DISSERTATION

INTERNATIONAL ENVIRONMENTAL (IN)JUSTICE: CRITICAL LEGAL STUDIES
AND JUSTICE IN CLIMATE CHANGE

Submitted by

Martin Joseph Adamian

Department of Political Science

In partial fulfillment of the requirements

For the Degree of Doctor of Philosophy

Colorado State University

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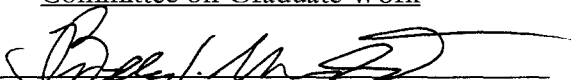
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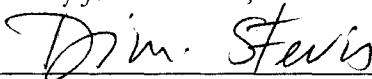
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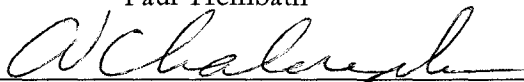
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_____
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ABSTRACT OF DISSERTATION

INTERNATIONAL ENVIRONMENTAL (IN)JUSTICE: CRITICAL
LEGAL STUDIES AND JUSTICE IN CLIMATE CHANGE

Most agree that severe climate change is now virtually inevitable, as is the

widespread ecological destruction, extinction, and human suffering that will come

with it. This study seeks to critically assess the prospect of achieving international

environmental justice through the use of international law in climate change. In order

to do so, I look at the significance of liberal theories of law and the ways in which

strands of critical jurisprudence have drawn into question some of liberalism's

fundamental assumptions. Concepts of social justice rooted in traditional liberal

theory are not adequate for addressing the kinds of competing moral claims that have

arisen over environmental issues. The role of community and culture is also not

easily captured in traditional liberal theories of social justice because such theories,

which are typically grounded in a concern for individual rights and preferences, do

not recognize claims based on the value of group identity. Furthermore, the

international legal system, much like our domestic legal systems, relies on a liberal

orientation towards the role of law as a solution to problems such as environmental

degradation. In this regard, the liberal assumptions about the rule of law, subjective

values, and the problems with legislation and adjudication must be considered if we

seek to achieve any kind of international environmental justice. The current

international system was established around the idea of state sovereignty and reflects

the hierarchies of power that have developed in that context. Ultimately, by showing

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the advantages of a critical legal approach I argue that liberal legal theory alone is insufficient for addressing the difficult and complicated issues that arise in regards to global environmental problems. As a result, a critical pluralist approach must be utilized in order to address problems such as climate change in a just manner.

Martin Joseph Adamian
Department of Political Science
Colorado State University
Fort Collins, CO 80523
Summer 2006

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To my mother and father and everyone else that has provided the
love and support I needed in order to finish

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INTRODUCTION

Injustice anywhere is a threat to justice everywhere.

—Martin Luther King, Jr.

Wherever in the world environmental degradation is happening, it is almost always linked to questions of social justice, equality, and people's quality of life in its widest sense. Humans have effectively covered the globe, and, in turn, they have engendered a host of environmental, biological, social, political and ethical problems. Many of these problems are difficult to address within the traditional state-centric capitalist world system. In this regard, a system of sovereign states complicates the prospect for cooperation regarding issues that cross national borders. For example, the ability to control rules of access to the environment and natural resources—to define who may alter, and to what extent, which specific natural materials, systems, and processes—has historically been a central component of state authority and legitimacy.[1] Nevertheless, international organizations and institutions are playing an ever increasing role in controlling such rules. The problems associated with a state-centric system can be seen in the attempts to deal with degradation of the global environment.

As we begin the twenty-first century, the Earth's physical and biological systems are under unprecedented strain and transformation. In this regard, the human impact on the biosphere has the potential to be one of the most decisive issues of the century. The human population reached 6.3 billion in 2003 and is projected to increase to about 9

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[1] Ken Conca, "Rethinking the Ecology-Sovereignty Debate," in Ken Conca and Geoffrey D. Dabelko (eds.), *Green Planet Blues*, Second Edition (Boulder: Westview Press, 1998), p. 90.

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billion in the next fifty years.[2] In addition, much of the world is choked with pollution which threatens air quality, particularly in poorer areas of the world. As carbon dioxide (CO_2) and other greenhouse gases build up in the atmosphere, the average surface temperature of the Earth has reached the highest level ever measured on an annual basis. The biological diversity is also under incredible stress. Scientists believe that a mass extinction of plants and animals is under way and predict that a quarter of all species could be pushed to extinction by 2050 as a consequence of global warming alone.

This becomes a social justice issue when we recognize that these environmental problems are disproportionately born by the poor both nationally as well as internationally. While the rich can easily make sure that their children breathe clean air, drink clean water, and are properly clothed and sheltered, those at the bottom of the global socioeconomic ladder are less able to avoid the consequences of motor vehicle exhausts, polluting industry, and power generation. This unequal distribution of externalities is compounded by the fact that globally and domestically the poor are not the major polluters. Most environmental pollution and degradation is caused by the actions of those in the high consumption nations of the industrialized world, especially the more affluent groups within those societies. In this regard, there is an increasing awareness of the fact that poor people and people of color are forced to bear a disproportionate share of the environmental risks.[3] This raises a number of ethical,

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[2] Regina S. Axelrod, David Leonard Downie, and Norman J. Vig (eds.), *The Global Environment: Institutions, Law, and Policy*, Second Edition (Washington, D.C.: CQ Press, 2005), p. 1.

[3] See, for example P. Mohai and B. Bryant, "Environmental Racism: Reviewing the Evidence," in B. Bryant and P. Mohai (eds.), *Race and the Incidence of Environmental Hazards: A Time for Discourse* (Boulder: Westview Press, 1992), pp. 163-176; Robert D. Bullard, *Dumping in Dixie: Race, Class, and Environmental Quality* (Boulder: Westview Press, 1990); Robert D. Bullard, "Waste and Racism: A Stacked Deck?," *Forum for Applied Research and Public Policy*, Vol. 8, 1993, pp. 29-45; S. M. Capek, "The 'Environmental Justice' Frame: A Conceptual Discussion and an Application," *Social Problems*, Vol.

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social, and economic issues that have been discussed under the rubric of environmental

racism[4] and environmental justice.[5] In fact, virtually all environmental decisions raise

ethical dilemmas. This is particularly true when we look at the prospect of global climate

change.

Global warming happens when greenhouse gases such as CO_2 warm the Earth by

trapping additional solar radiation within the atmosphere. There are other gases besides

CO_2 that act as greenhouse gases, most notably water vapor, but also methane (CH_4),

nitrous oxide (N_2O), and fluorocarbons. It is important to realize that before humans

started increasing the concentrations of these gases in significant amounts, these gases

worked together to create a protective layer that kept the Earth far warmer and more

inhabitable than it would have otherwise have been.

The industrial revolution was made possible by cheap and easy energy extracted

from fossil fuels. Since that time, the atmospheric concentrations of greenhouse gases

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40, No. 1, 1993, pp. 5-24; V. Jordan, "Sins of Omission," *Environmental Action*, Vol. 11, 1980, pp. 26-27; A. Szasz, *EcoPopulism: Toxic Waste and the Movement for Environmental Justice* (Minneapolis: University of Minnesota Press, 1994); United Church of Christ, Commission for Racial Justice, *Toxic Wastes and Race: A Natural Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites* (New York: United Church of Christ, 1987); and, James P. Lester, David W. Allen, and Kelly M. Hill, *Environmental Injustice in the United States: Myths and Realities*, (Boulder: Westview Press, 2001).

[4] The term "environmental racism" was coined in 1982 by Benjamin Chavis, then the head of the National Association for the Advancement of Colored People (NAACP), at a protest in the town of Afton, North Carolina. The concept of environmental racism was soon broadened to "environmental justice," to include unequal exposures by class, race and ethnicity: poor Latino and Native American communities were quickly seen to face the same types of disproportionate impacts of pollution as blacks in the U.S. South [Bradley C. Parks and J. Timmons Roberts, "Environmental and Ecological Justice," in Michele M. Betsill, Kathryn Hochstetler, and Dimitris Stevis (eds.), *Palgrave Advances in International Environmental Politics*, (Palgrave Macmillan, 2006), pp. 329-330].

[5] To the degree that we value the ecosystem for its own sake and not simply as an exploitable resource, we enter a new realm of ethical thinking, one in which justice is not defined only in terms of an equitable distribution of costs and benefits among humans, but also in terms of the effects of human activities on the whole ecosystem [Fen Osler Hampson and Judith Reppy (eds.) *Earthly Goods: Environmental Change and Social Justice* (Ithaca: Cornell University Press, 1996), p. 5]. See also Nicholas Low and Brendan Gleeson, *Justice, Society and Nature: An Exploration of Political Ecology* (London: Routledge, 1998); and Dimitris Stevis, "Whose Ecological Justice?," *Strategies*, Vol. 13, No. 1, pp. 63-76.

have increased, reaching their highest recorded levels in the 1990s and most continuing to increase to this day.[6] Carbon in the form of CO_2 is by far the most significant; it is responsible for half of warming, has a long atmospheric half life, and will become a larger and larger fraction of greenhouse pollution. During the period 1750 to 2000, the atmospheric concentration of CO_2 increased by 31 +/- 4 percent, primarily due to the combustion of fossil fuels, land use, and land-use change.[7] The atmospheric concentration of CH_4 increased by 151 +/- 25 percent from the years 1750 to 2000.[8] The significance of this increase can be measured in terms of "radiative forcing"—which in this context is a measure of the amount of additional energy trapped or reflected by the greenhouse gases that humans have added to the atmosphere.[9]

The impacts of climate change are all around us and easily discernable. Since the industrial revolution, the global average surface temperature has increased by about 0.6 +/- 0.2 degrees C over the 20th century.[10] It is important to keep in mind that this is an average. In fact, the temperature is increasing much more quickly near the poles, and

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[6] Intergovernmental Panel on Climate Change, *Climate Change and Biodiversity: IPCC Technical Paper V*, 2002, p. 4.

[7] Ibid. The atmospheric concentration of CO_2 increased from about 275 parts per million (ppm) to over 370 ppm, and it continues to rise, at about 1.5 ppm per year [Tom Athanasiou and Paul Baer, *Dead Heat: Global Justice and Global Warming* (New York: Seven Stories Press, 2002), p. 32].

[8] Intergovernmental Panel on Climate Change, *Climate Change and Biodiversity*, p. 5.

[9] Positive radiative forcing refers to an increase in the solar energy absorbed from the sun. It produces generally warmer temperatures and changes in the patterns and variability of the weather. The increase in radiative forcing attributable to humans for just CO_2 is about 1.46 watts per square meter (Ibid). It is worth noting that the warming effect of greenhouse gases is partially offset by a negative radiative forcing (cooling effect) caused by other pollutants called aerosols, particularly sulfur compounds produced by combustion. Many of these cooling pollutants are extremely dangerous to human health, particularly in the local communities where they concentrate.

[10] Intergovernmental Panel on Climate Change, *Climate Change 2001: Synthesis Report*, 2001, p. 5.

many scientists now expect the Artic ice cover to be almost entirely gone by 2080.[11] It is also worth noting that the 1990s were the warmest decade on record, and 1998 the warmest year since 1861.

Most agree that severe climate change is now virtually inevitable, as is the widespread ecological destruction, extinction, and human suffering that will come with it. Further, climate change is truly a global environmental problem; its causes, effects, and potential solutions transcend state boundaries and create a need for international cooperation. Yet efforts to address this issue have been fragmented at best and largely ineffective. In this regard, climate change has proved to be a significant issue both politically and ecologically.

This study seeks to critically assess the prospect of achieving international environmental justice through the use of international law. In order to do so, I will utilize critical legal studies and other lessons from critical jurisprudence more generally, to analyze the theoretical foundations of international law. I will look at the significance of liberal theories of law and the ways in which strands of critical jurisprudence have drawn into question some of liberalism's fundamental assumptions. The liberal discourse has helped shape law in the domestic context, and, through the domestic analogy, it has been applied to the use of international law as well.

Concepts of social justice rooted in traditional liberal theory are not adequate for addressing the kinds of competing moral claims that have arisen over environmental issues. The role of community and culture is also not easily captured in traditional liberal theories of social justice—even in those that accept that all preferences may not be

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[11] Norwegian Polar Institute, "Polar Bears Facing Extinction," *The Independent* (London), May 14, 2002.

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equal—because such theories, which are typically grounded in a concern for individual

rights and preferences, do not recognize claims based on the value of group identity.[12]

Furthermore, the international legal system, much like our domestic legal systems, relies

on a liberal orientation towards the role of law as a solution to problems such as

environmental degradation. In this regard, the liberal assumptions about the rule of law,

subjective values, and the problems with legislation and adjudication must be considered

if we seek to achieve any kind of international environmental justice.

After looking at the application of these legal theories to the use of international

law to achieve international environmental justice, I will look more specifically at

climate change. The issues surrounding climate change provide an excellent case study

from which to see the potential benefits of critical legal studies. Many suggest that the

battle against global warming is essential to the larger battle for global justice. As Dale

Jamieson notes:

> Debates about climate change are as much about the distribution of
> wealth, power and authority as they are about whether or not scientists
> have accurately depicted the natural and human systems that contribute to
> climate change. How we as individuals should act in the face of the rapid
> anthropogenic environmental changes that are now sweeping the globe
> with disastrous consequences for many of our contemporaries, future
> generations, and nonhuman nature is one of the most interesting and
> important ethical questions that climate change confronts us with. But just
> as important are the ethical questions that underlie our collective
> responses to climate change.[13]

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[12] Hampson and Reppy, *Earthly Goods*, pp. 5-6.

[13] Dale Jamieson, "Climate Change and Global Environmental Justice," in Clark A. Miller and
Paul N. Edwards (eds.), *Changing the Atmosphere: Expert Knowledge and Environmental Governance*
(Cambridge: MIT Press, 2001), p. 289.

This study begins from an interest in these ethical questions and a promotion of their just resolution.[14] In this age of globalization,[15] justice has become an elusive concept, often forgotten or ignored. Particularly in the domestic sphere, there is faith in the political institutions that have been established to ensure some equitable distribution of benefits and risks. On the international level, it is assumed that political institutions that represent states are capable of adequately representing the variety of interests at stake and ultimately reaching a just resolution of international conflict. This is particularly true of the use of international law to address global environmental problems.

Critical legal studies help expose the ethical issues that remain when we attempt to address these issues through the use of international environmental law. There is no promise that our current efforts to address global environmental problems such as climate change will produce international environmental justice. The current international system was established around the idea of state sovereignty and reflects the hierarchies of power that have developed in that context. Further, it is important to recognize that the most powerful states have evolved with the idea of sovereignty and been able to appropriate it to maintain their privileged position. Therefore, critical

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[14] Ethics have to do with tension between the way the world *is* and the way it *ought to be*. It is important to realize that all propositions about how we should behave or how public policy should be formulated rest on an implicit ethic and implied morality.

[15] The term "globalization" has been used to describe the increasing interdependence of peoples and states in the international system. According to the International Monetary Fund, globalization refers to "the increasingly close international integration of markets both for goods and services and for capital" [International Monetary Fund (IMF), W*orld Economic Outlook* (Washington, D.C.: International Monetary Fund, May 1997)]. It has also been used to describe "a process, a policy, a predicament, and the product of vast, invisible international forces producing massive changes worldwide" [Charles W. Kegley and Eugene R. Wittkopf, *World Politics: Trends and Transformations*, Tenth Edition (Belmont: Thomson Wadsworth, 2006), p. 262]. Information technology, high speed travel, and the presence and significance of computers and other forms of technology in our daily lives, have magnified the ways in which our individual behaviors impact the natural world.

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analyses of the foundations of international law are necessary in order to get at the often overlooked issues of power and justice that liberal legal theory takes for granted. Ultimately, by showing the advantages of a critical legal approach I argue that liberal legal theory alone is insufficient for addressing the difficult and complicated issues that arise in regards to global environmental problems. As a result, a critical pluralist approach must be utilized in order to address problems such as climate change in a just manner.

Organization of Dissertation

Chapter One provides a theoretical orientation that guides the study. I discuss the relationship between the different strains of legal theory, focusing specifically on liberal theories of law and justice as a representation of mainstream jurisprudence. In addition, I discuss critical jurisprudence and critical legal studies. Critical jurisprudence generally, and critical legal studies more specifically, are presented as an alternative understanding of legal phenomena that are utilized to assess the prospect of achieving international environmental justice in the context of climate change. Since these theories have been developed in the domestic context, this chapter focuses exclusively on their application to legal phenomena within the state.

In the second chapter I shift the analysis to international legal phenomena by looking at international law and jurisprudence. International law relies on the domestic analogy and is grounded in political and legal liberalism. In this chapter I discuss the domestic analogy and the unique nature of the international legal system. I also discuss the application of critical international legal studies to work toward international environmental justice. I point out that there has been a noticeable absence in the

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application of critical legal studies to international phenomena. This is the gap in the literature that this project begins to fill.

Chapter Three looks at international environmental law and justice. I look at the existence and significance of international law dealing with global environmental problems such as climate change. The international legal system has been relied on in our global attempt to address these issues. Further, many scholars have suggested that a system of global environmental governance exists to address the practical and ethical issues raised by the prospect of climate change. In this chapter I discuss the existence and viability a system of global environmental governance. In addition, I look specifically at the climate change regime and the ways in which international environmental law is used to address this issue. Certainly there is a broad, complex, and often overlapping attempt to address these issues on the international level through a variety of institutions and mechanisms. Nevertheless, we must remain critical of the extent to which these issues are adequately addressed. Therefore, this chapter also looks at how international environmental justice has been defined within the liberal legal tradition and what critical legal studies might be able to add. In this regard, I will be comparing these theoretical approaches and the ways in which they address issues of international environmental justice.

Chapter Four continues the discussion of climate change, focusing on what liberal legal theory and critical legal studies tell us about justice in this context. Climate change provides an excellent case study to illustrate the benefits of critical legal studies and its potential application to global environmental problems. Nevertheless, we must ask, is liberal legal theory adequate for addressing the difficult issues raised by global climate

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change? The chapter starts with a discussion of the ways in which environmental justice has been addressed in the context of climate change. Justice is no longer simply justice between states; increasingly issues of environmental justice must consider non state actors, concerns with intergenerational equity, and the pursuit of universal ideals and virtues, such as a clean and safe environment. Ultimately, I discuss what critical legal studies can tell us about international legal phenomena, particularly the possibility of achieving international environmental justice in the context of climate change. In addition, I identify a number of tools from the critical legal studies literature and discuss their applicability to the study of international environmental problems such as climate change. I look at the assumptions of international law and legal theory, focusing on the ways in which we borrow from our domestic legal experiences to shape the ways in which we utilize international law to modify behavior on the international level. I point out that critical legal studies allows us to look at the structural level of analysis while taking into consideration both individual and state behavior. This is absolutely necessary in order to assess the prospects of achieving international environmental justice in the context of climate change.

I finish with some concluding remarks about the hope of achieving international environmental justice within a system of sovereign states who rely on international law. I discuss what a just resolution to global environmental problems such as climate change might look like and how we might be able to move in that direction. At the very least this study should illustrate the complexity of these issues and the difficulty of providing a one-size-fits-all solution to such problems. We need more critical analysis of international legal phenomena and institutions. Only with such analysis will we be in a

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position to make the world a better place in which rich and poor can share in the

prosperity and beauty that the natural world can provide.

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CHAPTER ONE:

Liberal Legal Theory and its Discontents

It is the theory that decides what can be observed.

—Albert Einstein

There is substantial research and writing on issues of implementation and compliance with international law, but much less that looks at the theoretical framework that underlies the creation and utilization of such laws.[16] Yet in order to properly analyze the use of international law to achieve international environmental justice, we must first look at the fundamental assumptions that we make about the use of law on the international level. The theoretical framework dictates and shapes the policies that are adopted and the ways in which these policies become a form of global governance that influences both states as well as individual actors.

This chapter will situate the theoretical framework from which we will look at the prospect of achieving international environmental justice. In order to do so, we will need a proper understanding of the relevant legal theory; ultimately we will need to look at the

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[16] Richard Falk has noted, "most international lawyers, whether inside or outside of universities, profess to be anti-theoretical. Such a profession is often accompanied, or even justified, by a conviction that theory is a waste of time in legal studies" [*The Status of International Law in International Society* (Princeton, 1970), p.8]. But as he points out in a separate article, "[t]o refuse to re-examine theory is to be stuck with old theory rather than to be rid of theory altogether. The difference between the antitheoretical and the theorist is that the former is the servant of implicit theory, whereas the theorist, if competent, is the master of an explicit theory that he uses as an instrument for substantive study" ["The Adequacy of Contemporary Theories of International Law. Gaps in Legal Thinking," *Virginia Law Review,* Vol. 50, No. 2, March 1964, p. 233].

relationship between liberal legal theory,[17] as a representation of mainstream legal studies, and critical legal studies. Mainstream approaches to the study of law are associated with liberal legal theory and present a very modern orientation towards the use of law and legal process. Yet, liberal theories of law and justice are inadequate for addressing issues of environmental justice. In this regard they impede the prospect of achieving international environmental justice, particularly in the context of climate change. Therefore, in order to move beyond the limits of liberal legal theory this chapter lays out the contours of liberal theories of law and then discusses critical legal studies as a critique in order to properly understand the reasons that some get more than others in regards to the distribution of environmental harms and benefits. This will provide a framework from which international environmental justice can be pursued.

Mainstream Legal Studies: Classical Liberalism and Liberal Legal Theory

In order to understand the assumptions and theoretical structure that underpins the international legal system and the use of international law, it will be necessary to look at classical liberalism generally before looking specifically liberal legal theory as a representation of mainstream legal studies. Building on the assumptions of classical liberalism, mainstream legal studies has denied the values of community and human

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[17] I am interested in the intersection of liberalism and mainstream legal theory. In this regard, I will use the terms "liberal legal theory," and "liberal theories of law" interchangeably with the concept of "liberal legalism." "Liberal legalism" is the term that critical legal scholars have attached to mainstream law and legal scholarship. It is worth noting that these terms are without fixed meanings. See Wendy Brown and Janet Halley (eds.) *Left Legalism /Left Critique* (Duke University Press, 2002). In order to provide conceptual clarity it is necessary to also differentiate "liberal legalism" from the related term "legal liberalism." Laura Kalman uses the phrase "legal liberalism" to refer to trust in the potential of courts, particularly the U.S. Supreme Court, to bring about "those specific social reforms that affect large groups of people such as blacks, or workers, or women, or partisans of a particular persuasion; in other words, *policy change with nationwide impact"* [*The Strange Career of Legal Liberalism* (New Haven: Yale University Press, 1996), p. 2. Italics in original]. She suggests that the Warren Court established its reputation as liberal bastion in 1954, when it declared school segregation unconstitutional in *Brown v Board of Education*. To a generation of lawyers, *Brown* served as "a sign that law (and therefore we) could play a part in building a better society."

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connection with a universal perspective that emphasized the importance of only certain values—the values of autonomy and individual self-interest. In this regard, I am referring to a political order that replaced Tudor Monarchy rooted in explicit class privilege with modern democratic constitutionalism rooted in abstract individualism.[18]

The political theory of liberalism has its initial roots in the social contract theories of the seventeenth and eighteenth centuries, particularly in that of John Locke, who argued that government rests on the consent of its citizens and that there are basic human rights which the state may not violate under any circumstances.[19] Many consider Locke to be the founding father of liberalism, even though the actual term was imported from Spain early in the nineteenth century.[20] After its initial birth, liberalism flourished in the nineteenth century utilitarianism of Jeremy Bentham, James Mill, John Stuart Mill, and in the works of Adam Smith and other theorists of the market where it took the form of economic liberty. In the twentieth century, liberalism has ranged from laissez-faire libertarianism to defenses of the modern welfare state.[21]

Liberalism presupposes the legitimacy of a state in which equality before the law is guaranteed and individual liberty is the overriding objective. In this regard, freedom is equated with individual rights. Within a liberal state equality and freedom are

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[18] Brown and Halley, "Introduction," *Left Legalism /Left Critique*, p. 5.

[19] Christopher Berry Gray (ed.), *The Philosophy of Law: An Encyclopedia* (New York: Garland Publishing Inc., 1999), p. 506.

[20] Kenneth R. Minogue, *The Liberal Mind* (Toronto: Vintage Books, 1963), pp. 1-2.

[21] Gray, *The Philosophy of Law*, p. 506. It is important to note that the term "liberalism" has a number of related but independent meanings. The popular usage of the word liberalism most often is used to signify one end of the political spectrum opposite conservatism. Practical politics in the U.S., whether liberal or conservative, range over only the central portion of the ideological spectrum, and are largely outgrowths of classical liberalism.

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maximized to the point where they begin to cancel one another.[22] Further, a liberal state

is one where most actions of the government are taken with the consent of at least a

majority of the population. In this regard, the modern liberal state actualizes conceptions

of personality and society as these are understood in liberal consciousness. Therefore,

the person is understood in terms of abstract possibilities which are not tied together

with any adequate understanding of group life. The dominant consciousness in the

liberal state includes a characteristic view of the relation between man as an agent or a

thinker and the external world, between man and his fellows, and between man and his

work or social place. With respect to the first, it emphasizes the subjection of nature to

human will as the ideal of action and the choice of efficient means to given ends as the

exemplary procedure of reason.

From its beginnings, liberalism has evolved as a theory of society which

corresponds to its theory of self. Society is composed of individuals and has no reality

distinct from that of its members. What may appear to be the accomplishments of the

whole is in fact the sum of the activities of its members. What is defined as good is

relative to the wants of distinct persons, and therefore, the group is not considered a

source of value in its own right. The immediate measure of conduct is within the

individual rather than the group to which he belongs. With these conceptions of the self

and society, liberalism has tried to promote a maximum amount of freedom with the

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[22] Within the liberal order, "free market" and "libertarian" conservatives draw the line closer to
freedom, as distinct from "moral conservatives," who argue for strong limits on both equality and freedom.
"Liberals" usually draw it closer to equality and thus differ from "civil libertarians," whose primary
concern is the promotion of liberty. It is important to recognize that these are differences of degree; almost
no one in contemporary political life disaffirms one in favor of the other.

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requirements of general order.[23] This is particularly important when we attempt to define and pursue issues of justice.

Law and the state are traditionally viewed as technically neutral within liberalism.[24] Authority is justified by the existence of representative institutions and their claim to provide procedural justice.[25] Political antagonisms are to be reconciled by representative institutions, and economic tensions are to be resolved by natural exchanges within a free market. Clashes of private interest and conflicts over limited resources are to be mediated through open and extensive exchanges of goods and services. It is believed that when each pursues his or her interest within impartial rules of law, the life, liberty, and estate of all will be advanced.[26] The assumption is that the interests of distinct individuals are, on the whole, conducive to the general good. In this regard, promotion of liberty is believed to accelerate the progress of modern life. "As the release of private energies generates higher levels of prosperity," Cornelius Murphy, Jr. notes, "individualism is considered to be an integral part of both political and economic freedom. And the legal order, disengaged from its subservience to natural law, gains autonomy."[27]

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[23] Cornelius F. Murphy, Jr., *Descent into Subjectivity: Studies of Rawls, Dworkin and Unger in the Context of Modern Thought* (Wakefield: Longwood Academic, 1990), pp. 131-2.

[24] This is true despite the fact that "liberals" recognize that these institutions have been historically beholden to socially dominant groups, and even if "conservatives" sometimes regard the state as an inappropriate intruder into the domain of personal and economic freedom.

[25] Many scholars differentiate between procedural justice and substantive justice. Procedural justice is based on the existence of impartial rules and regulations that are established to provide equality of opportunity, while substantive justice instead seeks equality of outcome. An emphasis on substantive justice questions whether laws and procedures actually produce equality.

[26] Ibid., p. 132.

[27] Ibid.

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The first systematic liberal philosophers of law were the British utilitarians Bentham and John Austin, followed by John Stuart Mill. They discussed liberal legal theory as a cluster of views about both the nature of law and the permissible limits to the use of law. At the heart of liberalism is the view that the state should not use its coercive power to impose conceptions of the good life upon individuals. Mill's *On Liberty* (1859) is the classical defense of the idea that individuals should be left free to choose the kinds of lives they want to lead, up to the point at which their actions harm others.[28]

In at least one of its significant modern forms, liberalism is also committed to equality. The state treats its citizens as equals only when it permits each person to develop and act on his or her own conception of the good.[29] Historically, this commitment to liberty has been manifest in a philosophical association between liberalism and legal positivism.[30] In this regard, liberals are drawn to the legal positivist insistence on the separation between laws and morals, from the level of basic theories of law, to the level of adjudication in particular cases.[31]

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[28] John Stuart Mill, *On Liberty* (New York: Penguin Group, 1975).

[29] Gray, *The Philosophy of Law*, p. 506.

[30] Although the seeds of legal positivism were laid in the early 1500s and mid 1600s, it achieved the status of a dominant paradigm with the establishment of the Harvard Law School as the major force in western jurisprudence. See Edward J. Conroy and Caryn L. Beck-Dudley "Meta-jurisprudence: A Paradigm for Legal Studies" *American Business Law Journal*, Vol. 33, Summer 1996, p. 700.

[31] Legal positivism achieved its purest expression as legal formalism. In this regard, Christopher Columbus Langdell, the first dean of the Harvard Law School, articulated the view that law is a science of legal principles. Langdell is quoted as stating: "It is indispensable to establish at least two things; first that the law is a science; secondly, that all the printed material of that science are contained in the printed books . . . (which are to us like) . . . the laboratories . . . to chemists . . . museums . . . to the geologists, (and) botanical gardens . . . to the botanist. Law as a science consists of certain principles and doctrines . . . . (T)he number of fundamental legal doctrines is much less than is normally supposed" [Arthur E. Sutherland, *The Law at Harvard: A History of Ideas and Men* (Cambridge, Massachusetts: Belknap Press of Harvard University Press, 1967), pp. 174-5]. In this regard, legal positivism separates legal reasoning from any considerations of morality or ethics.

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In liberal legal theory, legal reasoning is formal. As it emphasizes the uniform application of general rules, it upholds the ideal of the rule of law. Government, standing above the social order, rules with the impersonality of neutral power. As ideals about the purpose of law change, however, legal reasoning becomes purposive. Greater attention is given to the demands of substantive justice.

The writings of H.L.A. Hart reflect the intersection of legal positivism and liberal legalism. He develops a positivist theory of law in *The Concept of Law* (1961), in which he argues that law and morality are conceptually separate.[32] In his fundamental jurisprudential writings, Hart defended this "separation thesis" on multiple levels: the level of identifying a legal system, of identifying its rules or principles, and of the adjudication of particular cases. Here the emphasis remains on procedural justice, a system of rules or principles are believed to provide adequate safeguards against self interest. With regard to identifying the rules or principles, for example, Hart contended that what matters is the system's accepted method of picking out rules of law—it's "rule of recognition"—not the moral status of a given rule. With regard to adjudication, Hart argued that value judgments are not involved in the judge's application of "core" instances of legal rules and that, when judges step out into the "penumbra," they should be regarded as making law, with all the risks and benefits of judicial lawmaking.[33] Hart's insistence on the separation of law and morality stemmed importantly from his

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[32] H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961). It is argued that legal positivism maintains that law provides a seamless web of rules and regulations from which judges can apply the fact to the law and make a mechanical determination. In this view, the legal system functions without reference to external sources. See Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978), pp. 81-130, 331-35.

[33] Gray, *The Philosophy of Law*, p. 507.

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liberalism—from the view that to identify a rule as legal because of its moral status unacceptably risked the legal enforcement of morality.[34]

Contemporary liberal legalism is also deeply indebted to Rawls' *A Theory of Justice*, in which he argues that basic principles of justice—roughly, equality, liberty for all, and departures from equality of social "primary goods" when and only when these are to the greatest benefit of the least advantaged—should form the framework for political institutions and constitutional law.[35] The adequacy of Rawls theory of justice as a representation of liberal theories of justice will become significant when we assess the adequacy of such theories to account for international environmental justice.

