

Posthuman international law and the rights of nature

Dr Emily Jones, School of Law and Human Rights Centre, University of Essex*

Both posthuman theory and the rights of nature (RoN) movement have the potential to challenge the anthropocentrism of international environmental law (IEL). Scholars have begun to document the transformative shifts that could occur through the application of posthuman legal theory to IEL, but these theories have yet to be applied to law in practice. On the other hand, RoN have been applied in domestic law but little in international law, while the question of what RoN includes and excludes remains contested.

This article brings posthuman theory and RoN together, reflecting on how posthuman legal theory can contribute to the framing of RoN, with a focus on challenging the anthropocentrism of IEL. The article argues, first, that the next step for posthuman legal theory will be its application to existing law. Noting convergences between posthuman legal theory and the rights of nature (RoN), the article contends that those seeking to apply posthuman legal theory might find some interesting alliances by turning to RoN. Second, it is argued that using posthuman theory to frame RoN could help to ensure that RoN live up to their transformative potential.

1 INTRODUCTION

International environmental law (IEL) has developed greatly over the past few decades, seeking in part to address some of the challenges posed by environmental degradation.¹ However, IEL is anthropocentric, situating human needs, and particularly economic interests,² above other values and considerations while separating the governance of humans, non-humans, and their environments into different areas of law.³ This fragmentation operates to ensure that different entities and systems are protected in different ways, and IEL's understanding of 'the environment' has produced a legal system that does not reflect the reality of how ecosystems work. Legal understandings of the environment, therefore, not only uphold problematic value hierarchies but also deny the reality that environments, humans, and non-humans are

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¹ For an overview of the development of IEL and the multiple ways in which it seeks to protect the environment, see: P Sands and J Peel, *Principles of Environmental Law* (Cambridge University Press, Cambridge 4th edn 2018).

² The prioritization of economic interests is also a problem within international law generally. See: G Baars, *The Corporation, Law and Capitalism: A Radical Perspective on the Role of Law in the Global Political Economy* (Haymarket Books, Chicago 2020); N Tzouvala, *Capitalism as Civilisation: A history of international law* (Cambridge University Press, Cambridge 2020).

On IEL's neoliberal anthropocentrism, see: L Kotzé et al., 'Friend or Foe? International environmental law and its structural complicity in the Anthropocene's climate injustices' (2021) 11(1) *Oñati Socio-Legal Series* 180.

³ For example, the governance of human interests in environmental issues tends to be covered, at the international level, primarily through human rights law. However, the governance of the sea is governed under the Law of the Sea whereas issues relating to biodiversity are covered in different Conventions again. While these instruments are sometimes brought together to bear on one another, too often they are treated as distinct, resulting in conflicts. See: UN General Assembly, Convention on the Law of the Sea, 10 December 1982; United Nations, Convention on Biological Diversity, 5 June 1992 (1760 U.N.T.S. 69).

interconnected and interdependent.⁴

This article argues that posthuman theories (which seek to dismantle hierarchies between humans (such as gender, race, and class) as well as the idea that the human sits in hierarchical superiority over all other entities, including matter and non-humans⁵) can be used to destabilize the problematic anthropocentrism of the law and to re-think the onto-epistemological basis of IEL.

Posthuman legal theory has expanded as an area of research over the past few years. Scholarship has focused on various key issues in law, from posthuman data to military technologies.⁶ Scholarship has also emerged addressing questions concerning how the law can better account for matter,⁷ with research beginning to emerge on how international law can better account for matter.⁸ Posthuman theory has also been applied to environmental law.⁹ While scholarship on posthuman theory and law has been successful in challenging the humanist and anthropocentric underpinnings of legal frames, as legal theorist Margaret Davies notes, the application of these theories to the law itself — to legal practice — is the next step that needs to be taken.¹⁰

In response to this challenge, this article draws on the work of critical environmental law scholars who use posthuman theory to challenge the current onto-epistemic basis of IEL,¹¹ while taking up Davies' call for applied posthuman legal theory. The article focuses on the rights of nature (RoN) movement, noting the links between some of the understandings of the environment that underpin RoN and posthuman theory. While nature has been recognized as having rights in some domestic contexts,¹² RoN have yet to be adopted within international

⁴ While the term 'the environment' is sometimes used within environmental governance to denote flora and fauna only, I have taken this term to mean the wider material world.

⁵ R Braidotti, *Posthuman Knowledge* (Polity Press, Cambridge 2019).

⁶ On conflict and military technologies, see: M Arvidsson, 'Targeting, Gender, and International *Posthumanitarian* Law and Practice: Framing the Question of the Human in International Humanitarian Law' (2018) 44.1 *Australian Feminist Law Journal* 9; G Heathcote, 'War's Perpetuity: Disabled Bodies of War and the exoskeleton of Equality' (2018) 44.1 *Australian Feminist Law Journal* 71; E Jones, 'A Posthuman-Xenofeminist Analysis of the Discourse on Autonomous Weapons Systems and Other Killing Machines' (2018) 44.1 *Australian Feminist Law Journal* 93; L Wilcox, 'Embodying Algorithmic War: Gender, race and the posthuman in drone warfare,' (2016) *Security Dialogue*, 1; L Wilcox, 'Drones, swarms and becoming-insect: feminist utopias and posthuman politics' (2017) 116 *Feminist Review*, 25.

On posthuman data, see: J Käll, 'The Materiality of Data as Property' (2020) 61 *Harvard International Law Journal Frontiers* 1; J Käll, 'A Posthuman Data Subject? The Right to be Forgotten and Beyond' (2017) 18(5) *German Law Journal* 1145.

⁷ See: M Davies, *Law Unlimited* (Routledge, Oxford and New York 2017); A Philippopoulos-Mihalopoulos, *Spatial Justice: Body, Landscape, Atmosphere* (Routledge, Oxford and New York 2015).

⁸ J Hohmann, 'Diffuse subjects and dispersed power: New materialist insights and cautionary lessons for international law' (2021) *Leiden Journal of International Law* 1.

⁹ E.g. A Grear, 'Anthropocene, Capitalocene, Chthulucene: Re-encountering environmental law and its 'subject' with Haraway and New Materialism,' in L J Kotzé (ed), *Environmental Law and Governance for the Anthropocene*, (Hart, Oxford and Portland, Oregon 2017).

¹⁰ Davies supra (n 7), 72.

¹¹ Grear supra (n 9); A Philippopoulos-Mihalopoulos, 'Towards a critical environmental law,' in A Philippopoulos-Mihalopoulos (ed), *Law and Ecology: New Environmental Foundations* (Routledge, Abingdon 2011); D Otto and E Jones, 'Thinking through anthropocentrism in international law: queer theory, posthuman feminism and the postcolonial' (2020) LSE Centre for Women, Peace and Security blog <https://www.lse.ac.uk/women-peace-security/assets/documents/2020/Final-Jones-and-Otto-Anthropocentrism-Posthuman-Feminism-Postcol-and-IL-LSE-WPS-Blog-2019-002.pdf> last accessed 23 November 2020; A Grear and D Otto, 'International Law, Social Change and Resistance: A conversation between Professor Anna Grear (Cardiff) and Professorial Fellow Dianne Otto (Melbourne)' (2018) 26 *Feminist Legal Studies* 351.

¹² I discuss some of these contexts in more detail below. However, for an overview of the multiple contexts where RoN have been recognized, see: Global Alliance for the Rights of Nature's (GARN), 'RON Map' <https://www.therightsofnature.org/map-of-rights-of-nature/> last accessed 8 April 2021.

law.¹³ However, there is increasing international interest in doing so, and this article argues that those seeking to apply posthuman legal theory to IEL might find some useful alliances with RoN approaches. At the same time, it is also argued that posthuman theory can provide some insights for RoN. Seeking to think the law through the posthuman, this article outlines the potentials in RoN from a posthuman perspective, while addressing the limitations and highlighting the barriers faced when working within, albeit seeking to change, the liberal humanist and anthropocentric frame of IEL.

It should be noted that Indigenous peoples have played a central role in ensuring the recognition of RoN in many domestic jurisdictions.¹⁴ While some posthuman theories and some strands of Indigenous thought have commonalities,¹⁵ there are also divergences, with Indigenous theories and practices being multiple and differing. It should be noted that not all Indigenous peoples support a RoN approach. Some Australian Nations have, for example, rejected the approach, calling instead for stronger Indigenous environmental governance through ‘Caring for Country’.¹⁶

While much work needs to be done to bring Indigenous and posthuman thought together, noting cross-overs and differences, such a project lies outside the scope of the present article, which focuses on why posthuman legal theorists should engage with and support the RoN movement and what RoN might also learn from such engagements.¹⁷

2 THE ANTHROPOCENTRIC AND FRAGMENTED ‘ENVIRONMENT’ OF INTERNATIONAL ENVIRONMENTAL LAW

IEL is made up of a series of focused instruments that govern different parts of the environment, with different principles and approaches emerging accordingly. Examples include

¹³ See: H Harden-Davies et al., ‘Rights of Nature: Perspectives for Global Ocean Stewardship’ (2020) 122 Marine Policy 1. There are multiple international documents which have called for the recognition of RoN – see Section 4.

¹⁴ E O’Donnell et al., ‘Stop Burying the Lede: The Essential Role of Indigenous Law(s) in Creating Rights of Nature’ (2020) 9(3) Transnational Environmental Law 403.

On the links between indigenous thought and Earth jurisprudence, see: K Anker, ‘Ecological Jurisprudence and Indigenous Relational Ontologies,’ in K Anker et al. (eds), *From Environmental to Ecological Law*, (Routledge, Oxford and New York 2021).

¹⁵ See: S Bignall and D Rigney, ‘Indigeneity, Posthumanism and Nomad Thought: Transforming Colonial Ecologies,’ in R Braidotti and S Bignall (eds), *Posthuman Ecologies* (Rowman & Littlefield, London 2019); S Bignall, S Hemming and D Rigney, ‘Three Ecosophies for the Anthropocene: Environmental Governance, Continental Posthumanism and Indigenous Expressivism’ (2016) 10.4 Deleuze Studies 455.

¹⁶ V Marshall, ‘Removing the Veil from the ‘Rights of Nature’: The Dichotomy between First Nations Customary Rights and Environmental Legal Personhood’ (2020) Australian Feminist Law Journal <<https://www.tandfonline.com/doi/abs/10.1080/13200968.2019.1802154>> accessed 23 November 2020.

It is also important to note that Caring for Country is a rich and complex concept. Deborah Bird Rose’s work on the many meanings of Country exemplifies this well. See: D B Rose, ‘Country’ in D B Rose, *Nourishing Terrains: Australian Aboriginal Views of Landscape and Wilderness*, (Australian Heritage Commission, 1996) 6. Pelizzon and Kennedy also discuss the many meanings of Country. See: A Pelizzon and J Kennedy, ‘Welcome to Country: Legal Meanings and Cultural Implications’ (2012) 16 Australian Indigenous Law Review 58, 65-66.

