Book Review—*Natural Resources and Human Rights: An Appraisal*

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The relationship between international law and natural resources has received some examination in legal scholarship, traditionally focused on such principles as states' permanent sovereignty over natural resources.[1] But significant evolutions in the application of human rights norms raise important new questions about how international law properly shapes the regulation of natural resource development in ways responding to these norms. These evolutions have already begun to foster major political theory literature on human rights and natural resources (often linked with philosophical analyses of territoriality),[2] but the legal literature on the topic has been slower to develop even in the context of significant contestation.[3]

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1 See especially Nico Schrijver, *Sovereignty Over Natural Resources: Balancing Rights and Duties* (Cambridge: Cambridge University Press, 2008).

2 See e.g. Tamar Meisels, *Territorial Rights,* 2nd ed (Springer, 2009); Cara Nine, *Global Justice and Territory* (Oxford: Oxford University Press, 2012); Leif Wenar, Blood Oil: Tyrants, *Violence, and the Rules that Run the World* (Oxford: Oxford University Press, 2016); Anna Stilz, *Territorial Sovereignty: A Philosophical Explanation* (Oxford: Oxford University Press, 2019).

3 Some disputes have played out more in the form of jurisdictional wrangling. See e.g. Dwight Newman, *Natural Resource Jurisdiction in Canada* (Toronto: LexisNexis, 2013) (on the complexities of natural resource jurisdiction in a federal state context also involving Indigenous rights. A focus on claims of Indigenous peoples as rights claims, as present throughout not just Gilbert's account but much scholarship, may actually paradoxically undermine the claims of Indigenous peoples to jurisdiction and governance, and this would also be a theme warranting more attention. Jurisdictional and governance arrangements

In Natural Resources and Human Rights: An Appraisal,[4] Professor Jérémie Gilbert offers an important work of legal scholarship analysing developments in the application of human rights law to the regulation of natural resources. In part, he is reviewing already-established applications on such matters as the right to development and the rights of Indigenous peoples. But he is also extrapolating toward potential future applications of rights to natural resource issues and, ultimately, advocating toward aspirational visions of those applications. The endeavour is ambitious.

Indeed, Gilbert seeks to frame the field in new ways. In the introduction to the book, he explains that he is deliberately eschewing certain traditional distinctions, such as those between renewable and non-renewable resources and distinctions related to global common pool resources. He does not explain the possible consequences of failing to use these traditional distinctions. One might wonder if some elements of the account are reinventing too much or, indeed, are detached from distinctions that may bear appropriately on the approach to genuinely different categories of resources.

Gilbert develops his analysis within what he suggests is an explicitly constructivist approach to legal norms and decision-making.[5] Within this approach, he sets out that he is concerned with the effects of different norms and that he thus adopts a practice-oriented approach to examining the application and implementation of legal norms. Putting matters in this way undoubtedly wards off some possible criticism that the account is detached from legal reality. Yet, one possible query from the outset is how this theoretical approach coheres with his ultimately aspirational account of some of the applications of rights norms.

In terms of his conceptual frameworks on rights, Gilbert suggests simply that he is taking a rights-based approach that includes procedural rights, that he is concerned with expanding the scope of rights-holders, particularly in the context of structural inequalities faced by groups such as women and Indigenous peoples, and that he takes a broad view of duty-bearers that goes beyond the traditional state-based conceptions of international law.[6]

Chapter 1 of the book engages with better-known international human rights norms bearing on natural resources, notably concerning itself with the complex interplay of state sovereignty over natural resources and peoples' rights to self-determination. He shows the development of these two strands of rights held by different rights-holders. While both may have been shaped within decolonization endeavours, they do need a reconciliation between them, notably to be found in human rights obligations of states. Indigenous rights are an example of rights directly challenging the dominant state-centric approach, but so are suchrights as food sovereignty rights held by peasants. While there is very little jurisprudence directly on point, Gilbert takes the view that state sovereignty over natural resources must ultimately yield to the rights held

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can reflect rights of communities in more complex ways than rights ascriptions, but focusing on rights-based approaches can miss these broader constitutional considerations).

4 Jérémie Gilbert, *Natural Resources and Human Rights: An Appraisal* (Oxford: Oxford University Press, 2018).

5 *Ibid* at 9.