It is important to recognize that there is no one thinker who accepts the liberal theory of law per se, or whose doctrines are completely defined by its tenets. Nevertheless its prevalence should not be underestimated. "Liberalism must be seen all of a piece," Roberto Mangabeira Unger notes, "not just as a set of doctrines about the disposition of power and wealth, but as a metaphysical conception of the mind and society. Only then can its true nature be understood, and its secret empire overthrown."[36] It is also worth noting that some scholars suggest that liberalism "is an intellectual compromise so extensive that it includes most of the guiding beliefs of modern western opinion. It has even, in the form of Humanism, begun to work out an appropriate set of religious beliefs."[37]

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[34] Ibid.

[35] Ibid., p. 508.

[36] Roberto Mangabeira Unger, *Knowledge and Politics* (New York: The Free Press 1975), p. 6.

[37] Minogue, *The Liberal Mind*, p. vii.

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Clearly, the ideal of the rule of law has become a dominant cultural theme, but new intellectual ferments have begun to challenge this liberal conception of law and progress. A significant amount of criticism of the liberal theory of law has developed out of critical jurisprudence, more specifically out of critical legal studies. In the next section I look at these theoretical approaches before turning our attention specifically to the criticisms that are made against liberal theories of law. Ultimately, liberal legal theory fails to adequately account for collective entities by focusing on the significance of the individual, and in the process disguises the fact that legal systems perpetuate domination and subordination. These claims will become significant when we look at the prospect of using international environmental law to address climate change.

Critical Jurisprudence

Critical jurisprudence is based upon the various critical approaches to the study of law and legal process, including critical legal studies, critical race theory, critical feminism, and Latina and Latino critical theory (LatCrit Theory).[38] In this regard, it is a category of jurisprudence[39] that engages in a deconstruction of law's empire—the

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[38] It is worth noting that critical jurisprudence is difficult to categorize. As noted by David Kennedy and Chris Tennant:

> Much of this work does not fit easily into traditional academic disciplines. Some of these writers are public international law scholars, others focus on particular issues, like the environment, nationalism, or trade. Some come from legal sociology, comparative law or legal philosophy. Some use the insights of other disciplines, including anthropology, economics, and feminism. Some have been interested in progressive or critical dimensions of contemporary legal philosophy or method. Some think of themselves as deeply progressive; others eschew political affiliation of all sorts. Whatever their intellectual roots, most of these scholars see themselves as challenging the dominant intellectual style or assumptions of their field ["New Approaches to International Law: A Bibliography," *Harvard International Law Journal,* Vol. 35, Spring 1994, pp. 417, 418].

[39] Jurisprudence refers to a branch of legal philosophy devoted to the study of law and adjudication. See, e.g., George C. Christie, *Jurisprudence: Text and Readings on the Philosophy of Law* (St. Paul: West Publishing Co., 1973). Traditional jurisprudence deals with general theories of legal rights, problems of judicial decision making, and the nature of law. Jurisprudence, as taught at most American law schools, has been organized around a number of central themes that attempted to explain the nature of

monolithic set of norms, rules, and institutions that constitute a legal system. It

challenges the macrostructure and microfoundation of modern jurisprudence and its

accompanying legal discourse. Law is not pure; it is a socially constructed network of

"prepackaged categories, clusters, reified systems."[40] The goal of this movement is to

promote a better understanding of law and legal process, an understanding that is more

faithful to political realities and capable of supporting a more equitable legal system.

Although not all critical approaches to the study of law and legal process would

consider themselves postmodern, some suggest that critical jurisprudence is steeped in

the postmodern tradition.[41] Postmodern theory has become an integral part of both

domestic and international legal scholarship.[42] Although postmodernism resists a stable

identity, in jurisprudence, postmodernism signals the movement away from

interpretation premised upon the belief in universal truths, core essences, or foundational

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law and judicial decision making in terms of an objective theory distinct from political and moral philosophy. See Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (New York: New York University Press, 1995), p. 259.

[40] Mark Kelman, *A Guide to Critical Legal Studies* (Cambridge: Harvard University Press, 1987), p. 294.

[41] See generally Minda, *Postmodern Legal Movements*. For overviews of postmodernism and postmodern theory, see Jean-Francois Lyotard, *The Postmodern Condition: A Report on Knowledge*, translated by Geoff Bennington and Brian Massumi (Minneapolis: University of Minneapolis Press, 1994); Steven Best and Douglas Kellner, *Postmodern Theory: Critical Interrogations* (New York: Guilford Press, 1991); and, Steve Conner, *Postmodernist Culture* (Cambridge: Blackwell, 1989).

[42] In regards to domestic legal scholarship see, e.g., Tim Murphy, "Britcrits: Subversion and Submission, Past, Present and Future," *Law & Critique* Vol. 10, 2000, pp. 237-279; Carrie Menkel-Meadow, "The Trouble with the Adversary System in a Postmodern, Multi-Cultural World," *William & Mary Law Review* Vol. 38, 1996, pp. 5-44; Jayne Chong-Soon Lee, "Navigating the Topology of Race," *Stanford Law Review* Vol. 46, 1994, pp. 747-780; Richard Thompson Ford, "The Boundaries of Race: Political Geography in Legal Analysis," *Harvard Law Review* Vol. 107, 1994, pp. 1843-1921; Anthony E. Cook, "Reflections on Postmodernism," *New England Law Review*, Vol. 26, 1992, pp. 751-782; Joan C. Williams, "Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory," *Duke Law Journal*, Vol. 41, April 1991, pp. 296-323; J.M. Balkin, "Deconstructive Practice and Legal Theory," *Yale Law Journal*, Vol. 96, 1987, pp. 743-786. In regards to international legal scholarship see, e.g., James M. Cooper, "Spirits in the Material World: A Post-Modern Approach to United States Trade Policy," *American University International Law Review*, Vol. 14, 1999, pp. 957-1023; and, J. A. Lindgren Alves, "The United Nations, Postmodernity, and Human Rights," *University of San Francisco Law Review*, Vol. 32, 1998, pp. 479-532.

theories. It is neither a theory nor a concept; it is rather a skeptical attitude or aesthetic that "distrusts all attempts to create large-scale, totalizing theories in order to explain social phenomena."[43] Postmodernists resist the idea that "there is a 'real' world or legal system 'out there,' perfected, formed, complete and coherent, waiting to be discovered by theory."[44] It represents a move away from reliance on the rule of law and any grand theory of law and legal process. Therefore, postmodern legal critics employ local, small-scale problem-solving strategies to raise new questions about the relation of law, politics and culture in order to reconceptualize the practice of legal interpretation. However, postmodernism is an unstable category, and it ends up meaning many things to many people. Therefore, it should not be surprising that postmoderns would resist the effort to reduce the meaning of postmodernism to statements made by a single author or text. Further, it would be unreasonable to expect all theorists in a diverse category of jurisprudence such as critical jurisprudence to embrace it.

Despite the diversity, it can be argued that each strand of critical jurisprudence rests on three core assumptions. First, critical jurisprudence posits that the underlying norms, rules, and institutions of society are socially constructed and shaped primarily by dominant groups.[45] Second, critical jurisprudence argues that these norms, rules, and institutions consciously and unconsciously perpetuate the interests of dominant groups at the expense of marginalized groups. Third, critical jurisprudence suggests there must be

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[43] Minda, *Postmodern Legal Movements,* p. 224.

[44] Ibid.

[45] See, e.g., Haney Lopez, "The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice," *Harvard Civil Rights-Civil Liberties Law Review,* Vol. 29, 1994, p. 1; Kimberle W. Crenshaw, "Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law", *Harvard Law Review,* Vol. 101, 1988, p. 1331; and, Charles R. Lawrence, III, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism", *Stanford Law Review,* Vol. 39, 1987, p. 317.

a fundamental transformation of existing norms, rules, and institutions to remedy the consequences of marginalization.

Critical jurisprudence has made an important contribution to the study of law and legal process, particularly in the United States. It encourages a discourse that challenges notions of formalism, essentialism, and the nature of privileged positions that permeate the liberal paradigm.[46] It also provides an analytic framework for identifying mechanisms by which the politics of domination and subordination can be challenged. The development of such remedial programs is particularly important for a research program that questions the fairness of the status quo and seeks to promote the development of a more equitable system.[47] In this regard, critical jurisprudence has promoted a rich flow of scholarship and has led to the development of several distinct approaches to the study of law. Yet, as noted, critical jurisprudence is a category of jurisprudence that covers a wide variety of critical approaches to the study of law and legal process. Of particular import for this work is the sub tradition of critical legal studies which we will turn to next.

A. Critical Legal Studies

As a specific subset of critical jurisprudence, the critical legal studies movement has had a profound impact on the study of law and legal process for the more than twenty five years. Critical legal studies have largely developed as a critical legal theory

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[46] Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Cambridge: Harvard University Press, 1986), pp. 5-14 . See also Roy L. Brooks & Mary Jo Newborn, "Critical Race Theory and Classical Liberal Civil Rights Scholarship: A Distinction Without a Difference?," *California Law Review*, Vol. 82, 1994, pp. 787-845, and, William A. Edmundson, "Transparency and Indeterminacy in the Liberal Critique of Critical Legal Studies," *Seton Hall Law Review*, Vol. 24, 1993, pp. 557-602.

[47] William J. Aceves, "Critical Jurisprudence and International Legal Scholarship: A Study of Equitable Distribution," *Columbia Journal Transnational Law*, Vol. 39, 2001, p. 305.

focused predominantly on the use of law in the American legal system.[48] It was officially started in 1977 at the conference at the University of Wisconsin-Madison, but its roots extend back to the 1960s when many of its founding members participated in social activism surrounding the Civil Rights movement and the Vietnam War.[49] The organizers were attempting to locate those people working either at law schools or in closely related academic settings with a certain vaguely perceived, general political or cultural predisposition. These scholars borrowed from such diverse fields as social theory, legal sociology, legal anthropology, political philosophy, economics, as well as literary theory. Since that time critical legal studies has steadily grown in influence and changed the landscape of legal theory. As an intellectual movement, critical legal studies combined the concerns of legal realism, critical Marxism, feminism, and structuralist or post-structuralist literary theory. In this regard, critical legal studies are a heterogeneous body of legal theory that borrows from a number of traditions in developing a critique of the liberal legal tradition. In this section, I will present a summary and a critical assessment of certain recurring themes in critical legal studies. This will be a conceptual account of the basic claims made repeatedly by certain critical legal scholars, but I must note that I cannot adequately capture the essence of all the work that has been done by people who have identified themselves with this tradition.

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[48] It is worth noting that CLS has also focused a considerable amount of attention to the legal education with in the U.S. as well. My analysis will focus on the application of CLS to international legal phenomena; therefore I am most interested in the CLS critique of the use of law, legislation and adjudication and what this can tell us about the prospects of achieving international environmental justice in climate change.

[49] The history of the origins of critical legal studies can be found in Mark Tushnet, "Critical Legal Studies: A Political History," *Yale Law Journal*, Vol. 100, 1991, pp. 1515-1544, and, John Henry Schlegel, "Notes toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies," *Stanford Law Review*, Vol. 36, 1984, pp. 391-411. For a bibliography of critical legal studies literature, see Duncan Kennedy and Karl Klare, "Bibliography of Critical Legal Studies," *Yale Law Journal*, Vol. 94, 1984, pp. 461-463.

Despite the social transformations of the 1960s, the dominant theory of law has remained positivist and has been the lighting rod for criticism, including that of critical legal studies. Legal realism, law and economics, behavioral analysis, and sociological jurisprudence all share the positivist epistemology.[50] Even the case method of legal instruction is a positivist device.[51] Critical legal studies react to the domination of positivism by pointing to the inadequacies and contradictions of a legal process supposedly divorced from politics or values. Its critical methodology is antipositivist, grounded in the long tradition of metaphysical philosophy. Further, critical legal studies views legal positivism as responsible for maintaining those who are currently in power. Law has been presented as neutral and above, or at least autonomous from politics.

According to Gary Minda, critical legal scholars "rediscovered the political critique of radical legal realism, and have gone beyond it to show how the dominant tradition in legal scholarship (as well as the interdisciplinary tradition of progressive legal realism) helped to justify an abstract legal discourse that ignored the politics of power."[52] Legal realism challenged the established natural law paradigm.[53] In this

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[50] See Jeffrey A. Standen, "Critical Legal Studies as an Anti-Positivist Phenomenon," *Virginia Law Review*, Vol. 72, No. 5, August 1986, p. 996; G. Edward White, *Patterns of American Thought* (Indianapolis: Bobbs-Merill Co., 1978), pp. 99-135; and, Richard Posner, "The Present Situation in Legal Scholarship," *Yale Law Journal*, Vol. 90, 1981, pp. 1113, 1120.

[51] See Stranden, "Critical Legal Studies as an Anti-Positivist Phenomenon," p. 996, and, Roger Cramton, "The Ordinary Religion of the Law School Classroom," *Journal of Legal Education*, Vol. 29, 1978, pp. 247, 263.

[52] Minda, *Postmodern Legal Movements*, p. 106. Some consider legal realism, the school of legal thought that flourished in the 1920s and 1930s, as the jurisprudential divide between the old order and modernity. Adopting a generous definition of legal realism, William Fisher, Morton Horwitz, and Thomas Reed have described the heart of the movement as "an effort to define and discredit classical legal theory and practice and to offer in their place a more philosophically and politically enlightened jurisprudence" (Kalman, *The Strange Career of Legal Liberalism*, p. 13). Legal realists included legal thinkers such as Oliver Wendell Holmes, Felix Frankfurter, Roscoe Pound, Benjamin Cardozo, and Louis Brandeis. Holmes marked himself as a realist when he declared that the life of law was "not logic but experience," . . . and when he condemned classical legal thinker Langdell as the world's greatest living "legal theologian," whose ideal in law, the end of all his striving, is the *elegantia juris*, or logical integrity of the system as

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regard, critical legal studies have built on the critique of legal realism. Realists argued

that classical legal thought ignored the indeterminacy of law and the role of idiosyncrasy

in explaining judicial decisions. Their scholarship attempted to explicate the internal

logic of legal rules and institutions and their relationship to other rules and institutions.

According to the realists, the doctrinal scholarship of traditional legal scholarship erred

in treating law as a system of neutral rules that judges mechanically applied to reach the

one legally "correct" decision.[54] By pretending law was not socially constructed,

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system" (Ibid., p. 13-14). Seen this way, some scholars maintain, legal realism "set the agenda" for legal and, later, constitutional theory, by calling into question "three related ideals cherished by most Americans: the notion that, in the U.S., the people (not unelected judges) select the rules by which they are governed; the conviction that the institution of judicial review reinforces rather than undermines representative democracy; and the faith that ours is a government of laws, not men" [William Fisher, Morton Horwitz, and Thomas Reed (eds.), *American Legal Realism* (New York: Oxford University Press, 1993), pp. xiii-xv, 2-4, 9, 26. See also Oliver Wendell Holmes, "Book Review," *American Law Review*, Vol. 14, 1880, p. 234 (Langdell as "theologian"); Joseph Singer, "Legal Realism Now," *California Law Review*, Vol. 76, 1988, p. 465; and, Morton Horwitz, "Book Review", *Journal of American History*, Vol. 75, 1988, p. 299.

[53] Aristotle provides an enduring definition of natural law. He stated:
Let us now classify all unjust and just actions, beginning with the following points. Just and unjust actions have been defined in reference to two kinds of law . . . I call law on the one hand specific, on the other common, the latter being unwritten, the former written, *specific* being what has been defined by each people in reference to themselves, and common that which is based on nature; for there is in nature a common principle of the just and unjust that all people in some way divine, even if they have no association or commerce with each other... [Aristotle, *Rhetoric* Bk. I, Ch. 13, in *On Rhetoric: A Theory of Civil Discourse*, translated by George A. Kennedy (Oxford: Oxford University Press, 1991), p. 102].
        In this view, religion and reason determined what law ought to be and government was left the task of carrying it out. This was workable in a world, or nation, with a homogenous religion. However, when Martin Luther published his Ninety-Five Theses in 1517 and initiated the Reformation, religious homogeneity in Europe had begun to wane. See Sydney Ahlstron, *A Religious History of the American People* (New Haven: Yale University Press, 1972). England, for example, eventually became home to Calvinists, Puritans, Baptists, Anabaptists, Methodists, Lutherans, and Catholics with each adopting different methods for knowing religious truth. This splintering produced competing schools of natural law.

[54] In this regard, legal realists challenged the legal positivism embraced by mainstream legal studies. Legal positivism suggests that there is a seamless web of rules and regulations that insulate the legal system from the influences of morality or ethics. Further, this seamless web eliminates judicial discretion by claiming that the common law addresses all legal issues and judges simply need to look harder within the existing law for guidance. It is also worth noting that legal positivism and the idea of law as a seamless web of rules has become the basis of modern jurisprudence. Society has shifted from a religious and moral orientation to more of a positivist orientation, emphasizing the social construction of laws and the practical justification for their creation. We acknowledge that laws are constructed to achieve specific societal objectives without reference to any (external source) basis in nature or natural law. In this

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traditionalists had imbued the rule of law with a false integrity. The realists advocated a two-step program. They would expose both legal indeterminacy and judicial idiosyncrasy. While older legal scholars analyzed legal doctrine to demonstrate consistency, the realists' dissection of judicial decisions proved cases inconsistent and indeterminate. Having done that, the realists freed themselves to treat law as a tool of social policy and to look to the social sciences to define good policy.[55]

Like the legal realists before them, critical legal scholars debunk the formalist legal philosophy that even today exerts a considerable influence over American law. The similarities between legal realism and critical legal studies also include: skepticism about the extent to which legal precedent uniquely determines subsequent legal outcomes; emphasis on the interplay of external factors or biases, such as economic interests, in the development of legal doctrine; fear of the reification of legal concepts as if they were natural and necessary; and, recognition of the extent to which legal doctrine and legal institutions are contingent products in an evolutionary process of social change.[56] Like critical legal scholars, legal realists rebelled against accepted legal theories of the day and urged more attention to the social context of the law.

Critical legal scholars condemned the realists' divorce of fact from value and justice from morality. For example, critical legal scholars argue that the realists' distinction between law and politics is untenable. One cannot devise law without resort to nonscientific values:

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regard, legal positivism has paved the way for legal realism as well as our reliance on liberal legalism, and has help to present a very modern orientation towards the use of law and legal process.

[55] Kalman, *The Strange Career of Legal Liberalism*, p. 16.

[56] Richard W. Bauman, *Critical Legal Studies: A Guide to the Literature* (Boulder: Westview Press, 1996), p. 3.

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[A] central deception of traditional jurisprudence [is that] the majority claims for its social and political judgment not only the status of law . . . but also that its judgment is the product of distinctly legal reasoning, of a neutral, objective application of legal expertise. This latter claim, essential to the legitimacy and mystique of the courts, is false.[57]

Critical legal studies assert that behind all legal doctrine and legal systems stand political judgments that reflect the unarticulated domination of the makers and shapers of the law: "supposedly universal norms are deployed for the benefit of a particular class."[58] Because they identify entitlements with power over others, critical legal scholars argue that the liberal ideals of freedom to act without harming others, and freedom to transact with consenting others, are self-defeating. Accordingly, these ideals cannot be realized in a legal regime and efforts to realize them will yield doctrinal systems that are structured by recurrent, irresolvable debates.[59]

Building on the postmodern tradition some suggest that the position of critical legal studies can be characterized as a three-part thesis. First, critical legal studies maintain that the legal text itself is indeterminate; legal rules and principles, in the absence of political supplements, do not determine a particular outcome given a particular case at hand. Critical legal studies denies that the meaning of words have "essences" or core meanings, and claims a la Wittgenstein that a word's meaning arises and shifts according to its "use", i.e., according to the work it does in a particular context. If meaning is made determinate via context, and law's context is a political one (political in that law originated in the legislature, a political arena) then law is

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[57] David Kairys (ed.), *The Politics of Law* (New York: Pantheon, 1982), p. 13.

[58] Robert Gordon, "Critical Legal Histories," *Stanford Law Review*, Vol. 36, No. 1/2, January 1984, pp. 57, 93.

[59] Guyora Binder, "Critical Legal Studies," in Dennis Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory*, (Cambridge: Blackwell Publishers Inc., 1996), p. 281.

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indeterminate in the absence of political considerations. Second, the context, in part, that

brings closure to the law, that which makes law determinate is the social-legal mind-

set—the set of assumptions, purposes and goals, categories, etc. that are commonly held

by members of the legal profession. The mind-set conditions adjudication by filtering the

meaning of a particular text and enables the judge to arrive at a specific decision. And,

third, such a "mind-set", closes off alternative interpretations of the law, and the

assumptions and categories within this mind set must be examined and perhaps

substituted so that new interpretations of the law proliferate.[60]

Critical legal studies consist of a number of theories that challenges and overturns

accepted norms and standards in legal theory and practice. Proponents of this theory

believe that logic and structure attributed to the law grow out of the power relationships

of the society. The law exists to support the interests of the party or class that forms it

and is merely a collection of beliefs and prejudices that legitimize the injustices of

society. The wealthy and the powerful use the law as an instrument for oppression in

order to maintain their place in the hierarchy. The basic idea of critical legal studies is

that the law is politics and it is not neutral or value free. Many in the critical legal studies

movement want to overturn the hierarchical structures of domination in the modern

society and many of them have focused on the law as a tool in achieving this goal.

This is true of Roberto Mangabeira Unger who can be seen as one of the main

representatives of the critical legal studies movement. In what has been referred to as the

manifesto of critical legal studies, he starts with the claim that, "[t]he critical legal

studies movement has undermined the central ideas of modern legal thought and put

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[60] Sean Marie O'Brien, *Toward a Normative Critical Legal Theory* (Ph.D. Thesis, University of Colorado, 1989).

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another conception of law in their place. This conception implies a view of society and informs a practice of politics."[61] As Unger points out, critical legal studies have developed out of the leftist tradition in modern legal thought and practice. In this regard, two overriding concerns have marked this tradition. First, critical legal studies include a critique of formalism and objectivism that permeate the liberal paradigm.[62] Formalism, in this view is seen as "a commitment to, and therefore a belief in the possibility of, a method of legal justification that contrasts with open ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary."[63] Structures of political power are thought to be neutral, value-free, and scientific. Impersonal purposes, policies, and principles are indispensable components of legal reasoning that result in a gapless system of rules. In addition, it is the belief that only through this restrained, relatively apolitical method of analysis is legal doctrine possible. Laws are created as a result of procedures that are themselves viewed as legitimate because they allow all interest groups to be represented and to compete for influence. Objectivism is the belief that the authoritative legal materials—the system of statutes, cases, and accepted legal doctrines—embody and sustain a defensible scheme of human association. They attempt to support an intelligible moral order, one that derives itself from the legitimacy of the institutions and procedures that have created the laws.[64]

The second concern that Unger discusses is the continued use of legal practice and legal doctrine to advance progressive aims. Regardless of the criticisms that have

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[61] Unger, *The Critical Legal Studies Movement*, p. 1.

[62] Ibid., p. 5-14.

[63] Ibid., p. 1.

[64] See O'Brien, *Toward a Normative Critical Legal Theory.* One of their central objections to liberal theory is its alleged depiction of legal reasoning as neutral and apolitical.

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been made against formalism and objectivism, the legal system and legal doctrine remain the battle ground in the unrelenting struggle for justice. This is true in the U.S. and other domestic legal systems, and increasingly so on the international level. Within the U.S. both state courts and federal courts see attempts to address issues such as environmental justice. On the international level, we see increasing use of international law to resolve disputes between international actors. Issues such as climate change, a problem that clearly crosses national boundaries both in cause and effect, play themselves out through interstate negotiations about the language of each pronouncement. It is my contention that critical legal studies force us to question the use of law to address issues of international environmental justice. Mainstream legal studies is deeply engrained within the liberal paradigm and as a result fails to address the significance of group life and the ways in which legal systems are used to justify a system that benefits certain groups at the expense of others. In the next section I will discuss a number of common themes and criticisms from critical legal studies that can be utilized to address these issues.

The Critical Legal Critique of Liberal Theories of Law

Although many consider liberalism as the vantage point from which one can grasp the entire condition of modern thought, it is important to recognize that much of modern thought is irreconcilable with liberal principles. For example, the fundamental assumptions of liberalism prohibit the inclusion of non distributional understandings of justice which must be addressed if we are to account for why some groups of people are privileged and others are disproportionately forced to bear the costs of environmental harms. The major theoretical aim of the critical legal studies movement is to provide a

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critique of liberal legal and political philosophy. It is the liberal political order, and not

simply an ideological position, that critical legal studies challenge as inadequate to the

production of substantive freedom and equality.[65] In this section I will discuss a number

of criticisms that critical legal scholars have advanced specifically targeting liberal legal

theory. I will show that liberal theories of law and justice are problematic and should be

supplemented by the insights of critical legal studies. In this regard, we must move

beyond liberal theories of law if we wish to lay a foundation for achieving international

environmental justice. First, I address the fact that liberalism and liberal legal theories

fail to adequately account for substantive communal values. This is one of the central

arguments put forth by critical legal scholars, and a fundamental criticism that permeates

through the entire liberal paradigm. In addition, I discuss the claim that liberal legal

theory masks domination and subordination. Liberal theories of law give the legal

system and governmental institutions the appearance of legitimacy. In order to

understand the significance of this claim I look at the critical legal studies claims about

the adequacy of the rule of law, the problems of legislation and adjudication, as well as

critical legal claims about the indeterminacy of law.

A. The Limits of Subjective Individual Values

Classical liberal figures, such as Locke, put great emphasis on the intrinsic value

of the individual, and conceived of the good society as one that must protect the

individual while promoting a good deal of autonomy. These theorists, as well as

contemporary liberal theorists such as Rawls, believe that the individual has the right to

decide the sort of life that she wants to live and that the individual's life should be free,

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[65] Critical legal scholars often refer to liberalism without making a distinction between "liberals" and "conservatives" or between "liberals" and "communitarians"—all of whom embrace the liberalism that critical legal studies seeks to question.

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to a large extent from state regulation.[66] In this regard, as noted earlier, the group is simply a collection of individuals, or, in other words, the attributes of a group are the sum of the attributes of its individual members. The whole is basically just the sum of its parts and all the attributes of the group can be explained as a combination of the attributes of its members.[67]

The inability to adequately account for collective life is one of the most significant critiques of the liberal doctrine. Liberalism views the group as an entity with no independent existence, with no group values that stand apart from the individual and subjective ends of its membership. If we were to conclude that the collective has an autonomous existence and is a source of value in its own right, we could no longer maintain that all ends were individual. Further, if we claim an objective moral worth for the values of the community or the nation, we would also have to abandon the idea of subjectivity.

In *Law and Politics*, Unger constructs liberalism as an "ideal type", synthesizing views of Thomas Hobbes, Locke, David Hume, Benedict Spinoza, Jean-Jacques Rousseau and Kant.[68] Unger believes that the multiplication of groups, particularly in

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[66] As to what comprises "legitimate state regulation" is a source of debate within the liberal political tradition. Those who advocate very limited regulation are now called "conservatives" (though they still remain firmly in the classical liberal tradition given their emphasis on individual autonomy) and those who believe that "legitimate" state regulation should be extended, are usually referred to as "liberals" (though they are departing somewhat from classical liberalism in their desire to further extend state regulation into the economic realm).

[67] This is both a methodological and a moral idea. The methodological idea is that by summing up all we know about the individual members taken separately we can find out all there is to know about the group. Clearly we must count the characteristics the individuals have because they are members of the group. In regards to the moral idea, the group must never be viewed as a source of values in its own right. See Unger, *Knowledge and Politics*, p. 82.

[68] Ibid. In the first part of *Knowledge and Politics* Unger provides an extended definition of liberalism from the perspective of a "total critic." See Kelman, *A Guide to Critical Legal Studies*, p. 2. For others critical legal scholars, liberalism is little more than a very loose term for the dominant postfeudal

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their corporate form, diminishes individual life. The social image of the self is formed by the role that he or she is expected to fulfill. This leads to an estrangement of the individual from reality and ultimately from his community. In this regard, the liberal state is a failure; with its assumption of self interest it gives priority to privately chosen ends.

In liberal theory, according to Unger, men are governed by their self-interest and are guided by appraisal of the most efficient means of achieving their privately-chosen ends. This doctrine of instrumental self interest purports to explain the phenomenon of obedience to rules of law. Legal rules are factors to be taken into account in calculating efficiencies, and one complies to the extent that self-interest and private goals are better served by compliance than by disobedience. Unger asserts that this explanation reveals a fundamental weakness in liberal theory. Liberalism has no way of accounting for the fact that individuals obey the rules even in circumstances where personal advantage may counsel disobedience. In his view this is not a failure to understand the nature of rules; it is a failure to understand the nature of personality and the relationship between the individual and the community.[69] Therefore, liberal legal theories fail to adequately deal with the question of communal values. By focusing exclusively on the individual they fail to account for the unique situation of communities and the inability of a legal system based on liberal tenets to account for substantive communal values.

Critical legal studies can help. Mark Kelman discusses a number of contradictions in liberal thought that force us to question the viability of subjective individual values.

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beliefs held across all but the left and right fringes of the political spectrum. Largely because of the depth of his analysis and his significance to the movement more generally, Unger will remain an important part of my analysis.

[69] Murphy, *Descent into Subjectivity*, pp. 144-145.

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He notes that there is a contradiction between a commitment to the traditional liberal notion that values or desires are arbitrary, subjective, and individual while facts or reason are objective and universal. In this regard he challenges the idea that we can know social and ethical truths objectively. Further, he suggests that there is a contradiction between a commitment to an intentionalistic discourse, in which human action is seen as the by product of a self-determining individual will, and deterministic discourse, in which the activity of normal subjects merits neither respect nor condemnation because it is simply deemed the expected outcome of existing structures.[70]

The principle of subjective value, as discussed by Unger, is closely linked with the liberal conception of rules as the basis of order and freedom in society.[71] In this view, ends are viewed as individual in the sense that they are always the objectives of particular individuals. The political doctrine of liberalism does not acknowledge communal values. In fact, the individuality of values is the very basis of personal identity in liberal thought, a basis the communal conception of value destroys. Therefore, all values are individual and subjective. As Unger clarifies:

> Values are subjective in the sense that they are determined by choice. Subjectivity emphasizes that an end is an end simply because someone holds it, whereas individuality means that there must always be a particular person whose end it is.[72]

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[70] Kelman, *A Guide to Critical Legal Studies*.

[71] It must be recognized that self-interest, the generalized search for comfort and glory, and any sharing of common values will all be insufficient to keep the peace. It is in the individual's self-interest to benefit from a system of laws established by others but not to obey or establish that system himself. In many contexts this is referred to as the free rider problem. Individuals are free to enjoy the benefits of the social contract, while selectively embracing the rules and values that work to ones advantage while disregarding those that conflict with one's self interest.

[72] Unger, *Knowledge and Politics*, p. 75.

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The opposing conception is the idea of objective value, which was a major theme of the philosophy of the ancients. Objective values are standards and goals of conduct that exist independently of human choice. Liberal political thought has always been in revolt against the conception of objective value. If we were able to perceive such values, they would become the true foundation of the social order. Public rules would be relegated to a subsidiary role, as devices for the specification of the objective standards, when those standards were imprecise, or for their enforcement, when they were disobeyed.

To establish order and freedom the laws must be impersonal. As such, they must embody more than the values of an individual or of a group. Rules based on the interest of a single person or class of persons destroys the good of freedom because, by definition, they constitute a dominion of some wills over the wills of others. It is also worth noting that such laws leave order without any support except the terror by which they were imposed, for the oppressed will not love the laws and will only obey them reluctantly.