¹⁷ For more on indigenous perspectives on RoN, see: J Ruru, Listening to Papatūānuku: a call to reform water law’ (208) 48 Journal of the Royal Society of New Zealand 215; T A Eisenstadt and K Jones West, *Who Speaks for Nature? Indigenous Movements, Public Opinion and the Petro-State in Ecuador*, (Oxford University Press, Oxford 2019); I Vargas-Roncancio, ‘Conjuring sentiment beings and relations in law,’ in K Anker et al. (eds), *From Environmental to Ecological Law*, (Routledge, Oxford and New York 2021). On Indigenous legal theory and the environment (though not necessarily from a RoN perspective), see: A Mills, ‘Aki, Anishianaabek, kaye tahsh Crown’ (2010) 9(1) Indigenous Law Journal 107 (here, on concepts of relation to land and natural resources); and S Hemming et al., ‘Indigenous Nation Building for Environmental Futures: Murrundi flows through Ngarrindjeri country’ (2019) 26(3) Australasian Journal of Environmental Management 216 (here, on Indigenous Nation (re)building and water management).

treaties that focus on conservation and sustainable use of natural resources and biodiversity,¹⁸ the obligation to preserve the marine environment,¹⁹ and instruments to decrease pollution,²⁰ and so forth. Positive obligations focus on specific areas, and there is no general obligation in international law to protect the environment.²¹ While the UN General Assembly has taken up the task of environmental protection, most notably through the work of the UN Environment Programme (UNEP), there is also no single organization that has the competence over all environmental matters.²² The issue of fragmentation within public international law generally²³ is thus a key challenge within IEL too,²⁴ and while certain areas of IEL are moving towards a more integrated approach, changes are occurring only within specific areas.²⁵ While some efforts to unite IEL are being made through the ongoing negotiations to create a Global Pact for the Environment,²⁶ the aim of the Pact is to consolidate existing principles, with new principles being created only as required for consolidation purposes.²⁷ Simultaneously, environmental protection regimes²⁸ — and thereby the principles that Pact negotiations are seeking to consolidate — remain anthropocentric. Overall, and despite integrative developments, IEL remains highly fragmented. Different parts of the environment remain subject to different legal regimes and obligations.²⁹ In addition, as a specialized area of general international law, IEL is formed by laws arising from the sovereign will of states — a framework for international law-making that ensures that state interests, and thereby economic interests, must be balanced against environmental damage and may even be protected over environmental interests.³⁰ These structural formations work to ensure that the central subject of IEL remains stubbornly

¹⁸ United Nations, Convention on Biological Diversity supra (n 3).

¹⁹ UN General Assembly, Convention on the Law of the Sea, supra (n 3), Article 192.

²⁰ Conference of the Parties, Adoption of the Paris Agreement, 12 December 2015, U.N. Doc. FCCC/CP/2015/L.9/Rev/1.

²¹ For example, looking at the Stockholm Declaration, it seems Principle 2 comes closest to seeking to protect the environment overall. However, environmental protection is named as needed for the sake of ‘future generations’, retaining an anthropocentric stance. See: Stockholm Declaration, UN General Assembly, United Nations Conference on the Human Environment, 15 December 1972, A/RES/2994.

²² The UN Environment Assembly (UNEA) does do some important work here, however. See: <<https://environmentassembly.unenvironment.org/>> last accessed 23 November 2020.

²³ M Koskenniemi, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ International Law Commission 2006 A/CN.4/L.682.

²⁴ This has been noted by the UN Secretary General as well as the Ecological Law and Governance Association in the Oslo Manifesto. See: UN General Assembly, Report of UN Secretary General, ‘Gaps in International Environmental Law and environment-related instruments: towards a global pact for the environment’ 30 November 2018, A/73/419; Ecological Law and Governance Association, ‘Oslo Manifesto,’ <<https://elgaworld.org/oslo-manifesto>> last accessed 4 March 2021.

²⁵ Redgwell argues that ongoing developments within the remit of the UN Convention on Biological Diversity 1992 are possibly the strongest example of attempts at integration. C Redgwell, ‘International Environmental Law,’ in Malcolm D. Evans (ed), *International Law*, (Oxford University Press, 5th edn Oxford 2018), 677.

²⁶ UN General Assembly, ‘Resolution Adopted by the General Assembly on 10 May 2018: Towards a Global Pact for the Environment’ 10 May 2018, A/Res/72/277. See also: Global Pact for the Environment, ‘Where are we now?’ <<https://globalpactenvironment.org/en/the-pact/where-are-we-now/>> last accessed 8 April 2021. For a good overview of ongoing negotiations on the Pact, see: Y Aguila and J E Viñuales, ‘A Global Pact for the Environment: Conceptual foundations’ (2019) 28(1) *Review of European, Comparative and International Environmental Law* 3.

²⁷ On the balance in the negotiations between consolidation and innovation and the ability of the Pact to put forward provisions which may go beyond those found in existing Treaty regimes, see: Aguila and J E Viñuales, supra (n 26), 8.

²⁸ See: the Stockholm Declaration supra (n 21).

²⁹ See: U Natarajan and J Dehm, ‘Where is the Environment? Locating Nature in International Law’ (2019) TWAILR <<https://twailr.com/where-is-the-environment-locating-nature-in-international-law/>> last accessed 23 November 2020.

³⁰ See, e.g. the Principle of Sustainable Development.

anthropocentric.³¹

One key attempt at bringing a more integrated/holistic approach to environmental protection invokes international human rights law standards. The intersections between human rights and the environment are wide ranging, from the issue of environmental refugees to the environmental impacts of conflict.³² One of the most promising and rapidly developing convergences between human rights and the environment is to be found in the right to a healthy environment. While there is no global treaty that recognizes the right, the right has emerged in recent decades in the form of multiple hard and soft law sources, including treaties and international instruments;³³ the statutes and jurisprudence of regional human rights systems;³⁴ and the jurisprudence of UN human rights bodies and mechanisms.³⁵ The right to a healthy environment includes many elements, including ‘the right to breathe clean air, [and to have] access to clean water and adequate sanitation, healthy and sustainable food, a safe climate, and healthy biodiversity and ecosystems’.³⁶ The right has developed extensively in recent years, but is not universally accepted, yet ‘[i]n total, 124 States are parties to legally binding international

³¹ While the central subject of international law has never been the human *per se*, in that the state is the primary subject of international law, this point remains. For example, Grear and Blanco exemplify the central role Transnational corporations play in the global order. See: E Blanco and A Grear, ‘Personhood, jurisdiction and injustice: law colonialities and the global order’ (2019) 10(1) *Journal of Human Rights and the Environment* 86. Similar such points have also been made by Baars and Tzouvala. See: Baars *supra* (n 2)); Tzouvala *supra* (n 2). While indeed, the corporation, the state, international organizations (i.e. non-human legal subjects) play a central role in international law, alongside, of course, individuals within specific areas of the law (e.g. human rights), my conjecture is that the law remains anthropocentric despite this. This is because the law serves human needs primarily. In fact, as the work cited above exemplifies, the central role of the corporation upholds global inequalities between humans and the privileging of some human interests over others, despite the façade of the corporation itself. As Grear and Blanco argue (99-102), this has occurred in part due to the liberal, individual framing of legal personhood which has allowed some subjects which fit this problematic, racialized and masculinist model well, such as the corporation, to foster power. See also here, on the latter point: R Sydney Parfitt, ‘Theorizing Recognition and International Personality’ in A Orford and F Hoffman (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, Oxford 2016) 583.

On a similar note, Usha Natarajan and Kishan Khoday argue that IEL is set-up in a way that re-enforces ecological harm. See: U Natarajan and K Khoday, ‘Locating Nature: Making and Unmaking International Law’ (2014) 27(3) *Leiden Journal of International Law* 573.

³² The relationship between the enjoyment of rights and the quality of the human environment was first recognised in 1968. See, UN General Assembly, 1968, UNGA Res 2398 (XXII).

On environmental refugees see: UNHCR, ‘Climate change and disaster displacement,’ <<https://www.unhcr.org/uk/climate-change-and-disasters.html>> last accessed 23 November 2020; On the environmental impacts of conflict, see: E Cusato, ‘International Law, the Paradox of Plenty and the making of Resource-Driven Conflict’ (2020) 33(3) *Leiden Journal of International Law* 649; K Hulme, *War Torn Environment: Interpreting the Legal Threshold* (Brill, Leiden 2004).

³³ See, e.g. the 1972 Stockholm Declaration (*supra* (n 21)), Principle 1; UN General Assembly, UNGA Res 45/94 (1990)

Many instruments that invoke ideas around the right to live in a quality environment are also linked to the rights of future generations e.g. Declaration of the Hague on the Environment, 11 March 1989, 28 ILM 1308 (1989) or the rights of the child e.g. Convention on the Rights of the Child, 28 November 1989, in force 2 September 1990, 29 ILM 1340 (1990), Article 29(e).

³⁴ E.g. African Charter on Human and Peoples' Rights, 1982, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, Article 24 Organization of American States (OAS), Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"), 16 November 1999, Article 11; Inter-American Court of Human Rights Advisory Opinion OC-23, 15 November 2018.

³⁵ Much here, has been developed specifically in relation to human rights and the movement and dumping of toxic and dangerous products and wastes. See, e.g. Sub-Commission on Prevention of Discrimination and Protection of Minorities (1998), Res 1998/26; UN Human Rights Council, (2007) Res 5/1, UN Doc. A/HRC/RES/5/1, Appendix I; UN Human Rights Council, (2008), Res 9/1, UN Doc A/HRC/RES/9/1.

See also; Report of the Special Rapporteur on Human Rights and the Environment, ‘Issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment,’ Human Rights Council, 2019, A/HRC/40/55, p. 2-4.

³⁶ Special Rapporteur on Human Rights and the Environment *supra* (n35), para 17.

treaties that explicitly include the right to a healthy environment.³⁷ The UN Special Rapporteur on Human Rights and the Environment has argued that there is ‘a compelling basis for the United Nations to move expeditiously to provide global recognition of the right to a healthy and sustainable environment’.³⁸ Despite this, the human right to a healthy environment still has some way to go to be universally recognized, and what the right includes and how it is enforced differs greatly across regions and states. While the right to a healthy environment thus encompasses many possible elements, potentially providing a more integrated means by which a locality and its overall ‘health’ can be protected, the right remains limited, not only in terms of its enforcement but also in the way in which it is framed. Anthropocentrism, after all, is central to human rights. Since the right to a healthy environment is a human right and therefore protects human interests primarily, the right is enforced to ensure that humans live within a healthy environment. Naturally, this means that environmental damage that does not (at first glance) impact humans and/or their immediate environments but nevertheless impacts other species — and/or habitats without human occupants (such as the high seas) — is not addressed by the right in its current framing.³⁹ Accordingly, while the human right to a healthy environment is indeed one of the most promising areas of global environmental protection it, like IEL generally, continues primarily to promote human interests and is marked by the deep anthropocentrism that pervades the fragmented way in which interests are protected in IEL.

