reviews two recent publications that respond to the disproportionate effects of global environmental crisis on the marginalized within the framework of international law. It suggests that while both texts are important works of scholarship, each leaves an impression that international law, at least as we know it, is inadequate to the task of framing meaningful responses not only to the disproportionate effects of environmental crisis on the marginalized, but to that crisis itself. It is argued that the difficulty in utilizing international environmental law as a means of addressing problems of global environmental degradation may be better conceived not as a weakness in international environmental law per se, but as a symptom of the severance of human and natural environment that undergirds the logic of international law. Acknowledgment of the relationship between foundational concepts of international law and environmental exploitation invites sober consideration of the limits of international law as a framework for generating responses to global environmental crisis, and its disproportionate effect on the marginalized.

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1 Introduction

This essay reviews two recent texts that address the disproportionate effects of global environmental crisis on those marginalized by the international order.[1] Jenny Grote Stoutenburg's *Disappearing Island States in International Law*[2] is a painstaking exercise in doctrinal analysis of the implications in international law of territorial loss for small island states. *International Environmental Law and the Global South*,[3] a formidable collection edited by Shawkat Alam, Sumudu Atapattu, Carmen G. Gonzalez and Jona Razzaque, aligns with the Third World Approaches to International Law (TWAIL) movement, and describes itself as 'the first volume to place the North-South divide in international environmental law in its historical context' (at 3). In both form and substance, then, these two texts offer alternative approaches for gaining purchase on the problem of environmental limits from within the framework of international law, and both are important works of scholarship. However this review argues that each text leaves an impression that international law, at least as we know it, is inadequate to the task of framing meaningful responses not only to the disproportionate effects of environmental crisis on the marginalized, but to that crisis itself.

Stoutenburg's monograph, adapted from her doctoral thesis, exemplifies the doctrinal genre; she describes the text as an 'exercise in legal extrapolation' (at 6). Her entry point is the question of what will happen in law to small island states that lose territory due to the compound effects of anthropogenic climate change. To those unfamiliar with the maddening circularity of the law of statehood, the question might appear to be a simple one; yet the absence of an agreed legal definition of statehood in the era of self-determination leaves the existing sources of law open to significant political contestation. With a practitioner's sensibility, Stoutenburg steers clear of explicitly normative judgments and analogizes from positive law to map out the range of possible outcomes for small island states in maritime law and the law of statehood. In contrast, Alam, Atapattu, Gonzalez and Razzaque take as their entry point the entire field of international environmental law, and endeavour to offer a view from the South on the historical inequities inherent in its development. The volume consists of 29 chapters by 32 scholars and practitioners, and is both interdisciplinary and critical in its positioning as a TWAIL corrective to Northern-centric accounts of issues in international environmental law.

[1] The language of environmental crisis is used in this discussion to refer both to the scientific facts of anthropogenic climate change, and the political discourse of global environmental crisis. This usage is informed by the insights of science and technology studies on the co-production of scientific and political knowledge. See generally S. Jasanoff (ed.), *States of Knowledge: The Co-Production of Science and Social Order* (2004). Nevertheless this choice of terminology is not unproblematic. Use of the language of crisis in international law has been famously critiqued by Charlesworth in 'International Law: A Discipline of Crisis', 65 *Modern Law Review* (2002) 377. Charlesworth's critique has been expanded upon recently by Diane Otto, who asks 'whether it is possible to turn the momentum of a crisis to more progressive ends', and calls for 'un-crisis thinking'. Otto, 'Decoding Crisis in International Law: A Queer Feminist Perspective', in B. Stark (ed.), *International Law and Its Discontents: Confronting Crises* (2015) 117.

[2] J. G. Stoutenburg, *Disappearing Island States in International Law* (2015).

[3] S. Alam, S. Atapattu, C. G. Gonzalez and J. Razzaque (eds), *International Environmental Law and the Global South* (2015).

Two principal observations emerge from reading these texts together. Firstly, it is intriguing that it is not Stoutenburg's doctrinal treatment but the TWAIL-oriented collection that demonstrates the most faith in international law's ability to secure redress for those suffering disproportionate loss due to the complex effects of global environmental crisis. It might be expected that it would be Stoutenburg, in her adoption of the strictures of doctrinal method, whose work would demonstrate implicit faith in the capacity of international law to analogize its way to an effective response to problems of environmental injustice. Yet Stoutenburg's text unfolds with an increasing sense of gloom. Finding little positive obligation on wealthy, high-emitting states to respond to problems of territorial loss facing small island states, she concludes with a sense of dejection that even extralegal notions of 'international solidarity' are unlikely to motivate the 'international community of states' to action (at 449–450). It is Alam, Atapattu, Gonzalez and Razzaque who, even as they curate a catalogue of myriad continuities in the long history of exploitation by the global North of the resources and peoples of the global South, maintain faith in the promise of universal justice that lies at the heart of the project of international law.

The second observation to be made is that *International Environmental Law and the Global South* ultimately does not offer a coherent account of the relationship between international law and the 'North-South divide' it takes as its organizing problematic.[4] As a result, the collection does not dispel the impression that arises with Stoutenburg's conclusion that international law is not simply neutral to global environmental crisis, but may actively facilitate it. The intention in positing the complicity of international law in environmental crisis is to invite consideration of the limits of international law as a means of framing responses to environmental loss suffered by those marginalized by the international order. Taking the existential precarity of atoll states as an example, this review applies an historical framework to the problem. Within this alternative frame, the problem is figured not as a matter of territorial loss due to climate change, but of increasing uninhabitability due to centuries of imperial land use practices. From this perspective, the problem of territorial loss addressed by Stoutenburg is inseparable from the 'North-South divide' taken as the key problematic in *International Environmental Law and the Global South*, and a doctrinal application of international law appears more inhibiting than productive in identifying avenues of redress.

The review concludes by surveying recent interventions in the field which suggest that the difficulty of deploying international environmental law as a framework for responding to global environmental crisis may be better conceived not as a weakness in international environmental law *per se*, but as a symptom of the manner in which foundational precepts of international law prefigure the natural environment

[4] The phrase 'critical faith' is borrowed from Sundhya Pahuja, who with Luis Eslava has described this faith in the agonic potential of international law as characteristic of the TWAIL movement. See S. Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (2011), at 1–2; and Eslava and Pahuja, 'Between Resistance and Reform: TWAIL and the Universality of International Law', 3 *Trade, Law and Development* (2011) 103.

as an object to be exploited.[5] If the humanist foundations of international law are predicated on the exploitation of the natural environment, then it behoves all who work with international law in an era of global environmental crisis to consider how their work might perpetuate that exploitation. Environmentally responsible practice of international law may involve more than advocating legal solutions to discrete environmental problems. It may also call for an increased sensitivity in judging when international law is and is not an appropriate language in which to frame those problems, in order to generate responses that do not perpetuate the exploitation of peoples and places marginalized by the international order.