6 *Ibid* at 8.

by the people whom the state serves.[7]

Chapter 2 of the book considers evolving property rights and their potential implications for rights-based approaches to natural resource issues. Here, Gilbert again relies heavily upon Indigenous rights as a key example, citing the landmark decision in Awas Tingni v. Nicaragua,[8] in which the Inter-American Court of Human Rights held that the right to property in the American Convention on Human Rights must be read as including collective property rights of Indigenous communities as part of a natural evolution of international law. There is significant extrapolation here, as Gilbert initially alludes more broadly to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),[9] but he then cites to only article 25 of the instrument, even while articles 26 and 27 also bear directly on property rights to land, quite possibly offering a more limited read on the scope of the rights at issue than Gilbert assumes.[10] However, Gilbert also goes on to discuss various decisions of such human rights bodies as the Committee on Economic, Social, and Cultural Rights (CESCR) and the Committee on the Elimination of Racial Discrimination (CERD). He also turns to community fishing rights, which he suggests show an emergent rights-based approach in the jurisprudence of several such treaty bodies. While some of his examples extend beyond the Indigenous context, the chapter strongly exemplifies some of Gilbert's tendencies to see Indigenous peoples' success in attaining rights protections as an inspiration for further rights-based developments.

Chapter 3 turns to ways in which international human rights law (IHRL) may affect the governance of natural resources. There is obviously an extensive literature on the right to development, but Gilbert suggests this right has more bearing on resource governance than commonly realized. A key example for him is the Endorois case from the African Commission on Human Rights,[11] which shows that the right to development is not just about the governmental assertion of national development needs but must also encompass the contemplation of large losses that might be borne by particular communities that call for participation, consent-oriented processes, and benefit-sharing. Again, he draws inspiration from the larger set of Indigenous rights developments showing transitions from consultation-based approaches to consent-based approaches and manifesting attention to benefit-sharing. He suggests that these transitions highlight better potential interpretations of the right to development in IHRL more broadly.[12]

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7 *Ibid* at 22–26, 32–33.

8 *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001), Inter-Am Ct HR (Ser C) No 79.

9 *United Nations Declaration on the Rights of Indigenous Peoples,* GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc No A/RES/61/295 (2007).

10 Gilbert, *supra* note 4 at 42. For an important discussion of these articles, admitting certain limits on their application that would cast different light than simply referring to article 25, see e.g. Claire Charters, "Indigenous Peoples' Rights to Land, Territories and Resources in the UNDRIP: Articles 10, 25, 26, and 27", in Jessie Hohmann & Marc Weller, eds, *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford: Oxford University Press, 2018).

11 *Center for Minority Rights Development (Kenya) and Minority Rights Group International ex rel. Endorois Welfare Council v. Kenya,* Communication No 276/2003 (Afr Comm'n Hum & Peoples' Rights 2010).

12 Gilbert, *supra* note 4 at 90–91.

Chapter 4 considers some interpretations of the right to life, notably those that have shifted it toward rights to livelihood,[13] as well as those that see in the right to life protections for personal integrity interests against violence by state or non-state actors. Gilbert argues that these interpretations might have broader bearing on conflicts related to natural resources, offering protection to natural resource defenders and simultaneously providing support for emerging transnational torts jurisprudence that concerns violence associated with resource development.[14]

Chapter 5 considers the implications of cultural rights in the natural resource context. The case law referenced encompasses a mixture of Indigenous rights jurisprudence on maintenance of traditional practices, broader rights-based jurisprudence on intangible cultural heritage, and emerging case law on spiritual approaches to certain land-related claims. As in the last chapter, there is a struggle to weave together different strands of jurisprudence to support a claim that certain categories of rights have had, and can have, further bearing on natural resources. He ends up with relatively discrete, disconnected parts of the chapter on natural resources and cultural identity, natural resources and cultural heritage, and natural resources and sacred sites, which is somewhat surprising when cultural identity, cultural heritage, and spirituality will normally be interwoven.