As Stephen Turner argues on the basis of related concerns, ‘the very design of the law itself is fundamentally predisposed to environmental degradation and forms part of a dysfunctional global legal architecture which cannot achieve environmental sustainability’.⁴⁰ IEL reproduces a problematic subject/object binary for which humans are the central subject of the law and ‘the environment’ is mere object. This remains the case both when the environment is being protected (where it is still seen as an object) as well as when it is being exploited, i.e. as an economic resource. Non-humans and the environment thus range along what Anna Grear calls a ‘spectrum of objectifications’.⁴¹

Such critiques have led Grear to ask whether ‘environmental law [can] respond to alternative modes of knowing and coordination? Can environmental law respect multiple forms of sharing the world?’⁴² It is clear from the brief overview of IEL just offered that IEL has a long way to go to address these questions in the positive. Grear draws on posthuman and new materialist theory to seek to answer the questions she poses.⁴³ It is to such theories that this article now also turns its attention.

3 POSTHUMAN THEORY

To understand whether posthuman theory can help re-imagine IEL, there is a need to outline what posthuman theory is and what strands of posthuman theory I will draw on here. Posthuman theories broadly call for an account of subjectivity that includes non-human entities, including a better understanding of the agency of matter and/or ‘the environment’.⁴⁴ Critical posthuman theory sits at the convergence between post-humanism and post-anthropocentrism, and explicitly seeks to dismantle hierarchies between humans, such as gender, race and class, as

³⁷ Special Rapporteur on Human Rights and the Environment supra (n35), para 11.

³⁸ Special Rapporteur on Human Rights and the Environment supra (n35), para 16.

³⁹ This is a point Neimanis has raised, albeit in relation to the right to water. See: A Neimanis, ‘Bodies of Water, Human Rights and the Hydrocommons’ (2009) 21 TOPIA: Canadian Journal of Cultural Studies 161, 173.

⁴⁰ S J Turner, *A Global Environmental Right*, (Routledge, Oxford 2014) 32.

⁴¹ Grear supra (n 9), 87.

⁴² Grear supra (n 9), 90.

⁴³ Grear supra (n 9), 90.

⁴⁴ R Braidotti, *The Posthuman* (Polity Press, Cambridge 2013) 82.

well as to dismantle the idea that the human sits in hierarchical supremacy over other subjects—including the environment and non-humans.⁴⁵ Posthuman theory therefore brings critiques of humanism as found, for example, in critical race studies, gender theory and critical disability studies together and alongside critical animal and environmental studies, and sites itself at the conjunction between these areas of study to provide a convergent critique of the exclusionary nature of the so-called human subject situated at the centre of Western philosophy.⁴⁶ Re-thinking law through a posthuman lens and working to dismantle the dominant subject situated at the heart of the legal system would have radical implications for how the law is envisaged.⁴⁷

Posthuman theory is a vast and varied field. In this article, I am primarily interested in posthuman theories of new materialism. New materialism is part of the posthuman convergence between post-anthropocentrism and post-humanism,⁴⁸ although new materialism, which broadly seeks to re-situate the importance of matter in Western thought, lies more squarely within post-anthropocentrism. Drawing on new materialism within the wider frame of posthuman theory ensures that critiques of humanism are not lost when undertaking the new materialist shift. Leaning into posthuman theory brings the question of who is seen as a subject and questions of matter together. This avoids the risk in some strands of new materialist thinking (which have been subject to criticism) that in seeking to re-centre ontology, epistemology is sometimes sidelined, producing a theory of matter that, ultimately, thinks about matter alone.⁴⁹ For critics, this neglect of epistemology results in an inadequate account of how new materialist perspectives apply in a world where inequalities between humans remain.⁵⁰ Posthuman theory, in bringing together critiques of both humanism and anthropocentrism, ensures that the question of matter's significance can be thought without risking the displacement of important epistemological turns that have come about through feminist, queer, critical race, postcolonial and crip theory among others.⁵¹

What I am terming here as 'posthuman theories of new materialism' include a broad

⁴⁵ Braidotti supra (n 5)..

⁴⁶ On critical race studies, the postcolonial and posthumanism see, for example: R Amaro, 'Afrofuturism' in R Braidotti and M Hlavajova (eds), *Posthuman Glossary* (Bloomsbury, London and New York 2018); Bignall and Rigney, supra (n 15); Bignall, Hemming and Rigney supra (n 15).

On gender and posthumanism see, e.g. R Braidotti, *Posthuman Feminism* (Polity Press, forthcoming 2021); Otto and Jones supra (n 11); C Åsberg and R Braidotti (eds), *A Feminist Companion to the Posthumanities* (Springer International, 2018); Jones supra (n 6); Wilcox supra (n 6); S Alaimo, *Bodily Natures: Science, Environment, and the Material Self* (Indiana University Press, Bloomington 2010); S Alaimo and S Heckman, *Material Feminisms* (Indiana University Press, Bloomington 2008); K Barad, 'Posthumanist Performativity: Toward an Understanding of how Matter comes to Matter' (2003) 28(3) *Signs: Journal of Women and Culture in Society* 801; D Haraway, *Simians, Cyborgs and Women: The Reinvention of Nature* (Routledge, New York and Oxford 1991).

On critical disability studies and posthumanism see, e.g.: Heathcote supra (n 6); D Goodley, R Lawthom and K Runswick-Cole, 'Posthuman Disability Studies' (2014) 7 *Subjectivity* 341.

On critical animal studies and posthumanism see, for example; P MacCormack, 'Introduction' in P MacCormack (ed), *The Animal Catalyst: Towards Ahuman Theory* (Bloomsbury, London and New York 2014); J T Maher, 'Legal Technology Confronts Speciesism, or, We Have Met the Enemy and He is Us' in P MacCormack (ed), *The Animal Catalyst: Towards Ahuman Theory* (Bloomsbury, London and New York 2014); Y Otomo and E Mussawir (eds), *Law and the Question of the Animal: A Critical Jurisprudence* (Routledge, Oxford 2013).

On critical environmental studies/posthumanism see: S Mentz, 'Blue Humanities' in R Braidotti and M Hlavajova (eds), *Posthuman Glossary* (Bloomsbury, London and New York 2018); S Alaimo, *Exposed: environmental politics and pleasures in posthuman times* (University of Minnesota Press, Minneapolis and London 2016).

⁴⁷ Davies supra (n 7).

⁴⁸ Braidotti supra (n 5).

⁴⁹ R Braidotti, 'A Theoretical Framework for the Critical Posthumanities' (2019) 36(6) *Theory, Culture & Society* 31, 42-43.

⁵⁰ See: Braidotti supra (n 49), 42-43; S Choat, 'Science, Agency and Ontology: A Historical Materialist Response to New Materialism' (2017) *Political Studies* 1; Alaimo supra (n 46), 178-188.

⁵¹ See: D Haraway, *Staying with the Trouble: Making Kin in the Chthulucene* (Duke University Press, Durham 2016); Alaimo supra (n 46).

range of theories: from theories of ‘vibrant matter’;⁵² ‘onto-epistemology’;⁵³ ‘agential-realism’;⁵⁴ or ‘vitalist materialism’.⁵⁵ While the following paragraphs by no means provide a comprehensive review of this field, I have sought to provide an overview of some core arguments with the aim of applying these theories to IEL and, specifically, to RoN.

3.1 Posthuman theories of new materialism and IEL

Posthuman theories of new materialism challenge dominant understandings of subjectivity, stressing both the ‘force of living matter’ and the ways in which ‘nature-culture’ has already been complicated by techno-scientific discovery.⁵⁶ For example, Jane Bennett, in her work on ‘vibrant matter,’ challenges the binding of ‘subjectivity’ to the fantasy of ‘human uniqueness’⁵⁷ and the ‘fantasy that “we” are really in charge of those “its”’.⁵⁸ Bennett characterizes matter as an ‘actant’,⁵⁹ challenging the idea that objects are opposite to subjects through a focus on ‘thing-power’.⁶⁰ Bennett notes that humans are part of a shared, ‘vital materiality’.⁶¹ Humans impact upon, and are impacted by, things yet humans are also ‘a particularly potent mix of minerals’.⁶² Bennett, and posthuman theory more broadly, thus challenges the idea that agency is something held by humans alone but, rather, states that ‘the locus of agency is always a human-nonhuman working group’.⁶³

Challenging the centrality of humans as subject and matter as object is vital. Such centrality has long worked to uphold ideas that humans dominate the environment, justifying exploitation.⁶⁴ This in turn has prevented adequate understanding of the various non-human powers that circulate in the world.⁶⁵ Dismantling the subject/object binary that dominates Western thought is essential work, particularly when it comes to understanding ‘the environment’ and therefore IEL. This dismantling is also required if cultures of domination and extraction are to be challenged.

Posthuman new materialist theory centres the agency of matter, situating ‘the cultural’ within a wider collective of human and nonhuman interactions. Bruno Latour’s work on Actor-Network theory⁶⁶ is used to argue that the world is a network, a crisscrossing of multiple assemblages, both human and nonhuman, in which nature and culture are overlapping as opposed to distinct.⁶⁷ Such theories seek to create a world that could adequately account for that fact that, as Carolyn Merchant argues,

⁵² J Bennett, *Vibrant Matter: a political ecology of things* (Duke University Press, Durham and London 2010).

⁵³ K Barad, *Meeting the Universe Halfway: quantum physics and the entanglement of matter and meaning* (Duke University Press, Durham and London 2007).

⁵⁴ Barad supra (n 53).

⁵⁵ Braidotti supra (n 44), 55.

⁵⁶ Braidotti supra (n 44), 3.

⁵⁷ Bennett supra (n 52), ix.

⁵⁸ Bennett supra (n 52), x.

⁵⁹ Bennett supra (n 52), viii.

⁶⁰ Bennett supra (n 52), 2.

⁶¹ Bennett supra (n 52), 14.

⁶² Bennett supra (n 52), 11.

⁶³ Bennett supra (n 52), xvi.

⁶⁴ Bennett supra (n 52), ix.

⁶⁵ Bennett supra (n 52), ix.

⁶⁶ B Latour, *Reassembling the Social: An Introduction to Actor-Network Theory* (Oxford University Press, Oxford 2007).

⁶⁷ See: V Kirby, ‘Natural Convers(at)ions: Or, What if Culture was really Nature all along?’ in S Alaimo and S Hekman (eds), *Material Feminisms* (Indiana University Press, Bloomington 2007) 225.