2 Framing Island States at Risk: Stoutenburg's *Disappearing Island States*

It is now well known that small atoll states are particularly susceptible to significant environmental degradation.[6] The list of low-lying atoll states currently identified as at risk of legal extinction due to rising sea levels includes Kiribati, Tuvalu, Niue and the Marshall Islands in the Pacific, and the Maldives in the Indian Ocean.[7] The issue of territorial loss has garnered such attention that Kiribati and the Maldives now function in popular discourse as totems of anthropogenic climate change.[8] As evidence of irreversible environmental damage mounts, a number of lines of response to the specific risks faced by small island states have emerged from within international law. One line of response takes place within the specialized sub-field of climate law, with the proliferation of documentation processes that now comprise the industry of legal and scientific experts concentrated around the United Nations Framework Convention on Climate Change (UNFCCC).[9] Institutional treatments of the problem of island degradation tend to be framed within the broader policy category of 'small island developing states', or 'SIDS'.[10] The United Nations declared

5 Khoday, Lamb, McCreary, Mickelson, Natarajan and Porras, 'Locating Nature: Making and Unmaking International Law – Introduction', 27 *Leiden Journal of International Law* (2014) 571. Humphreys and Otomo, 'Theorising International Environmental Law', in F. Hoffmann and A. Orford (eds), *The Oxford Handbook of International Legal Theory* (2016).

6 Intergovernmental Panel on Climate Change, 'Chapter 17: Small Island States', *Third Assessment Report of the Intergovernmental Panel on Climate Change – Report of Working Group II: Impacts, Adaptation and Vulnerability* (2001), available at https://www.ipcc.ch/ipccreports/tar/wg2/index.php?idp=619 (last visited 25 April 2016).

7 See M. B. Gerrard and G. E. Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (2013), at 6.

8 On the notion of small island states as the 'canaries in the coal mine' of climate change, see Farbotko, 'Wishful Sinking: Disappearing Islands, Climate Refugees and Cosmopolitan Experimentation', 51 *Asia Pacific Viewpoint* (2010) 47.

9 Mayer has reviewed trends in the emerging field of climate law. Mayer, 'Climate Change and International Law in the Grim Days', 24 *European Journal of International Law* (2013) 947.

10 The collective term 'small island developing states' or 'SIDS' was in use from the early 1990s. See United Nations General Assembly Secretariat, Report on the Global Conference on the Sustainable Development of Small Island Developing States, UN Doc. A/CONF.167/9, October 1994, available at http://www.un.org/documents/ga/conf167/aconf167-9.htm (last visited 25 April 2016). Also Stoutenburg, *supra* note 2, at 19.

2014 to be the 'Year of SIDS', and the Third UN Conference on SIDS was held in Apia, Samoa in September 2014.[11]

The other line of response to the problem of territorial loss is that offered by mainstream international lawyers on the question of what might legally follow in the law of statehood should the physical area of a state cease to exist. The matter is one of undoubted juridical novelty. A number of doctrinal treatments of the problem conclude that once habitable territory is lost, it is unlikely a state would maintain sovereign status for any length of time beyond that required to wind up its existing rights and obligations.[12] The stronger contributions add a normative conclusion: given the context, it would be appropriate to consider the recognition of a *sui generis* form of international personality in order to mitigate the disproportionate loss these states are facing due to processes of climate change to which they have barely contributed.[13]

Jenny Grote Stoutenburg's treatment of the doctrinal problem in *Disappearing Island States in International Law* is the most thorough to date. The questions it sets out to answer are framed as questions of positive law, of *lex lata*: 'at which point would a sovereign state disappear? Who could make that determination? Which legal status would its citizens have? And does international law protect the international legal personality of states that lose their effective statehood for reasons beyond their control?' (at 3). On Stoutenburg's reading, these challenges to island statehood might reveal something essential of international law: 'the treatment accorded to disappearing island states presents the litmus test as to whether international law is capable of evolving from a law based solely on coexistence or even cooperation, to a law based on solidarity and shared responsibility' (at 4). Stoutenburg's intention in producing the work, however, is not only diagnostic but clearly normative, albeit carefully worded: she 'hopes to contribute to an academic discourse that attaches to the survival of low-lying island states the importance it should rightfully enjoy' (at 7). Where she deems *lex lata* to fail in that regard – as consistently proves to be the case – Stoutenburg responds in the idiom of *lex ferenda* by stepping through proposals for doctrinal reform which aim for the legal survival of states *qua* states.

In Part One, 'Fathoming the Waters', Stoutenburg describes the literature on disappearing island states as a continuation of the emergence of small island studies as a distinct discourse in international relations from the early 1970s. Stoutenburg notes that small island studies emerged contemporaneously with the independence of many

[11] See United Nations General Assembly Secretariat, Report of the Third International Conference on Small Island Developing States, UN Doc. A/CONF.223/10, 1–4 September 2014, available at http://www.un.org/ga/search/view_doc.asp?symbol=A/CONF.223/10&Lang=E (last visited 25 April 2016).

[12] See, for example, Wong, 'Sovereignty Sunk? The Position of "Sinking States" at International Law', 14 *Melbourne Journal of International Law* (2013) 346; Jain, 'The 21st Century Atlantis: The International Law of Statehood and Climate Change-Induced Loss of Territory', 50 *Stanford Journal of International Law* (2014) 1; and Crawford and Rayfuse, 'Climate Change and Statehood', in R. Rayfuse and S. Scott (eds), *International Law in an Era of Climate Change* (2012) 243. McAdam provides a clear analysis of doctrinal treatments of the issue in J. McAdam, *Climate Change, Forced Migration and International Law* (2012), at 119.

[13] Iterations of this argument have been made by Rayfuse and Burkett. See Rayfuse, 'International Law and Disappearing States: Maritime Zones and the Criteria for Statehood', 42 *Environmental Policy and Law* (2011) 281; and Burkett, 'The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood, and the Post-Climate Era', 2 *Climate Law* (2011) 1.

of the island nations in question, and the rise of the discourse of development. Yet in this brief account, the relationship between decolonization and the institutionalization of development discourse goes largely unexplained (at 11–17). Although she is certainly not unaware or forgiving of the fact that the rhetoric of sustainable development in particular has failed to address the inequality that she terms 'North-South relations' (at 29), Stoutenburg's narration is untouched by critiques of development as a mode of normalizing global economic inequality following the independence movements of the mid-20th century, variations of which have been made by Gilbert Rist, Sundhya Pahuja and others.[14] The TWAIL movement for its part is bypassed altogether in Stoutenburg's general assertion that 'developing countries at large are mollified' by the deployment of the language of sustainable development in 'environmental and economic relations' (at 29). The background given in Part One implies a connection between territorial loss and the institutionalization of economic inequality in the postcolonial era, yet does not seek to offer an explanation for that connection.

Stoutenburg's work is strongest when she moves into doctrinal analysis. Part Two, 'Maritime Entitlements', considers the implications for small island states of territorial loss under the law of the sea; and Part Three, 'State Extinction and Continuity', considers the implications of territorial loss under the law of statehood. Part Two commences with a clear explanation of the law of the sea as it applies to island states. Stoutenburg notes with frustration that although the law of the sea is a regime of formal equality in that the maritime entitlements of small island states derive from the same rules that apply to all coastal states, regardless of land area, the loss facing small island states is aggravated by the adoption of ambulatory baselines.[15] The economies of small island states tend to depend heavily on their ability to exploit natural and other resources present in their maritime zones, from hydrocarbon and mineral deposits and fisheries to shipping and tourism.[16] According to current law, however, as coastlines recede, so too will maritime zones; and should an island state's habitable territory disappear altogether, so too will its territorial sea (notwithstanding the notoriously ambiguous treatment of 'rocks' in UNCLOS, which Stoutenburg discusses at 86–90). Stoutenburg steps through proposals for the creation and management of a new regime of stable maritime zones as proposed in different iterations by ITLOS Judge José Luis Jesus, Rosemary Rayfuse and others.[17] The purpose of such

[14] See generally G. Rist, *The History of Development* (2002); and Pahuja, *supra* note 4. Mickelson surveys critiques of the development paradigm in Mickelson, 'Critical Approaches', in D. Bodansky, J. Brunnée and E. Hey (eds), *Oxford Handbook of International Environmental Law* (2008) 262, at 275 ff.