Chapter 6 turns to the protection of natural resources, notably suggesting that IHRL can provide direct support for stewardship models and biodiversity-supporting measures. While there is substantial literature on human rights and climate change, Gilbert suggests there are further issues that warrant attention, such as the bearing of IHRL on climate justice in the context of differently exposed communities and diverse impacts of climate change. He argues that human rights-based arguments can assume a larger role in climate change litigation and might guide that litigation in constructive directions.[15] More broadly, he suggests that IHRL has the potential to help address certain difficult issues of environmental law, even while he recognizes the possible dangers of shifting environmental law to a human-centered approach.[16] On this matter, Gilbert had also briefly addressed in the introduction the potential critique that he is engaged in an anthropocentric exercise in addressing natural resource issues based on human rights. He suggested that IHRL could call into question whether it is always

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13 He cites the *Ogiek* case, A*frican Court of Human and Peoples' Rights v Kenya,* Application 006/2012 (26 May 2017), although better examples would actually exist in the constitutional jurisprudence of the Indian Supreme Court. *Cf* e.g. Anup Surendranath, "Life and Personal Liberty", in Sujit Choudhry, Madhav Khosla & Pratap Bhanu Mehta, eds, *The Oxford Handbook of the Indian Constitution* (Oxford: Oxford University Press, 2016). Gilbert's focus here on a regional human rights decision over a more developed body of domestic jurisprudence illustrates an issue in his approach to which I will return later.

14 Canada has had a series of such cases. See e.g. Dwight Newman, *Mining Law of Canada* (Toronto: LexisNexis, 2018) at 218–222, discussing such cases as *Choc v Hudbay Minerals Inc.*, 2013 ONSC 1414, *Garcia v Tahoe Resources Inc.*, 2015 BCSC 2045, rev'd 2017 BCCA 39, leave to appeal refused [2017] S.C.C.A. No. 94 (S.C.C.), and *Araya v Nevsun Resources Ldt.*, 2016 BCSC 1856, aff'd 2017 BCCA 401, leave to appeal granted. The Supreme Court of Canada heard an appeal from *Araya v Nevsun Resources Ltd*, 2017 BCCA 401 in January 2019. Its decision in *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, was 5-to-2-to-2, suggesting that some interesting issues remain for the future.

15 Gilbert, *supra* note 4 at 171–172.

16 See *Ibid* at 177–178.

appropriate to see nature simply as an economic resource.[17]

At this juncture, one somewhat puzzling gap is evident. While Gilbert is aware of the literature on climate change and while he alludes to developing climate change litigation, he is less attentive to one of the major jurisprudential developments in the climate change context that could instantiate his claim. By the time Gilbert was writing his book, the Urgenda case in the Netherlands had already seen some lower courts mandate governmental action based on human rights secured within the European regional human rights framework. While he obviously cannot be critiqued for being unaware of the December 2019 Netherlands Supreme Court decision not yet rendered, that judgment is particularly illustrative of the claims at issue. The Netherlands Supreme Court affirms the use of a rights-based approach to determining governmental action related to greenhouse gas emissions, and ultimately prescribes the need for government to achieve a particular percentage-based reduction in carbon emissions.[18]

While Gilbert has a few lines referencing the possible significance of such cases,[19] his focus on a particular framing of IHRL actually sees him wanting to shape potential rights-based analyses of climate change in terms of peoples' rights and in terms of supporting climate justice for marginalized communities. In doing so, he is thus less attentive to a key case law development bearing on sustainability law. This development was based on different human rights than Gilbert has emphasized, and it arose in this instance in Urgenda in domestic rights-based litigation (albeit under the auspices of a regional human rights treaty).

Some of these distinctions may illustrate a more complex issue with Gilbert's focus. His various discussions, drawing throughout on rights of peoples, of particular local communities, and of Indigenous peoples,[20] show a somewhat distinctive openness to the use of more collectively oriented rights, whether in the form of something like the right to development or some of the range of Indigenous rights. This readiness stands apart from dominant strands within the international human rights movement, which has recently seen some scholars and activists insisting on a renewed focus on an established set of individually oriented rights.[21]

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17 *Ibid* at 6–7.

18 Netherlands Supreme Court, The Hague, 20 December 2019, *State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda,* No 19/00135.