The relation between humans and the nonhuman world is ... reciprocal. Humans adapt to nature's environmental conditions; but when humans alter their surroundings, nature responds through ecological changes.⁶⁸

Posthumanist theory can embrace such dynamics of reciprocity, but also renders visible deeper, more complex levels of entanglement: humans and non-humans are situated in co-emergent relationalities. In this sense, agency is never 'pure' or 'absolute' but rather, agency is always distributed, always conditioned by entanglements between agential 'beings', human, nonhuman and matter alike.⁶⁹ This, however, is a world where, as Haraway writes, '[n]othing is connected to everything; everything is connected to something'.⁷⁰ The repercussions of such relationalities directly challenge IEL's imagined separation of humans, non-humans, and environments into different legal spheres.⁷¹

Posthuman theories of matter itself also have implications for IEL. As Grear argues,

If matter has escaped its imposed (imagined) inertia — if matter begins to evade categorisations, to over-spill linear conceptions of causality, to generate meanings — then matter necessarily challenges the previous *taken for granted* of environmental law.⁷²

In short, posthuman understandings disrupt the object/subject binary that underlies IEL, challenging human exceptionalism and the idea that humans, non-humans, and environments can ever be understood in a disconnected way. To give a more concrete example, drawing on the work of Marcus Taylor: currently the law tends to view a river as an object. Environmental laws accordingly focus on regulating and conserving the use of river water, the river itself being seen as a static object able to be tamed by human actions.⁷³ Yet if one takes a posthuman approach, human and non-human connections can be more easily seen, as well as the ability of the river, itself, to act. Taylor uses the example of a drought in 2012 in the Deccan Plateau in India, explaining how the water initially dried up and noting the wider factors that caused this (including climate change as well as over consumption and water pollution, thus reducing the availability of clean water elsewhere). In response, local communities began to extract more groundwater to meet their needs, undermining small cattle farming practices that relied upon groundwater. This caused farmers to sell their cattle, increasing vulnerability in the area. In response, wealthier people began to use technology to drill deeper, extracting water and creating a further shortage for all. These people then sold the water to the farmers at a higher price.⁷⁴ This example shows the multiply related ways in which environments and humans interact with, and react to, one another as elements in an assemblage. A posthuman understanding allows all

⁶⁸ C Merchant, *Ecological Revolutions: Nature, Gender and Science in New England* (University of North Carolina Press, Chapel Hill 1989) 8.

⁶⁹ S Alaimo, 'Trans-Corporeal Feminisms and the Ethical Space of Nature,' in S Alaimo and Hekman (eds), *Material Feminisms* (Indiana University Press, Bloomington 2007), 246.

⁷⁰ Haraway supra (n 51), 31.

⁷¹ These theories also share some common concerns with Earth jurisprudence which likewise identifies how humans, non-humans and matter are all interconnected, albeit from a radically different starting point: e.g. T Berry, *The Great Work' our way into the future* (Bell Tower, New York 1999); C Cullinan, *Wild Law: A Manifesto for Earth Jurisprudence* (Green Books, 2003); A Naess, *Ecology of Wisdom* (Penguin, 2016); C Cullinan, *Wild Law: A Manifesto for Earth Justice* (Green Books, 2nd edn, Cornwall 2011); P Burdon, *Earth Jurisprudence: Private Property and the Environment* (Routledge, Oxford and New York 2017); N Rogers and M Maloney (eds), *Law as if Earth Really Mattered* (Routledge, Oxford and New York 2017).

⁷² Grear supra (n 9), 92— author's own emphasis.

⁷³ M Taylor, *The Political Ecology of Climate Change Adaptation: Livelihoods, agrarian change and the conflicts of development* (Routledge, Oxford and New York 2015).

⁷⁴ Taylor supra (n 73). See also: B Ohdedar, 'The Human Rights to Water in India: in search of an alternative commons-based approach in the context of climate change' in T Haller et al., *The Commons in a Glocal World: Global Connections and Local Responses* (Routledge, Oxford and New York 2019). With thanks to Birsha Ohdedar for the suggested example.

these factors and connections to be made analytically visible in a different way: The river is no longer a static object but a living actant which is in connection with human actants, responding to them in its own distinctive and lively manner. The human subject of human rights and the environment becomes ‘repositioned as just one partner’⁷⁵ in a ‘spatial and temporal web of interspecies dependencies’⁷⁶ in which lively matter is, itself, an actant, a ‘subject’ for which the law must adequately account.

An environmental law that is receptive to the epistemic shift required to take account of the insights of posthuman theory might allow for the casting-aside of ‘the eco-destructive assumptions and ideological closures of the Anthropocene-Capitalocene’⁷⁷ allowing, instead, for a more livable law of a different imaginary in which relations are tangled, tentacular and co-emergent: a law, to use Donna Haraway’s words, for the Chthulucene.⁷⁸

It is clear that posthuman theory will have radical implications for IEL, offering the potential to challenge and possibly to resolve some of the core tensions raised by critical IEL scholars. This potential arises precisely because posthuman theory challenges the same dominant Western epistemological frames that underlie IEL itself: i.e. anthropocentrism, humanism and the division of nature/culture and subject/object — and offers instead a more empirically faithful account of ‘the world’.

4 THE RIGHTS OF NATURE: A WAY FORWARD?

Over the past few decades, nature has begun to be recognized both as having rights and as being a legal person in certain contexts.⁷⁹ RoN laws are ‘emerging in response to extreme pressure on ecosystems, and on communities that live and rely on them’.⁸⁰ The call for the environment to have legal rights and/or personhood, allowing it to bring claims in law on behalf of ‘itself’, could challenge the anthropocentrism of IEL.

RoN has much in common with posthuman legal theories. A RoN approach has the potential to provide a more integrated account of the environment, with RoN laws directly challenging ‘the values of dominant political and economic systems, which view humans as separate from nature, treat the elements of nature as objects for human exploitation, and prioritize exponential economic growth over ecosystem functioning’.⁸¹ This aim very much aligns with posthuman theory and with its call for a greater understanding of the connection between human and non-human entities. Allowing nature as an actant and seeing nature as a connected ecosystem that encompasses multiple human and non-human interests legally able to have its rights presented in courts could help to tackle some of the shortcomings identified by critiques of IEL. However, crucially, the effectiveness of RoN in reaching these aims will depend on how nature and its rights are defined.

As noted earlier, RoN have been recognized in a variety of domestic contexts in multiple different ways⁸² and have yet to be implemented at the international level. Some states have,

⁷⁵ Grear supra (n 9), 92.

⁷⁶ D Haraway, *When Species Meet* (University of Minnesota Press, Minnesota 2008) 11.

⁷⁷ Grear supra (n 9), 95.

⁷⁸ See: Haraway supra (n 51).

⁷⁹ Post-anthropocentric conceptions of environmental governance have a long history. Much is left to be said about the relationship between these bodies of thought and RoN. See, e.g. CD Stone, *Should Trees have Standing? Law, Morality and the Environment* (Oxford University Press 3rd edn, Oxford and New York 2010); Berry supra (n 71); Naess supra (n 71); Burdon supra (n 71); Rogers and Maloney supra (n 71).

⁸⁰ C M Kauffman and L Sheehan, ‘The Rights of Nature: Guiding our Responsibilities through Standards,’ in S Turner et al. (eds), *Environmental Rights: The Development of Standards*, (Cambridge University Press, Cambridge 2019), 343.

⁸¹ Kauffman and Sheehan supra (n 80), 356.

⁸² D R Boyd, *The Rights of Nature: a legal revolution that could save the world*, (EWC Press, 2017).

however, begun to push for the international recognition of RoN. In 2009, the Bolivian President called on the UN General Assembly (UNGA) to adopt a Universal Declaration of the Rights of Mother Earth (UDRME).⁸³ In 2010, Bolivia then hosted the World People's Conference on Climate Change and the Rights of Mother Earth where around 35,000 people from over 140 countries⁸⁴ wrote the citizens' UDRME.⁸⁵ The text asserts the rights of nature, which includes the role of humans and pays particular attention to the multiple power dynamics that structure the climate change debate, calling for the 'decolonization of the atmosphere' while noting the links between the ways in which the environment is exploited and capitalist and patriarchal structures.⁸⁶ At the UN level, annual intergovernmental negotiations have been held since 2009 on constructing a non-anthropocentric understanding of sustainable development. Several UN General Assembly Resolutions and UN Secretary General Reports have now been produced that call for the recognition of RoN.⁸⁷ A series of UNGA Interactive Dialogues have also been held on Harmony with Nature.⁸⁸ In 2015, the UNGA called for the creation of an expert report on Earth Jurisprudence, establishing a global network of experts.⁸⁹ The Expert Report on Earth Jurisprudence that followed was released in 2016.⁹⁰ The Report recognizes the 'fundamental legal rights of ecosystems and species to exist, thrive and regenerate'.⁹¹ In 2017, the UNGA Dialogue focused on applying Earth Jurisprudence to the Sustainable Development goals.⁹² In terms of setting international standards, the jurisprudence of the citizen-led (and therefore non-binding) International Tribunal for the Rights of Nature, which applies the UDRME to real cases, is also of use.⁹³ Overall, and notwithstanding such developments, however, RoN has yet to be seriously considered within international law. Seeking to situate RoN within IEL will require considerable continued advocacy, but also offers potential, precisely because definitions have yet to be set.

To understand what RoN could include/exclude there is a need to analyze their application in domestic law. As noted above, Indigenous peoples have been central in obtaining RoN in various contexts. For example, Indigenous peoples played a key role in the recognition of RoN in Ecuador's 2008 constitution.⁹⁴ The constitution 'celebrates' nature, with nature being defined as 'Pachamama,' referring to the sacred deity revered by Indigenous peoples of the Andes.⁹⁵ In New Zealand, Indigenous peoples have also played a central role in the recognition of RoN. Here, RoN have been recognized through two agreements which came about following long negotiations processes with local Māori activists, (the Whanganui *īwi* in relation to the Whanganui river or Te Awa Tupua and the Tūhoe *īwi* in relation got the Te Urewera forest).⁹⁶ However, as also noted above, Indigenous people have not been involved in all instances of

⁸³ Evo Morales, 'Address by H.E. Mr. Evo Morales Ayma, the President of the Plurinational State of Bolivia', 64th Session of the General Assembly of the United Nations (2009).

⁸⁴ Stats on delegates from: Kauffman and Sheehan supra (n 80), 347.

⁸⁵ World People's Conference on Climate Change and the Rights of Mother Earth, April 22nd 2010, Bolivia, People's agreement <<https://pwccc.wordpress.com/support/>> last accessed 23 November 2020.

⁸⁶ World People's Congress supra (n 85).

⁸⁷ For a full list of these, see; UN Harmony with Nature, 'UN Documents on Harmony with Nature' <http://harmonywithnatureun.org/unDocs/> last accessed 23 November 2020.

⁸⁸ See; UN Harmony with Nature, 'Interactive Dialogues of the General Assembly' <<http://www.harmonywithnatureun.org/dialogues/>> last accessed 23 November 2020.

⁸⁹ United Nations, UNGA Res A/RE/S/70/208 (2015), 3–4.

⁹⁰ United Nations, UNGA Res A/71/266 (2016).

⁹¹ United Nations supra (n 90), 7.

⁹² UNGA, 'Report of the Secretary-General' (2017) UN Doc A/72/175.

⁹³ Rights of Nature Tribunal <<https://www.rightsofnaturetribunal.org/>> last accessed 23 November 2020.

⁹⁴ See: Eisenstadt and Jones West supra (n 13).

⁹⁵ Republic of Ecuador, Constitution of 2008, trans. Georgetown University, Preamble <<https://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>> last accessed 23 November 2020.