[15] See also Rayfuse, *supra* note 13, at 281 ff.

[16] A field of small island studies has developed around attempts to generalize the economic, geographical and sociopolitical particularities of small island states. For paradigmatic examples of this literature, see Briguglio, 'Small Island States and Their Economic Vulnerabilities', 23 *World Development* (1995) 1615; and G. Baldacchino and D. Milne (eds), *Lessons from the Political Economy of Small Islands: The Resourcefulness of Jurisdiction* (2000).

[17] See Rayfuse, 'Sea Level Rise and Maritime Zones: Preserving the Maritime Entitlements of 'Disappearing' States', in Gerrard and Wannier (eds), *supra* note 7, 167. Jesus, 'Rocks, New-born Islands, Sea Level Rise and Maritime Space', in J. Frowein, K. Scharioth, I. Winkelmann and R. Wolfrum (eds), *Verhandeln für den Frieden. Negotiating for Peace: Liber Amicorum Tono Eitel* (2003) 579.

a development would essentially be to freeze states' maritime entitlements: baselines would be fixed in their current locations, whether by actual physical intervention on coastlines or by multilateral agreement.[18]

Stoutenburg's support for the stabilization of maritime zones is tempered only by her assessment that such a development within the law of the sea would not counteract the repercussions in the law of statehood of a total loss of territory. It is states that have rights under UNCLOS; and states, according to positive law, require some territory, however small in area. Thus in Part Three, Stoutenburg turns to her core problem: with respect to territorial loss, where are the legal thresholds of statehood beyond which a state would cease to exist? To deal with this question is to prod at the meaning of sovereignty, and to do so in the doctrinal idiom is exceptionally difficult.[19] Stoutenburg describes the failure of the international community to agree on a definition of statehood in the decolonizing era, and the unlikely rise to prominence of the 1933 Montevideo Convention on the Rights and Duties of States as the default source of authority, with its notoriously circular criteria of permanent population, defined territory, government and capacity to enter into relations with other states (at 249–250). After surveying the shift from constitutive to declaratory accounts of statehood in the era of decolonization, and the corresponding shift from legitimacy to effectiveness as the basic principle against which the criteria for statehood are assessed, she reasons that territory's role is essentially functional with respect to population: 'land thus only counts as territory for the purposes of the statehood definition when it harbours a permanent population' (at 266). On this basis, Stoutenburg concludes that so long as a small island state could maintain a 'population nucleus' to serve as a 'legal anchor' to the departed diaspora, it would likely be protected from legal extinguishment (at 273). Once this was no longer possible, all thresholds of effective statehood would be crossed, and the legal personality of the state would likely recede incrementally via its exclusion from participation in international institutions (at 314).

The text then turns to consider the legal viability of proposals for the continued recognition of small island states after territorial loss on the basis of the principle of legality as opposed to effectiveness (315 *et seq.*). Adopting the concept of the deterritorialized state as a desirable alternative to loss of statehood, Stoutenburg steps through the question of whether the legal extinction of a state after total territorial loss could be held to violate any *jus cogens* norms of international law; and if so, whether any such violation would give rise to a duty owed by other states of continued recognition of that state once 'deterritorialized'.[20] The right to self-determination, the principle of permanent sovereignty over natural resources, fundamental human rights and the fundamental right to state survival are considered in turn. In seeking to articulate a legal duty of continued recognition within this framework, Stoutenburg is forced to

[18] Stoutenburg, *supra* note 2, at 214.

[19] J. Crawford, *The Creation of States in International Law* (2nd edn, 2007), at 32.

[20] Rayfuse, 'W(h)ither Tuvalu? International Law and Disappearing States', in Ocean Policy Research Foundation, *Proceedings of the International Symposium on Islands and Oceans* 91–93 (2009). Burkett, *supra* note 13.

contend with the gap in enforceability between positive treaty obligations and these *jus cogens* norms on the one hand, and on the other, the difficulty of establishing legal causation of climate change so as to give rise to duties of any kind owed by high-emitting, high-consumption states to small island states suffering territorial loss. On Stoutenburg's reading, these obstacles to establishing a legal duty of continued recognition are insurmountable. With respect to self-determination, she cannot find a way to turn the right into an obligation of continued recognition owed by other states.[21] The principle of permanent sovereignty over natural resources proves similarly unhelpful in the context of anthropogenic climate change, as territorial loss cannot be characterized as wrongful appropriation of resources.[22] Similarly, potential claims of human rights violations would 'fail due to the limited scope of states' extraterritorial human rights obligations and the difficulty of proving causation' (at 356).

In the absence of direct liability for environmental harm according to established principles of legal responsibility, Stoutenburg cannot establish a duty of continued recognition, or indeed any legal obligations on high-emitting states to act at all. The UNFCCC regime creates little obligation to fund effective mitigation and adaptation measures.[23] The law of the sea offers no respite to small island states at risk of total territorial loss. There is no duty of continued recognition of island states once 'deterritorialized'. There are no *jus cogens* norms that might rehabilitate the international law that falls so very short in these respects. Even in cases where direct responsibility for environmental harm can be attributed to former administrative authorities – such as with Nauru, Banaba and the Marshall Islands – legal action has failed, largely due to the galling power imbalances between parties.[24]

In *Disappearing Island States*, the dissonance between Stoutenburg's desire to see small island states at risk of total territorial loss maintain personality in international law and the doctrinal method she applies to the task creates a certain dramatic tension in what is otherwise a clinically professional text. Stoutenburg does not argue a normative case for how the international community of states should respond to the devastation wrought upon small island environments, although her desire to see action is clear. The historical and political context of the environmental destruction suffered by small island communities hovers in the background of her work, attended by hints of a quiet anger, yet she remains lawyerly to a fault. Whilst striving to state what the law is, she seems painfully aware that the law she is looking for is not there; as *lex lata*, high-emitting state responsibility for territorial loss caused by sea level rise simply is not there to be found. Such law might be created, but Stoutenburg's careful

[21] Stoutenburg, *supra* note 2, at 341.

[22] *Ibid.*, at 345.

[23] The gap between the aspirational language of the UNFCCC and legal obligation to fund adaptation and mitigation was reinscribed with the Paris Agreement of December 2015. See UNFCCC, Adoption of the Paris Agreement, UN Doc. FCCC/CP/2015/L.9/Rev.1, 12 December 2015, available at https://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf (last visited 25 April 2015); also Dehm, 'International Law, Temporalities and Narratives of the Climate Crisis', 4 *London Review of International Law* (2016) 167, at 179.