19 Gilbert, *supra* note 4 at 171.

20 See generally *Ibid*.

21 A new mood of modesty of goals, which has inevitable tendencies against new recognition of collective rights, is present in such works as Hurst Hannum, *Rescuing Human Rights: A Radically Moderate Approach* (Cambridge: Cambridge University Press, 2019). Those who argue the other side, seeking a new expansion of human rights goals, also seem to do so in terms of individually framed rights. See notably Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Cambridge, Mass.: Belknap Press, 2018), *passim*. Some writers on Indigenous rights have supposed the new acceptance of a body of collective rights. See notably Mauro Barelli, *Seeking Justice in International Law: The Significance and Implications of the UN Declaration on the Rights of Indigenous Peoples* (London: Routledge, 2016) and Sheryl Lightfoot, *Global Indigenous Politics: A Subtle Revolution* (London: Routledge, 2016). While I wish they were right on this point, the claim seems unduly optimistic as to the broader state of acceptance of collective rights within the international human rights movement. Notably, in his latest work, Michael Ignatieff—never an enthusiast for group rights in the first place—pays them even less heed than previously: see Michael Ignatieff, *The Ordinary Virtues: Moral Order in a Divided World* (Cambridge, Mass: Harvard University Press, 2017). I have previously noted and critiqued the peculiarity of him as a Canadian writing a book

Because international human rights discourse continues to function in a framework principally oriented towards individuals, some could be hesitant and take the view that Gilbert might more strategically achieve actual impacts on natural resource policy by asserting the role of more individually oriented rights.

However, there is a potential response on behalf of Gilbert on this point within which one would see Gilbert as not mistaken, but visionary in his readiness to draw upon broader thought on collectively oriented rights. Frankly, the matter of whether rights-based approaches to the natural resource context draw principally upon collectively or individually oriented rights will end up having significant potential to shape differently the impact of a rights-based approach in this context. This is because the application of individual rights can ultimately affect policies only in ways oriented toward individuals rather than in ways that take account of irreducible community goods. For example, an individually oriented approach could represent certain individual interests in identity that are affected by natural resource policy, but only a more collectively oriented approach can properly represent some of the broader significance of certain natural resources for cultural development.[22]

One could nonetheless critique Gilbert on this front for his creative reliance on an approach to rights that is not at the forefront of international human rights discourse without offering any sort of bridge from the mainstream rights discourse. My previously argued view, of course, has been that there are cogent ways of understanding collective rights and individual rights harmoniously in non-antagonistic relationships.[23] But Gilbert needs to make similar arguments to show how his collectively oriented approaches to rights fit into the broader rights framework before his arguments are as saleable as they could be.

Despite his inclusion of a chapter on environmental issues, this chapter illustrates what the title of Gilbert's book should make obvious—his principal focus is actually on natural resources and the ways in which rights-based approaches shape ownership, governance, and regulation of resources. While he is at various spots concerned with defending himself against allegations of anthropocentrism in his approach,[24] the more telling challenge might actually be questions about the degree to which his approach reflects broader sustainability considerations, and his discussion of climate change yet again illustrates this point. Notably, his discussion on climate change issues seeks to draw not simply on Indigenous rights, but on climate justice scholarship.[25] Scholars writing on climate justice inevitably refer to issues of intergenerational equity and claims of future generations, but such concepts are strangely absent from Gilbert's discussion. One might try to defend a lack of explicit attention to future generations by sug-

about rights without even mentioning group rights generally or Indigenous rights specifically: Dwight Newman, "Making Rights Ordinary: A Reply to Michael Ignatieff" (2017) 13 J Intl L & Intl Rel 29.

22 For my prior arguments that certain irreducibly collective goods can be properly situated within rights theory only with a theory of collective rights, see generally Dwight Newman, *Community and Collective Rights: A Theoretical Framework for Rights Held by Groups* (Oxford: Hart Publishing, 2011).