⁹⁶ Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (New Zealand); Te Urewera Act 2014 (New Zealand).

RoN recognition. For example, Indigenous groups are not involved in the proposed ‘right of nature’ Bill in the Philippines,⁹⁷ nor in the initial recognition of RoN in India (subsequently overruled by the Supreme Court).⁹⁸ It is clear, however, that Indigenous legalities have been central in the recasting of legal concepts that has led to the emergence of the recognition of RoN.⁹⁹

In 2008, Ecuador became the first country to recognize RoN constitutionally. Ecuador’s constitution outlines nature rights as being inherent to the Earth itself, a legal recognition and status that applies nationally. This broad national coverage differs from other RoN provisions, which focus on specific ecosystems.¹⁰⁰ For example, in New Zealand, the Whanganui River (Te Awa Tupua) and the Te Urewera forest¹⁰¹ have had their legal personality recognized.¹⁰² Here, however, the relevant laws define the boundaries of the two ecosystems and thus legal personality is only recognized in relation to these two specific areas — not nationwide. The latter is a more common approach to the application of RoN in domestic law, with the High Court of Uttarakhand in India too, for example, recognizing the legal personhood of Ganges and Yamuna Rivers alone.¹⁰³

From a posthuman perspective, recognition of RoN within a bounded area alone runs the risk of perpetuating fragmentation (depending on the construction of ‘an area’). Thinking about the development of posthuman theory-informed international RoN standards, RoN would require an entanglement-responsive approach recognizing the juridical implications of distributed agency and interconnection. Seeing nature as agentic, and accounting for the intimate connections between human and non-human lives and ‘environments’ would address core problems outlined above concerning IEL — namely its anthropocentric underpinnings and its fragmented nature. And, arguably, this kind of agency and connection must be recognized globally. Recognizing RoN within a bounded area alone potentially denies such interconnections beyond those boundaries.

RoN provisions differ in their content, but they do share at least one key commonality: the linking of the health and wellbeing of the environment to that of the people who live there such that the provisions allow people to bring legal claims on behalf of nature. In coming to the Te Awa Tupua agreement, for example, the Whanganui *imi* argued that they are connected to the environment they live in and that the river is alive, and an ancestor. The Te Awa Tupua Act recognizes the river as a legal person with ‘all the rights, powers, duties and liabilities of a legal person’.¹⁰⁴ To uphold the river’s interests, a guardian body (Tu Pou Tupua) must be appointed and is authorized to speak on behalf of the river.¹⁰⁵ The guardian body is made up of one *imi* representative and one Crown representative. The river and the people are deemed to be inseparable,¹⁰⁶ meaning that harming the river is, by law, harming the *imi*. Similarly, the Te Urewera Act recognises Māori ties to the forest and the Māori view that the forest is a living

⁹⁷ L Chavez, ‘Philippine bill seeks to grant nature the same legal rights as humans’ (2019) Mongabay <<https://news.mongabay.com/2019/08/philippine-bill-seeks-to-grant-nature-the-same-legal-rights-as-humans/#:~:text=A%20coalition%20in%20the%20Philippines,confer%20legal%20personhood%20on%20nature.&text=The%20bill%20is%20part%20of,their%20protection%20amid%20intensifying%20threats>> last accessed 4 March 2021.

⁹⁸ First recognized by the High Court of Uttarakhand in: *Mohd. Salim v. State of Uttarakhand and Others* (Writ Petition (PIL) No. 126 of 2014, (March 20, 2017) with the decision being overruled by the Supreme Court of India later that year. See: *The State of Uttarakhand and Orgs v Mohd. Salim & Ors.*, Supreme Court of India, Petition for Special Leave to Appeal No. 016879/2017.

⁹⁹ See: O’Donnell et al. supra (n 14).

¹⁰⁰ Kauffman and Sheehan supra (n 80), 344.

¹⁰¹ For a further discussion of this context see: Kauffman and Sheehan supra (n 80), 354-5.

¹⁰² Supra (n 96).

¹⁰³ Supra (n 98).

¹⁰⁴ Te Awa Tupua Act supra (n 96).

¹⁰⁵ Te Awa Tupua Act supra (n 96).

¹⁰⁶ Te Awa Tupua Act supra (n 96), Article 69(2).

being. This Act also created a Board to serve as the guardian of the forest's interests, recognizing the legal personality of Te Urewera.¹⁰⁷

Similarly, in Ecuador, the constitution states that humans are an inherent part of nature, linking RoN to the right to a healthy environment.¹⁰⁸ Furthermore, Article 71 of the constitution states that all 'persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature'.¹⁰⁹ In the US, similarly, RoN provisions link local communities to nature, a development at the state-based (regional) level (there are now well over 40 such RoN local laws¹¹⁰), and which have primarily grown through the work of local environmental activists. RoN in the US therefore tend to be linked to community rights, with nature being framed as being integral to human welfare.¹¹¹

Obviously, the focus on community or people's rights within RoN (in any of the abovementioned formulations) could be seen as a human-centered approach. It might be assumed, therefore, that a posthuman approach would necessarily read such a human community focus as anthropocentric. However, posthuman theory suggests not the displacement of culture for or by nature but, rather, the need to focus on the nature-culture continuum.¹¹² By drawing out the entanglements between humans, non-humans, and 'the environment', a more reciprocal dynamic can be made central for the law, which will need to balance these sometimes-competing interests, but to do so from a starting point that does not, *ab initio*, assume them to exist in atomistic competition or to pre-exist such enquiry as privileged agentic subject versus objectified matter. Whether or not existing RoN approaches always achieve this is, however, another question.

RoN provisions have been applied through different means, in different contexts. One clear division discernible is the difference between models that recognize the rights of nature (as in Ecuador) and provisions that recognize nature's legal personality. In New Zealand a legal personality model has been used. This is because the *whi* do not emphasize the concept of rights because, to *whi*, nature is not property but rather is a living, 'spiritual' entity as well as a 'physical entity',¹¹³ an ancestor.¹¹⁴ Accordingly, the concept of guardianship is therefore promoted. The preference for the guardianship approach, in part, explains the difference between provisions in New Zealand and, say, Ecuador.¹¹⁵ The different models result in different procedures. Unlike Ecuador's RoN laws, New Zealand's laws do not award inherent rights. Rather, legal personality is instilled in the river and forest. This grants the river and the forest (through their guardians) procedural access rights in New Zealand's legal system but does not give them special rights *per se*. The natural systems thus have the mediated right to petition the court or to receive

¹⁰⁷ For a further discussion of this context see: Kauffman and Sheehan *supra* (n 80), 354-5.

For more both on this specific case and on the rights of rivers, see; E O'Donnell, *Legal Rights for Rivers: Competition, Collaboration and Water Governance*, (Routledge, London and New York 2020). See also: Boyd *supra* (n 82), 131-157.

¹⁰⁸ Republic of Ecuador *supra* (n 95).

¹⁰⁹ Republic of Ecuador *supra* (n 95), Art 71.

¹¹⁰ By mid-2017, at least 43 US local governments had adopted some form of RoN ordinances. Craig Kauffman and Pamela Martin compiled data on these cases. See footnote 9 in Kauffman and Sheehan *supra* (n 80).

¹¹¹ See, e.g. City of Pittsburgh, Code of Ordinances, Title 6, art 1, ch 618, 'Marcellus Shale Natural Gas Drilling Ordinance' (2010) <https://library.municode.com/pa/pittsburgh/codes/code_of_ordinances?nodeId=COOR_TTTSIXCO_ARTIRERAC_CH618MASHNAGADR> last accessed 23 November 2020).

For more on this, see: Kauffman and Sheehan *supra* (n 80), 346-7.

¹¹² D Haraway, 'A Cyborg Manifesto: Science, Technology, and Socialist-Feminism in the Late Twentieth Century' in D Haraway, *Simians, Cyborgs and Women: The Reinvention of Nature* (Free Association Books, London, 1991) 149, 151; C Åsberg, 'Feminist Posthumanities in the Anthropocene: Forays into the Postnatural' (2017) 1(2) *Journal of Posthuman Studies* 185.

¹¹³ Te Awa Tupua Act *supra* (n 96), Article 13(a).

¹¹⁴ C M Kauffman, 'Managing People for the Benefit of the Land: Practicing Earth Jurisprudence in Te Urewera, New Zealand,' (2020) 27(1) *ILSE: Interdisciplinary Studies in Literature and Environment* 1.

¹¹⁵ See: C Kauffman and P L Martin, 'Constructing Rights of Nature Norms in the US, Ecuador, and New Zealand' (2018) 18(4) *Global Environmental Politics*, 43, 57.

reparations, for example, but do not have the right to be protected in and of themselves.¹¹⁶

The differences between how RoN provisions have been designed also impacts what happens when RoN clash with other rights. Ecuador, being one of the first states to recognize RoN, has some of the most developed jurisprudence in this area, but the recognition of RoN in Ecuador has in practice been highly contested and environmental damage remains rampant, particularly in relation to industrial activity and oil extraction.¹¹⁷ Many provisions have yet to be adequately defined and applied.

Under the Constitution of Ecuador, nature has ‘the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structures, functions and evolutionary processes’.¹¹⁸ In addition, it is stated that ‘[n]ature has the right to be restored’ and that the state ‘shall apply preventative and restrictive measures on activities that might lead to the extinction of species, the destruction of ecosystems and the permanent alteration of natural cycles’.¹¹⁹ Nature rights are not, however, absolutely protected: the constitution situates sustainable development as core, seeking to balance environmental needs against development needs.¹²⁰ Central, however, is Article 395.4, which states that, ‘In the event of doubt about the scope of legal provisions for environmental issues, it is the most favorable interpretation of their effective force for the protection of nature that shall prevail’.¹²¹ This, however, is not always the outcome, and RoN laws have, since 2008, developed within a highly politicized context.¹²²

Nevertheless, despite contestation, there are signs of real progress. Several cases have established a standard that killing any animal that is part of an endangered species constitutes a RoN violation.¹²³ Other judgments have focused on government construction projects, concluding that such projects cannot impede the ability of ecosystems or species to regenerate.¹²⁴ The disruption of migration and breeding patterns has also been ruled as violating RoN¹²⁵ and the government has been ordered to control illegal mining.¹²⁶ RoN have also been enforced in other contexts, for example, in 2011, following the government’s removal of several shrimp companies from ecological reserves, one company sought to sue the government, arguing that their removal infringed their economic interests as well as their property rights and the right to work.¹²⁷ In 2015, the Constitutional Court ruled on this case, declaring that because natural rights are transversal, they impact on all other rights, including property rights. The Court stated that all actions of the state and individuals must be in accordance with the rights of nature,¹²⁸

¹¹⁶ See: Kauffman and Sheehan supra (n 80), 346.

¹¹⁷ For more on the tension between the recognition of RoN and mineral mining in Ecuador, see: T A Eisenstadt and K Jones West, *Who Speaks for Nature? Indigenous Movements, Public Opinion and the Petro-State in Ecuador*, (Oxford University Press, Oxford 2019).