[24] Stoutenburg, *supra* note 2, at 394–395.

choice of words in her conclusion does little to counter the impression that she holds out little hope of such a *denouement*: 'while international solidarity after the causation of dangerous anthropogenic interference with the climate system cannot compensate for its absence beforehand, it is by no means clear that the international community of states would be prepared to accept even this *ex post* expression of shared responsibility'.[25]

Stoutenburg's monograph reads as a loss of faith in the capacity of international law to adapt to the unprecedented environmental circumstances the work seeks to address. What emerges is an impression of international law as a tool inapt to the task of corralling states into formation in response to global environmental crisis. For Stoutenburg, then, the chronic flaw of international law is its reliance on consent to drive reform, enforcement and resourcing of the project of global governance it promises.[26] The text's concluding gestures toward the possibility of 'moral responsibility' (at 374) or 'international justice and solidarity' (at 375 and 450) as means of motivating global action are weakly made. Stoutenburg leaves it open whether she is gesturing toward natural law, or politics, or both. Yet it is hard to begrudge her this final weakness. *Disappearing Island States* executes its doctrinal brief so exhaustively that by the end of the text she seems understandably exhausted by failing to find what she has set out to find, and there is little room left to see beyond the terrain of *lex lata* and *lex ferenda* she has mapped out in such painstaking detail. Stoutenburg wants the book to be useful to small island states, and it will be, not least as a clear guide to the law relevant to questions of maritime entitlements and statehood in the context of territorial loss. However what it may be most useful in doing is demonstrating that international law is not a promising avenue through which to hold high-emitting states to account for the disproportionate effects of their conduct on small island communities. This is an important contribution to make to the debate, and indeed one that accords with the broader argument made about international law in this review. But one is left with the sense that it is not the contribution that Stoutenburg was hoping to make.

3 Framing the 'North-South Divide': *International Environmental Law and the Global South*

At first glance it might appear ironic that the hope Stoutenburg finds disappointed springs in *International Environmental Law and the Global South*, a TWAIL-oriented collection of contributions from an imposing assembly of scholars and practitioners working with international environmental law. The volume is an important addition to the currently fashionable 'state of the field' handbooks, which include *The Oxford Handbook of International Environmental Law* edited by Daniel Bodansky, Jutta Brunnée, and Ellen Hey, the *Research Handbook on International Environmental Law* edited by

[25] *Ibid.*, at 450.
[26] *Ibid.*, at 447.

Malgosia Fitzmaurice, David Ong and Panos Merkouris, and the *Routledge Handbook of International Environmental Law* edited by Shawkat Alam, Jahid Hossain Bhuiyan, Tareq Chowdhury and Erika Techera.[27] The geographical diversity of voices in *International Environmental Law and the Global South* is a crucial contribution to the field, given the continued dominance of Northern perspectives in international legal scholarship at large. In the introductory chapter, Sumudu Atapattu and Carmen Gonzalez describe the concern to which the collection is addressed as follows: the 'global environmental agenda has been dominated by the priorities and concerns of affluent countries' (at 2). In response, the intention of the volume is twofold: it 'examines the ways in which the North-South divide has compromised the effectiveness of international environmental law and proposes a variety of strategies to bridge the divide' (at 2).

Three key points can be drawn from the phrasing of this introductory statement of intent. First is the commitment to the 'North-South divide' as an analytical framework, which runs consistently throughout the various contributions to the volume. Atapattu and Gonzalez define the North-South divide as follows: '(d)espite its heterogeneity, the global South shares a history of Northern economic and political domination' (at 2), a domination engendered by colonialism and the resulting incorporation of Southern regions into the international economic order as 'exporters of raw materials and importers of manufactured goods' (at 6). The volume thus attempts to resituate international environmental law within the historical context from which it is readily severed in more doctrinally oriented treatments of the field, so as to generate a different order of response. Atapattu and Gonzalez embrace the concept of environmental justice, which Gonzalez has described in previous work as a moral, historically grounded narrative that privileges restorative over technocratic responses to the disproportionate effects of environmental degradation on the South.[28] In this text, the concept of environmental justice is deployed as follows: '(t)he objective is to reconceptualise environmental problems as manifestations of social, economic, and environmental injustice between and within nations and to place them in historical context rather than treating them as technical problems to be overcome by scientific innovation or more effective planning' (at 13).

The second point that can be drawn from the introductory chapter is the way in which the editors relate the North-South divide to international environmental law: in this account, the North-South divide has 'compromised the effectiveness' of international environmental law. The implication here is that although economic and political domination of the South by the North is chronic within international environmental law, it is not necessarily inherent to its logic. Rather, it is a distortion of practice that can be rectified, because the source of the distortion is not international law *per se* but the global economic order. As Atapattu and Gonzalez describe, '(b)y

[27] Bodansky, Brunnée, and Hey (eds), *supra* note 14. M. Fitzmaurice, D. M. Ong and P. Merkouris (eds), *Research Handbook on International Environmental Law* (2010). S. Alam, J. H. Bhuiyan, T. M. R. Chowdhury and E. J. Techera (eds), *Routledge Handbook of International Environmental Law* (2013). See also R. S. Abate and E. A. Kronk Warner (eds), *Climate Change and Indigenous Peoples: The Search for Legal Remedies* (2013).

[28] See Gonzalez, 'Environmental Justice and International Environmental Law', in Alam, Bhuiyan, Chowdhury and Techera (eds), *supra* note 27, 84.

depriving Southern countries of the tools used by the global North and certain middle-income Southern countries to diversify and industrialize their economies while enhancing the protection of investors and intellectual property, the international economic order institutionalizes Southern poverty' (at 8). Thirdly, the intention of the text is to contribute to the rectification of that distortion of law by the economic order, so that international law might be rehabilitated as a means of achieving environmental justice for the marginalized. The collection is described as owing an 'intellectual debt' to the TWAIL movement (at 12), which is described in the following terms: 'TWAIL's goal is to make real "the promise of international law to transform itself into a system based, not on power, but justice"' (at 13).[29] The claim is that scholarly attention to the injustice institutionalized in the international order in which international environmental law has developed will generate more effective responses to the environmental crisis engendered by that order. As an intervention in the field of international environmental law, the collection thus makes the double move of 'agonic contingency' that Luis Eslava and Sundhya Pahuja argue is characteristic of the TWAIL movement: it draws attention to the injustice that has flowed from the presumed universality of Eurocentric norms, whilst embracing the concept of universality itself as a state of permanent dialogue between different but equal subjects.[30]

There is no suggestion, however that such transformation of international law will be easily realized, and the collection allows for considerable variance of approach. For example, the discourse of sustainable development – which along with environmental justice is described as an 'overarching framework' of the collection (at 19) – receives varying treatment. Ruth Gordon's contribution, 'Unsustainable Development?', deconstructs the discourse of sustainable development by reversing the usual North-to-South direction of its deployment.[31] In Gordon's hands, the problem is not the unsustainable environmental practices of the poor, but the 'unsustainability of modern industrial life' (at 51). She concludes that '(t)he living conditions of the poor are unacceptable, while those of high-income consumers are just as unacceptable as they further acute economic inequity and are unsustainable; thus perhaps our salvation lies somewhere in the middle' (at 71). The implications of this conclusion are left unspoken, but it is hard to discount the inference of redistribution. In 'Trade and the Environment: Perspectives from the Global South', Shawkat Alam takes a different tack on sustainable development. While he also places the onus of responsibility for achieving sustainable development on the North, in Alam's account the responsibility owed is not to alter Northern lifestyles but to 'facilitate sustainable development and trade for Southern countries' (at 316).

Diversity in scholarly perspective is a key strength of this volume, and it places on the editors the considerable burden of narrating a frame capable of holding together the depth and breadth of the volume's moving parts. At least in regard to the discourse

[29] This formulation quotes from Anghie, 'What is TWAIL: Comment', American Society of International Law, Proceedings of the 94th Annual Meeting (2000), at 40.

[30] Eslava and Pahuja, *supra* note 4, at 122.