B. Domination and Subordination under a Rule of Law

At the focal point of the critical legal studies critique of liberalism is the concept of the rule of law. In order for a "rule of law" to exist, it is commonly assumed that there must be a law-making process, a process of law-enforcement, and an adjudication process. That is, in order for law to operate, certain institutions must exist to establish and support a legal system. Within the liberal tradition, the common solution to the problems of order and freedom is the making and applying of impersonal rules or laws. Yet critical legal studies argue that the rule of law perpetuates domination and

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subordination while hiding behind a facade of neutrality. In this regard, critical legal scholars question the false integrity that is given to the rule of law. Law is seen as a neutral mechanism in the pursuit of freedom and order, however it also reinforces a system of private property that justifies an unequal and inequitable distribution of benefits and harms in modern liberal societies as well as in the international system of states.

The commitment to the rule of law originates with the birth of modern liberalism in the seventeenth century and has remained as strong as ever in contemporary liberal theory. In his *Second Treatise of Government*, Locke expressed his commitment in these words:

> [F]reedom of men under government is to have a standing rule to live by, common to every one of that society and made by the legislative power erected in it, a liberty to follow my own will in all things where the rule prescribes not, and not to be subjected to the inconstant, uncertain, unknown, arbitrary will of another man.[73]

The importance of the rule of law to Locke's thinking is concisely formulated in his *Letter Concerning Toleration*: "There are two sorts of contests amongst men; the one managed by law, the other by force: and these are of that nature, that where the one ends, the other always begins."[74]

The rule of law plays such a central role in the theories of liberal thinkers because they judge it to be an indispensable institutional mechanism for securing the dominant value cherished by their tradition—individual liberty—and those values that are intertwined with it, such as toleration, individuality, privacy, and private property. The

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[73] John Locke, *Second Treatise of Government* (Cambridge: Cambridge University Press, 1960), p. 15.

[74] John Locke, *A Letter Concerning Toleration* (Indianapolis: Hackett, 1983), p. 49.

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liberal believes that in the absence of the rule of law, there would be no way to secure in practice the individual liberty that he cherishes in theory. Liberalism and liberal legal theory maintains that law is an indispensable mechanism for regulating public and private power in a way that effectively helps to prevent the oppression and domination of the individual by other individuals and by institutions. Nevertheless, we must recognize that the rule of law as well as the defense of individual liberty has historically justified a system of private property that ultimately has masked inequity on the national and international levels.

Liberal theories of law make a distinction between the private and public spheres, between a regulated and non-regulated realm, yet such a distinction gives the impression that there is a sphere in which the state cannot be responsible for the injustice that exist.[75] According to Duncan Kennedy, the distinction between "public and private law [which is an institutional manifestation of the public/private distinction] replicates the hidden message that the state stands outside civil society and is not implicated in the

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[75] Critics of liberalism and the rule of law have attempted to identify contradictions in liberal thought, a set of paired rhetorical arguments that both resolve cases in opposite, incompatible ways and correspond to distinct visions of human nature and human fulfillment. Further, they have attempted to show that mainstream thought invariably treats one term in each set of contradictory impulses as privileged. For example, Unger depicts the liberal tradition as dividing reality into a series of dichotomies. He argues that liberalism maintains a distinction between reason and desire, fact and value, freedom and necessity, and a private and public sphere. Another example of the dichotomies maintained by liberalism would be the procedural distinction between plaintiff and defendant. Let us suppose that there is a lawsuit which involves a large petroleum corporation and a black women living in a city ghetto. The fact that this women and the corporation will be categorized as "plaintiff" and "defendant", respectively, is to presuppose that they are both equal and free under the law. This is to ignore very real socio-economic differences and to depoliticize their actual situation. Critical legal studies find such dichotomies, which are reflected in the legal realm, as problematic. Nigel Purvis also takes the position that liberalism creates dichotomies. He includes sovereignty/world order, as well as domestic/international realms ("Critical Legal Studies in Public International Law," *Harvard International Law Journal,* Vol. 32, No. 1, 1991, pp. 81-127). Allan Hutchinson includes subjective/objective, male/female, public/private, self/other, individual/community, or whatever, as devices for providing a plausible description of the world and a convenient prescription for action. ["Introduction," in Allan Hutchinson (ed.), *Critical Legal Studies* (Rowman & Littlefield Publishers, Inc., 1989), p. 4-5].

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hierarchical outcomes of private interaction."[76] Kelman points out that the state, in

refusing to increase regulation of the economic realm so as to ensure a more even

distribution of wealth than at present, is implicated in society's economic inequality.[77]

Critical legal scholars suggest that the rule of law is a mask that lends to existing

social structures the appearance of legitimacy and inevitability; it transforms the

contingency of social history into a fixed set of structural arrangements and ideological

commitments.[78] Moreover, they demonstrate that the status quo and its intellectual

footings are far from being built on the hard rock of historical necessity, but are actually

sited on the shifting sands of social contingency. In this regard the liberal claim to

neutrality is pretextual and conceals unacknowledged interests and relationships of

power.

The distinction between law and politics is at the heart of the liberal tradition, yet

critical legal scholars find such a distinction problematic for a variety of reasons. The

central characteristic of liberal theory, according to critical legal studies, is that it

maintains a distinction between the political (i.e. legislative realm, conceived as the

arena where competing visions of the good life are debated and incorporated into

legislation) and the legal realm, conceived as that arena where law (the result of

legislation) can be neutrally applied to particular cases. As critical legal studies

characterizes it, the possibility of neutral application of the law must be maintained if

law is to impartially enforce the political program decided upon by elected

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[76] Duncan Kennedy, "The Structure of Blackstone's Commentaries," *Buffalo Law Review,* Vol. 28, 1979, p. 205.

[77] Kelman, *A Guide to Critical Legal Studies.*

[78] See Kennedy, "The Structure of Blackstone's Commentaries," p. 205, in which he argues that certain supposedly "neutral" rules mask class domination.

representatives.[79] Kelman discusses this as a contradiction between a commitment to mechanically applicable rules as the appropriate form for resolving disputes and a commitment to situation-sensitive, ad hoc standards.[80]

If law is political, if there really is no neutral way of applying the law and if adjudication amounts to legislation then how can we justify a system that benefits some individuals at the expense of others? First, the balance of powers is thrown off, since the judiciary, in fact, would have legislative powers. Second, as Tushnet points out, if adjudication amounts to legislation, our democratic system is called into question. Judges are, more often than not, appointed and not elected, and if they are legislating, they do so without the consent of the people.[81] I discuss the problems of legislation and adjudication in the next section.

C. The Problem of Legislation and Adjudication

The issues of legislation and adjudication are problematic for liberal political and legal theory. According to liberal thought, society is held together by rules. As discussed above, rules are the main devices for establishing order and freedom. Nevertheless, there can be no coherent, adequate doctrine of legislation or adjudication on liberal premises. This is largely due to the conflicting values of order and freedom that must be balanced. For liberal political thought, the laws must be universal, consistent, public, and capable of coercive enforcement. This requires an adequate theory of rule application, including the capacity to deduce conclusions from premises and the ability to choose efficient means to accepted ends. The major liberal theories of adjudication view the task of

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[79] O'Brien, *Toward a Normative Critical Legal Theory*, p. 17.

[80] Kelman, *A Guide to Critical Legal Studies*.

[81] Mark Tushnet, "An Essay on Rights," *Texas Law Review*, Vol. 62, 1984, p. 1363.

applying law either as one of making deductions from the rules or as one of choosing the best means to advance the ends the rules themselves are designed to foster.[82] The resort to a set of rules as the foundation of order and freedom is a consequence of the subjective conception of value.

Unger, in particular, argues that liberals are committed both to liberty and the rule of law, but these fit together uneasily without commitment to a communal conception of the good. The rule of law, as embodied in legislative enactments, is the basis for order. Yet rules are subject to interpretation in adjudication, and, unless one interpretation can be justified objectively and communally—as more than the judge's own values—liberty suffers, since adjudication becomes the imposition of one set of subjective values upon parties who do not share them.[83]

One solution to the problem of freedom is to refute the idea that legislation has to choose among competing individual and subjective values, and gives preference to some over others. This is the formal theory of freedom. It is illustrated by the political and legal doctrines of Kant and by the kinds of legal positivism that grew directly out of the Kantian tradition.[84] This does not completely rectify the problem. As Unger puts it:

> [W]e are still in the dark about what to legislate. Which of the infinite number of things men want to do should be allowed and which forbidden? But, as soon as we try to reach the level of concrete regulation of conduct, we are forced to prefer some values to others. This, however, is just what the formal theory of freedom was meant to avoid. Given the principle of subjective value, any such preference would be inherently incapable of justification.[85]

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[82] Unger, *Knowledge and Politics*, p. 75.

[83] Gray, *The Philosophy of Law*, p. 508.

[84] Unger, *Knowledge and Politics*, p. 85.

[85] Ibid.

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A second response to the question of freedom in liberal thought is the claim that there exists some procedure for lawmaking on the basis of the combination of private ends, to which procedure all individuals might subscribe in self-interest. In this regard, self interest means the intelligent understanding of what we need in order to achieve our own individual and subjective goals. To the extent that such a method for legislation is possible, there will be no contradiction between the premise of the subjectivity of ends and the existence of laws that command, prohibit, or permit particular forms of conduct.

This doctrine, also referred to as the substantive theory of freedom, has three main forms. In the first form, the interests to be protected by the state, and therefore, the content of laws, are determined by the method of legislation. Classical utilitarianism is an example of this view. According to the second form, we subscribe in self-interest to the procedures for making laws and settling disputes rather than to the plan of social organization. The doctrine of the social contract, as formulated by Locke and Rousseau, represents this position. The utilitarian and social contract versions of the substantive theory of freedom can be collapsed into a third form. It appeals to the conception of an ideal system of procedures for lawmaking that all men might accept in self-interest and the operation of which can be shown to lead to certain specific conclusions about the distribution of wealth and power. The work of Rawls illustrates this view. The third category of the substantive theory of freedom tries to escape from the traps of both the social contract and utilitarian doctrines by imagining a hypothetical situation in which men would be able to legislate without knowing their positions in society, and thus without knowing what their particular values as real individuals would be.[86] The

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[86] Ibid., p. 87.

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substantive theory of freedom breaks down because it does not succeed in finding a neutral way to combine individual, subjective values.[87]

It is insufficient to have a doctrine for the justification of rulemaking unless we also have one for the application of rules. It is one thing to show, as the legal realists did, that words already written by someone else (i.e., the legislature) are subject to interpretation and thus manipulation by a decision maker (i.e., the judge) enforcing the written word. Kennedy reminds us, however, that even a lawmaker, legislator or judge who is sure she wants to redistribute money from landlords to tenants may have doubts about whether fixed rules such as housing codes, or flexible standards such as a requirement that the place be kept in a habitable condition will do the trick. The point then is that deciding how to "formulate" legal commands is just as hard as deciding how to "interpret" them. Here, again, this helps Kennedy return to the importance of focusing on judges because he presents them so convincingly as rule formulators as well as rule interpreters.[88]

Once we manage to formulate an adequate doctrine of lawmaking, we will also need to apply the laws to particular cases. In this regard, the theory of adjudication is a continuation of the theory of legislation. The main question is, by what standards, or in what manner, can the laws be applied without violating the requirements of freedom?[89] Unger makes the distinction between legal and substantive justice. In this regard, he suggests that:

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[87] Ibid., p. 86.

[88] Jeremy Paul, "Symposium Critical Legal Studies (Debut de Siecle): A Symposium on Duncan Kennedy's A Critique of Adjudication: Introduction CLS 2001," *Cardozo Law Review*, Vol. 22, 2001, pp. 701-705.

[89] Unger, *Knowledge and Politics*, p. 89.

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> To understand the nature of adjudication one must distinguish two
> different ways of ordering human relations. One way is to establish rules
> to govern general categories of acts and persons, and then to decide
> particular disputes among persons on the basis of established rules. This
> is legal justice. The other way is to determine goals and then, quite
> independently of rules, to decide particular cases by a judgment of what
> decision is most likely to contribute to the predetermined goals, a
> judgment of instrumental rationality, this is substantive justice.[90]

In the case of legal justice, the laws are made against the background of the ends they

are designed to promote. Only after the rules have been formulated do decisions under

the rules become possible. Therefore, the possibility of some sort of distinction between

legislation and adjudication is precisely what defines legal justice. On the other hand, the

distinctive feature of substantive justice is the nonexistence of any line between

legislation and adjudication. In the pure case of substantive justice, there is neither

rulemaking nor rule applying, because rather than prescriptive rules there are only

choices as to what should be accomplished and judgments of instrumental rationality

about how to get it done.[91]

Neither the regime of formal nor that of substantive justice is able to solve the

problem of freedom since formal and substantive justice cannot be reconciled. As a

result, there is no coherent solution to the problem of adjudication as it is defined by

liberal thought. Unger states:

> A system of laws or rules (legal justice) can neither dispense with a
> consideration of values in the process of adjudication, nor be made
> consistent with such a consideration. Moreover, judgments about how to
> further general values in particular situations (substantive justice) can
> neither do without rules, nor be made compatible with them. This is the
> antimony of rules and values. The antimony of rules and values stands at
> the core of modern jurisprudence, any treatment of it has to deal with the

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[90] Ibid.

[91] Ibid., p. 90.

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main types of modern legal theory, and with well-known objections to each of them.[92]

The simplest and most familiar account of legal justice is formalism. In its strictest version, the formalist theory of adjudication states that the legal system will dictate a single, correct judgment in every case. It is as if it were possible to deduce correct judgments from the laws by an automatic process. The regime of legal justice can therefore be established through a technique of adjudication that can disregard the policies or purposes of the law.[93]

The liberal doctrine of adjudication is premised on formalism. The formalist position, Unger argues, is incoherent because it is inconsistent with the premises of liberal political theory, which it also presupposes.[94] Formalism assumes that words have clear meanings. One need not look beyond ones everyday experiences to recognize that this is not always true. To the extent that words have plain meanings, it will be clear to what fact situations they apply. "The judge who applies the laws to the persons and acts they denote is, by definition, applying the laws uniformly. He exercises no arbitrary power."[95]

The main problem with formalism is its dependence on a view of language that cannot be reconciled with the modern ideas of science and nature. Formalism is a doctrine of adjudication that relies on two sets of premises, premises about language and

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[92] Ibid., pp. 91-92.

[93] Ibid., p. 92.

[94] Ibid.

[95] Ibid.

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premises about value, that contradict one another. It is therefore an incoherent theory.[96]

The liberal theory of the state is premised on the idea that there are no moral essences, that values are subjective and relative. This idea makes the market and democracy seem like the only possible social institutions for a liberal society since it is assumed that values and interests can adequately be determined by the market and elections. Yet, when a judge interprets the law, how can he or she avoid the imposition of subjective and therefore arbitrary preferences? Judges must interpret the law by finding and applying the meaning of the words of the rule. This seems to allow the judge to escape from the fact that there are no moral essences. Jeremy Paul points out that:

> [A] key facet of American law is that we do not permit judges openly to
> admit how much ideological power they actually have. Judicial opinions
> must be crafted in rhetoric that denies judges' ideological power and that
> portrays the decision as a product of the legal materials and other
> nonideological policy analysis. So Kennedy continues his refashioning of
> CLS claims: we inhabit a legal system in which judges practice "denial,"
> in what Kennedy calls "bad faith" of the judge's own power.[97]

But as Unger suggests, formalism relies on a new kind of essentialism, the belief that there are essential meanings to words. We cannot merely shift our essentialism from values to words. Therefore, formalism does not solve the dilemma of subjective value; it merely restates it.

The language of legal reasoning and legal rights comes to be seen as a description of the way things are rather than a moral and political choice. For example, if I put a gun to your head and force you to do something, we should say that the contract is void because there is duress. On the other hand, if I am the only employer in town and you

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[96] Ibid., p. 94.

[97] Paul, "Symposium Critical Legal Studies," p. 709.

are faced with the choice of work for me or starving, we say that there is no duress.[98] We

say this because the legal system recognizes physical coercion but not economic

coercion. Of course, the choice to recognize one but not the other is a political and moral

decision.[99]

The critique of formalism has shown that purposive interpretation is inescapable.

Furthermore, it turns out that it is also destructive of the very foundations of legal

justice. A coherent theory of adjudication or of legal justice is not possible on the

premises of liberal thought. Yet those premises are what make the distinction between

lawmaking and the application of the law possible and necessary. It remains to consider

briefly whether the problem of freedom can be solved by a regime of substantive justice.

There is no place for substantive justice in liberal thought. To begin with, the

principles of subjective value and of individualism preclude the possibility of any stable

set of common ends. Moreover, the values or goals taken for granted are always

indeterminate. They still leave us to determine the means we should prefer to further the

ends we have chosen, or what substantive content we should give an abstract value.

Thus, one cannot base a social order on judgments about how to advance given goals

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[98] James Boyle, "Introduction," in James Boyle (ed.), *Critical Legal Studies*, (New York: New York University Press, 1992), pp. xvii-xviii.

[99] These political and moral decisions are avoided in legal education. The first year law student learns how to make exceptions devour rules and rules devour exceptions. They are taught to see words as solid and immutable and then to turn that method on its head so that words are merely place-holders for, or short-hand descriptions of, policy goals. Once the student graduates, the avoidance continues. "The predicament of the modern lawyer is to argue constantly about policy, as if rational choice among competing values were possible, yet to remain faithful to the idea that values are subjective and to the political doctrine of which the idea is a part" (Unger, *Knowledge and Politics*, p. 95).

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without relying on rules that establish what counts as an available means, and what does not.[100]

Order based on rules and order based on values, the regimes of legal and substantive justice, the theory of adjudication and the theory of instrumental rationality, are equally inadequate. To operate a system of rules we have to appeal to a consideration of purpose that end up dissolving what we meant by a system of rules in the first place.[101] Only by rejecting the principles of subjective value and of individualism can we allow for the possibility of communal values, and only by repudiating the distinction between fact and value, could we go from the mere description of these communal values to their use as standards of evaluation.

D. Indeterminacy of Law

Among the most important claims in critical legal theory has been its challenge to the view that law is composed primarily of determinative rules that are logically applied by neutral adjudicators to reach predictable, correct results. In this regard, the indeterminacy of law is related to the problems of legislation and adjudication. Writers within the critical legal studies movement have rejected, for example, H. L. A. Hart's explanation of law as essentially consisting in different types of rules whose legitimacy depends on their valid adoption by relevant authorities. These scholars have doubts about the essentialist conception of law as a system of primary and secondary rules, where the characteristic dispute is at an analytic or linguistic level.[102]

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[100] Ibid., pp. 97-98.

[101] Ibid., p. 98.

[102] Bauman, *Critical Legal Studies*, p. 33.

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In this regard, critical legal scholars challenge the determinacy of law as well as the manner in which power asymmetries maintain the status quo while marginalizing countless groups. In this regard, it has challenged the importance of the vindication of rights, especially constitutional rights. "Offended by the hierarchical structures of domination that characterize modern society," as Hutchinson argues, "[critical legal studies] people work toward a world that is more just and egalitarian."[103] Martha Minow clarifies that:

> [t]he critical scholar seeks to demonstrate the indeterminacy of legal doctrine: any given set of legal principles can be used to yield competing or contradictory results; the critical scholar engages in historical socioeconomic analysis to identify how particular groups, social classes or entrenched economic institutions benefit from legal decisions despite the indeterminacy of the legal doctrines; the critical scholar tries to expose how legal analysis and legal culture mystifies outsiders and legitimates its results; and the critical scholar may elucidate new or previously disfavored social visions and argue for their realization in legal or political practice in part by making them part of legal discourse.[104]

Critical legal studies also demonstrate the indeterminacy of the law by revealing self-contradiction in the underlying doctrine. In this regard, our legal norms do not logically lead to particular results or rationales concerning most important or difficult issues. Instead, we must recognize that a wide variety of interpretations, distinctions, and justifications are available; and judges have the authority and power to choose. Moreover, critical legal studies asserts that established doctrinal constructs and legal principles are reified, that is, they mistake particular myths about the world for impartial

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[103] Hutchinson, *Critical Legal Studies*, p. 3. Hutchinson adds that critical legal scholars: "do not wish to embroider still further the patchwork quilt of liberal politics, but strive to cast it aside and reveal the vested interests that thrive under its snug cover. Their ambition is to make a bigger social bed with more popular bedding. It is not surprising that critical legal studies particular contribution to this social struggle has concentrated on the leading part that law has played in maintaining the status quo and stymied efforts to effect fundamental change." Ibid.

[104] Martha Minow, "Law Turning Outward," *Telos*, Vol. 73, 1986, pp. 84-5.

and necessary truth. Realizing the ultimate inseparability of law and politics, critical

legal studies contends that legal reasoning itself is a vehicle of domination employed by

the producers of legal fictions, the jurists of the ruling class.[105]

Law, for critical legal scholars, is neither a determinant of particular material

conditions nor an inevitable outgrowth of a particular type of political or economic

system. It is, instead, a contingent social construction that shapes and constrains our

lives while justifying a system of private property that explains why some get more than

others. However, what is a contingent social construction gets mistaken for a historical

or structural necessity. What is a human creation, informed by a particular view of the

social world, gets mistaken for an impersonal, determining force.[106] By laying bare the

rhetorical status of law, it becomes possible to subvert law's philosophical and political

authority. In a world in which law plays such an important role and in which it is almost

impossible to appreciate social life without utilizing, often implicitly, the framework of

legal relations, one needs to understand the historicity and ideology of the lawyer's way

of thinking about and acting in the world is extremely important.[107] This is true in

domestic legal systems as well as in the international legal system which we will turn to

in the next chapter.

Concluding Remarks

In sum, although liberalism may have contributed to the improvement of the

social lot, some have suggested that it has now outlived its usefulness and has become a

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[105] For a discussion of the doctrine of stare decisis, see Kairys (ed.), *The Politics of Law*, pp. 11-17.

[106] See Gordon, "Critical Legal Histories," p. 117.

[107] Ibid.

dangerous political anachronism.[108] As the basis for mainstream legal studies, liberal theories of law provide the theoretical foundation for a system of laws that fails to adequately account for the values of community life, instead focusing solely on individual, subjective values. In addition, such a system of laws provides a facade of legitimacy that hides hierarchies of power that ultimately dictate who gets what in society. The reliance on the rule of law creates problems of legislation and adjudication as indeterminate legal mechanisms are applied inconsistently to justify the interests of specific individuals and groups within society.

This chapter has looked at the contribution of critical legal scholars in order to show that critical legal studies provide a viable theoretical alternative to the liberal legal order. Now that we have a basic understanding of the different theories of law and the relationship between the theories we will need to turn to a discussion of international law and jurisprudence. International jurisprudence relies on the domestic analogy and is grounded in liberal legal theory. Although much of critical jurisprudence generally, and critical legal studies more specifically, has been developed in the context of domestic legal phenomena, it is worth considering the applicability of critical legal studies to the international legal system. We discuss what has been done in this regard and the gaps that exist in the literature. I suggest that critical legal studies have not been adequately utilized to address international legal phenomena. Critical legal studies can help us understand the prospects of achieving international environmental justice through the use of an international legal system that fails to adequately address the structural level of analysis. Therefore, in the next chapter we will look at the relationship between domestic and international law through a discussion of the domestic analogy. In addition we will

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[108] Hutchinson, *Critical Legal Studies*, p. 3.

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look at the unique nature of the international legal system and the jurisprudence that has been developed to address the variety of theoretical and practical issues that are confronted when we try to use international law to address international environmental problems such as climate change. Once we have addressed international jurisprudence we will be able to apply the lessons of critical legal studies to the issue of climate change and the prospect of achieving international environmental justice through the use of international environmental law.

CHAPTER TWO:

International Law and Jurisprudence

The decadent international but individualistic capitalism in the hands of which we found ourselves after the war is not a success. It is not intelligent. It is not beautiful. It is not just. It is not virtuous. And it doesn't deliver the goods.

—John Maynard Keynes

The discussion of legal theory in the previous chapter focused on domestic legal phenomena and the theory that has developed in an effort to understand it. Traditional jurisprudence has analyzed the existence and usefulness of law within states. In this regard, law has been used and discussed as a tool of public policy. Since this project seeks to assess the possibility of achieving international environmental justice through the use of international law to address global environmental problems such as climate change, we will need to shift our attention to the ways in which these issues and ideas have been transferred to the international level of analysis. Climate change is a global problem that must be addressed through international cooperation. No state has the capacity to address these issues independently. Therefore, states must coordinate efforts in order to avoid the duplication and the inefficiencies that plague decentralized political organization. Domestic laws will be necessary but not adequate in and of themselves. This chapter discusses the possibility of using legal theory, specifically the lessons of critical legal studies to address climate change in a just and equitable manner.

The international legal system developed out of the interaction of international actors, including states since before the birth of the state system with the Peace of

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Westphalia in 1648. The seventeenth-century Dutch jurist, Hugo Grotius, is generally regarded as "the father of international law,"[109] although the term "international law" was not coined until 1789 in an essay written by Bentham.[110] Despite its relatively long historical development, ambiguities about the nature and significance of international law continue today. In fact, many go as far as questioning the legal quality of international law. Implicit in such a view is the idea that for international law to qualify as law in the traditional sense it must approximate our common understandings of law drawn from our domestic experience. In this regard, we must recognize that international jurisprudence and our theoretical understanding of the use of law on the international level has developed as an extension of legal theory more generally.

In several respects, the international system mirrors domestic society; its norms, rules, and institutions vary in form and not substance. It is therefore not surprising that the common understanding of international law as well as the literature surrounding international law is heavily dependent on experiences within domestic legal systems. Characteristics of the domestic model are transformed into prerequisites for international order. In this regard, the phrase "domestic analogy" has been used to refer to the argument that endorses a transfer to the domain of international relations those legal and political principles which sustain order within states. The domestic analogy represents presumptive reasoning holding that there are certain similarities between domestic and international phenomena, in particular, that the conditions of order within states are

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[109] Some dispute this attribution of paternity, emphasizing instead the earlier contributions of the Spanish School of international law. See Richard Falk, Friedrich Kratochwil, and Saul H. Mendlovitz (eds.) *International Law: A Contemporary Perspective* (Boulder: Westview Press, 1985), p. 7.

[110] Jeremy Bentham, *Introduction to the Principles of Morals and Legislation* (New York: Hafner Publishing Company, 1948). Bentham claimed to be doing nothing more than renaming what had been called "the law of nations."

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similar to those of order between them, and that therefore those institutions that maintain order domestically should be reproduced at the international level.

But the international system is different. For example, the international legal system is often described as a primitive legal system. This reflects the common assumption that it has not fully developed or matured, presumably due to the fact that it has not lived up to the expectations produced by the dominance of centralization and law within the domestic context. It is important to recognize the significance of the fact that the international legal system is a decentralized system, where as domestic legal systems are extremely centralized. These factors have contributed to the fact that, particularly as of late, international law has been unable to satisfy our steadily increasing expectations about the requirements of global order and justice. This has created an impression of failure. Nevertheless, international law is increasingly relied on to resolve disputes between international actors. Specifically, international environmental law has been seen as the chief instrument for addressing global environmental problems on the international level.

For these reasons we must remain critical of the use of international law and the expectations that we place on it. Is there something about the theoretical foundations of the international legal system that limits the prospect of adequately addressing environmental problems through international environmental law? The international legal system has developed out of the domestic analogy and liberal theories of law and legal process. In this regard, it is important to look at the significance of the domestic analogy and its application to international environmental law. This chapter looks at the literature surrounding the domestic analogy and what the analogy can tell us about the

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theoretical foundations and potential for the use of international law. I look at the

arguments for and against the domestic analogy, as well as the distinctive features of the

international system and their impact on the use of the domestic analogy and

international environmental law more generally. It is worth noting that although the

domestic analogy has been used to support the application of liberal theories of law to

international legal phenomena, it is not necessary for the application of critical legal

studies to international law. Criticisms of the domestic analogy combined with the

unique nature of the international legal system force us to consider alternative theoretical

frameworks. In this regard, critical legal studies help provide a better understanding of

the operation and effectiveness of international law. In the final section of this chapter I

discuss the application of critical legal studies to international legal phenomena. As

global capitalism expands and reaches ever-further corners of the world, practical

problems continue to escalate and repercussions become increasingly serious and

irreversible. These practical problems carry with them equally important ethical issues.

Perhaps international law as currently conceived and applied is incapable of adequately

addressing such issues.

The Domestic Analogy

Although it has had a broad range of supporters and critics,[111] the label itself is

relatively uncommon. It is worth noting that the term "domestic analogy" has a

somewhat pejorative connotation in that an analogical mode of reasoning is thought not

to have the validity of logical deduction or the firmness of scientific induction. It is not

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[111] Supporters of the domestic analogy seem to include: Abbe de Saint-Pierre, Kant, C.-H. de Saint-Simon, W. Ladd, James Lorimer, J.C. Bluntschli, Lassa Oppenheim, and Hersch Lauterpacht. On the other hand, opponents of the domestic analogy include: Hobbes, Spinoza, S. Pufendorf, C. Wolff, E. de Vattel, C.A.W. Manning, Hedley Bull, and those who follow, or agree with, their basic tenets about the uniqueness of international society.

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surprising, therefore, to find one of the early instances of the use of the label in the writings of C.A.W. Manning, a critic of the domestic analogy.[112]

The domestic analogy involves presumptive reasoning which holds that there are certain similarities between domestic and international phenomena. More specifically, the domestic analogy maintains that the conditions of order within states are similar to those of order between them, and that therefore those institutions that sustain order domestically should be reproduced at the international level. This analogy between domestic law and international law has helped shape international legal scholarship. Characteristics of the domestic model are transformed into prerequisites for international order. But we must ask, as Hidemi Suganami does, "[h]ow beneficial is it . . . to transfer to the domain of international relations those legal and political principles which sustain order within states?"[113]

It has been suggested that natural law theory set the stage for the domestic analogy, as well as the modern idea of world organization more generally.[114] Traditionally, the existence and the binding force of legal rules presuppose the state. But the natural law doctrine that there is law independent of any connection with a state made it possible to hold the view that the relations between states are governed by law

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[112] Manning has some claim to be one of the founders of International Relations as an academic discipline in Britain, and perhaps, more broadly, in the English-speaking world. See Hidemi Suganami, *The Domestic Analogy and World Order Proposals*, (Cambridge: Cambridge University Press, 1989), p. 10, and, A.M. James, *The Bases of International Order*, (London: Oxford University Press, 1973), Preface. Manning's reference to the term domestic analogy appears in the lecture entitled, "The future of the collective system", which he delivered in 1935 at the Geneva Institute of International Relations.

[113] Suganami, *The Domestic Analogy and World Order Proposals*, p. 1.

[114] Walter Schiffer, *The Legal Community of Mankind: A Critical Analysis of the Modern Concept of World Organization* (New York: Columbia University Press, 1954). Suganami suggests that Schiffer overstates the influence (*The Domestic Analogy and World Order Proposals*, p. 4). He believes that although natural law doctrine may have made it possible, what actually shaped the idea of world organization was the assumption that international society should become more closely analogous in its structure to domestic society.

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despite the absence of universal state-like organization above the states.[115] This idea was

even shared by certain positivist writers despite their explicit rejection of the natural law

doctrine. The essence of the modern patterns of thought concerning world organization

is that international law and order can be maintained by a centralized institution, that is,

by an association of sovereign states which is not itself a state. Such a pattern of thought

could not have arisen unless it had been assumed that there existed, or could exist, a

legal order binding upon independent states. Thus, the suggestion that such an

assumption has its historical origin in natural-law doctrine, and, when combined with the

idea of progress, contributed to the emergence of the League of Nations.[116]

According to Hans Morgenthau, "the application of domestic legal experience to

international law is really the main stock in trade of modern international thought."[117]

More recently, Charles Beitz made the same point when he stated that "most writers in

the modern tradition of political theory, and many contemporary students of

international politics, have conceived of international relations on the analogy of the

[Hobbesian] state of nature," and that "perceptions of international relations have been

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[115] All forms of natural law theory subscribe to the overlap thesis, which asserts that there is a necessary relation between the concepts of law and morality. According to this view, the concept of law cannot be fully articulated without reference to moral notions. In this regard, it is often taken for granted that laws can be criticized on moral grounds; that there are standards against which legal norms can be compared. These standards against which law is judged have sometimes been described as "a (the) higher law" [Brian Bix, "Natural Law Theory," in Patterson, Dennis (ed.) *A Companion to Philosophy of Law and Legal Theory* (Cambridge: Blackwell Publishers Inc., 1996), p. 223]. For some, this means that there are law-like standards that have been stated in or can be derived from divine revelation, religious texts, a careful study of human nature, or consideration of nature. For others, the reference to "higher law" is meant metaphorically, in which case it at least reflects our mixed intuitions about the moral status of law.