¹¹⁸ Republic of Ecuador supra (n 95), Art 71.

¹¹⁹ Republic of Ecuador supra (n 95), Art 72 and 73.

¹²⁰ See, for example, Republic of Ecuador supra (n 95), Art 395. See also: Art 408.

¹²¹ Republic of Ecuador supra (n 95), Art 395.4.

¹²² Kauffman and Sheehan supra (n 80), 349.

¹²³ See, for example: Judgment No. 09171-2015-0004, Ninth Court of Criminal Guarantees, Guayas Province, Republic of Ecuador (23 April 2015) 55–59. See also: Kauffman and Sheehan supra (n 80), 350.

And: Judgment No. 2003-2014 – C.T., National Court of Justice, Specialized Chamber of Criminal, Military Criminal, Criminal Police and Transit Cases, Republic of Ecuador (7 September 2014); Kauffman and Martin (n 106) 137.

¹²⁴ Judgment No. 11121-2011-0010, Provincial Court of Justice, Loja Province, Republic of Ecuador (30 March 2011). See: Kauffman and Sheehan supra (n 80), 350-1.

¹²⁵ Judgment No. 269 – 2012, Civil and Mercantile Court, Gala’pagos Province, Republic of Ecuador (28 June 2012). See: Kauffman and Sheehan supra (n 80), 351.

¹²⁶ Constitutional Protective Action No. 0016-2011, Twenty-Second Criminal Court, Pichincha Province, Republic of Ecuador (20 May 2011). See: Kauffman and Sheehan supra (n 80), 352.

¹²⁷ Judgment No. 166-15-SEP-CC, Case No. 0507-12-EP, Constitutional Court of Ecuador, Republic of Ecuador (20 May 2015) 2. See: Kauffman and Sheehan supra (n 80), 353.

¹²⁸ Judgment No. 166-15-SEP-CC, Case No. 0507-12-EP, Constitutional Court of Ecuador, Republic of Ecuador (20 May 2015) 12. See also: Kauffman and Sheehan supra (n 80), 353.

proclaiming that this position reflects ‘a biocentric vision that prioritizes nature in contrast to the classic anthropocentric conception in which the human being is the centre and measure of all things, and where nature was considered a mere provider of resources’.¹²⁹ Thus, the courts in Ecuador have sought to use RoN to challenge anthropocentrism with the transversal application of RoN and their ability to challenge other rights. While such approaches and standards could provide key normative inspirations when setting global RoN standards, it is salutary that the setting of standards in Ecuador took considerable effort, especially when it came to challenging economic interests,¹³⁰ and that this struggle is still very much ongoing.¹³¹

In New Zealand, the Te Awa Tupua Act does not derogate from existing private rights in the Whanganui River.¹³² The Act states that any actor, public or private, must ‘have particular regard to’ the interests of the river¹³³ and must recognize the values of the Te Awa Tupua, which include treating the river as a living entity.¹³⁴ Thus, as Craig M Kauffman and Linda Sheehan note, through giving legal personhood to nature (but not giving nature rights per se), the New Zealand system has been set up so that ‘decisions on how to balance the rights of ecosystems against the rights of other legal persons (e.g. individuals and corporations) in a given situation will need to be made’.¹³⁵ Currently, the hierarchy of rights between these multiple competing interests is unclear. Standards will likely develop over time, much as in Ecuador. These Acts, therefore, while being key for Māori rights, are carefully constructed to ensure that they are framed around the neo/liberal legal order. The Acts allow for recognition through a legal personhood framework, thereby drawing on the existing options with New Zealand’s settler-colonial legal framework, avoiding the outright prioritization of RoN over, for example, corporate rights to exploit nature.¹³⁶ It remains to be seen, however, how a court would rule in the instance of a clash between property rights and nature rights.¹³⁷

A key emerging RoN standard in the US that might prove central when seeking to set out posthuman theory-informed international RoN standards is the right of nature to flourish.¹³⁸ Kauffman and Sheehan argue that

the right to flourish switches the emphasis from preventing permanent damage to ensuring some level of well-being for an ecosystem. This would require a more restrictive definition of which human impacts are acceptable, and thus stricter standards based on measurements of the well-being of ecosystems.¹³⁹

¹²⁹ Judgment No. 166-15-SEP-CC, Case No. 0507-12-EP, Constitutional Court of Ecuador, Republic of Ecuador (20 May 2015) 10 – trans. from Kauffman and Sheehan supra (n 80), 353.

¹³⁰ For more on this see; Kauffman and Sheehan supra (n 80), 357.

¹³¹ For more on this evolving history and the various challenges faced in Ecuador, see: C M Kauffman and P L Martin, *The Politics of Rights of Nature: Strategies for Building a More Sustainable Future* (MIT Press, forthcoming 2021). RoN laws in Ecuador are still developing. For example, in 2014, RoN were codified into a new Penal Code and Ecuador’s 2018 Environmental Code also included RoN provisions. While these are promising steps, unfortunately both codes remain vague at the level of application. See: Republic of Ecuador, Penal Code, Organic Law, 2014; Republic of Ecuador, Environmental Code, 2018. With thanks to Craig Kauffman for his insights on the Penal and Environmental Code in Ecuador. See also: See Kauffman and Sheehan supra (n 80), 353-4.

¹³² The situation of the forest is a little different as it was formerly a national park. For more on this see: Kauffman and Martin supra (n 115), 52.

¹³³ Tw Awa Tupua Act supra (n 96), Art 15(3).

¹³⁴ Tw Awa Tupua Act supra (n 96), Art 13.

¹³⁵ Kauffman and Sheehan supra (n 80), 354.

¹³⁶ Otto and Jones supra (n 11).

¹³⁷ For more information on the history of the law in New Zealand, see: Kauffman and Martin supra (n 115), 56-58.

¹³⁸ Kauffman and Sheehan supra (n 80), 347.

See, for example: Ordinance of the City Council of Santa Monica establishing Sustainability Rights, 12 March 2012, [https://www.smgov.net/departments/council/agendas/2013/20130312/s2013031207-C-1.htm#:~:text=\(a\)%20All%20residents%20of%20Santa,sustainable%20climate%20that%20supports%20thriving>](https://www.smgov.net/departments/council/agendas/2013/20130312/s2013031207-C-1.htm#:~:text=(a)%20All%20residents%20of%20Santa,sustainable%20climate%20that%20supports%20thriving>) last accessed 23 November 2020.

¹³⁹ Kauffman and Sheehan supra (n 80), 347.

Overall, the right for nature to flourish could come to set an important RoN standard. Calling for the right to flourish goes beyond merely restoring nature but, rather, could be a step towards recognizing nature's full agency in a way that is more akin to Bennett's new materialist understanding of the agency of matter. Such a right would contrast with the more limited understanding of nature's legally defined rights, which does not — inherently — allow for a wider understanding of the agency of matter itself. It is clear from this review of their success and limitations thus far that RoN challenge powerful political and economic interests, making the question of their implementation highly politicized. There are signs, arguably, that recognition of RoN globally could be one way of potentially dismantling the subject/object dichotomy at the heart of IEL. RoN could also provide a way to challenge the more top-down, state led approach taken within IEL, allowing multiple stakeholders to have a greater say in environmental protection. While there is clearly growing international interest in RoN, the question of standards and implementation remains a lively field of contestation and tensions. However, domestic examples of application — such as the ones outlined above — could, and arguably do, suggest standards that could and should be considered as models for a way forward.

5 POTENTIALS AND PITFALLS OF A POSTHUMAN THEORY-INFORMED RIGHTS OF NATURE APPROACH

Above, I analyzed some of the flaws in existing IEL, noting the ways in which posthuman theory might be used to provide a much-needed onto-epistemic shift. I have also outlined how RoN might provide one way to re-think IEL through the notion of the posthuman.

RoN and posthuman theory align across several vectors. For one, both seek to recognize the agency of nature-matter. Both therefore challenge the subject/object binary that underpins Western thought, challenging human exceptionalism. However, while inherent links between RoN and posthuman theory have been suggested,¹⁴⁰ from a legal studies perspectives, it becomes clear that it is not a given that a RoN approach will inherently produce a posthuman approach to IEL. After all, these projects, while related, are distinct and it is true to say that posthuman theory and RoN have not yet extensively been brought into mutual conversation. In the next few pages, I will seek to analyze the potentials and risks of a posthuman theory-informed RoN approach, focusing on the issues of representation, universalism, and global inequalities.

5.1 Who represents nature?

Posthuman theory posits that nature has agency.¹⁴¹ However, if RoN are to be upheld at law, humans must put forward nature's claims on its behalf. Humans can seek to represent nature drawing on a variety of tools, which may include, for example, Earth jurisprudence¹⁴² or the application of scientific knowledge. However, these tools are by no means neutral and they do not always provide clear answers. Take the application of scientific knowledge, for example: while the application of the 'right to science' to international environmental law may, indeed, as Anna-Maria Hubert argues, create a more 'effective, equitable and democratically legitimate and accountable process',¹⁴³ exactly what science says for the purpose of understanding what is best

¹⁴⁰ See, for example, artist Ursula Biemann and architect Paulo Tavares' fantastic project on 'Forest Law.' See: 'Ursula Biemann and Paulo Tavares: BAK' (2015) Frieze, Issue 175 <https://www.frieze.com/article/ursula-biemann-paulo-tavares> last accessed 13 April 2021.

Similarly, Jessie Hohmann, while not discussing RoN, does not the potential for new materialism to push rights beyond the more than human. See: Hohmann *supra* (n 8), 12-14.

¹⁴¹ Bennett *supra* (n 52).

¹⁴² See, for example: *supra* (n 71)..

¹⁴³ A Hubert, 'The Human Right to Science and Its Relationship to International Environmental Law' (2020) 31(2) *European Journal of International Law* 625, 625.

for nature is contestable. To give a concrete example of how science, despite drawing on a variety of recognized methods to seek to ensure rigour, is contestable, one can look to deep-sea mining. While deep-sea mining, or what is termed ‘exploitation’, has not yet been legally authorized, the Mining Code, which would authorize such exploitation, is currently under draft.¹⁴⁴ There is an obligation under international law to ensure that adequate environmental impact assessments (EIAs) are conducted before mining can go ahead.¹⁴⁵ Scientists argue, however, that the standards currently set for conducting EIAs are too low,¹⁴⁶ noting how the measures used to conduct EIAs in international waters lag behind international standards applicable to other environments and within other areas of international law.¹⁴⁷ There is no defined minimum scope for conducting a valid EIA in international law.¹⁴⁸ Accordingly, while EIAs have been conducted,¹⁴⁹ the concern is that the standards set when conducting such EIAs are inadequate.¹⁵⁰ Commenting specifically on the EIAs that have been conducted on deep-sea mining, Holly J. Niner et al. argue that these EIAs lack the ‘statistical power’ required in order to be adequate or accurate.¹⁵¹

What this example shows is that it is not always clear what is best for nature. While one group of scientists might argue that any harm to ecosystems caused by deep-sea mining will be minimal, another challenges that stance. This lack of certainty makes it difficult (at least drawing on the ‘authority of science’) for humans to represent nature at all. From a posthuman perspective, however, this dilemma becomes ever more complex. As posthuman theorist Vicky Kirby has argued, to ‘represent nature’ is to risk re-inscribing a humanist and anthropocentric blueprint through a human framing of what nature is and wants. As Kirby states, nature does not need a ‘human scribe to represent itself, to mediate or translate its identity’.¹⁵² Nature is self-organizing and has a language of its own, comprised of a series of networks.¹⁵³ Yet if the law is to protect nature’s rights, nature will require human representation. This is a problem: humans do not always know what is best for nature¹⁵⁴ and are tied to humanist and anthropocentric blueprints of thought when working within the dominant Eurocentric framework of international law.