[31] Atapattu also considers critiques of sustainable development in Atapattu, 'International Environmental Law Principles and the North-South Divide', in Alam *et al.* (eds), *supra* note 3, at 87 ff.

of sustainable development, the collection's accommodation of both redistributive and growth-based critiques of global economic inequality comes at the cost of consistent critique. Of course, whether such inconsistencies are properly regarded as flaws depends entirely on whether the editors intended the volume to serve as a coherent critique of the dominance of Northern interests in international environmental law, or as a survey of critiques of that dominance from scholarly voices that identify with the South. The latter is probably the better characterization of its contribution to the field. What this means, however, is that the nature of the relationship between international law and the North-South divide remains unclear. Inequality distorts international law in practice; but the theoretical basis on which international law is extricated from the global economic order identified as the cause of the North-South divide is not explained. This ambiguity goes to the nature of international law itself which, as Eslava and Pahuja observe, is a question with which the TWAIL movement writ large has abstained from engaging.[32] M. Rafiqul Islam's contribution, 'History of the North-South Divide in International Law: Colonial Discourses, Sovereignty and Self-Determination' is particularly ambiguous here. At times he describes the North-South divide as inherent to the logic of international law, for example: '[t]he root of this North-South divide lies in the very creation, nature, features, and orientation of international law from its antiquity to the present context' (at 23). At other times, he describes international law as a tool for overcoming that divide: 'the sovereign equality of states as one of the founding pillars of international law is meant to address this global power imbalance and afford opportunities for weak and small states to pursue their sovereign rights' (at 42). As a matter of history, it is hard to maintain that the sovereign equality of states was 'meant to' address the global power imbalance.[33] Yet Islam's interest in this chapter seems to be less in assessing the nature of the North-South divide as a matter of history than in holding international law to its mid-20th-century promise to overcome that divide.

The tension between these two objectives runs throughout the collection, and tends to be resolved in favour of faith in the transformative potential of international law rather than historically grounded and consistent critique of its limitations. This is not to say that individual contributions lack consistency of critique, or that they are forced to demonstrate glib optimism in the face of the chronic failure of international environmental law to deliver justice to its marginalized subjects. For example, Maxine Burkett's contribution, 'A Justice Paradox: Climate Change, Small Island Developing States, and the Absence of International Legal Remedy', commences with the point that Stoutenburg regretfully intimates toward in her monograph: international law has thus far failed to provide an avenue of redress for small island states at risk. Burkett's chapter, adapted from a longer article published in 2013,[34] surveys potential

[32] Eslava and Pahuja, *supra* note 4, at 105.

[33] For differing critiques of the doctrine of sovereign equality, see generally G. Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (2004); and A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005).

[34] Burkett, 'A Justice Paradox: On Climate Change, Small Island Developing States, and the Quest for Effective Legal Remedy', 35 *University of Hawai'i Law Review* (2013) 633.

avenues for bringing home liability to high-emitting states for the disproportionate effects of climate change on small island states. She notes the ineffectuality of the climate change regime has necessitated consideration of establishing liability under UNCLOS, the United States' Alien Tort Statute, and international human rights law: 'the search for a viable means for remedy demonstrates the failure of the UNFCCC to address the absence of enforceable compliance mechanisms to date' (at 441).[35] Unconstrained by the doctrinal form adopted by Stoutenburg, however, Burkett is free to observe that even in case of technical failure, legal action taken by small island states can be politically useful, in terms of raising public awareness of the effects of climate change, leveraging activist campaigns, and placing democratic pressure on decision makers. This sociolegal approach appends a coda of hope to Stoutenburg's downcast conclusion on the potential for law to deliver justice to small island states at risk of territorial loss. Burkett concludes that although 'litigation is certainly not the only, or even the strongest, weapon available, it is perhaps one of several that SIDS need to employ in their fight to survive' (at 449). This is a more nuanced take on the potential for international law to deliver justice to the South. It is not so much that law in and of itself will facilitate change, but that 'law can shape social meaning and inform both individual and collective action' (at 450).

A number of contributions to the volume repeat this move of locating the redemptive promise of international environmental law not in legal avenues of redress, but in the capacity for legal action to engender sociopolitical change. In 'Human Rights, the Environment and the Global South', Louis Kotzé notes the existence of significant critiques of human rights which caution against deployment of rights discourse as a vehicle for structural change in the international order.[36] Still, he concludes that 'human rights instil dialogue where it is most needed; they create and further facilitate a culture of greater care for people and their environment, and provide a broad, paradigmatic framework wherein to situate issues related to environmental justice' (at 191). Daniel Maldonado's contribution, 'International Law, Cultural Diversity, and the Environment: The Case of the General Forestry Law in Colombia', is particularly helpful in explicitly connecting the political utility of strategic litigation described by Burkett, Kotzé and others with the question of how faith in international law remains tenable for the South in the face of strong critiques of its Eurocentrism.[37] Maldonado argues that the value of international law as a tool in the struggle for global environmental justice lies in its susceptibility to 'counterhegemonic' deployment by vulnerable groups in the global South, offering a case study of a popular action brought in Colombia by indigenous and black communities and advocates against the

[35] Razzaque makes a similar point in his contribution, 'Access to Remedies in Environmental Matters and the North-South Divide', in Alam *et al.* (eds), *supra* note 3, 588.

[36] Kotzé, 'Human Rights, the Environment and the Global South', in *Ibid.*, 190. Prominent critiques of human rights discourse include S. Moyn, *Human Rights and the Uses of History* (2014); Engle, 'International Human Rights and Feminisms: When Discourses Keep Meeting', in D. Buss and A. Manji (eds), *International Law: Modern Feminist Approaches* (2005) 47.

[37] Maldonado, 'International Law, Cultural Diversity, and the Environment: The Case of the General Forestry Law in Colombia', in Alam *et al.* (eds), *supra* note 3, 508.

constitutionality of the General Forestry Law to demonstrate the point.[38] The plaintiffs successfully argued that minority rights to prior consultation under the Constitution should be interpreted according to ILO Convention 169, and that on this basis, the General Forestry Law was unconstitutional in its violation of that right with respect to forestry activity on land collectively owned by indigenous and black communities. As he rightly points out, such examples challenge critiques that deny any potential in international law as a tool for the marginalized on the basis of its Eurocentrism. Maldonado's contribution suggests that to minimize the counterhegemonic potential of international law is to minimize the struggle of those who have wielded it against the Eurocentric international order.[39]

International Environmental Law and the Global South is a significant intervention in a field that can only benefit from open and systematic interrogation of the complicity of international law in the environmental exploitation of the South. If, as Eslava and Pahuja argue, the TWAIL movement revives international law as an agonic project through its demonstration of a 'praxis of universality',[40] this volume is an excellent contribution. The strength of the volume lies in its willingness to perform what an inclusive universality might look like, by leaving open a space for dialectic engagement between potentially incommensurate accounts of the structural relationship between international law and the North-South divide around which the volume is organized. The necessary limitation of this approach is that *International Environmental Law and the Global South* does not offer a theoretically coherent account of that structural relationship. This may disappoint those readers who come to the volume expecting to find it. Whereas the lasting impression left by the volume is of insistent faith in the potential of international law to deliver on its promise of global environmental justice, the grounds of that faith are ultimately left open to contention. Maldonado's contribution offers a useful possibility: faith in international law need not be grounded in the fetishization of global justice and universal governance. It can be a pragmatic – and unromantic – affair.

4 International Law as Narrative Framework: Aligning 'Disappearing Island States' with the 'North-South Divide'

Reading *Disappearing Island States* and *International Environmental Law and the Global South* together invites arms' length consideration of the capacity of international law to

[38] *Ibid.*, at 511–517.