23 See *ibid*.

24 Gilbert, *supra* note 4 at 6–7, 177–178.

25 See Gilbert, *supra* note 4 at 167-72 (Oxford: Oxford University Press, 2014) [referencing such works as Tracey Skillington, *Climate Justice and Human Rights* (New York: Springer, 2016), Dominic Roser & Christian Seidel, *Climate Justice: An Introduction* (London: Taylor & Francis, 2016), and Henry Shue, *Climate Justice: Vulnerability and Protection* (Oxford: Oxford University Press, 2014)]

gesting that a focus on group claims or collective rights, very much present in Gilbert, already involves the rights of persisting communities.[26] But a merely implicit reference to one of the key dimensions of the climate justice debates seems relatively unsatisfying, and there is therefore a sense in which Gilbert's framing in terms of rights-based considerations may exclude other dimensions of justice related to sustainability. In one sense, there are two strands of literature that need to speak to each other more, and while Gilbert initially set out to put them in dialogue, he does so to a much lesser degree than he could have.

In his concluding chapter, Gilbert returns to some of what he frames as central advantages of his approach, which he sees as ultimately supporting better inclusion of local communities in decision-making. He suggests the span of ways in which rights-based approaches might contribute in natural resource contexts highlights the solid legal foundations offered by human rights. He also suggests that his approach is attentive to a broader range of rights-holders and duty-bearers, thus offering greater protection in resource decision-making to marginalized communities and appropriately demanding participation from business and financial institutions. Ultimately, he argues that an approach attuned to human rights has application across various questions of natural resource governance and resource development. He maintains that the book shows where this sort of rights-based approach has some jurisprudential foundations and where more legal development is needed.[27]

There is a substantial accomplishment in this book in so far as it draws together various lines of jurisprudence that might not have been previously seen as linked. Rights-based approaches focused on natural resource issues span a wide range of topics and draw upon a broad array of norms, but Gilbert manages to integrate this wide variety of material into a unified argument and framework. In that sense, Gilbert's work in Natural Resources and Human Rights is, to at least some degree, field-shaping.

At the same time, one can also maintain that the field needs more complexity than Gilbert's formative discussion has thus far allowed. Apart from some of the narrowness of rights-based approaches referenced earlier, Gilbert has also dodged some of the more complex dilemmas that arise even within rights-based frameworks. For example, seal harvesting and whaling have generated enormous conflicts where Indigenous rights instruments have supported different views than those presented by many environmentalists and environmentalist-supported instruments. While some environmentalists might have raised these issues in tactical support of fundraising campaigns without necessarily having strong views against seal harvesting or whaling in and of themselves, others have certainly seen the practices as having deep moral implications related to their broader environmentalist worldviews and have strongly supported state action against these practices.[28] While environmentalists have made concessions now to Indigenous rights, these concessions may well be tactical. Close observers of these conflicts suggest that the reconciliations struck may, in truth, simply embed irrecon-

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[26] A proper account of collective rights speaks implicitly to some intergenerational issues. *Cf* Jeremy Waldron, "Redressing Historic Injustice" (2002) 52 UTLJ 135 at 137.

[27] Gilbert, *supra* note 4 at 6–7, 177–188.

[28] For discussion, see Malgosia Fitzmaurice, "Indigenous Peoples in Marine Areas: Whaling and Sealing", in Stephen Allen, Nigel Bankes & Øyvind Ravna, eds, *The Rights of Indigenous Peoples in Marine Areas* (Oxford: Hart Publishing, 2019) and Charlotte Epstein, *The Power of Words in International Relations: Birth of an Anti-Whaling Discourse* (Boston: MIT Press, 2006).

cilable issues amongst the challenges to be confronted in the future by bodies like the International Whaling Commission (IWC) and certain trade-related bodies.[29] Gilbert's work does not attend to these more uncomfortable examples where different strands of material might actually involve genuinely different values, although this is likely to be excused in the context of a book trying to offer a coherent framework in some foundational ways.

Not as an aside, but as something concerning the central issues of rights interpretation, Gilbert's book should also make readers rethink some complex assumptions about the relationships between Indigenous rights and international human rights norms more broadly. Some broader discussions on Indigenous rights have focused on the distinctiveness of what Indigenous peoples had attained. Gilbert does not deny that, but he also tries to draw upon Indigenous rights norms in reshaping aspects of IHRL more generally,[30] thus following cohesively with approaches that have rightly tried to avoid binary categories distinguishing between Indigenous peoples and non-Indigenous local communities or minority groups. Instead, they try to find less divisive approaches to rights, recognizing that non-Indigenous communities may hold some of the same rights as Indigenous communities even if not yet recognized in rights instruments.