This representational necessity presents a conundrum: if ‘the world’ really is ‘a witty agent’ with an ‘independent sense of humor’¹⁵⁵ as Donna Haraway argues, how can that wit, that agency, ever be fully understood by humans, let alone represented non-reductively by them in

¹⁴⁴ See: International Seabed Authority, ‘The Mining Code’ <https://www.isa.org.jm/mining-code> last accessed 12 April 2021.

¹⁴⁵ Pulp Mills on the River Uruguay (Argentina v Uruguay), International Court of Justice, Judgment of 20 April 2010. More specifically in relation to the law of the sea, the need for EIAs was affirmed in: Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in The Area, International Tribunal for the Law of the Sea, Advisory Opinion of 1 February 2011, para 124-150.

¹⁴⁶ Niner et al., ‘Deep-Sea Mining With No Net Loss of Biodiversity - An Impossible Aim’ (2018) 5 *Frontiers in Marine Science* 1; Flora and Fauna International, ‘The risks and impacts of deep-sea mining to marine ecosystems’ https://cms.fauna-flora.org/wp-content/uploads/2020/03/FFI_2020_The-risks-impacts-deep-seabed-mining_Executive-Summary.pdf last accessed 12 April 2021, 7; J M Durden et al., ‘Environmental Impact Assessment process for deep-sea mining in “The Area”’ (2018) 87 *Marine Policy* 194.

¹⁴⁷ Harden-Davies et al. *supra* (n 13)..

¹⁴⁸ Pulp Mills on the River Uruguay *supra* (n 145), para 205.

¹⁴⁹ See: Bundesanstalt für Geowissenschaften und Rohstoffe, ‘Environmental Impact Assessment’ 2018 https://isa.org.jm/files/files/documents/EIA_BGR_0.pdf last accessed 12 April 2021; Global Sea Mineral Resources, ‘Environmental Impact Assessment’ 2018 available to download at <https://www.isa.org.jm/minerals/environmental-impact-assessments> last accessed 12 April 2021.

¹⁵⁰ H Harden-Davies et al. *supra* (n 13)..

¹⁵¹ Niner et al. *supra* n 146, 7. On both the inadequacies of existing processes, as well as proposals on how to make the process more robust, see: Durden et al. *supra* (n 146).

¹⁵² Kirby *supra* (n 67), 232.

¹⁵³ Kirby *supra* (n 67), 232.

¹⁵⁴ Kirby *supra* (n 67), 232.

¹⁵⁵ Haraway *supra* (n 46), 199.

court? However, this may be a Western problem. Haraway's human subject and the body of knowledge that she and most posthuman theory primarily draws on is Global North-centric. Some Indigenous cosmovisions, as I will outline shortly, are not necessarily presented with the same conundrum of representation.

Bennett, likewise primarily writing from a Western, US perspective, when discussing the need to create a political system that includes matter, is all too aware of this dilemma concerning human understanding and representation. '[T]hing power,' she states, is that which 'we cannot know' and which 'refuses to dissolve completely into the milieu of human knowledge'.¹⁵⁶ Posthuman neo-materialisms thus present an impossibility: the need to include matter/'nature' in understandings of the world and the impossibility of humans ever being able to fully understand it. However, while there is something about matter and 'nature' that will always exceed human knowledge, this does not mean that matter should remain sidelined or objectified.¹⁵⁷ Rather, posthuman theory points to the need to remain 'perceptually open', to accept that not all can be known but seek to know and understand what can, as Bennett argues.¹⁵⁸ Rosi Braidotti argues that 'we need to devise a new vocabulary, with new figurations to refer to the elements of our posthuman embodied and embedded subjectivity'.¹⁵⁹ Accordingly, not only must matter be included in thought, accepting the limits of current understandings, but there is a need to remain open to change, to new languages and figurations.¹⁶⁰

Turning at this point towards Indigenous cosmovisions and practices of relationality might yield clues towards such new languages and figurations. The question of how nature is represented has been central to the framing of provisions in New Zealand. For example, during the Te Urewera negotiations, the Tūhoe *imi* were keen to ensure that the focus was on the return of the land to its pre-settler dignity, not on them gaining ownership or property rights over it. For the Tūhoe *imi*, nature is not and cannot be property. As the CEO of Te Uru Taumatua (the organization representing the Tūhoe *imi*), Kirsti Luke, argued in 2013,

Ownership and the owning of Te Urewera has been a mechanism to destroy belonging and care, and therefore community. Ownership granted entitlement without having earned it... Ownership does not value kinship with the things around us... it breeds very transactional relationships between humans and the land...¹⁶¹

In this instance, to respect this non-ownability, a legal personality model was applied: no one owned Te Urewera, and legal personality was deployed as 'an imperfect approximation of recognizing the forest as a whole, living, spiritual being but likely the best possibility within a European legal framework'.¹⁶² Earth jurisprudence suggests a similar solution, noting that an ecosystem's natural order is so complex that humans are incapable of fully understanding it, and concluding that humans should seek to structure their systems to best fit this natural order, rather than trying to dominate nature.¹⁶³

Yet even if nature can be acceptably represented, to some degree at least, other problems arise in relation to any approach relying on legal personhood. There are risks in seeking to challenge the liberal framework of the law by calling upon legal constructs so intimately and ultimately dependent upon an anthropocentric, individualistic account of the legal subject.¹⁶⁴ By

¹⁵⁶ Bennett supra (n 52), 3.

¹⁵⁷ Bennett supra (n 52), 3.

¹⁵⁸ Bennett supra (n 52), 14.

¹⁵⁹ Braidotti supra (n 44), 82.

¹⁶⁰ Bennett supra (n 52), 111.

¹⁶¹ K Luke, Presentation at the United Nations Interactive Dialogue of the General Assembly on Harmony with Nature, United Nations Headquarters, New York, Monday, April 23, 2018 as quoted in Kauffman supra (n 114), 6.

¹⁶² Kauffman supra (n 114), 7.

¹⁶³ Kauffman supra (n 114), 10.

¹⁶⁴ On the legal subject, see; N Naffine, 'Women and the Cast of Legal Persons' in J Jones, A Grear, R A Fenton and K Stevenson (eds), *Gender, Sexualities and Law* (Routledge, Oxford 2011) 15; A Grear, "Sexing the Matrix":

trying to work within the system, even when seeking to include a new subject, one risks merely extending the existing paradigm without actually challenging it sufficiently. In other words, by calling for inclusion without a wider paradigm shift, there is a risk, as Braidotti argues (in relation to the inclusion of animals as subjects), that '[h]umanism is actually being reinstated uncritically under the aegis of species [and materialist] egalitarianism'.¹⁶⁵ While egalitarianism is not directly at issue in the case of legal personhood for Te Urewera, it is at least likely that the underpinnings of the very construct called upon need to be re-thought. In short, there is a risk that calling for nature to be recognized as a subject within the current legal system, perhaps particularly at the international level, will reinforce or legitimize the very same system that makes such resort necessary. This dilemma does not mean, however, that RoN and posthuman approaches should be abandoned. Rather, as feminist theorists of international law have argued with respect to gender justice, there is a need for multiple strategies at multiple levels, seeking to foster legal change from within the system while also seeking to re-think the system itself.¹⁶⁶ In this sense, RoN may play a 'transitional role'¹⁶⁷ but need not be the end game. While RoN may have been 'unthinkable just a few decades ago'¹⁶⁸ they are now 'gaining momentum',¹⁶⁹ and as such approaches become more accepted, the space for more radical ideas of what RoN can be, or for ideas beyond RoN, will also open up.¹⁷⁰

The realities of power dynamics must also be recognized here. For example, Indigenous groups have, in some instances, and as outlined above in the context of New Zealand, adopted a strategy of working within the system while trying to bring their own knowledge to bear on that system. While there are indeed limitations to such an approach, and such negotiations are a far cry from adopting Māori jurisprudence throughout New Zealand, the negotiations have arguably represented an important milestone in the settler-colonial state and pressed back, albeit imperfectly, incompletely and contingently, against the dominant onto-epistemology (albeit that the risks of system-legitimation noted above still persist).

Perhaps one way in which RoN can be thought of beyond the liberal individual subject would be through challenging the meaning of rights themselves. Rights have predominantly been applied in law to bounded, individual legal subjects — a perennial challenge.¹⁷¹ Garver, for example, asks whether rights of nature (as rights) can be radical enough to create an ecological law?¹⁷² It is relatively clear that if RoN are framed through current dominant legal understandings of rights, their impact will be limited. However, rights can be re-thought. As Iván Vargas-Roncancio asks, drawing on ethnographic research focusing on indigenous cosmovisions: what happens if rights are granted 'to relationships instead of substances and or/persons?'¹⁷³ Arguably, if rights are granted to relationships, the framing shifts. Rights are currently balanced against one

embodiment, disembodiment and the law – towards the re-gendering of legal rationality,' in J Jones, A Grear, R A Fenton and K Stevenson (eds), *Gender, Sexualities and Law* (Routledge, Oxford 2011) 39; Sydney Parfitt supra (n 31).

¹⁶⁵ Braidotti supra (n 44), 78-79.

¹⁶⁶ Jones supra (n 6); C Charlesworth, G Heathcote and E Jones, 'Feminist scholarship on international law in the 1990s and today: an inter-generational conversation' (2019) 27(1) *Feminist Legal Studies* 79; F Bird, 'Is this a time of beautiful chaos? Reflecting on international feminist legal methods' (2020) 28(2) *Feminist Legal Studies* 179.

¹⁶⁷ G Garver, 'Are right of nature radical enough for ecological law?' in K Anker et al. (eds), *From Environmental to Ecological Law*, (Routledge, Oxford and New York 2021) 100.

¹⁶⁸ Boyd supra (n 82), 222.

¹⁶⁹ Boyd supra (n 82), 223.

¹⁷⁰ See also Yufatt who proposes a new model for thinking through legal personhood through a model of human-nonhuman personification: R Youfatt, 'Personhood and the Rights of Nature: The New Subjects of Contemporary Earth Politics' (2017) 11 *International Political Sociology* 39.

¹⁷¹ R Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (Edward Elgar, Cheltenham 2018).

On the limits of human rights and reimagining them from a new materialist perspective, see: A Grear, 'Human Rights and New Horizons? Thoughts toward a New Juridical Ontology' (2018) 43(1) *Science, Technology & Human Values* 129.