[116] Schiffer, *The Legal Community of Mankind*, pp. 8-9, 29, 107-8.

[117] Hans J. Morgenthau, *Scientific Man versus Power Politics* (Chicago: University of Chicago Press, 1946), p. 113.

more thoroughly influenced by the analogy of states and persons than by any other device."[118]

But the domestic analogy is not without its critics. In fact, the idea that relations between states are not fully analogous to those between individuals is found in an embryonic form in the writing of Hobbes. Hobbes used international relations as an example to illustrate his contention that the state of nature would be the state of war. But why didn't the state of nature among states (the international state of nature) lead to the creation of a greater Leviathan when, according to him, the state of nature among individuals (the pure state of nature) would result in the emergence of the state? He argued instead that the state of nature among states was less intolerable to men than the pure state of nature.[119]

It is interesting to look at Locke's ideas here as well. Individuals in Locke's state of nature are sovereign; that is to say, they have the absolute right to decide matters for themselves, subject to the natural or moral rights of others. In this regard he is drawing upon natural law to make his argument. They can only justifiably be constrained in this if by free consent they combine together under one authority or government which then exercises some of those rights on their behalf. In short, in the interest of justice and public order, individuals enter into a social contract. Well, what is different about international relations? It can be argued that the international order, in the absence of world government, is a sort of state of nature in which individual nation states are sovereign, that is, free to decide matters for themselves. To avoid moral disorder,

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[118] Charles Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1979), p. 69.

[119] Suganami, *The Domestic Analogy and World Order Proposals*, p. 12.

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individual states, just like the individuals in Locke's state of nature, have reason to combine into an international social contract that would exist above the state.[120]

Gordon Graham discusses two very serious lines of objection that can be brought against this Lockean analysis of the domestic analogy. First, the Lockean idea of a state of nature assumes that in a pre-political state, where there are no civil laws to regulate behavior, there are nonetheless, moral laws.[121] That is to say, the world of Locke's state of nature is a moral world, to which the concepts of right and wrong[122] are reflected in its civil enactments. In effect, Locke's conception allows for the possibility to do something or someone wrong even where no criminal law has been promulgated against it.[123] Second, there are considerable questions about whether the moral framework appropriate to relations between individual human beings is relevant to relations between states. Leaders of state, as individuals, have general moral duties to other people. But do they have duties to other countries? In this regard, the domestic analogy assumes that

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[120] Ibid., p. 14. As Suganami notes, a social contract among sovereign states to leave the international state of nature can be of two types, corresponding to what has been called the 'cosmopolitanist' and 'internationalist' forms of domestic analogy. The domestic analogy in the 'cosmopolitanist' form leads to an argument for a world state, and its 'internationalist' form produces an argument that certain basic principles of domestic society should be transferred to the international sphere without altering the fundamental structure of international relations in a system of sovereign states.

[121] Of course, Hobbes would have disagreed, he believed that the state of nature is one in which there is *no* pre-political idea of right and wrong. It is also worth noting that at least according to the Realist political tradition, the international order is a Hobbesian, not Lockean state of nature, one in which concepts of moral right and wrong do not apply, and where the sole consideration upon which international relations, including international co-operation, are to be conducted is one of national self-interest. Realism denies the relevance of the domestic analogy by claiming that whereas the relation between individuals in a state of nature is a moral one, the relation between states is not. In short, realism rejects moralism with respect to international affairs, and hence denies that there can be ethics in international affairs at all. See Gordon Graham, *Ethics and International Relations* (Cambridge: Blackwell Publishers, Inc., 1997), pp. 18-19.

[122] In Locke's view the concepts of right and wrong were ultimately based in natural law.

[123] Ibid., p. 19.

individuals and collective entities are to be treated alike as far as moral responsibility is concerned.

Looking to contemporary literature, we get a more specific definition of the domestic analogy from Hedley Bull. Bull is one of the best known critics of domestic analogy in the English speaking world. According to him, the domestic analogy is:

> the argument from the experience of individual men in domestic society to the experience of states, according to which the need of individual men to stand in awe of a common power in order to live in peace is a ground for holding that states must do the same. The conditions of an orderly social life, on this view, are the same among states as they are within them: they require that the institutions of domestic society be reproduced on a universal scale.[124]

Bull argues that "anarchy among states is tolerable to a degree to which among individuals it is not."[125] Bull provides four grounds for this assertion. First, unlike the individual in the Hobbesian state of nature, the state does not find its energies so absorbed in the pursuit of security that the life of its members is that of mere brutes. Second, states in the international state of nature are free from all kinds of vulnerability to which individuals in the pure state of nature are subject. Third, to the extent that states are vulnerable to external attacks, they are not equally so; the vulnerability of a great power is qualitatively different from that of a small state. This can be contrasted with the Hobbesian state of nature, where men are so little different in their individual physical abilities that even the weakest could have a fair chance of killing the strongest. Fourth, compared with individual human beings, states are much more economically self-

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[124] Hedley Bull, "Society and Anarchy in International Relations," in Herbert Butterfield and Martin Wight (eds.), *Diplomatic Investigations: Essays in the Theory of International Politics* (Cambridge: Harvard University Press, 1966), p. 35.

[125] Ibid., p. 45.

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sufficient. Therefore, states can survive without a high degree of economic cooperation much more successfully than can individuals among themselves.[126]

If we accept that the domestic and international experiences differ significantly then not only are we forced to consider the viability of the domestic analogy but we must also question the desirability of any proposal that either presupposes a centralized world government or that is based on domestic legal experiences that ultimately rely on the centralized nature of the domestic legal order. Richard Falk, for one, is careful to point out that we need systematic inquiry in order to accurately achieve the preferred future of the world legal order. As Falk notes:

> The failure to conduct this inquiry, including the failure to consider the preconditions of such a centralization of the world legal order, is one of the reasons why proposals to reform the legal order of international society so blandly and so consistently endorse some model of world government as the natural culmination of ideological dreams.[127]

In this regard, it is worth noting that the domestic legal order depends upon the functioning of a central government and this dependence is presupposed to be the crucial element of adequate legal order in every human setting.[128]

We need to be able to look outside the confines of the domestic analogy and consider other alternatives that may be more appropriate given the unique nature of the international legal system. For one thing, it is not at all clear that government on an international scale is capable of dealing with the main challenges to world order that might motivate its creation. National governments, even those with well established

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[126] Ibid., pp. 45-8.

[127] Richard A. Falk, *The Status of Law in International Society* (Princeton: Princeton University Press, 1970), pp. viii-ix.

[128] Nevertheless, it is important to recognize that states differ substantially in the degree of centralization and the ways in which power is distributed within the system.

legal systems have been forced to endure costly civil wars. Given the decentralized

nature of the international legal order, the early decades of a world government might be

marked by a series of civil wars of a magnitude and frequency more detrimental than the

pattern of warfare that is characteristic of the existing international system.

Distinctive Features of the International System

On a basic level it is easy to see that international law is unlike law in our

domestic system. This has led to doubts about the legal quality of international law. In

this section I look at aspects of this international system that set it apart from our

domestic legal experience. In this regard, three central themes will be discussed: the

primitive nature of the international legal system, the existence of a rule of law, and the

significance of a decentralized legal order.

Often used is the imagery of the international legal system as a primitive system.

Such imagery has been useful in preserving the legal nature of prescriptions in the

international arena by characterizing them as something other than norms of mere

convenience or morality. At the same time, it has been able to account for the

indubitable weaknesses of these norms as well as to answer the question of how some of

these weaknesses could be remedied—specifically, by suggesting analogies taken from

the development of the domestic legal order. Thus centralization of sanctioning

mechanisms and their further development through codification appear to be the answers

to the decentralized and still largely customary self-help system of international law.[129]

Implicit in such suggestion is a theory of law that interprets the force of

prescriptions in terms of constraints. It assumes that actors follow rules largely out of

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[129] Friedrich Kratochwil, "The Role of Domestic Courts as Agencies of the International Legal Order," in Falk, Kratochwil and Mendlovitz (eds.), *International Law*, p. 236.

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fear of threatened sanctions.[130] The implicit image here is that of criminal law. Through

the threat of negative consequences the law intervenes in the decision-making process of

a utility-maximizing actor and thus makes him behave in a certain manner. Aside from

the question of whether this implicit theory about the functioning of norms as causes of

decision is appropriate even within the narrow confines of criminal law, viewing all law

through the lenses of criminal law leads to serious distortions.[131] This is particularly

problematic when we realize that in the international system actors are largely collective

entities with complex motivations and decision making processes. This makes it almost

impossible to analyze international law within this context. For one thing, even if we

assume that actors are rational utility maximizers, it is often unclear who is forced to

suffer the negative consequences that result from violations of international law.

Sir Hersch Lauterpacht, for one, has suggested that the domestic analogy might be

more appropriate in a formative period of international law. He suggests that the

recourse to private law, which was, perhaps, justified in the formative period of

international law owing to the then prevalent patrimonial conception of state, has

subsequently impeded the growth of international law, and ought to be discouraged. The

habit of falling back on private law is looked upon as betraying a regrettable tendency to

imitation, as ignoring the special structure of international relations, and as threatening

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[130] Ibid.

[131] The inappropriateness of viewing law merely as a sanctioning or constraining system has also been noted in sociology. See, for example, Judith Blake and Kingsley Davis, "Norms, Values and Sanctions," in Robert Faris (ed.), *Handbook of Modern Sociology* (Chicago: Rand McNally, 1964), pp. 456-484, and in the jurisprudential literature, see, for example, David Miers and William Twining, *How to Do Things with Rules* (London: Weidenfeld and Nicholson, 1976).

to thwart, by introducing technicalities and intricacies of municipal jurisprudence, every

attempt at a fruitful and creative scientific activity in the domain of international law.[132]

Directly related to this notion of international law as a primitive legal system is

the debate surrounding the existence of a rule of law. In this regard, many want to

question whether international law is really law. To answer this question, we must come

up with a definition of law or a rule of law.[133] Law has been defined as a set of rules or

expectations that govern the relations between the members of a society, that have an

obligational basis, and whose violation is punishable through the application of sanctions

by society.[134] It is the obligational character of law that distinguishes it from morality,

religion, or social mores. This definition implies that at least three fundamental

conditions must be present if law, or a rule of law can be said to exist in a society: "(i) a

process for developing an identifiable, legally binding set of rules that prescribe certain

patterns of behavior among societal members (a law-making process); (ii) a process for

punishing illegal behavior when it occurs (a law-enforcement process); and (iii) a

process for determining whether a particular rule has been violated in a particular

instance (a law-adjudication process)."[135] Put another way, one must ask, "if law is really

law, who enacts, construes, and enforces it?"[136] It is worth noting that these are the three

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[132] H. Lauterpacht, *Private Law Sources and Analogies of International Law* (New Haven: Archon Books, 1970).

[133] The phrase "rule of law" is used to indicate the minimal requirements for the existence of a viable legal system, regardless of whether it is being applied to international or domestic legal phenomena.

[134] This definition is based on William D. Coplin, *The Functions of International Law* (Chicago: Rand McNally, 1966), p. 1-3.

[135] J. Martin Rochester, *Between Peril and Promise: The Politics of International Law* (Washington, D.C.: CQ Press, 2006), p. 34.

[136] George Will, "The Perils of 'Legality'," *Newsweek*, September 10, 1990, p. 66.

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conditions normally associated with domestic law within national societies, and further

reflect the three branches of government that exist within the government of the U.S..

In regards to international law, which is traditionally defined as the body of rules

which are binding upon states in their relations with one another, the most obvious

difference is that the central government institutions that are associated with law within

the domestic context simply do not exist in relations between states. There is no world

government, no supreme law-giver, no police squads patrolling international affairs and

directing traffic, and no court, at least not one that has all of the normal attributes of a

court.[137] Put another way, international law does not meet the "Five Cs" test of law:

Congress, Code, Court, Cop, and Clink:

> First, the rule must be produced by a centralized legislative body—a
> "Congress," or parliament, or whatever. Second, this legislative body
> must produce a written "Code." Anyone should be able to pull out a
> statute book and read precisely what the rule says. Third, there must be a
> "Court"—a judicial body with complete compulsory jurisdiction to
> resolve disputes about the rules or determine culpability for violation of
> the rules. Fourth, there must be a "Cop," some centralized means of
> enforcing violations of the rule. Finally, there has to be a "Clink." There
> must be some kind of sanctions that will be imposed on those who choose
> to violate the rule.[138]

However, if we overlook the decentralized nature of the authoritative institutions in the

international system, or in other words, abandon the stereotype of law as "a centralized

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[137] Rochester, *Between Peril and Promise,* p. 35.

[138] Ibid. In Anthony Clark Arend, *Legal Rules and International Society* (New York: Oxford University Press, 1999), p. 29, the author credits the "Five C's" terminology to lectures he heard Inis Claude give. Neither Arend nor Claude subscribe to the view that international law's failure to meet the "Five C's" test means that it cannot be law; both were merely articulating the common assumptions surrounding law. I would add that "the common assumptions surrounding law" are significant when attempting to define international law, particularly given the significance of the domestic analogy.

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constraint system backed by threat of coercive sanctions"[139] and adopt instead a more

relaxed definition of law then it would leave open the possibility of accepting

international law as law.[140] In this regard, we must be prepared to demonstrate how law

can operate in a decentralized political system such as the international system.

The final characteristic of the international legal system that must be considered is

the significance of this decentralization. Most dominant legal theories have their

foundation in the political context of centralized states. These are states in which there is

a vertical or hierarchical relationship between unequal centers of power.[141] This is in

contrast to systems such as the international system in which there is a horizontal or

nonhierarchical order between equal centers of power.[142]

It is widely assumed that the achievement of compliance in highly decentralized

social systems is extremely difficult. Those who make this assumption generally regard

some form of hierarchical organization as a necessary condition for compliance, and

anarchy as a recipe for extreme disorder. Oran Young has considered a number of

attributes common to all decentralized social systems with respect to compliance.[143] He

suggests that this point of view rests on a tendency to single out certain extreme cases

and to equate all problems of compliance in decentralized social systems with these

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[139] This is the traditional notion of law attributed to John Austin, nineteenth century British writer, cited in Edward Collins (ed.), *International Law in a Changing World* (New York: Random House, 1970), p. 2.

[140] Rochester, *Between Peril and Promise*, p. 35.

[141] Gidon Gottlieb, "The Nature of International Law: Toward a Second Concept of Law," in Falk, Kratochwil, and Mendlovitz (eds.), *International Law*, p. 188.

[142] See Richard Falk, "International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order," *Temple Law Quarterly*, Vol. 32, Spring 1959, p. 295.

[143] Oran Young, "Compliance in the International System," in Falk, Kratochwil and Mendlovitz (eds.), *International Law*, pp. 99-111.

extreme cases. He uses the example of a crowded subway car. People typically don't know each other and therefore have no stable expectations nor viable rules to guide their interactions. In addition, interactions are fleeting and noniterative; the members of the group will fluctuate constantly as people enter and leave the car. Moreover, mechanisms for the coordination of expectations are typically weak. Under the circumstances, members of the group are not likely to be willing to take significant chances in the hopes of encouraging compliance on the part of others.

It is possible that the above example is the exception rather than the rule. Young sees "no reason to conclude that the extreme cases are predominant in most social systems. There are numerous situations in which subjects left to their own calculations in the absence of any organized sanctions nevertheless exhibit high levels of compliance."[144] He points out that in Switzerland, for example, many public telephones and buses are operated on what amounts to an honor system in which compliance with prescriptions concerning payment are essentially voluntary.

There are numerous situations in which simple self-interest dictates compliance. That is, when looked at in simple cost-benefit terms, the expected benefits of compliance often outweigh the costs without regard to any prospects of enforcement, inducement, or social pressure. In some cases, this flows from the fact that noncompliance carries its own penalty. In other cases, the prospect of counter violations, retaliation, undermining the general viability of the prescriptions in question, or reducing the opportunities for profitable interactions in the future are sufficient to make the expected costs of violations outweigh the possible gains.

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[144] Ibid., p. 100.

Yet, individuals operating in highly decentralized social systems realize that that they cannot rely upon a government or some other centralized public authority to maintain order and to preserve the social fabric of the system. Therefore, they are likely to be more concerned with the social consequences of their behavior than they would be in a centralized system, where such concerns can be allowed to atrophy without causing undue harm, at least in the short run.[145]

Although decentralized social systems do not have centralized and formally organized governments, it would be a mistake to assume that they entirely lack institutions relating to compliance. In this regard it is possible to distinguish at least three characteristics of compliance mechanisms in decentralized systems. First, activities relating to compliance are often performed by a wide range of actors rather than by a single actor specialized to the task of handling compliance problems. For example, some systems have authorized self-help arrangements in which it is entirely acceptable for individual actors to determine sanctions under specified circumstances. Second, there are many systems in which compliance mechanisms are developed for individual functional areas, with the result that there is no centralized agency concerned with problems of compliance in general. In the international system, there are distinct arrangements for maritime transport, air transport, commodity trade, monetary transactions, specialized problems relating to the management of natural resources, and so forth.[146] Third, it is common in decentralized social systems for separate institutions to handle different aspects of the overall problem of compliance. As a result, there may be quite distinct

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[145] Michael Taylor, *Anarchy and Cooperation* (London: Wiley, 1976), pp. 134-140.

[146] See Ronald S. Tauber, "Enforcement of IATA Agreements," *Harvard International Law Journal*, Vol. 10, 1969, pp. 1-33, and, Bart S. Fisher, "Enforcing Export Quota Agreements: The Case of Coffee," *Harvard International Law Journal*, Vol. 12, 1971, pp. 401-435.

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arrangements for inspection and information gathering, the application of prescriptions, and the organization of sanctions.[147]

It is important to note that the prescriptions of the international system are more afflicted by ambiguity than those of many other social systems. Young suggests that this is because the system is both heterogeneous, in the sense that patterns of relationships among the actors diverges widely, and volatile, in the sense that patterns of relationships among the actors change rapidly. In addition, many important international prescriptions are intrinsically difficult to put into operation in real-world situations.[148]

In sum, the international system is arguably a primitive, highly decentralized social system that differs substantially from the more mature, centralized legal systems that exist in the domestic context. Nevertheless, the domestic analogy has been important in the development of international law and jurisprudence. These facts have significant consequences for the prospect of using international law and the domestic analogy to address specific issues such as climate change through the use of international law. Critics of the domestic analogy suggest that it may no longer be relevant, leaving room for the development and application of alternative theoretical frameworks. In this regard, critical legal studies allows for a more thorough analysis of the basis and adequacy of international environmental law. In the next section I discuss the application of critical legal studies to questions of law and justice on the international level.

International Jurisprudence

While critical jurisprudence and critical legal studies more specifically have focused primarily on critiquing law and legal process in the U.S., it is worthwhile to

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[147] Young, "Compliance in the International System," p. 102.

[148] Ibid.

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consider its relevance and application to other legal systems. It should not be too surprising to learn that power asymmetries, marginalization, and subordination exist in all legal systems.[149] Indeed, these phenomena have long been recognized to permeate the norms, rules, and institutions of the international system. In several respects, the international system mirrors domestic society; its norms, rules, and institutions vary in form and not substance.[150] Power asymmetries, marginalization, and subordination permeate the structure and process of the international system. Indeed, subordination politics perpetuate the marginalization of countless groups, a process that began centuries ago.

Our analysis of the domestic analogy and the unique nature of the international legal system require us to look beyond the assumptions and theoretical framework from which international law has been developed. Critical jurisprudence supports the development of policies to counteract subordination. In this regard, critical legal studies can provide an alternative theoretical framework from which to assess the adequacy of international environmental law as well as the prospects of achieving international environmental justice in the context of climate change. In this section I will look at attempts to use critical jurisprudence and critical legal studies to analyze international legal phenomena.

A variety of scholars have attempted to use critical jurisprudence to challenge the structure and process of international law and its concomitant institutions. For example, the "Third World" critique of international law challenges the legitimacy of the

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[149] Aceves, "Critical Jurisprudence and International Legal Scholarship," pp. 301-2.

[150] See Suganami, "The Domestic Analogy and World Order Proposals."

international system.[151] According to these scholars, the colonial and imperial past of the international system is perpetuated in the contemporary rules and institutions of international law. The principle of sovereignty, long considered the cornerstone of international law, ensures that inequality remains a central feature of the international system. In addition, the feminist school is equally critical of the international system, although its principal focus is to expose gender bias in the rules and institutions of the international system. To these scholars, international law is a thoroughly gendered system. These scholars show that power asymmetries, marginalization, and subordination permeate the international system. As William J. Aceves notes:

> The current structure of the international system clearly manifests the explicit nature of subordination politics. Centuries of imperial policies and colonial domination have profoundly affected the landscape of the international system. Yesterday's hegemons are today's developed states; yesterday's colonies are today's developing states. While Europe and North America prosper, counties in Africa, Latin America, and Asia continue to struggle with social, economic, and political inequalities.[152] To many developing countries, the distinction between the colonial and post colonial eras is blurred if not irrelevant—a distinction without value.[153]

According to Elizabeth Iglesias, "many of the problems we share, as racially subordinated peoples, are a function of the impoverishment and subordination of our

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[151] Even the term "Third World," which is commonly used, connotes an implicit value judgment and promotes marginalization.

[152] The United Nations Human Development Report highlights these disparities in wealth and power. See United Nations Development Programme, *2000 Human Development Report*. For example, the United Nations Development Programme has developed a Human Development Rank list divided into three categories that represent levels of overall development: high, medium, and low. Only three Latin American countries and no African countries appear in the High Human development Rank list. In contrast, no European country appears in the Low Human development Rank list. See also World Bank, *Poverty Reduction and the World Bank*, 1996.

[153] Aceves, "Critical Jurisprudence and International Legal Scholarship," pp. 319-320.

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nations of origin through the processes of colonialism and imperial capitalism."[154] A

vision statement proposed by a group of scholars steeped in the Third World approach

shares these concerns:

> We are a network of scholars engaged in international legal studies, and
> particularly interested in the challenges and opportunities facing 'third
> world' peoples in the new world order. We understand the historical scope
> and agenda of the dominant voice of international law and scholarship as
> having participated in, and legitimated global processes of
> marginalization and domination that impact on the lives and struggles of
> Third World peoples.[155]

In many respects, the United Nations Charter represents an example of the power

asymmetries, marginalization, and subordination that plagues the international system.

For example, membership in the Security Council is divided between permanent and

non-permanent members.[156] While the ten non-permanent members are rotated every

two years, the five permanent members have remained on the Security Council since

1945.[157] The permanent members wield enormous power in the Security Council.

Because of their veto power, they can prevent the adoption of any Security Council

resolution. As a result, it is not surprising that the permanent members have been

reluctant to give up power and expand membership in the Security Council. In addition,

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[154] Elizabeth M. Iglesias, "International Law, Human Rights, and LatCrit Theory," *University Miami Inter-American Law Review,* Vol. 28, 1996-1997, pp. 177, 180.

[155] Aceves, "Critical Jurisprudence and International Legal Scholarship," pp. 318-319. See also James Thuo Gathii, "Alternative and Critical: The Contribution of Research and Scholarship on Developing Countries to International Legal Theory," *Harvard International Law Journal,* Vol. 41, 2000, pp. 263, 273.

[156] United Nations Charter, Article 23.

[157] The permanent members of the Security Council include China, France, Russia, the United Kingdom, and the U.S.. There has been considerable debate about including other member states but this does not necessarily overcome the criticism that such a system perpetuates the power asymmetries, marginalization, and subordination of the international system. In 1971, the United Nations General Assembly voted to replace Taiwan with the People's Republic of China as a permanent member of the Security Council. See G.A. Res. 2758, United Nations GAOR, 26th Sess., 1976th plen. mtg., Supp. No.29, at 2, United Nations Doc. A/8429 (1971).

the United Nations Charter hinders the adoption of amendments.[158] Power politics is used to justify a system that favors the permanent, previously imperialistic superpowers. In drafting the United Nations Charter, "the basic premise was that upon these members would fall the brunt of the responsibility for maintaining international peace and security and, therefore, to them must be given the final or decisive vote in determining how that responsibility should be exercised."[159] In contrast, the general assembly is a fully democratic institution where each state is entitled to one vote, and no state wields a veto. The power of this deliberative body, however, pales in comparison to the Security Council.[160] Ultimately, the United Nations reflects the power hierarchies that existed at the time of its creation. To the extent that reform is discussed, it is often suggested that the Security Council should reflect more current power asymmetries without any reference to justice or equality.

In addition to the United Nations Security Council, the Bretton Woods institutions also represent an example of marginalization in the international system. The principal Bretton Woods institutions, the International Bank for Reconstruction and Development (World Bank) and the International Monetary Fund (IMF), were established in 1944 to promote monetary and financial stability in the post war era. Membership in the World Bank and IMF is open to any state. However, voting power in these institutions is based

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[158] Article 108 requires the unanimous consent of all permanent members of the Security Council and a two thirds vote in the General Assembly before an amendment to the Charter can be made.

[159] D.W. Bowett, *The Law of International Institutions*, Fourth Edition (New York: F.A. Praeger, 1982), p.28. According to Bowett, this political reality explained why the United Nations member states accepted an arrangement that might otherwise be found inconsistent with the principle of sovereign equality.

[160] But see Uniting for Peace Resolution, United Nations Doc. A/RES/377(V)(allowing the General Assembly to recommend collective measures when the Security Council is unable to act because of the exercise of a veto by one of the permanent members).

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upon less egalitarian features. A country's voting power in the Bretton Woods

institutions is directly related to economic wealth, thereby privileging certain states over

others.

Although a number of scholars have critiqued international institutions such as the

UN, IMF, and World Bank, there have been very few explicit applications of critical

legal studies to the international legal system. Ultimately, this is a gap in the literature

that this project seeks to fill. I now turn to a discussion of the explicit application of

these ideas to international phenomena before applying lessons from critical legal studies

to the issue of climate change in the next chapter.

In one of the few and most explicit utilizations of critical jurisprudence on the

international level, Aceves examines the practice of equitable distribution in

international organizations.[161] He shows that critical jurisprudence has equal relevance

and usefulness for examining the structure of the international system. He uses critical

jurisprudence to suggest that participation and representation are essential to ensure the

fairness of international organizations and, therefore, equitable distribution policies play

an important role in promoting equality in an unequal world. Through the lens of critical

jurisprudence, Aceves reveals the shortcomings of existing institutional design within

the framework of international law, in general, and international organizations, in

particular. Specifically, the underlying norms, rules, and institutions of the international

legal system perpetuate the marginalization and subordination of countless groups. In

turn, these phenomena undermine the fairness of international law and its accompanying

institutions.

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[161] Aceves, "Critical Jurisprudence and International Legal Scholarship."

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Critical jurisprudence helps us see the significance of participation and representation to ensure fairness in the international system. In this regard, equitable distribution policies play an important role in promoting international environmental justice.[162] Through further deconstruction, however, critical jurisprudence reveals the shortcomings of equitable distribution. In trying to promote fairness in the international system, equitable distribution policies may, in fact, be responsible for the further erosion of this seminal principle. No matter how noble the goals of equitable distribution, they cannot absolve the original sin that continues to haunt the state and the international system—these are artificial entities created and maintained to perpetuate the Westphalian balance of power.[163] Existing policies of equitable distribution do not alter this reality. In short, there are fundamental differences between states and people, and these differences are not captured within existing international discourse.

While these findings may seem contradictory, they are entirely consistent with the critical tradition. "The arrogance and potential dominance associated with knowing the right answer and knowing what is best for the oppressed," Aceves continues, "must be tempered with the postmodern contingency, relativity and potential deconstruction of our own foundations of knowledge."[164] No theory is capable of resolving the intractable problems facing international law and its concomitant institutions. While other theories preach their omni-science, critical jurisprudence recognizes its own limitations. This is, perhaps, its greatest strength.

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[162] It is worth noting that this will also support my discussion of justice in the context of social justice movements. In that regard, the liberal focus on distributive justice is inadequate and must be broadened to include both participation and recognition.

[163] Aceves, "Critical Jurisprudence and International Legal Scholarship," p. 393.

[164] Ibid.

Although critical jurisprudence and critical legal studies more specifically have

not been adequately utilized to assess international phenomena, at least one scholar has

highlighted its usefulness. Anthony Carty has noted that:

> [C]ritical international legal studies constitute a so-called post-modern
> approach to international law. That is to assert that the discipline is
> governed by a particular, historically conditioned discourse which is, in
> fact, quite simply, the translation onto the international domain of some
> basic tenets of liberal political theory.[165]

In this regard, critical international legal studies would focus on many of the same

inconsistencies and incoherencies that exist in domestic legal systems. Legal positivism

and liberal legal theory dominate our understanding and use of law in both the domestic

and international contexts. Carty argues that critical international legal studies

> opposes itself to positivist international law, as representative of an actual
> consensus among States. The crucial question is simply whether a
> positive system of universal international law actually exists, or whether
> particular States and their representative legal scholars merely appeal to
> such positivist discourse so as to impose a particularist language upon
> others as if it were a universally accepted legal discourse. So post-
> modernism is concerned with unearthing difference, heterogeneity, and
> conflict as reality in place of fictional representations of universality and
> consensus.[166]

Critical jurisprudence has made an important contribution to legal scholarship, yet

much work still needs to be done particularly in regards to international phenomena. It

promotes a better understanding of the social construction of the various norms, rules,

and institutions that constitute the international system. It encourages a discourse that

challenges notions of essentialism and the nature of privileged positions among state

actors. It also provides an analytic framework for identifying mechanisms by which

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[165] Anthony Carty, "Critical International Law: Recent Trends in the Theory of International Law," *European Journal of International Law*, Vol. 2, 1991, p. 1.

[166] Ibid.

subordination politics can be challenged in the international system. The development of

such remedial programs is particularly important for a research program that questions

the fairness of the status quo and seeks to promote the development of a more equitable

system. Nevertheless, there has been relatively little use of these insights to international

legal phenomena. Critical jurisprudence generally, and critical legal studies more

specifically, can help provide a better understanding of global environmental politics and

help us to bring about international environmental justice.

Concluding Remarks

Critical jurisprudence and its application to international law raise some

interesting questions about the prospects for global environmental justice. Is it possible

that a system of international law can deal with the complex pressures on the global

environment, particularly in this era of globalization? What is international

environmental justice in the context of climate change and can it be achieved? I believe

that critical jurisprudence is an appropriate framework from which to do so. Particularly

as we search for solutions to the looming environmental crises that plague the globe, we

must be cognizant of the effects of the structure of the international system and the

inequalities that are perpetuated. Critical jurisprudence provides a useful approach for

examining the structure of the international legal system.[167] The benefits of this approach

are evident. As noted by one scholar, the perspective and methodologies of critical

jurisprudence have "created a conceptual space for exploring how the formulation and

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[167] See Henry J. Richardson III, "Correspondence," *American Journal of International Law*, Vol. 94, 2000, p. 99, and, Stephen Ratner and Anne-Marie Slaughter, "Reply to Correspondence," *American Journal of International Law*, Vol. 94, 2000, p. 101. For efforts to merge the international and national discourse on human rights and civil rights, see Sharon K. Hom and Eric K. Yamamoto, "Symposium on Race and the Law at the Turn of the Century: Collective Memory, History, and Social Justice," *University of California, Los Angeles Law Review*, Vol. 47, 2000, p. 1747.

resolution of key debates in international law reproduce the conditions of subordination

of peoples of color, both domestically and internationally."[168] In the next chapter I will

show how we can utilize this conceptual space to address the pressing issues associated

with the pursuit of international environmental justice.