[39] As Parfitt has pointed out in reference to the case of Abyssinia, counterhegemonic deployment of international law is not simply a matter of reproducing Eurocentric norms, but can produce hybridized concepts of the international that demand theorization in their own right. Parfitt, 'Empire des Négres Blancs: The Hybridity of International Personality and the Abyssinia Crisis of 1935–36', 24 *Leiden Journal of International Law* (2011) 849. For an account of the expansion of international law in the nineteenth and early twentieth century as a process of appropriation and reconceptualization of classical international law in the non-West, see A. B. Lorca, *Mestizo International Law: A Global Intellectual History 1842–1933* (2015).

[40] 'In a praxis of universality, certainty should give way to dialectics, and affirmation to multiple assertions.' Eslava and Pahuja, *supra* note 4, at 122.

deliver on the promise of environmental justice. The relationship between international law and the natural environment demands creative attention in the contemporary moment. As the evidence of irrevocable environmental harm mounts, it is increasingly obvious that an adequate response cannot be left to those who work within the field of international environmental law. As Usha Natarajan and Kishan Khoday have identified, the specialization of international environmental law into an almost hermetic sub-field has unfortunately done little to foster understanding within the broader discipline of the relationship between international law *per se* and the natural environment.[41] Precisely because time is of the essence in responding to global environmental crisis, the limitations of international law as a framework for conceiving solutions to problems of environmental harm require sober assessment. This work is thankfully underway. Commentators on the climate crisis of various theoretical orientations have begun to identify the underlying importance of narrative frameworks in prefiguring modes of response.[42] Postcolonial historian Dipesh Chakrabarty, for example, describes climate change as a phenomenon that stretches the limits of disciplinary ordering in the Enlightenment severance of natural from human history, a severance replicated in postcolonial critiques of the human subject.[43] Within international law, too, the need to reassess basic narrative presumptions has been identified. Benoît Mayer concludes his review of the developing sub-discipline of climate law by stating that a 'strong ethical narrative needs to be re-invented to guide and inspire the development of climate change mitigation and adaptation'.[44] Julia Dehm has recently argued that modes of narrating 'the climate crisis' prefigure possible responses to the problem, and concludes by identifying 'the urgent imperative of constructing narratives adequate to our times'.[45]

Dehm's point is particularly salutary with respect to the plight of small island states at risk of territorial loss. Total territorial loss of the land mass of a state appears to be an entirely novel juridical problem, as opposed to loss of territory to another political entity via legally recognizable processes of conquest, settlement or cession.[46] Doctrinal responses to the statehood question tend to assume that the conditions of possibility that have caused the legal question of extinction to become more than hypothetical are themselves novel.[47] Thus the phenomenon of island degradation is habitually framed

[41] 'From its specialized sphere of operations, [international environmental law] is not only incapable of deterring the momentum of the international system, but it serves to obfuscate the disciplinary correlation with environmental harm'. Natarajan and Khoday, 'Locating Nature: Making and Unmaking International Law', 27*Leiden Journal of International Law* (2014) 592.

[42] This work builds variously on the fields of law and literature, science and technology studies, and new materialism. See generally B. Latour, *An Inquiry into Modes of Existence: An Anthropology of the Moderns* (2013); and T. Cohen (ed.) *Telemorphosis: Theory in the Era of Climate Change*, vol. I (2012).

[43] Chakrabarty, 'The Climate of History: Four Theses', 35 *Critical Inquiry* (2009) 197; and 'Postcolonial Studies and the Challenge of Climate Change', 43 *New Literary History* (2012) 1.

[44] Mayer, *supra* note 9, at 967.

[45] Dehm, *supra* note 23, at 193. Windsor puts forward a case for a 'critical narratology' in approaches to international law in 'Narrative Kill or Capture: Unreliable Narration in International Law', 28 *Leiden Journal of International Law* (2015) 743, at 765.

[46] See Craven, 'The Problem of State Succession and the Identity of States under International Law', 9 *European Journal of International Law* (1998) 142.

[47] See, for example, Wong, *supra* note 12, at 348; and Jain, *supra* note 13, at 3.

in the context of rising sea levels due to anthropogenic climate change. Yet as Jane McAdam has long identified – as indeed does Stoutenburg – it is not the physical disappearance of territory but rather the uninhabitability of that territory that will force the populations of island states to relocate.[48] Adopting uninhabitability of territory rather than its physical disappearance as the entry point into the existential precarity facing small island communities leads the narrative in quite a different direction. Pressures on island habitability include not only the complex effects of sea level rise caused by climate change, but also more direct environmental practices of water pollution and waste disposal, as well as pressures not categorized as environmental, including inadequate infrastructure, economic and political instability, and social conflict.[49]

It is therefore problematic that doctrinal responses to the problem of island degradation frame the risk facing small island states as primarily a matter of anthropogenic climate change. Rising sea levels, extreme weather events and other markers of climate change are without question existential threats to atoll states. However, the assumption of rising sea levels as the entry point into the problem of territorial loss works to erase from view the material, populated history of ocean island degradation. Systematic and direct practices of environmental pressure and resource exploitation have characterized imperial treatment of ocean islands for centuries. Ocean islands were vital strategic sites in the expansion of European commerce across the globe.[50] As Richard Grove identified over 20 years ago, 'the early oceanic colonies provided the setting for well-documented episodes of rapid ecological deterioration'.[51] Colonial practices greatly altered the mode and degree of population of ocean islands.[52] For some islands, colonialism marked the transition from migratory to fixed modes of population. Histories of the pre-colonial period have established that many Pacific island communities, for example, migrated periodically and travelled extensively between regions.[53] The spatial fixity of colonial rule altered the manner in which island communities interacted with their environments, a major alteration now codified in the international state system of territorial sovereignty that effectively requires fixed population.[54] For some islands, imperial intervention meant not only foreign commercial

48 McAdam, *supra* note 12, at 123–124.

49 *Ibid.*. See also United Nations General Assembly Secretariat, *supra* note 11, at 7.

50 'The imperative to control islands closely was related to their place in the political economy of militarily protected European commercial networks.' L. Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400 – 1900* (2010), at 163.

51 R. H. Grove, *Green Imperialism: Colonial Expansion, Tropical Island Edens and the Origins of Environmentalism* (1995), at 474.

52 *Ibid.*

53 See, for example, Hau'ofa, 'Our Sea of Islands', in E. Waddell, V. Naidu and E. Hau'ofa (eds), *A New Oceania: Rediscovering Our Sea of Islands* (1993) 2.