¹⁷² Garver supra (n 167).

¹⁷³ Vargas-Roncancio supra (n 17), 122.

another, a framing that for RoN ‘essentially equips nature for battle with other rights holders’.¹⁷⁴ Clearly, existing liberal conceptions of rights are part of the currently dominant ‘divisive, reductionist and atomistic’ system which does not account for the interconnections between matter, humans and non-humans.¹⁷⁵ However, if rights are granted to relationships, the framing of relational dynamics opens up, promising a shift beyond the problematic theoretical underpinnings of existing applications of rights.¹⁷⁶ RoN, if so conceived and adequately developed both theoretically and jurisprudentially, have the potential, arguably not only to challenge IEL, but to address the entire way in which law and jural relations are currently understood.¹⁷⁷

5.2 Universalism, colonialism, and global inequalities

Since sovereign will¹⁷⁸ and the lack of a universal system for environmental protection¹⁷⁹ are two of the core challenges faced by IEL, it is tempting to think that seeking to create a universal RoN frame for environmental protection is required. However, there are vast problems with the concept of universalism that could haunt any application of RoN. Feminist and postcolonial theorists have long problematized international law’s claim to be universal (and its purported neutrality), noting the ways in which it both disguises and reproduces the gendered and racialized power hierarchies upheld by the law.¹⁸⁰ After all, many international legal principles were created at a time where much of the world was colonized and when only European States had a say on what international law was.¹⁸¹ Thinking specifically about Indigenous peoples, while Indigenous people have long interacted between peoples and nations, often ‘going beyond the nation-state in order to advance their position and pursue justice’,¹⁸² they were and often still are excluded from shaping, making and participating in international law.¹⁸³

IEL has also had to tackle the problems posed by structural injustices associated with universalism, most notably when seeking to balance environmental protection with the economic needs of different actors with varying levels of economic power.¹⁸⁴ Many provisions have been built into IEL that seek to manage this tension. For example, the concept of common but differentiated responsibility underpins many environmental law treaties, seeking to ensure that the economic development needs of some states are balanced against the wealth of others when deciding differing responsibilities to address climate change. Another example of how IEL seeks to balance this tension can be seen in the principle of sustainable development, which notes the

¹⁷⁴ Garver *supra* (n 167), 91.

¹⁷⁵ Garver *supra* (n 167), 91.

¹⁷⁶ On the liberal underpinnings of rights and alternative framings, see: Kapur *supra* (n 171)..

¹⁷⁷ Youfatt makes a similar argument, noting the need to emphasize the connections between the human and non-human. Youfatt, however, calls for legal personhood to be considered, not rights, suggesting that legal personhood has a stronger potential to recognize such connections. However, if rights are framed in relation, it seems rights framings could indeed fit Youfatt’s framing too. See Youfatt *supra* (n 170)..

¹⁷⁸ For example, Aguila and Viñuales note State sovereignty and the law of State will to push forward on environmental issues in a more radical way as a central reason why it seems unlikely that provisions in the Global Pact for the Environment will go beyond existing provisions in IEL. See: Aguila and Viñuales *supra* (n 26), 8.

¹⁷⁹ UN General Assembly *supra* (n 24).

¹⁸⁰ See: A Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, Cambridge 2012); C Charlesworth and C Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, Manchester 2000); H Charlesworth and C Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, Manchester, 2000).

¹⁸¹ A Anghie, ‘Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law’ (1999) 40(1) *Harvard International Law Journal* 1.

¹⁸² M McMillan and S Rigney, ‘The Place of the First Peoples in the International Sphere: A Logical Starting Point for the Demand for Justice by Indigenous Peoples’ (2016) 39(3) *Melbourne University Law Review* 981, 992.

¹⁸³ S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2nd ed, 2000); McMillan and Rigney *supra* (n 182), 994-997.

¹⁸⁴ See: S Alam et al. (eds), *International Environmental Law and the Global South* (Cambridge University Press, Cambridge, 2015).

need to exploit natural resources in a manner that is sustainable and in which economic objectives are taken into consideration to ensure that states, and especially states with stronger development needs, can continue to draw on their natural resources.¹⁸⁵ However, such approaches ultimately allow environmental exploitation to continue.¹⁸⁶ While sustainable development seeks to account for economic imbalances (many of which are the result of colonialism and the ways in which European powers profited, and continue to profit from, the extraction of resources from the places they once colonized) there are risks presented by this approach, which is used by states to justify environmental damage. As Usha Natarajan and Kishan Khoday note, while sustainable development does challenge ideas of economic growth, it is seldom used ‘to call for less development’.¹⁸⁷ Taking this argument further, they argue that the concept of sustainable development, in the end, ensures that the status quo remains, helping to ‘naturalize and obfuscate the process whereby some people systemically under-develop others’, resulting in the continued deepening of global inequalities.¹⁸⁸

Ultimately, such realities point to the need to challenge existing economic power imbalances. One way this might occur could be through the payment of reparations by states that benefited from the colonial extraction of the natural resources of those they colonized. Ultimately, however, the entire global capitalist system must be challenged if global economic imbalances are to shift and if the extractivist model upon which the global order is based upon is to be re-modelled. While much may be learnt from Marxist approaches to international law,¹⁸⁹ drawing on Indigenous jurisprudential models and experiences of environmental governance which challenge the nature/culture binary which underpins Western thought and embracing RoN approaches do hold out some hope of forging a less oppressive imaginary. Emerging literature on the commons and on new materialist onto-epistemologies for commoning might also provide a way in which to re-think the links between capitalism and the Anthropocene¹⁹⁰ (or the Capitalocene as Moore, among others, names it¹⁹¹). More could be learnt from looking towards work on radical alternatives to development¹⁹² and to ideas around ‘degrowth’¹⁹³ (which was importantly mentioned as a possible global solution for environmental issues for the first time at the international level in July 2020¹⁹⁴). It is into this mix of critiques, possibilities and risks that RoN emerges as one way of rethinking law. The tensions between the aims and the current

¹⁸⁵ Sustainable development’ is made up of several components, including the general need to exploit resources in a manner which is ‘sustainable,’ the need to preserve resources for future generations, the equitable use of resources between states and the need to consider economic and development objectivities. Sustainable development concretized recently through its use in the 2015 Paris Agreement to the UN Framework Convention on Climate Change (UNFCCC) and the 2017 Resolution of the UN General Assembly, ‘Our Ocean, Our Future: Call to Action,’ 6 July 2017, UNGA Res. 71/312. See also: R Gordon, ‘Unsustainable Development’ in : S Alam et al. (eds), *International Environmental Law and the Global South* (Cambridge University Press, Cambridge, 2015) 50.

¹⁸⁶ On the politics of IEL from a Global North/South perspective, calling for a more nuanced understanding of Global North/South relations in IEL, see: Natarajan and Khoday supra (n 31).

¹⁸⁷ Natarajan and Khoday supra (n 31), 589.

¹⁸⁸ Natarajan and Khoday supra (n 31), 589.

¹⁸⁹ See: Tzouvala supra (n 2); Baars supra (n 2); R Knox, ‘Marxist Approaches to International Law’ in A Orford and F Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, Oxford 2016); S Marks, ‘Human Rights and Root Causes’ (2011) 74 *Modern Law Review*, 57; C Miéville, *Between Equal Rights: A Marxist Theory of International Law*, (Pluto Press, 2006).

¹⁹⁰ See; A Grear, ‘Resisting anthropocene neoliberalism: Towards new materialist commoning?’ in A Grear, and D Bollier (eds), *The Great Awakening: New Modes of Life Amidst Capitalist Ruins* (Punctum Press, Brooklyn, NY, USA); Ohdedar supra (n 74); Neimanis supra (n 39).

¹⁹¹ J Moore, ‘The Capitalocene, Part I: on the nature and origins of our ecological crisis’ (2017) 44(3) *The Journal of Peasant Studies*, 594.

¹⁹² A Kothari, ‘Radical well-being alternatives to development’ in P Cullet and S Koonan (eds), *Research Handbook on Law, Environment and the Global South* (Edward Elgar, Cheltenham 2019).

¹⁹³ For more on defining degrowth, see: J Hickel, ‘What does degrowth mean? A few points of clarification’ (2020) *Globalizations* 1.

¹⁹⁴ See; United Nations, Report of the Secretary General on Harmony with Nature, 28 July 2020, UN Docs A/75/266.

application of RoN need to be constantly re-thought in the search for international RoN standards and approaches in the search for a way forward that does not collapse into the same nature/culture framework which permeates IEL.

6 CONCLUSION

I have argued that there are clear problems with IEL, which is essentially anthropocentric, separating human, non-human, and environmental interests into separately demarcated legal spheres, while prioritizing human interests over all others. I have sought to highlight posthuman legal theory's challenge to the anthropocentrism of IEL, and have suggested that those seeking to apply posthuman legal theory could greatly benefit from engaging with RoN approaches, drawing on some links between their respective aims. In turn, I have sought to understand what RoN could learn from posthuman theory.

To offer this reflection, I outlined some developing RoN standards in various domestic jurisdictions, with an eye towards the development of international standards. Drawing on the lessons learnt from domestic applications of RoN, several key challenges were highlighted including, for example, the core tension visible between economic interests and nature's rights. I then moved on to discuss some of the broader issues that haunt the application of both RoN and posthuman legal theory, focusing on the challenges presented by representation and universalism. Noting the problems with promoting universal concepts in an unequal world, I highlighted the need to situate RoN within the wider context of global economic inequalities, emphasizing the need to challenge global economic imbalances. This challenge must continue both through and beyond RoN.

On the question of representation, I drew on posthuman new materialist theory to argue that there is a central need to remain 'perceptually open'¹⁹⁵ and to devise new vocabularies,¹⁹⁶ recognizing the limits of the RoN project, while seeking to promote imaginative change.

To conclude, and as I noted in the course of my reflections, there are always risks in working within the liberal legal system in that, by working within the system and seeking to improve it, one risks legitimizing the system itself. This is a problem that all critical thinkers face: when seeking to apply critical thought, there is a risk that part of the radicality of that thought can be lost in application.¹⁹⁷ However, I suggest that critical change must occur both within a system as well as from outside to be effective. Implementing RoN standards is, as I have argued, a strong place to start when seeking to re-think IEL in a posthuman register. It is essential, with all that is now urgently at stake, that those seeking to apply posthuman legal theory to IEL engage with RoN approaches and that, in turn, the insights of posthuman theory are used to contribute to the development of international RoN IEL standards.

¹⁹⁵ Bennett *supra* (n 52), 14.

¹⁹⁶ Braidotti *supra* (n 44), 82.

¹⁹⁷ Feminist approaches to international law provide a good example here; while feminist approaches have been successful in adding women's concerns to existing international legal frames, such as within international human rights law, the transformative elements of feminist approaches which seek, for example, to challenge the gendered foundations of the international legal system itself, have been somewhat left behind in the focus on the inclusion of women. See: Jones *supra* (n 6); Charlesworth, Heathcote and Jones *supra* (n 166); Bird *supra* (n 166).