The complexity of those discussions should not be underestimated. Leading political theorist Will Kymlicka has emphasized what he termed the negotiated "firewall" between Indigenous rights and minority rights, with states acceding to the UNDRIP, in his view, precisely because they did not see recognition of Indigenous rights as having wider implications and because it actually implicitly marked a rejection of broad readings of minority rights.[31] While Kymlicka does not exactly advocate for the ongoing maintenance of that firewall, he does offer an account in which it would seem problematic to draw upon Indigenous rights norms in articulating broader interpretations of IHRL. The problem arises out of the idea that states agreed to Indigenous rights as a special set of rights applicable to Indigenous peoples without making concessions on minority rights, with the latter potentially having much farther-reaching effects on more states. Indigenous peoples were content with this state of negotiations, within Kymlicka's account, because they achieved what they were seeking to achieve and because they always took the view that they were distinctive from, and should not be lumped in with, minority groups generally.

However, if one conceptualizes the UNDRIP as less a negotiation of new rights than a specification of pre-existing rights and the application of IHRL to the particular circumstances of Indigenous peoples,[32] then the use of the UNDRIP in helping to interpret IHRL more broadly is on more solid footing. This conceptualization sees the UNDRIP as fundamentally involving an acceptance of how already established rights are to be interpreted in certain

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29 See Fitzmaurice, *ibid*.

30 See e.g. Gilbert, *supra* note 4 at 28, 74–75, 100 (it is a repeated theme in the book).

31 Will Kymlicka, "Beyond the Indigenous/Minority Dichotomy?" in Stephen Allen & Alexandra Xanthaki, eds, *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Oxford: Hart Publishing, 2011) 183.

32 This is the approach of James Anaya in many of his more recent writings on the *UNDRIP*. See e.g. S. James Anaya & Sergio Puig, "Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples" (2017) 67 UTLJ 435.

distinctive circumstances, namely those of Indigenous peoples. While those advocating this view have not necessarily explicitly recognized this implication, the logical result would be that acceptance of the UNDRIP actually amounts to acceptance of a view about interpretation of established rights in ways that could also be leveraged by minority groups apart from Indigenous peoples. While their circumstances differ from those of Indigenous peoples, those non-Indigenous minority groups that have greater similarity to Indigenous peoples would logically have rights claims with more similarities to those of Indigenous peoples, while others might be very different. These sort of complex issues about the conceptualization of Indigenous rights have important implications for on the human rights movement generally that deserve far more attention than they receive,[33] and there should be much more attention on them in the years ahead. Gilbert's book does not itself correct that, but it nonetheless assists in thinking about these issues in so far as it rests on implicit assumptions about them and illustrates some of the impacts resulting from a view incorporating those assumptions. In doing this, it could properly motivate others to take up further work on these conceptual and theoretical issues.

It is in some of these implicit dimensions of the book that one must think about what Gilbert means in taking what he had framed as a 'practice-oriented' approach. With respect, that characterization may not fully capture Gilbert's own theoretical sophistication. The book is not a simple doctrinal record of rights cases bearing on resource development, but a more comprehensive, even if still-nascent, theoretical statement of the interaction of rights norms and resource development.

Sustainability discourses often rightly reference the need to overcome various forms of legal fragmentation. Gilbert's work in Natural Resources and Human Rights is an important piece of scholarship in challenging and transcending some forms of legal fragmentation, at least in certain respects. It continues to have its limits and it will rightly face future challenges that seek more complexity, but it has the potential to shift scholarly and jurisprudential thinking in some very constructive ways that are coherent with sustainability discourses, particularly as others build upon some of Gilbert's work to further develop the sorts of syntheses he was seeking. Despite some limitations with what it accomplishes in the context of a tremendously challenging endeavour, the creative promise and wide-ranging synthesis it attempts will make Gilbert's Natural Resources and Human Rights a very significant work in the field for a long time to come.

[33] For one important recent intervention, see Duncan Ivison, *Can Liberal States Accommodate Indigenous Peoples?* (Cambridge, UK: Polity Press, 2020).