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[168] Iglesias, "International Law, Human Rights, and LatCrit Theory," p. 182.

CHAPTER THREE:

International Environmental Law and Justice

We do not inherit the Earth from our ancestors; we borrow it from our children.

—Native American Proverb

At this point we have laid out the theoretical orientation of this study by looking at the significance of liberal legal theory, and the criticisms of critical legal studies. In the previous chapter we looked more specifically at the implications of these theoretical claims to international legal phenomena in order to illustrate a gap in the literature and the potential contribution of critical legal studies on the international level. Now I will shift our analysis to international environmental law and justice to demonstrate the ways in which critical legal studies can augment our understanding and use of legal mechanisms to address global environmental problems. It is my contention that global environmental problems such as climate change are real, despite the debate that may exist about scientific certainty, and that such problems pose perhaps the most significant threat to humanity yet faced. This is particularly problematic when we realize that such problems inevitably produce a myriad of ethical dilemmas that are not easily seen or adequately addressed within the current legal framework. In fact, it is difficult enough to define international environmental justice, let alone to achieve it in the context of international negotiations.

This chapter takes up the issue of climate change by looking specifically at the climate change regime,[169] and showing how critical legal studies can be utilized to help determine whether international environmental justice is possible in this context. The climate system is the result of complex and dynamic interactions between the Earth's atmosphere, biosphere and oceans. Human activities have had a significant impact of the global climate system through the increased atmospheric emissions of greenhouse gases due to fossil fuel burning, deforestation, livestock farming and other human activities. If current trends continue the concentration of greenhouse gases in the atmosphere will lead to potentially disastrous effects. These impacts will affect the environmental, social, and economic interests of all states and have profound consequences for every aspect of human society.

Due to the transboundary nature of the causes and affects of climate change, no state can hope to arrest climate change on their own. Nevertheless, collective action by sovereign states with different socio-economic and environmental circumstances is extremely difficult. In this regard, climate change challenges mainstream legal theory and practice, as well as concepts of state responsibility, sovereign equality, and the centrality of states in the international legal system. Furthermore, there are a number of issues that are unique to climate change that make collective action more challenging still. These issues include the potentially irreversible damages and costs associated with

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[169] The term "regime" is used to refer to the rules, regulations and institutions relevant to a particular subject area. More specifically, in international relations, a regime has been defined as "a set of implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area in international relations" (S.D. Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables," *International Organizations*, Vol. 36, No. 21, 1982, p. 186). See also Farhana Yamin and Joanna Depledge, *The International Climate Change Regime: A Guide to Rules, Institutions and Procedures* (Cambridge: Cambridge University Press 2004), p. 6-7. It is important to note that this includes both binding, or hard international law, and nonbinding law sometimes referred to as soft international law.

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climate variation, the long planning horizons, regional variations, time lags between

cause and effect, scientific uncertainties and complexities inherent to climate change and

geographical discrepancies between those who pollute and those subject to climate

impacts.

As has been touched on previously, it should not be difficult to recognize that the

prospect of global climate change raises a number of very difficult practical, moral, and

ethical issues that states have only begun to address. Considerable debate exists

regarding the appropriate course of action that will be necessary to avert climate change

and the associated social problems and ethical issues that it will generate. This chapter

looks at the use of international law in the context of climate change. I start by looking at

international environmental law generally, leading into a discussion of international

efforts to address climate change. In this section, I will be looking at the international

legal mechanisms that have been developed and utilized, as well as the idea of global

environmental governance. In the latter part of this chapter I will look at how we define

international environmental justice. Ultimately I will show that liberal legal theory is

inadequate in theory and practice. This will lay the foundation for using critical legal

studies to access the prospects of achieving justice in this context. Although climate

change has received considerable international attention relatively recently, we must

question the extent to which such attention supports a more just and equitable world.

International Environmental Law

International environmental law is, arguably, the most dynamic area of

international law. One text book in this area properly describes international

environmental law as having "had the greatest impact, ultimately constituting a powerful

factor pushing towards a transformation of the fundamental basis of international

law."[170] Yet, a cohesive body of international law requiring sovereign states to regulate

behavior that affects the environment has not fully been developed. Historically,

international environmental problems were not a proper subject of international law. The

freedom of states to decide upon their internal set-up, national legislation and foreign

policy was virtually unrestricted, giving states maximum freedom to pursue their self-

interest. In this regard, environmental issues were considered matters of domestic

concern within the sovereign jurisdiction of each state, and as a result, they were

addressed by domestic regulation rather than international law. Justice in this regard

meant legality, sovereignty, equality, and fairness of treatment among states. However,

traditional international law was not well equipped to deal with the variety of issues that

arise regarding international environmental justice.

Over time, states began to accept, on a voluntary and reciprocal basis, a variety of

restrictions in order to pursue their shared objectives. This became increasingly true as

the international system became more and more interdependent. Nevertheless, the

sovereign equality of states, and the voluntary acceptance of international obligations

remain fundamental to the modern conception of international law. States have

established a number of international organizations and vested them with limited legal

powers sufficient to achieve particular common goals, but there is no central legislative

body at the international level. As a result, existing environmental rules are "a

patchwork, reflecting a piecemeal, fragmented and ad hoc response to problems as they

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[170] A.C. Kiss and D. Shelton, *International Environmental Law* (New York: Transnational Pub Inc., 1991), p. 2. See also Prue Taylor, *An Ecological Approach to International Law: Responding to Challenges of Climate Change* (London: Routledge, 1998), p. 3.

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have emerged."[171] Nonetheless, international law is increasingly used to resolve disputes between international actors, particularly those between states. Issues such as climate change play themselves out through interstate negotiations and late night debates about the language of each pronouncement.

Threats to the Earth's flora and fauna, wildlife, air, and water have been recognized by scientists and conservationists for more than a century, but it is only in the past three decades that states have begun to address these issues on a global scale. In 1972, 113 states sent representatives to the United Nations Conference on the Human Environment in Stockholm, Sweden. This marked the beginning of organized international efforts to develop a comprehensive plan to safeguard the environment while also promoting economic development. Although there were no binding treaties signed at Stockholm, the United Nations Environment Programme (UNEP) was established, creating a permanent framework from which global environmental trends could be monitored, international meetings and conferences organized, and international agreements negotiated. Many consider this conference as a watershed in the development of international environmental law. It represented an acknowledgment, by industrialized countries in particular, of the importance of multilateral efforts to deal with transboundary environmental problems.[172]

International environmental law continued to develop through the 1970s and early 1980s as more and more states began to realize the need to cooperate to address these pressing issues. In 1987, the World Commission on Environment and Development

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[171] Yamin and Depledge, *The International Climate Change Regime*, p. 11.

[172] Lorraine Elliott, *The Global Politics of the Environment* (New York: New York University Press, 1998), p. 7.

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issued its historic report *Our Common Future*[173] calling for a new era of "sustainable development."[174] To begin implementing this strategy, the United Nations Conference on Environment and Development (UNCED), known as the Earth Summit, was convened in Rio de Janeiro, Brazil, in June 1992. Representatives of governments, international organizations and nongovernmental organizations met in Rio. Many suggested that this was proof that environmental concerns had risen to occupy a central place in the agenda of world politics.

As a result of these and other diplomatic achievements, some suggest that a system for global environmental governance now exists. According to The World Resource Institute, this system consists of three elements:

> 1) international organizations such as UNEP, the United Nations Development Programme, the Commission on Sustainable Development, the World Meteorological Organization, and dozens of specific treaty organizations.
>
> 2) a framework of international environmental law based on several hundred multilateral treaties and agreements.
>
> 3) financing institutions and mechanisms to carry out treaty commitments and build capacity in developing countries, including the World Bank and Specialized lending agencies such as the Multilateral Fund and the Global Environment Facility.[175]

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[173] Also known as the Brundtland Commission, after its chair Norwegian prime minister Gro Harlem Brundtland.

[174] World Commission on Environment and Development, *Our Common Future* (New York: Oxford University Press, 1987).

[175] World Resources Institutes, *World Resources 2002-2004: Decisions for the Earth: Balance, Voice, and Power* (Washington, D.C.: World Resources Institute, 2003), p. 138.

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In total, there are hundreds of bilateral and regional treaties and organizations that deal with transboundary and shared resource issues. By one count, there are more than 900 international agreements with some environmental provisions.[176]

In the past decade, nonstate actors—including international environmental interest groups, nongovernmental organizations, scientific bodies, business and trade associations, women's groups, and indigenous people's organizations—have also come to play an important role in international environmental governance. These organizations participate in international negotiations, help monitor treaty compliance, and often play a leading role in the implementation of policies. At the Johannesburg summit in 2002, for example, more than 20,000 individuals registered as participants and countless others attended a parallel Global People's Forum and summit of indigenous people.

As decision making authority gravitates from the national to the international level, the question of legitimacy of international governance has begun to receive more and more attention. Sources of power are identifiable, but legitimacy is far more difficult to identify and to sustain, particularly on the international level.[177] Until recently, international institutions have generally been so weak, they have exercised so little authority that the issue of their legitimacy has barely arisen. Indeed, many political scientists have questioned whether international institutions have any significance at all. Hence, international relations scholars have traditionally focused on the causal role of international institutions, rather than on their legitimacy. Further, to the extent that

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[176] Edith Brown Weiss, "The Emerging Structure of International Environmental Law," in Norman J. Vig and Regina S. Axelrod (eds.), *The Global Environment: Institutions, Law, and Policy* (Washington, D.C.: CQ Press, 1999), p. 111.

[177] Donald. A. Brown, *American Heat: Ethical Problems with the United States' Response to Global Warming*, (Lanham: Rowman & Littlefield Publishers, Inc., 2002), p. vii.

international institutions do influence the behavior of states—to the extent that we can speak of global governance—this authority has generally been self imposed, resting on the consent of the very states to which it applies. Many modern theories of legitimacy attempt to base governmental authority on the consent of the governed. As Daniel Bodansky put it, "[in] international law, the strongly consensualist basis of obligation has tended to moot the issue of legitimacy."[178] But, as international institutions gain greater authority, their consensual underpinnings erode. In this regard it is important to recognize that democracy has become the touchstone of legitimacy in the modern world and demands for greater democracy in international environmental law have begun to be voiced. But, as Bodansky notes,

> [D]emocracy can mean different things - popular democracy, representative democracy, pluralist democracy, or deliberative democracy to name a few. What might it mean in the context of international environmental law? Democracy among states or among people? A system of majority decision making or simply greater participation and accountability? And if the latter, participation by whom and accountability to whom? Abraham Lincoln once characterized democracy as government "of the people, by the people, and for the people." But who are "the people" in this connection?[179]

Despite important strides, there is a growing perception that the current international governance system remains weak and ineffective. Without a centralized government or sovereign political authority to oversee global governance, international agencies often duplicate efforts while collectively failing to address other issues. It is also worth noting that these organizations are forced to rely on individual states to carry out their policies. States are reluctant to relinquish their sovereignty and right to pursue

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[178] Daniel Bodansky, "The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?" *American Journal of International Law,* Vol. 93, No. 3, July 1999, p. 597.

[179] Ibid., p. 599.

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their own national interest. Consequently, it appears that many patterns of global

environmental degradation have not been reversed and may result in devastating

ecological crisis. Therefore, international environmental problems and the legal

mechanisms that are utilized to address them must be analyzed in order to ensure that the

potential solutions that are explored are capable of providing the benefits sought. Critical

legal studies can help us see that often these mechanisms perpetuate domination and

subordination without effectively addressing the very complex problems that they were

created to tackle. This project seeks to illustrate the advantages to utilizing such an

approach to global environmental problems such as climate change.

Climate Change

The problem of climate change emerged on the international agenda through a

gradual buildup of scientific concern, and, later a transfer of that concern to the political

arena. Scientific research has played an important role in the development of a climate

change regime.[180] There has been speculation about the possibility of anthropogenic

climate change since as early as 1896,[181] although it wasn't until 1983 that a rough,

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[180] Science's claim to universality has particular appeal in the international arena because it appears to offer a neutral basis for reaching decisions on issues that are otherwise mired in controversy (Hampson and Reppy, *Earthy Goods*, p. 7). However, we must recognize that science is a purely descriptive enterprise and can never tell us how the world ought to be. "It is generally accepted that science cannot deduce prescriptive statements from facts. That is, one cannot deduce 'ought' from 'is' without supplying a new minor premise" (Brown, *American Heat*, p. 50). Dale Jamieson makes the point that the problems we face are not purely scientific problems that can be solved by the accumulation of scientific information. "Science has alerted us to the problem, but the problem also concerns our values. It is about how we ought to live, and how humans should relate to each other and to the rest of nature. These are problems of ethics and politics as well as problems of science" (Dale Jamieson, "Ethics, Public Policy, and Global Warming," *Science, Technology, & Human Values*, Vol. 17, No. 2, Spring 1992, p. 142).

[181] Svante Arrhenius, "On the Influence of Carbonic Acid in the Air Upon the Temperature of the Ground," *Philosophical* Magazine, Vol. 41, 1896, p. 237. See also Svante Arrhenius, *Worlds in the Making* (New York: Harper & Brothers, 1908). Knowing that CO_2 and water vapor were responsible for the natural warming of the atmosphere, Arrhenius calculated that a doubling of CO_2 would increase the earth's temperature by 4 to 6 degrees Celsius (Brown, *American Heat*, p. 14). It is interesting to note that this is only a few degrees more than what the most sophisticated computers would predict ninety years later. Arrhenius failed to recognize the ability of humans to change the climate, calculating that it would

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international consensus about the likelihood and extent of climate change emerged.[182] In

the late 1980s, a number of European countries began to press for concerted

international action to begin to reduce greenhouse gas emissions, although the U.S., first

in the Reagan and then in the Bush administration, emphasized scientific uncertainty[183]

and the unacceptable costs of action.[184]

The Intergovernmental Panel on Climate Change (IPCC) was created in

November 1988 by the World Meteorological Organization and the UNEP to synthesize

and assess the state of scientific knowledge on climate change and evaluate response

strategies.[185] The IPCC brings together thousands of scientists from around the world in

a tightly focused process designed to provide continually updated assessments of the

threat, the science that allows us to know the threat, and the uncertainty of that science.

In this regard the IPCC seeks to assess available scientific and socio-economic

information on climate change and its impacts and on the options for mitigating climate

change and adapting to it, as well as provide scientific/technical/socio-economic advice

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take several thousand years for humans to release enough greenhouse gases to cause a doubling of natural levels of CO_2.

[182] National Academy of Sciences/National Research Council, *National Academy Report* 1983. This consensus holds that although there are uncertainties, a doubling of atmospheric carbon dioxide from its industrial baseline is likely to lead to a 2.5 degree centigrade increase in the earth's mean surface temperature by the middle of the next century. Intergovernmental Panel on Climate Change, *Assessment Report,* 1990.

[183] It may be that there is some uncertainty about the effects of global warming on ecological systems; however, the range of uncertainty about its possible economic and social consequences and the ability of institutions to adapt to environmental change are even greater.

[184] Brown, *American Heat,* p. 16. It is worth noting that during this time, fossil fuel interests and, in particular, some coal and petroleum lobbies were engaged in an intense campaign against government action by stressing scientific uncertainty and adverse impacts to the U.S. economy. The positions taken by the Reagan and Bush administrations were remarkably similar to the views of these corporate interests.

[185] The United States strongly supported the creation of the IPCC to resolve issues of scientific uncertainty, yet the IPCC's conclusions did not convince the U.S. that it should make any commitments to reduce greenhouse gas emissions. Ibid., p. 19.

to the Conference of the Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC). In this regard, the IPCC process is one of the most ambitious attempts ever mounted to mobilize science for the purposes of making international law and policy.

Groups such as the IPCC play an increasingly significant role in the development of international law. From 1990, the IPCC has produced a series of Assessment Reports, Special Reports, Technical Papers, methodologies and other products that have become standard works of reference, widely used by policymakers, scientists and other experts.[186] The IPCC in 1996 in their Second Assessment Report issued the carefully crafted and oft-quoted phrase, "The balance of evidence suggests that there is a discernable human influence on global climate."[187] By the Third Assessment Report, published in 2001, the IPCC told us that, "there is new and stronger evidence that most of the warming observed over the last 50 years is attributable to human activities."[188] Atmospheric CO_2 concentrations have increased 31 percent since 1750, due primarily to human activities such as fossil fuel combustion and deforestation.[189] Overall, atmospheric concentrations of greenhouse gases are increasing at a rate that is unprecedented in the last 20,000 years.[190]

The IPCC has linked these finds to a number of observed changes in the global climate, including a rise in sea level; a decrease in snow cover; more frequent, persistent

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[186] Betsill, *Global Climate Change Policy*, p. 106.

[187] Intergovernmental Panel on Climate Change, *Second Assessment Report*, 1996.

[188] Intergovernmental Panel on Climate Change, *Third Assessment Report*, 2001. Currently the IPCC is working on its fourth assessment report, scheduled for publication in 2007.

[189] Betsill, *Global Climate Change Policy*, p. 107.

[190] Ibid.

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and intense El Nino episodes; and more frequent and severe droughts in parts of Africa and Asia. Additionally, they have suggested that climate change will increase threats to human health, particularly in lower income populations, predominantly within tropical/subtropical countries and exacerbate water shortages in many water-scarce areas of the world. Populations that inhabit small islands and low-lying coastal areas are at particular risk of severe social and economic effects from sea-level rise and storm surges. Further, the IPCC has acknowledged that the impacts of climate change will fall disproportionately upon developing countries and the poor persons within all countries, and thereby exacerbate inequities in health status and access to adequate food, clean water, and other resources.[191]

The IPCC has been very significant in the development of a climate change regime. Their findings have been endorsed by the COP, arguably silencing climate science skeptics and forcing the political pace of negotiations.[192] This coincided with a period of relative economic prosperity for most industrialized states resulting in widespread domestic support for increased environmental protection and development assistance. The creation of five major international instruments at the Earth Summit in 1992 attested to this global commitment. This included the UNFCCC, the Convention on Biological Diversity, Agenda 21,[193] the Rio Declaration on Environment and Development, and the Non-Legally Binding Statement of Principles on Forests.

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[191] Intergovernmental Panel on Climate Change, *Climate Change 2001*, pp. 9, 12.

[192] Yamin and Depledge, *The International Climate Change Regime*, p. 24.

[193] Agenda 21 also gave rise to additional negotiations which resulted in the adoption of the 1994 Convention to Combat Desertification and the 1995 Agreement on Straddling and Highly Migratory Fish Stocks. Ibid., p. 23.

Specifically in regards to climate change, it is noteworthy that the international community negotiated two major international treaties in less than a decade: the UNFCCC in 1992, and the 1997 Kyoto Protocol.[194] Both treaties have been significantly elaborated through additional legal instruments and decisions adopted by the UNFCCC's governing body, the COP. The international legal and institutional framework established by these legal instruments, and its relationship to other international issues, is as complicated and far reaching as the climate problem itself. The underlying complexity of the climate problem and the sheer pace of scientific and political developments are contributing factors.

The break up of the former Soviet Union and entry of many developing countries into the global economy in the early 1990s opened up the possibility of greater levels of international cooperation. In addition, regional economic integration, evidenced by the growth of the European Union and increasing significance of multilateral institutions in general lead to a number of major United Nation summits and action plans. These factors contributed to the rapid entry into force of the UNFCCC in March 1994. The UNFCCC has been ratified by 189 states and thus has nearly universal membership.[195] It divides countries into 3 groups based on their level of development and outlines general commitments, including reporting obligations for all parties. The specific aim is to return emissions to 1990 levels by 2000. In addition, it mandated that industrialized countries provide financial assistance to developing countries and promote technology transfers to developing countries and economies in transition.

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[194] By 1995, it was becoming quite clear that the weak nonbinding approaches to global warming contained in the UNFCCC were failing to make much progress. At the first COP to the UNFCCC in Berlin in 1995, the parties agreed to begin negotiations on a binding protocol on emissions limitations.

[195] Yamin and Depledge, *The International Climate Change Regime,* p. 2.

The Protocol was unanimously adopted by the third COP in December 1997 and

meant to provide a binding timetable for greenhouse gas emissions. In addition to the

6,000 delegates from more than 160 nations, there were 3,600 members of

environmental groups and 3,500 reporters following the negotiations.[196] The Protocol,

which has been widely regarded as one of the most innovative and ambitious

international agreements ever agreed, has been ratified by over 120 parties, and has

entered into force notwithstanding the decision of the U.S. not to proceed with

ratification.[197] The Protocol established individual emission targets for industrialized

countries, adding up to a total cut of 5% of global greenhouse gas emissions. Targets

range from -8%, for most countries, to +10% using 1990 as a baseline.[198] The emission

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[196] Among the most powerful industry representatives at Kyoto was the Climate Change Coalition, which included Exxon, Mobil, and Shell Oil, along with the big three U.S. automotive manufacturers, mining and transportation companies, steelmakers, and chemical producers (Brown, *American Heat*, p. 33).

[197] Although the Clinton administration supported greater U.S. action, some members of Congress voiced strong concerns about whether emission reduction targets would disadvantage the U.S. economically and competitively in world markets. Further, as the U.S. prepared for Kyoto, an industry coalition of oil companies, electric utilities, automobile manufactures, and farm groups launched a multi-million-dollar advertising campaign to generate public opposition to U.S. involvement in the Kyoto treaty. Ultimately, rather than stabilizing greenhouse gases at 1990 levels by 2000, the U.S. would find its greenhouse gas emissions almost 13 percent higher than 1990 by 2000 (Ibid., p. 28). In March 2001, the Bush administration announced that the U.S. would not join the Kyoto Protocol. At the sixth Session of the COP in July 2001 in Bonn, Germany, key compromises were reached by developed states other than the U.S. on implementing the Kyoto Protocol, including the use of carbon sinks as a means of earning emission credits. In Morocco in November 2001 at the Seventh Session of the COP, states reached final agreement on the details for implementing the Kyoto Protocol. The U.S. attended the session but maintained its position that its rejection of the treaty was final. In February 2002, President Bush announced his alternative approach for handling the problem of climate change with voluntary measures only. He stated:

> The approach taken under the Kyoto Protocol would have required the United States to make deep and immediate cuts in our economy to meet an arbitrary target. It would have cost our economy up to $400 billion, and we would have lost 4.9 million jobs. . . . I will not commit our Nation to an unsound international treaty that will throw millions of our citizens out of work ("Bush Administration Proposal for Reducing Greenhouse Gases," *The American Journal of International Law,* Vol. 96, No. 2, April 2002, pp. 488).

[198] It is worth noting that there is no ethically defensible reason why emissions quotas should be based on the state of energy consumption in 1990. See Robin Attfield, *The Ethics of the Global Environment* (West Lafayette: Purdue University Press, 1999), p. 93. Several other bases have been put forth. Steven Luper-Foy suggests that all natural resources should be regarded as available to the whole of

targets also cover certain carbon sequestration activities in land use, land use change and forestry sector, based on specific rules. These targets must be met by the commitment period of 2008-2012.[199] The Protocol also utilizes flexibility mechanisms including joint implementation, clean development mechanisms and emissions trading to help states meet there targets.

It is important to point out that throughout these negotiations divisions have emerged between industrialized and developing countries.[200] Most developing countries wanted to focus on implementation of existing commitments under the UNFCCC, while industrialized countries were interested in launching a post-Kyoto round covering developing countries. The stakes were raised by the fact that the U.S. Senate had made the "meaningful participation" of developing countries a condition for its ratification of

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humanity, present and future, and to be shared accordingly ("Justice and Natural Resources," *Environmental Values*, Vol. 1, No. 1, Spring 1992, p. 47-64). Michael Grubb, and others, have proposed recognition of the equal entitlement of all human beings to access to the absorptive capacities of the planet. This view would justify per capita emissions for all countries. See Michael Grubb, *The Greenhouse Effect: Negotiating Targets* (London: Royal Institute of International Affairs, 1989), and also, Grubb, *Energy Policies and the Greenhouse Effect* (Aldershot: Gower, 1990). Shue argues that whatever quotas are set for emissions, equity requires that provisions must be made for emissions entitlements which facilitate the satisfaction of everyone's basic needs [Attfield, *The Ethics of the Global Environment*, p. 93 citing Henry Shue, "Equity in an International Agreement on Climate Change" (unpublished), paper presented to IPCC workshop on "Equity and Social Considerations Related to Climate Change," Nairobi, 1994, pp. 7-14].

[199] Yamin and Depledge, *The International Climate Change Regime*, p. 25.

[200] As early as the 1972 Stockholm Conference, industrialized and developing states agreed to address the environment as well as development, but developing countries feared restrictions on their economic growth and had to threaten non-cooperation and appeal to socially shared norms of social justice in order to achieve this outcome. As a result the resolution remained vague on operational details and virtually no action was taken for almost two decades. See Peter Haas, Marc Levy and Ted Parson, "Appraising the Earth Summit: How Should We Judge UNCED's Success?", *Environment*, Vol. 34, No. 8, 1992, pp. 6-11, 26-33. As a result of the possibility of a North-South standoff and Southern opportunism, architects of the Stockholm Declaration designed a "Resolution on Institutional and Financial Arrangements" and included an "Environment Fund" to assist developing states in their efforts towards sustainability (Parks and Roberts, "Environmental and Ecological Justice," p. 330).

the Protocol.[201] By March of 2001, U.S. President George W. Bush explicitly rejected the Protocol. The U.S. has stood virtually alone in opposing specific targets and timetables for stabilizing CO_2 emissions. In this regard, the Bush administration has continually emphasized the scientific uncertainties involved in forecasts of global warming and also expressed concern about the economic impacts of CO_2 stabilization policies.[202] Nevertheless, multilateralism, backed by scientific consensus in the form of the IPCC's Third Assessment Report issued in early 2001, held the climate change regime together. In 2004, the Russian government approved the Protocol and set the stage for the Protocol's entry into force. At this point the climate change regime is primarily in an implementation phase, with Parties focused on putting into practice the large body of rules that are now in place to guide their efforts to combat climate change. These include the rules of the UNFCCC and Protocol, which parties are putting into practice and writing into national legislation.

The divisions between industrialized countries of the Global North and the developing countries of the Global South demonstrate the significance of power asymmetries and the need to use critical legal studies to assess the prospect of achieving international environmental justice in the context of climate change. Traditional liberal

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[201] Yamin and Depledge, *The International Climate Change Regime*, p. 26 citing Bryd-Hagel Resolution, Senate Resolution 98 adopted July 1997.

[202] There are many uncertainties concerning anthropogenic climate change. Nevertheless, many suggest that we cannot wait until all of the facts are in before we respond. All of the facts may never be in. Jamieson, for one, notes that there are uncertainties regarding the impacts of climate change, as well as uncertainties regarding human responses to climate change. See Jamieson, "Ethics, Public Policy, and Global Warming," p. 145. "One thing is certain: The impacts will not be homogenous. Some areas will become warmer, some will probably become colder, and overall variability is likely to increase. Precipitation patterns will also change, and there is much less confidence in the projections about precipitation than in those about temperature. These uncertainties about the regional effects make estimates of the economic consequences of climate change radically uncertain" (Ibid). In regards to human behavior he notes that climate change "will affect a wide range of social, economic, and political activities. Changes in these sectors will affect emissions of 'greenhouse gases,' which will in turn affect climate, and around we go again" (Ibid.).

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legal theory does not adequately address the questions of justice that must be taken into consideration if we are to effectively address issues such as climate change while pursuing international environmental justice. But what is international environmental justice? These issues will be discussed in the next section.

International Environmental Justice

It has become clear that the causes and consequences of global environmental degradation cannot be addressed without tackling inequality and injustice.[203] Issues of justice as they relate to environmental degradation are most often approached on the domestic front. In that regard, the concept of environmental justice has emerged from the growing recognition that people of color and people with low incomes, more often than other segments of the population, live and work in areas where environmental risks are high.[204] People in these communities are most often the unwilling recipients of pollution sources such as hazardous waste sites, incinerators, industrial production facilities, pesticides, and radiation exposure. One thing is clear: not everyone has the same opportunities to breathe clean air, drink clean water, enjoy pristine wilderness, or work in a clean, safe environment. This is true at both the domestic and international levels.

The literature on international environmental justice only begins to answer the variety of thorny questions that arise with international environmental change. Traditionally, international relations literature has largely ignored questions of justice. Realists and neorealists have argued that the application of moral principles or notions of justice is irrelevant in international relations since foreign policy will always be about acquiring and maintaining power in a world where there is no supranational authority to

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[203] Parks and Roberts, "Environmental and Ecological Justice," p. 329.

[204] See Introduction, Footnote #3.

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enforce the rules.[205] It is important to realize that environmental justice, particularly on

the international level, is a contested concept.[206] Not everyone agrees about how to

define justice, nor do they agree about how to weigh competing claims. It is interesting

to note that the United Nations Charter refers to justice but does not define it.[207] It talks

about the determination of the peoples of the United Nations "to establish conditions

under which justice and respect for the obligations arising from treaties and other

sources of international law can be maintained."[208] Furthermore, the charter provides

that "all members shall settle their international disputes by peaceful means in such a

manner that international peace and security, and justice, are not endangered."[209] It is

difficult to imagine how these provisions help reconcile competing notions of justice.

Decisions about environmental policy, like so many other policy decisions, often

have clear winners and losers. So it is important to realize that inherent in the notion of

environmental justice is the notion of justice. In fact, some argue that environmental

justice is devoted more to the topic of justice than to that of the environment.[210] In this

regard, we need to come to some common understanding of justice and how it can be

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[205] Kenneth Waltz, *Theory of International Politics*, (New York: McGraw-Hill, 1979).

[206] Parks and Roberts, "Environmental and Ecological Justice," p. 330. Parks and Roberts note that outsiders to the scholarly discussion on justice are usually left with an impression of "philosophical pandemonium . . . a cacophony of discordant philosophical voices . . . incommensurability." Another observer suggests that the pursuit of definitional consensus is a "hopeless and pompous task." Nevertheless, they suggest that a social movement does not need a seamless definition of its core conceptual frame, instead it needs one that motivates people to act, and one which puts pressure on policy-makers who are for a number of reasons averse to being tagged as racist.

[207] Hans Kelsen, *Principles of International Law* (New York: Rinehart & Company Inc., 1950).

[208] Yozo Yokota, "International Justice and the Global Environment," *Journal of International Affairs*, Vol. 52, No 2, Spring 1999, pp. 585 citing United Nations Charter, Preamble, para. 3.

[209] Ibid., citing United Nations Charter, art. 2, para. 3.

[210] Peter Wenz, *Environmental Justice* (Albany: State University of New York Press, 1988).

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pursued on the international level. In regards to international justice, compliance with international law may have more to do with the concept of fairness than with dispute settlement mechanisms or sanctioning regimes. As noted in one study on compliance:

> [P]eople obey the law because they believe that it is proper to do so, they react to their experiences by evaluating their justice or injustice, and in evaluating the justice of their experiences they consider factors unrelated to outcome, such as whether they have had a chance to state their case and been treated with dignity and respect.[211]

In this regard, the concept of fairness involves two features. First, it concerns the *ex ante* affirmation of a political order. The degree to which a new law or judicial opinion is likely to be perceived as fair will thus depend in part on the extent to which it has been formulated by a discursive process where: (a) those most likely to be affected have been invited to present their views; and (b) all the discourse's participants accept a need for mutual accommodation without reserving any matter as non-negotiable.[212] Second, fairness concerns the *ex post* affirmation of the decisions that emanate from a political order.

The fairness of international law, as of any other legal system, will be judged, first, by the degree to which the rules satisfy the participant's expectations of justifiable distribution of costs and benefits, and, second, by the extent to which the rules are made and applied in accordance with what the participants perceive as right process.[213] Both aspects of fairness are essential to a successful legal order. The importance of fairness in governance, both *ex ante* and *ex post*, has been recognized by numerous scholars, from

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[211] Tom Tyler, *Why People Obey the Law* (New Haven: Yale University Press, 1990), p. 178.