54 As applications of the principle of *terra nullius* in international law indicate, international law has traditionally assumed the European mode of population of land, expressed in practices of property and agriculture, to be the standard of legitimate use against which other modes of population should be measured. This of course was a central issue in the *Western Sahara* case, and in the pivotal Australian case of *Mabo*, which in principle overturned the doctrine of *terra nullius* as the legal basis of European colonization in Australia. See *Western Sahara*, Advisory Opinion, 16 October 1975, ICJ Reports (1975) 12, summary available at http://www.icj-cij.org/docket/index.php?sum=323&p1=3&p2=4&case=61&p3=5 (last visited 25 April 2016); and High Court of Australia, *Mabo v. Queensland (No. 2)*, 1 CLR 175.

intervention but new populations of indentured labourers.[55] Overpopulation is consistently identified as a significant and in some cases probably irreversible pressure on small island environments.[56]

Reframing the problem of island degradation as a matter of uninhabitability rather than territorial loss brings not only human migration but land use practices into the frame. Many island states at risk have been subjected to monocultural plantation agriculture and/or mineral extraction to such a degree that rehabilitation is unlikely. The case of Nauru provides a now notorious example.[57] The key point for this discussion is that the uninhabitability of the island of Nauru is not a recently apprehended risk. It was not only anticipated but actively worked towards by the island's trustees under the United Nations trusteeship system, interrupted only by the colonial independence movements of the 1950s and 1960s.[58] Prior to Nauruan independence in 1968, Australia planned to exhaust the island's phosphate reserves and then resettle the entire Nauruan population.[59] The existential precarity of Nauru is not the result of an unprecedented climate event, but of the intentional environmental destruction through phosphate mining. This places Nauru in the particular company of Banaba, its closest island neighbour, the entire population of which was considered by the British as an 'awkward obstacle' to phosphate mining operations and shifted to Rabi Island in Fiji.[60]

[55] In addition to better known examples of African slave labour in the Caribbean and Indian labour in Fiji, indentured labour was widely practised across the Pacific from the late 19th century well into the 20th century. See Mortensen, 'Slaving in Australian Courts: Blackbirding Cases 1869–1871', 4 *Journal of South Pacific Law* (2000) 7, available at http://www.usp.ac.fj/index.php?id=13200 (last visited 25 April 2016).

[56] United Nations General Assembly Secretariat, *supra* note 11, Preamble.

[57] See C. Weeramantry, *Nauru: Environmental Damage under International Trusteeship* (1992). Weeramantry's book is a reworking of the report of the Commission into the Rehabilitation of Phosphate Lands on Nauru, which provided the basis of Nauru's claim against Australia in the International Court of Justice. See *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Memorial of the Republic of Nauru, vol. 1, April 1990, available at http://www.icj-cij.org/docket/files/80/6655.pdf (last visited 25 April 2016). The case was settled in 1992. For an excellent recent ethnography of the effect of phosphate mining on the island of Banaba and the Banaban people, see K. M. Teaiwa, *Consuming Ocean Island: Stories of People and Phosphate from Banaba* (2015).

[58] As Viviani wrote in 1970: 'In June 1965, at a conference in Canberra between the Administering Authority and the Nauruan delegation, the Nauruans reiterated that it was Australia's positive obligation to restore the island. The Australian Government, on the other hand, was sure that resettlement was still the only practical solution and was not prepared to contribute to the cost of rehabilitation.' See N. Viviani, *Nauru: Phosphate and Political Progress* (1970), at 149. Also Anghie, '"The Heart of My Home": Colonialism, Environmental Damage, and the Nauru Case', 34 *Harvard International Law Journal* (1993) 445, at 458–459.

[59] See Tabucanon and Opeskin, 'The Resettlement of Nauruans in Australia: An Early Case of Failed Environmental Migration', 46 *Journal of Pacific History* (2011) 337.

[60] For an innovative account of the Banaban story, see Teaiwa, *supra* note 57. McAdam has drawn attention to the contemporary significance of the Banaban relocation in the context of climate change-induced migration. McAdam, 'Historical Cross-Border Relocations in the Pacific: Lessons for Planned Relocations in the Context of Climate Change', 49 *Journal of Pacific History* (2014) 301. The Banaban relocation was litigated in *Tito v. Waddell*, [1977] 2 WLR 496 (Chancery Division).

Nauru and Banaba may seem to be isolated cases, yet a survey of members of the Association of Small Island States (AOSIS), the peak advocacy body for SIDS, reveals that 43 of the 44 members are former colonies with histories of plantation agriculture, natural resource exploitation and/or indentured labour practices.[61] Of those islands currently identified as at risk of legal extinction, Kiribati and Tuvalu were subject to the British protectorate of the Gilbert and Ellice Islands from the late 19th century through to 1972, a period during which intense phosphate mining took place.[62] Prior to its official independence in 1965, the Maldives endured eras of Portuguese, Dutch and British rule, during which the atoll was used as a maritime loading point for water, food and coir rope used in shipping.[63] The Marshall Islands endured a decade of nuclear testing in Bikini Atoll when administered by the United States as the Trust Territory of the Pacific Islands.[64] The only state member of AOSIS that has never experienced colonialism or imperialism is Tonga which, due to the strength of its autochthonous monarchy, entered into a Treaty of Friendship with Great Britain in 1900.[65]

So what, then, is the point of narrating the problem of island degradation as a problem of uninhabitability rather than territorial loss? From this perspective, the problem appears as a continuation of a long history of imperial land use practices. The intention in offering an alternative narrative is not to suggest that Stoutenburg's approach is wrong. It is rather to illustrate that the doctrinal approach she adopts functions as a narrative framework that prefigures certain facts as more relevant than others, and that this has a direct effect on the scope of available responses to the problem. As McAdam has noted, 'many false assumptions are made about the role of climate change in forcing movement away from small Pacific island countries, which in turn impact on debates about their on-going statehood'[66]. Attributing territorial loss to climate change dehistoricizes the causes of impending uninhabitability to such a degree that the environmental legacies of colonialism and imperialism are difficult to keep in view. This in turn prefigures the scope of available responses. In much the same way as the 'natural disaster' paradigm of the 1970s and 1980s worked to normalize the structural disadvantage of the 'Third World' in the international order, the attribution of territorial loss to an externality of 'climate change' can work to normalize

[61] Data on file with author. The list of states used is available at http://aosis.org/about/members/ (last visited 25 April 2016). The United Nations does not maintain an official list of SIDS. UNCTAD maintains an 'unofficial' list of twenty-nine states, which is available at http://unctad.org/en/Pages/ALDC/Small%20Island%20Developing%20States/UNCTAD%C2%B4s-unofficial-list-of-SIDS.aspx (last visited 25 April 2016). All states on the UNCTAD list appear on the AOSIS list used to compile this data.

[62] Munro and Firth, 'Toward Colonial Protectorates: The Case of the Gilbert and Ellice Islands', 32 *Australian Journal of Politics and History* (1986) 63.

[63] See for example C. R. de Silva (ed.), *Portuguese Encounters with Sri Lanka and the Maldives: Translated Texts from the Age of Discoveries* (2009), at 173–217.

[64] Brown, 'Archaeology of Brutal Encounter: Heritage and Bomb Testing on Bikini Atoll, Republic of the Marshall Islands', 48 *Archaeology in Oceania* (2013) 26.

[65] For a history of Tonga, see I. C. Campbell, *Island Kingdom: Tonga Ancient and Modern* (1992).

[66] McAdam, *supra* note 12, at 127.

the structural disadvantage of ocean islands at risk of uninhabitability. [67] Within the frame of the law of statehood, emphasis falls on the fact that these islands are low-lying atolls – a 'natural' and blameless fact – rather than the fact that most of them have been systematically exploited for decades, if not centuries.[68] The fact that liability for the effects of exploitative land use practices is exceedingly difficult to bring home to colonial powers, and a full account of the benefits that have flowed from those practices is untraceable as a matter of law, is precisely the point. If international law cannot account for the historicity of environmental degradation as a category of analysis, then its usefulness as a means of achieving environmental justice is limited at best.