[212] Aceves, "Critical Jurisprudence and International Legal Scholarship," p. 391.

[213] Ibid.

Immanuel Kant to Jürgen Habermas.[214] Moreover, in his work on justice, John Rawls acknowledged the primacy of justice as fairness. "Justice is the first virtue of social institutions," Rawls argues, "as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust."[215]

In regards to environmental justice, very little attention has been paid to exactly what the "justice" of "environmental justice" refers, particularly in the realm of social movement demands. Most understandings of environmental justice refer to issues of equity or the distribution of environmental harms and benefits. Nevertheless, defining environmental justice as equity is incomplete, as activists, communities, and non-governmental organizations call for much more than just distribution. Critical legal scholars such as Aceves argue that participation and recognition are essential to ensuring fairness in the international system. Similarly, David Schlosberg suggests that the justice demanded by global environmental justice is really threefold: equity in the distribution of environmental risk, recognition of the diversity of the participants and experiences in affected communities, and participation in the political processes which create and manage environmental policy.[216] Most theories of environmental justice are incomplete theoretically, as they continue to be tied solely to the distributive understanding of justice and fail to adequately integrate the related realms of recognition and political

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[214] Ibid., p. 392.

[215] John Rawls, *A Theory of Justice* (Cambridge: The Belknap Press of Harvard University Press, 1971), p. 3.

[216] David Schlosberg, "Reconceiving Environmental Justice: Global Movements and Political Theories," *Environmental Politics,* Vol. 13, No. 3, Autumn 2004, pp. 517-540.

participation. Further, they are insufficient in practice, as they are not tied to the more thorough and integrated demands and expressions of the important movements for environmental justice globally. Schlosberg's central argument is that a thorough notion of global environmental justice needs to be locally grounded, theoretically broad, and plural—encompassing issues of recognition, distribution, and participation.[217]

In this regard, liberal theories of justice, such as Rawls, are inadequate as they focus solely on fair processes for distribution of goods and benefits. According to Rawls, in order to develop a right theory of justice, we are to step behind what he calls a veil of ignorance, to a place where we do not know our own strengths and weaknesses or our own place in the social structure. Therefore, he argues, one would come up with a fair notion of justice that everyone could agree with. Everyone would have the same political rights as everyone else, and the distribution of economic and social inequality in a society should benefit everyone, including the least well off. Brian Barry's notion of justice is similar, and follows from Rawls.[218] In his view, we should agree on the rules of distributive justice while remaining impartial to different notions of the good life individuals have. In this regard, he focuses on what could be referred to as procedural justice.

Liberal theories of justice, like that of Rawls, have been critiqued by other theorists such as Iris Young (1990) and Nancy Fraser (1997). Young argues that while theories of distributive justice offer models and procedures by which distribution may be improved, none of them thoroughly examine the social, cultural, symbolic, and institutional conditions underlying unjust distributions. Young is critical of the way

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[217] Ibid., p. 517-518.

[218] Brain Barry, *Justice as Impartiality* (Oxford: Oxford University Press, 1995).

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distributive theories of justice take goods as static, rather than due to the outcome of various social and institutional relations. "Distributional issues are crucial to a satisfactory conclusion of justice, [but] it is a mistake to reduce social justice to distribution."[219] Therefore, in our pursuit of justice, issues of distribution are essential, but incomplete.

Young's claim is that injustice cannot be based solely on inequitable distribution, or in other words, there are reasons why some people get more than others. Part of the problem of injustice and unjust distribution, according to Young, is a lack of recognition of group difference. She begins with the argument that if social differences exist, and are attached to both privilege and oppression, social justice requires an examination of those differences to undermine their effect on distributive injustice. Recognition becomes essential since a lack of recognition, demonstrated by various forms of insults, degradation, and devaluation at both the individual and cultural level, inflicts damage to both oppressed communities and the image of those communities. Therefore, the lack of recognition is an injustice not only because it constrains people and does them harm, but also because it is the foundation for distributive injustice. Similarly, Nancy Fraser's project has been focused on demonstrating that justice requires attention to both distribution and recognition.[220] She insists that we have to look at the reasons for inequality in order to understand and remedy it. Rawls and other theorists of liberal justice focus on ideal schemes and processes of justice in liberal societies, whereas

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[219] Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990), p. 1.

[220] Nancy Fraser, *Justice Interruptus: Critical reflections on the "Postsocialist" Condition* (New York: Routledge, 1997).

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Young and Fraser explore what the actual impediments to such schemes are, and how they can be addressed.

Most scholars working on questions of justice start with a liberal focus on distributive justice. This even includes noteworthy scholars such as Nicholas Low and Brendan Gleeson. "The distribution of environmental quality is the core of 'environmental justice'— with emphasis on distribution."[221] Low and Gleeson are supportive of political participation as a means towards environmental justice— they clearly make links between participation, inclusive procedures, and public discourse on the road to environmental justice. Yet these concerns are not incorporated into their ideal principles or practices of ecological justice; the focus is on global, cosmopolitan institutions rather than those at the local, community level. Further, they acknowledge the contextual and cultural bases of the meanings of both the terms "environment" and "justice",[222] but cannot bring this notion of cultural difference into their definition of either environmental or ecological justice.

In sum, we need a broad understanding of international environmental justice in order to discern what international environmental justice might look like in the context of climate change as well as to assess the possibility of achieving international environmental justice through the use of international environmental law. Critical legal studies can be an essential component of such an approach. It helps us understand issues of international environmental justice by broadening our conception of justice. Such knowledge is not only desirably, but indispensable in debates about international environmental problems such as climate change.

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[221] Low and Gleeson, *Justice, Society, and Nature*, p. 133.

[222] Ibid., pp. 46, 48, 67.

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Concluding Remarks

This chapter has discussed the initial dimensions of global environmental problems, including the issue of climate change and the issues of justice that must be addressed in this context. The prospect of global climate change has presented humanity and the international community with a very complex crisis that will impact people and communities around the world. It is important to realize that these are not simply practical problems of resource distribution; these issues also raise a number of ethical issues that require us to come to some understanding of international environmental justice in order to pursue a more just resolution of these problems. As I have shown, liberal theories of justice that focus solely on distributive justice are inadequate in this regard. Therefore, we must move beyond such theories in order to come to a better understanding of the theoretical assumptions that limit the ways in which international cooperation and law are utilized to address these issues. Critical legal studies allow us to do just that.

It has been shown that international environmental justice can mean a lot of things in the context of climate change. Increasingly, these issues are being addressed with international legal arrangements. We need to be critical of the extent to which these arrangements are just. Is it possible that a system of international law can deal with the complex pressures on the global environment, particularly in this era of globalization? Can an international legal system that is premised on state sovereignty and liberal theories of law and justice rise to the dynamic challenges that global climate change presents? I believe that critical jurisprudence, and critical legal studies more specifically provide an appropriate framework from which to address such challenges. Particularly as

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we search for solutions to the looming environmental crises that plague the globe, we must be cognizant of the effects of the structure of the international system and the inequalities that are perpetuated. In the next chapter I show the additional value to the application of critical legal studies. Specifically, I will look at the ways in which these issues have been discussed in the literature surrounding climate change while highlighting the further insights from critical legal analysis.

CHAPTER FOUR:

Environmental (In)justice in Climate Change

It is not the strongest of the species that survive, nor the most intelligent,
but the most responsive to change.

—Charles Darwin, 1835

The prospect of global climate change provides an excellent case from which to

access the adequacy of the theoretical foundations of international law and the ways in

which our understanding of law and justice shape the use of legal pronouncements to

address global environmental problems. In the previous chapter we discussed

international environmental law and justice. It was shown that liberal legal theory and

liberal understandings of justice are inadequate theoretically for addressing the very

complicated problems that are raised by global environmental problems. Critical legal

studies are particularly useful in addressing these issues while seeking to achieve some

level of international environmental justice. While focusing on the application of critical

legal theory to the key debates surrounding global climate change, this chapter looks

more specifically at the practical problems associated with addressing these issues while

pursuing international environmental justice.

Justice in Climate Change

One significant arena in which issues of international environmental justice have

been debated was the Kyoto Conference on Climate Change that took place in December

1997. It has been suggested that the results of the Kyoto Conference illustrate that

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"international justice in the context of the global environment is now concerned not only with justice among states with regard to sovereignty and equality, but also with (a) economic justice among states, (b) justice among non state actors, (c) justice between generations and (d) justice to pursue universal ideals and virtues, such as a clean and safe environment."[223] Although there may be some disagreement about the categories and their adequacy for covering all issues of justice in this context, these four categories represent the major issues that have been raised in the literature. In addition, Yokota raises a number of relatively new issues that have been, or will become, significant in debates about climate change and international environmental justice. The important point is that liberal legal theory alone is incapable of adequately addressing all of these issues. Therefore, I will use this set of concerns to show the ways in which critical legal studies can help us deal with the issues of international environmental justice that have been incorporated into the international discourse of climate change.

A. Justice Among States

People rarely solve environmental problems so much as displace them across time and space.[224] For example, we leave radioactive wastes for future generations to deal with or simply ship them overseas to other countries. In one case, Guinea-Bissau was offered four times its gross national product and twice its national debt to accept over

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[223] Yozo Yokota, "International Justice and the Global Environment," *Journal of International Affairs*, Vol. 52, No 2, Spring 1999, p. 595.

[224] John Dryzek, *Rational Ecology: Environment and Political Economy* (Oxford: Blackwell, 1987), p. 10. A clear example of displacement across space was the practice in the early part of the century to build higher smokestacks to address local air pollution. It is easy to see that the problem is not effectively addressed but instead simply relocated, very often across political boundaries.

fifteen million tons of toxic waste over a fifteen-year period.[225] Particularly with cases such as this it is easy to see that issues of justice necessarily arise when we discount the value of human lives as a solution to environmental problems. When environmental harms are displaced, some people are forced to suffer, while others benefit. This becomes even more problematic when one realizes that the practice of displacement cannot go on indefinitely.

A substantial amount of international environmental justice literature deals with justice between states, particularly the differences and conflicts that arise between the industrialized North and the developing South. In this view, of which Henry Shue's work is exemplary, international environmental accords are assessed according to whether or not they provide a fair distribution of benefits and burdens among rich and poor countries, which usually means a fair distribution of costs of adjustment necessitated by global environmental protection.[226] On a global scale, the Not-In-My-Backyard (NIMBY) movement forces environmental harms to the South. It pushes pollution and the most egregious pollution-causing industries to the poorer and less politically powerful parts of the world. In this regard, industrialized countries have been emitting a disproportionate share of global greenhouse emissions, yet are unwilling to take the bulk of responsibility. Moreover they have the financial resources and technological capabilities to best address these issues. As a result, many have argued that they should

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[225] Paul Wapner, "Environmental Ethics and Global Governance: Engaging the International Liberal Tradition," *Global Governance*, Vol. 3, 1997, p. 220. It should not be difficult to understand why the acceptance of toxics by debt-ridden countries is tempting. But we must recognize that the problem is more complex than offering poor nations the choice between poverty and poison. Toxics are often misrepresented as brick-making material, road fill and fertilizer. In addition, corrupt officials can be easy payoff targets for exporters seeking cheap outlets for toxic waste.

[226] Christian Reus-Smit, "The Normative Structures of International Society," p. 97.

assume greater responsibility for reducing global gas emissions.[227] In this regard, Shue

states:

> When radical inequalities exist, it is unfair for people in states with far
> more than enough to expect people in states with less than enough to turn
> their attention away from their own problems in order to cooperate with
> the much better-off in solving their problems (and all the more unfair . . .
> when the problems that concern the much better-off were created by the
> much better-off themselves in the very process of becoming as well off as
> they are).[228]

But if we take justice to imply the right of all countries to choose their own path to

industrial development, and hence to improve their living standards, then it is not

surprising to hear developing countries arguing that they should be entitled to increase

their emissions to the level of the industrialized countries. This highlights the classic

debate between the Global North and the Global South: how can the industrialized

countries suggest that poor states cannot utilize the same form of industrialization by

which they themselves became rich? It seems clear that if poor states pursue their own

economic self-interest, with the same disregard for the natural environment and the

economic welfare of other states, we will severely threaten the planetary ecosystem.[229]

In addition, there is no reason to believe that the international system will be any more

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[227] Yokota, "International Justice and the Global Environment," p. 595.

[228] Henry Shue, "Global Environment and International Inequity." *International Affairs*, Vol. 75, No. 3, 1999, pp. 544. If we are to have any hope of pursuing equitable cooperation between states we must try to arrive at a consensus about what equity means. As Shue states, "we need to define equity, not as a vague abstraction, but concretely and specifically in the context of both development of the economy in poor states and preservation of the environment everywhere." Shue also points out that equity does not necessarily mean equality. Further, even if it is equitable for goods and/or burdens to be distributed unequally, dignity and respect must be kept equal. Thus, for Shue, we must ask, which inequalities in which other goods and burdens are compatible with equal dignity and equal human respect? And which inequalities in other goods or burdens ought to be eliminated, reduced or prevented from being increased?

[229] "If we ask all countries to reduce emissions by the same percentage, we may condemn Third World countries to perpetual poverty because they would have to forgo the use of hydrocarbons in their economic development. Even though alternative energy substitutes might be available, at current energy prices they are not competitive" (Hampson and Reppy, *Earthly Goods*, p. 2).

just than before. In fact, additional environmental problems will raise a multitude of additional ethical issues that will need to be addressed.

These issues reflect the traditional liberal orientation towards distributive justice, yet immediately one can see the additional insight that can be gained from a critical legal approach that illuminates the underlying issues of justice that have been overlooked. It is worth noting that this is a popular way of conceptualizing international justice, the liberal focus on the individual is shifted to the states as is the limited concern for distribution. In this regard, people often speak as if everyone understands what it means to ask whether an arrangement is fair or biased toward one state over another. However, critical legal studies help us to see that there are a number of complicated issues that are disregarded in such a narrow view.

We need to understand the extent to which the international legal system is used to justify relations of power. The relationship between the Global North and the Global South is a function of the uneven distribution of power and influence in the international system.[230] International laws have been created and implemented on the international level to the benefit of industrialized states while failing to adequately address the most important issues confronted in the industrializing world. Whether we look at global environmental politics, international political economy, or any other subset of current world problems, we see legal mechanisms that have been created and utilized selectively to represent the interests of certain groups of states at the expense of others. Critical

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[230] Until relatively recently, it was widely accepted that developed countries of the Global North consume most of the world's fossil fuels and produce most of the CO_2. However, developed countries have been carrying out a sustained propaganda campaign alleging that deforestation in developing countries, and the generation of methane through irrigated rice farming and the raising of cattle, is also contributing to global warming. This has been carried out in order to shift the onus onto developing countries. See Anil Agarwal and Sunita Narain, "Global Warming in an Unequal World: A Case of Environmental Colonialism," in Ken Conca and Geoffrey D. Dabelko (eds.), *Green Planet Blues*, Second Edition (Boulder: Westview Press, 1998), p. 157-158.

legal scholars have pointed out that in the international system, as in national societies, law is politics. Therefore, the legal rules developed by a society tend to reflect the interests of those members of society who have the most resources with which to influence the rule-making process. Rochester points out that:

> Much of the current body of international law, for example, evolved from the international politics of the nineteenth and early twentieth centuries, when Western states dominated the international system. The traditional rules that were created to promote freedom of the sea, protection of foreign investment, and many other international activities tended to reflect the needs and interests of these powers.[231]

The divisions between the Global North and Global South, that have become so significant in climate change negotiations, represent the inability to get industrialized states such as the U.S. to take responsibility for the problems that they created. Certainly we need to take into consideration population trends and the future projections of greenhouse gas emissions in the industrializing world, but the states have used this as a reason to avoid accountability resulting in a set of watered down environmental laws that few think will actually fix the problem. Further, individuals and groups that have most benefited from industrialization are able to hide behind the banner of state sovereignty and effectively avoid liability.

States and the concept of state sovereignty[232] are problematic for a number of reasons. First of all, all states are different; they have diverse populations, economies, environments, political systems, and histories. Therefore, immediately we must recognize that they are not equal, nor is there a simple formula that can be devised to

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[231] Rochester, *Between Peril and Promise*, p. 51.

[232] State sovereignty raises a number of thorny issues that will be addressed below. Although a system of states must struggle to address issues that cross national boundaries, they also represent a decentralized set of institutions for addressing environmental problems.

determine equitable distributions. This is further complicated when we include issues of culpability and the ability to address issues such as climate change. Second, states differ in their ability to represent the various ethnic and cultural groups that exist within their borders. For example, many argue that indigenous groups in the U.S. as well as in more distant locations around the world are particularly vulnerable to the consequences of global climate change. Further, they may be the least culpable in terms of greenhouse gas emissions and the ability to adequately address the political and practical problems that such issues raise. In addition, many states are split by ethnic and racial conflict that revolves around the capability of political institutions to effectively represent the diverse interests of individuals and groups. In this regard, it is worth noting that not all individuals in the world share the right to political participation. This directly links us to the requirements of recognition and participation that that must be addressed once we look beyond liberal theories of law and justice.

Although justice between states has received the lion share of attention, one could argue that we are no closer to living in an environmentally equitable world. Many questions remain, as is evident in the most recent round of global climate negotiations. We continue to see a significant division between the Global North and Global South. This division has created numerous points of contestation yet it is only one of many potential splits that could hamper the ability of the international community to effectively address global climate change in a just manner.

B. Justice Among Non State Actors

With regards to the global environment, states are not the only entities that perpetuate, or are victimized by, environmental degradation. Other actors, such as

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citizens, consumers, businesses, individuals, enterprises, local governments and nongovernmental organizations also cause and/or are affected by environmental degradation. Therefore, it can be argued that in the context of the global environment, we must inevitably seek justice not only among states but also among nonstate actors. The UNCED opened the door to achieving this kind of justice by including representatives of nonstate actors to participate as observers. An "NGO Declaration: 10 Point Plan to Save the Earth Summit," sponsored by Greenpeace, the Forum of Brazilian nongovernmental organizations (representing 1,200 groups), Friends of the Earth and the Third World Network and endorsed by dozens of other groups, laid out a list of steps the Earth Summit would have to take in order "to address the huge environment and development problems the world faces."[233] These steps included: imposing binding reduction targets for greenhouse gas emissions, changing the North's consumption patterns and technologies, and regulating the activities of multinational corporations. To no one's surprise, UNCED negotiators did not revise their work to incorporate the issues raised by the NGO Declaration.

Although they do not have an official vote, they have the opportunity to interject a variety of issues that may not otherwise have been brought to the table. This is true of more recent rounds of negotiations as well. Nevertheless, we must ask, do these entities have any rights independent of the rights they hold as individuals in a global community? Clearly they are representatives of select segments of the population, but that cannot diminish their significance as individual actors.

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[233] Pratap Chatterjee, and Matthias Finger, *The Earth Brokers: Power, Politics and World Development* (New York: Routledge, 1994), p. 39.

It is also important to note that traditional international relations literature, as well as liberal political theory, fails to offer an adequate explanation for the plurality of actors that influence international environmental justice outcomes. Although early liberal thought placed considerable emphasis on the multiplicity of actors affecting world politics,[234] subsequent theory-building has largely been rooted in state centrism.[235] Many scholars have brought international organizations, nongovernmental organizations, epistemic communities, and transnational advocacy networks into analytical focus, many with an eye toward global environmental justice.[236] Nongovernmental organizations, as well as other nonstate actors, are increasingly interjecting issues of justice and equity into the discourse, although it is also unclear to what extent this has contributed to a more equitable set of arrangements.

Nonstate actors force us to return to many of the issues that have been discussed when considering justice between states. The liberal focus on the individual once again becomes difficult to reconcile when we talk about justice among groups that may emphasize the interests of certain states and/or groups, yet fail to adequately represent others. Interest groups are notorious for representing certain segments of society such as the wealthy and well educated, while failing to properly account for the least well off. In this regard, global civil society must be commended for looking outside the state centric system and adding to the international environmental justice discourse by showing the

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[234] See for example Robert Keohane and Joseph Nye, *Power and Interdependence: World Politics in Transition,* Second Edition, (Boston: Little Brown & Company, 1977).

[235] Matthew Paterson, *Global Warming and Global Politics*, (London: Routledge, 1996).

[236] Parks and Roberts, "Environmental and Ecological Justice," p. 339.

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ways in which groups working outside the state can provide avenues to both participation and recognition on the international level.

Clearly, there is a multiplicity of actors that exist and exert influence on environmental justice outcomes at the international level, but some certainly more than others. It has been argued that one of the most significant players has not been properly held accountable, that is corporations.[237] It is worth noting that of the world's largest 100 economies, 51 of them are corporations.[238] Nonstate actors, particularly corporations pose some difficult questions for those attempting to sort out issues of global environmental justice in a system of sovereign states. States appear powerless when compared to some corporations who can threaten to move jobs and tax revenues if states become too restrictive in their regulations. Therefore, nonstate actors deserve considerable attention if we wish to pursue justice in the context of climate change. In particular, we must put greater emphasis on the power of nonstate actors, including transnational corporations.

C. Justice Between Generations

Any discussion of justice, particularly as it relates to global environmental problems must address the concept of justice between generations. This has been referred to as intergenerational equity and can be considered displacement of

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[237] Paterson, *Global Warming and Global Politics*, p. 130. One report calculated that 122 corporations are responsible for 80 percent of total global CO_2 emissions. Exxon Mobil emissions alone are equivalent to about 80 percent of all emissions in Africa or South America. See Kenny Bruno, Joshua Karliner and China Brotsky *Greenhouse Gangsters vs. Climate Justice* (San Francisco: Transnational Resource & Action Center, 1999), pp. 6-7.

[238] Sarah Anderson and John Cavanagh, *Top 200: The Rise of Global Corporate Power*, (Washington D.C.: Institute for Policy Studies, 2000). When U.S. President Bill Clinton was asked what he was going to do about the overwhelming power of corporations, he answered, "What am I going to do about it? Nothing, I am only the President of the U.S.. I can't do anything about these companies" [Martin Khor, "Much More than a Memo", in Isabelle Reinery (ed.), *Comments on the Jo'burg Memo*, (Heinrich Boll Foundation, 2002), available at <www.worldsummit2002.org/download/wsp18.pdf>].

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environmental problems across time. It is a common assumption that the present

generation owes a duty to generations yet unborn to preserve the diversity and quality of

our planet's life-sustaining environmental resources.[239] Not all scholars agree,

particularly those that attempt to reconcile intergenerational equity with liberal legal

theory. Anthony D'Amato, for one, takes issue with the notion of rights of future

generations by invoking Derek Parfit's paradox and combining it with chaos theory.[240]

D'Amato argues that future generations cannot have rights because every intervention we

take to protect the environment affects the composition of the individuals that will make

up the future generations, robbing some potential members of future generations of their

existence.

In this regard, it should be easy to see that liberal theories of law and justice

cannot easily incorporate a concern for individuals that only exist in theory. Future

generations do not have definitive interests; although I suggest that at a minimum they

have an interest in survival and arguably should have a collective interest in a decent

environment. Disregarding for the moment the inadequacy of liberal legal theory to

account for collective interests, the current liberal international legal order struggles to

adequately represent individuals within states, how can it realistically account for the

interest of future generations. We must heed the warning expressed by Lothar Gundling

that, "[t]he most difficult challenge to all efforts to define and achieve 'intergenerational

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[239] Anthony D'Amato, "Agora: What Obligations does our generation owe to the next? An Approach to Global Environmental Responsibility," *American Journal of International Law*, Vol. 84, No. 1, 1990, pp.190.

[240] Ibid.

equity' will turn out to be that we have failed to achieve equity within our own

generation."[241]

Edith Brown Weiss refutes D'Amato's thesis by suggesting that intergenerational

rights are generational rights, which must be conceived of in the temporal context of

generations.[242] Weiss proposes three principles of intergenerational equity.[243] First, the

"conservation of options" principle maintains that we conserve the diversity of the

natural and cultural resource base, so that it does not unduly restrict the options available

to future generations in solving their problems and satisfying their own values, and

should be entitled to diversity comparable to that enjoyed by previous generations. The

second principle, "conservation of quality" requires that each generation maintain the

quality of the planet so that it is passed on in no worse condition that that in which it was

received, and should be entitled to planetary quality comparable to that enjoyed by

previous generations. Lastly, the principle of "conservation of access" suggests that each

generation provide its members with equitable rights of access to the legacy of past

generations and should conserve this access for future generations. "These principles

together constrain the actions of the present generation in developing and using the

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[241] Gundling, "Our Responsibility to Future Generations," p. 212.

[242] Edith B. Weiss "Our Rights and Obligations to Future Generations for the Environment," *American Journal of International Law*, Vol. 84, No. 1, 1990, p. 205. Further, I would add that the specific individuals that make up future generations can never be determined until they are born. For the reasons that D'Amato suggests, there are multiple events that can alter the pool of individuals until they are born. Therefore, it is, for all practical purposes impossible to isolate any future generation and attempt to determine what is in their best interest. In addition, I would suggest that any individual that has any potential for existence would accrue the same rights and resulting obligations on past generations, regardless of who this specific individual would be. Thus, I agree with Weiss that D'Amato does not adequately dispense with our obligation to future generations.

[243] Ibid., pp. 201-2.

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planet," Weiss notes, "but within these constraints do not dictate how each generation should manage its resources."[244]

The concept of intergenerational equity is implied in the term sustainable development. One of the most widely used definition, taken from the Brundtland Report, is that sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It is also worth noting that the minimum requirement of sustainable development, not to endanger the natural systems that support life on earth, is more or less identical to the objective of the UNFCCC: "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."[245] Although sustainable development has become a very popular concept, we must remain critical of its commitment to issues of justice.

Indeed, many scholars point out that sustainable development is a highly contested concept. As an economic concept, sustainable development has been heavily debated; although as an ethical principle it has received much less attention.[246] Wilfred Beckerman goes to great lengths to show that there is nothing particularly equitable about the concept of sustainable development.[247] He notes that the role of intergenerational egalitarianism in the concept of sustainable development depends on which of a very wide variety of definitions of this concept one adopts. Further, a survey

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[244] Ibid.

[245] United Nations Framework Convention on Climate Change, 1992, p. 9.

[246] Oluf Langhelle, "Sustainable Development and Social Justice: Expanding the Rawlsian Framework of Global Justice," *Environmental Values*, Vol. 9, 2000, pp. 296, 298.

[247] Wilfred Beckerman, "Sustainable Development and Our Obligations to Future Generations," pp. 71-92 in Andrew Dobson (ed.), *Fairness and Futurity: Essays on Environmental Sustainability and Social Justice* (Oxford: Oxford University Press, 1999), p. 71.

conducted by John Pezzey concluded that most definitions still understand sustainability to mean sustaining an improvement, or at least maintenance, of the quality of life, rather than just sustaining the existence of life.[248] Although Beckerman wants to conclude that there is no conflict of interest between generations and hence no need for any theory of intergenerational justice to resolve conflicts, he correctly points out that this does not relieve us of the need to consider our moral obligations to future generations.[249] This contradiction aside, Beckerman's call to move beyond the concept of sustainable development may be necessary.

Wapner discusses this form of justice as displacement across time.[250] When we refuse to address environmental challenges and leave them for future generations, we shift the burden of experiencing dirty air, unclean water, or increased global temperatures from ourselves to others.[251] Similar to displacement across space, this involves discounting the lives of those who must experience the ramifications of our current environmentally unsound practices, and as a result raises moral considerations.

Ted Benton suggests that given the current institutional forms, power relations, and economic norms which govern patterns of growth in the world system, the proposal to target growth at meeting the needs of the poorest whilst preserving the environmental

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[248] John Pezzey, *Sustainable Development Concepts: An Economic Analysis,* Environment Paper No. 2 (Washington: World Bank, 1992). In a more recent paper Pezzey has indicated that the variety of definitions of sustainable development has proliferated enormously since his 1992 survey. See "Sustainability Constraints versus 'Optimality' versus Intertemporal Concern, and Axioms versus Data" *Land Economics*, Vol. 73, No. 4, 1997, pp. 448-466.

[249] Beckerman, "Sustainable Development and Our Obligations to Future Generations," pp. 90-1.

[250] Wapner, "Environmental Ethics and Global Governance."

[251] Ibid., p 223.

needs of future generations is simply not a feasible option.[252] Benton concludes by suggesting that any alternative vision of sustainable development must combine its normative commitments to social justice and ecological protection with a critical political economy, a practice that can take root in the practice of grassroots social and political movements.[253] He claims that there is hope in the strengthening of coalitions around such movements and activities, rather than in reliance on the greening of the big corporations and the merely rhetorical adherence to sustainability on the part of many powerful nation states.

The hope of sustainable development is based on the observation that not all development is environmentally degrading. The early environmentalist goal of zero growth, if it means no more than zero growth of environmentally depleting activity, will not be sufficient to prevent long term damage to the biosphere. Not zero growth but zero destruction is required.[254] This raises serious questions: should economic growth remain the ultimate goal, or should we replace it with a focus on intellectual and/or spiritual growth? Should we question the materialism that seems to underlie our goals of economic growth? Thus, although the issue has been raised, the concept of sustainable development is not adequate in and of itself to protect future generations from environmental degradation.[255]

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[252] Ted Benton, "Sustainability and Capital Accumulation," in Dobson (ed.), *Fairness and Futurity*, p. 224.

[253] Ibid., p. 225.

[254] Low and Gleeson, *Justice, Society and Nature*, p. 12.

[255] See Brain Czech, *Shoveling Fuel for a Runaway Train: Errant Economists, Shameful Spenders, and a Plan to Stop Them All*, (Berkeley: University of California Press, 2000).

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It is also worth noting that there is considerable debate about the viability of a concept that embraces development while attempting to reconcile it with a vague notion of sustainability. Is it desirable, or even possible to achieve sustainability within a paradigm that relies on continuous growth? Perhaps the term sustainable development is nothing more than lip service to the often competing goals of ecological sustainability and industrial development. It is also important to realize that the concepts of sustainability and development do not necessarily get us closer to environmental justice. A working group within the World Council of Churches in 1979 put it very succinctly, "[a] sustainable society which is unjust can hardly be worth sustaining. A just society that is unsustainable is self defeating."[256]

Interestingly, Langhelle argues that the concept of sustainable development goes beyond liberal theories of justice. In this regard he suggests that sustainable development is based on three assumptions, which are for the most part ignored in liberal theories: an accelerating *ecological* interdependence, historical inequality in past resource use, and the 'growth of limits'.[257] These assumptions make it difficult to reconcile the competing goals of intra- and intergenerational justice. Yet, Langhelle suggests that it is the reconciliation of these goals that defines sustainable development. "It implies additional duties for developing and developed countries, but departs from liberal theories in that it

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[256] World Council of Churches, Working Group on Science and Society, *Faith, Science, and the Future*, Preparatory Readings for a World Conference Organized by the world Council of Churches at the Massachusetts Institute of Technology, Cambridge, Massachusetts, July 12-24, 1979 (Geneva: World Council of Churches, 1978), p. 1.

[257] Langhelle, *Sustainable Development and Social Justice*, p. 295.

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also defines the upper limits for resource use, most notably for energy and greenhouse gas emissions."[258] In this regard he points out that:

> Developed countries have in liberal theories no duty towards developing countries beyond basic need satisfaction and equal opportunity (or to create the conditions which make a well-ordered society possible). . . . Changing production and consumption standards in developed countries becomes a necessity in order to reconcile the concern for intra- and intergenerational justice. The alternative would be to prevent developing countries from aspiring and later attaining, a living standard equivalent to that of developed countries, and to argue that developed countries have an exclusive right to their present standard of living.[259]

Once again, the issues of justice between generations illustrate the limits of liberal legal theory and the usefulness of critical legal studies when looking at climate change.

D. Justice to Pursue Universal Ideals and Virtues

The pursuit of universal ideals and virtues would clearly include the pursuit of a clean and safe environment, as well as notions of human rights, dignity and respect. For example, as discussed above, Shue links his discussion of equity to the necessity of equality in regards to dignity and respect. Similarly, Wapner claims that international relations scholars tend to ignore the ethical dimension of transboundary environmental issues because they falsely conceptualize the character of environmental degradation. He attempts to reframe the understanding of environmental degradation to show that it fundamentally involves how humans treat each other.[260] By rethinking how we conceptualize environmental justice issues, these scholars have incorporated universal ideals into the discussion.

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[258] Ibid., p. 318.

[259] Ibid., p. 312.

[260] Wapner, "Environmental Ethics and Global Governance," p. 226.

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The existence of a right to a clean and safe environment is contested. Even if such a right exists, we do not know whether it is the "right to an environment" or the right to a "decent," "healthy," or "safe" environment.[261] Ensuring that a child has a clean environment certainly sounds like an admirable policy, and it would probably be hard to find anyone who would explicitly oppose it. Nevertheless, in this profit-driven world such desirable policies are often ignored or forgotten in the drive for economic growth and development. The Rio Declaration states: "Human beings are at the center of concerns for sustainable development[,]" and as such, "[t]hey are entitled to a healthy and productive life in harmony with nature."[262] Although this proclamation does not create a right for all human beings to live in an environmental and ecological system that meets certain minimum standards, it does evidence a desire on the part of the international community to begin movement toward recognition of desirable minimum standards.

Notwithstanding the ambiguity of the concept, determining whether, and to what extent, the right to an environment exists is very significant and practical since justiciability of a right depends on its substance.[263] In this regard, an appropriate starting point is human rights law.[264] There are broadly three main schools regarding the relationship between human rights and the right to an environment.[265] The first school

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[261] Malgosia Fitzmaurice, "The Right of a Child to a Clean Environment." *Southern Illinois University Law Journal*, Vol. 23, Spring 1999, p. 611.

[262] Cited in Timothy J. Schorn, "Drinkable Water and Breathable Air: A Livable Environment as a Human Right." *Great Plains Natural Resources Journal*, Vol. 4, Spring/Summer 2000, p. 121.

[263] Fitzmaurice, "The Right of a Child to a Clean Environment," p. 612.

[264] Schorn, "Drinkable Water and Breathable Air," p. 123.

[265] Fitzmaurice, "The Right of a Child to a Clean Environment," p. 612.

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consists of those who strongly support the view that there are no human rights without an environmental right. The second school takes the position that an international right to a clean environment, both as an already existing and emerging human rights concept is highly questionable. This school points out that such a right would be extremely difficult to conceptualize and operationalize. Finally, there is a school of thought that takes an intermediate position; environmental rights exist but are derived from existing human rights. Without the universalization of a minimum standard, we risk the continued division of the world between the "haves" and the "have nots," but this time it will be between those who have a decent environment in which to live and those who do not.[266] It would seem that a basic environmental human right is necessary in order to make all other human rights truly meaningful. In addition, such a right is compatible with other human rights, in fact arguably enhances them.[267]

Since the language of rights is firmly planted within the liberal tradition and suffers from some of its shortcomings, many critical legal scholars take the second position remaining critical of the existence and desirability of environmental rights. Duncan Kennedy, for example, takes the position that legal doctrine does not even give us a coherent way to talk about the rights of individuals under the law: "Rights discourse is internally inconsistent, vacuous, or circular. Legal thought can generate plausible rights justifications for almost any result."[268] He goes on to argue that rights discourse is a trap. In this regard he notes,

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[266] Schorn, "Drinkable Water and Breathable Air," p. 123.

[267] Ibid., p. 142.

[268] Duncan Kennedy, "Legal Education as Training for Hierarchy," in Kairys (ed.), *The Politics of Law*, p. 62.

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Rights discourse . . . presupposes or takes for granted that the world is and should be divided between a state sector that enforces rights and a private world of 'civil society' in which individuals pursue their diverse goals. This framework is, in itself, a part of the problem rather than of the solution. It makes it difficult even to conceptualize radical proposals such as, for example, decentralized democratic control of factories.[269]

Although the literature surrounding the right to a clean and safe environment arguably comes closest to providing a theoretical framework from which to pursue international environmental justice, we must remain critical of the extent to which the language of rights holds the salvation it promises. The fact the individuals arguably have a right to a clean and safe environment does not ensure that all individuals will have access to such an environment, nor does it dictate how to address violations of such rights. It is worth pointing out that not all cultures understand rights in the same way; some cultures fail to recognize individual rights, instead focusing on an orientation towards collective rights. This reinforces the possibility that the creation and use of environmental rights will be forced to confront some of the same issues that have plagued the long standing pursuit of human rights more generally. Although many agree that there should be some minimal standards that apply to all individuals, there is wide disagreement about what those minimal standards should be and how they should be enforced.

It could be argued that this component of justice is also reflected in the discussion of justice between humans and the rest of the natural world.[270] Alternatively, issues of

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[269] Ibid.

[270] It is important to note that I will only touch on the complexity of the issues raised by the prospect of an ecocentric understanding of justice. A proper analysis of the issues of justice raised and the implications of such issues is beyond the scope of this project and will need to be addressed elsewhere. In that regard, I must acknowledge that this project looks at anthropocentric understandings of justice as developed within the context of law and legal theory. Brown, for one, takes the position that many

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justice as they relate to the non human world could justify the addition of a fifth component of international environmental justice. As Holmes Rolston puts it, "[w]e do not yet have an adequate ethics for this Earth and its communities of life."[271] This is important because power without ethics can be destructive in any community.[272] Therefore, "[e]nvironmental ethics in the primary, naturalistic sense is reached only when humans ask questions not merely of prudential use but of appropriate respect and duty."[273] Rolston goes on to discuss the valuation of nature concluding that we need to follow nature.[274]

According to Dimitris Stevis, we need some form of justice that is inclusive of the non-human world. He is supportive of taking nature into account but reluctant to adopt ethical rules which intrude into nature or that do not address the implications of social asymmetries.[275] Ecological justice requires that we question what gives social entities license to act in particular ways and how they justify their environmental choices. In this regard, we must remain critical of those ecological and environmental justice advocates

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environmental ethicists are focused on issues that are not connected to crucial and pressing environmental ethical questions. He suggests that:

> [T]he focus of many environmental ethicists and theologians has been directed largely at such metaethical questions as whether humans have duties to animals and plants and what is the nature and source of a religious environmental ethic. Although these are important questions and are very relevant to some practical issues, . . . they have little to do with many of the environmental controversies that are unfolding right in front of us at this moment in history. For this reason, extraordinary important ethical issues are being overlooked by many of our most concerned philosophers and theologians (Brown, *American* Heat, pp. xviii-xix).

[271] Holmes Rolston (III), *Environmental Ethics* (Philadelphia, Pennsylvania: Temple University Press, 1988), p. xi.

[272] Ibid., p. xii.

[273] Ibid., p. 1.

[274] Ibid., p. 33. "Everything conducted in accordance with the laws of nature 'follows nature' in a broad, elemental sense, and it is sometimes asked whether human conduct ought to follow these laws."

[275] Stevis "Whose Ecological Justice?," p. 63.

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that do not make explicit the political economy/ecology that underlie their social and natural choices.

Other scholars have addressed ecological justice in this context, specifically Low and Gleeson. They suggest that the struggle for justice as it is shaped by the politics of the environment has two relational aspects: the justice of the distribution of environments among peoples, and the justice of the relationship between humans and the rest of the natural world. They refer to these aspects of justice as environmental justice and ecological justice, and suggest that they are really two aspects of the same relationship.[276] Although the distribution of environmental quality, with the emphasis on distribution, is the core of environmental justice, ecological justice must also be dealt with.

Ecological justice involves issues of justice to nature, and thus requires us to rethink our relationship to nature. Low and Gleeson suggest that in order to do so we must reconceive of the basis of justice in the way that we think of our self and thus how we define our interests and moral values.[277] A pivotal question throughout is whether ecological justice means abandoning the principles of liberal political and legal theory or merely their modification. A definition of self which ignores the need for individual difference and differentiation, stressing only identification with community and environment, is, according to Low and Gleeson, as diminishing as a definition which

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[276] Low and Gleeson, *Justice, Society and Nature*, p. 2.

[277] Ibid., p. 133.

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ignores the need for community and environment and reduces the self to an isolated pinpoint.[278]

Critical legal studies have shown us that law is created and used by powerful groups to represent their interests and the expense of those less powerful. Nowhere is this more evident than in the relationship between humans and the nonhuman world. Many scholars have suggested that we must include some concern for justice between humans and the rest of the natural world, but how can this be done within a system that ultimately fails to have any way to account for ecocentric values. Liberal legal theory starts from a defense of individual liberty, yet such a concern is necessarily anthropocentric since it is difficult to justify nonhuman liberty.

This category of issues has served as a catch all for international environmental justice issues that do not fit neatly within the other categories. Once again, the insights from critical legal studies can help us pursue international environmental justice. Although environmental rights may not be able to guarantee access to a clean and safe environment, they may be a valuable addition to a pluralistic approach that incorporates multiple legal and nonlegal, centralized and decentralized mechanisms for addressing climate change in a just manner. Low and Gleeson conclude that the challenge of the new century, the challenge of ecological and environmental justice is nothing less than the transformation of the global institutions of governance, the reinstatement of democracy at a new level, the democratization of both production and its regulation.[279] In this regard, we must address the foundational issues surrounding our relationship to the natural world. Liberal legal theory is inadequate in this regard. Critical legal studies

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[278] Ibid., p. 134.

[279] Ibid., p. 213.

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can help us address these issues while maintaining our commitment to international environmental justice. Only when we realize our interconnectedness with the natural world and the ways in which power relations dictate our relationship with it will we be able to operationalize ecological justice issues.

In sum, Yokota helps us see the limitations of a liberal legal order, particularly when we attempt to address global environmental issues such as climate change. The question remains, is international environmental justice possible in a system of sovereign states? This question has been an underlying theme throughout this project and will be addressed in more detail in the next chapter. At this point I have shown the value of using critical legal studies to analyze the prospects of achieving international environmental justice through the use of international environmental law. In this regard, I have addressed the limitations and expectations of international law more generally. Critical legal studies provide us with an alternative understanding of the theoretical foundations of the use of law. It has exposed the significance of the structure of the international system and the ways in which power relations dominate and dictate who benefits and at whose expense. Having shown the value of critical legal studies to the justice issues that have been discussed in the literature I now turn to a more explicit application of the major criticisms of liberal legal theory made by critical legal scholars to the issue of global climate change. If we have any hope of addressing the issue of climate change we must look beyond the limited understandings of justice that are presented within liberal theories of law. In this regard critical legal studies provides a better understanding of the ways in which legal phenomena can reinforce a system of injustice.

The Critical Legal Critique of International Environmental Law in Climate Change

As I have shown, critical legal studies are a heterogeneous body of legal theory that borrows from a number of traditions in developing a critique of the liberal legal tradition. In the first chapter I discussed the critical legal critique of liberal theories of law. In this section I will apply these claims in order to evaluate the prospect of achieving international environmental justice in climate change.[280] Liberal legal theory as a representation of mainstream legal studies has contributed to the current predicament in international society by fostering the belief that international law can be relied on to achieve global justice, particularly in the case of global environmental degradation. Yet, liberal theories of law and justice are inadequate. Therefore, we must also look to alternative approaches such as critical legal studies in order to assess the foundations of international environmental law.

Critical legal studies assert that behind all legal doctrine and legal systems stand political judgments that reflect inherent domination and subordination that benefits certain groups and classes at the expense of others. The law exists to support the interests of the group that forms it and is merely a collection of beliefs and prejudices that legitimize the injustices of society. On the domestic and international level the wealthy and the powerful use the law as a mechanism for oppression in order to maintain their place in the hierarchy. In this regard, the basic idea of critical legal studies is that law is politics and it is not neutral or value free. At this point I will apply the critical

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[280] It is worth noting that not all scholars that have been utilized in this project are critical legal scholars. Nevertheless, much of these individuals work is consistent with the overall objectives of critical legal studies and has contributed to my critical legal study of the use of international environmental law in climate change. In doing so I do not wish to suggest that these scholars or their work must be categorized within the critical legal tradition. I merely wish to utilize them to show what a critical legal study of global climate change might look like. My overall contention is that critical legal studies help us understand some of the limitations to the traditional liberal legal theory that underlies our use of international environmental law.

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legal critique, as well as some practical considerations about the unique nature of the international legal system in order to shown the ways critical legal studies can help assess the capacity of international environmental law to create a more just world. In this regard, I discuss the argument that liberal legal theory, as representative of mainstream legal studies cannot address substantive communal values and look at the implications for global climate change. Further, I look at the ways liberal legal theory masks domination and subordination in the context of climate change. The rule of law conceals the fact that domination and subordination permeate the international system. Yet liberal theories of law rely on the existence of a rule of law in order to protect individual liberty. I also look at the problems of legislation and adjudication as they apply to the issue of climate change. This will include a discussion of the significance of formalism, as well as the issues surrounding the indeterminacy of law. Throughout this discussion we will look at the unique nature of the international legal system and the problems that it poses for achieving international environmental justice.

A. Individual Subjective Values

One of the fundamental assumptions of classical liberalism as well as liberal theories of law is the focus on individual subjective values. It is assumed that the interests of distinct individuals are consistent and conducive to the general good, yet liberalism fails to properly account for the unique interests of collective entities through an adequate accounting of objective value. This is particularly problematic when we attempt to reconcile the interests of western industrialized democracies that explicitly recognize and pursue individual liberty with the interests of developing countries that struggle to fit their own notion of communal values into an international system that is

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dominated by liberal notions of individualism. Many developing countries are the home to indigenous groups that fight for rights of self determination. But, within the liberal tradition, it is only individuals that can have rights. An opposing view argues that groups as well as individuals have rights and value. It is worth noting that the notion of rights, and especially individual rights, is unknown in many African languages and is of limited significance in traditional Islamic, Hindu, and Buddhist communities.[281] It is also worth considering, if in this context there can be any meaningful protection of individual rights and values if the communities that these individuals live in are not protected. How do we understand the individual if not by reference to the community from which they develop their sense of self? Yet liberal theories of law fail to adequately account for communal values except for as the sum of the individual values that make up that community.

In regards to the use of international environmental law to address climate change, duties and obligations are outlined in reference to states based on their level of development. Many of the states in the Global South are home to the indigenous groups mentioned above. This provides an additional point of contention when international law fails to recognize these groups and their communal values. In addition, there is no way to ensure that these groups or any other sub-national units are able to adequately participate in the international climate change regime or the process of determining the responsibilities that such a regime mandates. In short, international law fails to adequately safeguard and represent the interests of all groups equally. Therefore, it is not surprising to realize that not all groups benefit equally from the use of international environmental law to address climate change.

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[281] Alan C. Lamborn and Joseph Lepgold, *World Politics into the 21st Century*, Preliminary Edition (New Jersey: Prentice Hall, 2003), p. 486.

Unger points out that the principle of subjective value is closely related to the liberal conception of rules as the basis of order and freedom in society. He suggests that ends are viewed as individual in the sense that they are always the objectives of particular individuals. This is true in regards to international law as well as law in the domestic context although on the international level we must deal with the aggregation of individual interest. Therefore, this issue is even more problematic when applied to international law and climate change since, as discussed above, the political doctrine of liberalism does not acknowledge communal values. The two basic ways in which the political doctrine of liberalism defines the opposition of rules and values correspond to two ideas about the source of laws and to two conceptions of how freedom and order may be established. Therefore, within the liberal tradition, laws must be impersonal in order to establish freedom and order. They must represent more than the values of an individual or of a group, since rules based on the interest of a single person or classes of persons contradict the basis of freedom. Nevertheless, there is no guarantee that international law represents anything more than the interest of certain groups of people, the most wealthy and powerful in any given society.

B. Domination and Subordination under a Rule of Law

There are three things that are necessary to support a rule of law in any given system. In this regard, it is commonly assumed that there must be a law-making process, a process of law-enforcement, and an adjudication process. This first issue that must be addressed in regards to the international environmental law surrounding climate change is whether law in this sense even exists. In regards to a law-making process we must immediately acknowledge that although the United Nations Environmental Programme

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and the United Nations more generally include most states in the international system, it does not include all states. More specifically, there is considerable debate about the adequacy and effectiveness of a climate change regime that fails to incorporate one of the largest contributors of global greenhouse emissions. At this point the U.S. government has been unwilling to sign on to the Protocol. This is significant for a couple of reasons. First, the U.S. has been and continues to be one of the world's largest contributors of greenhouse gas emissions. The U.S. has historically utilized coal and oil burning industries to propel its economic growth. Furthermore, current per capita consumption within the U.S. far out exceeds that of the most of the rest of the world. Therefore, considerable questions exist about the adequacy of a law making process that is not binding on all states in the international system, particularly those states that have been most responsible for causing climate change and arguable should be responsible for addressing the issue.

It is also worth noting that although the United Nations system has been utilized to coordinate international cooperation on a variety of issues, it is not a world government. The charter itself explicitly recognizes the need to accept state sovereignty as a fundamental limitation on its power. It is highly unlikely that the United Nations would have such broad support without safeguards such as these to protect individual states from the monopoly of power that might be used to pursue collective action that is not within each states national interest. The failure of the League of Nations largely turned on these same issues. The superpowers had very little incentive to join into such an organization without the ability to control the agenda. As a result, the Security Council was established in such a way that reflected the power hierarchies that existed at

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that time. Therefore, although there is an organization in which rules and regulations can be debated and created, considerable questions remain about the ability of such an organization to adequately address issues that adversely affect the least powerful groups in the international system.

Superpowers, such as the U.S., have considerable influence and formal veto power which permits them to control what issues are addressed and how, while less powerful states are unable to effectively utilize such an organization unless they can convince the major players that it is in their best interest as well. In this regard, issues such as climate change will never be adequately addressed since the international system is asking countries like the U.S. to make sacrifices that could possibly adversely affect their economy. Once again the utility of international law is challenged by the traditional realist claim that states, particularly powerful states will only follow international law when it is in their national interest. The U.S. was successful in incorporating flexible mechanisms which would seem to allow some progress towards addressing these issues while permitting states the opportunity to buy and sell the ability to pollute. Leaving the deeper questions about the adequacy of economic valuation of natural resources aside, such mechanisms arguably displace pollution without adequately minimizing the effects of global greenhouse gas emissions in a way that will solve the practical and ethical problems that surround the possibility of global climate change. Ultimately, even with the inclusion of flexible mechanisms, the U.S. did not believe that the Kyoto Protocol was consistent with their national interest.[282]

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[282] This highlights the significance of collective action problems in climate change. Clearly, addressing the prospect of global climate change is consistent with the U.S. national interest. Nevertheless, U.S. policymakers act consistent with their own interests. Further, concerns about the free rider problem have the potential to paralyze negotiations.

In sum, a law making process arguably exists, but we must recognize that considerable questions remain about the ability of such a process to produce a fair and equitable set of rules and regulations that are binding on the most significant international actors. Furthermore, many suggest that as a result of the inadequacies of the system itself, the rules and regulations that have been established fall short of sufficiently reducing and offsetting global greenhouse gas emissions in a way that will advert the most dire consequences of climate change. Even the specific commitments of the Kyoto Protocol, will neither "halt global emissions growth, nor have a discernible impact on economic growth."[283] In the end we must remain critical of international environmental law if it only gives lip service to the problems it is meant to deal with.

Even if a law making process exists, in order to have a rule of law we must also have adequate law enforcement and adjudicatory processes. In regard to law enforcement, it is often noted that the lack of a world government makes it extremely difficult to assure compliance in an international system that revolves around the sovereignty of states. This has been addressed above and ultimately results in the decentralized nature of the international system. Much of international law is non binding, and even for that small portion that utilizes binding timetables or regulations there is no international police force that is capable of sufficiently monitoring and enforcing these pronouncements.

Adjudication is equally problematic. Even when satisfactory processes have been established to monitor and enforce compliance with international laws we still need some sort of adjudicatory body to resolve disputes about noncompliance and come up

[283] Michael Grubb, C. Vrolijk, and D. Brack, *The Kyoto Protocol: A Guide and Assessment*, (London: Royal Institute of International Affairs, 1999), p. xxxiii.

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with just resolutions that are consistent with the overall objectives of the regime and rules that were established to address the problem. The use of name and shame polices can only go so far when attempting to reconcile the competing interests of economic and military superpowers, particularly those that have a tendency to follow international law only when it is consistent with their economic and military objectives.

Whether a rule of law exists is only part of the issue. If we assume that international environmental law is law, it is still to be determined whether it holds the promises that liberal legal theory suggests. The common solution to the problems of order and freedom within the liberal tradition is the making and applying of impersonal rules or laws. This is problematic in the climate change regime for all of the same reasons discussed above. The law making and law enforcement processes are simply inadequate to ensure that the rules, laws and norms that are established are impersonal. Instead we must recognize that they reinforce the power hierarchies that already exist and are the basis for the creation of the international institutions within which these laws are debated and created.

Critical legal scholars suggest that the rule of law is a mask that gives existing social structures the appearance of legitimacy and inevitability. In this regard, the liberal claim to neutrality is pretextual and conceals unacknowledged interests and relationships of power. Nevertheless, within the liberal tradition law is viewed as an indispensable mechanism for regulating public and private power in a way that prevents oppression and domination. We have already noted that the rule of law as well as the defense of individual liberty has historically justified a system of private property. This system of private property has ultimately supported inequity on the national and international

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levels. In regards to climate change, the flexible market mechanisms have been adopted in an attempt to address these issues while incorporating a market value for the externalities of global capitalism. However, we must remain critical of mechanisms that fail to fully take in to consideration environmental and ecological value by straining to fit these concepts within a very anthropocentric profit driven system. The liberal reliance on a system of private property justifies a class based system which benefits certain groups at the expense of others. This is done in the name of individual liberty, yet on the international level we must ask, whose liberty is being defended? Is individual liberty being protected or is it the freedom of corporations to exploit and oppress that is being nurtured? Ultimately, it is the corporation as a legal entity that benefits most form environmental valuations by allowing environmental degradation when it is economically defensible.

In sum, liberalism assumes that laws are universal, consistent, public, and capable of coercive enforcement. Nevertheless, it is unrealistic to assume that laws can be any of the above when they are produced in a system that simply reinforces the power hierarchies that exist in the system. Critical legal studies can be utilized to help us understand how the system reinforces such hierarchies while giving the perception of legitimacy. Since the resort to a set of rules as the foundation of order and freedom is a consequence of the subjective conception of value, we must accept that international laws will not be universal or consistent. This leads us into a discussion of the problems of legislation and adjudication, for if we seek universality and consistency we need an appropriate technique of rule application from which we can deduce conclusions from premises and choose the most efficient means to accepted ends. The major liberal

theories of adjudication view the task of applying law either as one of making deductions from the rules or as one of choosing the best means to advance the ends the rules themselves are designed to foster. This resort to a set of rules as the foundation of order and freedom is a consequence of the subjective conception of value.

C. Problem of Legislation and Adjudication

The problem of legislation results from the fact that in order to make law one has to choose among competing individual and subjective values, and ultimately give preference to some over others. A response to the question of freedom in liberal thought is the claim that there exists some procedure for lawmaking on the basis of the combination of private ends, to which procedure all individuals might subscribe in self-interest. In this regard, self interest means the intelligent understanding of what we need in order to achieve our own individual and subjective goals. To the extent that such a method for legislation is possible, there will be no contradiction between the premise of the subjectivity of ends and the existence of laws that command, prohibit, or permit particular forms of conduct. Nevertheless, this substantive theory of freedom breaks down because of the difficulty in finding a neutral way to combine individual, subjective values.

This is true in regards to climate change as well. We have noted the practical and ethical difficulties that have arisen in the attempt to come up with satisfactory international environmental laws that address climate change. One of the main reasons that the U.S. has been unwilling to participate in the Protocol relates to questions of equity that remain in regards to the differentiated responsibilities and resulting timetables established for countries of the Global South. Why should a state such as the

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U.S. agree to a set of arrangements that seem to put more of the onus on them?

Obviously this question can be answered by pointing to a number of differences in

regards to the causes of the current climate predicament. Nevertheless, it is not in the

U.S. national interest to sacrifice the standard of living and economy of Americans when

the obligations are not distributed equally yet the benefits are shared by all. On the other

hand, given the historic global greenhouse emissions of countries like the U.S., it is

equally unreasonable to expect lesser developed states to assume the same

responsibilities and obligations.

It is not enough to have a satisfactory method for rulemaking unless we also have

one for the application and adjudication of those rules. Critical legal scholars have

suggested that words written by someone else (i.e., the legislature) are subject to

interpretation and thus manipulation by a decision maker (i.e., the judge) enforcing the

written word. In this regard, deciding how to formulate legal commands is just as hard as

deciding how to interpret and apply them and therefore, the problem of adjudication is

really an extension of the problem of legislation. Unless we can justify one interpretation

of the rules over another, the claim of neutrality in the adjudication of disputes must be

rejected. Once we manage to formulate an adequate procedure for lawmaking, we will

also need to apply the laws to particular cases. But we still must address what standards,

or in what manner, can the laws be applied without violating the requirements of

freedom.[284]

In the first chapter, I discussed the difference between legal and substantive

justice, as well as the significance of formalism. Critical legal scholars, such as Unger,

conclude that liberal legal theory is incapable of avoiding purposive legislation and

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[284] Unger, *The Critical Legal Studies Movement*, p. 89.

adjudication. Laws are created and interpreted by individuals with no way of assuring that their decisions adequately account for all stakeholders. In this regard, liberal theories of law are unable to reconcile a concern for legal and substantive justice. Similarly, international environmental law has the potential to suffer from the same difficulty. That is, how can we ensure that the outcome of legal mechanisms have any connection with justice? A focus on legal justice can guarantee that the legal system treats all individuals similarly but it cannot account for the fact that individuals differ in their needs, capabilities, and responsibilities. Nevertheless, substantive justice is hard to define, let alone to pursue.

The use of international environmental law to address global climate change must contend with the problems of legislation and adjudication which relate back to the inability of liberal legal theory to safeguard from the domination of subjective individual values. Without the ability to justify the supremacy of certain wills over the wills of others, liberal legal theory has no way of achieving a satisfactory theory of legislation or adjudication. Critical legal scholars have illuminated this predicament and can facilitate a shift towards a focus on substantive justice.

D. Indeterminacy of Law

A related claim presented by critical legal scholars has been their challenge to the view that law is composed primarily of determinative rules that are logically applied by neutral adjudicators to reach predictable, correct results. This is true within the climate change regime as well. The amorphous and ad hoc nature of international law makes it difficult to expect definitive results. In addition, the rules themselves are not necessarily determinative or logically applied. Lastly, it is extremely difficult to suggest that

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anything about the rules and regulations are neutral. Therefore, it is exceedingly unlikely that the presence of a rule of law is sufficient to address a complicated issue such as climate change and the practical and ethical issues that are raised as we attempt to coordinate international cooperation to effectively deal with it.

As a result of the indeterminacy of law and legal pronouncements, international environmental law in and of itself reinforces hierarchies of power and allows countries of the Global North to maintain their privileged positions. International environmental law, like law in all legal systems is used to represent the interests of the wealthy and powerful. In this regard, it fails to provide freedom and order while protecting the individual liberty it wants to embrace. Instead, international environmental law gives the appearance of legitimacy while failing to effectively address problems such as climate change. While liberal theories of law and justice alone are inadequate, critical legal studies can be employed to unveil the significance of law and power in a way that can assist in addressing climate change while pursuing international environmental justice. Only with a broad, pluralist approach can we fully understand the theoretical foundations and limitations of international jurisprudence.

Concluding Remarks

The discourse surrounding international environmental justice can be discussed with reference to the set of categories established by Yokota. In this regard, "international justice in the context of the global environment is now concerned not only with justice among states with regard to sovereignty and equality, but also with (a) economic justice among states, (b) justice among non state actors, (c) justice between generations and (d) justice to pursue universal ideals and virtues, such as a clean and

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safe environment."[285] In the first part of this chapter I used these issues to show the value of critical legal studies when looking at the issues of international environmental justice that have been incorporated into the discourse of climate change. Liberal theories of law and justice are inadequate for addressing these issues, yet critical legal studies can help illuminate the significance of law and power where liberal theories leave off. For example, liberal legal theory has focused predominately on the issue of justice between states, while largely ignoring the additional issues raised by the inclusion of nonstate actors and future generations. Further, liberal legal theory has been caught up in the debates about the existence of environmental rights while failing to recognize the extent to which such a framework will continue to overlook the least well off. Critical legal studies provides a better understanding of the underlying structure of international law and how it has been used by certain groups at the expense of others. Ultimately, issues such as global climate change force us to recognize that there are trade offs that must be recognized when considering environmental policy decisions. As stated by Shue, "[o]ne person's desire for an additional jar of caviar is not equal in urgency to another person's need for an additional bowl of black beans."[286] Presumably the black beans represent subsistence while caviar reflects excess or luxury above and beyond mere survival.[287] In this regard, it remains very difficult to reconcile conflicting notions of justice.

In the latter part of this chapter I have applied the critical legal critique of liberal legal theory to the issues surrounding climate change. Once again the value of a critical

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[285] Yokota, "International Justice and the Global Environment," p. 595.

[286] Shue "Global Environment and International Inequity," p. 11.

[287] Similarly, one state's perceived need to spend just over a billion dollars a day for military build up is not equal to another's need to spend three hundred billion to feed the poor, or provide necessary infrastructure improvements.

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legal approach should be clear. Liberal theories of law and justice are inadequate for addressing the complicated ethical and practical issues that humanity is faced with in regards to global climate change. Critical legal scholars have highlighted a number of criticisms that must be addressed by any legal system, especially a legal system that has been built on the foundations of liberal legal theory. Therefore, if we have any hope of effectively dealing with global environmental problems such as climate change, we need a broad pluralistic approach. The concluding chapter will further explore how we can use such an approach to pursue international environmental justice.

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CHAPTER FIVE:

Conclusion

It is in justice that the ordering of society is centered.

—Aristotle

This project has brought together a number of strands of literature to address a very complicated and dynamic set of issues. I have discussed the significance of global environmental problems and the issues of justice that they raise. I have also addressed the theoretical framework that underlies the use of law as a tool of social policy. In this regard, I looked at classical liberalism as well as liberal theories of law and legal process to get a better understanding of the usefulness and limitations of using legal mechanisms to address global environmental problems. Ultimately, this project has sought to show the limitations of liberal legal theory while highlighting the utility of critical legal studies when looking at international legal phenomena such as the use of international law to address climate change. Critical legal studies help provide a better understanding of the significance of law and power, while seeking to promote the just resolution of global environmental problems.

Critical legal studies are a strain of critical jurisprudence that has been used predominately to address issues of law and justice that have arisen in the domestic context. Nevertheless, the theoretical insights of critical legal scholars should be utilized to address the increasing use of international environmental law to address global environmental problems. We must recognize that there is no necessary connection

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between law and justice. This is true on the domestic level as well as the international level of analysis. Therefore, we must remain critical of the use of international legal mechanisms to address these very complicated issues and recognize that, as with all policy decisions, there are clear winners and losers that must be taken into consideration. In order to assess the applicability of these theoretical ideas to international phenomena I have looked at the significance of the domestic analogy and the unique nature of the international system. In addition, I have discussed the foundations of international jurisprudence in order to determine the viability of critical international legal studies.

In Chapter Three, I looked more specifically at the issues surrounding global environmental problems such as climate change. Climate change is an excellent case study that can be used to show the applicability of the theoretical claims of critical legal scholars to the international legal system. Ultimately, this project stems from an interest in the just resolution of global environmental problems such as climate change. The prospects of global climate change raise some of the most difficult and significant problems that humanity has ever faced. As a result, climate change also raises a host of ethical issues that must be addressed if we have any concern for international environmental justice.