In this respect, *International Environmental Law and the Global South* is something of a missed opportunity. Whilst the editors state their commitment to historicizing the North-South divide, their insistence on the redemptive promise of international law steers the collection away from explaining the historical connection between the conceptual foundations of international law and the exploitation of the natural environment. The volume holds international law to its humanist ideals of justice and equality without direct consideration of the connection between that humanism and the environmental exploitation the volume seeks to address. As a matter of conceptual history, it has long been recognized that concepts of the human and concepts of nature are mutually constitutive in their modern antithesis.[69] It bears pointing out here that the severance of human from nature in Enlightenment humanism has long been critiqued from within non-European knowledge structures.[70] Yet the implications of this insight for the project of international law are only recently receiving attention.[71] Taking the mutual constitution of human and nature seriously would necessitate a reconsideration not only of environmental law but of international law itself. The interventions of the Locating Nature research project are particularly instructive in sketching out what that reconsideration might entail.[72] The work of

[67] '(T)he disproportionate incidence of disasters in the non-Western world is not simply a question of geography. It is also a matter of demographic difference, exacerbated in more recent centuries by the unequal terms of international trade…'. Bankoff, 'Rendering the World Unsafe: "Vulnerability" as Western Discourse', 25(1) *Disasters* (2001) 19, at 24. Also K. Hewitt (ed.) *Interpretations of Calamity from the Viewpoint of Human Ecology* (1983), at viii.

[68] There is some parallel here to critiques of the 'resource curse' discourse in international political economy. See, for example, Saad-Filho and Weeks, 'Curses, Diseases and other Resource Confusions', 31 *Third World Quarterly* (2013) 1.

[69] See Chakrabarty, 'Climate of History', *supra* note 43. Also Williams, 'Ideas of Nature', in R. Williams, *Problems in Materialism and Culture: Selected Essays* (1980), at 67. Within science and technology studies, the concept of 'co-production' has been used to capture this relationship. See Jasanoff, 'Ordering Knowledge, Ordering Society', in Jasanoff (ed.), *supra* note 1, 13.

[70] See generally C. F. Black, *The Land is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (2011) (Foreword by M. Ramose, at xi–xiii); R. Connell, *Southern Theory: The Global Dynamics of Knowledge in Social Science* (2009), at 196 (Ch. 9, 'The Silence of the Land'); and Teaiwa, *supra* note 57, at xvi.

[71] Humphreys and Otomo offer one helpful reading of that connection in arguing that 'the broad impetus underlying international environmental law – its principal motivating force – derives from a particular understanding of the human-natural relation that is directly traceable to European romanticism'. Humphreys and Otomo, *supra* note 5.

[72] See Khoday *et al.*, *supra* note 5, at 571.

Khoday *et al*. suggests that for international lawyers working towards environmental justice, an alternative starting point to the question of how international environmental law can be used to achieve that justice is the question of how international law prefigures understandings of the environment. As they identify, 'assumptions about nature lie at the heart of disciplinary concepts such as sovereignty, development, economy, property, and human rights'.[73] Individual contributions to the project offer accounts of how those foundational assumptions limit the ability of international law to gain purchase on the problem of environmental limits. Ileana Porras, for example, traces the emergence in the works of Gentili, Grotius and Vattel of a 'providentialist doctrine of commerce' that implicitly figures nature as a commodity for appropriation and exploitation, and argues that such 'patterns of associations' continue to inhabit the discipline.[74] Karin Mickelson considers how legal classifications of territory are predicated on an understanding of nature as 'existing for the benefit of humans', and suggests that the failure to effect structural change using international environmental law is related to a failure to grasp that exploitative understandings of the natural environment are deeply embedded within international law itself.[75] The project of deploying international law as a tool in the struggle for environmental justice can only be strengthened by direct reckoning with international law's complicity in perpetuating exploitative understandings of the natural environment.

5 Conclusion: International Law and Environmental Limits

International law has thus far proven limited as a tool for securing environmental justice for those marginalized by the international order. *Disappearing Island States* and *International Environmental Law and the Global South* both seek to address this problem in different ways. Stoutenburg's treatment of the question of small island states at risk of legal extinction is a painstaking application of doctrinal technique, however she is ultimately unable to find in law the justice she hopes to apportion for the disproportionate effects of climate change on small island states. Despite functioning on one level as a catalogue of similar failures of positive law, *International Environmental Law and the Global South* refuses to excuse international law from its promise of global justice, environmental and otherwise. This insistent faith demonstrates what an inclusive universality might look like, yet steers the volume away from a coherent critique of the relationship between international environmental law and the North-South divide the collection takes as its organizing problematic.

Reading these texts together prompts the question of whether the logic of international law itself is actively complicit in the environmental harm each seeks to address, rather than being passively indifferent to it. This review has endeavoured to show that

[73] *Ibid*., at 571–572.

[74] Porras, 'Appropriating Nature: Commerce, Property, and the Commodification of Nature in the Law of Nations', 27 *Leiden Journal of International Law* (2014) 641, at 659–660.

[75] Mickelson, 'The Maps of International Law: Perceptions of Nature in the Classification of Territory', 27 *Leiden Journal of International Law* (2014) 621, at 639.

assumptions of the appropriateness of international law as a framework for responding to environmental crisis have worked to perpetuate inattentiveness to the manner in which foundational precepts of international law prefigure the natural environment. To assume that international law is the appropriate framework within which to address problems of environmental limits is to curtail consideration of how international law itself is predicated on a conception of the natural environment that perpetuates its exploitation. The claim here is not that the humanist logic of international law is the determinative cause of practices of environmental exploitation. It is simply that international law is not neutral to that exploitation, and work remains to be done in determining the extent of that complicity. International law is no stranger to interdisciplinarity. The challenge of remaining relevant to the fight against environmental destruction may demand creative engagement with the limitations of the discipline as a framework for generating responses. In his introduction to *International Law and the Global South*, Judge Christopher Weeramantry poses the problem as a question of language: '[o]ne fears to think what words could be used by future generations to describe those who have damaged their environment, with full knowledge of what they were doing. And what would future generations think of a legal system that permits this to happen?'[76] Finding a narrative framework capable of acknowledging the historicity of the problem of environmental crisis may be crucial to generating effective responses.

Individual Contributions to International Environmental Law and the Global South

Christopher Weeramantry, *Foreword*;
Sumudu Atapattu and Carmen G. Gonzalez, *The North-South Divide in International Environmental Law: Framing the Issues*;
M. Rafiqul Islam, *History of the North-South Divide in International Law: Colonial Discourses, Sovereignty and Self-determination*;
Ruth Gordon, *Unsustainable Development*;
Sumudu Atapattu, *The Significance of International Environmental Law Principles in Reinforcing or Dismantling the North-South Divide*;
Karin Mickelson, *The Stockholm Conference and the Creation of the South-North Divide in International Environmental Law and Policy*;
Ved P. Nanda, *Global Environmental Governance and the South*;
Bharat H. Desai and Balraj K. Sidhu, *Quest for International Environmental Institutions: Transition from CSD to HLPF*;
Louis J. Kotzé, *Human Rights, the Environment and the Global South*;
Jorge Cabrera Medaglia, *Access and Benefit Sharing: North-South Challenges in Implementing the Convention on Biological Diversity and Its Nagoya Protocol*;
Rowena Maguire and Xiaoyi Jiang, *Emerging Powerful Southern Voices: Role of BASIC Nations in Shaping Climate Change Mitigation Commitments*;
Chidi Oguamanam, *Sustainable Development in the Era of Bioenergy and Agricultural Land Grab*;
Zada Lipman, *Trade in Hazardous Waste*;
Carlos Bernal, *The Right to Water: Constitutional Perspectives from the Global South*;
Shawkat Alam, *Trade and the Environment: Perspectives from the Global South*;

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