I have attempted to provide conceptual clarity in order to assess the prospects of achieving international environmental justice in the context of climate change. In this regard, I have discussed the major environmental issues that surround debates about climate change. I have also analyzed the issue of international environmental justice. As with much of the subject matter of this project, there has been a noticeable gap in the literature defining justice on the international level. In order to ground this work in the

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literature I looked at the ways in which these issues have been discussed. Here Yokota's work has provided a schema from which to address these issues in the context of climate change.

In this chapter I will bring it all together and attempt to sketch a roadmap of where to go from here. I will use the lessons from my discussion of legal theory, international jurisprudence, and the related discussions of global environmental governance and the climate change regime to evaluate the justice issues that have been identified in the literature. In this regard, it will be important to look at the claims of critical legal studies as well as the ways in which we define international environmental justice in order to consider the ability to address the variety of issues surrounding climate change in a just manner.

International environmental justice demands a focus on distribution, as well as recognition and participation. Yet it is important to recognize that they are three interlinking, overlapping circles of concern.[288] An examination of the literature and demands of environmental justice movements, both in the U.S. and globally, reveals that these movements are less absorbed with defining justice as solely distributional as most theorists suggest.[289] Schlosberg points out that movements tend to offer a more expansive and pragmatic notion of justice. In the U.S., for example, the issue of distribution is always present and always key, but is always tied with recognition and political participation. As a result, he suggests that a critical pluralism offers the best possible framework for thinking about both global social justice and environmental justice.

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[288] Schlosberg, "Reconceiving Environmental Justice," p. 521.

[289] Ibid., p. 522.

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Peter Wenz utilized this approach in one of the earliest discussions of environmental justice. For Wenz, such pluralistic notions of justice are welcome on a theoretical level. Environmental justice, he argues, is understood in numerous ways, depending on the context. Wenz sees value in the fact that we are "attracted to using one theory in one kind of situation and a different theory in a different kind of situation."[290] He argues that we need a pluralistic theory of environmental justice "that enables us to appeal in a consistent manner to principles featured in a variety of theories, even when those principles can not all be reduced to or derived from a single master principle."[291] In this regard, the lessons of critical legal studies can help can us understand the issues of justice that must be addressed in the context of climate change.

Schlosberg argues that injustice itself is a concept with multiple, integrated meanings. A singular focus on justice as distribution, and only distribution, is not only limited in theory, but it cannot encompass the broad and diverse demands for justice made by the global environmental justice movement.[292] Demands for the recognition of cultural identity and for full participatory democratic rights are integral demands for justice as well, and cannot be separated from distributional issues.[293] Yet these demands are not universally accepted throughout the world. This becomes problematic when we attempt to resolve global environmental problems in a just manner.

Although it is argued that social justice can only be served by broad access to and actual participation in decision making, it is worth noting that participation does not

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[290] Wenz, *Environmental Justice,* p. 313.

[291] Ibid.

[292] Schlosberg, "Reconceiving Environmental Justice," p. 536-537.

[293] Ibid.

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ensure equality. This seems painfully obvious when we look at the use of international law in climate change. The international climate change regime is open to all states in the system. In fact, broad participation by as many states as possible has been encouraged and many have argued that the international community will not be able to effectively address these issues without it. Nevertheless, it is extremely unlikely that such participation alone will ensure that we recognize the diversity of interests and peoples around the world. Further, it seems unlikely that participation and recognition of such diversity will lead to equitable distribution.

In this regard, the liberal focus on distribution will be problematic to actualize. There are various principles of fairness that people often use to judge what is a fair or just distribution. Robert Nozick, for one, distinguishes between historical principles and time-slice principles.[294] An historical principle is one that acknowledges that we cannot decide whether a given distribution is just or unjust simply by looking at the present situation. Therefore, we must also look at how the situation came about. In contrast, a time-slice principle looks at the existing distribution at that particular moment and analyzes the distribution based on some principle of fairness, disregarding the preceding events. It is interesting to consider both approaches when considering equitable distribution in climate change.

The historical approach forces use to consider how the problem of global climate change has come about. In this regard, it is the developed nations of the Global North that are most culpable for the cumulative greenhouse gas emissions up until the present. This is even more significant when you consider per capita emissions. Although at present emission rates contributions from developing nations will equal the built up

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[294] Robert Nozick, *Anarchy, State and Utopia*, (New York: Basic Books, 1974), p. 153.

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contributions of the developed nations some time around 2038, when we adjust for

population, per person contributions of developing countries will not equal per person

contributions of the developed nations for at least another century.[295] In fact, if

developed nations had per capita emissions at the level of developing nations today, we

would not be facing the prospect of global climate change and would have ample

opportunity to do something about it before emissions reached a level sufficient to cause

a problem. For that reason, it is not surprising that developing nations expect the

developed countries of the Global North to take the lead in addressing these issues at the

present time.

In defense of the developed countries, it might be argued that at the time when

they were developing they did not know the atmospheric limits of greenhouse gas

emissions and absorption. As a result, it could be argued that a time-slice approach

might be more appropriate.[296] In that view, it would be necessary to look at how the

ability of the atmosphere to absorb greenhouse gas emissions and allocate those

emissions per capita. Even with such a time-slice approach per capita emissions in

countries like the U.S. far exceed those in the developing counties of the Global South.

The U.S. produces more than 5 tons of carbon per person per year, while Japan and

Western Europe produce 1.6 to 4.2 tons per person per year. Compare this to the

developing world which produces an average of .6 tons per year with China at .76 and

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[295] See Peter Singer, *One World: The Ethics of Globalization*, (New Haven: Yale University Press, 2002), p. 33.

[296] Nevertheless, it could be argued that ignorance is no excuse and therefore we should use a standard of strict liability. Further, even with a time-slice approach as mentioned there would need to be some consideration of when governments could reasonably be expected to know that emissions might harm people in other countries.

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India at .29.[297] Therefore, it seems clear that both a historical as well as a time-slice approach to equitable distribution suggests that current greenhouse gas emissions are unjust.

Not surprisingly, given the difficulties associated with international cooperation regarding climate change and the disagreements between industrialized and developing states, there has been considerable debate about the adequacy and effectiveness of the existing climate change regime. In fact, some have suggested that the issue of global climate change has created the sharpest divide between the Global North and the Global South.[298] This divide was firmly implanted as a major obstacle to international cooperation at the 1992 Rio Earth Summit. Malaysian Prime Minister Mahathir Mohamed's remarks reflect this antagonism:

> When the rich chopped down our forests, built their poison-belching factories and scoured the world for cheap resources, the poor said nothing. Indeed, they paid for the development of the rich. Now the rich claim a right to regulate the development of the poor countries. And yet any suggestion that the rich compensate the poor adequately is regarded as outrageous. As colonies we were exploited. Now as independent nations we are to be equally exploited.[299]

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[297] These are 1996 figures. See Singer, *One World*, p. 35.

[298] Parks and Roberts, "Environmental and Ecological Justice," p. 331.

[299] Mahathir Mohamed, "Statement to the U.N. Conference on Environment and Development", in Ken Conca and Geoffrey D. Dabelko (eds.), *Green Planet Blues*, Second Edition (Boulder: Westview Press, 1998), pp. 326. It is important to note that there were considerable differences of opinion on the major outcomes of UNCED generally. Maurice Strong, the Secretary-General of the Rio Conference, had envisioned the task of the Conference as moving "environmental issues into the center of economic policy and decision-making." He had hoped that the conference would also establish the basis for the new dimension of international cooperation that will be required to ensure "our common future" ("ECO '92: Critical Challenges and Global Solutions", *Journal of International Affairs*, Vol. 44, No. 2, Winter 1991, pp. 290, 297). By the end of the conference results were mixed. Peter Haas, Marc Levy and Edward Parson argue that UNCED had laid a strong foundation for continuing commitment and momentum on environmental issues. See "Appraising the Earth Summit: how should we judge UNCED's success?", *Environment*, Vol. 34, No. 8, 1992, p. 32. Others were more skeptical.

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In their book, *The Earth Brokers: Power, Politics and World Development*, Pratap Chatterjee and Matthias Finger expose the realities of climate change negotiations. Speaking more generally, they point out that the UNCED process "promoted business and industry, rehabilitated nation-states as relevant agents, and eroded the Green movement."[300] They argue that UNCED has boosted precisely the type of industrial development that is destructive for the environment, the planet, and its inhabitants. They concluded that "as a result of UNCED, the rich will get richer, the poor poorer, while more and more of the planet is destroyed in the process."[301] In this regard, it is easy to see that power asymmetries are not only present but have helped to dictate the outcomes of global efforts to address environmental degradation.

Given the complexity of climate change negotiations it is not surprising to see that many believe that the treaties and agreements signed at Rio will fail to tackle any of the major causes of environmental problems, such as the pressure placed on the planet by consumption in the Global North or unsustainable patterns of development in the Global South. The problems of free trade, militarization, and mega-polluters like some multinational corporations were dropped from the agenda. The agreements to deal with the most obvious symptoms of environmental problems including global warming, desertification, and loss of species and forest cover fail to adequately address these issues. Therefore, it is hard to imagine that they will make a significant difference.

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[300] Chatterjee, and Finger, *The Earth Brokers*, p. 3.

[301] Ibid. Chatterjee and Finger suggest that the Brundtland report basically reformulated the old development myth, i.e. the myth of unlimited industrial development. The only new element is that development is now looked at from a planetary or global perspective. "Instead of stressing the development of a given society or country, the stress now is on the development of the planet as a whole." In this regard, the belief is that the major limits to growth are not the natural resources, but the state of technology and social organization.

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Overall, it is the view of Chatterjee and Finger that the UNCED did not offer any

vision or way out. There was no alternative to the still dominant development paradigm,

not even a critique of it.[302] Therefore, their ultimate conclusion is that the planet and

most of its inhabitants will be worse and not better off as a result of the UNCED process.

After UNCED, just as before, we do not have any answer to the increasingly pressing

global environment and development crisis, not even to aspects of it.[303]

Specifically in regards to climate change, the divisions between the Global North

and Global South have been extremely pronounced. Poor nations are the least

responsible for climate change at this point, yet they stand to lose most from its effects.

For example, the U.S. has only 4 percent of the world's population, yet is responsible for

21 percent of all global emissions.[304] This becomes significant when we compare that to

136 developing countries that together are only responsible for 24 percent of global

emissions.[305] Further, poor nations remain far behind countries like the U.S. in terms of

emissions per person. The average American citizen emits as much greenhouse gas into

the atmosphere as eight Chinese and as much as 20 citizens of India.[306] Overall, the

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[302] Ibid., p. 172.

[303] Ibid.

[304] Parks and Roberts, "Environmental and Ecological Justice," p. 342.

[305] G. Marland, T.A. Boden and R.J. Andres, "Global, Regional, and National Fossil Fuel CO_2 Emissions", in United States Department of Energy, *Trends: A Compendium of Data on Global Change*, (Oak Ridge: United States Department of Energy), available at <http:cdiac.esd.ornl.gov/trends/emis/em_cont.htm>.

[306] Parks and Roberts, "Environmental and Ecological Justice," p. 343. It has been suggested that the idea that developing countries like India and China should share the blame for destabilizing the climate is an excellent example of environmental colonialism. See Agarwal and Narain, "Global Warming in an Unequal World," pp. 157-158. A study conducted by India's Centre for Science and Environment, which uses World Resource Institute data for each country's gaseous emissions, concludes that developing countries are responsible for only 16 percent of the CO_2 accumulating in the Earth's atmosphere. The World Resource Institute report claims a Third World share of 48 percent. Similarly, Agarwal and Narain note that developing countries were not found to be responsible for any excess methane accumulation,

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richest 20 percent of the world's population is responsible for over 60 percent of current greenhouse gas emissions.[307]

To make matters worse, although everyone on the planet is threatened by global climate change, some places and some people in those places will suffer much sooner and much more than others. Developing countries, particularly the least developed countries are the most vulnerable to climate change, "[t]hey will experience the greatest loss of life, the most negative effects on economy and development, and the largest diversion of resources from other pressing needs."[308] "If sea levels rise as expected," Parks and Roberts argue "the small island states and impoverished low-lying nations like Bangladesh are expected to suffer human casualties 'of biblical proportions', an ethnicide some say approaches genocide."[309] Further, Africa will face destructive droughts, which may destabilize governments and bring even greater suffering to the region.[310] Ultimately, those threatened most by global climate change are almost invariably the

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although World Resource Institute claims a Third World share of 56 percent. It is important to note that the methane issue raises further questions of justice and morality. "Can we really equate the carbon dioxide contributions of gas guzzling automobiles in Europe and North America (or, for that matter, anywhere in the Third World) with the methane emissions of water buffalo and rice fields of subsistence farmers in West Bengal or Thailand? Do these people not have a right to live? No effort has been made to separate the 'survival emissions' of the poor, from the 'luxury emissions' of the rich."

[307] Parks and Roberts, "Environmental and Ecological Justice," p. 343.

[308] Roger E. Kasperson and Jeanne X. Kasperson, *Climate Change, Vulnerability, and Social Justice*, (Stockholm: Stockholm Environment Institute, 2001).

[309] Parks and Roberts, "Environmental and Ecological Justice," p. 331. It has been suggested by Bangladeshi Atiq Rahman that "if climate change makes [their] country uninhabitable [they] will march [their] wet feet into [our] living rooms" (Athanasiou and Baer, *Dead Heat*, p. 23).

[310] Intergovernmental Panel on Climate Change, *Climate Change 2001: Impacts, Adaptation and Vulnerability*, (Geneva: Intergovernmental Panel on Climate Change, 2001), available at <www.ipcc.ch/pub/tar/wg2/>; Intergovernmental Panel on Climate Change, *Climate Change 2001: Mitigation*, Contribution of Working Group III to the Third Assessment Report of the Intergovernmental Panel on Climate Change, edited by Bert Metz, Ogunlade Davidson, Rob Swart, Jiahua Pan (Cambridge: Cambridge University Press, 2001).

same people that have the fewest adaptive resources at their disposal to deal with the problem.

These concerns have not been alleviated by the passage and entry into force of the Protocol. Divisions between the Global North and the Global South remain a significant obstacle to U.S. involvement and have the potential to paralyze efforts to create meaningful targets and timetables in the regime more generally. The Protocol has foundered upon requests by some rich nations that poor nations set binding limits on their greenhouse gas emissions. In fact, it has been suggested that the biggest bargaining power of developing countries is their ability to obstruct the process. As their current emissions and populations grow faster than the ones in developed countries, it has been argued that any effort to address global climate change in the next century will be futile without the cooperation of these countries.[311] Furthermore, it has been argued that despite the ambitious goals of the Protocol, it is unlikely to adequately solve the problem of climate change. In this regard, it has become clear that debates about climate change are as much about the distribution of wealth, power and authority as they are about whether or not scientists have accurately depicted the natural and human systems that contribute to climate change.[312] Therefore, the questions about how we as individuals should act in the face of the rapid anthropogenic environmental changes is one of the most interesting and important ethical questions that climate change confronts us with. But, we must recognize that the ethical questions that underlie our collective responses to climate change are just as important.

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[311] Eric Neumayer, "In Defense of Historical Accountability for Greenhouse Gas Emissions", *Ecological Economics*, Vol. 33, No. 2, 2000, p. 191.

[312] See Jamieson, "Climate Change and Global Environmental Justice," p. 289.

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Environmental agreements and the procedures by which they are negotiated need to account for the interests of a wide range of stake-holders including environmental nongovernmental organizations, grass-roots movements, indigenous peoples, industry, financial institutions, scientific bodies and intergovernmental organizations, as well as states and governments. In light of the transboundary nature of global environmental problems such as climate change, and the diversity of the relevant actors, environmental governance must at a minimum be cooperative and collective. Nevertheless, international environmental law has been largely ineffective at addressing global environmental problems and it appears highly unlikely that the current climate change regime will do any better.

As Chatterjee and Finger point out, "[t]he negotiations for the climate convention are a good example of what happens if a global environmental problem cannot be turned . . . into the promotion of further industrial development. Therefore, the climate negotiations are probably best characterized as an 'effort to avoid conflicting positions through vagueness and ambiguity.'"[313] In an interview Maurice Strong admitted that:

> there is no denying [that] the underlying conditions that have produced
> the civilizational crisis [that] the Earth Summit was designed to address
> did not change during the meeting in Rio. . . . The patterns of production
> and consumption that gave rise to so many of the global risks [sic!] we
> are dealing with are still in place.[314]

In this regard, climate change negotiations fail to adequately deal with issues on the structural level of analysis. Global production and consumption produce problems that cannot be addressed by an international legal system that is based on the sovereignty of states. Yet, we continue to utilize the international legal system as if it holds the promise

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[313] Chatterjee and Finger, *The Earth Brokers*, p. 44.

[314] *Earth Island Journal*, 1993, Winter, p.18.

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of salvation. It is important that we question these assumptions. As global capitalism expands and reaches ever-further corners of the world, practical problems continue to escalate and repercussions become increasingly serious and irreversible. These practical problems carry with them equally important ethical issues as we seek to achieve some level of international environmental justice in the context of climate change. Yet, where do we go from here? In the next section I will address this question.

From Here to International Environmental Justice

This project has been critical of the current reliance on centralized legal mechanisms for addressing global environmental problems such as climate change. Throughout the discussions of legal theory and international jurisprudence, an underlying question has loomed: if international environmental law cannot solve the problems associated with global climate change in a just manner, then how should we proceed? If the international legal system rests on a faulty theoretical and pragmatic foundation, then how do we address these issues while maintaining our commitment to justice? It is important to stress the fact that this project has not simply sought to break down and criticize the use of international law. By laying the foundation for a pluralist theory of justice and discussing the potential insights from the critical legal studies movement, I have provided a supplementary theoretical understanding of global environmental politics and the ways in which liberal theories of law and justice limit our ability to adequately address these issues.

International law is not useless, but we must recognize its limitations in order to properly utilize it to address issues on the international level. Perhaps it is not adequate in and of itself, but it certainly must be part of a broad, pluralist approach to climate

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change. Fortunately we are not restricted to liberal legal theory. Critical legal studies can help us understand the international legal system and address global environmental problems within a system of sovereign states while working to overcome some of its shortcomings. In this regard, we must remain critical of the concept of state sovereignty and the ways in which it hampers our ability to address transboundary environmental problems.

A primary principle of international law is that states, as sovereign actors, cannot be bound without their consent. But clearly, this is problematic. We must ask whether cooperation and collective action can be achieved through diplomacy, international law and the development of international institutions, in a system of international governance in which the sovereignty of states remains a fundamental organizing principle. Andrew Hurrell and Benedict Kingsbury, for example, question whether "a fragmented and often highly conflictual political system made up of over 170 sovereign states and numerous other actors [can] achieve the high (and historically unprecedented) levels of cooperation and policy coordination needed to manage environmental problems on a global scale."[315]

The emphasis on state sovereignty in the traditional model of international law is argued to have led to "generally decentralized rule enforcement"[316] and an unwillingness among states to exercise guardianship over the global environment.[317] Further, the elaboration of more specific rights and obligations for states and the development of regulatory techniques are insufficient to strengthen international environmental law and

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[315] Andrew Hurrell, and Benedict Kingsbury, *The International Politics of the Environment* (Oxford: Clarendon Press, 1992), p. 1.

[316] Allen L. Springer, *The International Law of Pollution: Protecting the Global Environment in a World of Sovereign States* (Westport: Quorum Books, 1983), p. 32.

[317] Philippe J. Sands, "The Environment, Community and International Law," *Harvard International Law Journal,* Vol. 30, No. 2, Spring 1989, p. 393.

its contribution to international governance. We must move beyond merely reforming the international legal system to reassessing the fundamental assumptions that we take for grated when we attempt to use international law to deal with global environmental problems. Despite the rhetoric of a common future, climate change negotiations demonstrated that sovereignty is alive and well. In order to effectively address transboundary environmental problems such as climate change the concept of state sovereignty must be reconceptualized. The state should be displaced as the "*sole legitimate source of public policy.*"[318]

Many scholars have attempted to address the changing nature of state sovereignty. Michael Hardt and Antonio Negri suggest that a global order has emerged, "a new logic and structure of rule—in short, a new form of sovereignty. Empire is the political subject that effectively regulates these exchanges, the sovereign power that governs the world."[319] In their view, although the sovereignty of nation-states has declined, this does not mean that sovereignty itself has entirely disappeared. It is their contention that "sovereignty has taken a new form, composed of a series of national and supranational organisms united under a single logic of rule. This new global form of sovereignty is what [they] call Empire."[320] In their second book, *Multitude: War and Democracy in the Age of Empire* Hardt and Negri focus on the living alternative that they argue grows within Empire. In this regard, they argue that there are two faces to globalization:

> One, Empire spreads globally its network of hierarchies and divisions that maintain order through new mechanisms of control and constant conflict. Globalization is also the creation of new circuits of cooperation and

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[318] Elliott, *The Global Politics of the Environment*, p. 118.

[319] Michael Hardt and Antonio Negri, *Empire* (Cambridge: Harvard University Press, 2000), p. xi.

[320] Ibid., p. xii.

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collaboration that stretch across nations and continents and allow an unlimited number of encounters. This second face of globalization is not a matter of everyone in the world becoming the same; rather it provides the possibility that, while remaining different, we discover the commonality that enables us to communicate and act together.[321]

Therefore, multitude is working through Empire to create an alternative global society. They suggest that the conditions are emerging that give the multitude the capacity of democratic decision-making and that therefore sovereignty is no longer necessary.[322] They go on to discuss the power of the multitude and the project of a world beyond sovereignty. By combining the political ideas of James Madison and Lenin, they create a political project that seeks to destroy sovereignty and authority while promoting global democracy.

Karen Litfin suggests the familiar concept of sovereignty expressed in the modern territorial state, is being unsettled by a variety of forces, including environmental ones.[323] But it is not being eroded in a wholesale or homogeneous fashion. In fact, states are essential because they posses sufficient authority, legitimacy, resources, and territorial control to enforce environmental rules and norms. Sovereignty must be understood as a socially constructed institution that varies across space and time, with multiple meanings and practices. She also points out that states cooperate to cope with environmental problems by creating new international regimes and organizations. Although these new institutions may decrease states' autonomy of action, they always reinforce their legal sovereignty and often enhance their problem-solving capacity. As a

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[321] Michael Hardt and Antonio Negri, *Multitude: War and Democracy in the Age of Empire* (New York: Penguin Books, 2004), pp. xiii-xiv.

[322] Hardt and Negri go to great lengths to distinguish the conception of the multitude from other social subjects such as the people, the masses, or the working class. See Ibid., pp.xiv-xv.

[323] Karen T. Litfin, *The Greening of Sovereignty* (Cambridge: MIT Press, 1998), p. 3.

result, states remain the key players by engaging in sovereignty bargains, in which some

limitations on their autonomy which ultimately enhance the effectiveness of sovereignty

are voluntarily accepted. The cumulative effect of such bargains may be to alter the

norms and practices of sovereignty, and perhaps create and legitimize alternative

channels of political activity. Similarly, Mark Levy, Robert Keohane and Peter Haas

have argued that, although environmental regimes may limit the scope of governments to

act unilaterally, they also facilitate collective state-based problem solving.[324] By placing

states at the centre of institutional responses and strengthening their capacity to act

collectively, it is argued, the menu of choices available to states is being expanded, not

restricted.

Other scholars and activists, including those associated with the critical legal

studies movement continue to work towards global democracy while downplaying the

significance of the state. I briefly mentioned the literature surrounding global civil

society in Chapter Four. This would include the work of Ronnie Lipschutz, Paul Wapner

and others on social movements. Here the emphasis is not so much on international

environmental treaties and institutions, but on "politics beyond the state," or the

formation of alternative channels of control an authority and the reshaping of social

meanings and beliefs by nonstate actors. Such organizations and networks provide an

alternative framework from which to organize political and social life. In this regard,

sovereignty should not be seen as an impediment to progress.

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[324] Mark A. Levy, Robert O. Keohane, and Peter M. Haas, "Improving the Effectiveness of International Environmental Institutions," in Peter Haas, Robert Keohane, and Mark Levy (eds.), *Institutions for the Earth: Sources of Effective International Environmental Protection* (Cambridge: MIT Press, 1993), especially pp. 415-417.

Sovereignty can be considered both a blessing and a curse. It is the international level equivalent of individual liberty. On the one hand, it fails to properly take into consideration all interests within, as well as outside, the state. On the other hand, it represents a decentralized legal entity that is better able to represent local groups and interests than would a more centralized institution. In this regard, state sovereignty holds both promise and peril. However, the primitive and amorphous nature of international law lends itself to modification and further development in ways that might be able to capitalize on its strengths while overcoming its weaknesses.

There has been considerable discussion in the literature about the prospects of global governance, that is, governance without government. In this regard, it is not surprising to see that states have entered into an international social contract of sorts in an effort to address these issues. Although it is clear that we do not have an omnipotent world government with authority over states in regards to their ability to effectuate change within their territories, we do have what has increasingly been referred to as global governance. This includes international institutions such as the United Nations and the number of functional agencies that exist within the United Nations framework, as well as nongovernmental organizations, financial institutions, and global civil society. In chapter IV I discussed the existence of a system of global environmental governance and ultimately concluded that such a system remains weak and ineffective. Within a decentralized system, international agencies often duplicate efforts while collectively failing to address other issues. In that context, we can see the problems associated with purely decentralized legal mechanisms. Nevertheless, we must recognize that there is no one-size-fits-all solution to these problems. In this regard, we must pursue theoretical

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pluralism, as well as pluralist strategies and approaches to issues such as climate change. Global governance provides an alternative approach that may very well be an improvement over reliance on an international legal system of states.

Global institutions need to be strengthened, but many other actors, including individuals and private organizations must also take on far more responsibility for environmental governance. International environmental law and institutions can be used to coordinate international cooperation of global environmental problems, but they are not adequate in and of themselves. Additionally we need to explore other legal and nonlegal, centralized and decentralized mechanisms for addressing these issues. As discussed, one of the most significant actors that have not been held accountable in regards to climate change is corporations. Much more attention must be given to the ways in which corporations are able to avoid responsibility for the damage that they cause. Again, critical legal studies can be used to illuminate the power that they wield and they ways in which they might be held more accountable. Further, individuals must step out from behind the protections of the state and take responsibility as well. Individuals are not innocent or powerless to affect and address global environmental degradation, particularly when the damage is done to support their level of affluence.

It is also worth noting that decentralization has certain advantages, particularly when coupled with more centralized mechanisms in our pursuit of international environmental justice. For example, the community—whether city neighborhood, village, or rural locale—is a viable context for legal organization. Local communities are conducive to implementing a horizontal legal system based on representative authority and the delegation of power. In this regard, the community can be seen as a

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complimentary legal system with decentralized institutional and procedural supports, and instrumental in our quest for participation and recognition. Yet, support for decentralization should not be perceived as a replacement for centralized legal mechanisms. As noted by Richard Danzig, "if decentralization is to be successful it will involve the construction of a complimentary system, supplementing and in some areas substituting for, but nowhere destroying or totally displacing, the existing apparatus."[325]

Low and Gleeson suggest that the challenge of the new century—that is, the challenge of ecological and environmental justice—is nothing less than the transformation of the global institutions of governance, the reinstatement of democracy at a new level, the democratization of both production and its regulation.[326] In this regard, we must remain critical of the use of international environmental law and the injustices that exist. International institutions and laws hold the promise of garnering international cooperation to address the very complicated issues that face the globe, but not without continuous attention to issues of justice. This project has only begun to analyze these issues and the potential solutions that must be explored.

Concluding Remarks

Traditionally it is said that there are three options in responding to climate change: prevention, mitigation, and adaptation. Prevention has been an option for sometime, yet we have largely failed in this regard. Of course, adaptation is the least

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[325] Richard Danzig, "Toward the Creation of a Complimentary Decentralized System of Criminal Justice," *Stanford Law Review*, Vol. 26, 1973, p. 7.

[326] Low and Gleeson, *Justice, Society, and* Nature, p. 213.

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desirable and would be the most unjust;[327] therefore the debate is currently over

mitigation. Our attempts to mitigate the effects of climate change have largely taken the

form of international law. This project suggests that there are a number of problems with

a climate change regime that relies heavily on the use of international environmental

law, yet is locked within the theoretical limitations of liberal legal theory. Such a system

is unable to address the variety of practical, social and ethical issues raised by such a

complicated problem as climate change. This does not mean that international

environmental law is of no value in our quest to create a more just and equitable world.

We must remain critical of the ways in which law is used to justify a system that benefits

some at the expense of others.

It is important to note that climate change is a challenge to each individual as

much as the state. However, while individuals may be capable of developing personal

responsibility through their own choice, it is unrealistic to expect states to develop global

responsibility. Prue Taylor notes:

> States are not conscious entities, not living beings, but social institutions.
> They cannot initiate change themselves, rather they reflect and execute
> the change made by individuals, groups and society. Similarly,
> international law is not itself capable of bringing about change.
> International law is merely a body of treaties, principles and institutions.
> Its use is determined by the ability of states to incorporate international
> obligations within their municipal law and, at the same time, respond to
> new challenges.[328]

Although state action is indispensable in our effort to harness international cooperation

to deal with global problems such as climate change, we must question the assumptions

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[327] Adaptation has the potential to reduce adverse effects of climate change and can often produce immediate ancillary benefits, but will not prevent all damages. Intergovernmental Panel on Climate Change, *Climate Change 2001*, p. 12.

[328] Taylor, *An Ecological Approach to International Law*, p. 2.

of an international legal system that is based on state sovereignty. Ultimately, sovereignty must be recreated to incorporate a concern for planetary sovereignty and the sovereignty of peoples. This will require a greater democratization of environmental governance to incorporate not just greater participation but also to pay greater attention to and respond more effectively to local voices and local concerns rather than seeing the state as the sole arbiter of competing interests in the determination of public policy. Only then will we be able to rejuvenate the international legal system to address the practical and ethical issues that it seeks to remedy.

In sum, there is substantial work to be done. Centralized and decentralized legal mechanisms must be mixed with non legal and other creative approaches to global environmental problems. Critical international legal studies can help us understand and appreciate the magnitude and severity of the problems that currently face humanity. Global climate change is a serious problem that must be addressed with an explicit concern for international environmental justice. Nevertheless, much of our understanding of climate change and our efforts to uses international cooperation to address the issues have been limited by a reliance on liberal theories of law and justice. There is a noticeable gap in the literature applying the lessons of critical legal studies and critical jurisprudence more generally to international phenomena. In this regard, there is a need for more critical analysis of international law and institutions. Only with such analysis can we effectively bridge the divide between theory and practice.

The prospect of global climate change raises a number of very difficult issues. This project analyzes the theoretical assumptions that underlie our collective responses to these issues. Critical legal scholars suggest that there is a tenuous connection between

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law and justice. As a result, we must remain critical of the extent to which international environmental law can be used to achieve international environmental justice. As Schlosberg points out, "[j]ustice in theory may happen in isolation, neutrality, or behind a veil of ignorance, but that is simply not the case in practice."[329] It is absolutely essential that we move from theory to practice in order to make the world a more just place. Therefore, we must think critically about the practical implications of potential responses to global climate change. International environmental justice is an illusive concept, yet we must remain committed to it while seeking solutions to the difficult problems humanity faces.

This requires us to think critically about the implications of global capitalism and the structural level of analysis. Climate change negotiations fail to adequately address issues of economic production, consumption, and growth. While recognizing that law often does act as a weapon and shield for the capitalistic organization of society, critical legal scholars argue that law functions as much as a legitimating force as a deterministic instrument; law and society are not separate spheres, but are mutually constitutive and interpenetrative.[330] Therefore, we must move beyond our very limited understandings of law and justice and pursue broad, as well as localized solutions to global environmental problems such as climate change. This will require states, individuals, and corporations to take greater responsibility for their actions, and the ways in which their actions impact the natural world. International environmental justice depends on such responsibility.

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[329] Schlosberg, *Reconceiving Environmental Justice*, p. 520.

[330] Hutchinson, *Critical Legal Studies*, p. 7.

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